TITLE 44

PROPERTY

VOLUME 31

Chap. 1. General Provisions, 44-1-1 through 44-1-17.

2. Recordation and Registration of Deeds and Other Instruments, 44-2-1 through 44-2-253.

3. Regulation of Specialized Land Transactions, 44-3-1 through 44-3-250.

4. Determination of Boundaries, 44-4-1 through 44-4-31.

5. Acquisition and Loss of Property, 44-5-1 through 44-5-230.

6. Estates, 44-6-1 through 44-6-206.

VOLUME 32

7. Landlord and Tenant, 44-7-1 through 44-7-103.

8. Water Rights, 44-8-1 through 44-8-10.

9. Easements, 44-9-1 through 44-9-92.

10. Historic Preservation, 44-10-1 through 44-10-31.

11. Ejectment and Proceedings Against Intruders, 44-11-1 through 44-11-33.

12. Rights in Personalty, 44-12-1 through 44-12-322.

13. Exemptions from Levy and Sale, 44-13-1 through 44-13-120.

14. Mortgages, Conveyances to Secure Debt, and Liens, 44-14-1 through 44-14-613.

15. Uniform Prudent Management of Institutional Funds, 44-15-1 through 44-15-8.

16. Uniform Environmental Covenants, 44-16-1 through 44-16-14.

Law reviews. — For annual survey on real property, see 36 Mercer L. Rev. 285 (1984). For annual survey on law of real property, see 43 Mercer L. Rev. 353 (1991). For annual survey of real property law, see 44 Mercer L. Rev. 345 (1992). For annual survey article on real property law, see 45 Mercer L. Rev. 363 (1993). For article discussing developments in law of real property from June 1, 1996 through May 31, 1997, see 49 Mercer L. Rev. 257 (1997). For annual survey article on real property law, see 50 Mercer L. Rev. 307 (1998). For annual survey article discussing real property law, see 51 Mercer L. Rev. 441 (1999). For annual survey article on real property law, see 52 Mercer L. Rev. 383 (2000).

CHAPTER 1

GENERAL PROVISIONS

Sec.

44-1-1. "Property" defined.
44-1-2. "Realty" or "real estate" defined; extent of owner's interest in airspace.
44-1-3. "Personalty" defined; status of certain stocks.
44-1-4. "Estate" defined.
44-1-5. "Title" defined.
44-1-6. What things considered fixtures; movable machinery as personalty; effect of detachment from realty.
44-1-7. Possession of personalty.
44-1-8. Property rights in animals; factors establishing property in wild animals.
44-1-9. Ownership of deposit and offspring by wild animals on land.
44-1-10. Ownership of offspring of domestic or owned animals.
44-1-11. Application and construction of provisions relating to estates.
44-1-12. What constitutes perfect title.
44-1-13. Removal of improperly parked cars or trespassing personal property; concurrent jurisdiction; procedure; automatic surveillance prohibited; penalty.
44-1-14. Abatement of hazard from abandoned well or hole; recovery costs; use of county funds.
44-1-15. Removal or destruction of survey monuments prohibited; exceptions; penalties.
44-1-16. Failure to disclose in real estate transaction that property was occupied by diseased person or was site of death; failure to disclose information required to be provided or maintained in accordance with Code Section 44-9-44.1.
44-1-17. Responsibilities of buyers or grantees and grantors or owners relating to transfers of property within or adjacent to property zoned for agricultural or silvicultural use; notice to prospective purchaser, lessee, or grantee; effect of noncompliance.

Cross references. — Venue for actions regarding determination of titles to land, Ga. Const. 1983, Art. VI, Sec. II, Para. II. Property insurance, § 33-7-6 and Ch. 32, T. 33. State properties code, see § 50-16-30 et seq.

Law reviews. — For article, "Georgia Title Standards," see 26 Ga. B.J. 285 (1964). For article surveying Georgia cases in the area of real property from June 1977 through May 1978, see 30 Mercer L. Rev. 167 (1978). For annual survey on law of real property, see 42 Mercer L. Rev. 389 (1990). For annual survey article on real property law, see 46 Mercer L. Rev. 401 (1994).

JUDICIAL DECISIONS

Individual's identity is devisable. — Right of publicity survives the death of its owner and is inheritable and devisable. Martin Luther King, Jr., Ctr. for Social Change, Inc. v. American Heritage Prods., Inc., 694 F.2d 674 (11th Cir. 1983).

RESEARCH REFERENCES

ALR. — Presumption of identity of persons from identity of name in chain of title to real property, 5 ALR 428.

Right of purchaser under land contract to anticipate time of payment fixed by contract, 17 ALR 866.

Right of vendee who enters under parol contract, to recover for improvements where vendor refuses to convey, 17 ALR 949.

Reversal as affecting purchase of property involved in suit, pending appeal without supersedeas, 36 ALR 421.

Rights as between vendor and vendee under land contract in respect of interest, 75 ALR 316; 25 ALR2d 951.

Action to recover for improvements made on land, taxes or interest paid, or lien discharged, by one who mistakenly believed himself the owner, 104 ALR 577.

Expectation by one who improved real property of acquiring title or interest in property from a third person, who in fact had neither title nor enforceable interest as supporting claim for compensation against the true owner, 148 ALR 335.

Measure and items of recovery for improvements mistakenly placed or made on land of another, 24 ALR2d 11.

Marketability of title derived from or through, or affected by possible claim of, infant, 24 ALR2d 1306.

Res judicata or collateral estoppel effect, in state where real property is located, of foreign decree dealing with such property, 32 ALR3d 1330.

Res ipsa loquitur as to cause of or liability for real-property fires, 21 ALR4th 929.

Construction and effect of ''marketable record title'' statutes, 31 ALR4th 11.

Necessity and reasonableness of vendor's notice to vendee of requisite time of performance of real-estate sales contract after prior waiver or extension of original time of performance, 32 ALR4th 8.

Specificity of description of premises as affecting enforceability of contract to convey real property — modern cases, 73 ALR4th 135.

Construction and effect of provision in contract for sale of realty by which purchaser agrees to take property ''as is'' or in its existing condition, 8 ALR5th 312.

44-1-1. "Property" defined.

As used in this title, the term ''property'' means:

(1) Realty and personalty which is actually owned;

(2) The right of ownership of realty or personalty; and

(3) That which is subject to being owned or enjoyed. (Code 1933, § 85-101.)

History of Code section. — This Code section is derived from the decision in Wayne v. Hartridge, 147 Ga. 127, 92 S.E. 937 (1917).

Law reviews. — For article, ''Publicity, Liberty and Intellectual Property: A Conceptual and Economic Analysis of the Inheritability Issue,'' see 34 Emory L.J. 1 (1985). For article surveying real property law in 1984-1985, see 37 Mercer L. Rev. 343 (1985).

JUDICIAL DECISIONS

Salary of armed forces member is not "property" which is constructively present in every state in the Union for purposes of 42 U.S.C. § 659(a). Williamson v. Williamson, 247 Ga. 260, 275 S.E.2d 42, cert. denied, 454 U.S. 1097, 102 S. Ct. 669, 70 L. Ed. 2d 638 (1981).

Section applied to bondsman in guardianship proceeding. — There was no reason why the broad concept of property in former Code 1933, § 85-101 (see O.C.G.A. § 44-1-1) should not apply in construing the obligation of a bondsman in a guardianship proceeding under former Code 1933, § 49-225. Clark v. Great Am. Ins. Co., 387 F.2d 710 (5th Cir. 1967), cert. denied, 393 U.S. 825, 89 S. Ct. 86, 21 L. Ed. 2d 95 (1968).

Vested remainder is interest in property which may be levied upon. — Vested remainder interest in land is such an interest in property as may be levied upon under an execution, although the life estate is not terminated, and since the greater includes the less, a levy upon a described tract or

parcel of land is a levy upon the whole interest therein, including all vested remainder interests where such remainder interests exist. Cox v. Hargrove, 205 Ga. 12, 52 S.E.2d 312 (1949).

Extreme restriction on use can negate estate for years. — Certain restrictions imposed upon use of the premises under a lease can be so pervasive as to be fundamentally inconsistent with the concept of an estate for years. Allright Parking of Ga., Inc. v. Joint City-County Bd. of Tax Assessors, 244 Ga. 378, 260 S.E.2d 315 (1979).

Cited in Mason v. Young, 203 Ga. 121, 45 S.E.2d 643 (1947); Trust Co. v. S. & W. Cafeteria, 97 Ga. App. 268, 103 S.E.2d 63 (1958); Moore v. Lindsey, 662 F.2d 354 (5th Cir. 1981).

RESEARCH REFERENCES

Am. Jur. 2d. — 63A Am. Jur. 2d, Property, § 1 et seq.

C.J.S. — 73 C.J.S., Property, §§ 1, 3.

ALR. — "Property" as including business or profession, 34 ALR 716.

Oil, gas, or other mineral rights in land, apart from ownership of soil, as subject as real estate to lien of judgment against the owner of the mineral interest, 52 ALR 135.

Validity and effect of transfer of expectancy by prospective heir, 121 ALR 450.

Master and servant: regular payment of bonus to employee, without express contract to do so, as raising implication of contract for bonus, 66 ALR3d 1075.

Pension or retirement benefits as subject to award or division by court in settlement of property rights between spouses, 94 ALR3d 176.

44-1-2. "Realty" or "real estate" defined; extent of owner's interest in airspace.

(a) As used in this title, the term "realty" or "real estate" means:

(1) All lands and the buildings thereon;

(2) All things permanently attached to land or to the buildings thereon; and

(3) Any interest existing in, issuing out of, or dependent upon land or the buildings thereon.

(b) The property right of the owner of real estate extends downward indefinitely and upward indefinitely. (Orig. Code 1863, § 2197; Code 1868, § 2192; Code 1873, § 2218; Code 1882, § 2218; Civil Code 1895, § 3045; Civil Code 1910, § 3617; Code 1933, § 85-201.)

Cross references. — Obtaining title to mineral rights through adverse possession, § 44-5-168. Leasing mining interests in land, § 44-6-102. Determining ownership of gas injected into underground storage reservoir, § 46-4-58. Provisions regarding extent of title downward and upward indefinitely, § 51-9-9.

Law reviews. — For article, "Timber Transactions in Georgia," see 19 Ga. B.J. 413 (1957). For article, "Timber! — Falling Tree Liability in Georgia," see 10 Ga. St. B.J. 10 (2004).

JUDICIAL DECISIONS

Analysis

General Consideration
Real Estate
Fixtures
Airspace

General Consideration

Possession is basis of all ownership, and that which man can never possess would seem to be incapable of being owned. Thrasher v. City of Atlanta, 178 Ga. 514, 173 S.E. 817 (1934).

Ejectment not remedy for flooding by adjacent owner. — Riparian owner cannot maintain ejectment against adjacent proprietor who erects dam and floods own land. The riparian owner has a remedy by an action on the case, but the principle of this statute, that land embraces all above and below it, cannot be applied in such a case to give cause for ejectment. Ezzard v. Findly Gold Mining Co., 74 Ga. 520, 58 Am. R. 445 (1885) (see O.C.G.A. § 44-1-2).

Landowner to report gain from sale to cutter of timber aftergrowth as capital gain. — Landowner, which retained the right to possess and control the land throughout the term of a timber-cutting contract, subject to the cutter's cutting rights, continued to own the land and therefore the timber, even though it granted the cutter an option to purchase the land, and the landowner could therefore report its gain from sale of aftergrowth to the cutter as capital gain rather than ordinary income under the Internal Revenue Code. Glynn Land Co. v. United States, 602 F. Supp. 346 (S.D. Ga. 1985).

Cited in Currin v. Milhollin, 53 Ga. App. 270, 185 S.E. 380 (1936); Adams v. Chamberlin, 54 Ga. App. 459, 188 S.E. 550 (1936); Ingram & Le Grand Lumber Co. v. McAllister, 188 Ga. 626, 4 S.E.2d 558 (1939); Ramsey v. Kitchen, 192 Ga. 535, 15 S.E.2d 877 (1941); Turner v. Ross, 115 Ga. App. 507, 154 S.E.2d 798 (1967); Kirkland v. Morris, 233 Ga. 597, 212 S.E.2d 781 (1975); United States v. Wood, 28 Bankr. 383 (N.D. Ga. 1983).

Real Estate

Real property includes not only land, but all improvements. Fayette County Bd. of Tax Assessors v. Georgia Utils. Co., 186 Ga. App. 723, 368 S.E.2d 326, cert. denied, 186 Ga. App. 917, 368 S.E.2d 326 (1988).

When article of personalty becomes realty. — Whether an article of personalty connected with or attached to realty becomes a part of the realty, and therefore such a fixture that the article cannot be removed therefrom, depends upon the circumstances under which the article was placed upon the realty, the uses to which the article is adapted, and the parties who are at issue as to whether such article is realty or detachable personalty. Consolidated Whse. Co. v. Smith, 55 Ga. App. 216, 189 S.E. 724 (1937).

Until severed from land, building part of realty on which the building sits. Simpson v. Tate, 226 Ga. 558, 176 S.E.2d 62 (1970).

Deed includes buildings. — Deed to land includes all buildings and other things permanently attached to land conveyed. Sawyer Coal & Ice Co. v. Kinnett-Odom Co., 192 Ga. 166, 14 S.E.2d 879 (1941).

Inconsistency between parol agreement and deed. — When there is a conveyance of land by deed, containing no reservations as to the buildings, a parol understanding that the vendor retains the ownership of the buildings, with the right to enter and remove the buildings, is certainly inconsistent with the deed and ought to be excluded from the evidence. Simpson v. Tate, 226 Ga. 558, 176 S.E.2d 62 (1970).

Building erected upon another's land, under arrangement with landowner that the building be removed when required is real estate. Consolidated Whse. Co. v. Smith, 55 Ga. App. 216, 189 S.E. 724 (1937).

Fences. — Fences permanently affixed to land constitute a part of the realty. Bagley v. Columbus S. Ry., 98 Ga. 626, 25 S.E. 638, 58 Am. St. R. 335 (1896).

Rail fence is part of realty. La Rowe v. McGee, 171 Ga. 771, 156 S.E. 591 (1931).

Minerals in place are part of the land; minerals are real estate. Rockefeller v. First Nat'l Bank, 213 Ga. 493, 100 S.E.2d 279 (1957).

Real Estate (Cont'd)

Minerals are constituent elements of the land itself. Rockefeller v. First Nat'l Bank, 213 Ga. 493, 100 S.E.2d 279 (1957).

Absolute conveyance carries all mines, minerals, and clays in and under the land conveyed. Wright v. Martin, 149 Ga. 777, 102 S.E. 156 (1920).

Sand lying on land where deposited by forces of nature, though not actually attached to the soil, is a part of the realty. La Rowe v. McGee, 171 Ga. 771, 156 S.E. 591 (1931).

Standing timber is constituent element of the land itself. Rockefeller v. First Nat'l Bank, 213 Ga. 493, 100 S.E.2d 279 (1957).

Trees growing on land constitute a part of the realty. Coody v. Gress Lumber Co., 82 Ga. 793, 10 S.E. 218 (1889); Douglass v. Bunn, 110 Ga. 159, 35 S.E. 339 (1900); Marthinson v. King, 150 F. 48 (5th Cir. 1906); La Rowe v. McGee, 171 Ga. 771, 156 S.E. 591 (1931); Foy v. Scott, 197 Ga. 138, 28 S.E.2d 107 (1943).

Growing crops are a part of the land. Newton County v. Boyd, 148 Ga. 761, 98 S.E. 347 (1919).

Mature crops. — Annual productions of crops, having matured and ceasing to draw sustenance from the earth, become personalty. Hamilton v. State, 94 Ga. 770, 21 S.E. 995 (1894).

Nursery and nursery stock, though placed upon the land by the grantor after executing the security deed, are to be treated as a part of the realty, as between such grantor and a purchaser at the sale under the security deed. Adcock v. Berry, 194 Ga. 243, 21 S.E.2d 605 (1942).

Manure made in the usual course of husbandry upon a farm is so attached to and connected with the realty that, in the absence of an express stipulation to the contrary, the manure becomes appurtenant to and is treated as part of the realty. La Rowe v. McGee, 171 Ga. 771, 156 S.E. 591 (1931).

Easements for telephone lines constitute realty. In re Brinn, 262 F. 527 (N.D. Ga. 1919).

Fixtures

Definition of "fixtures". — Term ''fixtures'' may be deemed to embrace all those chattels which, by reason of their annexation to the land, partake both of the nature of personalty and realty, irrespective of the question whether the fixtures are removable or not. Burpee v. Athens Prod. Credit Ass'n, 65 Ga. App. 102, 15 S.E.2d 526 (1941).

Requisite of fixtures. — To constitute a fixture there must be annexation to realty, together with unity of title and ownership of the realty and the thing affixed. State v. Dyson, 89 Ga. App. 791, 81 S.E.2d 217 (1954).

General rule in Georgia is that personal property which is actually or constructively attached to real property is considered part of the realty so that an interest arises in the property under real estate law. Wright v. C & S Family Credit, Inc., 128 Bankr. 838 (Bankr. N.D. Ga. 1991).

Person owning thing annexed to land need not have fee simple title to the land. It is sufficient if the person holds an estate for years in the land or an easement or right of way over the land, and the purchaser of an interest in the land will acquire the vendor's title to the fixtures attached thereto, unless it is otherwise provided in the purchaser's contract. State v. Dyson, 89 Ga. App. 791, 81 S.E.2d 217 (1954).

Trade fixtures constitute exception to general rule. — General rule of common law was that articles attached to realty become a part thereof; but there was an exception to this rule in the case of trade fixtures. Consolidated Whse. Co. v. Smith, 55 Ga. App. 216, 189 S.E. 724 (1937).

Trade fixtures. — Owner of a place of trade is generally not permitted to remove trade fixtures adapted to the purpose for which the building was constructed, in the absence of an agreement to that effect entered into at the time of the sale. The fixtures will pass under the instrument which conveys title to the realty. The rule in reference to trade fixtures is applicable in cases of landlord and tenant, or when the occupant is in for a limited time; but it generally has no application whatever between a grantor and grantee. Consolidated Whse. Co. v. Smith, 55 Ga. App. 216, 189 S.E. 724 (1937).

Scale installed in tobacco warehouse is fixture. — When a scale is installed in a tobacco warehouse at the time of its erection, placed on and attached under the warehouse constructed for the particular

scale, fitted in an opening in the warehouse floor made for the scale, and attached to the warehouse floor, and has been located in the building for 10 years or more, and the warehouse could not be operated without the scale, the jury can find that the scale is a permanent fixture and part of the warehouse building, and that the scale passes with a conveyance of such building made by the owner, even though the building is owned by one person and the land on which the building is located is owned by another. Consolidated Whse. Co. v. Smith, 55 Ga. App. 216, 189 S.E. 724 (1937).

Motive-power pump and engine used for pumping water out of artesian well and the pipes and other accessories connected therewith, installed on premises for the purpose of furnishing water, is ordinarily considered a part of the real estate. Blain v. Corbin, 51 Ga. App. 472, 180 S.E. 854 (1935).

Water pumping equipment deemed part of land benefitted. — Water pump and gasoline motor installed upon a low piece of land for the specific purpose of supplying water to another and adjacent higher lot is, in purpose and method of its utilization, so associated with the lot of land where the pipes convey the water and for the use of which the pump was installed that the fixture is to be regarded as legally annexed, that is, a fixture, to the higher land rather than to the lot of land on which the fixture is actually installed. Blain v. Corbin, 51 Ga. App. 472, 180 S.E. 854 (1935).

Reservation of right to remove annexed articles. — Right to remove annexed articles as personalty may be reserved in instrument conveying title to realty, or by an agreement extrinsic and collateral. Consolidated Whse. Co. v. Smith, 55 Ga. App. 216, 189 S.E. 724 (1937).

Sale of wrongfully removed fixture to innocent purchaser. — When furnace is a chattel attached to the realty, as an irremovable fixture, and when, after the execution of a security deed, it is detached and carried away by the grantor, an action will lie for the furnace's recovery. The fact that it was subsequently attached to the realty of the grantor in another county and this realty was sold to an innocent purchaser does not deprive the innocent owner of the property merely because some other person may be the innocent purchaser who is ignorant of plaintiff's ownership. Burpee v. Athens Prod. Credit Ass'n, 65 Ga. App. 102, 15 S.E.2d 526 (1941).

Personalty affixed to realty termed "fixture" when transfer in doubt. — If the parties intend only to convey realty, the term ''fixtures'' is the accepted terminology if there is any doubt as to whether personalty affixed to the realty is to be transferred. San Joi, Inc. v. Peek, 140 Ga. App. 397, 231 S.E.2d 145 (1976).

Fixtures on leased property tax exempt. — Improvements on leased property were fixtures and were not taxable as personal property. Fulton County Bd. of Assessors v. McKinsey & Co., 224 Ga. App. 593, 481 S.E.2d 580 (1997).

Intent as to permanency or attachment open to investigation. — While the law classifies articles, the law at the same time recognizes their ambiguous or variable character and permits the parties to class the articles differently in different instances. The element of intention enters into the question of permanency, whether of attachment or placing, and the intention is open to investigation by parol evidence. Sawyer v. Foremost Dairy Prods., Inc., 176 Ga. 854, 169 S.E. 115 (1933).

Extent to which machine a fixture is question for jury. — When some of the machinery is shown not to be attached to the building other than by wires and pipes by which power is applied, others are not attached in any way to the building, and still others are attached, the case is a question for the jury. The issue is a question of fact, not a question of law. Sawyer v. Foremost Dairy Prods., Inc., 176 Ga. 854, 169 S.E. 115 (1933).

Airspace

One who owns the soil owns also to the sky. — Ownership above the surface was based upon the common law maxim, cujus est solum ejus est usque ad coelum — who owns the soil owns also to the sky. Former Code 1933, §§ 85-201 and 105-409 (see O.C.G.A. §§ 44-1-2 and 51-9-9) should therefore be construed in light of the authoritative content of the maxim itself. Thrasher v. City of Atlanta, 178 Ga. 514, 173 S.E. 817 (1934).

Limited to common law interpretation. — Even if former Code 1933, §§ 85-201 and

Airspace (Cont'd)

105-409 (see O.C.G.A. §§ 44-1-2 and 51-9-9) were intended to express the ad coelum doctrine in its entirety, it remains true that the maxim can have only such legal signification as it brings from the common law. Thrasher v. City of Atlanta, 178 Ga. 514, 173 S.E. 817 (1934).

Title includes only space seized and appropriated. — Language of former Code 1933, §§ 85-201 and 105-409 (see O.C.G.A. §§ 44-1-2 and 51-9-9) that the title to land extends upwards indefinitely would seem to be a limitation upon the ad coelum doctrine, indicating by implication that the title will include only such portions of the upper space as may be seized and appropriated by the owner of the soil. Thrasher v. City of Atlanta, 178 Ga. 514, 173 S.E. 817 (1934).

Title to land does not necessarily confer title to space far above. — In order to recover for a trespass, it is necessary to show title or actual possession. The space in the far distance above the earth is in actual possession of no one, and, being incapable of such possession, title to the land beneath does not necessarily include title to such space. Thrasher v. City of Atlanta, 178 Ga. 514, 173 S.E. 817 (1934); Delta Air Corp. v. Kersey, 193 Ga. 862, 20 S.E.2d 245 (1942).

Height to which landowner has title and control. — Landowner has title to and right to control air space above the land to a distance of at least 75 feet above the landowner's buildings thereon, but the landowner's title to the air space above the landowner's land is not necessarily limited to an altitude of that height. Scott v. Dudley, 214 Ga. 565, 105 S.E.2d 752 (1958).

Landowner has first claim to space overhead. — Space is up there, and the owner of the land has the first claim upon the space. If another should capture and possess the space, as by erecting a high building with a fixed overhanging structure, this alone will show that the space affected is capable of being possessed, and consequently the owner of the soil beneath the overhanging structure may be entitled to ejectment or to an action for trespass. Thrasher v. City of Atlanta, 178 Ga. 514, 173 S.E. 817 (1934).

Owner of land is preferred claimant to airspace above the land, and the landowner is entitled to redress for any use thereof which results in injury to the landowner or the landowner's property. Scott v. Dudley, 214 Ga. 565, 105 S.E.2d 752 (1958).

Right to complain of use tending to diminish enjoyment of soil beneath. — Legal title can hardly extend above an altitude representing the reasonable possibility of man's occupation and dominion, although as respects the realms beyond this the owner of the land may complain of any use tending to diminish the free enjoyment of the soil beneath. Thrasher v. City of Atlanta, 178 Ga. 514, 173 S.E. 817 (1934); Delta Air Corp. v. Kersey, 193 Ga. 862, 20 S.E.2d 245 (1942).

Occupant of the soil is entitled to be free from danger or annoyance by any use of the superincumbent space, and for any use infringement of this right the occupant may apply to the law for appropriate redress or relief. Thrasher v. City of Atlanta, 178 Ga. 514, 173 S.E. 817 (1934).

Airplane pilot does not seize and hold space or stratum of air through which the pilot navigates, and cannot do so. The pilot is merely a transient, and the use to which the pilot applies the ethereal realm does not partake of the nature of occupation in the sense of dominion and ownership. So long as the space through which the pilot moves is beyond the reasonable possibility of possession by the occupant below, the pilot is in free territory, not as every or any man's land, but rather as a sort of "no man's land." Thrasher v. City of Atlanta, 178 Ga. 514, 173 S.E. 817 (1934).

Trespass by aircraft a question of altitude. — Flight of aircraft across the land of another cannot be said to be a trespass without taking into consideration the question of altitude. It might or might not amount to a trespass according to the circumstances, including the degree of altitude, and even when the act does not constitute a trespass, it could be a nuisance, as if it "worketh hurt, inconvenience, or damage," to the preferred claimant, namely, the owner of the soil, or to a rightful occupant thereof. Thrasher v. City of Atlanta, 178 Ga. 514, 173 S.E. 817 (1934).

When aircraft flights constitute nuisance. — When the evidence showed that at least 75 flights were made over the plaintiff's school building daily at altitudes of from 50 to 75 feet, just over the top of plaintiff's trees, that the danger necessarily created

thereby to the life and safety of those occupying plaintiff's premises, the noise and vibration caused thereby, and the distracting effect on plaintiff's students made further operation of plaintiff's school impracticable, and that by such flights the right to enjoy freely the use of plaintiff's property has been substantially lessened, a continuing nuisance was established which equity would enjoin. Scott v. Dudley, 214 Ga. 565, 105 S.E.2d 752 (1958).

OPINIONS OF THE ATTORNEY GENERAL

For listing of numerous items to be considered as fixtures and as part of realty, see 1969 Op. Att'y Gen. No. 69-90.

Trees or timber are part of realty and remain such until severed. Once severed, trees or timber become personal property. 1958-59 Op. Att'y Gen. p. 379.

Advertisement sign per se is personal property, but when placed with the intention that the sign remain permanently in that place, the sign may be considered as part of the realty. 1970 Op. Att'y Gen. No. 70-163.

Mobile homes. — Mobile home can be considered as part of the realty when it is placed on the property with the intent that the mobile home remain permanently in place and that the mobile home pass as part of the realty when conveyed. In order to determine what the intent was with respect to the mobile home, all of the surrounding facts and circumstances should be considered in each case as outward manifestations of what was in fact intended. 1969 Op. Att'y Gen. No. 69-316.

RESEARCH REFERENCES

Am. Jur. 2d. — 63A Am. Jur. 2d, Property, §§ 13 et seq., 48, 49.

C.J.S. — 73 C.J.S., Property, §§ 18, 21 et seq.

ALR. — Scope and import of term "owner" in statutes relating to real property, 2 ALR 778; 95 ALR 1085.

Oil and gas or other mineral rights in land as affected by language in conveyance specifying purpose for which the property is to be used, 5 ALR 1498; 39 ALR 1340.

Severance of title or rights to oil and gas in place from title to surface, 29 ALR 586; 146 ALR 880.

Storage tank or other apparatus of gasoline station as fixture, 36 ALR 447; 52 ALR 798; 99 ALR 69.

Garage as fixture, 36 ALR 1519.

Oil, gas, or other mineral rights in land, apart from ownership of soil, as subject as real estate to lien of judgment against the owner of the mineral interest, 52 ALR 135.

Relative rights, as between municipality and abutting landowners, to minerals, oil, and gas underlying streets, alleys, or parks, 62 ALR2d 1311.

Solid mineral royalty as real or personal property, 68 ALR2d 728.

Manure as real or personal property as between seller and buyer of real property, 82 ALR2d 1099.

Separate assessment and taxation of air rights, 56 ALR3d 1300.

Airport operations or flight of aircraft as nuisance, 79 ALR3d 253.

Airport operations or flight of aircraft as constituting taking or damaging of property, 22 ALR4th 863.

Conveyance of land as including mature but unharvested crops, 51 ALR4th 1263.

Oil and gas royalty as real or personal property, 56 ALR4th 539.

Mine tailings as real or personal property, 75 ALR4th 965.

44-1-3. "Personalty" defined; status of certain stocks.

(a) As used in this title, the term "personalty" or "personal estate" means all property which is movable in nature, has inherent value or is representative of value, and is not otherwise defined as realty.

(b) Stocks representing shares in a corporation which holds lands or a franchise in or over lands are personalty. (Orig. Code 1863, § 2216; Code 1868, § 2211; Code 1873, § 2237; Code 1882, § 2237; Ga. L. 1882-83, p. 56, § 1; Ga. L. 1893, p. 35, § 1; Civil Code 1895, § 3070; Civil Code 1910, § 3646; Code 1933, § 85-1701.)

Law reviews. — For comment on Grant v. Haymes, 164 Ga. 371, 138 S.E. 892 (1927), see 1 Ga. L. Rev. No. 2, p. 45 (1927).

JUDICIAL DECISIONS

Movable fixtures are considered personal property. McCall v. Walter, 71 Ga. 287 (1883).

Shares of corporate stock are personalty. Hamil v. Flowers, 133 Ga. 216, 65 S.E. 961 (1909).

Shares of stock as personalty. — Shares of stock of domestic corporation, certificates of which are held by foreign corporation as transferee, are personalty. People's Nat'l Bank v. Cleveland, 117 Ga. 908, 44 S.E. 20 (1903).

Stock in a nonresident railroad corporation owned by a domestic railroad is personal property. Wright v. Louisville & N.R.R., 195 U.S. 219, 25 S. Ct. 16, 49 L. Ed. 167 (1904); Greene County v. Wright, 126 Ga. 504, 54 S.E. 951 (1906).

Bond for title is personalty. Copeland v. Pyles, 25 Ga. App. 95, 102 S.E. 552 (1920).

Movable safe. — Since a safe was not attached to the building and was movable at pleasure upon the safe's rollers, with no injury to any part of the building, the evidence did not demand finding that the safe was a fixture. Cozart v. Johnson, 181 Ga. 337, 182 S.E. 502 (1935).

Value of personalty including stock shares were recoverable. — Trial court was authorized to award a wife cash and stock as proceeds after a cooperative converted to a publicly held company as: (1) the wife was entitled to receive the value of the equity account for the years 1987 to 1993 as consideration for the relinquishment of the interest the wife held in the real estate; (2) such was consistent with the intent and spirit of the final decree; and (3) to rule otherwise would have left the wife with an illusory or meaningless asset. Cason v. Cason, 281 Ga. 296, 637 S.E.2d 716 (2006).

Cited in Woodcliff Gin Co. v. Kittles, 173 Ga. 661, 161 S.E. 119 (1931); Evans v. Pennington, 177 Ga. 56, 169 S.E. 349 (1933); DeFoor v. State, 233 Ga. 190, 210 S.E.2d 707 (1974); Anderson v. Burnham, 12 Bankr. 286 (Bankr. N.D. Ga. 1981); United States v. Wood, 28 Bankr. 383 (N.D. Ga. 1983); Chancellor v. Gateway Lincoln-Mercury, Inc., 233 Ga. App. 38, 502 S.E.2d 799 (1998).

OPINIONS OF THE ATTORNEY GENERAL

Mobile homes. — Mobile home can be considered as part of the realty when the mobile home is placed on the property with the intent that the mobile home remain permanently in place and that the mobile home pass as part of the realty when conveyed. In order to determine what the intent was with respect to the mobile home, all of the surrounding facts and circumstances should be considered in each case as outward manifestations of what was in fact intended. 1969 Op. Att'y Gen. No. 69-316.

Advertisement sign per se is personal property, but when placed with the intention that the sign remain permanently in that place, it may be considered as part of the realty. 1970 Op. Att'y Gen. No. 79-163.

RESEARCH REFERENCES

Am. Jur. 2d. — 63A Am. Jur. 2d, Property, § 21.

C.J.S. — 73 C.J.S., Property, § 32 et seq.

ALR. — Larceny by finder of property, 36 ALR 372.

Solid mineral royalty as real or personal property, 68 ALR 728; 99 ALR 486.

What passes under term ''personal estate'' in will, 53 ALR2d 1059.

Manure as real or personal property as between seller and buyer of real property, 82 ALR2d 1099.

Criminal liability for theft of, interference with, or unauthorized use of, computer programs, files, or systems, 51 ALR4th 971.

Conveyance of land as including mature but unharvested crops, 51 ALR4th 1263.

Oil and gas royalty as real or personal property, 56 ALR4th 539.

Mine tailings as real or personal property, 75 ALR4th 965.

44-1-4. "Estate" defined.

As used in this title, the term ''estate'' means the quantity of interest which an owner has in real or personal property. Any estate which can be created in realty may be created in personalty. (Orig. Code 1863, § 2225; Code 1868, § 2219; Code 1873, § 2245; Code 1882, § 2245; Civil Code 1895, § 3080; Civil Code 1910, § 3656; Code 1933, § 85-104.)

Law reviews. — For comment discussing the legal effect of concurrent leases under both common law and statutory law in Georgia, see 6 Ga. St. B.J. 320 (1970).

JUDICIAL DECISIONS

Common law rule. — Former Civil Code 1895, §§ 3080 and 3101 (see O.C.G.A. §§ 44-1-4 and 44-6-63 [repealed]) were a codification of the old law. Collins v. Smith, 105 Ga. 525, 31 S.E. 449 (1898).

"Estate" and the "character of the estate," according to our laws and common understanding, have reference to the interest in the property, to wit: an estate for years, an estate for life, an estate in remainder vested or contingent, and an estate in fee simple. DeVaughn v. McLeroy, 82 Ga. 687, 10 S.E. 211 (1889).

Realty and personalty are different kinds of property, but not different kinds of estates. DeVaughn v. McLeroy, 82 Ga. 687, 10 S.E. 211 (1889).

No distinction as to bequest of personalty and devise of realty. Winn v. Tabernacle Infirmary, 135 Ga. 380, 69 S.E. 557, 32 L.R.A. (n.s.) 512 (1910).

Ownership is necessary for estate. — In order for there to be an estate, there must be ownership of an interest in the property. Henson v. Airways Serv., Inc., 220 Ga. 44, 136 S.E.2d 747 (1964).

When lessee has only right of possession and use of the leased premises, not a proprietary interest therein, there is no ''merger of estates'' pursuant to O.C.G.A. § 44-6-2 when the lessee purchases the subject property. Life Chiropractic College, Inc. v. Carter & Assocs., 168 Ga. App. 38, 308 S.E.2d 4 (1983).

Estate may be created in money. — Any estate that can be created in realty may be created in personalty, and this includes money. Hicks v. Wadsworth, 57 Ga. App. 529, 196 S.E. 251 (1938).

Gift of whole estate includes money of the estate. Thornton v. Burch, 20 Ga. 791 (1856).

Remainder may be created in money since money is an estate or the part of an estate. Crawford v. Clark, 110 Ga. 729, 36 S.E. 404 (1900).

Former Civil Code 1910, §§ 3736 and 3737 applied to personalty as well as to realty by virtue of the provisions of former Civil Code 1910, § 3656 (see O.C.G.A. § 44-1-4). Hubbard v. Bibb Brokerage Co., 44 Ga. App. 1, 160 S.E. 639 (1931).

Power of appointment is not an absolute right of property. It is not an estate, and has none of the elements of an estate. Patterson & Co. v. Lawrence, 83 Ga. 703, 10 S.E. 355 (1889).

Effect of converting realty to personalty on nature of remainder interest. — Conversion of land into personalty does not change the character of the estate from vested to a contingent remainder, because estate or character of estate means quantity of interest and not character of property. DeVaughn v. McLeroy, 82 Ga. 687, 10 S.E. 211 (1889).

Life estate may be created in personal property, with the limitation that the life estate may not be created in such property as is destroyed in the use. First Nat'l Bank v. Geiger, 61 Ga. App. 865, 7 S.E.2d 756 (1940).

Cited in National Fin. Co. v. Citizens Loan & Sav. Co., 184 Ga. 619, 192 S.E. 717 (1937); Ward v. McGuire, 213 Ga. 563, 100 S.E.2d 276 (1957); Dodson v. Trust Co., 216 Ga. 499, 117 S.E.2d 331 (1960); J.B. McCrary Co. v. Peacock, 223 Ga. 476, 156 S.E.2d 57 (1967); Sams v. McDonald, 117 Ga. App. 336, 160 S.E.2d 594 (1968); Bryant v. Bryant, 224 Ga. 360, 162 S.E.2d 391 (1968).

RESEARCH REFERENCES

Am. Jur. 2d. — 28 Am. Jur. 2d, Estates, § 1 et seq.

C.J.S. — 31 C.J.S., Estates, § 4. 73 C.J.S., Property, §§ 8 et seq., 16.

ALR. — Validity and effect of transfer of expectancy by prospective heir, 121 ALR 450.

Right of survivor of parties to bank account in their joint names as affected by provision excluding his right of withdrawal during the lifetime of the other party, 155 ALR 1084.

Proceeds or derivatives of real property held by entirety as themselves held by entirety, 22 ALR4th 459.

44-1-5. "Title" defined.

As used in this title in referring to property, the term ''title'' signifies the means whereby a person's right to property is established. (Orig. Code 1863, § 2320; Code 1868, § 2317; Code 1873, § 2348; Code 1882, § 2348; Civil Code 1895, § 3208; Civil Code 1910, § 3796; Code 1933, § 85-102.)

Law reviews. — For article discussing the problems with acquiring good title, see 15 Ga. B.J. 281 (1953). For article advocating the adoption of a marketable title statute in Georgia, see 16 Ga. B.J. 263 (1954).

JUDICIAL DECISIONS

"Title" means provable right to own. — For practical purposes, the word ''title'' means the provable right to own particular property, and in its broader sense includes the proof by which that right may be established. National Fire Ins. Co. v. King, 49 Ga. App. 457, 176 S.E. 64 (1934).

Definition of "color of title". — Color of title may be defined as being a writing, upon the writing's face professing to pass title, but which does not do it, either from want of title in the person making the writing, or from the defective conveyance that is used — a title that is imperfect, but not so obviously that it would be apparent to one not skilled in law. Beverly v. Burke, 9 Ga. 44, 54 Am. Dec. 351 (1851).

One in possession of property and entitled to the legal title has sole and unconditional ownership as well as title in fee simple. National Fire Ins. Co. v. King, 49 Ga. App. 457, 176 S.E. 64 (1934).

Effect of parol evidence of payment. — When a plaintiff in ejectment shows by parol that the plaintiff bought and paid for the land in full and received the property under the plaintiff's possession, the plaintiff is clothed with such a perfect equity as would

amount to legal title. National Fire Ins. Co. v. King, 49 Ga. App. 457, 176 S.E. 64 (1934).

Bank deposits intended to be treated as cash. — When money, or drafts and checks deposited with the intention they be treated as cash, is placed in a bank on general deposit, title passes immediately to the bank. Foster v. People's Bank, 42 Ga. App. 102, 155 S.E. 62 (1930).

Title by capture during war can only be set up by the organized and recognized parties to the war, or by those claiming and acquiring title from the organized and recognized parties. Worthy v. Kinamon, 44 Ga. 297 (1871); Huff v. Odom, 49 Ga. 395 (1873).

Cited in Tucker Fed. Sav. & Loan Ass'n v. Alford, 169 Ga. App. 38, 311 S.E.2d 229 (1983).

RESEARCH REFERENCES

Am. Jur. 2d. — 63A Am. Jur. 2d, Property, § 29.

C.J.S. — 73 C.J.S., Property, § 55 et seq.

ALR. — Severance of title or rights to oil and gas in place from title to surface, 29 ALR 586; 146 ALR 880.

Marketable title, 57 ALR 1253; 81 ALR2d 1020.

Right of holder of bond or other instrument representing or based upon assessment for benefits or improvement, to purchase tax sale, or acquire tax title and hold same in his own right as against owner of land, 123 ALR 398.

Right to inundate land as rendering title thereto unmarketable, 15 ALR2d 966.

Abstracter's duty and liability to employer respecting matters to be included in abstract, 28 ALR2d 891.

44-1-6. What things considered fixtures; movable machinery as personalty; effect of detachment from realty.

(a) Anything which is intended to remain permanently in its place even if it is not actually attached to the land is a fixture which constitutes a part of the realty and passes with it.

(b) Machinery which is not actually attached to the realty but is movable at pleasure is not a part of the realty.

(c) Anything detached from the realty becomes personalty instantly upon being detached. (Orig. Code 1863, §§ 2198, 2199; Code 1868, §§ 2193, 2194; Code 1873, §§ 2219, 2220; Code 1882, §§ 2219, 2220; Civil Code 1895, §§ 3049, 3050; Civil Code 1910, §§ 3621, 3622; Code 1933, § 85-105.)

Law reviews. — For article discussing lawful removal of fixtures by tenant, see 4 Ga. B.J. 16 (1942). For article on the law governing removal of trade fixtures from property in Georgia, see 19 Ga. B.J. 35 (1956). For article, ''Things Attached to Realty,'' see 15 Mercer L. Rev. 343 (1964). For article discussing U.C.C. provisions establishing a security interest in fixtures as a means of protecting sellers, see 16 Mercer L. Rev. 404 (1965).

JUDICIAL DECISIONS

Analysis

General Consideration
Trade and Domestic Fixtures
Intention of Parties
Machinery

General Consideration

What constitutes "fixtures". — It was unnecessary to go beyond former Civil Code 1895, §§ 3045, 3049 and 3050 (see O.C.G.A. §§ 44-1-2 and 44-1-6) to ascertain what were fixtures, and the Code was in entire harmony with the common law on the subject. Wright v. DuBignon, 114 Ga. 765, 40 S.E. 747, 57 L.R.A. 669 (1902).

This statute does not always provide a certain and easy test by which it can be determined in a given case whether or not the article in question remains personalty, or is attached to the realty and a part thereof. Empire Cotton Oil Co. v. Continental Gin Co., 21 Ga. App. 16, 93 S.E. 525 (1917) (see O.C.G.A. § 44-1-6).

Term "fixtures" may be deemed to embrace all those chattels which, by reason of their annexation to the land, partake both of the nature of personalty and realty, irrespective of the question of whether the chattels are removable or not. Burpee v. Athens Prod. Credit Ass'n, 65 Ga. App. 102, 15 S.E.2d 526 (1941); Slater v. Dowd, 79 Ga. App. 272, 53 S.E.2d 598 (1949); Hargrove v. Jenkins, 192 Ga. App. 83, 383 S.E.2d 636 (1989).

Agreement as to building does not affect nature of property. — Building erected upon the land of another under arrangement with the owner of the land that the building shall be removed when required is real estate. Consolidated Whse. Co. v. Smith, 55 Ga. App. 216, 189 S.E. 724 (1937).

Factors considered in determining whether personalty is a fixture. — Whatever is placed in a building to carry out the obvious purpose for which the building was erected, or to permanently increase its value for such purpose, and not intended to be moved about from place to place but to be permanently used with the building, becomes a part of the realty, although it may be removable without injury either to itself or the building. Waycross Opera House Co. v. Sossman, 94 Ga. 100, 20 S.E. 252, 47 Am. St. R. 144 (1894); Cunningham & Co. v. Cureton, 96 Ga. 489, 23 S.E. 420 (1895); Brigham v. Overstreet, 128 Ga. 447, 57 S.E. 484, 10 L.R.A. (n.s.) 452, 11 Ann. Cas. 75 (1907).

Whether an article of personalty connected with or attached to realty becomes a part of the realty, and therefore such a fixture that the article cannot be removed therefrom, depends upon the circumstances under which the article was placed upon the realty, the uses to which the article is adapted, and the parties who are at issue as to whether such an article is realty or detachable personalty. Pendley Brick Co. v. Hardwick & Co., 6 Ga. App. 114, 64 S.E. 664 (1909); Harn v. State, 51 Ga. App. 34, 179 S.E. 553 (1935); Consolidated Whse. Co. v. Smith, 55 Ga. App. 216, 189 S.E. 724 (1937); Goger v. United States (In re Janmar, Inc.), 4 Bankr. 4 (Bankr. N.D. Ga. 1979).

To constitute a fixture there must be annexation to the realty, together with unity of title and ownership of the realty and the thing affixed. State v. Dyson, 89 Ga. App. 791, 81 S.E.2d 217 (1954).

Basic issue in determining whether an article of property is considered realty or personalty is whether the article can be removed without essential injury to the freehold or to the article itself; in addition, the court must consider the intent of the parties as shown by the contract, and if there is a question of intent, that question is for the trier of fact. Brown v. United States, 512 F. Supp. 24 (N.D. Ga. 1980).

Determination of whether a particular piece of personalty has become a fixture requires analysis of three distinct factors. First, the court must consider the degree of physical attachment and removability of the article: wherever the article can be removed without essential injury to the freehold, or the article itself, it is a chattel; otherwise, it is a fixture. Second, and even more important, is the intention of the parties with respect to the article's status. Finally, a third factor that must be considered is whether the requisite unity of title between the personalty and the realty was present at the time the article allegedly became a fixture. Homac, Inc. v. Fort Wayne Mtg. Co., 577 F. Supp. 1065 (N.D. Ga. 1983).

Difficulty or ease of removal of property from premises is not determinative of its status as a fixture vel non. Goger v. United States (In re Janmar, Inc.), 4 Bankr. 4 (Bankr. N.D. Ga. 1979).

Fixtures pass by conveyance of freehold. — As between grantor and grantee the strict rule of the common law prevails that, in absence of agreement to the contrary, all fixtures, whether actually or constructively

annexed to the realty, pass by a conveyance of the freehold. Wolff v. Sampson, 123 Ga. 400, 51 S.E. 335 (1905); Brigham v. Overstreet, 128 Ga. 447, 57 S.E. 484, 10 L.R.A. (n.s.) 452, 11 Ann. Cas. 75 (1907).

All fixtures, whether actually or constructionally annexed to the realty, pass by a conveyance of the freehold, absent an agreement to the contrary. Kal-O-Mine Indus., Inc. v. Camp (In re Lumpkin Sand & Gravel, Inc.), 104 Bankr. 529 (Bankr. M.D. Ga. 1989), aff'd, 111 Bankr. 370 (M.D. Ga. 1990).

Applicability to mortgages. — When fixtures are erected by owner who subsequently sells or mortgages premises, this statute is peculiarly applicable. When land is conveyed, whatever fixtures are annexed to the realty at the time of the conveyance pass with the estate to the vendee, unless there be some express provision to the contrary. Fixtures pass to a bona fide purchaser of the real estate, notwithstanding an agreement between the owner of the land and the vendor of the fixtures that the fixtures should remain personal property. The same rules as to fixtures which apply as between vendor and vendee apply also as between mortgagor and mortgagee. Waycross Opera House Co. v. Sossman, 94 Ga. 100, 20 S.E. 252, 47 Am. St. R. 144 (1894); Cunningham & Co. v. Cureton, 96 Ga. 489, 23 S.E. 420 (1895); Raymond v. Strickland, 124 Ga. 504, 52 S.E. 619, 3 L.R.A. (n.s.) 69 (1905) (see O.C.G.A. § 44-1-6).

Fixture becomes personalty when detached, and a cause of action in trover then arises which is not defeated when the chattel is later attached to other realty. Insilco Corp. v. Carter, 245 Ga. 513, 265 S.E.2d 794 (1980).

Building is real estate until severed. — Until severed from the land, a building is a part of the realty on which the building sits. Simpson v. Tate, 226 Ga. 558, 176 S.E.2d 62 (1970).

Action for trover lies for house wrongfully detached. — Under this statute, a house wrongfully detached from land and placed upon other land becomes personalty, and an action of trover will lie for the recovery. Kennedy v. Smith, 149 Ga. 61, 99 S.E. 27 (1919); Kennedy v. Smith, 23 Ga. App. 724, 99 S.E. 318 (1919) (see O.C.G.A. § 44-1-6).

Fixtures on leased property tax exempt. — Improvements on leased property were fixtures and were not taxable as personal property. Fulton County Bd. of Assessors v. McKinsey & Co., 224 Ga. App. 593, 481 S.E.2d 580 (1997).

Effect of removal of fixtures to save from fire. — When severed from the realty and saved from fire, fixtures become personalty, but remain the property of the landlord who has the right to dispose of the fixtures as the landlord thinks proper. Pope v. Gerrard, 39 Ga. 471 (1869).

Person owning thing annexed to land need not have fee simple title to the land. It is sufficient if the person holds an estate for years in the land or an easement or right of way over the land, and the purchaser of an interest in the land will acquire the vendor's title to the fixtures attached thereto, unless it is otherwise provided in their contract. State v. Dyson, 89 Ga. App. 791, 81 S.E.2d 217 (1954).

When ownership of land is in one person and thing affixed to the land is in another, and the fixture is in its nature capable of severance without injury to the former, the fixture cannot, in contemplation of law, become a part of the land, but necessarily remains distinct property to be used and dealt with as personal estate. Holland Furnace Co. v. Lowe, 172 Ga. 815, 159 S.E. 277 (1931); Stewart County v. Holloway, 69 Ga. App. 344, 25 S.E.2d 315 (1943).

Ownership of land and fixtures different. — That an owner of an undivided interest in land buys personalty attached to the freehold, cannot render the personalty a fixture when the interests of owners in the land and the personalty are different in extent. Holland Furnace Co. v. Lowe, 172 Ga. 815, 159 S.E. 277 (1931).

Priority of lien as to after-acquired fixtures. — When a seller of personal property, which is later affixed to realty, retains an unperfected security interest in the goods, the seller's security interest attaches upon delivery and is superior to another creditor's prior perfected security interest in existing and after-acquired personal property of the common debtor, when such after-acquired personalty is affixed to the realty as fixtures. Babson Credit Plan, Inc. v. Cordele Prod. Credit Ass'n, 146 Ga. App. 266, 246 S.E.2d 354 (1978).

Personalty affixed to the realty, which becomes a fixture passing with the realty, is

General Consideration (Cont'd)

subject to the rule that an unperfected purchase money security interest prevails over a prior interest in the realty to the extent of advances made prior to attachment of the latter security interest, but not those advances made subsequent to attachment. Babson Credit Plan, Inc. v. Cordele Prod. Credit Ass'n, 146 Ga. App. 266, 246 S.E.2d 354 (1978).

For examples of movable fixtures, see McCall v. Walter, 71 Ga. 287 (1883).

Ramps, which were part of a high-rise parking garage, constituted a fixture since the ramps were an integral part of the building and were intended to remain permanently in place. Trust Co. Bank v. Huckabee Auto Co., 58 Bankr. 826 (Bankr. M.D. Ga. 1986).

Counters and drawers in a drug store placed there by the landlord are fixtures. Pope v. Gerrard, 39 Ga. 471 (1869).

Glass show window which is permanent part of store building is not a mere trade fixture but is part of the realty. Chapman v. Silver & Bro., 18 Ga. App. 476, 89 S.E. 590 (1916).

"Double-wide" mobile home unit which has become permanently attached to the land on which the double-wide is placed ceases to be a ''vehicle'' under the Motor Vehicle Certificate of Title Act, O.C.G.A. Ch. 3, T. 40, so that a security interest is obtained by recording a security deed to the land and the ''improvements thereon'' rather than placing a lien on the mobile home under the vehicle title act. Walker v. Washington, 837 F.2d 455 (11th Cir. 1988).

Mobile home was fixture. — Debtors' mobile home, purchased some eight years earlier and placed on the debtors' raw land, could not be considered personal property but instead needed to be considered as a fixture to the realty based on evidence that the debtors removed the tongue device for hitching the mobile home, had placed a curtain around the base of the home, and had made improvements such as landscaping and addition of a carport attached to the mobile home on the land. Williamson v. Wash. Mut. Home Loans, Inc. (In re Williamson), 387 B.R. 914 (Bankr. M.D. Ga. 2008).

Mobile home was not a fixture. — Because a Chapter 13 debtor's evidence as to the condition of a mobile home established that the wheels, axles, and tow tongue were still attached, that the home was not sited on a permanent foundation, and that the home could be removed without real damage either to it or to the underlying realty, the home was not a fixture within the meaning of O.C.G.A. § 44-1-6(a), the presumption in O.C.G.A. § 40-3-20 that the mobile home was a vehicle was not rebutted, and a secured creditor's interest therein was not protected from modification by 11 U.S.C. § 1322(b)(2). INGOMAR, L.P. v. Collins (In re Collins), No. 05-42982, 2006 Bankr. LEXIS 4652 (Bankr. S.D. Ga. Sept. 14, 2006).

Movable safe. — When safe was not attached to the building and was moveable at pleasure upon the safe's rollers, with no injury to any part of the building, evidence did not demand finding that the safe was a fixture. Cozart v. Johnson, 181 Ga. 337, 182 S.E. 502 (1935).

Radio tower. — When the intention of the parties was unclear as to whether a radio tower was to be a fixture and the tower was bolted to concrete slabs with bolts in each of the tower's three legs, no guy wires secured the tower, the tower apparently could be removed from the realty without damage to the land or to the radio tower by removing these bolts and disassembling the tower, and the tower had already been removed once, the tower was personal property rather than a fixture. Tidwell v. Slocumb (In re Ga. Steel, Inc.), 71 Bankr. 903 (Bankr. M.D. Ga. 1987).

Trees. — Contract of sale in regard to timber attached to the realty but to be severed before title is to pass is an executory sale of personalty. Graham v. Weil, 126 Ga. 624, 55 S.E. 931 (1906); Clarke Bros. v. McNatt, 132 Ga. 610, 64 S.E. 795, 26 L.R.A. (n.s.) 585 (1909).

Cited in Jackson v. Crutchfield, 184 Ga. 412, 191 S.E. 468 (1937); Ramsey v. Kitchen, 192 Ga. 535, 15 S.E.2d 877 (1941); Hudgins & Co. v. Chesterfield Laundry, Inc., 109 Ga. App. 282, 135 S.E.2d 906 (1964); Kirkland v. Morris, 233 Ga. 597, 212 S.E.2d 781 (1975); Tifton Corp. v. Decatur Fed. Sav. & Loan Ass'n, 136 Ga. App. 710, 222 S.E.2d 115 (1975).

Trade and Domestic Fixtures

Trade fixtures exception to common law. — General rule of the common law was that

articles attached to the realty become a part thereof. But there was an exception to this rule in the case of trade fixtures. Consolidated Whse. Co. v. Smith, 55 Ga. App. 216, 189 S.E. 724 (1937); Stewart County v. Holloway, 69 Ga. App. 344, 25 S.E.2d 315 (1943).

Owner of place of trade generally not permitted to remove trade fixtures adapted to purpose for which building constructed, in absence of agreement to that effect entered into at the time of the sale. In the absence of such agreement, the fixtures will pass under the instrument which conveys title to the realty. Consolidated Whse. Co. v. Smith, 55 Ga. App. 216, 189 S.E. 724 (1937).

Applicability of rule as to trade fixtures. — Rule in reference to trade fixtures is applicable in cases of landlord and tenant, or when the occupant is in for a limited time; but the rule generally has no application whatever between a grantor and grantee. Consolidated Whse. Co. v. Smith, 55 Ga. App. 216, 189 S.E. 724 (1937).

Domestic fixtures. — An electric chandelier, annunciator, and like contrivances or devices attached to the ceiling or walls of a house by a tenant, at the tenant's own expense and for the tenant's personal comfort and convenience, come within the legal definition of ''domestic fixtures,'' when so placed that the fixtures can be readily detached without injury to the premises. Not being annexed to the rented structure with any view to their becoming permanently attached thereto as a part of the realty, the fixtures do not lose their identity as chattels. Consolidated Whse. Co. v. Smith, 55 Ga. App. 216, 189 S.E. 724 (1937).

Only domestic or trade fixtures are personalty. — Only fixtures of a building which are personalty are trade fixtures, or domestic or ornamental fixtures. Chapman v. Silver & Bro., 18 Ga. App. 476, 89 S.E. 590 (1916).

Intention of Parties

Intent of parties governs. — Determination of whether or not an object has become a fixture is generally governed by intent of the parties and is based upon a variety of factors. Goger v. United States (In re Janmar, Inc.), 4 Bankr. 4 (Bankr. N.D. Ga. 1979).

Articles of ambiguous or variable character. — While the law classifies articles, it at the same time recognizes their ambiguous or variable character and permits the parties to class articles differently in different instances. Sawyer v. Foremost Dairy Prods., Inc., 176 Ga. 854, 169 S.E. 115 (1933).

Right to remove annexed articles as personalty may be reserved in instrument conveying title to realty, or by an agreement extrinsic and collateral. Consolidated Whse. Co. v. Smith, 55 Ga. App. 216, 189 S.E. 724 (1937).

When intent shown by unambiguous contract, personal property, though attached, remains personal property. Babson Credit Plan, Inc. v. Cordele Prod. Credit Ass'n, 146 Ga. App. 266, 246 S.E.2d 354 (1978).

Parol agreement to allow removal inadmissible. — When there is a conveyance of land by deed containing no reservations as to the buildings, a parol understanding that the vendor retains the ownership of the houses, with the right to enter and remove the houses, is inconsistent with the deed and ought to be excluded from the evidence. Simpson v. Tate, 226 Ga. 558, 176 S.E.2d 62 (1970).

When permanency in question, parol evidence admissible. — Element of intention enters into the question of permanency, whether of attachment or placing, and the intention is open to investigation by parol evidence. Smith v. Odom, 63 Ga. 499 (1878); United Cigar Stores v. McKenzie, 140 Ga. 270, 78 S.E. 1006 (1913); Sawyer v. Foremost Dairy Prods., Inc., 176 Ga. 854, 169 S.E. 115 (1933).

Intention of parties is question for jury. — When it is doubtful, under all the circumstances, whether the article in question is personalty or is a fixture, the doubt is to be solved by the jury. Harn v. State, 51 Ga. App. 34, 179 S.E. 553 (1935).

Doubt as to whether affixed personalty to be transferred. — If the parties intend only to convey realty, the term ''fixtures'' is the accepted terminology if there is any doubt as to whether personalty affixed to the realty is to be transferred. San Joi, Inc. v. Peek, 140 Ga. App. 397, 231 S.E.2d 145 (1976).

Machinery

Construction of "movable at pleasure". — If the language of this statute, ''movable at pleasure,'' was interpreted in a literal sense, it would apply to almost every kind of machinery, and clearly such is not the intention

Machinery (Cont'd)

of the legislature. Cunningham & Co. v. Cureton, 96 Ga. 489, 23 S.E. 420 (1895) (see O.C.G.A. § 44-1-6).

Parties can vary provision that machinery passes with realty. — In a conveyance of land in fee, machinery attached thereto will ordinarily pass as part of the realty. But when it is intended otherwise by the parties, and the parties enter into a written contract expressly reserving to the seller the machinery with the right to remove the machinery, such agreement will be given effect. Hunter v. Hicks, 571 F.2d 928 (5th Cir. 1978).

Dredge used by the vendor in the vendor's mining operations was a fixture and ownership passed to the purchaser under the vendor's deed. Kal-O-Mine Indus., Inc. v. Camp (In re Lumpkin Sand & Gravel, Inc.), 104 Bankr. 529 (Bankr. M.D. Ga. 1989), aff'd, 111 Bankr. 370 (M.D. Ga. 1990).

For examples of whether certain machinery passes with realty, see Smith v. Odom, 63 Ga. 499 (1879); Cunningham & Co. v. Cureton, 96 Ga. 489, 23 S.E. 420 (1895); Brigham v. Overstreet, 128 Ga. 447, 57 S.E. 484, 10 L.R.A. (n.s.) 452, 11 Ann. Cas. 75 (1907); Empire Cotton Oil Co. v. Continental Gin Co., 21 Ga. App. 16, 93 S.E. 525 (1917); J.S. Schofield's Sons Co. v. Citizens' Bank, 2 F.2d 129 (5th Cir. 1924), cert. denied, 266 U.S. 635, 45 S. Ct. 226, 69 L. Ed. 480 (1925); Anglo-American Mill Co. v. Dingler, 8 F.2d 493 (N.D. Ga. 1925); Holland Furnace Co. v. Lowe, 172 Ga. 815, 159 S.E. 277 (1931); Rucker v. Hunt, 44 Ga. App. 836, 163 S.E. 612 (1932); Sawyer v. Foremost Dairy Prods., Inc., 176 Ga. 854, 169 S.E. 115 (1933); Consolidated Whse. Co. v. Smith, 55 Ga. App. 216, 189 S.E. 724 (1937); Atlanta Gas-Light Co. v. Farrell, 190 Ga. 437, 9 S.E.2d 625 (1940); Burpee v. Athens Prod. Credit Ass'n, 65 Ga. App. 102, 15 S.E.2d 526 (1941); Slater v. Dowd, 79 Ga. App. 272, 53 S.E.2d 598 (1949).

Jury question. — If some of the machinery is shown not to be attached to the building other than by wires and pipes by which power is applied, others are not attached in any way to the building, and still others are attached, the case calls for reference to a jury. The issue is a question of fact, not a question of law. Sawyer v. Foremost Dairy Prods., Inc., 176 Ga. 854, 169 S.E. 115 (1933).

OPINIONS OF THE ATTORNEY GENERAL

For listing of numerous items to be considered as fixtures and as part of realty, see 1969 Op. Att'y Gen. No. 69-90.

Advertisement sign per se is personal property, but when placed with the intention that the sign remain permanently in that place, the sign may be considered as part of the realty. 1970 Op. Att'y Gen. No. 70-163.

Mobile homes. — Mobile home can be considered as part of the realty if it is placed on the property with the intent that the mobile home remain permanently in place and that the mobile home pass as part of the realty when conveyed; in order to determine what the intent was with respect to the mobile home, all of the surrounding facts and circumstances should be considered in each case as outward manifestations of what was in fact intended. 1969 Op. Att'y Gen. No. 69-316.

RESEARCH REFERENCES

Am. Jur. 2d. — 35A Am. Jur. 2d, Fixtures, §§ 1 et seq., 26, 34, 35, 69 et seq., 115, 124, 137, 139. 63A Am. Jur. 2d, Property, §§ 12, 15, 19 et seq.

C.J.S. — 36A C.J.S., Fixtures, §§ 1 et seq., 16, 36, 51, 52. 73 C.J.S., Property, § 20.

ALR. — Rights of seller of fixtures retaining title thereto, or a lien thereon, as against purchasers or encumbrancers of the realty, 13 ALR 448; 73 ALR 748; 88 ALR 1318; 111 ALR 362; 141 ALR 1283.

Pavement, flooring, platform, walks, and the like as fixtures, 13 ALR 1454.

Storage tank or other apparatus of gasoline station as fixtures, 17 ALR 1221; 36 ALR 447; 52 ALR 798; 99 ALR 69.

Garage as fixture, 36 ALR 1519.

Flagpole or other ornament in garden, yard, or park as fixture, 50 ALR 640.

Agreement with owner that annexation to land shall not become fixture as affecting

rights of subsequent purchaser or mortgagee of land, 58 ALR 1352.

Electric fan as fixture, 62 ALR 251.

Pipe organ as fixture, 62 ALR 368.

Refrigerator or refrigerating plant as fixture, 64 ALR 1222; 169 ALR 478.

Cotton gin as fixture, 70 ALR 1128.

Intention as criterion of fixtures, 77 ALR 1400.

Chattel annexed to realty as subject to prior mortgage, 88 ALR 1114; 99 ALR 144.

Buildings erected by a tenant as ''trade fixtures,'', 107 ALR 1153.

Constructive annexation, for purpose of law, of fixtures where articles or parts not in themselves physically annexed are used in connection or association with articles or parts that are so annexed, 109 ALR 1424.

Fixtures as within contemplation of bulk sales or bulk mortgage act, 118 ALR 847.

Bowling alleys as fixtures, 123 ALR 690.

Nursery stock attached to the soil as real or personal property, and resulting rights, 125 ALR 1406.

Heating plant as a fixture, or as a part of or attached to realty, 126 ALR 599.

Vaults, vault doors, safes, or other repositories for valuables, or alarm system in connection therewith, as fixtures, 133 ALR 427.

Doctrine of constructive annexation as applied to plumbing material and heating apparatus delivered to premises but not installed, 10 ALR2d 207.

Sprinkler system as fixture, 19 ALR2d 1300.

Amusement apparatus or device as fixture, 41 ALR2d 664.

Appliances, accessories, pipes or other articles connected with plumbing as fixtures, 52 ALR2d 222.

Carpets, linoleum, or the like as fixtures, 55 ALR2d 1044.

Electric range as fixture, 57 ALR2d 1103.

Estoppel to assert that article annexed to realty is or is not a fixture, 60 ALR2d 1209.

Electronic computing equipment as fixture, 6 ALR3d 497.

What are ''fixtures'' within provision of property insurance policy expressly extending coverage to fixtures, 17 ALR3d 1381.

Fence as factor in fixing location of boundary line — modern cases, 7 ALR4th 53.

Air-conditioning appliance, equipment, or apparatus as fixture, 69 ALR4th 359.

44-1-7. Possession of personalty.

Personalty is deemed to be in the possession of a party when that party's right to the property is accompanied by immediate actual or constructive possession. (Orig. Code 1863, § 2218; Code 1868, § 2212; Code 1873, § 2238; Code 1882, § 2238; Civil Code 1895, § 3071; Civil Code 1910, § 3647; Code 1933, § 85-1702.)

JUDICIAL DECISIONS

What constitutes actual possession. — Person who knowingly has direct physical control over a thing at a given time is in actual possession of the thing. Thomas v. State, 153 Ga. App. 686, 266 S.E.2d 335 (1980).

What constitutes constructive possession. — Person who, though not in actual possession, knowingly has both the power and intention at a given time to exercise dominion or control over a thing is then in constructive possession of the thing. Thomas v. State, 153 Ga. App. 686, 266 S.E.2d 335 (1980).

Sole and joint possession distinguished. — If one person alone has actual or constructive possession of a thing, possession is sole. If two or more persons share actual or constructive possession of a thing, possession is joint. Thomas v. State, 153 Ga. App. 686, 266 S.E.2d 335 (1980).

Presumption of constructive possession arises from status as lessee of premises and head of household. Murray v. State, 155 Ga. App. 816, 273 S.E.2d 219 (1980).

Possession of money may be actual or constructive. DeFoor v. State, 233 Ga. 190, 210 S.E.2d 707 (1974).

Cited in Brewer v. State, 129 Ga. App. 118, 199 S.E.2d 109 (1973); Graham v. State, 152 Ga. App. 233, 262 S.E.2d 465 (1979); Chan-

cellor v. Gateway Lincoln-Mercury, Inc., 233 Ga. App. 38, 502 S.E.2d 799 (1998).

RESEARCH REFERENCES

Am. Jur. 2d. — 4 Am. Jur. 2d, Animals, § 13. 63A Am. Jur. 2d, Property, § 28 et seq.

C.J.S. — 73 C.J.S., Property, § 49 et seq.

ALR. — Larceny by finder of property, 36 ALR 372.

Construction of statute or ordinance making it an offense to possess or have alcoholic beverages in opened package in motor vehicle, 35 ALR3d 1418.

44-1-8. Property rights in animals; factors establishing property in wild animals.

(a) Property rights may exist in all animals, birds, and fish. To constitute property in those which are wild by nature as distinguished from domestic animals, they must be in the actual possession, custody, or control of the party claiming a property interest. Possession, custody, or control of wild animals may be obtained by taming or domesticating them, by confining them within restricted limits, or by killing or capturing them.

(b) Notwithstanding subsection (a) of this Code section, no property right shall be created in wildlife as defined by Code Section 27-1-2. (Orig. Code 1863, § 2220; Code 1868, § 2214; Code 1873, § 2240; Code 1882, § 2240; Civil Code 1895, § 3073; Civil Code 1910, § 3649; Code 1933, § 85-1703.)

Cross references. — State ownership of wildlife located in state, § 27-1-3.

JUDICIAL DECISIONS

Deer are not treated in law as domestic, and it would require positive or circumstantial evidence to show that a particular deer had lost the deer's natural quality of wildness by being domesticated or confined. Crosby v. State, 121 Ga. 198, 48 S.E. 913 (1904).

Cited in Shelley v. Queen, 104 Ga. App. 837, 123 S.E.2d 177 (1961); Blackston v. State, Dep't of Natural Resources, 255 Ga. 15, 334 S.E.2d 679 (1985).

OPINIONS OF THE ATTORNEY GENERAL

Only state may sell game animals. — Game animals, whether held in captivity legally or illegally, may not be sold by one other than the state. 1973 Op. Att'y Gen. No. 73-35.

Domestication does not divest state's interest. — Domestication, one way of obtaining a property right under law, in and of itself cannot divest the state of the interest in game animals which the state holds in trust for all the people of the state. The possession of a domesticated game animal is still subject to all applicable laws regarding game animals. 1973 Op. Att'y Gen. No. 73-35.

Former Code 1933, §§ 85-1703 and 85-1705 (see O.C.G.A. §§ 44-1-8 and 44-1-10) did not conflict with state's control over and ownership of animals ferae naturae, but merely set out the method by which individuals could gain property rights

in such animals when allowed to do so by the laws of the state. 1973 Op. Att'y Gen. No. 73-35.

Rights in game and wild animals depend on compliance with law. — When an individual has complied with the law and rules and regulations of the state in hunting or capturing a game or wild animal, the individual obtains a property right in the animal good against any other person. When an animal ferae naturae is captured or reduced to possession in violation of the applicable laws and rules and regulations, however, no property right vests in the person capturing or killing such animal. 1973 Op. Att'y Gen. No. 73-35.

RESEARCH REFERENCES

Am. Jur. 2d. — 4 Am. Jur. 2d, Animals, § 14. 63A Am. Jur. 2d, Property, § 24.

C.J.S. — 3B C.J.S., Animals, §§ 8, 10.

ALR. — Pollution of oyster beds, 3 ALR 762.

Escape of wild animal from confinement as affecting property rights, 52 ALR 1061.

Right created by private grant or reservation to hunt or fish on another's land, 49 ALR2d 1395.

44-1-9. Ownership of deposit and offspring by wild animals on land.

Anything deposited on realty by wild animals, birds, and fish except wildlife as defined by Code Section 27-1-2 shall belong to the owner of the realty. Honey deposited in a tree by bees shall belong to the owner of the tree even if the bees were hived by another person. The eggs and young of birds and the offspring of other animals and fish for as long as they remain unable to leave the land shall belong to the owner of the land. (Orig. Code 1863, § 2221; Code 1868, § 2215; Code 1873, § 2241; Code 1882, § 2241; Civil Code 1895, § 3074; Civil Code 1910, § 3650; Code 1933, § 85-1704; Ga. L. 1982, p. 3, § 44.)

OPINIONS OF THE ATTORNEY GENERAL

Landowner's permission needed to cut down tree containing wild bees and honey. — One could not go upon the land of any person and cut a tree containing wild bees and honey and take the bees and honey without first having the permission and consent of the owner of the land upon which the tree is situated. 1950-51 Op. Att'y Gen. p. 318.

RESEARCH REFERENCES

Am. Jur. 2d. — 63A Am. Jur. 2d, Property, § 27.

C.J.S. — 3B C.J.S., Animals, § 8, 10.

ALR. — Law of bees, 39 ALR 352.

Liability for injury or damage caused by bees, 86 ALR3d 829.

44-1-10. Ownership of offspring of domestic or owned animals.

The offspring of all animals follows the ownership of the mother and belongs to the owner of the mother at the time of birth. (Orig. Code 1863, § 2222; Code 1868, § 2216; Code 1873, § 2242; Code 1882, § 2242; Civil Code 1895, § 3075; Civil Code 1910, § 3651; Code 1933, § 85-1705.)

JUDICIAL DECISIONS

Declaratory of common law. — This statute confers no additional rights on a mortgagee. It is simply a statement of the common-law rule that "the brood belongs to the owner of the dam or mother, — partus sequitur ventrem." Dixon v. Pierce, 22 Ga. App. 291, 95 S.E. 995 (1918) (see O.C.G.A. § 44-1-10).

Effect of mortgage on increase of domestic animals. — Inasmuch as a mortgage in this state does not transfer title, but gives only a lien on the property included therein, a mortgage on domestic animals does not cover the increase thereof if there is no express mention of such increase in the instrument itself. Such increase may be sold by the mortgagor as the mortgagor's own, and a purchaser from the mortgagor gets a good title as against the mortgagee. Dixon v. Pierce, 22 Ga. App. 291, 95 S.E. 995 (1918).

Payment of foaling fee or for feeding does not alone give title. — Mere fact that the defendant might have paid the foaling fee or fed colts could not give the defendant title, unless there was an express contract to this effect. Walton v. Mitchell, 11 Ga. App. 159, 74 S.E. 1006 (1912).

Cited in Anderson & Conley v. Leverette, 116 Ga. 732, 42 S.E. 1026 (1902); Johnson v. Stevens, 19 Ga. App. 192, 91 S.E. 220 (1917).

OPINIONS OF THE ATTORNEY GENERAL

Former Code 1933, §§ 85-1703 and 85-1705 (see O.C.G.A. §§ 44-1-8 and 44-1-10) did not conflict with state's exercise of control over and ownership of animals ferae naturae, but merely set out the method by which individuals could gain property rights in such animals when allowed to do so by the laws of the state. 1973 Op. Att'y Gen. No. 73-35.

Ownership of game and wild animals. — When an individual has complied with the laws and rules and regulations of the state in hunting or capturing a game or wild animal, the individual obtains a property right in the animal good against any other person. When an animal ferae naturae is captured or reduced to possession in violation of the applicable laws and rules and regulations, however, no property right vests in the person capturing or killing such animal. 1973 Op. Att'y Gen. No. 73-35.

RESEARCH REFERENCES

Am. Jur. 2d. — 63A Am. Jur. 2d, Property, § 26.

C.J.S. — 3B C.J.S., Animals, § 6.

44-1-11. Application and construction of provisions relating to estates.

(a) Unless otherwise expressly provided, the provisions of this title relating to estates of either real or personal property shall be applicable to both.

(b) The rules of construction applicable to estates of personalty shall be the same as those applicable to estates of realty. (Orig. Code 1863, § 2225; Code 1868, § 2219; Code 1873, § 2245; Code 1882, § 2245; Civil Code 1895, § 3080; Civil Code 1910, § 3656; Code 1933, § 85-104.)

Cross references. — Estates generally, Ch. 6, T. 44.

RESEARCH REFERENCES

Am. Jur. 2d. — 28 Am. Jur. 2d, Estates, § 1 et seq.

C.J.S. — 31 C.J.S., Estates, § 4. 73 C.J.S., Property, §§ 39 et seq., 47.

ALR. — Validity and effect of transfer of expectancy by prospective heir, 121 ALR 450.

Right of survivor of parties to bank account in their joint names as affected by provision excluding his right of withdrawal during the lifetime of the other party, 155 ALR 1084.

Proceeds or derivation of real property held by entirety as themselves held by entirety, 22 ALR4th 459.

44-1-12. What constitutes perfect title.

One person may have the right of possession of certain property and another person may have the right to the property itself. A union of those rights constitutes a perfect title. (Orig. Code 1863, § 2321; Code 1868, § 2318; Code 1873, § 2349; Code 1882, § 2349; Civil Code 1895, § 3209; Civil Code 1910, § 3797; Code 1933, § 85-103.)

Law reviews. — For article discussing the problems with acquiring good title, see 15 Ga. B.J. 281 (1953). For article advocating the adoption of a marketable title statute in Georgia, see 16 Ga. B.J. 263 (1954).

JUDICIAL DECISIONS

"Perfect title" as used in § 53-12-4 to be construed with this section. — Phrase ''perfect title,'' as used in former Code 1933, § 108-112 was to be construed in connection with the definition of a ''perfect title'' given in former Code 1933, § 85-103 (see O.C.G.A. § 44-1-12), i.e., the union of right of property and right of possession. Sanders v. First Nat'l Bank, 189 Ga. 450, 6 S.E.2d 294 (1939).

Rebuttable presumption of ownership. — One in possession of personal property is presumed to be the owner until the contrary appears, and the burden of rebutting the presumption is upon the party claiming adversely to the one in possession. Hattaway v. Keefe, 191 Ga. App. 315, 381 S.E.2d 569 (1989).

Possession of a negotiable instrument is presumptive evidence of title, but it is not conclusive. Hattaway v. Keefe, 191 Ga. App. 315, 381 S.E.2d 569 (1989).

RESEARCH REFERENCES

Am. Jur. 2d. — 63C Am. Jur. 2d, Property, §§ 22 et seq., 31. 77 Am. Jur. 2d, Vendor and Purchaser, §§ 86, 89, 93, 96.

C.J.S. — 73 C.J.S., Property, §§ 39 et seq., 47, 49 et seq.

ALR. — Merger, as to other than intervening lienor, on purchase of paramount mortgage by owner of fee, 46 ALR 322.

Restriction forbidding manufacture or sale of liquor as breach of covenant of title or against encumbrances, or as negativing marketable title, 51 ALR 1460.

Marketable title, 57 ALR 1253; 81 ALR2d 1020.

Marketability of title derived from or through tax proceedings, 115 ALR 140.

Right of holder of bond or other instrument representing or based upon assessment for benefits or improvement, to purchase tax sale, or acquire tax title and hold same in his own right as against owner of land, 123 ALR 398.

Marketability of title as affected by question as to constitutionality of statute upon which vendor's title depends, of statute creating encumbrance or restriction upon the property, 152 ALR 963.

Vendor and purchaser: marketability of

title as affected by lack or insufficiency of proof that one of the parties to an instrument or proceeding in the chain of title was not married, 161 ALR 1472; 2 ALR3d 1335.

Marketability of title as affected by fact that grantor or mortgagor in chain of title acquired complete or perfect title after conveyance, 163 ALR 437.

Modern trends as to pleading a particular cause of injury or act of negligence as waiving or barring the right to rely on res ipsa loquitur, 2 ALR3d 1335.

Right to inundate land as rendering title thereto unmarketable, 15 ALR2d 966.

Determination of property rights between local church and parent church body: modern view, 52 ALR3d 324.

Use of property by public as affecting acquisition of title by adverse possession, 56 ALR3d 1182.

44-1-13. Removal of improperly parked cars or trespassing personal property; concurrent jurisdiction; procedure; automatic surveillance prohibited; penalty.

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

(1) ''Commission'' means the Public Service Commission.

(2) ''Private property'' means any parcel or space of private real property.

(a.1) Any person or his or her authorized agent entitled to the possession of any private property shall have the right to remove or cause to be removed from the property any vehicle or trespassing personal property thereon which is not authorized to be at the place where it is found and to store or cause to be stored such vehicle or trespassing personal property, provided that there shall have been conspicuously posted on the private property notice that any vehicle or trespassing personal property which is not authorized to be at the place where it is found may be removed at the expense of the owner of the vehicle or trespassing personal property. Such notice shall also include information as to the location where the vehicle or personal property can be recovered, the cost of said recovery, and information as to the form of payment; provided, however, that the owner of residential private property containing not more than four residential units shall not be required to comply with the posting requirements of this subsection. Only towing and storage firms issued permits or licenses by the local governing authority of the jurisdiction in which they operate or by the commission, and having a secure impoundment facility, shall be permitted to remove trespassing property and trespassing personal property at the request of the owner or authorized agent of the private property.

(b)(1) The commission shall have the authorization to regulate and control the towing of trespassing vehicles on private property if such towing is performed without the prior consent or authorization of the owner or operator of the vehicle, including the authority to set just and reasonable rates, fares, and charges for services related to the removal, storage, and required notification to owners of such towed vehicles. No storage fees shall be charged for the first 24 hour period which begins at the time the vehicle is removed from the property, and no such fees shall

be allowed for the removal and storage of vehicles removed by towing and storage firms found to be in violation of this Code section. The commission is authorized to impose a civil penalty for any violation of this Code section in an amount not to exceed $2,500.00.

(2) In accordance with subsection (d) of this Code section, the governing authority of a municipality may require towing and storage operators to charge lower maximum rates on traffic moving between points within such municipality than those provided by the commission's maximum rate tariff and may require higher public liability insurance limits and cargo insurance limits than those required by the commission. The governing authority of a municipality shall not provide for higher maximum costs of removal, relocation, or storage than is provided for by the commission.

(c) In all municipalities, except a consolidated city-county government, having a population of 100,000 or more according to the United States decennial census of 1970 or any future such census a person entitled to the possession of an off-street parking area or vacant lot within an area zoned commercial by the municipality shall have the right to remove any vehicle or trespassing personal property parked thereon after the regular activity on such property is concluded for the day only if access to such property from the public way is blocked by a sturdy chain, cable, or rope stretched at least 18 inches above grade across all driveways or other ways providing access to the off-street parking area or vacant lot and there is conspicuously posted in the area a notice, the location of which must be approved by the municipality's police department, that any vehicle or trespassing personal property parked thereon which is not authorized to be in such area may be removed at the expense of the owner along with information as to where the vehicle or trespassing personal property may be recovered, the cost of said recovery, and information regarding the form of payment.

(d)(1) In addition to the regulatory jurisdiction of the commission, the governing authority of each municipality having towing and storage firms operating within its territorial boundaries may require and issue a license or permit to engage in private trespass towing within its corporate municipal limits pursuant to this Code section to any firm meeting the qualifications imposed by said governing authority. The fee for the license or permit shall be set by such governing authority. The maximum reasonable costs of removal, relocation, and storage pursuant to the provisions of this Code section shall be compensatory, as such term is used in the public utility rate-making procedures, and shall be established annually by the governing authority of each municipality having towing and storage firms operating within its territorial boundaries; provided, however, that no storage fees shall be charged for the first 24 hour period which begins at the time the vehicle is removed from the property, and no such fees shall be allowed for the removal and storage of vehicles

removed by towing and storage firms found to be in violation of this Code section.

(2) Towing and storage firms operating within a municipality's corporate limits shall obtain a nonconsensual towing permit from the commission and shall file its registered agent's name and address with the commission.

(e) Any person who suffers injury or damages as a result of a violation of this Code section may bring an action in any court of competent jurisdiction for actual damages, which shall be presumed to be not less than $100.00, together with court costs. A court shall award three times actual damages for an intentional violation of this Code section.

(f) It shall be unlawful and punishable by a fine of $1,000.00 for any towing and storage firm, permitted or unpermitted, licensed or unlicensed, to enter into any agreement with any person in possession of private property to provide automatic or systematic surveillance of such property for purposes of removal and relocation of any such vehicle or trespassing personal property except upon call by such person in possession of such private property to such towing and storage firm for each individual case of trespass; provided, further, that it shall be unlawful and punishable by a fine of $1,000.00 for any towing and storage firm to pay to any private property owner or one in possession of private property any fee or emolument, directly or indirectly, for the right to remove a vehicle or trespassing personal property from said private property. (Ga. L. 1962, p. 146, § 1; Ga. L. 1968, p. 321, § 1; Ga. L. 1973, p. 2622, § 1; Ga. L. 1982, p. 2107, § 46; Ga. L. 1987, p. 1442, § 1; Ga. L. 1989, p. 1230, § 1; Ga. L. 1990, p. 8, § 44; Ga. L. 2003, p. 881, §§ 1, 2; Ga. L. 2005, p. 60, § 44/HB 95; Ga. L. 2005, p. 334, § 26-1/HB 501; Ga. L. 2007, p. 228, § 1/HB 316.)

Cross references. — Security interests in and liens on motor vehicles generally, see § 40-3-50 et seq. Traffic regulations pertaining to parking generally, see § 40-6-200 et seq.

Code Commission notes. — The amendment of subsections (a), (a.1), and (b) of this Code section by Ga. L. 2005, p. 60, § 44(1), irreconcilably conflicted with and was treated as superseded by Ga. L. 2005, p. 334, § 26-1. See County of Butts v. Strahan, 151 Ga. 417 (1921).

Administrative rules and regulations. — Procedure for Imposing Civil Penalties and Recommending Criminal Penalties, Official Compilation of the Rules and Regulations of the State of Georgia, Georgia Public Service Commission, Transportation, Chapter 515-16-14.

Non-Consensual Towing, Official Compilation of the Rules and Regulations of the State of Georgia, Georgia Public Service Commission, Transportation, Chapter 515-16-15.

Law reviews. — For article surveying recent legislative and judicial developments in Georgia's real property laws, see 31 Mercer L. Rev. 187 (1979).

JUDICIAL DECISIONS

Section is a codification of the common law. Although this section does require the property owner to conspicuously post a sign notifying one parked on the property that one's vehicle is subject to removal, and where such property may be recovered, this

added statutory requirement was intended to aid the aggrieved party in recovering of one's vehicle, and does not in any way alter or change what was allowed at common law. Reinertsen v. Porter, 242 Ga. 624, 250 S.E.2d 475 (1978) (see O.C.G.A. § 44-1-13).

Cited in Shaw v. Wheat St. Baptist Church, 141 Ga. App. 883, 234 S.E.2d 711 (1977); Littlejohn v. Tower Assocs., 163 Ga. App. 37, 293 S.E.2d 33 (1982); Porter v. City of Atlanta, 259 Ga. 526, 384 S.E.2d 631 (1989).

OPINIONS OF THE ATTORNEY GENERAL

Department of Natural Resources may remove vehicles blocking public boat launching ramps in accordance with this statute. 1970 Op. Att'y Gen. No. 70-157 (see O.C.G.A. § 44-1-13).

RESEARCH REFERENCES

Am. Jur. 2d. — 51 Am. Jur. 2d, Liens, §§ 3, 9, 11, 12, 52 et seq. 58 Am. Jur. 2d, Nuisances, §§ 131, 149, 218 et seq., 398 et seq., 412 et seq. 63A Am. Jur. 2d, Property, §§ 3, 27.

C.J.S. — 66 C.J.S., Nuisances, §§ 1 et seq., 178 et seq. 73 C.J.S., Property, §§ 1 et seq., 39 et seq., 47, 49, 50 et seq. 87 C.J.S., Trespass, §§ 13, 21.

44-1-14. Abatement of hazard from abandoned well or hole; recovery costs; use of county funds.

(a) As used in this Code section, the term ''abandoned well or hole'' means any manmade opening upon the surface of the earth which is ten feet or more in depth and which has not been used for a period of 60 days. The term does not include ditches; sand or gravel pits; stone, marble, or slate quarries; clay pits; surface mines as defined in Part 3 of Article 2 of Chapter 4 of Title 12, the ''Georgia Surface Mining Act of 1968''; or geologic boreholes as defined in Part 3 of Article 3 of Chapter 5 of Title 12, the ''Water Well Standards Act of 1985.''

(b) Whenever it is brought to the attention of any person that an open abandoned well or hole, as defined in subsection (a) of this Code section, exists on public or private property, such person shall immediately inform the governing authority of the county in which the hazard exists. The governing authority shall inform the owner or possessor of the land upon which the hazard exists. The governing authority of any such county is authorized to use county work crews, private contractors, or any inmate labor within the county to abate the hazard either by covering, filling, or otherwise. When the hazard exists on private property, the governing authority shall first obtain the permission of the owner or possessor of the property before proceeding with any action in regard to abating the hazard existing on the private property. Upon approval by the owner or possessor of the private property, the governing authority may use county work crews, private contractors, or inmate labor; but in no case shall any work other than making the hazard safe be done on private property.

(c) If the abandoned well or hole is located on private property and the owner or possessor of the property cannot be located or is not known, the

governing authority of the county may abate the hazard without the prior approval of the owner or possessor.

(d) The governing authority of the county is authorized to recover the reasonable costs of filling or covering the abandoned well or hole located on private property from the owner or possessor of said property.

(e) The governing authority of the county is authorized to expend county funds to accomplish the purpose of this Code section. (Ga. L. 1965, p. 446, §§ 1, 2; Ga. L. 1986, p. 922, § 1; Ga. L. 1987, p. 3, § 44; Ga. L. 1988, p. 13, § 44; Ga. L. 1992, p. 6, § 44.)

Cross references. — Abatement of nuisances generally, Ch. 2, T. 41. Rules and regulations relating to hiring out of inmates, see § 42-5-60.

Law reviews. — For annual survey of local government law, see 38 Mercer L. Rev. 289 (1986).

JUDICIAL DECISIONS

Jury instruction on duty to fill wells properly denied. — Trial court properly refused defendant's request for a jury charge on the duty to fill in abandoned wells since the requested charge was not accurate and was not adjusted to the evidence. McCoy v. State, 262 Ga. 699, 425 S.E.2d 646 (1993).

Covered hole not "open" abandoned well. — Because an abandoned well on the landowners' property, which had been covered over, did not become an ''open'' abandoned well or hole until after an injured person's leg fell through into the hole, the landowners did not violate O.C.G.A. § 44-1-14. Sisson v. Elliott, 278 Ga. App. 156, 628 S.E.2d 232 (2006).

OPINIONS OF THE ATTORNEY GENERAL

Taxation for purpose of abating pollution of wells. — County is authorized to collect and levy taxes for the purpose of abating the disposal of pollutants into wells by closing the wells. 1983 Op. Att'y Gen. No. U83-42.

County work crews composed of inmates can be utilized to enter upon private property to close abandoned wells or holes. 1983 Op. Att'y Gen. No. U83-42.

RESEARCH REFERENCES

Am. Jur. 2d. — 57 Am. Jur. 2d, Municipal, County School, and State Tort Liability, §§ 120, 124, 136, 137. 58 Am. Jur. 2d, Nuisances, §§ 8 et seq., 70 et seq., 79, 80, 82, 102, 106, 107, 113, 117 et seq., 156, 167 et seq., 226, 246 et seq., 440. 62 Am. Jur. 2d, Premises Liability, § 49 et seq. 62A Am. Jur. 2d, Premises Liability, § 617. 78 Am. Jur. 2d, Waters, §§ 206, 239, 395.

C.J.S. — 16A C.J.S., Constitutional Law, §§ 616, 617. 18 C.J.S., Convicts, §§ 2, 5, 16 et seq., 23. 65 C.J.S., Negligence, § 169. 65A C.J.S., Negligence, § 400 et seq. 66 C.J.S., Nuisances, § 121 et seq.

ALR. — Liability of landowner for injury to or death of child caused by cave-in or landslide, 28 ALR2d 195.

Liability of landowner for injury or death of adult falling down unhoused well, cistern, mine shaft, or the like, 46 ALR2d 1069.

Duty and liability as to plugging oil or gas well abandoned or taken out of production, 50 ALR3d 240.

44-1-15. Removal or destruction of survey monuments prohibited; exceptions; penalties.

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

(1) ''Geodetic control monuments'' means those survey monuments which are established by federal, state, local, and private agencies, the position of which monuments on the earth's surface has been fixed by high-order surveying and computation for use by surveyors and engineers in the extension of geodetic position to property corners, improvements to property, utility systems, streets and highways, and such other objects and things as may be located by surveying. Such monuments may be in the form of metal disks set in concrete, rock, metal, or some other fixed permanent object, the position thereof having been published by the agency which established the monument and made available to the public as well as to land surveyors and engineers for public use.

(2) ''Property corner monuments'' means those survey monuments which are established to identify property corners, the location and description of which are made a part of any plat or any instrument pertaining to real property filed in the office of the clerk of the superior court of any county of this state. Said survey monuments may be any permanent or semipermanent objects or any live or dead plant material, including, but not limited to, iron or steel pipes, bars, or rods; concrete markers, including highway right of way markers; stone or rock, whether natural or erected; trees, stumps, stakes, and marks, including those marks made on trees, stones, rocks, concrete, or metal; and such other monuments as may be described in said plats and instruments of record.

(b) It shall be unlawful for any person willfully and knowingly to remove, destroy, injure, or displace any geodetic control monument or property corner monument except under the authority of the agency which originally set the monument or, in the case of a property corner monument, under the authority of a registered land surveyor or duly elected or appointed county surveyor having the written permission of all landowners who are parties to said property corner monument. In the case of a geodetic control monument, the record of any authorized change shall be published; and, in the case of a property corner monument, the record of any authorized change shall be filed for record in the office of the clerk of the superior court of the county in which the monument is located.

(c) Any person who violates this Code section shall be guilty of a misdemeanor and upon conviction thereof shall be fined not less than $100.00 nor more than $500.00 and may also be punished by imprisonment for not less than 30 days nor more than 60 days. (Ga. L. 1978, p. 1614, §§ 1-3; Ga. L. 1982, p. 3, § 44.)

Cross references. — Recording maps and plats of real estate, § 15-6-67 et seq.

RESEARCH REFERENCES

Am. Jur. 2d. — 12 Am. Jur. 2d, Boundaries, §§ 4, 5.

C.J.S. — 11 C.J.S., Boundaries, § 17.

ALR. — Conveyance with reference to tree, or similar monument, as giving title to center thereof, 2 ALR 1428; 61 ALR5th 739.

44-1-16. Failure to disclose in real estate transaction that property was occupied by diseased person or was site of death; failure to disclose information required to be provided or maintained in accordance with Code Section 44-9-44.1.

(a)(1) No cause of action shall arise against an owner of real property, a real estate broker, or any affiliated licensee of the broker for the failure to disclose in any real estate transaction the fact or suspicion that such property:

(A) Is or was occupied by a person who was infected with a virus or any other disease which has been determined by medical evidence as being highly unlikely to be transmitted through the occupancy of a dwelling place presently or previously occupied by such an infected person; or

(B) Was the site of a homicide or other felony or a suicide or a death by accidental or natural causes;

provided, however, an owner, real estate broker, or affiliated licensee of the broker shall, except as provided in paragraph (2) of this subsection, answer truthfully to the best of that person's individual knowledge any question concerning the provisions of subparagraph (A) or (B) of this paragraph.

(2) An owner, real estate broker, or affiliated licensee of the broker shall not be required to answer any question if answering such question or providing such information is prohibited by or constitutes a violation of any federal or state law or rule or regulation, expressly including without limitation the federal Fair Housing Act as now or hereafter amended or the state's fair housing law as set forth in Code Sections 8-3-200 through 8-3-223.

(b) No cause of action shall arise against an owner of real property, real estate broker, or affiliated licensee of the broker for the failure to disclose in any real estate transaction any information or fact which is provided or maintained or is required to be provided or maintained in accordance with Code Section 42-9-44.1. No cause of action shall arise against any real estate broker or affiliated licensee of the broker for revealing information in accordance with this Code section. Violations of this Code section shall not create liability under this Code section against any party absent a finding of

fraud on the part of such party. (Code 1981, § 44-1-16, enacted by Ga. L. 1989, p. 1633, § 1; Ga. L. 1998, p. 1050, § 1; Ga. L. 2001, p. 1155, § 1.)

Code Commission notes. — Pursuant to Code Section 28-9-5, in 1998, at the end of paragraph (a)(2), ''Code Section'' was deleted preceding ''8-3-223'' and ''Code Sections'' was substituted for ''Code Section'' preceding ''8-3-200''.

Editor's notes. — Ga. L. 1983, p. 471, effective March 15, 1983, repealed former § 44-1-16 (based on Ga. L. 1971, p. 624, §§ 2, 3), which pertained to information required to appear on posters for outdoor use.

Code Section 42-9-44.1, referred to in subsection (b), was repealed by Ga. L. 2006, p. 379, § 28, effective July 1, 2006.

Law reviews. — For note on the 2001 amendment to O.C.G.A. § 44-1-16, see 18 Ga. St. U. L. Rev. 260 (2001).

44-1-17. Responsibilities of buyers or grantees and grantors or owners relating to transfers of property within or adjacent to property zoned for agricultural or silvicultural use; notice to prospective purchaser, lessee, or grantee; effect of noncompliance.

(a) Prior to any purchase, lease, or other acquisition of real property or any interest in real property located within any county which has land zoned for agricultural or silvicultural use or identified on an approved county land use plan as agricultural or silvicultural use, it shall be the buyer's or grantee's responsibility to determine whether the subject property is within, partially within, or adjacent to any property zoned or identified on an approved county land use plan as agricultural or silvicultural use. If the grantor, owner, or agent of the owner knows that the property being acquired is within, partially within, or adjacent to any property zoned or identified on an approved county land use plan as agricultural or silvicultural use, the owner or agent for the owner shall deliver to the prospective purchaser, lessee, or grantee a notice which states the following:

> ''It is the policy of this state and this community to conserve, protect, and encourage the development and improvement of farm and forest land for the production of food, fiber, and other products, and also for its natural and environmental value. This notice is to inform prospective property owners or other persons or entities leasing or acquiring an interest in real property that the property in which they are about to acquire an interest lies within, partially within, or adjacent to an area zoned, used, or identified for farm and forest activities and that farm and forest activities occur in the area. Such farm and forest activities may include intensive operations that cause discomfort and inconveniences that involve, but are not limited to, noises, odors, fumes, dust, smoke, insects, operations of machinery during any 24 hour period, storage and disposal of manure, and the application by spraying or otherwise of chemical fertilizers, soil amendments, herbicides, and pesticides. One or more of these inconveniences may occur as the result of farm or forest activities which are in conformance with existing laws and regulations and accepted customs and standards.''

(b) Noncompliance with any provision of this Code section shall not affect title to real property nor prevent the recording of any document.

(c) This Code section shall not apply to any transaction involving title passing by foreclosure, deed in lieu of foreclosure, tax deed, deed to secure debt, or from an executor or administrator.

(d) This Code section shall not create a cause of action for damages or equitable relief. (Code 1981, § 44-1-17, enacted by Ga. L. 1995, p. 1198, § 1.)

Editor's notes. — Ga. L. 1995, p. 1198, § 4(a), not codified by the General Assembly, provides that this Code section applies to any transaction involving real property entered into on or after July 1, 1995.

Law reviews. — For note on the 1995 enactment of this Code section, see 12 Ga. St. U.L. Rev. 313 (1995).

CHAPTER 2

RECORDATION AND REGISTRATION OF DEEDS AND OTHER INSTRUMENTS

Article 1

Recording

Part 1

Recording of Deeds and Other Real Property Transactions

Sec.

44-2-1. Where and when deeds recorded; priority as to subsequent deeds taken without notice from same vendor.

44-2-2. Duty of clerk to record certain transaction affecting real estate and personal property; priority or recorded instruments; effect of recording on rights between parties to instruments.

44-2-3. Voluntary deeds or conveyances of land; effect of recording.

44-2-4. Protection of good faith purchases and liens without notice against unrecorded liens or conveyances.

44-2-5. Recording execution and deed after sheriff's sale; evidence of execution where original lost.

44-2-6. Recording bond for title, contracts, transfers, and assignments; priority as to subsequent deeds taken without notice from same vendor.

44-2-7. Recording of surrender or satisfaction of bond for title.

44-2-8. Recording of options to purchase land and assignments of such options; effect as notice.

44-2-9. Recording leases, usufructs, and assignments thereof; effect as notice.

44-2-10. Recording deeds and bills of sale to personalty; effect as notice.

44-2-11. Recording copy of instrument recorded in other counties in which part of affected land is located in cases where original lost or destroyed.

44-2-12. Rerecording lost or destroyed deeds and other instruments; validity.

44-2-13. Rerecording instruments upon creation of new county or change in county lines; effect on validity of original record.

44-2-14. Requirements for recordation.

44-2-15. Officers authorized to attest registrable instruments.

44-2-16. Effect of acknowledgment subsequent to execution.

44-2-17. Validity of attestation by a state or county officer who appears to have no jurisdiction to attest the instrument.

44-2-18. Recording deed upon affidavit of subscribing witness; effect of substantial compliance.

44-2-19. Recording deed on affidavit of third person.

44-2-20. Recorded affidavits relating to land as notice of facts cited therein; admissibility of such affidavits in evidence; presumption as to facts recited; filing and recording.

44-2-21. Recording instrument executed out of state; attestation and acknowledgment; validity of attestation by officer who appears to have no jurisdiction to attest the instrument.

44-2-22. Legal effect of good record title for 40 years.

44-2-23. When deed serves as evidence; effect of affidavit alleging forgery.

44-2-24. Withdrawal of affidavit of forgery upon loss of deed by affiant.

44-2-25. Recording techniques; photostatic copies of plats.

44-2-26. Recording of plat or copy of plat — When and where authorized; duty of clerk.

44-2-27. Recording of plat or copy of plat — When deemed recorded.

44-2-28. Recording of plat or copy of plat — Incorporation by reference.

Sec.
44-2-29. Recording of plat or copy of plat — Ratification of record made prior to statutory authorization; effect of incorporation by reference of plat prior to authorization.
44-2-30. Filing and recording of notice of settlement.

Part 2

Uniform Real Property Electronic Recording

44-2-35. Short title.
44-2-36. Definitions.
44-2-37. Electronic documents treated as original; electronic signatures acceptable.
44-2-38. Role of clerk of court.
44-2-39. Adoption of rules and regulations; standardization.
44-2-39.1. Promotion of uniformity.
44-2-39.2. Construction with federal law.

Article 2

Land Registration

Part 1

In General

44-2-40. Short title.
44-2-41. Definitions.
44-2-42. Performance of clerk's and sheriff's duties by deputies; liability.
44-2-43. Fraud, forgery, and theft in connection with registration of title to land; penalty.
44-2-44. Fraudulent acts by office of clerk personnel; penalties.
44-2-45. Fraud or false entries by sheriffs and deputies; penalties.
44-2-46. Fraudulent acts and malpractice of examiners; penalty.
44-2-47. Reduction of felonies under this article to misdemeanors.

Part 2

Proceedings to Register

44-2-60. Jurisdiction of superior court over matters in this article.
44-2-61. Proceedings to be in rem; operation of decree.
44-2-62. Procedure as to actions for registration; persons under disability.
44-2-63. Persons claiming less than fee; establishing title without registration.
44-2-64. Petition — Verification; contents; description of land; surveys; amendments.
44-2-65. Petition — Inclusion of separate parcels in one proceeding; individual registration of separate parts of one tract.
44-2-66. Petition — Persons included as defendants.
44-2-67. Issuance and service of process or summons; service by publication; notice to nonresidents; request for petition; guardians ad litem.
44-2-68. Appointment of resident agent for service on nonresident petitioner.
44-2-69. Service upon state, county, or municipality.
44-2-70. Waiver or acknowledgment of service.
44-2-71. Conclusive effect of evidence of service of process and notice; liability of officers for false returns or failure to publish or mail notice.
44-2-72. Posting notice on land and buildings; ascertainment of and notice to occupants; return to court; seizure and custody of the land and attachment of jurisdiction.
44-2-73. Effect of notice; appearances or pleadings as waiver of service, notice, and defects.
44-2-74. Service on other persons found by examiner to be entitled to notice.
44-2-75. Additional notice; judge's discretion.
44-2-76. Who may file objections or cross-action to petition.
44-2-77. Survey of land upon order of judge or examiner; notice to adjoining landowners; protest; procedure for trying issue.
44-2-78. Dismissal without prejudice.
44-2-79. Amendment or severance of petitions or other pleadings; power of court or examiner to require additional facts.
44-2-80. Treatment of land pending reg-

Sec.
istration; appearance of person acquiring interest in land pending registration.
44-2-81. No default judgment or decree.
44-2-82. Entry of judgment and decree; inclusion of limitations and encumbrances; decree in favor of cross-action; separate decree for each parcel.
44-2-83. Conclusiveness of decree; effect of disability on conclusiveness; recourse of persons under a disability against assurance fund.
44-2-84. Review by Supreme Court.

Part 3

Examiners

44-2-100. Appointment and qualification of examiners and special examiners; filing order of appointment and affidavit.
44-2-101. Referral of case to examiner; preliminary report; contents; time of filing; evidentiary effect.
44-2-102. Hearing; final report; delay of hearing to add new parties; notice.
44-2-103. Examiner's powers; contents, filing, and notice of examiner's report; right to jury trial, new trial, and appeal; recommitment to examiner after trial or reversal on appeal.
44-2-104. Authority to inspect pertinent records.
44-2-105. Appointment of stenographer; compensation.

Part 4

Registers and Registration

44-2-120. Furnishing and maintaining register books; issuance of owner's certificate of title.
44-2-121. Signing and dating register entries and owners' certificates.
44-2-122. Clerk's duties and liabilities; conclusive effect of registration entries; time for filing caveat; petition for direction.
44-2-123. Clerk's duty to ensure proper execution of voluntary transfer; liability for damage or loss arising from registration of improperly executed transfer.
44-2-124. Performance of duties upon disqualification, death, or disability of clerk.
44-2-125. When recordation other than registration not required; filing instruments; admissibility of certified copies and use as evidence; recordation procedure when instrument is not in short form.
44-2-126. Notation of lien or encumbrance on certificate of title — In general.
44-2-127. Notation of lien or encumbrance on certificate of title — Registered encumbrances, rights, and adverse claims.
44-2-128. Registration of transactions affecting unregistered land as notice.
44-2-129. Registration of involuntary transactions on court's order; form.
44-2-130. Cancellation of decedent's certificate and issuance of new certificate to personal representative.
44-2-131. Declaration of title by descent upon petition; service of petition and publication of notice; transfer of registered title and issuance of new certificates; rights of surviving spouse.
44-2-132. Compelling production of owner's certificate for registration of involuntary transfer; cancellation of certificate upon failure to produce it; notice of cancellation.
44-2-133. Procedure for obtaining duplicate of lost owner's certificate.
44-2-134. Filing caveat objecting to entry in title register; show cause hearing upon caveat.
44-2-135. Obtaining notations in title register.
44-2-136. Cancellation of mortgage, lien, equity, or lis pendens; entry of cancellation on title register and certificate; procedure upon refusal to authorize cancellation.
44-2-137. What adverse claims affect registered land; effect of fraud or forgery; limitations on actions to set aside.

Sec.
44-2-138. What limitations govern actions by injured party for fraud or negligence.
44-2-139. Registration and title certificate to run with land [Repealed].
44-2-140. Availability of prescription or adverse possession against registered land.
44-2-141. Rights, burdens, and incidents as to both registered and unregistered land; validity of transfers of title by last registered owner.
44-2-142. Notation of change of name on register and certificate.
44-2-143. Notation of liens and lis pendens on register; effect absent notation.
44-2-144. Freeing land from further registration; certificates as conclusive source of title; notation of encumbrances; when land automatically freed; registered land free of further registration; exception.

Part 5

Conveyance, Transfer, and Descent

44-2-160. Manner of recording deeds conveying title to registered land; validity of previous conveyances of registered land.
44-2-161. Partial transfer of registered land; undivided interest; interest in particular portion; notations on register; issuance of certificates.
44-2-162. Subdivision of registered land; procedure.
44-2-163. Conveyance to secure debt; form; notation and registration; creditor's certificate.
44-2-164. Assignment or negotiation of creditor's certificate; effect of transfer of indebtedness; surrender and cancellation of certificate; order of cancellation; notation.
44-2-165. Sale by holder of creditor's certificate; application for transfer to purchaser; opportunity to object to transfer; order of application of sale proceeds.
44-2-166. Transfer to secure debt; notation of bond for title or to reconvey.

Sec.
44-2-167. Validity and priority of unrecorded transfers of owner's certificate to registered lands.
44-2-168. Descent of registered land as personalty [Repealed].
44-2-169. Personal representative as trustee; right of personal representative to a commission; power of heirs to require transfer.
44-2-170. Right of personal representative to have registered land transferred to him where such land transferred to heirs before his appointment; action against heirs who have improperly appropriated land.
44-2-171. Procedure for ascertaining, and transfer to, heirs or beneficiaries.
44-2-172. Transfer by clerk pursuant to judgment; production of copy of decree and order.
44-2-173. Petition for involuntary transfer; referral to examiner; notice; appointment of guardians ad litem; order of transfer.
44-2-174. Attack on transfers made to hinder, delay, or defraud creditors; decree voiding such transfer; entry of cancellations and transfers on register and certificate.
44-2-175. Registering subsequent transfers or voluntary conveyances of land held in trust or otherwise restricted.
44-2-176. Duty of tax officer to have delinquent taxes or assessments noted; effect of delinquencies prior to notation; liability of officer.

Part 6

Assurance Fund

44-2-190. Payment into assurance fund upon original registration; determination of amount.
44-2-191. Separate account for assurance fund.
44-2-192. Investment of fund; application of income; transfer of excess.
44-2-193. Action against fund — Limitations; defense by Attorney General; measure of damages; tolling

Sec.
of limitations during disability; notice to unknown persons.
44-2-194. Action against fund — Parties defendant.
44-2-195. Action against fund — Execution on judgment; payment from fund; liability of other defendants to plaintiff and to fund.
44-2-196. Action against fund — How judgments satisfied when fund insufficient; interest.
44-2-197. Liability of fund for registered owner's breach of trust.

PART 7

FEES

44-2-210. Fees under article; deposit and payment of fees; award of costs.

PART 8

FORMS

44-2-220. Power of judges to make general rules and forms for matters under this article; power to modify forms; uniformity of forms.
44-2-221. Petition to register land.
44-2-222. Process.
44-2-223. Advertisement.
44-2-224. Acknowledgment of service.
44-2-225. Sheriff's return.
44-2-226. Certificate of mailing; entry of such certificate on petition.
44-2-227. Examiner's appointment.
44-2-228. Oath of examiner.
44-2-229. Referral to examiner.
44-2-230. Preliminary report of examiner; schedules.
44-2-231. Final report of examiner.
44-2-232. Decrees of title.
44-2-233. Book of decrees; index.
44-2-234. Title register book; registered title number; index of title register.
Sec.
44-2-235. Duty of clerk to enter on new certificate all entries and notations of record.
44-2-236. Certified copies of certificates of title or entries thereon.
44-2-237. Recordation and notation of plat; attaching certified copy to certificate; fee.
44-2-238. Recordation of lengthy description — Reference on title register; effect.
44-2-239. Recordation of lengthy description — Notation on owner's or creditor's certificate; attaching certified copy; fee.
44-2-240. Owner's certificate of title.
44-2-241. Transfer of whole of registered estates, undivided interests, divided portions, and to secure debt, with power of sale.
44-2-242. Creditor's certificate; endorsement of certificate.
44-2-243. Transfer of portion or undivided interest to secure debt.
44-2-244. Judge's order of transfer.
44-2-245. Registration and recordation of mortgages.
44-2-246. Notation of delinquent taxes or assessments.
44-2-247. Notation of judgment.
44-2-248. Notation of special right; notice of lis pendens; recordation and notation of lengthy descriptions.
44-2-249. Cancellation of creditor's certificate.
44-2-250. Request to cancel entries.
44-2-251. Registration and notation of other voluntary transactions [Repealed].
44-2-252. Updating entries and notations on owner's certificate; clerk's endorsement.
44-2-253. Filing cases; method of filing papers relating to registered lands.

Cross references. — Recording of maps or plats of real estate by clerk of superior court generally, § 15-6-67 et seq. Title insurance, § 33-7-8. Filing conveyances of property to or by state with State Properties Commission, § 50-16-122.

Law reviews. — For article discussing the problems with acquiring good title, see 15 Ga. B.J. 281 (1953). For article advocating the adoption of a marketable title statute in Georgia, see 16 Ga. B.J. 263 (1954). For article on title examinations and closings, see 22 Mercer L. Rev. 505 (1971). For article discussing 1976 to 1977 developments in

Georgia real property law, see 29 Mercer L. Rev. 219 (1977).

JUDICIAL DECISIONS

Construed with Chapter 11 of this Title. — Relief in ejectment is not coextensive with that under Title 22 of the Land Registration Act in that ejectment title can never be settled as against the world. Conversely, relief may be had in ejectment which cannot be had under the Act, including possession of the premises and judgment for mesne profits. Union Bag-Camp Paper Corp. v. Coffee County Hunting & Fishing Club, 216 Ga. 44, 114 S.E.2d 511 (1960).

Effect of registration law on adverse possession. — Protection which the registration law gives to one taking title to lands upon the faith of the record title should not be destroyed except upon clear and satisfactory evidence showing a clear equity in one who seeks to establish a right in hostility to the record title by adverse possession. Such possession must be actual, open, visible, exclusive, and unambiguous. McDonald v. Taylor, 200 Ga. 445, 37 S.E.2d 336 (1946).

Sufficiency of evidence proving title. — Title to land cannot be proved by hearsay testimony. Neither can title to land be established by general reputation in the community as to ownership. City of Marietta v. Glover, 225 Ga. 265, 167 S.E.2d 649 (1969).

Cited in Craig v. Arnold, 227 Ga. 333, 180 S.E.2d 733 (1971).

RESEARCH REFERENCES

Am. Jur. Trials. — Prospective Purchaser's Recovery of Damages for Tortuous Interference with Real Estate Contract, 97 Am. Jur. Trials 107.

Real Estate Broker's Breach of Fiduciary Duty to Disclose Material Facts to Seller-Principal, 101 Am. Jur. Trials 1.

ALR. — Concealment, misrepresentation, or mistake as regards identity of person for whom property is purchased as ground for cancellation of deed, 6 ALR2d 812.

Clay, sand, or gravel as ''minerals'' within deed, lease, or license, 95 ALR2d 843.

ARTICLE 1

RECORDING

Cross references. — Real estate transfer taxes, see § 48-6-1 et seq.

Law reviews. — 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).

JUDICIAL DECISIONS

Effect of grantor's conveyance to another before grantor became owner. — Title of a bona fide purchaser is not impaired by a conveyance from the purchaser's grantor to another, which was made and filed before the purchaser's grantor became the owner of the property, since to hold otherwise would be to require a purchaser to extend back indefinitely the purchaser's period of record search against the name of each prior owner. Insilco Corp. v. Carter, 245 Ga. 513, 265 S.E.2d 794 (1980).

Constructive notice of subsequent deeds. — Purchaser has constructive notice of any deeds out of the purchaser's grantor from the date of deed, rather than the date of the deed's recording. Insilco Corp. v. Carter, 245 Ga. 513, 265 S.E.2d 794 (1980).

Cited in Gray v. Georgia Real Estate Comm'n, 209 Ga. 301, 71 S.E.2d 645 (1952).

OPINIONS OF THE ATTORNEY GENERAL

Instrument which conveys only security interest in personal property is not entitled to recording as an instrument affecting title to land. 1975 Op. Att'y Gen. No. U75-87.

RESEARCH REFERENCES

ALR. — Record of executory contracts for the sale of real estate, 26 ALR 1546.

Fraudulent misrepresentation or concealment by a contracting party concerning title to property or other subjects which are matters of public record, 33 ALR 853; 56 ALR 1217.

Allowance for improvements in reliance upon title or interest defeated by failure to record conveyance, 40 ALR 282.

Use of diminutive or nickname as affecting operation of record as notice, 45 ALR 557.

Failure to record or delay in recording an instrument affecting real property as basis of estoppel in favor of creditors not directly within protection of recording acts, 52 ALR 183.

Presumption or burden of proof as to whether or not instrument affecting title to property is recorded, 53 ALR 668.

Grantee or mortgagee by quitclaim deed or mortgage in quitclaim form as within protection of recording laws, 59 ALR 632.

Effect of alteration in deed or mortgage with consent of parties thereto after acknowledgment or attestation, 67 ALR 364.

Assignment of future rents as within recording laws, 75 ALR 270.

Right of one otherwise protected by recording law against prior unrecorded deed or mortgage as affected by fact that all or part of the consideration was unpaid at the time he received notice, actual or constructive, of the prior instrument, 109 ALR 163.

Federal government or agencies of federal government as subject to payment of tax or fee imposed upon, or for, recording or filing instrument, 124 ALR 1267.

Validity and effect, as to previously recorded instrument, of statute which places or changes time limit on effectiveness of record of mortgages or other instruments, 133 ALR 1325.

Record of instrument which comprises or includes an interest or right that is not a proper subject of record, 3 ALR2d 577.

Agreement between real estate owners restricting use of property as within contemplation of recording laws, 4 ALR2d 1419.

Personal covenant in recorded deed as enforceable against grantee's lessee or successor, 23 ALR2d 520.

Recorded real property instrument as charging third party with constructive notice of provisions of extrinsic instrument referred to therein, 89 ALR3d 901.

Part 1

Recording of Deeds and Other Real Property Transactions

Editor's notes. — Ga. L. 2009, p. 695, § 1, effective May 5, 2009, designated Code Sections 44-2-1 through 44-2-30 as this part.

44-2-1. Where and when deeds recorded; priority as to subsequent deeds taken without notice from same vendor.

Every deed conveying lands shall be recorded in the office of the clerk of the superior court of the county where the land is located. A deed may be recorded at any time; but a prior unrecorded deed loses its priority over a subsequent recorded deed from the same vendor when the purchaser takes such deed without notice of the existence of the prior deed. (Laws 1755, Cobb's 1851 Digest, p. 159; Laws 1768, Cobb's 1851 Digest, p. 162; Laws

1785, Cobb's 1851 Digest, p. 164; Laws 1788, Cobb's 1851 Digest, p. 160; Laws 1837, Cobb's 1851 Digest, p. 175; Code 1863, § 2667; Code 1868, § 2663; Code 1873, § 2705; Code 1882, § 2705; Civil Code 1895, § 3618; Civil Code 1910, § 4198; Code 1933, § 29-401.)

Cross references. — Recording of certificate of order for year's support, § 53-5-11.

Law reviews. — For annual survey on law of real property, see 43 Mercer L. Rev. 353 (1991).

For note, "The Effect of Failure to Record Conditional Sale Contracts in Georgia," see 11 Mercer L. Rev. 358 (1960). For note discussing the Motor Vehicle Certificate of Title Act provisions in Ch. 3, T. 40, and their impact, see 13 Mercer L. Rev. 258 (1961).

For comment on Manchester Motors, Inc. v. Farmers & Merchants Bank, 91 Ga. App. 811, 87 S.E.2d 342 (1955), see 18 Ga. B.J. 82 (1955).

JUDICIAL DECISIONS

Analysis

General Consideration
Applicability
Where and When Deeds Recorded
Priority of Deeds from Same Vendor
1. In General
2. Notice
3. Vendor
4. Bona Fide Purchaser
Unrecorded Deed
Other Instruments
1. Power of Attorney
2. Bill of Sale

General Consideration

Written instruments of title favored. — Law favors title to realty being evidenced by written instruments; conversely, the law does not favor title to realty being evidenced by parol agreements. Freeman v. Saxton, 243 Ga. 571, 255 S.E.2d 28 (1979).

Effect of restrictive covenants in unrecorded instrument. — Purchaser of land without actual notice may take free of restrictive covenants contained in an unrecorded contract or deed. Jenkins v. Sosebee, 74 Bankr. 440 (Bankr. N.D. Ga. 1987).

For history of this statute, see Downs v. Yonge, 17 Ga. 295 (1855); Bell v. McCawley, 29 Ga. 355 (1859); Riley v. Southwestern R.R., 63 Ga. 325 (1879); Hockenhull v. Oliver, 80 Ga. 89, 4 S.E. 323, 12 Am. St. R. 235 (1887); White v. Interstate Bldg. & Loan Ass'n, 106 Ga. 146, 32 S.E. 26 (1898); Lindley v. Frey, 115 Ga. 662, 42 S.E. 79 (1902); Wadley Lumber Co. v. Lott, 130 Ga. 135, 60 S.E. 836 (1908); Wilkes v. Folsom, 154 Ga. 618, 115 S.E. 4 (1922) (see O.C.G.A. § 44-2-1).

For cases illustrative of the law before enactment of Ga. L. 1889, p. 106, §§ 1 and 4 (see O.C.G.A. § 44-2-2), see Gibson v. Hough & Sons, 60 Ga. 588 (1878); Lowe v. Allen, 68 Ga. 225 (1881); Latham v. Inman, 88 Ga. 505, 15 S.E. 8 (1891).

Cited in Hand v. McKinney, 25 Ga. 648 (1858); Lessee of Dudley v. Bradshaw, 29 Ga. 17 (1859); Dickson v. Chapman, 153 Ga. 547, 112 S.E. 830 (1922); Dorsey v. Clower, 162 Ga. 299, 133 S.E. 249 (1926); Terry v. Ellis, 189 Ga. 698, 7 S.E.2d 282 (1940); Mendenhall v. Holtzclaw, 198 Ga. 95, 31 S.E.2d 171 (1944); Blue Ridge Apt. Co. v. Telfair Stockton & Co., 205 Ga. 552, 54 S.E.2d 608 (1949); Georgia R.R. & Banking Co. v. Fulmer, 84 Ga. App. 101, 65 S.E.2d 636 (1951); United States v. West, 132 F. Supp. 934 (N.D. Ga. 1955); Day v. C.O. Smith Guano Co., 95 Ga. App. 581, 98 S.E.2d 173 (1957); Mack Trucks, Inc. v. Ryder Truck Rental, Inc., 110 Ga. App. 68, 137 S.E.2d 718

(1964); Pressley v. Jennings, 227 Ga. 366, 180 S.E.2d 896 (1971); Palmer v. Forrest, Mackey & Assocs., 251 Ga. 304, 304 S.E.2d 704 (1983); Tarbutton v. All That Tract or Parcel of Land Known as Carter Place, 641 F. Supp. 521 (M.D. Ga. 1986); Minor v. McDaniel, 210 Ga. App. 146, 435 S.E.2d 508 (1993); Bell v. State, 234 Ga. App. 693, 507 S.E.2d 535 (1998).

Applicability

Contract took priority over deed. — Recording of a contract to sell land took priority over a later recorded deed transferring the disputed land. Parks v. Stepp, 277 Ga. 704, 594 S.E.2d 364 (2004).

Section does not apply to security deeds. In re Hammett, 286 F. 392 (N.D. Ga. 1923). See also Randall v. Hamilton, 156 Ga. 661, 119 S.E. 595 (1923) (see O.C.G.A. § 44-2-1).

No application to question of bona fides where occupant seeking to setoff permanent improvements. — Construction notice is evidence, as a matter of course. In a contest between deeds involving merely title, it would be conclusive. However, this statute does not purport to deal with the question of bona fides where an occupant of land is seeking to setoff permanent improvements. The burden on this question is on the party asserting notice. Harper v. Durden, 177 Ga. 216, 170 S.E. 45 (1933) (see O.C.G.A. § 44-2-1).

This statute does not purport to deal with the question of bona fides when an occupant of land is seeking to setoff permanent improvements. The burden on this question is on the party asserting notice. McKaig v. Hardy, 196 Ga. 582, 27 S.E.2d 11 (1943) (see O.C.G.A. § 44-2-1).

Security deeds not properly attested or acknowledged, although recorded, did not provide subsequent purchasers of property constructive notice of their content and the deeds lost whatever priority the deeds may have had over the purchasers' title. 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).

In the absence of fraud, a deed which on the deed's face complies with all statutory requirements is entitled to be recorded, and once accepted and filed with the clerk for record, provides constructive notice to the world of the deed's existence. Leeds Bldg. Prods., Inc. v. Sears Mtg. Corp., 267 Ga. 300, 477 S.E.2d 565 (1996), overruling White v. Magarahan, 87 Ga. 217, 13 S.E. 509 (1891); Propes v. Todd, 89 Ga. App. 308, 79 S.E.2d 346 (1953), overruled on other grounds, Leeds Bldg. Prods., Inc. v. Sears Mtg. Corp., 267 Ga. 300, 477 S.E.2d 565 (1996).

Where and When Deeds Recorded

Purpose of requiring a deed to be recorded in the county where the land lies is to give constructive notice of the deed to the world. Williams v. Smith, 128 Ga. 306, 57 S.E. 801 (1907). See also Sapp v. Cline, 131 Ga. 433, 62 S.E. 529 (1908).

Deed may be recorded at any time after the deed's execution. Lindley v. Frey, 115 Ga. 662, 42 S.E. 79 (1902); Wadley Lumber Co. v. Lott, 130 Ga. 135, 60 S.E. 836 (1908).

If land lies partly in each of two counties deed is recorded in each county. Kennedy v. Harden, 92 Ga. 230, 18 S.E. 542 (1893). See also Chapman v. Floyd, 68 Ga. 455 (1882).

Construed with § 44-14-63. — Since, at the time of execution of bills of sale in question, the maker was a resident of one county but had the maker's domicile in another, the holder of junior bill of sale recorded in county where maker was resident had title to property superior to that of the holder of senior bill of sale recorded in county where maker had the maker's domicile, in view of fact that former Code 1933, § 67-1305 (see O.C.G.A. § 44-14-63) provides for the recording in the county where the maker resided at the time of the execution of the instruments, and the law draws a clear distinction between residence and domicile. Commercial Bank v. Pharr, 75 Ga. App. 364, 43 S.E.2d 439 (1947).

Priority of Deeds from Same Vendor

1. In General

Former Code 1933, §§ 29-401 and 67-2501 and 67-2503 (see O.C.G.A. §§ 44-2-1 and 44-2-2) were to be construed together. Price v. Watts, 223 Ga. 805, 158 S.E.2d 406 (1967).

Donor need not own land at time of first deed. — Falling within the scope of this statute are not only cases in which the donor owns the land at the time the donor makes

Priority of Deeds from Same Vendor (Cont'd)
1. In General (Cont'd)

the first of the two deeds, but also those cases in which the donor does not, at that time, own the land but has come to own the land when the donor makes the second deed. Faircloth v. Jordan, 18 Ga. 350 (1855) (see O.C.G.A. § 44-2-1).

As against each other, deeds take priority from date of filing for record. — In a contest between deeds upon a valuable consideration from the same grantor conveying the same property, such deeds, as against each other, when taken without notice, will take priority only from and after the date of lawful record or filing for record, and neither deed, upon being recorded, will relate back so as to affect the rights of the parties touching the subject matter of the deed at any time before the deed is filed for record. Fourth Nat'l Bank v. Howell, 92 Ga. App. 868, 90 S.E.2d 78 (1955).

Statute operates only in favor of purchaser in good faith when there is valuable consideration. Webb v. John Doe, 33 Ga. 565 (1863); Byrd v. Aspinwall, 108 Ga. 1, 33 S.E. 688 (1899); Lindley v. Frey, 115 Ga. 662, 42 S.E. 79 (1902); Wadley Lumber Co. v. Lott, 130 Ga. 135, 60 S.E. 836 (1908); Dix v. Wilkinson, 149 Ga. 103, 99 S.E. 437 (1919) (see O.C.G.A. § 44-2-1).

Section does not apply in a contest between deeds unless the junior grantee is a bona fide purchaser for value. Minor v. Georgia Kraft Co., 219 Ga. 434, 134 S.E.2d 19 (1963); Price v. Watts, 223 Ga. 805, 158 S.E.2d 406 (1967) (see O.C.G.A. § 44-2-1).

Voluntary deeds not included. — If the legislature had intended to include voluntary deeds, the word "grantor," and not "vendor," would have been used. Toole v. Toole, 107 Ga. 472, 33 S.E. 686 (1899).

Junior deed recorded without notice of unrecorded senior deed given priority. — To give priority to a junior recorded deed over a senior unrecorded deed, it must appear that the junior deed was for a valuable consideration and taken without notice of the unrecorded deed. Nickerson v. Porter, 189 Ga. 671, 7 S.E.2d 231 (1940).

Senior unrecorded deed loses the deed's 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 the junior recorded deed. Terry v. Ellis, 189 Ga. 698, 7 S.E.2d 282 (1940).

Deed of prior date loses the deed's 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 being the first to go to record in the office of the clerk of the superior court of the county where the land lies; 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).

Senior unrecorded deed loses the deed's priority over a junior recorded deed for value from the same vendor, taken without knowledge or notice of the existence of the senior deed. Whether the defendant purchased without notice of the senior deed in the petitioner's chain of title was a question for the jury. Tucker v. Long, 207 Ga. 730, 64 S.E.2d 69 (1951).

Junior deed, properly recorded, taken without notice of an unrecorded senior deed from the same vendor and for a valuable consideration, has priority over the unrecorded senior deed. Michael v. Poss, 209 Ga. 559, 74 S.E.2d 742 (1953); Fourth Nat'l Bank v. Howell, 92 Ga. App. 868, 90 S.E.2d 78 (1955).

When, in a contest between plaintiff and defendant as to title to certain described land, each claiming under a deed from a common grantor, the deed under which defendant claims having been given for a valuable consideration and executed prior to the deed under which plaintiff claims but recorded after plaintiff's deed, the deed under which plaintiff claims reciting a consideration of love and affection, the defendant's deed has priority over the plaintiff's deed. Minor v. Georgia Kraft Co., 219 Ga. 434, 134 S.E.2d 19 (1963).

Deed which is executed between a grantor and grantee, recorded, but never actually delivered to the grantee until after the grantor's death, is a superior title to a different deed between the same grantee and grantor that is actually delivered to the grantee but is recorded later than the undelivered deed. Dawson v. Keitt, 232 Ga. 10, 205 S.E.2d 309 (1974).

Recorded quitclaim deed, taken in good faith for valuable consideration, without notice, also prevails over a prior unrecorded deed. This rule is not altered by the fact that the quitclaim deed conveys only the grantor's rights, title, and interest in and to the land, instead of conveying the land itself. Archer v. Kelley, 194 Ga. 117, 21 S.E.2d 51 (1942).

Sheriff's deed recorded ahead of prior deed by defendant in execution comes within statute. McCandless v. Inland Acid Co., 108 Ga. 618, 34 S.E. 142 (1899); Maddox v. Arthur, 122 Ga. 671, 50 S.E. 668 (1905); Bennett v. Southern Pine Co., 123 Ga. 618, 51 S.E. 654 (1905); Culbreath v. Martin, 129 Ga. 280, 58 S.E. 832 (1907) (see O.C.G.A. § 44-2-1).

Recorded security deed superior to unrecorded title bond. — When, at the time that a security deed was executed and recorded, a bond for title was not recorded, and the obligee on the bond for title was not in possession of the property, and when the grantee in the security deed had no actual notice of the outstanding bond for title, the rights conveyed by the security deed were superior to those held by the obligee in the bond for title. Kelley v. Spivey, 182 Ga. 507, 185 S.E. 783 (1936).

2. Notice

Section in conflict with common-law rule of estoppel. — As to those cases which come within the provisions of this statute, it is in conflict with the common-law rule of estoppel by deed. Faircloth v. Jordan, 18 Ga. 350 (1855) (see O.C.G.A. § 44-2-1).

What constitutes notice. — Any sort of notice, actual or constructive, will suffice to give notice. Wyatt v. Elam, 23 Ga. 201, 68 Am. Dec. 518 (1857).

Actual possession is such notice. Wyatt v. Elam, 23 Ga. 201, 68 Am. Dec. 518 (1857). See also Wyatt v. Elam, 19 Ga. 335 (1856).

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 the loans 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 the loans 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).

Lis pendens and Lost Deed Affidavit, with the accompanying copy of the Security Deed, were filed pre-petition and were sufficient to put a person of ordinary prudence fully upon guard, and induce serious inquiry. For these reasons, under Georgia law, the trustee could not qualify as a bona fide purchaser on the bankruptcy petition date and therefore could not be availed of the strong-arm powers of 11 U.S.C.S. § 544(a)(3). Elec. Registration Sys. v. Pyke (In re Pyke), No. 07-10033, 2007 Bankr. LEXIS 4748 (Bankr. S.D. Ga. Aug. 1, 2007).

Any circumstance placing ordinary prudent person upon guard constitutes notice. — Any circumstance which would place a person of ordinary prudence fully upon the person's guard, and induce serious injury, is sufficient to constitute notice of a prior unrecorded deed, and a younger deed, taken with such notice, acquires no preference by being recorded in due time. Price v. Watts, 223 Ga. 805, 158 S.E.2d 406 (1967).

When recitals contained in a deed clearly put any subsequent purchaser on notice of the existence of an earlier misplaced or lost deed, the later deed, though recorded first, would not be entitled to priority. Harper v. Paradise, 233 Ga. 194, 210 S.E.2d 710 (1974).

Admissions against title not estoppel in behalf of one to whom not made. — Admissions against one's title to land, and in favor of the title of a third person, will be no estoppel in behalf of one to whom the admissions were not made, and who has merely heard of the admissions, it not appearing that the admissions were made for the purpose of being acted upon, or with any design or intention that the admissions should be acted upon. Randolph v. Merchants & Mechanics Banking & Loan Co., 181 Ga. 671, 183 S.E. 801 (1936).

Sole purpose and effect of recording of deed is to afford third parties constructive notice of the existence of the deed. City

Priority of Deeds from Same Vendor (Cont'd)
2. Notice (Cont'd)

Whsle. Co. v. Harper, 100 Ga. App. 151, 110 S.E.2d 561 (1959).

Recording is necessary to give constructive notice. See Fourth Nat'l Bank v. Howell, 92 Ga. App. 868, 90 S.E.2d 78 (1955).

Grantee's duty to record deed thereby supplying notice. — It is made the plain duty of a grantee to record the grantee's deed, thereby giving constructive notice to every one of the deed's existence and of the grantee's rights thereunder; since it is thus made the duty of the grantee to supply notice, every one is justified in relying upon an examination of the record and believing that a purchase of land will convey all title which the record fails to disclose is in another. Archer v. Kelley, 194 Ga. 117, 21 S.E.2d 51 (1942).

Recorded tax deed gives notice of a defeasible title. Bennett v. Southern Pine Co., 123 Ga. 618, 51 S.E. 654 (1905).

Purchaser has notice whether or not purchaser knows of record. — Properly recorded deed gives notice whether or not the subsequent purchaser knows of the record. McElwaney v. MacDiarmid, 131 Ga. 97, 62 S.E. 20 (1908).

Erroneous index in record book. — Properly recorded deed gives notice even when erroneous index in record book fails to show where deed is found. Chatham v. Bradford, 50 Ga. 327, 15 Am. R. 692 (1873).

Irregular registration does not give notice to anyone. Williams v. Adams, 43 Ga. 407 (1871).

Want of notice can only be set up by subsequent bona fide purchaser. Zorn v. Thompson, 108 Ga. 78, 34 S.E. 303 (1899). See also Avera v. Southern Mtg. Co., 147 Ga. 24, 92 S.E. 533 (1917); Dix v. Wilkinson, 149 Ga. 103, 99 S.E. 437 (1919).

Failure to conduct title examination. — When purchaser was under constructive notice as to the legal description of the purchaser's own deed, which incorporated the recorded plat by reference, and as to the ownership of the lot the purchaser believed the purchaser was buying but that was owned by another, the purchaser's failure to conduct a title examination was the sole proximate cause of injuries and the purchaser's negligence action was barred. Reidling v. Holcomb, 225 Ga. App. 229, 483 S.E.2d 624 (1997).

3. Vendor

Both deeds must emanate, as two streams of title, from the same source. Murphy v. Peabody, 63 Ga. 522 (1879).

"Same vendor" construed. — Words "same vendor" cannot be construed to mean the heir of the vendor. Webb v. John Doe, 33 Ga. 565 (1863); Dodge v. Briggs, 27 F. 160 (S.D. Ga. 1886).

It is sufficient if the second deed is made by the vendor's representative, either during the vendor's lifetime or after the vendor's death. Culbreath v. Martin, 129 Ga. 280, 58 S.E. 832 (1907).

4. Bona Fide Purchaser

One getting title, and legal obligation to pay, is bona fide purchaser. — To be a bona fide purchaser in the full sense, one must pay the purchase money, or at least become legally bound to do so, and get title before getting notice of the rights of third persons. Gleaton v. Wright, 149 Ga. 220, 100 S.E. 72 (1919).

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).

Lender was bona fide purchaser. — Trial court erred in determining that a second wife acquired a one-half interest in property quitclaimed to her by her husband because the husband had only a life estate in the property, and she was not a bona fide purchaser. The parties' lender, however, was a bona fide purchaser for value pursuant to O.C.G.A. §§ 44-2-1, 44-2-2, and 44-2-4(b). Price v. Price, 286 Ga. 753, 692 S.E.2d 601 (2010).

Unrecorded Deed

Effect of unrecorded deed. — Unrecorded deed of bargain and sale is postponed only to later bona fide purchasers for value without notice. Ivey v. Transouth Fin. Corp., 566 F.2d 1023 (5th Cir. 1978).

Penalty of failure to record a deed of bargain and sale has reference only to the rights of a subsequent vendee, taking a deed from the same vendor without notice of the

existence of the prior unrecorded deed. Caldwell v. Northwest Atlanta Bank, 194 Ga. 370, 21 S.E.2d 619 (1942).

Statute is exclusive and is intended to describe the one situation recognized by law in which a deed of bargain and sale loses its priority, namely, a subsequent recorded deed from the same vendor, taken without notice of the existence of the first. Thus, this statute places an unrecorded deed of bargain and sale ahead of all other assertions of priority except a contract conveyance or a lien recorded before the first deed. Manchester Motors, Inc. v. F & M Bank, 91 Ga. App. 811, 87 S.E.2d 342 (1955), for comment, see 18 Ga. B.J. 82 (1955) (see O.C.G.A. § 44-2-1).

Unrecorded deeds of bargain and sale are not postponed to subsequent judgment liens. Webb v. United-American Soda Fountain Co., 59 F.2d 329 (5th Cir. 1932).

Unrecorded deed valid between original parties. — Grantee in a security deed is under no duty to the grantor to have the deed recorded. Such a deed, as between the original parties, is valid irrespective of whether it is recorded or not. It is only as against third persons, acting in good faith without notice, that recording is required. Corbin v. Shadburn, 49 Ga. App. 91, 174 S.E. 259 (1934).

Effect of unrecorded sale deed in action for sale of timber. — Purchaser at sale who fails to record the purchaser's sale deed, and leaves the grantor in possession, cannot maintain a suit for trespass, or a trover action for timber felled by the grantor and sold to an innocent purchaser who has no notice of the sale of the land or of the landlord/tenant relationship between the purchaser and the grantor. Beavers v. Reynolds Bros. Lumber Co., 68 Ga. App. 858, 24 S.E.2d 813 (1943).

Other Instruments

1. Power of Attorney

Power of attorney need not be recorded with deed. — Power of attorney, under which a deed is made, is a muniment of title, and may be recorded along with the deed, but its record is not necessary to the validity of the record of the deed. Johnson v. Johnson, 184 Ga. 783, 193 S.E. 345 (1937).

Record of deed affords constructive notice of power's execution. — Since the record of a power of attorney merely affords proof of the validity of a deed executed thereunder, as distinguished from the validity itself, the record of a deed executed under a power of attorney affords constructive notice of its execution, even though the power of attorney substantiating its validity is not recorded with the deed. Johnson v. Johnson, 184 Ga. 783, 193 S.E. 345 (1937).

2. Bill of Sale

Conditional bills of sale must be recorded within 30 days of their date. — Registration and record of conditional bills of sale shall be governed in all respects by the laws relating to the registration of mortgages on personal property, except that they must be recorded within 30 days from their date, and in this respect the instruments differ from mortgages, deeds, and bills of sale to secure debt, since these latter instruments date only from the time the instruments are filed for record as to innocent purchasers without notice thereof. Scoggins v. General Fin. & Thrift Corp., 80 Ga. App. 847, 57 S.E.2d 686 (1950) (decided under former Code 1933, § 67-1403, prior to enactment of Title 11).

When not recorded within time allowed, subsequent valid liens superior to seller's rights. — When a conditional bill of sale or retention title contract is executed in another state on property afterward brought into this state, and this instrument is not recorded in the county of the buyer's residence within the time allowed, bona fide valid liens subsequently created against the property by the buyer would be superior to the rights of the seller, there being no question of actual knowledge of the rights of the seller under the conditional sale contract, or any fraud. Allen v. Dickey, 54 Ga. App. 451, 188 S.E. 273 (1936) (decided under former Code 1933, § 67-1403, prior to enactment of Title 11).

Bill of sale to personalty to secure debt stands on same footing as realty deed to secure debt. Carrollton Prod. Credit Ass'n v. Allen, 93 Ga. App. 150, 91 S.E.2d 93 (1955).

Effect of failure to record bill. — Effect of failure to record deeds and bills of sale to secure debt shall be the same as the effect of failure to record a deed of bargain and sale.

Other Instruments (Cont'd)
2. Bill of Sale (Cont'd)

Commercial Bank v. Pharr, 75 Ga. App. 364, 43 S.E.2d 439 (1947).

Failure to record a bill of sale to secure debt has the same result as a failure to record a security deed or a deed of bargain and sale. Williams v. General Fin. Corp., 98 Ga. App. 31, 104 S.E.2d 649 (1958).

Recording of bill serves as constructive notice. — When bills of sale to secure debt have been recorded in the county of the residence of the maker thereof, the registration serves as constructive notice from the date the bills of sale are filed for record. General Fin. & Thrift Corp. v. Bank of Wrightsville, 92 Ga. App. 808, 90 S.E.2d 93 (1955).

Assignee's rights against holder of junior bill of sale. — Since the undisputed evidence showed that the defendants owed a certain sum on a note and bill of sale to secure debt on certain personalty, the transferee for value of these instruments was entitled to claim the property to the extent of the amount due, as against the holder of notes secured by a junior bill of sale to the same property which was executed subsequent to the first instruments but prior to the assignment thereof. Adel Banking Co. v. Parrish, 84 Ga. App. 329, 66 S.E.2d 150 (1951).

Effect of lien on unrecorded bill of sale. — Unrecorded bill of sale is uniformly superior to any lien arising by operation of law as is the case with any mechanic's lien. Manchester Motors, Inc. v. F & M Bank, 91 Ga. App. 811, 87 S.E.2d 342 (1955), for comment, see 18 Ga. B.J. 82 (1955).

OPINIONS OF THE ATTORNEY GENERAL

Instruments effective against third parties only from date filed for record. — Deeds, mortgages, and liens take effect against third parties acting in good faith and without notice only from the time those documents are filed for record. 1945-47 Op. Att'y Gen. p. 120.

Constructive delivery of a warranty deed may be effected by delivery to an escrow agent within 120 days after the execution of the sales contract provided all of the following elements are present: (1) the escrow agent must be the agent of both the seller and the buyer, not just that of the seller; (2) the seller must release all control over the warranty deed when the seller delivers the deed to the escrow agent; (3) the escrow agent must be instructed to deliver the warranty deed to the buyer on the happening of a specific future event involving monetary consideration; (4) the escrow agent must be able to enforce the covenants and warranties found in former Code 1933, § 29-301 (see O.C.G.A. § 44-5-60) on behalf of the buyer; and (5) the real estate transaction must be properly recorded to put the world on notice of the buyer's equitable interest in the realty. 1974 Op. Att'y Gen. No. U74-17 (rendered prior to revision of Chapter 3, Article 1 of this Title).

RESEARCH REFERENCES

Am. Jur. 2d. — 23 Am. Jur. 2d, Deeds, § 270. 66 Am. Jur. 2d, Records and Recording Laws, § 46.

C.J.S. — 26A C.J.S., Deeds, §§ 159, 160. 76 C.J.S., Records, §§ 6, 7.

ALR. — Priority where senior instrument affecting real property is recorded after execution but before recording of junior instrument, 32 ALR 344.

Neglect or fault of recording or filing officer as affecting consequences of failure properly to record or file instrument affecting property, 70 ALR 595.

Recording laws as applied to assignments of mortgages on real estate, 89 ALR 171; 104 ALR 1301.

Presumption and burden of proof as regards good faith and consideration on part of purchaser or one taking encumbrance subsequent to unrecorded conveyance or encumbrance, 107 ALR 502.

Recording laws as applied to power of attorney under which deed or mortgage is executed, 114 ALR 660.

Federal government or agencies of federal government as subject to payment of tax or fee imposed upon, or for, recording or filing instrument, 124 ALR 1267.

Delivery of a deed without manual transfer or record, 129 ALR 11; 87 ALR2d 787.

Rule which makes priority of title depend upon priority of record as applied to record of later instrument in second chain title which antedates record of original instrument in first chain record of which, however, antedated record of original instrument in second chain, 133 ALR 886.

Priority between devisee under devise pursuant to testator's agreement and third person claiming under or through testator's unrecorded deed, 7 ALR2d 544.

Sufficiency of delivery of deed where grantor retains, or recovers, physical possession, 87 ALR2d 787.

44-2-2. Duty of clerk to record certain transaction affecting real estate and personal property; priority or recorded instruments; effect of recording on rights between parties to instruments.

(a)(1) The clerk of the superior court shall file, index on a computer program designed for such purpose, and permanently record, in the manner provided constructively in Code Sections 15-6-61 and 15-6-66, the following instruments conveying, transferring, encumbering, or affecting real estate and personal property:

(A) Deeds;

(B) Mortgages;

(C) Liens of all kinds; and

(D) Maps or plats relating to real estate in the county.

(2) For the purpose of this subsection, ''liens'' shall be defined as provided in Code Sections 15-19-14, 44-14-320, and 44-14-602 and shall include all liens provided by state or federal statute.

(3) When indexing liens, the clerk shall enter the names of debtors in the index in the manner provided for names of grantors conveying real estate in subsection (b) of Code Section 15-6-66 and the names of creditors or claimants in the manner as provided therein for names of grantees making such conveyances.

(4) When indexing maps or plats relating to real estate in the county, the clerk of superior court shall index the names or titles provided in the caption of the plat, as required by paragraph (2) of subsection (b) of Code Section 15-6-67, as both the grantor and grantee.

(b) Deeds, mortgages, and liens of all kinds which are required by law to be recorded in the office of the clerk of the superior court and which are against the interests of third parties who have acquired a transfer or lien binding the same property and who are acting in good faith and without notice shall take effect only from the time they are filed for record in the clerk's office.

(c) Nothing in this Code section shall be construed to affect the validity or force of any deed, mortgage, judgment, or lien of any kind between the

parties thereto. (Ga. L. 1889, p. 106, §§ 1, 4; Civil Code 1895, §§ 2778, 2781; Civil Code 1910, §§ 3320, 3323; Code 1933, §§ 67-2501, 67-2503; Code 1981 § 44-2-2; Ga. L. 1982, p. 3, § 44; Ga. L. 2002, p. 799, § 5; Ga. L. 2006, p. 334, § 1/SB 306.)

Cross references. — Duty of clerk to obtain names and addresses of grantors and grantees prior to recording title transfer, § 15-6-63. Duty of clerk of superior court to maintain grantor-grantee index, § 15-6-66.

Law reviews. — For note, ''The Effect of Failure to Record Conditional Sale Contracts in Georgia,'' see 11 Mercer L. Rev. 358 (1960).

For comment on Manchester Motors, Inc. v. Farmers & Merchants Bank, 91 Ga. App. 811, 87 S.E.2d 342 (1955), see 18 Ga. B.J. 82 (1955).

JUDICIAL DECISIONS

Analysis

General Consideration
Applicability
Docket
Priorities
1. In General
2. Construction of Section as to Deeds
3. Notice
4. Filing
Parties to Instrument

General Consideration

Conflict with § 44-14-39. — Former Code 1933, § 67-111 (see O.C.G.A. § 44-14-39) was necessarily repealed in 1889 insofar as it conflicted with former Code 1933, §§ 67-2501 and 67-2503 (see O.C.G.A. § 44-2-2). Buchanan v. Georgia Acceptance Co., 61 Ga. App. 476, 6 S.E.2d 162 (1939).

Scope and purpose of section. — Statute does not create a new competition between deeds of bargain and sale and judgment liens. Its scope is to fix the time when, and the manner in which, liens acquired by contract or obtained by operation of law are to take effect, and to settle their priorities. Donovan v. Simmons, 96 Ga. 340, 22 S.E. 966 (1895) (see O.C.G.A. § 44-2-2).

Statute was intended not only for the protection of innocent creditors who might acquire liens or transfers of property of a defendant in fi. fa. to secure their debts, but also for the protection of bona fide purchasers for value who obtain title to such property by absolute deed. Harvey & Brown v. Sanders, 107 Ga. 740, 33 S.E. 713 (1899) (see O.C.G.A. § 44-2-2).

Security deed entitled to be recorded. — In the absence of fraud, a deed which on the deed's face complies with all statutory requirements is entitled to be recorded, and once accepted and filed with the clerk for record, provides constructive notice to the world of the deed's existence. Leeds Bldg. Prods., Inc. v. Sears Mtg. Corp., 267 Ga. 300, 477 S.E.2d 565 (1996), overruling White v. Magarahan, 87 Ga. 217, 13 S.E. 509 (1891); Propes v. Todd, 89 Ga. App. 308, 79 S.E.2d 346 (1953), overruled on other grounds, Leeds Bldg. Prods., Inc. v. Sears Mtg. Corp., 267 Ga. 300, 477 S.E.2d 565 (1996).

Effective date of deeds. — In determining for purposes of an implied easement of necessity when common owners had deeded land now belonging to the parties, the trial court erred in relying on the date of recording rather than on the date of the actual conveyance; there was nothing in O.C.G.A. § 44-2-2 that provided authority for holding that the deeds were not in force or did not take effect until recorded. Burnette v. Caplan, 287 Ga. App. 142, 650 S.E.2d 798 (2007).

Cited in Atlanta Title & Trust Co. v. Tidwell, 173 Ga. 449, 160 S.E. 620 (1931); Lasch v. Columbus Heating & Ventilating Co., 174 Ga. 618, 163 S.E. 486 (1932); Sta-

ples v. Heaton, 55 Ga. App. 495, 190 S.E. 420 (1937); Motor Contract Co. v. Citizens & S. Nat'l Bank, 66 Ga. App. 78, 17 S.E.2d 195 (1941); Blue Ridge Apt. Co. v. Telfair Stockton & Co., 205 Ga. 552, 54 S.E.2d 608 (1949); McEntyre v. Burns, 81 Ga. App. 239, 58 S.E.2d 442 (1950); Burgess v. Simmons, 207 Ga. 291, 61 S.E.2d 410 (1950); Georgia R.R. & Banking Co. v. Fulmer, 84 Ga. App. 101, 65 S.E.2d 636 (1951); United States v. West, 132 F. Supp. 934 (N.D. Ga. 1955); Mack Trucks, Inc. v. Ryder Truck Rental, Inc., 110 Ga. App. 68, 137 S.E.2d 718 (1964); In re Tinsley, 421 F. Supp. 1007 (M.D. Ga. 1976); Jordan v. Jordan, 246 Ga. 395, 271 S.E.2d 450 (1980); Palmer v. Forrest, Mackey & Assocs., 251 Ga. 304, 304 S.E.2d 704 (1983); Webster v. Snapping Shoals Elec. Membership Corp., 176 Ga. App. 265, 335 S.E.2d 637 (1985); Minor v. McDaniel, 210 Ga. App. 146, 435 S.E.2d 508 (1993).

Applicability

Statute refers only to contractual liens, not liens acquired by operation of law. Thus, an unrecorded deed is superior to a subsequent judgment lien. Ivey v. Transouth Fin. Corp., 566 F.2d 1023 (5th Cir. 1978) (see O.C.G.A. § 44-2-2).

Word ''lien,'' as used in the phrase ''who may have acquired a transfer or lien binding the same property,'' applies only to liens acquired by contract, and not to those obtained by judgment. Donovan v. Simmons, 96 Ga. 340, 22 S.E. 966 (1895).

Statute has reference only to liens arising by contract, and not to judgments. Caldwell v. Northwest Atlanta Bank, 194 Ga. 370, 21 S.E.2d 619 (1942) (see O.C.G.A. § 44-2-2).

Word ''lien'' refers solely to liens acquired by contract to the exclusion of liens created or arising by operation of law. Manchester Motors, Inc. v. F & M Bank, 91 Ga. App. 811, 87 S.E.2d 342 (1955), for comment, see 18 Ga. B.J. 82 (1955).

In determining that a debtor's transfer of a security interest in certain real property to a judgment creditor occurred for purposes of 11 U.S.C. § 547(b) when the creditor's judgment lien was recorded, the court applied O.C.G.A. § 9-12-86 because: (1) case law holding that an unrecorded deed had priority over a recorded judgment lien was limited to O.C.G.A. § 44-2-2 and did not prevent the application of § 9-12-86 in the instant case; (2) § 9-12-86 provided an exception to the general rule of O.C.G.A. § 9-12-80 that a creditor acquired a lien when a judgment was entered; and (3) a trustee's imputed knowledge of a transfer was not relevant for purposes of 11 U.S.C. § 547. Pettigrew v. Hoey Constr. Co. (In re NotJust Another CarWash, Inc.), No. 04-90859-MGD, 2007 Bankr. LEXIS 979 (Bankr. N.D. Ga. Feb. 15, 2007).

Contests between common-law judgments. — Statute has no application to contests between ordinary common-law judgments. Griffith v. Posey, 98 Ga. 475, 25 S.E. 515 (1896) (see O.C.G.A. § 44-2-2).

Contests between mortgage and distress warrant. — Statute is not applied in a contest between a mortgage and distress warrant for the appropriation of a fund arising from a sale of the mortgaged property. Jones v. Howard, 99 Ga. 451, 27 S.E. 765, 59 Am. St. R. 231 (1896) (see O.C.G.A. § 44-2-2).

Materialman's lien. — Rule of this statute is not applicable to a materialman's lien for the reason that actual recording is indispensable to the creation of liens of this character. Jones v. Kern, 101 Ga. 309, 28 S.E. 850 (1897) (see O.C.G.A. § 44-2-2).

Tax claims. — Provisions of this statute, declaring effective from the date of filing ''deeds, mortgages, and liens of all kinds'' as against third persons acting in good faith and without notice, have no application to claims for taxes. Suttles v. Dickey, 192 Ga. 382, 15 S.E.2d 445 (1941) (see O.C.G.A. § 44-2-2).

Construed with § 9-13-60. — Former Civil Code 1910, §§ 3320 and 3323 (see O.C.G.A. § 44-2-2) did not affect statutory method in former Civil Code 1910, §§ 6038 and 6039 (see O.C.G.A. § 9-13-60) for redeeming land of judgment debtor and subjecting the land to the judgment. Dedge v. Bennett, 138 Ga. 787, 76 S.E. 52 (1912).

Section does not change rule in claim case. — Well settled rule, in a claim case, that the plaintiff in execution makes out a prima facie case by proving that the property claim was in possession of the defendant in fi. fa. after the rendition of the judgment, was not changed by the passage of this statute. Russell & Co. v. Morris, 134 Ga. 65, 67 S.E. 404 (1910) (see O.C.G.A. § 44-2-2).

Section does not affect dormancy of judgment provision. — Former Civil Code 1910,

Applicability (Cont'd)

§§ 4355, 4356, and 4357 (see O.C.G.A. § 9-12-60) as to dormancy of judgments was not affected by the passage of former Civil Code 1910, §§ 3320 and 3323 (see O.C.G.A. § 44-2-2). Columbus Fertilizer Co. v. Hanks, 119 Ga. 950, 47 S.E. 222 (1904).

Docket

Section does not restrict clerk of the court to keeping only one book in which to make the prescribed entry as to filing for record of papers of the kinds specified. Touchstone Live Stock Co. v. Easters, 172 Ga. 454, 157 S.E. 683 (1931).

One book for realty liens and another for personalty liens constitute docket. — If the clerk keeps one book as part of the clerk's docket in which are entered notations of the filing for record of deeds and mortgages and other liens on realty, which show the day and hour of filing, and another book as part of the clerk's docket in which are entered notations of the filing of record of deeds and mortgages and other liens on personalty, both books will constitute the docket. An entry of filing which states the day and hour of filing, made in either book, of an instrument retaining title in a vendor as security for the purchase price of personalty and also creating a mortgage on realty by the purchaser as additional security for the purchase price will comply with the law. Touchstone Live Stock Co. v. Easters, 172 Ga. 454, 157 S.E. 683 (1931).

Priorities

1. In General

Deeds not recorded within 12 months. — Before the passage of this statute, when there was a contest between two deeds whereby a person conveyed the same land to different persons, and neither deed was recorded within 12 months from the date of the deed's execution, the older deed would prevail. Davis v. Harden, 143 Ga. 98, 84 S.E. 426 (1915); Roles v. Shivers, 152 Ga. 798, 111 S.E. 189 (1922); Randall v. Hamilton, 156 Ga. 661, 119 S.E. 595 (1923) (see O.C.G.A. § 44-2-2).

Vendor must record out-of-state retention of title contract within six months. — When a person sells personal property in another state under a contract retaining title in the vendor until the payment of the purchase price, and the property is afterwards brought into this state, the vendor must, within six months after the property is so removed, record the instrument in the county where the vendee resided at the time of executing the instrument if a resident of this state, or in the county where the property is if the vendee is a nonresident, in order for the vendor to have priority over third persons acquiring in good faith and without notice interests in the property by a transfer or lien. Northern Fin. Corp. v. Hollingsworth, 52 Ga. App. 337, 183 S.E. 73 (1935) (decided under former Code 1933, § 67-108, prior to adoption of T. 11).

Heir's recorded deed inferior to ancestor's unrecorded deed. — Prior to this statute, a recorded deed from an heir or devisee was inferior in dignity to an unrecorded deed of the ancestor. McCandless v. Inland Acid Co., 108 Ga. 618, 34 S.E. 142 (1899); Equitable Loan & Sec. Co. v. Lewman, 124 Ga. 190, 52 S.E. 599, 33 L.R.A. (n.s.) 879 (1905) (see O.C.G.A. § 44-2-2).

Senior unrecorded deed loses priority over junior deed recorded without notice. — Following the passage of this statute, a senior unrecorded deed loses the deed's priority over a subsequent recorded deed from the same vendor, taken for a valuable consideration and without notice of the existence of the older deed. Dickson v. Champman, 153 Ga. 547, 112 S.E. 830 (1922) (see O.C.G.A. § 44-2-2).

A junior deed, properly recorded, taken without notice of an unrecorded senior deed from the same vendor and for a valuable consideration, has priority over the unrecorded senior deed. Fourth Nat'l Bank v. Howell, 92 Ga. App. 868, 90 S.E.2d 78 (1955).

When, in a contest between plaintiff and defendant as to title to certain described land, each claiming under a deed from a common grantor, the deed under which defendant claims having been given for a valuable consideration and executed prior to the deed under which plaintiff claims but recorded after plaintiff's deed, the deed under which plaintiff claims reciting a consideration of love and affection, the defendant's deed has priority over the plaintiff's

deed. Minor v. Georgia Kraft Co., 219 Ga. 434, 134 S.E.2d 19 (1963).

Recorded quitclaim deed, taken in good faith for valuable consideration, without notice, prevails over a prior unrecorded deed. This rule is not altered by the fact that the quitclaim deed conveys only the grantor's rights, title, and interest in and to the land, instead of conveying the land itself. Archer v. Kelley, 194 Ga. 117, 21 S.E.2d 51 (1942).

Purchaser at judicial sale. — Under this statute, a purchaser of land at a judicial sale, acting in good faith and without notice, acquires title as against a prior conveyance by the owner, unrecorded at the time of the making and confirmation of the latter sale. Ousley & Bro. v. Bailey & Co., 111 Ga. 783, 36 S.E. 750 (1900) (see O.C.G.A. § 44-2-2).

Valid deed, though unrecorded, is superior to subsequent judgment or attachment against the same property. Smith v. Worley, 10 Ga. App. 280, 73 S.E. 428 (1912).

Effect of failure to record deeds and bills of sale. — Failure to record deeds and bills of sale has the same effect as failing to record deeds and bargains of sale. Carrollton Prod. Credit Ass'n v. Allen, 93 Ga. App. 150, 91 S.E.2d 93 (1955).

Effect of a failure to record a security deed as against ordinary judgment liens is the same as the effect of a failure to record a deed of bargain and sale. Caldwell v. Northwest Atlanta Bank, 194 Ga. 370, 21 S.E.2d 619 (1942).

Effect of a failure to record a mortgage or bill of sale to secure a debt shall be the same as is the effect of a failure to record a deed of bargain and sale. Manchester Motors, Inc. v. F & M Bank, 91 Ga. App. 811, 87 S.E.2d 342 (1955), for comment, see 18 Ga. B.J. 82 (1955).

Right of transferee of second security deed. — When grantor made a deed to secure a debt, which was filed for record, and subsequently the same grantor made to another grantee a deed conveying the same property to secure a debt, which deed was filed for record at an earlier time, and when this grantee transferred and assigned the grantee's deed and the indebtedness thereby secured, receiving the full amount of the secured debt, as the transferee had no actual or constructive notice of the first deed, the grantee's right in and to the property conveyed in the deeds was unaffected by the prior deed. Nightingale v. Juniata College, 186 Ga. 365, 197 S.E. 831 (1938).

Recorded conditional bill of sale. — Conditional bill of sale having been duly executed, attested, and recorded prior to the time of the issuing of the execution on the distress warrant, it had priority over a subsequent lien under a distress warrant for rent. Blackmar Co. v. Wright Co., 62 Ga. App. 861, 10 S.E.2d 117 (1940).

Interests of innocent third parties. — Under this statute, an unrecorded contract retaining title in the vendor of personal property until full payment of the purchase money is not good as against the interests of third parties acting in good faith and without notice, who may have acquired a transfer or lien binding the same property. Bradley & Co. v. Cochran, 27 Ga. App. 463, 108 S.E. 624 (1921) (see O.C.G.A. § 44-2-2).

Priority of attachment lien. — Attachment lien is superior to the lien of an unrecorded conditional sale contract executed before the issuance and levy of the attachment. Rhodes v. Jones, 55 Ga. App. 803, 191 S.E. 503 (1937).

2. Construction of Section as to Deeds

Former Civil Code 1895, §§ 2778 and 2881 (see O.C.G.A. § 44-2-2) must be construed with former Civil Code 1895, § 3618 (see O.C.G.A. § 44-2-1). White v. Interstate Bldg. & Loan Ass'n, 106 Ga. 146, 32 S.E. 26 (1898); Wadley Lumber Co. v. Lott, 130 Ga. 135, 60 S.E. 836 (1908); Price v. Watts, 223 Ga. 805, 158 S.E.2d 406 (1967).

Not applicable unless junior grantee is bona fide purchaser. — Former Civil Code 1933, §§ 29-401, 67-2501, and 67-2503 (see O.C.G.A. §§ 44-2-1 and 44-2-2) were construed together, and did not apply in a contest between deeds unless the junior grantee was a bona fide purchaser for value. Minor v. Georgia Kraft Co., 219 Ga. 434, 134 S.E.2d 19 (1963).

Recorded voluntary deed not given priority over prior unrecorded deed. — Construing former Civil Code 1895, §§ 2778, 2781, and 3618 (see O.C.G.A §§ 44-2-1 and 44-2-2), a voluntary deed, though duly recorded and taken without notice of a prior voluntary deed executed by the same grantor and not recorded, did not give to the second grantee a priority over the first.

Priorities (Cont'd)
2. Construction of Section as to Deeds (Cont'd)

Toole v. Toole, 107 Ga. 472, 33 S.E. 686 (1899).

3. Notice

What constitutes notice of prior deed. — Any circumstance which would place a person of ordinary prudence fully upon the person's guard and induce serious inquiry is sufficient to constitute notice of a prior unrecorded deed, and a younger deed, taken with such notice, acquires no preference by being recorded in due time. Price v. Watts, 223 Ga. 805, 158 S.E.2d 406 (1967).

Unrecorded deed by testatrix is inferior as without notice. — Following the passage of this statute, an unrecorded deed made by a testatrix is ordinarily to be regarded as inferior in dignity to a deed, duly recorded, subsequently made by her devisee to an innocent purchaser for value without notice of the prior conveyance. But this statute has no application to a case where the testatrix recognized in her will the title of her donee, and the purchaser from her devisee was thus put upon notice that the property conveyed to him formed no part of the estate of the testatrix and could not be regarded as passing to the devisee under the residuary clause of the will. Equitable Loan & Sec. Co. v. Lewman, 124 Ga. 190, 52 S.E. 599, 33 L.R.A. (n.s.) 879 (1905) (see O.C.G.A. § 44-2-2).

Burden of proof. — Onus is on third party in possession of property covered by retention of title contract entered into in another state and not recorded in this state within the statutory period to show that the third party acquired that party's interest in good faith and without actual notice of the vendor's retention of title. Northern Fin. Corp. v. Hollingsworth, 52 Ga. App. 337, 183 S.E. 73 (1935) (decided under former Code 1933, § 67-108, and prior to adoption of T. 11).

Burden of showing notice of secret equity on equity's owner. — When a creditor sought to enforce a legal right arising from a judgment lien on land while title was in the husband, the burden of showing that the creditor had notice of wife's secret equity was on the wife. Word v. Bowen, 181 Ga. 736, 184 S.E. 303 (1936).

Duty of grantee to record deed. — It is plain duty of a grantee to record the grantee's deed, thereby giving constructive notice to everyone of the deed's existence and of the grantee's rights thereunder; and since it is thus made the duty of the grantee to supply notice, everyone is justified in relying upon an examination of the record and believing that a purchase of land will convey all title which the record fails to disclose is in another. Archer v. Kelley, 194 Ga. 117, 21 S.E.2d 51 (1942).

When recording does not constitute notice. — Registry of a deed not legally attested, proved, or acknowledged is not constructive notice to a subsequent bona fide purchaser. Coniff v. Hunnicutt, 157 Ga. 823, 122 S.E. 694 (1924).

Even if deed is recorded, in order to operate as constructive notice to a bona fide purchaser, the deed must not lie outside the purchaser's chain of title. Jenkins v. Sosebee, 74 Bankr. 440 (Bankr. N.D. Ga. 1987).

Filing mortgage lien constitutes notice. — Filing of a mortgage in the office of the clerk of the superior court of the county in which the land lies is, from the time of filing, notice to the world of the mortgage's existence; therefore, the lien of a mortgage so filed, though not properly recorded, is superior to that of common-law executions entered on the docket after the filing of the mortgage. Merrick v. Taylor, 14 Ga. App. 81, 80 S.E. 343 (1913).

An entry of filing, made in a book kept by a clerk for the filing for record of mortgages and other liens on personalty, of an instrument retaining title in a vendor as security for the purchase price of personalty, and also creating a mortgage on the realty by the purchaser as additional security for the purchase price, will be notice to a subsequent purchaser of the realty. Lasch v. Columbus Heating & Ventilating Co., 174 Ga. 618, 163 S.E. 486, answer conformed to, 45 Ga. App. 200, 164 S.E. 211 (1932).

Sufficiency of description of land conveyed. — Registered security deed reciting as matter of description that the land thereby conveyed is situated in a named city, county, and state, and further describing the land by reference to a designated map and other papers, is sufficient to put a subsequent purchaser of this lot from the same grantor on notice as to what land was in fact

conveyed by the deed. Talmadge Bros. & Co. v. Interstate Bldg. & Loan Ass'n, 105 Ga. 550, 31 S.E. 618 (1898).

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).

Notice of foreclosure sale held sufficient. — Because the debtor failed to send written notice of the correct address of the subject property to the bank or the bank's agents, and could not assert an absent grantee's priority to escape the consequences of the debtor's own failure to provide a correct property address to all future holders of the note and deed, the foreclosure sale was not set aside; thus, the trial court properly granted summary judgment to the bank and the assignees of the security interest on the ground that the bank provided sufficient notice of the foreclosure sale. Jackson v. Bank One, 287 Ga. App. 791, 652 S.E.2d 849 (2007), cert. denied, 2008 Ga. LEXIS 169 (Ga. 2008).

Only deed to same land constitutes muniment of purchaser's title. — In view of the provisions of this statute, a deed which constitutes one of the muniments of a purchaser's title is a deed to the same land, and not a deed from the purchaser's grantor to other land, and this is true even though the prior deed of the purchaser's grantor conveys a lot or parcel of the same general tract. Hancock v. Gumm, 151 Ga. 667, 107 S.E. 872, 16 A.L.R. 1003 (1921) (see O.C.G.A. § 44-2-2).

4. Filing

Presentation of the instruments to the office of the clerk constitutes a proper filing. Pease & Elliman Realty Trust v. Gaines, 160 Ga. App. 125, 286 S.E.2d 448 (1981).

Instrument takes effect from time of filing. — Following the passage of this statute, the filing for record of a mortgage which on the mortgage's face is entitled to be recorded is notice to all third persons without notice, although the mortgage may be afterwards so defectively recorded that the actual record is not such notice. In such a case, the filing for record is sufficient notice to all third persons without notice. Durrence v. Northern Nat'l Bank, 117 Ga. 385, 43 S.E. 726 (1903); Greenfield v. Stout, 122 Ga. 303, 50 S.E. 111 (1905); Henderson v. Armstrong, 128 Ga. 804, 58 S.E. 624 (1907); Wadley Lumber Co. v. Lott, 130 Ga. 135, 60 S.E. 836 (1908); Albany Nat'l Bank v. Georgia Banking Co., 137 Ga. 776, 74 S.E. 267 (1912); Blakely Artesian Ice Co. v. Clarke, 13 Ga. App. 574, 79 S.E. 526 (1913); Brown v. Aaron, 20 Ga. App. 592, 93 S.E. 258 (1917).

Lien of a mortgage on realty will be effective, as against subsequent purchasers from the mortgagor, from the date of the filing. Touchstone Live Stock Co. v. Easters, 172 Ga. 454, 157 S.E. 683 (1931).

Competing deeds, as against each other, were effective only from and after being filed for record. Such was the clear import of the language of former Code 1933, §§ 29-401, 67-2501, and 67-2503 (see O.C.G.A. §§ 44-2-1 and 44-2-2). Fourth Nat'l Bank v. Howell, 92 Ga. App. 868, 90 S.E.2d 78 (1955).

Deed providing easement took priority. — Deed to the appellee, which provided an easement over the appellant's property, took priority over a deed to the appellant, which did not mention the easement, since the deed to the appellee was recorded first. Church of the Nativity, Inc. v. Whitener, 249 Ga. App. 45, 547 S.E.2d 587 (2001).

It is the date of filing, not the date of recording, that fixes rights under the law with respect to instruments required to be recorded. Giordano v. Stubbs, 228 Ga. 75, 184 S.E.2d 165 (1971), appeal dismissed and cert. denied, 405 U.S. 908, 92 S. Ct. 960, 30 L. Ed. 2d 779 (1972).

Effectiveness of filing not affected by manner of recording. — Owner and holder of a deed, mortgage, conditional sales contract, and other liens required by law to be recorded in the office of the clerk of the superior court, is protected by filing the owner's paper with the clerk of the court, whose duty it is to record the filing on a public docket required for that purpose. Improper record, or no record at all, has no effect on the efficacy of the filing. Buchanan v. Georgia Acceptance Co., 61 Ga. App. 476, 6 S.E.2d 162 (1939).

When a deed which appears on the deed's

Priorities (Cont'd)
4. Filing (Cont'd)

face to be entitled to record is filed for record in the office of the clerk of the superior court of the county in which the land lies, it takes effect, as against third persons without notice, from the time it is so filed. The actual recording is the duty of the clerk, and this statute does not contemplate that an erroneous performance shall operate to defeat the grantee who has properly filed the grantee's deed. Thomas v. Hudson, 190 Ga. 622, 10 S.E.2d 396 (1940) (see O.C.G.A. § 44-2-2).

When a deed is filed for record in the office of the clerk of the superior court of the county in which the land lies, the deed takes effect, as against third persons without notice, from the time the deed is so filed, and the deed is admissible in evidence as ''a registered deed'' without further proof of the deed's execution, although the clerk may have failed to record the deed or may have recorded the deed in the wrong book. Pease & Elliman Realty Trust v. Gaines, 160 Ga. App. 125, 286 S.E.2d 448 (1981).

Clerk liable for improper filing or recording. — If any injury is done by the failure to record a paper, or by the improper recording of a paper, the clerk would be liable to the injured party for a breach of duty; filing puts the world on notice as to the contents of papers filed for record, whether the papers are recorded or not. This law, however, can only apply if there is a proper filing of the paper to be recorded, and a filing under circumstances in which an improper filing and indexing and an improper recording occurs could be charged as a breach of duty on the part of the clerk. Buchanan v. Georgia Acceptance Co., 61 Ga. App. 476, 6 S.E.2d 162 (1939).

Parties to Instrument

Recordation unnecessary as between maker of security deed and grantee. — It is not essential, in order to convey title to land to secure a debt as between the maker and the grantee, that the deed should be recorded. As between the maker of the security deed and the grantee, the latter would get a good title. Cooper v. Bacon, 143 Ga. 64, 84 S.E. 123 (1915).

Because the security deed between debtors and lender was effective as between those parties at execution, it was not relevant that the security deed was recorded within 90 days prior to debtors filing a petition in bankruptcy; under the doctrine of equitable subrogation, the security deed was not avoidable as a preferential transfer. Gordon v. NovaStar Mortg., Inc. (In re Hedrick), No. 04-92733-JEM, 2005 Bankr. LEXIS 1923 (Bankr. N.D. Ga. Aug. 31, 2005), aff'd, 524 F.3d 1175 (11th Cir. 2008); modified and reh'g denied, 529 F.3d 1026 (11th Cir. 2008).

Wife of deceased life estate holder. — Trial court erred in determining that a second wife acquired a one-half interest in property quitclaimed to her by her husband because the husband had only a life estate in the property, and she was not a bona fide purchaser. The parties' lender, however, was a bona fide purchaser for value pursuant to O.C.G.A. §§ 44-2-1, 44-2-2, and 44-2-4(b). Price v. Price, 286 Ga. 753, 692 S.E.2d 601 (2010).

OPINIONS OF THE ATTORNEY GENERAL

Instruments effective against third parties only from date filed for record. — Deeds, mortgages, and liens take effect against third parties acting in good faith and without notice only from the time those instruments are filed for record. 1945-47 Op. Att'y Gen. p. 120.

Docket kept and recorded in well-bound books. — Clerk of the superior court must keep the dockets identified and described in O.C.G.A. § 15-6-61(4) either by microfilm, photographic or photostatic process, or in well-bound books, except that all instruments evidencing the title to real property, including the docket identified and described in subsection (a), and title instruments for personal property if recorded for ten years or less, must be kept and recorded in well-bound books only. For real property instruments which identify a grantor and a grantee, either a duplex index book or a cross-reference card index system for indexing such instruments must be maintained. The clerk may use the computer services of the county in which the clerk's office is located as a supplemental means of provid-

ing access to the information contained in the dockets and indexes maintained by the clerk. 1988 Op. Att'y Gen. No. U88-26.

RESEARCH REFERENCES

Am. Jur. 2d. — 66 Am. Jur. 2d, Records and Recording Laws, § 133 et seq.

C.J.S. — 76 C.J.S., Records, §§ 20, 37 et seq.

ALR. — Priority where senior instrument affecting real property is recorded after execution but before recording of junior instrument, 32 ALR 344.

Constructive notice by record of instrument relating to specific chattels as affected by changes therein, 63 ALR 1456.

Validity of unfiled chattel mortgage as against persons with actual notice thereof, 68 ALR 274.

Purchase-money mortgage as within provision of statute defeating or postponing lien of unrecorded or unfiled mortgage, 137 ALR 571; 168 ALR 1164.

Priority between devisee under devise pursuant to testator's agreement and third person claiming under or through testator's unrecorded deed, 7 ALR2d 544.

Priority, as between holder of unfiled or unrecorded chattel mortgage who secures possession of goods or chattels, and subsequent purchaser or encumbrancer, 53 ALR2d 936.

Sale of real property as affecting time for filing notice of or perfecting mechanic's lien as against purchaser's interest, 76 ALR2d 1163.

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 ALR3d 1040.

44-2-3. Voluntary deeds or conveyances of land; effect of recording.

Every unrecorded voluntary deed or conveyance of land made by any person shall be void as against subsequent bona fide purchasers for value without notice of such voluntary deed or conveyance; provided, however, that, if the voluntary deed or conveyance is recorded in accordance with Code Section 44-2-1, it shall have priority over subsequent deeds or conveyances to the described land. (Orig. Code 1863, § 2588; Code 1868, § 2590; Code 1873, § 2632; Code 1882, § 2632; Civil Code 1895, § 3530; Civil Code 1910, § 4110; Code 1933, § 96-205; Ga. L. 1943, p. 400, § 1; Code 1933, § 29-401.1, enacted by Ga. L. 1964, p. 475, § 1.)

Law reviews. — For annual survey of real property law, see 56 Mercer L. Rev. 395 (2004). For article, ''Eleventh Circuit Survey: January 1, 2008 — December 31, 2008: Article: Trial Practice and Procedure,'' see 60 Mercer L. Rev. 1313 (2009).

JUDICIAL DECISIONS

Section applies to subsequent purchasers from grantor's agents, but not others. — This statute, while including bona fide purchasers from administrators, executors, and others who in effect sell land as agents of the grantor making the voluntary conveyance, does not include purchasers acquiring title from other sources. Harper v. Paradise, 233 Ga. 194, 210 S.E.2d 710 (1974) (see O.C.G.A. § 44-2-3).

Effect of restrictive covenants in unrecorded instrument. — Purchaser of land without actual notice may take free of restrictive covenants contained in an unrecorded contract or deed. Jenkins v. Sosebee, 74 Bankr. 440 (Bankr. N.D. Ga. 1987).

What constitutes a voluntary conveyance. — Voluntary conveyance is one made without any consideration deemed valuable in law to support the conveyance. Clayton v. Tucker, 20 Ga. 452 (1856); Almond v. Gairdner & Arnold, 76 Ga. 699 (1886).

Voluntary conveyance depends upon the intention of the parties, which is to be ascertained by an inquiry into all the facts and circumstances at the time of the conveyance's execution which will throw light upon the question as to whether the deed was a sale or gift. Martin v. White, 115 Ga. 866, 42 S.E. 279 (1902); Shackelford v. Orris, 135 Ga. 29, 68 S.E. 838 (1910).

Payment necessary to constitute bona fide purchase. — Actual payment of the purchase price, before notice, is essential to the maintenance of the claim that one is a bona fide purchaser of property for value and without notice. Rowe v. Gaskins, 148 Ga. 817, 98 S.E. 493 (1919).

Grantee in security deed acting in good faith stands in attitude of bona fide purchaser, and is entitled to the same protection. Roop Grocery Co. v. Gentry, 195 Ga. 736, 25 S.E.2d 705 (1943).

Priority of landlord's lien. — Bona fide purchaser without notice will be protected against a landlord's lien for rent. Thornton v. Carver, 80 Ga. 397, 6 S.E. 915 (1888).

To sustain voluntary conveyance against subsequent bona fide purchaser, notice to purchaser must be actual. Finch v. Woods, 113 Ga. 996, 39 S.E. 418 (1901); Scott v. Atlas Sav. & Loan Ass'n, 114 Ga. 134, 39 S.E. 942 (1901); Waters v. Wells, 155 Ga. 439, 117 S.E. 322 (1923); Roop Grocery Co. v. Gentry, 195 Ga. 736, 25 S.E.2d 705 (1943).

Constructive notice alone is not sufficient to defeat the rights of a subsequent bona fide purchaser. Herndon v. Kimball, 7 Ga. 432, 50 Am. Dec. 406 (1849); Byrd v. Aspinwall, 108 Ga. 1, 33 S.E. 688 (1899) (decided prior to Orig. Code 1863, § 2588 and under Civil Code 1895, § 3530).

Registration is insufficient notice to bona fide purchaser. — Registration of a voluntary deed does not constitute such notice to a subsequent bona fide purchaser as will deprive the purchaser of the preference to which the purchaser is entitled. Fleming v. Townsend, 6 Ga. 103, 50 Am. Dec. 318 (1849); Finch v. Woods, 113 Ga. 996, 39 S.E. 418 (1901). For additional cases, see 6 Enc. Dig. 642.

Section includes subsequent purchasers from grantor's agents, but not others. — This statute, providing that ''every voluntary deed or conveyance made by any person shall be void as against subsequent bona fide purchasers for value without notice of such voluntary conveyance,'' while including bona fide purchasers from administrators, executors, and others who in effect sell land as agents of the grantor making the voluntary conveyance, does not include purchasers acquiring title from other sources. Mathis v. Solomon, 188 Ga. 311, 4 S.E.2d 24 (1939) (see O.C.G.A. § 44-2-3).

When an original owner executed a voluntary deed to a life tenant and remainderman, and the life tenant executed a deed in fee simple to a bona fide purchaser without notice, this statute would not pass a superior title or create a superior equity in favor of such a purchaser from the life tenant. Mathis v. Solomon, 188 Ga. 311, 4 S.E.2d 24 (1939) (decided under former Code 1933, § 96-205).

Notice once recorded. — Under Georgia's recording statute, O.C.G.A. § 44-2-3, the world was on notice of mortgage company's security deed once the deed was recorded; because of that, no one who purchased an interest after recording of that security deed could have been a bona fide purchaser of interest superior to mortgage company's. Gordon v. Novastar Mortg., Inc. (In re Hedrick), 524 F.3d 1175 (11th Cir. 2008), cert. denied, 129 S. Ct. 631, 172 L.Ed.2d 610 (2008).

Dispute based on recording of land sales contract. — Recording of a contract to sell land took priority over a later recorded deed transferring the disputed land. Parks v. Stepp, 277 Ga. 704, 594 S.E.2d 364 (2004).

Internal Revenue Service lien. — Claim by the Internal Revenue Service that a reformation of a conveyance deed that had failed to describe all of the property that was being transferred had no effect on a prior lien filed by the IRS had no merit because O.C.G.A. § 44-2-3 (on which the IRS was relying) provided only that an unrecorded conveyance was void only against certain subsequent bona fide purchasers and did not mention creditors such as the IRS. Nat'l Assistance Bureau, Inc. v. Macon Mem. Intermediate Care Home, Inc., No. 5:06-cv-301 (CAR), 2009 U.S. Dist. LEXIS 66362 (M.D. Ga. June 8, 2009).

Cited in Leggett v. Patterson, 114 Ga. 714, 40 S.E. 736 (1902); West v. Wright, 121 Ga. 470, 49 S.E. 285 (1904); Culbreath v. Martin, 129 Ga. 280, 58 S.E. 832 (1907); Stubbs v. Glass, 143 Ga. 56, 84 S.E. 126 (1915); Leachman v. Cobb Dev. Co., 226 Ga. 103, 172 S.E.2d 688 (1970); Pressley v. Jennings, 227 Ga. 366, 180 S.E.2d 896 (1971); Wiggins v. Southern Bell Tel. & Tel. Co., 245 Ga. 526, 266 S.E.2d 148 (1980); Minor v. McDaniel, 210 Ga. App. 146, 435 S.E.2d 508 (1993).

RESEARCH REFERENCES

Am. Jur. 2d. — 23 Am. Jur. 2d, Deeds, §§ 7, 191. 58 Am. Jur. 2d, Notice, § 18.

C.J.S. — 26A C.J.S., Deeds, § 158.

ALR. — Use of diminutive or nickname as affecting operation of record as notice, 45 ALR 557.

Presumption and burden of proof as regards good faith and consideration on part of purchaser or one taking encumbrancer subsequent to unrecorded conveyance or encumbrance, 107 ALR 502.

Rule which makes priority of title depend upon priority of record as applied to record of later instrument in second chain title which antedates record of original instrument in first chain record of which, however, antedated record of original instrument in second chain, 133 ALR 886.

Priority between devisee under devise pursuant to testator's agreement and third person claiming under or through testator's unrecorded deed, 7 ALR2d 544.

44-2-4. Protection of good faith purchases and liens without notice against unrecorded liens or conveyances.

(a) All innocent persons, firms, or corporations acting in good faith and without actual notice which purchase real or personal property for value or obtain contractual liens on the property from distributees, devisees, legatees, or heirs at law holding or apparently holding real or personal property by will or inheritance from a deceased person shall be protected in the purchase of the property or in acquiring such a lien thereon as against unrecorded liens or conveyances created or executed by the deceased person upon or to the property in like manner and to the same extent as if the property had been purchased or the lien acquired from the deceased person.

(b) All innocent persons, firms, or corporations which purchase real or personal property for value or obtain contractual liens on the property from a surviving joint tenant, or surviving joint tenants, holding or apparently holding real or personal property as a surviving joint tenant, or surviving joint tenants, shall be protected in the purchase of the property or in acquiring such a lien thereon as against unrecorded liens or conveyances created or executed by a deceased joint tenant upon or to the property, and as against other unrecorded instruments resulting in a severance of any joint tenant's interest, in like manner and to the same extent as if the property had been purchased or the lien acquired from the deceased joint tenant and surviving joint tenant, or surviving joint tenants. (Ga. L. 1912, p. 143, § 1; Code 1933, § 67-2502; Ga. L. 1984, p. 1335, § 1.)

JUDICIAL DECISIONS

Statute cannot be extended beyond the statute's terms to aid bona fide purchaser from life tenant as against a remainderman who does not join in the conveyance. Mathis v. Solomon, 188 Ga. 311, 4 S.E.2d 24 (1939); Harper v. Paradise, 233 Ga. 194, 210 S.E.2d 710 (1974) (see O.C.G.A. § 44-2-4).

Wife of deceased life estate holder was not a bona fide purchaser. — Trial court erred in determining that a second wife acquired a one-half interest in property quitclaimed to her by her husband because the husband had only a life estate in the property, and she was not a bona fide purchaser. The parties' lender, however, was a bona fide purchaser for value pursuant to O.C.G.A. §§ 44-2-1, 44-2-2, and 44-2-4(b). Price v. Price, 286 Ga. 753, 692 S.E.2d 601 (2010).

Cited in Michael v. Poss, 209 Ga. 559, 74 S.E.2d 742 (1953).

RESEARCH REFERENCES

Am. Jur. 2d. — 66 Am. Jur. 2d, Records and Recording Laws, § 144.

ALR. — Priority, as between holder of unfiled or unrecorded chattel mortgage who secures possession of goods on chattels, and subsequent purchaser or encumbrancer, 53 ALR2d 936.

Construction and effect of ''marketable record title'' statutes, 31 ALR4th 11.

44-2-5. Recording execution and deed after sheriff's sale; evidence of execution where original lost.

A purchaser at a sheriff's sale may have the execution under which the property was sold recorded with his deed together with all the entries on the execution. In the event of the loss or destruction of the original execution, a copy of the record shall be admitted in evidence. (Laws 1845, Cobb's 1851 Digest, p. 179; Code 1863, § 2671; Code 1868, § 2667; Code 1873, § 2709; Code 1882, § 2709; Civil Code 1895, § 3625; Civil Code 1910, § 4207; Code 1933, § 29-412.)

JUDICIAL DECISIONS

Cited in Mayor of Fort Valley v. Levin, 183 Ga. 837, 190 S.E. 14 (1937); Martin v. Clark, 190 Ga. 270, 9 S.E.2d 54 (1940).

RESEARCH REFERENCES

C.J.S. — 26A C.J.S., Deeds, § 424.

44-2-6. Recording bond for title, contracts, transfers, and assignments; priority as to subsequent deeds taken without notice from same vendor.

Every bond for title, bond to reconvey realty, contract to sell or convey realty or any interest therein, and any and all transfers or assignments of realty shall be filed and recorded in the office of the clerk of the superior court of the county where the land referred to in the instrument is located. The filing and recording shall, from the date of filing, be notice of the

interest and equity of the holder of the instrument in the property described therein. The filing and recording may be made at any time; but such bond for title, bond to reconvey realty, contract to sell or convey realty or any interest therein, and any transfer or assignment of realty shall lose its priority over deeds, loan deeds, mortgages, bonds for titles, bonds to reconvey realty, contracts to sell or convey realty or any interest therein and any transfer or assignment of realty from the same vendor, obligor, transferor, or assignor which is executed subsequently but filed for record first and is taken without notice of the former instrument. (Ga. L. 1900, p. 68, §§ 1, 2; Civil Code 1910, §§ 4213, 4214; Ga. L. 1921, p. 157, § 2; Code 1933, §§ 29-418, 29-418.1.)

Law reviews. — For annual survey of real property law, see 56 Mercer L. Rev. 395 (2004).

JUDICIAL DECISIONS

Purpose of 1921 amendments. — Amendment of statute in 1921 was passed to supplement the original section. McClure v. Smith, 115 Ga. 709, 42 S.E. 53 (1902); Guaranty Inv. & Loan Co. v. Athens Eng'g Co., 152 Ga. 596, 110 S.E. 873 (1922) (see O.C.G.A. § 44-2-6).

Amendment of this statute in 1921 made further provision for recording bonds for title, supplements the original language of this statute, and made plainer the statute's meaning. Fender v. Hodges, 166 Ga. 727, 144 S.E. 278 (1928) (see O.C.G.A. § 44-2-6).

Priority of contract over deed. — Recording of a contract to sell land took priority over a later recorded deed transferring the disputed land. Parks v. Stepp, 277 Ga. 704, 594 S.E.2d 364 (2004).

Primary intent and purpose of this statute was to give notice to all persons dealing with the obligor, from the date of the filing of the bond, of the interest and equity of the holder of the bond in the property therein described so that any one acquiring a lien on or title to the property after the filing of the bond would take the property subject to the interest and equity of the obligee in the bond. Gleaton v. Wright, 149 Ga. 220, 100 S.E. 72 (1919); Fender v. Hodges, 166 Ga. 727, 144 S.E. 278 (1928); Peterson v. Perry, 191 Ga. 816, 14 S.E.2d 100 (1941).

Phrase "equity of the holder" refers to equity as is derived from terms of instrument, and not to some other equity which the holder has in the property. Peterson v. Perry, 191 Ga. 816, 14 S.E.2d 100 (1941).

Obligee in a recorded bond is protected to the extent of purchase money actually paid before notice of the rights of a grantee in a senior unrecorded deed from the obligor in the bond. The recorded bond for title does not take priority over the unrecorded senior deed to the extent of the entire estate purchased. Gleaton v. Wright, 149 Ga. 220, 100 S.E. 72 (1919).

Transfer under security deed on same basis as to recordation as deed itself. — Transfer of title held under the security deed, made to assign all interest in the debt secured as in the land as security therefor, stands on the same basis as to execution and recordation as the deed itself. Citizens & S. Bank v. Farr, 164 Ga. 880, 139 S.E. 658 (1927); Mortgage Guarantee Co. of Am. v. Atlanta Com. Bank, 166 Ga. 412, 143 S.E. 562 (1928).

Recorded security deed entitled to priority over unrecorded bond for title. — After one obtained and duly recorded a security deed without notice of any kind of the existence of prior unrecorded bond for title from one's grantor to the same land, the former is entitled to priority in the distribution of the proceeds derived from the sale of the land. The same priority exists in favor of subsequent holders under duly recorded deeds as against a transferee of the bond, such transfer never having been recorded. Fender v. Hodges, 166 Ga. 727, 144 S.E. 278 (1928).

Recording of collateral assignment. — When a collateral assignment was properly recorded, purchasers were presumed thereby to have bought real property with knowledge of the assignee's power to foreclose under the collateral assignment, and the purchasers were not bona fide purchasers for value without notice; thus, the assignee's security interest took priority over the purchasers' rights. Palmetto Capital Corp. v. Smith, 284 Ga. App. 819, 645 S.E.2d 9 (2007), cert. denied, 2007 Ga. LEXIS 649 (Ga. 2007).

Priority between contracts for sale. — Because a sales contract was recorded first, the description of the boundaries contained therein prevailed, and the landowners therein enjoyed superior title to any disputed property within the bounds of that description. Parks v. Stepp, 260 Ga. App. 431, 579 S.E.2d 874 (2003), aff'd, 277 Ga. 704, 594 S.E.2d 364 (2004).

Effect of restrictive covenants in unrecorded instrument. — Purchaser of land without actual notice may take free of restrictive covenants contained in an unrecorded contract or deed. Jenkins v. Sosebee, 74 Bankr. 440 (Bankr. N.D. Ga. 1987).

Cited in New London Square, Ltd. v. Diamond Elec. & Supply Corp., 132 Ga. App. 433, 208 S.E.2d 348 (1974); Milligan v. Gilmore Meyer Inc., 775 F. Supp. 400 (S.D. Ga. 1991).

RESEARCH REFERENCES

Am. Jur. 2d. — 23 Am. Jur. 2d, Deeds, §§ 4, 270. 66 Am. Jur. 2d, Records and Recording Laws, § 47.

ALR. — Use of diminutive or nickname as affecting operation of record as notice, 45 ALR 557.

Constructive trust against one holding merely bond for deed or other executory contract and not legal title, 173 ALR 1275.

Priority between devisee under devise pursuant to testator's agreement and third person claiming under or through testator's unrecorded deed, 7 ALR2d 544.

Risk of loss by casualty pending contract for conveyance of real property — modern cases, 85 ALR4th 233.

44-2-7. Recording of surrender or satisfaction of bond for title.

When any bond for title has been recorded and is subsequently surrendered or satisfied, such surrender or satisfaction may be entered of record by the clerk of the superior court in the same manner that cancellations of mortgages and deeds to secure debts are entered of record. (Ga. L. 1900, p. 68, § 3; Civil Code 1910, § 4215; Code 1933, § 29-419.)

RESEARCH REFERENCES

Am. Jur. 2d. — 23 Am. Jur. 2d, Deeds, §§ 4, 270. 66 Am. Jur. 2d, Records and Recording Laws, § 47.

44-2-8. Recording of options to purchase land and assignments of such options; effect as notice.

When executed with the formality prescribed for the execution of deeds to land, options to purchase land or any interest in land and assignments of such options to purchase may be recorded in the county in which the property described in the instrument is located. The record shall, from the date of filing, be notice of the interest and rights of the parties to the option to purchase in and with respect to the property described in the option to

purchase and of the interest and rights of any person holding an assignment of the option to purchase. (Ga. L. 1960, p. 858, § 1.)

JUDICIAL DECISIONS

Cited in Banks v. Harden, 221 Ga. 505, 145 S.E.2d 563 (1965); Bootery, Inc. v. Cumberland Creek Properties, Inc., 271 Ga. 271, 517 S.E.2d 68 (1999).

RESEARCH REFERENCES

Am. Jur. 2d. — 66 Am. Jur. 2d, Records and Recording Laws, § 47.

C.J.S. — 76 C.J.S., Records, § 11.

ALR. — Instrument for purchase of land as a contract or an option, 3 ALR 576; 87 ALR 563.

Exercise of option as affecting rights intervening between giving and exercise of option, 50 ALR 1314.

When optionee's delay in exercising option excused, 157 ALR 1311.

Grant to lessee of first privilege or right to purchase leased premises as constituting absolute or conditional option, 34 ALR2d 1158.

Validity of option to purchase realty as affected by indefiniteness of term provided for exercise, 31 ALR3d 522.

Construction and operation of "option agreement — flat payment" land contract under which optionee has right to take title when periodic payments (otherwise to be treated as rent) equal agreed price, 55 ALR3d 159.

Construction and effect of options to purchase at specified price and at price offered by third person, included in same instrument, 22 ALR4th 1293.

Circumstances excusing lessee's failure to give timely notice of exercise of option to renew or extend lease, 27 ALR4th 266.

Sufficiency as to method of giving oral or written notice exercising option to renew or extend lease, 29 ALR4th 903.

What constitutes timely notice of exercise of option to renew or extend lease, 29 ALR4th 956.

Waiver or estoppel as to notice requirement for exercising option to renew or extend lease, 32 ALR4th 452.

Sufficiency as to parties giving or receiving notice of exercise of option to renew or extend lease, 34 ALR4th 857.

44-2-9. Recording leases, usufructs, and assignments thereof; effect as notice.

When executed with the formality prescribed for the execution of deeds to land, leases or usufructs of land or of any interest in land and assignments of such leases or usufructs for any purpose, including the purpose of securing debt, may be recorded in the county where the property described in the instrument is located. The record shall, from the date of filing, be notice of the interest of the parties to the lease or usufructs in the property described in the instrument and of the interest of any person holding an assignment of any interest in such lease or usufruct. (Ga. L. 1958, p. 413, § 1.)

Law reviews. — For article analyzing legal aspects of time shared (multiple, revolving) ownership of property, see 12 Ga. St. B.J. 75 (1975).

For note discussing lessee's option to purchase, see 22 Ga. B.J. 565 (1960).

For comment discussing the legal effect of concurrent leases under both common law and statutory law in Georgia, see 6 Ga. St. B.J. 320 (1970).

OPINIONS OF THE ATTORNEY GENERAL

Lease itself, not a notice of the existence of a lease, should be recorded. 1968 Op. Att'y Gen. No. 68-157.

RESEARCH REFERENCES

Am. Jur. 2d. — 66 Am. Jur. 2d, Records and Recording Laws, § 52.

C.J.S. — 76 C.J.S., Records, § 11.

ALR. — Necessity of consideration to support option under seal, 2 ALR 631; 21 ALR 137.

Priority where senior instrument affecting real property is recorded after execution but before recording of junior instrument, 32 ALR 344.

Validity of reservation of oil and gas or other mineral rights in deed of land, as against objection of repugnancy to the grant, 157 ALR 485.

Continued possession of tenant as constructive notice to third person of unrecorded transfer of title of original lessor, 1 ALR2d 322.

Record of instrument which comprises or includes an interest or right that is not a proper subject of record, 3 ALR2d 577.

44-2-10. Recording deeds and bills of sale to personalty; effect as notice.

Absolute deeds and bills of sale to personalty may be recorded in the office of the clerk of the superior court of the county where the maker resides. Such record, being permissive and not compulsory, is not constructive or implied notice to anyone. This Code section shall not apply to transactions covered by Article 9 of Title 11. (Laws 1819, Cobb's 1851 Digest, p. 168; Ga. L. 1855-56, p. 142, § 1; Code 1863, § 2672; Code 1868, § 2668; Code 1873, § 2710; Code 1882, § 2710; Civil Code 1895, § 3626; Civil Code 1910, § 4208; Code 1933, § 29-413; Ga. L. 1962, p. 156, § 1.)

JUDICIAL DECISIONS

Editor's notes. — In light of the similarity of the statutory provisions, decisions rendered prior to the enactment of Art. 9, T. 11, are included in the annotations for this Code section.

Former Civil Code 1910, § 4208 (see O.C.G.A. § 44-2-10) applied only to an absolute bill of sale. The law with reference to the registration and priority of bills of sale to secure debt was to be found in former Civil Code 1910, §§ 3306 and 3307 (see O.C.G.A. §§ 44-14-60 and 44-14-63). Balchin v. Jones, 10 Ga. App. 434, 73 S.E. 613 (1912); Butler v. LaGrange Grocery Co., 29 Ga. App. 612, 116 S.E. 213 (1923).

Effect, among concurrently dated documents, of prior recording. — Priority of recording gives priority among concurrently dated bills of sale to secure debt, if taken without notice to the others. Fourth Nat'l Bank v. Howell, 92 Ga. App. 868, 90 S.E.2d 78 (1955).

Effect of recordation on title. — Recordation has no effect on the title to personalty, which is acquired by the grantee in the bill of sale upon the execution and delivery of the instrument by the grantor. Recording an absolute bill of sale to personalty under the provisions of statute has only the effect of making the instrument admissible in evidence without further proof of the instrument's execution. Jones v. Liberty Mut. Fire Ins. Co., 90 Ga. App. 667, 83 S.E.2d 837 (1954).

Cited in Williams v. Logan & Mears, 32 Ga. 165 (1861); Jones v. Newberry, 16 Ga. App.

424, 85 S.E. 617 (1915); Mack Trucks, Inc. v. Ryder Truck Rental, Inc., 110 Ga. App. 68, 137 S.E.2d 718 (1964).

RESEARCH REFERENCES

C.J.S. — 76 C.J.S., Records, § 11.

ALR. — Record of instrument which comprises or includes an interest or right that is not a proper subject of record, 3 ALR2d 577.

Priority between devisee under devise pursuant to testator's agreement and third person claiming under or through testator's unrecorded deed, 7 ALR2d 544.

44-2-11. Recording copy of instrument recorded in other counties in which part of affected land is located in cases where original lost or destroyed.

A copy from the registry of any instrument conveying or affecting land in any county of this state which is recorded in the office of the clerk of the superior court of the county, if duly certified by the clerk, may be filed for record and recorded in the office of the clerk of the superior court of any other county where some of the land conveyed or affected by such instrument is located in the same manner and with the same force and effect for all purposes as if the certified copy were the original instrument, provided an affidavit is attached to the certified copy and recorded with it in which the affiant says that he owns an interest in property affected by the instrument, that the original instrument has been lost or destroyed, and that he truly believes that the original instrument was genuine. (Ga. L. 1943, p. 577, § 1.)

44-2-12. Rerecording lost or destroyed deeds and other instruments; validity.

When the record of any deed or other recorded instrument or the certificate of record is lost or destroyed, the clerk of the superior court may rerecord the instrument and the certificate of record. The rerecording shall be as valid as the original recording and shall take effect from the date of the original recording, provided the rerecording is within 12 months after the loss or destruction of the original recording. (Ga. L. 1882-83, p. 148, § 1; Civil Code 1895, § 3619; Civil Code 1910, § 4199; Code 1933, § 29-402.)

Cross references. — Similar provisions regarding rerecording of instruments, § 24-5-24.

JUDICIAL DECISIONS

Constitutionality. — Attack on the constitutionality of this statute, on the ground that the Act from which this statute was codified was broader than the Act's title, was without merit. Ashburn v. Spirey, 112 Ga. 474, 37 S.E. 703 (1900) (see O.C.G.A. § 44-2-12).

Retroactivity. — Statute has no retroactive effect upon deeds, the records of which were destroyed before the date of the statute's enactment. Ashburn v. Spirey, 112 Ga. 474, 37 S.E. 703 (1900) (see O.C.G.A. § 44-2-12).

No date-back feature for corrective deeds. — While O.C.G.A. § 44-2-12 provides authorization for rerecorded deeds to have a date-back feature, no comparable authority exists for corrective deeds. Green Rivers Forest, Inc. v. Aetna Life Ins. Co., 200 Bankr. 956 (Bankr. M.D. Ga. 1996).

RESEARCH REFERENCES

Am. Jur. 2d. — 66 Am. Jur. 2d, Records and Recording Laws, § 72.

44-2-13. Rerecording instruments upon creation of new county or change in county lines; effect on validity of original record.

(a) When the creation of a new county or a change in county lines causes land to be included in a different county than that in which it was situated at the time of the recording of a deed, mortgage, or other lien therein, any holder of such a deed, mortgage, or other lien may have such instrument rerecorded in the office of the clerk of the superior court of the county in which the land is newly situated. If the original of such deed, mortgage, or other lien is lost, a certified copy thereof from the record where the same was recorded may in like manner be rerecorded in the county in which the land affected is newly situated. Upon payment of the recording fees, it shall be the duty of the clerk of the superior court of the county where the instrument is rerecorded to cause the deed, mortgage, or other lien to be entered upon the proper records for such papers; and the clerk shall note on the record book the date of the original recording and the book and page or pages upon which the deed or mortgage or other lien was originally recorded.

(b) The rerecording of a deed, mortgage, or other lien pursuant to subsection (a) of this Code section shall not affect the validity of the original record as notice. (Ga. L. 1908, p. 95, §§ 1, 2; Civil Code 1910, §§ 4200, 4201; Code 1933, §§ 29-403, 29-404.)

Cross references. — Filing of survey and plat of county for which boundaries have been changed, § 36-3-5.

RESEARCH REFERENCES

Am. Jur. 2d. — 66 Am. Jur. 2d, Records and Recording Laws, § 72.

C.J.S. — 26A C.J.S., Deeds, § 159.

44-2-14. Requirements for recordation.

(a) Before any deed to realty or personalty or any mortgage, bond for title, or other recordable instrument executed in this state may be recorded, it must be attested or acknowledged as provided by law. However, nothing

in this Code section shall dispense with another witness where an additional witness is required. This Code section shall not apply to transactions covered by Article 9 of Title 11.

(b) No affidavit prepared under Code Section 44-2-20 and no instrument by which the title to real property or any interest therein is conveyed, created, assigned, encumbered, disposed of, or otherwise affected shall be entitled to recordation unless the name and mailing address of the natural person to whom the affidavit or instrument is to be returned is legibly printed, typewritten, or stamped upon such affidavit or instrument at the top of the first page thereof.

(c) If an instrument or affidavit is titled or recorded without compliance with subsection (b) of this Code section, such noncompliance does not alone impair the validity of the filing of recordation or of the constructive notice imparted by filing or recordation.

(d) Subsection (b) of this Code section does not apply to the following:

(1) An affidavit or instrument executed before July 1, 1994;

(2) A decree, order, judgment, or writ of any court;

(3) A will; or

(4) Any plat. (Laws 1785, Cobb's 1851 Digest, p. 164; Laws 1827, Cobb's 1851 Digest, pp. 171, 172; Laws 1839, Cobb's 1851 Digest, p. 177; Laws 1850, Cobb's 1851 Digest, pp. 180, 181; Ga. L. 1849-50, p. 149, § 1; Ga. L. 1853-54, p. 26, § 1; Code 1863, § 2668; Code 1868, § 2664; Code 1873, § 2706; Code 1882, § 2706; Ga. L. 1893, p. 37, § 1; Civil Code 1895, § 3620; Civil Code 1910, § 4202; Ga. L. 1924, p. 83, § 1; Ga. L. 1931, p. 153, § 1; Code 1933, § 29-405; Ga. L. 1963, p. 188, § 39; Ga. L. 1994, p. 1943, § 1.)

JUDICIAL DECISIONS

"Other registrable instruments" construed. — Words "other registrable instruments" in this statute mean deeds and other instruments required by law to be executed with the formality of deeds. New London Square, Ltd. v. Diamond Elec. & Supply Corp., 132 Ga. App. 433, 208 S.E.2d 348 (1974) (see O.C.G.A. § 44-2-14).

Words "or other registrable instrument" do not include a materialman's claim of lien. New London Square, Ltd. v. Diamond Elec. & Supply Corp., 132 Ga. App. 433, 208 S.E.2d 348 (1974).

Statute provides two modes under which a deed may be recorded, by attestation or by acknowledgment. Ballard v. Orr, 105 Ga. 191, 31 S.E. 554 (1898); Stallings v. Newton, 110 Ga. 875, 36 S.E. 227 (1900); Hansen v. Owens, 132 Ga. 648, 64 S.E. 800 (1909) (see O.C.G.A. § 44-2-14).

Deeds of realty and personalty may be acknowledged before, as well as attested by, an officer, or proven by the affidavit of a subscribing witness to prepare the deeds for record. Webb v. United-American Soda Fountain Co., 59 F.2d 329 (5th Cir. 1932).

For historical discussion of common law and statutory provisions on attestation and acknowledgment, see Webb v. United-American Soda Fountain Co., 59 F.2d 329 (5th Cir. 1932).

Effect of acknowledgment on title. — Acknowledgment, while required for recordation, is not necessary in order to convey

title by a deed properly signed and delivered. Stallings v. Newton, 110 Ga. 875, 36 S.E. 227 (1900); Northrop v. Columbian Lumber Co., 186 F. 770 (5th Cir. 1911).

Instrument valid between parties even though unattested, or improperly attested. — Retention of title contract or a mortgage may be valid between the parties even though it is unattested, or improperly attested and not recorded and not entitled to be recorded because of such improper attestation. Central Bank & Trust Co. v. Creede, 103 Ga. App. 203, 118 S.E.2d 844 (1961).

Alleged defect in notarization not apparent on face of document. — Trial court did not err in granting summary judgment to the corporations on the issue of whether the corporations had actual or constructive notice of fraud regarding the relatives' quitclaim deeds despite the relatives' assertions that the deeds were notarized after the deeds were signed and were notarized outside the presence of each of the relatives; even assuming the assertion was true, that defect in proper notarization was not apparent from the face of any of the deeds involved, all of which were signed, witnessed, and notarized. Bowman v. Century Funding, Ltd., 277 Ga. App. 540, 627 S.E.2d 73 (2006).

Deed ineligible for recordation. — Deed was materially altered when an attachment containing the description of one of two parcels of property was removed, the deed was ineligible for recordation, and the buyer's failure to object to the recording of the altered deed did not support a finding that the buyer accepted the altered deed without objection as: (1) the seller did not resign the deed and it was not re-attested; (2) the buyer was not sent the altered deed or land description; (3) there was no evidence that the buyer consented to the alteration or that the buyer otherwise agreed to accept only one parcel of land; (4) the delivery of the altered deed to the bank's attorney was not constructive delivery to the buyer as the attorney represented the bank and the buyer had not authorized the attorney to accept and retain the recorded deed on the buyer's behalf; and (5) the buyer never received a copy of the altered deed or land description before or after it was recorded. Z & Y Corp. v. Indore C. Stores, Inc., 282 Ga. App. 163, 638 S.E.2d 760 (2006).

Cited in Mack Trucks, Inc. v. Ryder Truck Rental, Inc., 110 Ga. App. 68, 137 S.E.2d 718 (1964); Sullivan v. Sullivan, 286 Ga. 53, 684 S.E.2d 861 (2009).

RESEARCH REFERENCES

Am. Jur. 2d. — 23 Am. Jur. 2d, Deeds, § 101.

C.J.S. — 26A C.J.S., Deeds, §§ 382 et seq., 394.

ALR. — Acknowledgment or oath over telephone, 12 ALR 538; 58 ALR 604.

Sufficiency of certificate of acknowledgment, 29 ALR 919.

44-2-15. Officers authorized to attest registrable instruments.

Any of the instruments enumerated in Code Section 44-2-14 may be attested by a judge of a court of record, including a judge of a municipal court, or by a magistrate, a notary public, or a clerk or deputy clerk of a superior court or of a city court created by special Act of the General Assembly. With the exception of notaries public and judges of courts of record, such officers may attest such instruments only in the county in which they respectively hold their offices. (Laws 1785, Cobb's 1851 Digest, p. 164; Laws 1827, Cobb's 1851 Digest, pp. 171, 172; Laws 1839, Cobb's 1851 Digest, p. 177; Laws 1850, Cobb's 1851 Digest, pp. 180, 181; Ga. L. 1849-50, p. 149, § 1; Ga. L. 1853-54, p. 26, § 1; Code 1863, § 2668; Code 1868, § 2664; Code 1873, § 2706; Code 1882, § 2706; Ga. L. 1893, p. 37, § 1; Civil Code 1895, § 3620; Civil Code 1910, § 4202; Ga. L. 1924, p. 83, § 1;

Ga. L. 1931, p. 153, § 1; Code 1933, § 29-406; Ga. L. 1951, p. 15, § 1; Ga. L. 1983, p. 884, § 4-1.)

JUDICIAL DECISIONS

Recorded deed must be attested, acknowledged, or proven by affidavit. — To admit a deed to record, it must be a perfect deed. It must be attested by two witnesses. It must be attested or acknowledged, if executed in this state, as provided in former Civil Code 1910, § 4202 (see O.C.G.A. § 44-2-15), or it must be probated as provided in former Civil Code 1910, § 4205 (see O.C.G.A. § 44-2-18). Citizens' Bank v. Taylor, 169 Ga. 203, 149 S.E. 861 (1929).

Deeds of realty and personalty may be acknowledged before, as well as attested by, an officer, or proven by the affidavit of a subscribing witness to prepare the deeds for record. Webb v. United-American Soda Fountain Co., 59 F.2d 329 (5th Cir. 1932).

Effect of statutory modification. — Codifiers intentionally modified preexisting law which allowed clerk of inferior court to make attestation required. Miller v. Southwestern R.R., 55 Ga. 143 (1875); Kennedy v. McCardel, 88 Ga. 454, 14 S.E. 710 (1892) (decided under former Code 1873, § 2706, prior to amendment by Ga. L. 1924, p. 83, § 1).

For other modifications made by the codifiers, see Gress Lumber Co. v. Coody, 99 Ga. 775, 27 S.E. 169 (1896); Anderson & Conley v. Leverette, 116 Ga. 732, 42 S.E. 1026 (1902).

Attestation by justice of peace of another state does not meet requirements of this statute. Eaton v. Freeman, 58 Ga. 129 (1877) (see O.C.G.A. § 44-2-15).

Attestation by notary public of another county. — Attestation by a notary public of another county than that in which recordation is sought does not meet requirements of this statute. Allgood v. State, 87 Ga. 668, 13 S.E. 569 (1891). See also Brockett v. American Slicing Mach. Co., 18 Ga. App. 670, 90 S.E. 366 (1916) (see O.C.G.A. § 44-2-15).

Clerk of superior court can attest deed in the county wherein the clerk holds office, and not elsewhere, and the clerk cannot only witness a deed when the deed is to be recorded in that county. Anderson & Conley v. Leverette, 116 Ga. 732, 42 S.E. 1026 (1902).

Attesting officer presumed to have jurisdiction. — In the absence of direct evidence to the contrary, a deed is presumed to have been executed where attested, and the attesting officer is presumed to have had jurisdiction. Rowe v. Spencer, 132 Ga. 426, 64 S.E. 468, 47 L.R.A. (n.s.) 561 (1909); Flint River Lumber Co. v. Smith, 134 Ga. 627, 68 S.E. 436 (1910). See also Glover v. Cox, 137 Ga. 684, 73 S.E. 1068, 1913B Ann. Cas. 191 (1912); Cammon v. State, 20 Ga. App. 175, 92 S.E. 957 (1917).

Lack of attestation or acknowledgment as affecting notice. — Registry of deed not attested, or not legally proved or acknowledged, is not constructive notice to a subsequent purchaser. Citizens' Bank v. Taylor, 169 Ga. 203, 149 S.E. 861 (1929).

Alleged defect in notarization not apparent on face of document. — Trial court did not err in granting summary judgment to the corporations on the issue of whether the corporations had actual or constructive notice of fraud regarding the relatives' quitclaim deeds despite the relatives' assertions that the deeds were notarized after the deeds were signed and were notarized outside the presence of each of the relatives; even assuming the assertion was true, that defect in proper notarization was not apparent from the face of any of the deeds involved, all of which were signed, witnessed, and notarized. Bowman v. Century Funding, Ltd., 277 Ga. App. 540, 627 S.E.2d 73 (2006).

RESEARCH REFERENCES

Am. Jur. 2d. — 23 Am. Jur. 2d, Deeds, § 99.

C.J.S. — 26A C.J.S., Deeds, §§ 68, 69.

44-2-16. Effect of acknowledgment subsequent to execution.

If subsequent to its execution a recordable instrument is acknowledged in the presence of any of the officers referred to in Code Section 44-2-15, that fact, certified on the deed by such officer, shall entitle it to be recorded. (Laws 1785, Cobb's 1851 Digest, p. 164; Laws 1827, Cobb's 1851 Digest, pp. 171, 172; Laws 1839, Cobb's 1851 Digest, p. 177; Laws 1850, Cobb's 1851 Digest, pp. 180, 181; Ga. L. 1849-50, p. 149, § 1; Ga. L. 1853-54, p. 26, § 1; Code 1863, § 2668; Code 1868, § 2664; Code 1873, § 2706; Code 1882, § 2706; Ga. L. 1893, p. 37, § 1; Civil Code 1895, § 3620; Civil Code 1910, § 4202; Ga. L. 1924, p. 83, § 1; Ga. L. 1931, p. 153, § 1; Code 1933, § 29-408.)

JUDICIAL DECISIONS

Deeds may be acknowledged, attested, or subscribed to by witness. — Deeds of realty and personalty may be acknowledged before, as well as attested by, an officer, or proven by the affidavit of a subscribing witness to prepare the deeds for record. Webb v. United-American Soda Fountain Co., 59 F.2d 329 (5th Cir. 1932).

Deed not properly attested or acknowledged as required is ineligible for recording, and, even if recorded, does not constitute constructive notice. Higdon v. Gates, 238 Ga. 105, 231 S.E.2d 345 (1976).

Alleged defect in notarization not apparent on face of document. — Trial court did not err in granting summary judgment to the corporations on the issue of whether the corporations had actual or constructive notice of fraud regarding the relatives' quitclaim deeds despite the relatives' assertions that the deeds were notarized after the deeds were signed and were notarized outside the presence of each of the relatives; even assuming the assertion was true, that defect in proper notarization was not apparent from the face of any of the deeds involved, all of which were signed, witnessed, and notarized. Bowman v. Century Funding, Ltd., 277 Ga. App. 540, 627 S.E.2d 73 (2006).

RESEARCH REFERENCES

Am. Jur. 2d. — 23 Am. Jur. 2d, Deeds, §§ 98, 99.

ALR. — Acknowledgment or oath over telephone, 12 ALR 538; 58 ALR 604.

44-2-17. Validity of attestation by a state or county officer who appears to have no jurisdiction to attest the instrument.

(a) As used in this Code section, the term ''state'' means any one of the states of the United States and any territories and possessions of the United States, including the District of Columbia, Puerto Rico, and the Virgin Islands.

(b) Wherever a deed, mortgage, bond for title, or other recordable instrument appears by its caption to have been executed in one state or county and the official attesting witness appears to be an officer of a different state or of another county, which official would not have jurisdiction to witness instruments in the state or county named in the caption, the instrument, notwithstanding its caption, shall be conclusively considered

and construed to have been attested by the officer in the state or county in which he has authority to act. Such deed, mortgage, bond for title, or other recordable instrument so witnessed shall be entitled to be recorded if in other respects it is so entitled. (Ga. L. 1918, p. 209, § 1; Ga. L. 1923, p. 111, § 1; Code 1933, § 29-407; Ga. L. 1951, p. 29, § 1; Ga. L. 1976, p. 521, § 1.)

JUDICIAL DECISIONS

Cited in Yancey Bros. Co. v. Caldwell, 93 Ga. App. 445, 91 S.E.2d 837 (1956).

44-2-18. Recording deed upon affidavit of subscribing witness; effect of substantial compliance.

If a deed is neither attested by nor acknowledged before one of the officers named in Code Section 44-2-15, it may be recorded upon the affidavit of a subscribing witness, which affidavit shall be made before any one of the officers named in Code Section 44-2-15 and shall testify to the execution of the deed and its attestation according to law. A substantial compliance with the requirements of this Code section shall be held sufficient in the absence of all suspicion of fraud. (Laws 1850, Cobb's 1851 Digest, p. 181; Code 1863, § 2669; Code 1868, § 2665; Code 1873, § 2707; Code 1882, § 2707; Civil Code 1895, § 3623; Civil Code 1910, § 4205; Code 1933, § 29-410.)

JUDICIAL DECISIONS

Deed must be attested, acknowledged, or proven by affidavit. — To admit a deed to record, it must be a perfect deed. It must be attested by two witnesses. It must be attested or acknowledged, if executed in this state, as provided in former Civil Code 1910, § 4202 (see O.C.G.A. § 44-2-15), or it must be probated as provided in former Civil Code 1910, § 4205 (see O.C.G.A. § 44-2-18). Citizens' Bank v. Taylor, 169 Ga. 203, 149 S.E. 861 (1929).

Deeds of realty and personalty may be acknowledged before, as well as attested by, an officer, or proven by the affidavit of a subscribing witness to prepare the deeds for record. Webb v. United-American Soda Fountain Co., 59 F.2d 329 (5th Cir. 1932).

When a recorded security deed did not contain an attestation, but included a closing attorney's affidavit, the deed was not properly attested under O.C.G.A. § 44-2-18 because, while the closing attorney's affidavit indicated that the deed was executed, the affidavit did not make reference to attestation. Gordon v. Terrace Mortg. Co. (In re Hong Ju Kim), No. 06-66024-CRM, 2007 Bankr. LEXIS 4398 (Bankr. N.D. Ga. Nov. 28, 2007).

Clerk of court, with witnesses, can authenticate deed. — Clerk of the superior court alone of the county in which a deed is attested, and in which the deed must be recorded, can, by the clerk's official attestation, with one or more other witnesses, give the deed such authenticity as to admit the deed to record. Bosworth v. Davis, 26 Ga. 406 (1858).

Signature presumed genuine. — If a deed purports to be executed in the presence of, and is attested by, an officer authorized to make such attestation and another witness, and is recorded, as permitted by this statute, the signature is presumed genuine. But this may be disproved and the signature shown to be a forgery. Hansen v. Owens, 132 Ga. 648, 64 S.E. 800 (1909) (see O.C.G.A. § 44-2-18).

What constitutes substantial compliance. — When a subscribing witness to a deed which is not officially attested at the time of the deed's execution appears before an officer authorized to officially attest a deed, and on oath testifies to the execution and delivery of the deed according to law, and signs an affidavit setting forth the execution, and the certificate of the officer to the affidavit states that it was ''sworn to before'' the officer, but omits to certify that the deed was ''subscribed'' in the officer's presence, the affidavit of probate is a sufficient compliance with the terms of this statute. Willie v. Hines-Yelton Lumber Co., 167 Ga. 883, 146 S.E. 901 (1929) (see O.C.G.A. § 44-2-18).

Even assuming that a creditor's security deed was defective under O.C.G.A. § 44-14-33 by the deed's lack of a notary seal, an affidavit accompanying the deed constituted substantial compliance with the remedial provisions of O.C.G.A. § 44-2-18, curing the alleged defect, and a bankruptcy trustee thus could not avoid the lien under 11 U.S.C. § 544(a). Gordon v. Terrace Mortg. Co. (In re Hong Ju Kim), 571 F.3d 1342 (11th Cir. 2009).

Attestation or acknowledgment as affecting notice. — Registry of deed not attested, or not legally proved or acknowledged, is not constructive notice to a subsequent purchaser. Citizens' Bank v. Taylor, 169 Ga. 203, 149 S.E. 861 (1929).

For historical discussion of common law and statutory provisions on attestation and acknowledgment, see Webb v. United-American Soda Fountain Co., 59 F.2d 329 (5th Cir. 1932).

Cited in A.O. Blackmar Co. v. NCR, 64 Ga. App. 739, 14 S.E.2d 153 (1941).

RESEARCH REFERENCES

Am. Jur. 2d. — 23 Am. Jur. 2d, Deeds, §§ 98, 99.

44-2-19. Recording deed on affidavit of third person.

If the subscribing witness or witnesses are dead, are insane, have moved outside the state, or are otherwise incapacitated to make the affidavit provided for in Code Section 44-2-18, the affidavit of a third person testifying to the execution of the deed and to the genuineness of the handwriting of the subscribing witness or witnesses shall be sufficient to admit the deed to record. (Laws 1838, Cobb's 1851 Digest, p. 176; Laws 1841, Cobb's 1851 Digest, p. 178; Ga. L. 1858, p. 53, § 1; Code 1863, § 2670; Code 1868, § 2666; Code 1873, § 2708; Code 1882, § 2708; Civil Code 1895, § 3624; Civil Code 1910, § 4206; Code 1933, § 29-411.)

JUDICIAL DECISIONS

Swearing to genuineness of handwriting of person executing not required. — Original Acts from which this statute was codified required not only that the third person therein referred to should swear to the genuineness of the handwriting of the subscribing witnesses, but the third person was required also to swear to the genuineness of the handwriting of the person executing the instrument. The omission of this latter requisite in these present provisions of a positive statute may be fairly attributable to oversight rather than to a deliberate purpose to repeal the law; however, the effect is a repeal. McVicker v. Conkle, 96 Ga. 584, 24 S.E. 23 (1895) (see O.C.G.A. § 44-2-19).

Affidavit asserting witness did not sign deed raises jury issue. — When an affiant asserts plainly that, to the affiant's knowledge, the affiant's mother did not sign the deed in question, the affidavit alone raises an issue for a jury to determine as to the genuineness of the deed. Mathews v. Brown, 235 Ga. 454, 219 S.E.2d 701 (1975).

RESEARCH REFERENCES

Am. Jur. 2d. — 23 Am. Jur. 2d, Deeds, § 99.

44-2-20. Recorded affidavits relating to land as notice of facts cited therein; admissibility of such affidavits in evidence; presumption as to facts recited; filing and recording.

(a) Recorded affidavits shall be notice of the facts therein recited, whether taken at the time of a conveyance of land or not, where such affidavits show:

(1) The relationship of parties or other persons to conveyances of land;

(2) The relationship of any parties to any conveyance with other parties whose names are shown in the chain of title to lands;

(3) The age or ages of any person or persons connected with the chain of title;

(4) Whether the land embraced in any conveyance or any part of such land or right therein has been in the actual possession of any party or parties connected with the chain of title;

(5) The payment of debts of an unadministered estate;

(6) The fact or date of death of any person connected with such title;

(7) Where such affidavits relate to the identity of parties whose names may be shown differently in chains of title;

(8) Where such affidavits show the ownership or adverse possession of lands or that other persons have not owned such lands nor been in possession of same; or

(9) Where such affidavits state any other fact or circumstance affecting title to land or any right, title, interest in, or lien or encumbrance upon land.

Any such affidavits may be made by any person, whether connected with the chain of title or not.

(b) In any litigation over any of the lands referred to and described in any of the affidavits referred to in subsection (a) of this Code section in any court in this state or in any proceedings in any such court involving the title to such lands wherein the facts recited in such affidavits may be material, the affidavits or certified copies of the record thereof shall be admissible in evidence and there shall be a rebuttable presumption that the statements in said affidavits are true. The affidavits or certified copies thereof shall only be admissible as evidence in the event the parties making the affidavits are

deceased; they are nonresidents of the state; their residences are unknown to the parties offering the affidavits; or they are too old, infirm, or sick to attend court.

(c) Affidavits referred to in subsections (a) and (b) of this Code section shall be filed by the clerk of the superior court of the county where the land is located and shall contain a caption referring to the current owner and to a deed or other recorded instrument in the chain of title of the affected land. The clerk of the superior court shall record such affidavits, shall enter on the deed or other recorded instrument so referred to the book and page number on which such affidavit may be recorded, and shall index same in the name of the purported owner as shown by such caption in both grantor and grantee indexes in deed records as conveyances of lands are recorded and indexed; and he shall receive the same compensation therefor as for recording deeds to lands. (Ga. L. 1955, p. 614, §§ 1-3; Ga. L. 1982, p. 3, § 44.)

Law reviews. — For article, ''Some Rescission Problems in Truth-In-Lending, as Viewed From Georgia,'' see 7 Ga. St. B.J. 315 (1971).

JUDICIAL DECISIONS

Statute will be strictly construed by the court. Dollar v. Thompson, 212 Ga. 831, 96 S.E.2d 493 (1957) (see O.C.G.A. § 44-2-20).

Contents of affidavit. — Properly recorded affidavit ''shall'' contain a caption showing the information enumerated in this statute. This is made mandatory by the use of the word ''shall,'' rather than permissive language. Dollar v. Thompson, 212 Ga. 831, 96 S.E.2d 493 (1957) (see O.C.G.A. § 44-2-20).

Although affidavit gave proper statutory notice to the corporations as to the identity of the property owner, referred to the county grantor-grantee index, was properly witnessed and notarized, and contained other proper information, it did not settle the question of the identity of the property owner's heirs; thus, since a question of fact remained as to whether the affidavit afforded the corporations with actual or constructive notice as to a claim by the property owner's excluded spouse, the trial court should not have granted summary judgment to the corporations as to the claim of the one relative. Bowman v. Century Funding, Ltd., 277 Ga. App. 540, 627 S.E.2d 73 (2006).

Affidavit cancelled. — Trial court properly granted a renter summary judgment and removed an affidavit asserting adverse possession filed by the owner of the first floor of a building with regard to a 1,350 square foot space on the second floor of the building as the renter established that title was acquired via a quit claim deed, that the renter changed the door at the base of the stairwell and had sole access to the second floor space, as well as posted no trespassing signs. The owner of the first floor failed to establish a continuous, exclusive, and uninterrupted possession of the space based on sporadic repairs made to the roof of the entire building. MEA Family Invs., LP v. Adams, 284 Ga. 407, 667 S.E.2d 609 (2008).

Ga. L. 1955, p. 614, §§ 1-3 (see O.C.G.A. § 44-2-20) provided an exception to both the hearsay rule and to former Code 1933, § 38-1603 (see O.C.G.A. § 24-9-1), relating to competency of witnesses. King v. King, 238 Ga. 268, 232 S.E.2d 549 (1977).

Affidavit admissible only if affiant unavailable. — Affidavits shall be admissible only when the person making the affidavit is not available as a witness for stated reasons. Dollar v. Thompson, 212 Ga. 831, 96 S.E.2d 493 (1957).

Cited in Parker v. Adamson, 109 Ga. App. 172, 135 S.E.2d 487 (1964); Jones v. Van Vleck, 224 Ga. 796, 164 S.E.2d 724 (1968); Crane v. Gaddis, 224 Ga. 804, 164 S.E.2d 844

(1968); Minor v. Ray, 122 Ga. App. 531, 177 S.E.2d 842 (1970).

RESEARCH REFERENCES

ALR. — Necessity of showing authority or qualification of affiant in affidavit made in behalf of corporation, 3 ALR 132.

44-2-21. Recording instrument executed out of state; attestation and acknowledgment; validity of attestation by officer who appears to have no jurisdiction to attest the instrument.

(a) To authorize the recording of a deed to realty or personalty executed outside this state, the deed must be attested by or acknowledged before:

(1) A consul or vice-consul of the United States, whose certificate under his official seal shall be evidence of the fact;

(2) A judge of a court of record in the state or county where executed, with a certificate of the clerk under the seal of such court of the genuineness of the signature of such judge;

(3) A clerk of a court of record under the seal of the court; or

(4) A notary public or justice of the peace of the county or city of the state or the state and the county, city, or country where executed, with his seal of office attached; if such notary public or justice of the peace has no seal, then his official character shall be certified by a clerk of any court of record in the county, city, or country of the residence of such notary or justice of the peace.

(b) A deed to realty must be attested by two witnesses, one of whom may be one of the officials named in subsection (a) of this Code section.

(c) Wherever any deed to realty or personalty executed outside this state appears by its caption to have been executed in one state and county and the official attesting witness appears to be an official of another state or county, which official would not have jurisdiction to witness such deed in the state and county named in the caption, the deed, notwithstanding the caption, shall be conclusively considered and construed to have been attested by the officer in the state and county in which he had authority to act.

(d) This Code section shall not apply to transactions covered by Article 9 of Title 11. (Ga. L. 1895, p. 73, § 1; Civil Code 1895, § 3621; Ga. L. 1900, p. 52, § 1; Civil Code 1910, § 4203; Ga. L. 1912, p. 71, § 1; Ga. L. 1924, p. 58, § 1; Code 1933, § 29-409; Ga. L. 1951, p. 261, § 1; Ga. L. 1962, p. 156, § 1; Ga. L. 1982, p. 3, § 44.)

Cross references. — General provision that no seal is required for notary's attestation of deeds, § 45-17-6.

Law reviews. — For comment discussing the legal effect of concurrent leases under both common law and statutory law in Georgia, see 6 Ga. St. B.J. 320 (1970).

JUDICIAL DECISIONS

Analysis

General Consideration
Decisions Prior to Art. 9, T. 11

General Consideration

Notarial seal is required for effective recording. The absence of the seal renders the recording a nullity. However, unrecorded security deeds remain valid against the persons executing the deeds. Ivey v. Transouth Fin. Corp., 566 F.2d 1023 (5th Cir. 1978).

Priority of unrecorded deed of bargain and sale. — Unrecorded deed of bargain and sale is postponed only to later bona fide purchasers for value without notice. Ivey v. Transouth Fin. Corp., 566 F.2d 1023 (5th Cir. 1978).

Admissibility of unrecorded instruments. — Unrecorded deeds or mortgages may be introduced in evidence upon sufficient proof of execution. Ivey v. Transouth Fin. Corp., 566 F.2d 1023 (5th Cir. 1978).

Cited in Hagan v. Hagan, 165 Ga. 364, 141 S.E. 54 (1927); Florida Blue Ridge Corp. v. Tennessee Elec. Power Co., 106 F.2d 913 (5th Cir. 1939); Mack Trucks, Inc. v. Ryder Truck Rental, Inc., 110 Ga. App. 68, 137 S.E.2d 718 (1964).

Decisions Prior to Art. 9, T. 11

Editor's notes. — All of the following notes were taken from cases decided prior to the effective date of Art. 9, T. 11, January 1, 1964. See § 11-10-101.

On the history of this statute, see Crummey & Hamilton v. Bentley, 114 Ga. 746, 40 S.E. 765 (1902); Durrence v. Northern Nat'l Bank, 117 Ga. 385, 43 S.E. 726 (1903); McTyre v. Stearns, 142 Ga. 850, 83 S.E. 955 (1914) (see O.C.G.A. § 44-2-21).

Former Civil Code 1895, §§ 5060 and 5062 (see O.C.G.A. § 9-10-113) did not repeal former Civil Code 1895, § 3621 (see O.C.G.A. § 44-2-21). Simpson v. Wicker, 120 Ga. 418, 47 S.E. 965, 1 Ann. Cas. 542 (1904).

Purpose. — Requirement of this statute is merely a provision for admission of paper to record. Balchin v. Jones, 10 Ga. App. 434, 73 S.E. 613 (1912) (see O.C.G.A. § 44-2-21).

"Attestation" and "subscribed" construed. — Attestation is witnessing actual execution of paper, and subscribing one's name as witness to fact. Gilliam v. Burgess, 169 Ga. 705, 151 S.E. 652 (1930).

What is intended as signature constitutes signing. — Exactly what constitutes a signing has never been reduced to a judicial formula. The principle is that whatever the testator or grantor is shown to have intended as the grantor's signature is a valid signing, no matter how imperfect, unfinished, fantastical, illegible, or even false the separate characters or symbols the grantor used might be when critically judged. Gilliam v. Burgess, 169 Ga. 705, 151 S.E. 652 (1930).

Consul's attestation must be done at consulate. — It is clear that it was not intended that a consul could act in relation to the matter of attesting deeds at any other place than that at which the laws of the United States authorize the consul to perform such acts. Therefore, if a consul of the United States attests a deed at any place other than the consulate, such attestation would not be sufficient to authorize the record of the deed. McCandless v. Yorkshire Guarantee & Sec. Corp., 101 Ga. 180, 28 S.E. 663 (1897). See also, Long v. Powell, 120 Ga. 621, 48 S.E. 185 (1904).

Certificate evidences fact of execution and attestation of deed. — Words in subsection (a)(1) would seem to contemplate a certificate in every instance as evidence not merely of the fact that the person purporting to be the attesting officer is such an officer, but of the whole complex fact of execution and attestation of the deed, including the identity and official character of the attesting witness. McTyre v. Stearns, 142 Ga. 850, 83 S.E. 955 (1914) (see O.C.G.A. § 44-2-21).

Acknowledgement when deed executed out of state. — When a deed to realty in this state is executed out of the state, a judge of a court of record of the venue of the execution may take an acknowledgment thereof. Cunningham v. Barker, 109 Ga. 613, 35 S.E. 53 (1900).

Clerk's certificate under court's seal is prima facie evidence of judicial authority. Ford v. Nesmith, 117 Ga. 210, 43 S.E. 483 (1903).

For illustration of procedure of acknowledgement before clerk, see Ford v. Nesmith, 117 Ga. 210, 43 S.E. 483 (1903).

Effect of lack of seal or certificate on out-of-state bill of sale. — Bill of sale executed out of this state, probated before a notary public, is not entitled to record in Georgia when the seal of the notary is not attached, and when the official character of the notary is not certified by a clerk of the court of record in the county or city of the residence of the notary. Southeastern Equip. Co. v. Peoples Ins. & Fin. Co., 105 Ga. App. 539, 125 S.E.2d 114 (1962).

Clerk's certificate referring to power under which notary holds appointment not required. — This statute does not require the certificate of the clerk to contain any statement with reference to the power under which the notary holds the notary's appointment. Durrence v. Northern Nat'l Bank, 117 Ga. 385, 43 S.E. 726 (1903) (see O.C.G.A. § 44-2-21).

Requirement of two witnesses not satisfied. — Attestation of deed to realty solely by notary does not satisfy requirement of this statute for two witnesses. Kimbrell v. Thomas, 139 Ga. 146, 76 S.E. 1024 (1912) (see O.C.G.A. § 44-2-21).

Presumption that deed executed within attesting officer's jurisdiction. — Every presumption which the law may indulge may be invoked in favor of the inference that the deed was executed within the attesting official's jurisdiction since the deed does not bear evidence to the contrary. Glover v. Cox, 137 Ga. 684, 73 S.E. 1068, 1913B Ann. Cas. 191 (1912). See also In re Williams, 224 F. 984 (S.D. Ga. 1915).

OPINIONS OF THE ATTORNEY GENERAL

Word "seal" is reflective of standard mode of notarization at time of statute's original enactment. 1975 Op. Att'y Gen. No. U75-53 (see O.C.G.A. § 44-2-21).

Rubber stamp qualifies as "seal". — Deeds executed in states allowing notaries public to use a rubber stamp in indelible ink, in lieu of a raised seal, qualify for recordation in Georgia. 1975 Op. Att'y Gen. No. U75-53.

44-2-22. Legal effect of good record title for 40 years.

A prima-facie case shall be made out in actions respecting title to land upon showing good record title for a period of 40 years, and it shall not be necessary under such circumstances to prove title to the original grant from the state. (Ga. L. 1953, Jan.-Feb. Sess., p. 63, § 1.)

Law reviews. — For article surveying real property law, see 34 Mercer L. Rev. 255 (1982).

For note advocating land registration similar to the Torrens system and criticizing the 1952 amendments to Art. 2 of this chapter, as well as view that that article is solely a means to clear title, see 6 Mercer L. Rev. 320 (1955).

JUDICIAL DECISIONS

Section constitutes major change in rules of evidence in cases involving title to land. Shippen v. Cloer, 213 Ga. 172, 97 S.E.2d 563 (1957) (see O.C.G.A. § 44-2-22).

Section not sole means of proving ownership. — In an ejectment action by a landowner against a sign company, the landowner was not required to show record title

for 40 years to prove ownership of the property; O.C.G.A. § 44-2-22 does not provide the sole means by which a party may prove ownership of land, but merely supplies an evidentiary shortcut to proving ownership of land when two parties make adverse claims to the land. Outdoor Sys. v. Woodson, 221 Ga. App. 901, 473 S.E.2d 204 (1996).

Proving ownership prior to passage of statute. — Prior to enactment of this statute, when a plaintiff in ejectment relied upon a record or paper title to prove ownership, it was necessary, in order to make out a prima facie case, to prove a regular chain of title from the state, or from some grantor in possession, or from a common source from which the grantor and the defendant claimed. Shippen v. Cloer, 213 Ga. 172, 97 S.E.2d 563 (1957) (see O.C.G.A. § 44-2-22).

Effect of recital in deed of source of title. — Although a recital in a deed that the parties making the deed were heirs at law of a former owner is not evidence of the fact recited, except as against parties to the deed and their privies, it may be sufficient to show prima facie good title in the grantee. Herrington v. Church of Lord Jesus Christ, 222 Ga. 542, 150 S.E.2d 805 (1966).

Defenses to ejectment action survive section's enactment. — Defendant in ejectment action may assert defenses which the defendant could assert prior to section's enactment; after the plaintiff has established plaintiff's prima facie case by showing a good record title for 40 years, the burden of proceeding is upon the defendant, who must introduce evidence to rebut the plaintiff's prima facie case; otherwise the plaintiff's evidence will demand a verdict in plaintiff's favor. Shippen v. Cloer, 213 Ga. 172, 97 S.E.2d 563 (1957) (see O.C.G.A. § 44-2-22).

Statute is merely a rule of evidence under which the plaintiff in ejectment can make a prima facie case; the statute did not change the fundamental rules governing the ownership of property, and the statute does not deprive the defendant in ejectment of any defenses which the defendant could have asserted prior to the enactment of this statute. Costello v. Styles, 227 Ga. 650, 182 S.E.2d 427 (1971) (see O.C.G.A. § 44-2-22).

Legal title in third person. — Defendant, except when some special relationship between defendant and the plaintiff forbids it, may defeat a recovery by showing, beyond all controversy, legal title in a third person, without connecting defendant with that title, provided the title so shown was subsisted at the date of the commencement of the action and was paramount to the plaintiff's. Shippen v. Cloer, 213 Ga. 172, 97 S.E.2d 563 (1957).

Ripening of prescriptive title in another. — When the plaintiff made out a prima facie case when the plaintiff introduced in evidence the plaintiff's chain of title, such a title, like any other title to land, may be lost by the subsequent ripening of a prescriptive title thereto in another. Hearn v. Leverette, 213 Ga. 286, 99 S.E.2d 147 (1957).

When both parties in action apparently have good title, legal title determined by other evidence. — When the plaintiff and the defendant in an ejectment action each appear to have good record title for 40 years from separate sources, other evidence must be resorted to in order to determine the owner of the legal title. Costello v. Styles, 227 Ga. 650, 182 S.E.2d 427 (1971).

Ejectment petition properly denied. — When an original property owner, in the owner's ejectment petition, did not present any testimony or documentary evidence that the grantor had title to the property purportedly conveyed by the quitclaim deed, the owner failed to make out a prima-facie case based on good record title for a period of 40 years. Brooks v. Green, 277 Ga. 722, 594 S.E.2d 629 (2004).

Cited in Finney v. Green, 211 Ga. 143, 84 S.E.2d 28 (1954); Seal v. Aldredge, 100 Ga. App. 458, 111 S.E.2d 769 (1959); John Doe v. Roe, 234 Ga. 127, 214 S.E.2d 880 (1975).

44-2-23. When deed serves as evidence; effect of affidavit alleging forgery.

A recorded deed shall be admitted in evidence in any court without further proof unless the maker of the deed, one of his heirs, or the opposite party in the action files an affidavit that the deed is a forgery to the best of his knowledge and belief. Upon the filing of the affidavit, the genuineness of the alleged deed shall become an issue to be determined in the action.

(Laws 1812, Cobb's 1851 Digest, p. 167; Laws 1827, Cobb's 1851 Digest, p. 172; Laws 1841, Cobb's 1851 Digest, p. 178; Ga. L. 1855-56, p. 143, § 1; Code 1863, § 2674; Code 1868, § 2670; Code 1873, § 2712; Code 1882, § 2712; Civil Code 1895, § 3628; Civil Code 1910, § 4210; Code 1933, § 29-415.)

Cross references. — Admissibility of certified copies of deeds in lieu of original, §§ 24-5-27, 24-5-28.

Law reviews. — For article surveying real property law, see 34 Mercer L. Rev. 255 (1982).

JUDICIAL DECISIONS

Analysis

General Consideration
Applicability to Instruments and Issues
Admissibility of Recorded Instrument
Procedure as to Proof of Genuineness
Illustrative Cases

General Consideration

Rule was taken from the common law. McArthur v. Morrison, 107 Ga. 796, 34 S.E. 205 (1899).

Statute is to be strictly construed. Haithcock v. Sargent, 145 Ga. 84, 88 S.E. 550 (1916) (see O.C.G.A. § 44-2-23).

Affidavit is a special pleading to be employed solely as a basis for raising and trying an issue as to the genuineness of a recorded deed. Haithcock v. Sargent, 145 Ga. 84, 88 S.E. 550 (1916).

Statute is intended to qualify the ordinary effect of registry, leaving the genuineness of the deed to be proved as with respect to other papers not required by law to be registered. Hanks v. Phillips, 39 Ga. 550 (1869) (see O.C.G.A. § 44-2-23).

Remedy is cumulative; any other method of attacking the genuineness of the deed may also be employed. John Doe v. Roe, 36 Ga. 463 (1867); Sibley v. Haslam, 75 Ga. 490 (1885); Knight v. Suddeth & Crenshaw, 126 Ga. 231, 55 S.E. 31 (1906).

Effect of the statute is to make registration the equivalent of proof in the absence of an attack for forgery. McArthur v. Morrison, 107 Ga. 796, 34 S.E. 205 (1899) (see O.C.G.A. § 44-2-23).

For this statute to apply, deed must have been recorded in county in which land lies; it is not sufficient if the deed has been recorded in an adjoining county in which other land embraced in the deed lies. Kennedy v. Harden, 92 Ga. 230, 18 S.E. 542 (1893).

Cited in Gunn v. Wades, 65 Ga. 537 (1880); Webb v. Till, 134 Ga. 388, 67 S.E. 1034 (1910); Burt v. Gooch, 37 Ga. App. 301, 139 S.E. 912 (1927); Cook v. Parks, 46 Ga. App. 749, 169 S.E. 208 (1933); Rogers v. Eason, 183 Ga. 431, 188 S.E. 693 (1936); Minor v. Fincher, 206 Ga. 721, 58 S.E.2d 389 (1950); Gibson v. Causey, 223 Ga. 135, 153 S.E.2d 704 (1967); Metts v. Easters, 229 Ga. 754, 194 S.E.2d 450 (1972); Allgood v. Allgood, 230 Ga. 312, 196 S.E.2d 888 (1973); State Hwy. Dep't v. Kinsey, 131 Ga. App. 770, 206 S.E.2d 835 (1974).

Applicability to Instruments and Issues

Statute has no application to an unregistered deed. Payne v. Ormond, 44 Ga. 514 (1871); Gorham v. Montfort, 137 Ga. 134, 72 S.E. 893 (1911) (see O.C.G.A. § 44-2-23).

Statute applies to any registered deed though more than 30 years old. Hill v. Nisbet, 58 Ga. 586 (1877); Patterson v. Collier, 75 Ga. 419, 54 Am. R. 472 (1885); Leverett v. Tift, 6 Ga. App. 90, 64 S.E. 317 (1909) (see O.C.G.A. § 44-2-23).

Statute not applicable to a will, though duly probated and admitted to record. Smith v. Stone, 127 Ga. 483, 56 S.E. 640 (1907) (see O.C.G.A. § 44-2-23).

Copy of a deed when admissible as proof may also be attacked for forgery. Patterson v. Collier, 75 Ga. 419, 54 Am. R. 472 (1885).

Applicability to Instruments and Issues (Cont'd)

Copy of deed not properly recorded is not admissible into evidence. Thus, the question of forgery is immaterial. Kennedy v. Harden, 92 Ga. 230, 18 S.E. 542 (1893); Crummey & Hamilton v. Bentley, 114 Ga. 746, 40 S.E. 765 (1902).

Only issue permissible under this statute is that of forgery vel non. Roberts v. Roberts, 101 Ga. 765, 29 S.E. 271 (1897) (see O.C.G.A. § 44-2-23).

This statute, being a special statutory proceeding designed to answer the one purpose of calling in question and trying the one issue as to the execution of the deed, there is no authority of law for drawing into the trial of that issue questions foreign to the fact of execution, and which tend only to raise an estoppel against the alleged grantor. Richards v. Smith, 170 Ga. 398, 153 S.E. 44 (1930) (see O.C.G.A. § 44-2-23).

This statute applies only when recorded deed is collaterally introduced in evidence, and does not refer to instruments forming the basis of the action. Steiner v. Blair, 38 Ga. App. 753, 145 S.E. 471 (1928) (see O.C.G.A. § 44-2-23).

Admissibility of Recorded Instrument

Recorded deed admissible without further proof of execution. — Deed attested by three witnesses, one of whom is an officer authorized by law to attest deeds, and recorded is admissible in evidence without further proof of the deed's execution, and all presumptions are in favor of the deed's genuineness. Guthrie v. Gaskins, 171 Ga. 303, 155 S.E. 185 (1930).

When the deed to the plaintiff, on which the plaintiff claimed title to the property in dispute, recited a valuable consideration and had been duly recorded, and no affidavit of forgery had been filed as required by this statute, the court did not err in admitting the deed in evidence over the objection that there was no proof of the deed's execution. Page v. Brown, 192 Ga. 398, 15 S.E.2d 506 (1941) (see O.C.G.A. § 44-2-23).

In a dispossessory action brought by a mortgage company against a possessor, the trial court properly granted the mortgage company a writ of possession as the company produced a recorded certified copy of the security deed, which the possessor failed to prove was a fraud since the possessor's signature on the deed matched that as appeared on the answer filed. The trial court properly rejected the possessor's attempt to examine the mortgage company's counsel regarding the authenticity of the deed since counsel represented the mortgage company and was, therefore, not competent to testify. Egana v. HSBC Mortg. Corp., 294 Ga. App. 456, 669 S.E.2d 159 (2008).

Effect of deed question of law. — Generally, a registered deed is entitled to be admitted in evidence, and the effect of such a deed is a question of law for the court. Miles v. Blanton, 211 Ga. 754, 88 S.E.2d 273 (1955).

Recorded bill of sale admissible without proof of execution. — In the absence of an attack on a properly witnessed and recorded bill of sale, placing upon a party the burden of proving the bill of sale's execution, it was not error to admit the bill of sale without proof of the bill of sale's execution. Watkins v. Muse, 78 Ga. App. 17, 50 S.E.2d 90 (1948).

Bill of sale for an automobile was not inadmissible because it was not recorded prior to bringing this suit. Recordation has no effect on title to personalty, which is acquired by the grantee in the bill of sale upon the execution and delivery of the instrument by the grantor. Recording an absolute bill of sale to personalty has only the effect of making the instrument admissible in evidence without further proof of the bill of sale's execution. Jones v. Liberty Mut. Fire Ins. Co., 90 Ga. App. 667, 83 S.E.2d 837 (1954).

Certified copy has same effect as original recorded instrument. — Certified copy must be considered the same instrument as the original recorded retention title contract so that the admissibility of one necessarily controls the admissibility of its twin, providing, of course, that some reason appears why it should be necessary to introduce both. Dawson v. General Disct. Corp., 82 Ga. App. 29, 60 S.E.2d 653 (1950).

Procedure as to Proof of Genuineness

Presumption that alteration made at or before deed's execution. — Presumption is that any alteration was made at or before the time of the execution of the deed and, in the absence of an affidavit of forgery, the regis-

tered deed is admitted in evidence without an explanation of the alteration. Collins v. Boring, 96 Ga. 360, 23 S.E. 401 (1895); McConnell Bros. v. Slappey, 134 Ga. 95, 67 S.E. 440 (1910); Gilmer v. Harrison, 146 Ga. 721, 92 S.E. 67 (1917).

Presumption is sufficiently strong to admit a deed in evidence over objection that the deed has been altered since the deed's execution. Buck v. Kitchens, 155 Ga. 721, 118 S.E. 51 (1923).

Burden of proof where affidavit of forgery filed. — Filing of the affidavit places upon the party introducing the deed the burden of showing affirmatively what the law in case of a registered deed presumes in the party's favor: that it was in fact executed and delivered in accordance with what purports to be the facts as stated therein. Holland v. Carter, 79 Ga. 139, 3 S.E. 690 (1887); Collins v. Boring, 96 Ga. 360, 23 S.E. 401 (1895); Bentley v. McCall, 119 Ga. 530, 46 S.E. 645 (1904); Sapp v. Cline, 131 Ga. 433, 62 S.E. 529 (1908); Strickland v. Babcock Lumber Co., 142 Ga. 120, 82 S.E. 531 (1914); James v. Steele, 147 Ga. 598, 95 S.E. 11 (1918).

When the burden is upon the plaintiff to establish the genuineness of a deed, it will not suffice, after having shown the death of the two attesting witnesses to the deed, to prove the genuineness of the signature of the attesting witnesses, but, in order to carry the burden, one should go further and introduce primary evidence, that is, proof of the actual signing by the alleged maker of the deed, or of the genuineness of the maker's signature affixed thereto, or that such evidence is not attainable. Strickland v. Babcock Lumber Co., 142 Ga. 120, 82 S.E. 531 (1914).

Filing an affidavit of forgery changes the burden of proof as to registered deeds, whereas primarily the party offering a deed has the burden of proving the deed's execution, the party may, in the absence of the affidavit, shift this burden by showing its regular registration, thereby making such a prima-facie case of genuineness that throughout the trial the deed is to be given the probative weight to which a genuine deed is entitled, unless further proof overcomes this presumption prima-facie raised in its favor. McCall v. Asbury, 190 Ga. 493, 9 S.E.2d 765 (1940).

Proof of signing and signature may be done by circumstantial evidence. Bentley v. McCall, 119 Ga. 530, 46 S.E. 645 (1904).

When no affidavit filed, burden of disputing genuineness upon party against whom deed admitted. — When no affidavit is filed, the burden is upon the party against whom the deed is admitted to disprove the deed's genuineness. Leverett v. Tift, 6 Ga. App. 90, 64 S.E. 317 (1909); Haithcock v. Sargent, 145 Ga. 84, 88 S.E. 550 (1916); Jett v. Hart, 152 Ga. 266, 109 S.E. 654 (1921).

If a deed is duly recorded and no affidavit of forgery is filed, the burden of disputing the deed's genuineness rests upon the party against whom the deed has been admitted, though, in the ultimate sense, the burden of establishing the execution of the deed is upon the party offering the deed, throughout all the exigencies of the trial. McCall v. Asbury, 190 Ga. 493, 9 S.E.2d 765 (1940).

Sufficiency of affidavit of forgery. — Affidavit must be made either by alleged maker of deed, the maker's heirs, or opposite party in the case. Kelly v. William Sharp Saddlery Co., 99 Ga. 393, 27 S.E. 741 (1896).

Deed, when offered, may be attacked by an affidavit of forgery by the opposite party, whether the plaintiff or the defendant, and even by one who is not a party to the cause if one is the maker of the deed or an heir of the maker of the deed. Steiner v. Blair, 38 Ga. App. 753, 145 S.E. 471 (1928).

In order to cast on the applicant for registration under the Land Registration Law (see § 44-2-40 et seq.) the burden of proving the genuineness of a deed shown in the preliminary report of the examiner, an affidavit of forgery must be filed, and written objections, though verified, which aver that certain deeds are forgeries, do not amount to an affidavit of forgery. McCall v. Asbury, 190 Ga. 493, 9 S.E.2d 765 (1940).

No issue of genuineness when affidavit's purpose to show party induced to sign instrument. — When the alleged maker of a deed which is the basis of an action against the maker files an affidavit that the deed is a forgery, it is the duty of the court to arrest the case and require an issue to be made and tried as to the genuineness of the alleged instrument. The court does not err in refusing to require such an issue to be made and in allowing the instrument to be admitted in evidence where the defendant admits the genuineness of the defendant's signature, and when it appears, from the defendant's

Procedure as to Proof of Genuineness (Cont'd)

testimony, that the purpose of the affidavit is not to enable the defendant to prove a material and fraudulent alteration of the instrument, subsequent to the instrument's execution, by the party claiming a benefit thereunder, but is merely to show that the defendant was induced to sign the instrument without reading the instrument, relying upon the good faith of the opposite party to incorporate therein the terms of the agreement previously arrived at. Ford v. Serenado Mfg. Co., 27 Ga. App. 535, 109 S.E. 415 (1921); Odum v. Cotton States Fertilizer Co., 38 Ga. App. 46, 142 S.E. 470 (1928).

Evidence admissible to show deed forged. — Affidavit of forgery, provided by this statute to be filed where the execution of a deed is denied, is in effect only a special pleading by which the factum of a deed may be determined in a special proceeding. Except for casting the burden of establishing the genuineness of the deed upon the party tendering the deed, the special plea is in effect no more than any other defense, for even though no affidavit of forgery is filed, if the defendant in the defendant's plea denies the execution of the deed, evidence is nevertheless admissible which tends to show that the deed is forged and fraudulent. United States v. 550.6 Acres of Land, 68 F. Supp. 151 (N.D. Ga. 1945), aff'd sub nom. Shropshire v. Hicks, 157 F.2d 767 (5th Cir. 1946) (see O.C.G.A. § 44-2-23).

Notwithstanding that the deed had been recorded, the plaintiff was not required to file an affidavit of forgery, but could assail the deed's genuineness by allegation, thereby assuming the burden of disproving the deed's genuineness. Stow v. Hargrove, 203 Ga. 735, 48 S.E.2d 454 (1948) (see O.C.G.A. § 44-2-23).

Possession of premises under forged deed. — It is possible to enter into possession of premises in good faith under forged deed, but the circumstances attendant upon the execution of the forgery are admissible in evidence as throwing light upon the bona fides of entry. Thorpe v. Atwood, 100 Ga. 597, 28 S.E. 287 (1897).

Right to new trial. — Upon decision of forgery issue against the plaintiff, plaintiff has right to move for new trial. Vance v. Gamble, 95 Ga. 730, 22 S.E. 576 (1895).

Illustrative Cases

Reversible error not found in admission of deed. — In an action for trespass to land, it was not reversible error to admit in evidence a deed conveying to the defendant all of a certain land lot, when the entire controversy was with regard to only a portion of that lot, and the prevailing party relied for that party's claim to this portion of the lot not on this deed, but to other paper title and independent adverse possession. Anderson v. Black, 191 Ga. 627, 13 S.E.2d 650 (1941).

Proof held sufficient to establish forgery. — Proof that a deed purporting to have been executed in 1835 was not recorded until 1883, when the subscribing witnesses were dead and shortly before the action for the land was brought, and also that the alleged grantor could not, in fact, write the grantor's name, and signed interrogatories with the grantor's mark, denying the signature of the deed, while the deed purported to be signed in writing, was held sufficient to establish forgery. Walker v. Logan, 75 Ga. 759 (1885).

When the plaintiff, in an equitable proceeding seeking to enjoin the defendant from evicting the plaintiff from the premises, allege that the plaintiff was not a tenant of the defendant but was the owner of the premises, and that if the defendant claimed to have a deed to the premises, the deed was either a forgery or was fraudulently obtained, and the defendant in the defendant's answer claimed that the plaintiff was a tenant and that the defendant owned the title by virtue of the deed from the plaintiff, and the plaintiff testified that the plaintiff never executed a deed conveying the land to the defendant, this was sufficient (even though the recorded deed was introduced in evidence, and even though the subscribing witnesses testified as to its genuineness) to support a verdict and decree in favor of the plaintiff permanently enjoining the defendant from evicting the plaintiff from the premises involved. Hightower v. Phillips, 184 Ga. 532, 192 S.E. 26 (1937).

RESEARCH REFERENCES

Am. Jur. 2d. — 23 Am. Jur. 2d, Deeds, § 166.

C.J.S. — 26 C.J.S., Deeds, §§ 424, 445.

ALR. — Parol evidence rule as applied to escrow agreement, 49 ALR 1529.

Forgery as affecting registration under Torrens Act, 68 ALR 357.

Forged deed or bond for title as constituting color of title, 68 ALR2d 452.

Procuring signature by fraud as forgery, 11 ALR3d 1074.

Presumptions and burden of proof as to time of alteration of deed, 30 ALR3d 571.

44-2-24. Withdrawal of affidavit of forgery upon loss of deed by affiant.

Where an affidavit of forgery has been filed to the plaintiff's deed, and the deed has been turned over to the defendant or his counsel in order to procure evidence upon the issue of forgery, and such deed is destroyed or lost by the defendant or his counsel or for any cause is not returned to the plaintiff, the judge trying the case shall strike the affidavit of forgery and withdraw the issue from the jury until the deed is produced. The same rule shall apply when the plaintiff files an affidavit of forgery as to the deed of the defendant. (Ga. L. 1887, p. 60, §§ 1, 2; Civil Code 1895, § 3629; Civil Code 1910, § 4211; Code 1933, § 29-416.)

RESEARCH REFERENCES

Am. Jur. 2d. — 23 Am. Jur. 2d, Deeds, §§ 164, 167, 168.

ALR. — Forgery as affecting registration under Torrens Act, 68 ALR 357.

Forged deed or bond for title as constituting color of title, 68 ALR2d 452.

Procuring signature by fraud as forgery, 11 ALR3d 1074.

44-2-25. Recording techniques; photostatic copies of plats.

All decrees, deeds, mortgages, or other instruments affecting the title to land shall be recorded by the clerk of the superior court by the use of printing, typewriting, handwriting in ink, photostating, or photographing, which record shall be clear, legible, and permanent. The record may be made by any one or more of such methods. It shall be lawful to make a photostatic copy or copies of any plats, blueprints, or other copies of plats that are already of record in the clerk's office. These copies or photostatic copies thereof shall serve all purposes and shall be as authentic as the originals. (Ga. L. 1929, p. 321, § 1; Code 1933, § 29-420; Ga. L. 1950, p. 413, § 1.)

RESEARCH REFERENCES

Am. Jur. 2d. — 23 Am. Jur. 2d, Deeds, § 270.

C.J.S. — 26A C.J.S., Deeds, §§ 161, 162. 76 C.J.S., Records, § 3 et seq.

ALR. — Fraudulent misrepresentation or concealment by a contracting party concerning title to property or other subjects which are matters of public record, 33 ALR 853; 56 ALR 1217.

Duty of vendor as to abstract of title, 52 ALR 1460.

44-2-26. Recording of plat or copy of plat — When and where authorized; duty of clerk.

The owner of real property or of any interest therein or any holder of a lien thereon may have a plat of the property or a blueprint, tracing, photostatic copy, or other copy of a plat of the property recorded and indexed in the office of the clerk of the superior court of the county in which the property or any part thereof is located. It shall be the duty of the clerk to record and index any plat or any blueprint, tracing, photostatic copy, or other copy of the plat. (Ga. L. 1937, p. 746, § 1.)

JUDICIAL DECISIONS

Unofficial plat is admissible in evidence if proven to be correct. Mickle v. Moore, 188 Ga. 444, 4 S.E.2d 217 (1939).

Description in lease prevails over that in plat. — When a lease describes the premises by metes and bounds, such a description will prevail over that of an attached sketch or plat when they differ in describing the premises. Duke v. Wilder, 212 Ga. 26, 90 S.E.2d 12 (1955).

Cited in Conyers v. Fulton County, 117 Ga. App. 649, 161 S.E.2d 347 (1968).

OPINIONS OF THE ATTORNEY GENERAL

Plats reduced in size. — Clerks of superior courts may accept for recording plats which have been reduced in size if the plats comply with the requirements of O.C.G.A. § 44-2-26. 1989 Op. Att'y Gen. No. U89-4.

Photocopies of plats. — Clerks of superior courts are not authorized under O.C.G.A. §§ 15-6-67 to 15-6-69 to record photocopies of plats, although such a recording will not affect or invalidate any legal description or legal instrument based on such plat. 1989 Op. Att'y Gen. No. U89-4.

44-2-27. Recording of plat or copy of plat — When deemed recorded.

When any plat or any blueprint, tracing, photostatic copy, or other copy of the plat is securely pasted or fastened in the book provided by the clerk for that purpose, such pasting or fastening shall be deemed a recording of the plat. (Ga. L. 1937, p. 746, § 2.)

44-2-28. Recording of plat or copy of plat — Incorporation by reference.

When any deed, mortgage, or other instrument conveying an interest in or creating a lien on real property refers to the boundaries, metes, courses, or distances of the real estate delineated or shown on any plat of the property or on any blueprint, tracing, photostatic copy, or other copy of the plat which has been recorded as authorized in Code Section 44-2-26 and when the deed, mortgage, or other instrument states the office, book, and page of recordation of the plat or of the blueprint, tracing, photostatic copy, or other copy of the plat, the reference shall be equivalent to setting forth

in the deed, mortgage, or other instrument the boundaries, metes, courses, or distances of the real estate as may be delineated or shown on the plat or on the blueprint, tracing, photostatic copy, or other copy thereof. (Ga. L. 1937, p. 746, § 3; Ga. L. 1982, p. 3, § 44.)

JUDICIAL DECISIONS

Contract referring to plat must identify tract sold. — Contract to sell part of a larger tract shown on the plat referred to must identify the part to be sold. McMichael Realty & Ins. Agency, Inc. v. Tysinger, 155 Ga. App. 131, 270 S.E.2d 88 (1980).

Cited in Five Dee Ranch Corp. v. Federal Land Bank, 148 Ga. App. 734, 252 S.E.2d 662 (1979).

OPINIONS OF THE ATTORNEY GENERAL

Plat may be referred to in conveyance to aid in description of the property conveyed; such a plat need not be recorded to be utilized to aid in description; it is required that the plat be identified as the one referred to, and evidence of the plat's correctness shown; if these basic requirements are met, the court may even correct errors and deficiencies in the plat to develop a description of the property conveyed. 1973 Op. Att'y Gen. No. U73-19.

RESEARCH REFERENCES

Am. Jur. 2d. — 23 Am. Jur. 2d, Deeds, §§ 38 et seq, 50.

C.J.S. — 26A C.J.S., Deeds, § 53 et seq.

ALR. — Rights as between grantees in severalty of lots or parts of same tract, where actual measurements vary from those given in deeds or indicated on the map or plat, 97 ALR 1227.

Conveyance of lot with reference to map or plat as giving purchaser rights in indicated streets, alleys, or areas not abutting his lot, 7 ALR2d 607.

44-2-29. Recording of plat or copy of plat — Ratification of record made prior to statutory authorization; effect of incorporation by reference of plat prior to authorization.

Any plats or any blueprints, tracings, photostatic copies, or other copies of plats recorded prior to March 29, 1937, in the manner described in Code Section 44-2-26 are declared to have been duly recorded; and the reference in any deed, mortgage, or other instrument executed prior to March 29, 1937, to the boundaries, metes, courses, or distances of the real estate delineated or shown on any plat or on any blueprint, tracing, photostatic copy, or other copy of a plat recorded prior to March 29, 1937, in the manner described in Code Section 44-2-26 shall have the same effect as if the boundaries, metes, courses, or distances of the real estate were specifically set forth in the deed, mortgage, or other instrument. (Ga. L. 1937, p. 746, § 5.)

JUDICIAL DECISIONS

Cited in Conyers v. Fulton County, 117 Ga. App. 649, 161 S.E.2d 347 (1968).

RESEARCH REFERENCES

C.J.S. — 26A C.J.S., Deeds, § 54 et seq.

44-2-30. Filing and recording of notice of settlement.

(a) Any party, or his or her legal representative, to a settlement which will convey legal or equitable title to real estate or any interest therein or create any lien thereon by way of a deed to secure debt, mortgage, or other instrument may file an instrument to be designated a ''notice of settlement'' with the clerk of the superior court of the county in which the real estate is situated. The notice of settlement shall be filed, permanently recorded, and indexed by the clerk of the superior court in the same manner as real estate records of the county. The clerk of the superior court shall transmit such information regarding notices of settlement as required by the Georgia Superior Court Clerks' Cooperative Authority for inclusion in the state-wide uniform automated information system for real and personal property records, as provided for by Code Sections 15-6-97 and 15-6-98. The clerk of the superior court shall charge a fee for the filing and recording of the notice of settlement as is required for filing other instruments pertaining to real estate as set forth in division (f)(1)(A)(i) of Code Section 15-6-77.

(b) The notice of settlement provided for in subsection (a) of this Code section shall be signed by said party or legal representative and shall set forth the names of the parties to the settlement and a description of the real estate. If the notice is executed by any one other than an attorney at law of this state, the execution shall be acknowledged or proved in the manner provided by law for the acknowledgment or proof of deeds.

(c) After the filing of a notice of settlement, any person claiming title to, an interest in, or a lien upon the real estate described in the notice through any party in the notice shall be deemed to have acquired said title, interest, or lien with knowledge of the anticipated settlement and shall be subject to the terms, conditions, and provisions of the deed or mortgage between the parties filed within the period provided by subsection (e) of this Code section.

(d) The form of the notice of settlement shall be substantially as follows:

''NOTICE OF REAL ESTATE SETTLEMENT

This form must be executed by a party or legal representative. If the notice is executed by anyone other than an attorney at law in Georgia, it must be executed and acknowledged or proved in the same manner as a deed.

Name(s) and address(es)
_____
_____
_____
_____
Seller(s)
-and-
Name(s) and address(es)
_____
_____
_____
_____
Buyer(s)
-and-
Name(s) and address(es)
_____
_____
_____
_____
Mortgagee(s)

Notice of Settlement

NOTICE is hereby given of a contract, agreement, and mortgage and commitment between the parties hereto.

The lands to be affected are described as follows:

All that certain tract or parcel of lands and premises situate lying and being in the _____ of _____, County of _____ and State of Georgia, commonly known as _____ and more particularly described as follows:

Tax map reference

County of _____ Block No. ____ Lot No. ____ Block ____

Prepared by:

_____

Name

_____

_____

Address

_____

Telephone Number''

(e) The notice of settlement shall be effective for 30 days from the date of filing; provided, however, that the notice of settlement shall be allowed to be renewed by a second filing for one additional 30 day period. Any lien filed during said 30 days shall attach to the premises described in the notice immediately upon the expiration of the 30 days, provided that the premises have not been conveyed and notwithstanding the filing of a subsequent notice of settlement. (Code 1981, § 44-2-30, enacted by Ga. L. 2006, p. 649, § 1/HB 1282; Ga. L. 2007, p. 47, § 44/SB 103.)

Part 2

Uniform Real Property Electronic Recording

Effective date. — This part became effective May 5, 2009.

Cross references. — Electronic records and signatures, § 10-12-1 et seq. Filing documents by electronic means, § 15-10-53.

44-2-35. Short title.

This part shall be known and may be cited as the ''Uniform Real Property Electronic Recording Act.'' (Code 1981, § 44-2-35, enacted by Ga. L. 2009, p. 695, § 1/HB 127.)

44-2-36. Definitions.

As used in this part, the term:

(1) ''Authority'' means the Georgia Superior Court Clerks' Cooperative Authority established pursuant to Code Section 15-6-94.

(2) ''Document'' means information that is:

(A) Inscribed on a tangible medium or that is stored in an electronic or other medium and is retrievable in perceivable form; and

(B) Eligible to be recorded in the land records maintained by the clerk of superior court.

(3) ''Electronic'' means relating to technology having electrical, digital, magnetic, wireless, optical, electromagnetic, or similar capabilities.

(4) ''Electronic document'' means a document that is received by the clerk of superior court in an electronic form.

(5) ''Electronic signature'' means an electronic sound, symbol, or process attached to or logically associated with a document and executed or adopted by a person with the intent to sign the document.

(6) ''Paper document'' means a document that is received by the clerk of superior court that is not electronic.

(7) ''Person'' means an individual, corporation, business trust, estate, trust partnership, limited liability company, association, joint venture, public corporation, government, or governmental subdivision, agency, or instrumentality, or any other legal or commercial entity.

(8) ''State'' means a state of the United States, the District of Columbia, Puerto Rico, the United States Virgin Islands, or any territory or insular possession subject to the jurisdiction of the United States. (Code 1981, § 44-2-36, enacted by Ga. L. 2009, p. 695, § 1/HB 127.)

44-2-37. Electronic documents treated as original; electronic signatures acceptable.

(a) An electronic document prepared and filed in compliance with this part shall satisfy any requirement as a condition for recording that a document be an original, on paper or another tangible medium, or in writing.

(b) An electronic signature shall satisfy any requirement as a condition for recording that a document be signed.

(c) A requirement that a document or a signature associated with a document be notarized, acknowledged, verified, witnessed, or made under oath is satisfied if the electronic signature of the person authorized to perform that act, and all other information required to be included by other applicable law, is attached to or logically associated with the document or signature. A physical or electronic image of a stamp, impression, or seal need not accompany an electronic signature. (Code 1981, § 44-2-37, enacted by Ga. L. 2009, p. 695, § 1/HB 127.)

44-2-38. Role of clerk of court.

A clerk of superior court:

(1) Who implements any of the functions listed in this Code section shall do so in compliance with standards established by the authority;

(2) May receive, index, store, archive, and transmit electronic documents;

(3) May provide for access to, and search and retrieval of, documents and information by electronic means;

(4) Who accepts electronic documents for recording shall continue to accept for filing paper documents as authorized by state law and shall record both electronic documents and paper documents in the same manner as provided for by law;

(5) For archival purposes, may convert into electronic form paper documents accepted for recording;

(6) May convert into electronic form historical documents recorded on paper;

(7) May accept electronically any fee or other moneys that the clerk of superior court is authorized to collect; and

(8) May agree with other officials of a state or a political subdivision thereof, or of the United States, on procedures or processes to electronically facilitate satisfaction of prior approvals and conditions precedent to recording and on the electronic payment of statutorily required fees and other moneys. (Code 1981, § 44-2-38, enacted by Ga. L. 2009, p. 695, § 1/HB 127.)

44-2-39. Adoption of rules and regulations; standardization.

(a) The authority shall adopt rules and regulations and any standardized forms necessary to implement this part.

(b) To promote uniform standards and practices and compatibility of technology used within offices of clerks of superior court in this state and recording offices in other states that have enacted or may enact provisions substantially similar to those contained within this part, the authority shall consider when adopting, amending, and repealing its rules and regulations and any standardized forms:

(1) Standards and practices of other jurisdictions;

(2) The most recent standards promulgated by national standard-setting bodies, such as the Property Records Industry Association;

(3) The views of interested persons and governmental officials and entities;

(4) The needs of counties of varying size, population, and resources; and

(5) Standards that ensure that electronic documents are accurate, authentic, adequately preserved, and resistant to tampering. (Code 1981, § 44-2-39, enacted by Ga. L. 2009, p. 695, § 1/HB 127.)

44-2-39.1. Promotion of uniformity.

In applying and construing this part, consideration shall be given to the need to promote uniformity of the law with respect to its subject matter among states that enact substantially similar provisions. (Code 1981, § 44-2-39.1, enacted by Ga. L. 2009, p. 695, § 1/HB 127.)

44-2-39.2. Construction with federal law.

The provisions of this part modify, limit, and supersede the federal Electronic Signatures in Global and National Commerce Act, 15 U.S.C. Section 7001, et seq., but shall not modify, limit, or supersede Section 101(c) of that federal act, 15 U.S.C. Section 7001(c), or authorize electronic delivery of any of the notices described in Section 103(b) of that federal act, 15 U.S.C. Section 7003(b). (Code 1981, § 44-2-39.2, enacted by Ga. L. 2009, p. 695, § 1/HB 127.)

ARTICLE 2

LAND REGISTRATION

Law reviews. — For note advocating land registration similar to the Torrens system and criticizing the 1952 amendments to The Land Registration Act as well as view that the Act is solely a means to clear title, see 6 Mercer L. Rev. 320 (1955).

JUDICIAL DECISIONS

Constitutionality. — Requirements for land registration is not violative of the constitutional provision which declares that no law or ordinance shall pass which refers to more than one subject matter. Nor would the fact that the penal provision is unconstitutional render the entire Act void. Crowell v. Akin, 152 Ga. 126, 108 S.E. 791, 19 A.L.R. 51 (1921).

Rules of law applicable. — In proving such title as will entitle an applicant to registration and a decree in the applicant's favor, the same rules of law apply as in suits for the recovery of possession of land by ejectment or statutory complaint for land. Lankford v. Holton, 187 Ga. 94, 200 S.E. 243 (1938), later appeal, 195 Ga. 317, 24 S.E.2d 292 (1943).

Part 1

In General

JUDICIAL DECISIONS

Purpose of chapter. — Ultimate goal of any complaint brought under the Georgia Land Registration Law is to determine conclusively the question of title. Gordon v. Georgia Kraft Co., 217 Ga. 500, 123 S.E.2d 540 (1962).

Persons not affected. — Upon a proper construction of the Georgia Land Registration Law, its provisions do not apply to a person who is not made a party to proceedings instituted thereunder, and as to whom there is no compliance with the statute as to service or notice. Couey v. Talalah Estates Corp., 183 Ga. 442, 188 S.E. 822 (1936).

Evidence required to register title. — Applicant seeking to register applicant's title may rely upon what is shown in the preliminary report without introducing in evidence the conveyances specified therein. Asbury v. McCall, 192 Ga. 102, 14 S.E.2d 715 (1941), later appeal, 202 Ga. 154, 42 S.E.2d 370 (1947).

Where plat admissible in evidence. — In proceeding under the Georgia Registration Law, plat is admissible in evidence where one who made the plat testifies to the plat's correctness, even if one testifies that in making the plat one examined the deeds of record and numerous other plats some of which were not in evidence, and the plat did not show on the plat's face the angles at which the lines were run. Henrietta Egleston

Mem. Hosp. v. Groover, 202 Ga. 327, 43 S.E.2d 246 (1947).

Cited in Cole v. Ogg, 180 Ga. 343, 179 S.E. 116 (1935); Burgess v. Simmons, 191 Ga. 322, 12 S.E.2d 323 (1940); Beasley v. Burt, 201 Ga. 144, 39 S.E.2d 51 (1946); Manning v. Simmons, 207 Ga. 304, 61 S.E.2d 150 (1950); James v. Florida Realty & Fin. Corp., 208 Ga. 652, 68 S.E.2d 601 (1952); Hicks v. Simpson, 229 Ga. 214, 190 S.E.2d 73 (1972).

OPINIONS OF THE ATTORNEY GENERAL

Effect of unrecorded written leases and contracts for oil leases. — When oil companies or operators secure from the true owner of land a written contract of lease, such a contract is binding between the parties and cannot be set aside by the owner at will, even if the lease was not registered. Should a company obtain a written lease from the true owner of land and fail to record the lease, as deeds and mortgages are recorded, and should the true owner sell the land to a third party who does not know of the lease, the third party purchasing the land would obtain a good title to all the interest in the land including mineral rights. 1945-47 Op. Att'y Gen. p. 397.

44-2-40. Short title.

This article shall be known and may be cited as ''The Land Registration Law.'' (Ga. L. 1917, p. 108, § 1; Code 1933, § 60-101.)

JUDICIAL DECISIONS

Cited in Couey v. Talalah Estates Corp., 183 Ga. 442, 188 S.E. 822 (1936).

44-2-41. Definitions.

As used in this article, the term:

(1) ''Clerk'' means the clerk of the superior court of the county where the land is located and includes his lawful deputies and any person lawfully acting as clerk under the general laws or under this article.

(2) ''Court'' means the superior court of the county where the land is located.

(3) ''Involuntary transaction'' means all transmissions of registered land or of any interest therein other than those included in paragraph (6) of this Code section and all other rights or claims, judicial proceedings, liens, charges, or encumbrances not created directly by contract with the registered owner but arising by operation of law or of equitable principles or because of dower, the exercise of the right of eminent domain, levies on delinquent taxes, or any other like matters affecting registered land or any interest therein.

(4) ''Judge,'' ''judge of the court,'' ''judge of the superior court,'' ''judge of the superior court of the county where the land is located'' or words of similar purport mean any judge presiding in the superior court of the county where the land is located. While it is intended that as a usual

matter the judge of the superior court of each circuit shall be the judge who shall act upon and sit in the various matters arising in that circuit with which the judges of such courts are charged under this article, as to such matters any judge of the superior court shall have jurisdiction to perform the functions of judge under this article. In the event the judge of the superior court of the circuit in which the transaction or matter arises is disqualified, absent from the circuit, ill, dead, or from any other cause cannot act in the matter, it shall be the duty of any other judge of the superior court to whom the matter is presented to act in the matter to the same extent as if the same arose in one of the counties of his own circuit. In any matter arising under this article, upon the request of the judge of the superior court of the circuit in which it arose, any judge of the superior court may act upon it as if it had arisen in his own circuit.

(5) ''Registered land'' means any estate or interest in land which shall have been registered under this article.

(6) ''Voluntary transaction'' means all contractual and other voluntary acts or dealings, except by will, by any registered owner of any estate or interest in land, with reference to such estate or interest and any right of homestead or exemption therein. (Ga. L. 1917, p. 108, § 3; Code 1933, § 60-102; Ga. L. 1982, p. 3, § 44.)

JUDICIAL DECISIONS

Cited in Parham v. Kennedy, 60 Ga. App. 52, 2 S.E.2d 765 (1939).

44-2-42. Performance of clerk's and sheriff's duties by deputies; liability.

The duties required of the clerk and the sheriff by this article may be performed through their lawful deputies; but the clerk or the sheriff, as the case may be, shall be responsible for the acts of such deputies. (Ga. L. 1917, p. 108, § 83; Code 1933, § 60-415; Ga. L. 1982, p. 3, § 44.)

44-2-43. Fraud, forgery, and theft in connection with registration of title to land; penalty.

Any person who: (1) fraudulently obtains or attempts to obtain a decree of registration of title to any land or interest therein; (2) knowingly offers in evidence any forged or fraudulent document in the course of any proceedings with regard to registered lands or any interest therein; (3) makes or utters any forged instrument of transfer or instrument of mortgage or any other paper, writing, or document used in connection with any of the proceedings required for the registration of lands or the notation of entries upon the register of titles; (4) steals or fraudulently conceals any owner's certificate, creditor's certificate, or other certificate of title provided for under this article; (5) fraudulently alters, changes, or mutilates

any writing, instrument, document, record, registration, or register provided for under this article; (6) makes any false oath or affidavit with respect to any matter or thing provided for in this article; or (7) makes or knowingly uses any counterfeit of any certificate provided for by this article shall be guilty of a felony and shall be punished by imprisonment for not less than one nor more than ten years. (Ga. L. 1917, p. 108, § 85; Code 1933, § 60-9901; Ga. L. 1982, p. 3, § 44.)

Cross references. — Forgery and fraudulent practices generally, Ch. 9, T. 16.

JUDICIAL DECISIONS

Cited in Crowell v. Akin, 152 Ga. 126, 108 S.E. 791, 19 A.L.R. 51 (1921).

RESEARCH REFERENCES

ALR. — Forged deed or bond for title as constituting color of title, 68 ALR2d 452.

44-2-44. Fraudulent acts by office of clerk personnel; penalties.

Any clerk, deputy clerk, special clerk, or other person performing the duties of the office of clerk who: (1) fraudulently enters a decree of registration without authority of the court; (2) fraudulently registers any title; (3) fraudulently makes any notation or entry upon the title register; (4) fraudulently issues any certificate of title, creditor's certificate, or other instrument provided for by this article; or (5) knowingly, intentionally, and fraudulently does any act of omission or commission under color of his office in relation to the matters provided for by this article shall be guilty of a felony and shall be removed from office and be permanently disqualified from holding any public office and shall be punished by imprisonment for not less than one nor more than ten years. (Ga. L. 1917, p. 108, § 85; Code 1933, § 60-9902; Ga. L. 1982, p. 3, § 44.)

Cross references. — Forgery and fraudulent practices generally, Ch. 9, T. 16.

44-2-45. Fraud or false entries by sheriffs and deputies; penalties.

Any sheriff, deputy sheriff, or other person performing the duties of the office of sheriff who knowingly and fraudulently makes any false entry or return in connection with any matter arising under this article or who fraudulently conspires with any person or persons to defraud any other person or persons through this article shall be guilty of a felony and shall be removed from office and be permanently disqualified from holding any public office in this state and shall be punished by imprisonment for not less

than one nor more than ten years. (Ga. L. 1917, p. 108, § 85; Code 1933, § 60-9904.)

Cross references. — Forgery and fraudulent practices generally, Ch. 9, T. 16.

44-2-46. Fraudulent acts and malpractice of examiners; penalty.

Any examiner of title who knowingly and fraudulently makes any false report to the court as to any matter relating to any title which is sought to be registered under this article, as to any matter affecting the same, or as to any other matter referred to him under this article or who fraudulently conspires with any other person or persons to use this article in defrauding any other person or persons, firm, or corporation or who is guilty of any willful malpractice in his office shall be guilty of a felony and be punished by imprisonment for not less than one nor more than ten years. (Ga. L. 1917, p. 108, § 85; Code 1933, § 60-9903.)

Cross references. — Forgery and fraudulent practices generally, Ch. 9, T. 16.

44-2-47. Reduction of felonies under this article to misdemeanors.

The felonies provided for in this article may, in the matter of punishment, be reduced to misdemeanors in the manner prescribed in Code Section 17-10-5. (Ga. L. 1917, p. 108, § 85; Code 1933, § 60-9905.)

Part 2

Proceedings to Register

JUDICIAL DECISIONS

Cited in Johnson v. Henderson, 221 Ga. 327, 144 S.E.2d 358 (1965).

RESEARCH REFERENCES

ALR. — Constitutionality of provisions of Torrens Law as to prima facie effect of the examiner's reports, 19 ALR 62.

44-2-60. Jurisdiction of superior court over matters in this article.

For the purpose of enabling all persons owning real estate within this state to have the title thereto settled and registered as prescribed by this article, the superior court of the county in which the land is located shall have exclusive original jurisdiction of all petitions and proceedings had thereupon. (Ga. L. 1917, p. 108, § 2; Code 1933, § 60-201.)

Cross references. — Judges who may preside in the superior court of the county where the land is located, § 44-2-41.

JUDICIAL DECISIONS

Dispossessory action held not transferable. — In a dispossessory action filed in state court, there was no evidence of the lack of a landlord-tenant relationship, and no evidence justifying a challenge to the ownership of the land so as to require transfer of the case to the superior court. Bread of Life Baptist Church v. Price, 194 Ga. App. 693, 392 S.E.2d 15 (1990).

Cited in Setlock v. Setlock, 286 Ga. 384, 688 S.E.2d 346 (2010).

RESEARCH REFERENCES

Am. Jur. 2d. — 66 Am. Jur. 2d, Registration of Land Titles, §§ 2, 10.

C.J.S. — 76 C.J.S., Registration of Land Titles, § 4.

44-2-61. Proceedings to be in rem; operation of decree.

The proceedings under any petition for the registration of land and all proceedings in the court in relation to registered land shall be proceedings in rem against the land; and the decree of the court shall operate directly on the land and shall vest and establish title thereto in accordance with this article upon all persons who are parties to said proceedings, whether by name or under the general designation of ''whom it may concern.'' (Ga. L. 1917, p. 108, § 4; Ga. L. 1931, p. 190, § 1; Code 1933, § 60-202; Ga. L. 1939, p. 341, § 1.)

JUDICIAL DECISIONS

Rules of law applicable. — In proving such title as will entitle an applicant to registration and a decree in the applicant's favor, the same rules of law apply as in suits for the recovery of possession of land by ejectment or statutory complaint for land. Lankford v. Holton, 187 Ga. 94, 200 S.E. 243 (1938), later appeal, 195 Ga. 317, 24 S.E.2d 292 (1943).

Action not substitute for ejectment. — Relief in ejectment is not coextensive with that which may be had under the Georgia Land Registration Act. In ejectment, title can never be settled as against the world. Conversely, relief may be had in ejectment which cannot be had under the act, including possession of the premises and judgment for mesne profits. The Georgia Land Registration Act is not a substitute for ejectment or for the statutory action for land. A proceeding to register the title may be brought by a person in possession against others not in possession, contrary to the rule in ejectment. Crowell v. Akin, 152 Ga. 126, 108 S.E. 791, 19 A.L.R. 51 (1921).

Applicant judged on strength of own application. — Every applicant for benefits under the Land Registration Act must stand on the strength of the applicant's own application, and not upon the weakness of the applicant's adversary's title. Lankford v. Holton, 187 Ga. 94, 200 S.E. 243 (1938), later appeal, 195 Ga. 317, 24 S.E.2d 292 (1943).

Conclusiveness of judgment on adverse claimants. — As stated in Ga. L. 1917, p. 108, § 4 (see O.C.G.A. § 44-2-61), actions under the Georgia Registration Law were proceedings in rem; and judgments rendered therein, decreeing registration of title in the names of the applicants, were conclusive upon all adverse claimants, except in cases of fraud or forgery, in which cases such claimants can file appropriate proceedings to set

aside decrees and certificates of registration. Rock Run Iron Co. v. Miller, 156 Ga. 136, 118 S.E. 670 (1923).

Cited in Hancock v. Lizella Fruit Farm, 184 Ga. 73, 190 S.E. 362 (1937); Gordon v. Georgia Kraft Co., 217 Ga. 500, 123 S.E.2d 540 (1962).

RESEARCH REFERENCES

Am. Jur. 2d. — 66 Am. Jur. 2d, Registration of Land Titles, §§ 1, 5, 7, 10.

C.J.S. — 76 C.J.S., Registration of Land Titles, §§ 1, 2, 22.

ALR. — Necessity of actual possession to give title by adverse possession under invalid tax title, 22 ALR 550.

44-2-62. Procedure as to actions for registration; persons under disability.

Action for registration of title shall be begun by a petition to the court by the person, persons, or corporation claiming, singly or collectively, to own or to have the power of appointing or disposing of an estate in fee simple in any land whether or not subject to liens, encumbrances, or lesser estate. Minors and other persons under disability may bring and defend actions by a guardian, a guardian ad litem, a next friend, or a trustee, as the case may be. (Ga. L. 1917, p. 108, § 5; Code 1933, § 60-203.)

JUDICIAL DECISIONS

Equity not applicable. — Proceeding under the Georgia Land Registration Act is purely statutory, not equitable. Bird v. South Ga. Indus. Co., 150 Ga. 420, 104 S.E. 232 (1920).

Party with undivided half interest may register such interest. — Fact that one of the defendants claiming title by adverse possession owned an undivided half interest in one of four tracts involved, and the other defendants owned the other half interest, would not defeat the defendants' right to registration of such respective interests, under the terms of the Land Registration Act. Lankford v. Holton, 187 Ga. 94, 200 S.E. 243 (1938), later appeal, 195 Ga. 317, 24 S.E.2d 292 (1943).

Cited in Holton v. Lankford, 189 Ga. 506, 6 S.E.2d 304 (1939); Burgess v. Simmons, 207 Ga. 291, 61 S.E.2d 410 (1950); Turner v. Kelley, 212 Ga. 175, 91 S.E.2d 356 (1956).

RESEARCH REFERENCES

Am. Jur. 2d. — 66 Am. Jur. 2d, Registration of Land Titles, § 10 et seq.

C.J.S. — 76 C.J.S., Registration of Land Titles, § 2 et seq.

44-2-63. Persons claiming less than fee; establishing title without registration.

Any person possessing lands and claiming an interest or estate less than the fee therein may have his title to such lands established under this article without the registration and transfer features provided in this article. (Ga. L. 1917, p. 108, § 6; Code 1933, § 60-204.)

RESEARCH REFERENCES

Am. Jur. 2d. — 66 Am. Jur. 2d, Registration of Land Titles, §§ 5, 18.

C.J.S. — 76 C.J.S., Registration of Land Titles, §§ 2, 5.

44-2-64. Petition — Verification; contents; description of land; surveys; amendments.

The petition and amendments thereto shall be signed and sworn to by each petitioner, or, in the case of a corporation, by some officer thereof, or, in the case of a person under disability, by the person filing the petition. It shall contain a full description of the land, its valuation, and its last assessment for county taxation; shall show when, how, and from whom it was acquired, a description of the title by which he claims the land, and an abstract of title; shall state whether or not it is occupied; and shall give an account of all known liens, interests, and claims, adverse or otherwise, vested or contingent. Full names and addresses, if known, of all persons who may have any interest in the land, including adjoining owners and occupants, shall be given. The description of the land given in the petition shall be in terms which will identify the same fully and which will tend to describe the same as permanently as is reasonably practicable under all the circumstances. If the land is in a portion of the state in which land is divided into land districts and lot numbers by state survey, the petition shall state the number of the land district and the lot number or numbers in which the tract is located. Before passing a decree upon any petition for registration, the judge, on his own motion or upon the recommendation of the examiner, may require a fuller and more adequate description or one tending more permanently to identify the tract in question to be included in the petition by amendment; and if, in the discretion of the court, it shall be necessary, the judge may for that purpose require a survey of the premises to be made and the boundaries marked by permanent monuments. The acreage or other superficial contents of the tract shall be stated with approximate accuracy; and where reasonably practicable the court may require the metes and bounds to be stated. (Ga. L. 1917, p. 108, § 7; Code 1933, § 60-207.)

Law reviews. — For survey article on local government law, see 59 Mercer L. Rev. 285 (2007).

JUDICIAL DECISIONS

Applicant's burden of proof. — It is necessary for the applicant for registration to allege and prove good title in the applicant. Rock Run Iron Co. v. Miller, 156 Ga. 136, 118 S.E. 670 (1923); Smith v. Board of Educ., 168 Ga. 755, 149 S.E. 136 (1929).

When the applicant for registration does not show that the applicant has a good title to the land, the applicant's petition should be denied. Gould v. Gould, 194 Ga. 132, 21 S.E.2d 64 (1942).

Effect of judgment on landowner not named as party. — Land registration judgment, if granted, would not be binding upon

an adjoining landowner who was not named and served. State v. Bruce, 231 Ga. 783, 204 S.E.2d 106 (1974).

Incomplete petition insufficient to support findings. — When the petition and abstract failed to include certain deeds or to claim registration thereunder, and several were executed during the pendency of the suit, the findings of the examiner and the decrees of the court could not properly be based on such instruments. Lankford v. Holton, 187 Ga. 94, 200 S.E. 243 (1938), later appeal, 195 Ga. 317, 24 S.E.2d 292 (1943).

Sufficiency of property description in deed. — Test as to sufficiency of the description of property contained in a deed is whether or not the description discloses with sufficient certainty what the intention of the grantor was with respect to the quantity and location of the land therein referred to, so that the land's identification is practicable. Gould v. Gould, 194 Ga. 132, 21 S.E.2d 64 (1942).

Deed wherein the description of the property sought to be conveyed is so vague and indefinite as to afford no means of identifying any particular tract of land is inoperative either as a conveyance of title or as color of title. Gould v. Gould, 194 Ga. 132, 21 S.E.2d 64 (1942).

If the description is so indefinite that no particular tract of land is pointed out by the instrument itself, the description must be held so defective as to prevent the instrument from operating as a conveyance of title. Gould v. Gould, 194 Ga. 132, 21 S.E.2d 64 (1942).

Petition which describes the tract by bounding land owners, by acreage, by courses and distances, by reference to back deeds and, finally, by reference to two plats, meets the requirements of law. Gordon v. Georgia Kraft Co., 217 Ga. 500, 123 S.E.2d 540 (1962).

Imperfect description not invalid if land identifiable by extrinsic data. — Deed is not invalid when the description is imperfect, if the instrument refers to extrinsic data by means of which the land may be identified. Likewise an ambiguous descriptive clause may be aided by aliunde evidence. But such imperfect or ambiguous descriptions must not be confounded with a description utterly lacking in definiteness. A deed which fails to describe any particular land or to furnish any key to the confines of the land purporting to be conveyed is void. Gould v. Gould, 194 Ga. 132, 21 S.E.2d 64 (1942).

Cited in Couey v. Talalah Estates Corp., 183 Ga. 442, 188 S.E. 822 (1936); Holton v. Lankford, 189 Ga. 506, 6 S.E.2d 304 (1939).

RESEARCH REFERENCES

Am. Jur. 2d. — 66 Am. Jur. 2d, Registration of Land Titles, § 19.

C.J.S. — 76 C.J.S., Registration of Land Titles, §§ 13, 14.

44-2-65. Petition — Inclusion of separate parcels in one proceeding; individual registration of separate parts of one tract.

Any number of separate parcels of land which are claimed by the petitioner under the same general claim of title and are located in the same county may be included in the same proceeding. Any one tract may be established in several parts, each of which shall be clearly and accurately described and registered separately. (Ga. L. 1917, p. 108, § 8; Code 1933, § 60-208.)

RESEARCH REFERENCES

Am. Jur. 2d. — 66 Am. Jur. 2d, Registration of Land Titles, § 19.

C.J.S. — 76 C.J.S., Registration of Land Titles, §§ 13, 14.

44-2-66. Petition — Persons included as defendants.

The petition shall include as defendants all persons whom it shows to have any interest, equity, or claim upon said land or upon any interest in the land whether such claim is vested or contingent and whether or not the claim is adverse to the petitioner; and the petition shall also include as defendants all other persons ''whom it may concern.'' (Ga. L. 1917, p. 108, § 9; Code 1933, § 60-205.)

JUDICIAL DECISIONS

Party neither named nor served not bound by decree. — When there was a known claimant of the land which the plaintiff sought to have registered who was in possession thereof at the time the proceedings were instituted, this section required that the claimant be named as a party defendant; since the claimant was not named and served as such, the claimant was not bound by the decree rendered in such proceedings. Couey v. Talalah Estates Corp., 183 Ga. 442, 188 S.E. 822 (1936).

Cited in Turner v. Kelley, 212 Ga. 175, 91 S.E.2d 356 (1956).

RESEARCH REFERENCES

Am. Jur. 2d. — 66 Am. Jur. 2d, Registration of Land Titles, § 18.

C.J.S. — 76 C.J.S., Registration of Land Titles, § 9.

44-2-67. Issuance and service of process or summons; service by publication; notice to nonresidents; request for petition; guardians ad litem.

(a)(1) Upon the petition being filed in the office of the clerk of the superior court in the county where the land is located, the clerk shall issue a process directed to the sheriffs of this state and their lawful deputies requiring all of the defendants named in the petition and all other persons ''whom it may concern'' to show cause before the court on a named day not less than 40 nor more than 50 days from the date thereof why the prayers of the petition should not be granted and why the court should not proceed to judgment in such cause. The clerk shall make the necessary copies of the petition and process for service.

(2) A copy of the petition and process shall be served in accordance with Code Section 9-11-4 upon each party who is named as a defendant in the original petition and who is a resident of this state, provided that such service shall be within 30 days from the time of issuance of process. Second originals and copies may be issued and served in the same manner provided for in Code Section 9-11-4.

(3) The clerk of the superior court shall also cause to be published for four separate weeks in the newspaper in which the advertisements of sheriff's sales in the county are advertised a notice addressed ''to whom it may concern'' and to each person named in the petition as a defendant

who resides outside of the state or whose place of residence is unknown. The notice shall give notice of the filing of the petition by the petitioner and a description of the land which the petitioner seeks to register and shall warn such defendants to show cause why the petition should not be granted before the court on the date named in the process.

(4) Wherever the petition discloses or it otherwise becomes disclosed to the court in the progress of the proceedings that any nonresident is interested, such nonresident shall also be notified by the clerk of the court mailing to him a copy of the petition and process by registered or certified mail or statutory overnight delivery to his post office address, if known, as the same may be disclosed to the court through the petition or other proceedings in the case.

(5) The judge of the court may grant additional time for service or return of the process and may provide for service in cases not provided for in this subsection wherever the exigencies of justice may so require.

(b) Notwithstanding subsection (a) of this Code section, instead of the clerk's issuing process and making copies of the petition and process and instead of service of the petition and process being made, it shall be sufficient for the clerk to prepare and cause to be issued and served as provided in subsection (a) of this Code section a summons substantially in the following language:

''To (here list the defendants shown in the petition):

Please take notice that (here name the plaintiff or plaintiffs) has filed in said court a petition seeking to register, under the provisions of the Land Registration Law, the following described lands (describe them). You are notified to show cause to the contrary, if any you have, before said court on or before the _____ day of _____, _____.

_____

Clerk''

However, if the petitioner so requests and if he delivers copies of the petition to the clerk, the clerk shall attach a copy of the process to the petition and cause the same to be served as provided in subsection (a) of this Code section. Wherever in this article a requirement is made for serving on any person a copy of the petition and process, it shall be sufficient in lieu thereof to serve a copy of the summons as provided for in this subsection.

(c) Notwithstanding subsection (b) of this Code section, if any defendant named in the original petition shall through his counsel request in writing a copy of the petition from the applicant, the applicant shall provide the defendant with a copy of the petition, with all exhibits attached, within five days of the request. The time within which a defendant must file an answer or cross-action to the application shall be suspended from the date of his request for a copy of the petition until the date he receives the copy of the petition, with all exhibits attached, from the applicant.

(d) Guardians ad litem shall be appointed for infants and other persons under disability in proceedings under this article, as provided for in Title 9. (Ga. L. 1917, p. 108, § 10; Code 1933, § 60-209; Ga. L. 1943, p. 326, § 1; Ga. L. 1964, p. 170, § 1; Ga. L. 1982, p. 3, § 44; Ga. L. 1999, p. 81, § 44; Ga. L. 2000, p. 1589, § 3.)

Editor's notes. — Ga. L. 2000, p. 1589, § 16, not codified by the General Assembly, provides that the amendment to this Code section is applicable with respect to notices delivered on or after July 1, 2000.

JUDICIAL DECISIONS

Service of the petition on resident defendants is required as in ordinary actions at law. Couey v. Talalah Estates Corp., 183 Ga. 442, 188 S.E. 822 (1936).

Cited in Hudson v. Varn Turpentine & Cattle Co., 176 Ga. 538, 168 S.E. 581 (1933).

RESEARCH REFERENCES

Am. Jur. 2d. — 66 Am. Jur. 2d, Registration of Land Titles, § 10 et seq.

44-2-68. Appointment of resident agent for service on nonresident petitioner.

A nonresident petitioner shall appoint a resident agent or attorney upon whom process and notice may be served. (Ga. L. 1917, p. 108, § 7; Code 1933, § 60-210.)

RESEARCH REFERENCES

Am. Jur. 2d. — 66 Am. Jur. 2d, Registration of Land Titles, § 10 et seq.

C.J.S. — 76 C.J.S., Registration of Land Titles, § 11.

44-2-69. Service upon state, county, or municipality.

If the petition discloses that it involves the determination of any public right or interest of this state or of any county or municipality thereof, the process or notice, in order to affect the state, the county, or the municipality, shall be served:

(1) In the case of the state, upon the Attorney General;

(2) In the case of a county, upon the judge of the probate court or, if the judge of the probate court is disqualified, upon the clerk of the superior court; or

(3) In the case of a municipality, upon the mayor of the municipality or, if there is no mayor or if the mayor is disqualified, upon a majority of the members of the council or other governing body of the municipality. (Ga. L. 1917, p. 108, § 11; Code 1933, § 60-211.)

RESEARCH REFERENCES

Am. Jur. 2d. — 66 Am. Jur. 2d, Registration of Land Titles, § 10 et seq.

C.J.S. — 76 C.J.S., Registration of Land Titles, §§ 9, 11.

44-2-70. Waiver or acknowledgment of service.

Any person entitled to notice or service of process under this article may waive such notice or service by a written acknowledgment of service or written waiver of service entered upon the petition or entitled in the cause and signed by such person in the presence of the judge of the superior court, the clerk of the superior court of the county, the examiner, or any other person or official authorized by law to administer oaths, to take acknowledgments, or to act as a notary public or official witness. His signature shall be attested by such officer. (Ga. L. 1917, p. 108, § 12; Code 1933, § 60-212; Ga. L. 1945, p. 140, § 2.)

RESEARCH REFERENCES

Am. Jur. 2d. — 66 Am. Jur. 2d, Registration of Land Titles, §§ 2, 10.

C.J.S. — 76 C.J.S., Registration of Land Titles, §§ 1, 11, 22.

44-2-71. Conclusive effect of evidence of service of process and notice; liability of officers for false returns or failure to publish or mail notice.

Before passing the decree authorizing the registration of land, the court shall be satisfied that the publication of notice and service of process required by this article have been made. After judgment, the entry of service by the sheriff or his deputy shall be conclusive evidence and shall not be subject to traverse nor shall any acknowledgment of service be subject to traverse. The recital of the service of process and of the giving and publishing of notices contained in the decree or final judgment in the case shall be conclusive evidence that such service, publication, and notice have been legally given; provided, however, that nothing in this Code section shall prevent any aggrieved person from having a right of action against any sheriff who shall make a false return of service, or against any clerk or examiner who shall falsely attest a waiver or acknowledgment of service, or against any clerk who shall fail to publish the notice or to mail the notice required by this article. (Ga. L. 1917, p. 108, § 13; Code 1933, § 60-213.)

RESEARCH REFERENCES

Am. Jur. 2d. — 66 Am. Jur. 2d, Registration of Land Titles, §§ 2, 10.

C.J.S. — 76 C.J.S., Registration of Land Titles, §§ 1, 11, 22.

44-2-72. Posting notice on land and buildings; ascertainment of and notice to occupants; return to court; seizure and custody of the land and attachment of jurisdiction.

(a) A notice similar to the notice published as provided in Code Section 44-2-67 shall be delivered by the clerk to the sheriff of the county or to one of his lawful deputies; and the sheriff or his lawful deputy shall, within 30 days from the date the petition is filed, post the same upon the land in some conspicuous place. If there is more than one tract of land, the clerk shall furnish enough notices to the sheriff or his deputy to allow the posting of a notice upon each tract of land included in the petition.

(b) If the land contains one or more dwelling houses or one or more buildings used as a place of business, the sheriff shall conspicuously post upon each house or building the notice provided for in subsection (a) of this Code section; and he shall state this in his return to the court.

(c) Within 30 days from the date the petition is filed, the sheriff shall go upon the land and ascertain the identities of the occupants of the land. He shall make an official return to the court stating the name and post office address of each person over 14 years of age actually occupying the premises.

(d) After receiving the sheriff's return, the clerk shall send a copy of the petition and process by registered or certified mail or statutory overnight delivery to each person occupying the land or he may require the sheriff or his deputy to serve a copy of the petition and process upon such persons. The clerk shall make an entry if he has mailed the notices or, if the sheriff has made the service of process, the sheriff shall make the return.

(e) After the sheriff or his deputy has entered upon the land, posted the notices provided for in subsections (a) and (b) of this Code section, and made his return to the court as provided in subsection (c) of this Code section, the land shall be deemed to have been seized and brought into the custody of the court for the purposes of this article; and the court's jurisdiction in rem and quasi in rem shall attach thereto for purposes of land registration proceedings under this article.

(f) The clerk shall attach to each owner's certificate of title a certified copy of the sheriff's return. (Ga. L. 1917, p. 108, § 14; Code 1933, § 60-214; Ga. L. 1943, p. 326, § 1; Ga. L. 2000, p. 1589, § 3.)

Editor's notes. — Ga. L. 2000, p. 1589, § 16, not codified by the General Assembly, provides that the amendment to this Code section is applicable with respect to notices delivered on or after July 1, 2000.

JUDICIAL DECISIONS

Cited in Hudson v. Varn Turpentine & Cattle Co., 176 Ga. 538, 168 S.E. 581 (1933).

RESEARCH REFERENCES

ALR. — What is ''public place'' within requirements as to posting of notices, 90 ALR2d 1210.

44-2-73. Effect of notice; appearances or pleadings as waiver of service, notice, and defects.

The notices provided for and to be given under this article shall stand as personal service of process and shall be conclusive and binding on all persons so notified and on all the world. Appearances or pleadings in the case shall constitute a waiver of process and service and of notice and of any defect therein. (Ga. L. 1917, p. 108, § 14; Code 1933, § 60-214.)

44-2-74. Service on other persons found by examiner to be entitled to notice.

If the report of the examiner discloses that persons other than those who have been notified are entitled to notice, a copy of the petition shall be served upon such persons in the same manner as other persons named as defendants in the petition are required to be served by this article; and, in addition to the copy of the petition, there shall be attached a notice from the clerk directed to such person informing him that he shall appear and show cause against the judgment being rendered in the case, if any, within ten days from the date of the service of the notice. However, nothing in this Code section shall be construed to require the giving of additional notice by publication other than the published notice provided for in this article to nonresidents or persons who, by reason of absence from the state or by reason of their whereabouts being unknown, cannot be found and served with process. (Ga. L. 1917, p. 108, § 17; Code 1933, § 60-215.)

RESEARCH REFERENCES

Am. Jur. 2d. — 66 Am. Jur. 2d, Registration of Land Titles, § 10.

C.J.S. — 76 C.J.S., Registration of Land Titles, § 11.

44-2-75. Additional notice; judge's discretion.

Wherever notice is required by this article and no provision is made as to how notice shall be given or wherever, in the discretion of the judge, additional notice to that provided for in this article should be given to any particular person or persons or to the public generally, the judge may order such notice to be given and may provide the manner in which it shall be given. (Ga. L. 1917, p. 108, § 72; Code 1933, § 60-216.)

44-2-76. Who may file objections or cross-action to petition.

Any person, whether notified or not, may become a party to the proceeding for the purpose of filing objections to the granting of the relief prayed for in the petition or any part thereof either by filing in court an answer showing that he claims some interest in the premises and stating the grounds of his objection or by filing a cross-action praying that the title to the land or some interest therein be decreed to be in him and be registered accordingly. (Ga. L. 1917, p. 108, § 18; Code 1933, § 60-206.)

JUDICIAL DECISIONS

Objectors having no interest in the land are without authority to contest the right of the applicant to a decree of registration of title in the applicant's name. Asbury v. McCall, 202 Ga. 154, 42 S.E.2d 370 (1947); McCook v. Council, 202 Ga. 313, 43 S.E.2d 317 (1947).

Finding which is unexcepted to is binding. — When the final report of the examiner in a land registration case recited that the evidence did not disclose that the objectors had any interest in the land, and such finding was unexcepted to, the report became binding upon all parties to the litigation. Asbury v. McCall, 202 Ga. 154, 42 S.E.2d 370 (1947); McCook v. Council, 202 Ga. 313, 43 S.E.2d 317 (1947).

Finding against one contestant does not entitle other to decree. — Finding against one of two contestants, each seeking the benefits of The Land Registration Act and a decree of title, does not entitle the other to a decree in that person's favor. Thomasson v. Coleman, 176 Ga. 375, 167 S.E. 879 (1933).

Cited in Lankford v. Holton, 187 Ga. 94, 200 S.E. 243 (1938).

RESEARCH REFERENCES

Am. Jur. 2d. — 66 Am. Jur. 2d, Registration of Land Titles, § 18.

C.J.S. — 76 C.J.S., Registration of Land Titles, § 9.

44-2-77. Survey of land upon order of judge or examiner; notice to adjoining landowners; protest; procedure for trying issue.

While the cause is pending before the examiner of titles or at any time before final decree, the judge, or the examiner with the approval of the judge, may require the land to be surveyed by some competent surveyor and may order durable bounds to be set and a plat thereof to be filed among the papers of the suit. Before such survey is made, all adjoining landowners shall be given at least five days' notice. The petitioner or any adjoining owner dissatisfied with the survey may file a protest with the court within ten days from the time the plat is filed; and thereupon an issue shall be made up and tried as in case of protest to the return of land processioners. (Ga. L. 1917, p. 108, § 22; Code 1933, § 60-217.)

JUDICIAL DECISIONS

Survey by one other than court-appointed surveyor permitted. — When no survey such as provided for in this statute was ordered, but the petitioner introduced in evidence the testimony and survey of the petitioner's own surveyor, who testified as to the location

of the land lines, corners, and landmarks of the property, the evidence offered was competent and not subject to the objection that the petitioner's survey did not comply with this statute. Harris v. Ernest L. Miller, Co., 213 Ga. 748, 101 S.E.2d 715 (1958) (see O.C.G.A. § 44-2-77).

Although this statute calls for the use of a registered surveyor, this is directory and a court does not commit error when the court approves the services of a registered engineer, provided the court determines the engineer is equally well qualified to perform the services required of a surveyor. Smith v. Bruce, 241 Ga. 133, 244 S.E.2d 559 (1978).

Cited in Union Bag-Camp Paper Corp. v. Coffee County Hunting & Fishing Club, 216 Ga. 44, 114 S.E.2d 511 (1960).

RESEARCH REFERENCES

Am. Jur. 2d. — 66 Am. Jur. 2d, Registration of Land Titles, § 19.

C.J.S. — 76 C.J.S., Registration of Land Titles, §§ 14, 15.

44-2-78. Dismissal without prejudice.

If the petitioner's title is not and cannot be made proper for registration, the petition may, at the discretion of the court or the petitioner, be dismissed without prejudice on terms to be determined by the court. (Ga. L. 1917, p. 108, § 23; Code 1933, § 60-218.)

RESEARCH REFERENCES

Am. Jur. 2d. — 66 Am. Jur. 2d, Registration of Land Titles, § 12.

C.J.S. — 76 C.J.S., Registration of Land Titles, § 13.

44-2-79. Amendment or severance of petitions or other pleadings; power of court or examiner to require additional facts.

Amendments to petitions or other pleadings, including joinder, substitution, or discontinuance of parties, the severance of pleadings, and the omission or severance of any portion or parcel of the land may be ordered or allowed by the court at any time before the final decree upon terms that may be just and reasonable. The court may require facts to be stated in the petition in addition to those prescribed by this article. The examiner shall have the same powers subject to review by exception to his reports. (Ga. L. 1917, p. 108, § 24; Code 1933, § 60-219.)

JUDICIAL DECISIONS

Cited in Holton v. Lankford, 189 Ga. 506, 6 S.E.2d 304 (1939).

RESEARCH REFERENCES

Am. Jur. 2d. — 66 Am. Jur. 2d, Registration of Land Titles, §§ 10, 12.

C.J.S. — 76 C.J.S., Registration of Land Titles, §§ 9, 11.

44-2-80. Treatment of land pending registration; appearance of person acquiring interest in land pending registration.

Pending registration, the land described in any petition may be dealt with as if no petition had been filed; but any person who shall acquire any interest in or claim against any such land shall at once appear as a petitioner or answer as a party defendant in the pleadings for registration, and such interest or claim shall be subject to the decree of the court. (Ga. L. 1917, p. 108, § 25; Code 1933, § 60-220.)

Cross references. — Filing notice of lis pendens, § 44-14-610.

RESEARCH REFERENCES

Am. Jur. 2d. — 66 Am. Jur. 2d, Registration of Land Titles, § 18.

C.J.S. — 76 C.J.S., Registration of Land Titles, § 9.

44-2-81. No default judgment or decree.

No decree shall be rendered by default and without the necessary facts being shown. (Ga. L. 1917, p. 108, § 21; Code 1933, § 60-221.)

RESEARCH REFERENCES

Am. Jur. 2d. — 66 Am. Jur. 2d, Registration of Land Titles, § 20.

C.J.S. — 76 C.J.S., Registration of Land Titles, § 16.

44-2-82. Entry of judgment and decree; inclusion of limitations and encumbrances; decree in favor of cross-action; separate decree for each parcel.

After the record has been perfected and settled, the judge of the superior court shall proceed to decide the case; and if, upon consideration of such record, the title shall be found in the petitioner, the judge shall enter a decree to that effect ascertaining all limitations, liens, encumbrances, and the like and declaring the land entitled to registration according to his findings. Such decree shall be entered upon the minutes of the superior court and shall become a part of the records thereof. If, upon consideration of the record, the judge finds that the petitioner is not entitled to a decree declaring the land entitled to registration, he shall enter judgment accordingly. If any person shall have filed a cross-action praying for the title to be found in him, the judge may enter a decree to that effect in like manner ascertaining and declaring all limitations, liens, and the like and declaring the land entitled to registration according to his findings. If separate parcels shall be involved, the court shall render a separate decree as to each parcel; and the same shall be done where the petitioner has divided a tract into

separately described parcels and has accurately described each parcel for separate registration. (Ga. L. 1917, p. 108, § 26; Code 1933, § 60-222.)

JUDICIAL DECISIONS

Constitutionality. — This statute is not unconstitutional on the ground that the statute confers upon the judge of the superior court the right to render judgment without the verdict of a jury in a civil case other than one founded on an unconditional contract in writing where no issuable defense is filed on oath. Crowell v. Akin, 152 Ga. 126, 108 S.E. 791, 19 A.L.R. 51 (1921) (see O.C.G.A. § 44-2-82).

Trial judge to inspect record and enter decree. — This statute is not intended as a modification of the other sections as to the method of ascertaining the facts, but on proper construction simply means that the trial judge shall inspect the record after the record has been ''perfected and settled'' by ascertainment of the facts as otherwise provided, and shall thereupon enter a decree in accordance with such record. It does not dispense with findings of fact by an examiner, as contemplated by other provisions of law, although when there is an error apparent upon the face of the examiner's report ''wholly irrespective of the evidence'' on which it is based, the court should correct that error by the court's judgment. Holton v. Lankford, 189 Ga. 506, 6 S.E.2d 304 (1939) (see O.C.G.A. § 44-2-82).

Findings of fact required. — Under The Land Registration Act, there can be no registration without findings of fact in favor of the party whose title is registered. Holton v. Lankford, 189 Ga. 506, 6 S.E.2d 304 (1939).

Cited in Harris v. Ernest L. Miller Co., 213 Ga. 748, 101 S.E.2d 715 (1958).

RESEARCH REFERENCES

Am. Jur. 2d. — 66 Am. Jur. 2d, Registration of Land Titles, §§ 20, 22.

C.J.S. — 76 C.J.S., Registration of Land Titles, § 16.

44-2-83. Conclusiveness of decree; effect of disability on conclusiveness; recourse of persons under a disability against assurance fund.

Every decree rendered as provided in this article shall bind the land and bar all persons claiming title thereto or interest therein, shall quiet the title thereto, and shall be forever binding and conclusive upon and against all persons, including this state, whether mentioned by name in the order of publication or included under the general description ''whom it may concern.'' It shall not be an exception to the conclusiveness of the decree that the person is a minor, is incompetent by reason of mental illness or retardation, or is under any disability; but said person may have an action against the assurance fund provided for in Part 6 of this article. (Ga. L. 1917, p. 108, § 27; Code 1933, § 60-223.)

Cross references. — Proceedings quia timet and proceedings to remove clouds upon titles, § 23-3-40 et seq.

JUDICIAL DECISIONS

Cited in Dyal v. Watson, 174 Ga. 330, 162 S.E. 682 (1932); Hudson v. Varn Turpentine & Cattle Co., 176 Ga. 538, 168 S.E. 581 (1933).

RESEARCH REFERENCES

Am. Jur. 2d. — 66 Am. Jur. 2d, Registration of Land Titles, §§ 20, 22.

C.J.S. — 76 C.J.S., Registration of Land Titles, § 16.

44-2-84. Review by Supreme Court.

All judgments and decrees of the superior court or the judge thereof which are rendered under this article shall be subject to review by the Supreme Court. (Ga. L. 1917, p. 108, § 82; Code 1933, § 60-224.)

RESEARCH REFERENCES

Am. Jur. 2d. — 66 Am. Jur. 2d, Registration of Land Titles, § 23.

C.J.S. — 76 C.J.S., Registration of Land Titles, § 17.

Part 3

Examiners

RESEARCH REFERENCES

ALR. — Constitutionality of provisions of Torrens Law as to prima facie effect of the examiner's reports, 19 ALR 62.

44-2-100. Appointment and qualification of examiners and special examiners; filing order of appointment and affidavit.

The judge of the superior court of each judicial circuit shall appoint at least one auditor, who shall be known as the examiner, who shall discharge the duties provided for the examiner in this article but whose relation and accountability to the court shall be that of an auditor in the general practice existing in this state. The judge shall appoint as many examiners in the circuit as the public convenience may require in connection with the carrying out of this article; and the judge may, in any case, appoint a special examiner. Examiners shall hold office at the pleasure of the judge and shall be removable at any time with or without cause. Each examiner 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. Each examiner shall take and file in the office of the clerk of the superior court of the county of his residence, along with the order of his appointment, an oath or affidavit substantially in the form prescribed in Code Section 44-2-228. (Ga. L. 1917, p. 108, § 15; Code 1933, § 60-301.)

Cross references. — Auditors generally, Ch. 7, T. 9.

JUDICIAL DECISIONS

Cited in Holton v. Lankford, 189 Ga. 506, 6 S.E.2d 304 (1939).

RESEARCH REFERENCES

Am. Jur. 2d. — 66 Am. Jur. 2d, Registration of Land Titles, § 2.

C.J.S. — 76 C.J.S., Registration of Land Titles, §§ 1, 22, 43.

44-2-101. Referral of case to examiner; preliminary report; contents; time of filing; evidentiary effect.

Upon the filing of a petition as provided in this article, the clerk shall at once notify the judge who shall refer the action to one of the general examiners or to a special examiner. It shall then become the duty of the examiner to make up a preliminary report containing an abstract of the title to the land from public records and all other evidence of a trustworthy nature that can reasonably be obtained by him, which abstract shall contain:

(1) Extracts from the records and other matters referred to therein which are complete enough to enable the court to decide the questions involved;

(2) A statement of the facts relating to the possession of the lands; and

(3) The names and addresses, so far as the examiner is able to ascertain, of all persons interested in the land as well as all adjoining owners showing their several apparent or possible interests and indicating upon whom and in what manner process should be served or notices given in accordance with this article.

The preliminary report of the examiner shall be filed in the office of the clerk of the superior court on or before the return day of the court as stated in the process unless the time for filing the report is extended by the court. The report shall be prima-facie evidence of the contents thereof. (Ga. L. 1917, p. 108, § 16; Code 1933, § 60-302; Ga. L. 1982, p. 3, § 44.)

JUDICIAL DECISIONS

Constitutionality. — This statute is not violative of the due process clauses of the state and federal constitutions in that the preliminary examination by the examiner is ex parte and before the parties adversely interested are brought into the proceeding, or in that the preliminary report of the examiner is declared to be prima facie evidence of the contents thereof, such report not being binding upon the court or conclusive upon the parties adversely interested in the proceeding. Crowell v. Akin, 152 Ga. 126, 108 S.E. 791, 19 A.L.R. 51 (1921); Saunders v. Staten, 152 Ga. 142, 108 S.E. 797 (1921) (see O.C.G.A. § 44-2-101).

Purpose of the preliminary report is to furnish to the court and to the parties any information likely to affect the title or the possession, and so that any person interested in or likely to be interested in the result of the suit may be notified. Crowell v. Akin, 152 Ga. 126, 108 S.E. 791, 19 A.L.R. 51 (1921).

Reliance upon preliminary report. — An applicant seeking to register the applicant's title under The Land Registration Act may rely upon what was shown in the examiner's preliminary report, without introducing in evidence the conveyances specified therein. McCall v. Asbury, 190 Ga. 493, 9 S.E.2d 765 (1940).

Unless the words ''the said report shall be prima facie evidence of the contents thereof,'' are read out of this statute, it must be held that when the report is put in evidence the party offering the report has offered sufficient proof of the deeds therein referred to. McCall v. Asbury, 190 Ga. 493, 9 S.E.2d 765 (1940) (see O.C.G.A. § 44-2-101).

Adoption of report without transcript. — Examiner's brief of the evidence in a title registration proceeding fully complied with O.C.G.A. § 44-2-103(b), and a trial court did not err in adopting the report without first reviewing a transcript; if a stenographic report did exist, the registrant never made timely request that the report be filed or direct the trial court's attention to evidence appearing in the report. A A OK, Ltd. v. City of Atlanta, 280 Ga. 764, 632 S.E.2d 633 (2006).

Burden of proof of deed shifts when affidavit of forgery filed. — In order to cast on the applicant for registration the burden of proving the genuineness of a deed shown in the preliminary report of the examiner, an affidavit of forgery must be filed, pursuant to former Code 1933, § 29-415 (see O.C.G.A. § 44-2-23); and written objections, though verified, which aver that certain deeds were forgeries did not amount to an affidavit of forgery. McCall v. Asbury, 190 Ga. 493, 9 S.E.2d 765 (1940).

De novo investigation and report required upon sustaining exceptions to original report. — On sustaining the exceptions to an examiner's report the case should be referred again to the same or a different examiner for a de novo investigation and report. Such is the procedure adopted by reference in The Land Registration Act; for, under the practice applying generally in cases referred to an auditor, where exceptions of fact are sustained, so as to leave no basis for a judgment or decree, the issues must ordinarily be again referred to an auditor, or submitted to a jury. Holton v. Lankford, 189 Ga. 506, 6 S.E.2d 304 (1939).

Cited in Asbury v. McCall, 192 Ga. 102, 14 S.E.2d 715 (1941).

RESEARCH REFERENCES

Am. Jur. 2d. — 66 Am. Jur. 2d, Registration of Land Titles, §§ 2, 10.

C.J.S. — 76 C.J.S., Registration of Land Titles, §§ 8, 14, 15.

44-2-102. Hearing; final report; delay of hearing to add new parties; notice.

As soon as practicable after the return day stated in the process, the examiner shall proceed to hear evidence and make up his final report to the court. However, if it has developed from the preliminary report filed by him that persons other than those named as defendants in the original petition are entitled to service or notice, the hearing shall not begin until after ten days from the date of the service of notice upon such persons. The examiner shall give notice of the time and place of the hearing to the petitioner and to persons who have filed any pleading in the case. (Ga. L. 1917, p. 108, § 19; Code 1933, § 60-303.)

JUDICIAL DECISIONS

Cited in Holton v. Lankford, 189 Ga. 506, 6 S.E.2d 304 (1939); Asbury v. McCall, 192 Ga. 102, 14 S.E.2d 715 (1941).

RESEARCH REFERENCES

Am. Jur. 2d. — 66 Am. Jur. 2d, Registration of Land Titles, §§ 2, 10.

C.J.S. — 76 C.J.S., Registration of Land Titles, §§ 8, 14, 15.

44-2-103. Examiner's powers; contents, filing, and notice of examiner's report; right to jury trial, new trial, and appeal; recommitment to examiner after trial or reversal on appeal.

(a) At the time and place set for the hearing, the examiner shall, in like manner as other auditors, proceed with similar powers as to the compelling of the attendance of witnesses, the production of books and papers, and adjournment and recessing to hear all lawful evidence submitted. In addition he may make such independent examination of the title as he may deem necessary.

(b) Within 15 days after the hearing has been concluded unless for good cause the time is extended by the judge, the examiner shall file with the clerk a report of his conclusions of law and of fact setting forth the state of the title; any liens or encumbrances thereon, by whom held, and the amounts due thereon; the abstract of title to the land; any other information affecting the validity of the title; and a brief or a stenographic report of the evidence taken by him. He shall mail notice of the filing of his report to each of the parties who have appeared in the case. Any of the parties to the proceeding may file exceptions to the conclusions of law or of fact or to the general findings of the examiner within 20 days after such report is filed. The clerk shall thereupon notify the judge that the record is ready for his determination.

(c) If the petitioner or any contestant of the petitioner's right shall demand a trial by jury upon any issue of fact arising upon exceptions to the examiner's report, the court shall cause the same to be referred to a jury either at the term of court which may then be in session or at the next term of the court or at any succeeding term of the court to which the case may be continued for good and lawful reasons. It shall be the duty of the judge to expedite the hearing of the case and not to continue it unless for good cause shown or upon the consent of all parties at interest. The issue or issues of fact shall be tried before the jury, in the event jury trial is requested, upon the evidence reported by the examiner except in cases where, under law, evidence other than that reported by an auditor may be submitted to the jury on exceptions to an auditor's report. Furthermore, in cases where the examiner has reported to the court findings of fact based on his personal examination, either party may introduce additional testimony as to such facts, provided that the party will make it appear under oath that he has not been fully heard and given full opportunity to present testimony on the same matter before the examiner. The verdict of the jury upon the questions of fact shall operate to the same extent as in the case of exceptions to an auditor's report in an ordinary civil action.

(d) In all matters not otherwise provided for, the procedure upon the examiner's report and the exceptions thereto shall be in accordance with procedure prevailing as to the auditor's reports and exceptions thereto.

(e) The right to grant a new trial upon any issue submitted to a jury and the right of appeal to the Supreme Court shall be as provided for in Code Sections 5-6-37 through 5-6-44, 5-6-48, and 5-6-49.

(f) The judge may refer or recommit the record to the examiner in like manner as auditor's reports may be recommitted or he may on his own motion recommit it to the same or any other examiner for further information and report. Where an exception or exceptions to the examiner's report have been sustained by the court or by verdict on the trial of an issue of fact or where the Supreme Court reverses the judgment of the trial court, it shall not be necessary for the trial court to recommit the case to an examiner, but the judge shall proceed to enter a decree in accordance with the law and the facts as thus established and appearing from the record; provided, however, that if the judge, in his discretion, is of the opinion that it is in the interests of truth and justice that a recommitment to an examiner should be made, he may, upon the motion of any party or on his own motion, order a recommitment of the whole case or any part thereof or for the taking of additional testimony upon any matter which the court deems necessary to the rendition of a true and correct decree. (Ga. L. 1917, p. 108, § 20; Code 1933, § 60-304; Ga. L. 1943, p. 326, § 1; Ga. L. 1992, p. 6, § 44.)

Law reviews. — For survey article on local government law, see 59 Mercer L. Rev. 285 (2007).

JUDICIAL DECISIONS

Constitutionality. — Provisions of this statute relating to the trial by jury, upon demand, of issues of fact arising upon exceptions to the examiner's report, which is to be taken as prima facie true, and restricting the hearing to the evidence reported by the examiner, except as otherwise provided in this statute, are not unconstitutional limitations of the right of trial by jury. Crowell v. Akin, 152 Ga. 126, 108 S.E. 791, 19 A.L.R. 51 (1921) (see O.C.G.A. § 44-2-103).

This statute is not violative of the due process clauses of the state and federal constitutions, upon the ground that the statute provides for the independent examination of the title by the examiner and for the submission by the examiner of a final report based upon such findings, which shall be taken as prima facie true, such report not being conclusive upon the parties nor binding upon the court until after trial by jury upon exceptions of fact filed thereto. Crowell v. Akin, 152 Ga. 126, 108 S.E. 791, 19 A.L.R. 51 (1921) (see O.C.G.A. § 44-2-103).

Equity procedure applicable. — While an action under The Land Registration Act is not a case in equity, but is a purely statutory proceeding, the statute expressly makes the procedure in equity applicable to exceptions to an examiner's report in such case. Bird v. South Ga. Indus. Co., 150 Ga. 420, 104 S.E. 232 (1920); Holton v. Lankford, 189 Ga. 506, 6 S.E.2d 304 (1939).

Procedure on the report of the examiner under the Georgia Land Registration Act is the same as that on the report of an auditor in an equity case. Bird v. South Ga. Indus. Co., 150 Ga. 420, 104 S.E. 232 (1920); McCaw v. Nelson, 168 Ga. 202, 147 S.E. 364 (1929).

Examiner's report binding on parties if not excepted to. — An examiner's report,

when not excepted to within 20 days as required by this statute, becomes binding upon all parties to that proceeding and the parties are not allowed to later challenge the report. Miller v. Turner, 209 Ga. 255, 71 S.E.2d 517 (1952) (see O.C.G.A. § 44-2-103).

Sole function of the jury, as expressed in The Land Registration Act, is to pass upon issues of fact raised by exceptions to the examiner's report. Holton v. Lankford, 189 Ga. 506, 6 S.E.2d 304 (1939).

Issues to be submitted to jury. — Party is entitled to have submitted to a jury certain disputed issues of fact found by the examiner upon which the examiner concluded that the other party had acquired prescriptive title and was entitled to have the land registered in that party's name. Allen v. Johns, 235 Ga. 667, 219 S.E.2d 369 (1975).

Either party may request jury. — Either the applicant or the defendant in a land registration proceeding may insist upon a jury trial upon any material issue of fact arising out of exceptions to the examiner's report. Gordon v. Georgia Kraft Co., 217 Ga. 500, 123 S.E.2d 540 (1962).

Provision for jury trial upon demand mandatory. — See Crowell v. Akin, 152 Ga. 126, 108 S.E. 791, 19 A.L.R. 51 (1921); Saunders v. Staten, 152 Ga. 142, 108 S.E. 797 (1921).

Jury empanelment not required if there are no material issues of fact. — If an examination of the record reveals no material issues of fact and further reveals that the finding of the examiner was demanded by the evidence, then it is not error for the court, instead of empaneling a jury and directing a verdict, to render judgment in accordance with the findings of the examiner. Gordon v. Georgia Kraft Co., 217 Ga. 500, 123 S.E.2d 540 (1962).

Failure to request jury trial not waiver. — Fact that neither party requests a trial by jury does not operate as a waiver of jury trial, except as to such issues of fact as might be raised by exceptions to the examiner's report. Holton v. Lankford, 189 Ga. 506, 6 S.E.2d 304 (1939).

When there has been no express waiver and the parties merely fail to demand a jury trial upon issues specifically designated by the statute, the waiver is therefore only that which may be implied from such inaction, and it should not be extended beyond the plain meaning of the statute. Holton v. Lankford, 189 Ga. 506, 6 S.E.2d 304 (1939).

Effect of waiver of jury trial. — Waiver of jury trial authorizes the trial judge to act as jury only to the extent of passing upon the exceptions as a jury would otherwise have done and does not carry consent for the judge to act as trier for the purpose of making new findings of fact. Holton v. Lankford, 189 Ga. 506, 6 S.E.2d 304 (1939).

Exceptions of law and fact to be separated. — Exceptions to an examiner's report must separately classify exceptions of law and exceptions of fact, making each exception clear and distinct, specifying the errors complained of. Bird v. South Ga. Indus. Co., 150 Ga. 420, 104 S.E. 232 (1920).

Failure to support exceptions is ground for dismissal. — Neglect of a party excepting to an examiner's report on matters of fact, or on matters of law dependent for a decision upon the evidence, to set forth, in connection with each exception of law or fact, the evidence necessary to be considered in passing thereon, or to point out the same by appropriate reference, or to attach as exhibits to one's exceptions those portions of the evidence relied on to support the exceptions, is sufficient reason in a land registration proceeding for dismissing or disapproving the exceptions of fact and for overruling or dismissing the exceptions of law. Davis v. Varn Turpentine & Cattle Co., 167 Ga. 690, 146 S.E. 458 (1929); Morris v. James, 216 Ga. 272, 116 S.E.2d 286 (1960).

Remand to examiner lies within the discretion of trial judge, whose decision will not be reversed when appellees fail to show that the trial court has abused this discretion. Bruce v. Rowland Hills Corp., 243 Ga. 278, 253 S.E.2d 709 (1979).

When de novo investigation and report required. — On sustaining the exceptions to an examiner's report, the case should be referred again to the same or a different examiner for a de novo investigation and report. Holton v. Lankford, 189 Ga. 506, 6 S.E.2d 304 (1939).

Adoption of report without transcript. — Examiner's brief of the evidence in a title registration proceeding fully complied with O.C.G.A. § 44-2-103(b), and a trial court did not err in adopting the report without first reviewing a transcript; if a stenographic report did exist, the registrant never made

timely request that the report be filed or direct the trial court's attention to evidence appearing in the report. A A OK, Ltd. v. City of Atlanta, 280 Ga. 764, 632 S.E.2d 633 (2006).

Right to new trial. — See Rock Run Iron Co. v. Heath, 155 Ga. 95, 116 S.E. 590 (1923).

Cited in Smith v. Board of Educ., 166 Ga. 535, 143 S.E. 578 (1928); Reynolds v. Smith, 186 Ga. 838, 199 S.E. 137 (1938); Burgess v. Simmons, 208 Ga. 672, 68 S.E.2d 902 (1952); Simon Wolf Endowment Fund, Inc. v. West, 210 Ga. 172, 78 S.E.2d 420 (1953); City of Marietta v. Glover, 225 Ga. 265, 167 S.E.2d 649 (1969); Smith v. Bruce, 241 Ga. 133, 244 S.E.2d 559 (1978); Smith v. State, 248 Ga. 154, 282 S.E.2d 76 (1981).

RESEARCH REFERENCES

Am. Jur. 2d. — 66 Am. Jur. 2d, Registration of Land Titles, §§ 2, 10.

C.J.S. — 76 C.J.S., Registration of Land Titles, §§ 8, 14, 15.

44-2-104. Authority to inspect pertinent records.

For the purposes of this article, every clerk of the superior court, every judge of the probate court, and every other officer in this state having charge of public records shall allow every examiner appointed by any court in this state free inspection of all the public records relating to his office and in any manner pertaining to any matter under the investigation of an examiner. (Ga. L. 1917, p. 108, § 68; Code 1933, § 60-305; Ga. L. 1982, p. 3, § 44.)

44-2-105. Appointment of stenographer; compensation.

In any case, by consent of the parties or upon the order of the judge, the examiner may procure the services of a stenographer to report the testimony taken before him. The stenographer's compensation, unless agreed on by the parties, shall be fixed by the judge and taxed as costs. (Ga. L. 1917, p. 108, § 71; Code 1933, § 60-306.)

Part 4

Registers and Registration

RESEARCH REFERENCES

ALR. — Constitutionality of provisions of Torrens Law as to prima facie effect of the examiner's reports, 19 ALR 62.

Failure properly to index conveyance or mortgage of realty as affecting constructive notice, 63 ALR 1057.

44-2-120. Furnishing and maintaining register books; issuance of owner's certificate of title.

(a) The governing authority of each county shall provide the following books for the clerk of the superior court in the county:

(1) A book, to be known as the ''register of decrees of title,'' in which the clerk shall enroll, register, and index all decrees of title;

(2) A book, to be known as the ''title register'' and to be prepared, printed, and ruled in substantially the manner as provided in Code Section 44-2-234, in which the clerk shall enroll, register, and index the certificate of title provided for in this part and all subsequent transfers of title and note all voluntary or involuntary transactions in any way affecting the title to said land which are authorized to be entered thereon; and

(3) Such additional books as may, from time to time, be necessary.

(b) Upon the registration of the decree and certificate of title, the clerk shall issue, under the seal of his office, an owner's certificate of title which shall be delivered to the owner or his duly authorized agent or attorney. (Ga. L. 1917, p. 108, § 28; Code 1933, § 60-401.)

RESEARCH REFERENCES

Am. Jur. 2d. — 66 Am. Jur. 2d, Registration of Land Titles, § 10.

C.J.S. — 76 C.J.S., Registration of Land Titles, § 18.

44-2-121. Signing and dating register entries and owners' certificates.

Every entry made in the register of decrees of title, in the title register, or upon the owner's certificate under any of the provisions of this article shall be signed by the clerk and dated with the year, month, day, hour, and minute accurately stated. (Ga. L. 1917, p. 108, § 29; Code 1933, § 60-402.)

RESEARCH REFERENCES

Am. Jur. 2d. — 66 Am. Jur. 2d, Registration of Land Titles, § 10.

C.J.S. — 76 C.J.S., Registration of Land Titles, § 18.

44-2-122. Clerk's duties and liabilities; conclusive effect of registration entries; time for filing caveat; petition for direction.

(a) The clerk of the superior court shall determine whether any instrument, writing, record, or other matter is in proper shape for registration and shall correctly and legally make the registration, including all formal incidents thereto. The clerk shall be liable to any injured person for any failure of duty in this respect.

(b) All registrations of title and all entries and notations made by him upon the title register of transfers or of the cancellation or discharge of liens or encumbrances shall be prima facie conclusive. Unless a caveat shall be filed, as provided for in Code Section 44-2-134, seeking to set aside, modify, or otherwise affect such entry, notation, or registration, within 12

months from the date of the making of the same upon the title register, the same shall become absolutely conclusive upon all persons. This subsection shall be considered and construed as a statute of limitations against the questioning of the correctness of the clerk's action and shall be without exception on account of disabilities but shall not operate as a limitation in favor of the clerk regarding any action against him for wrongdoing or neglect of duty.

(c) In the event application is made to a clerk to have any transfer or other transaction registered or noted and he is in doubt as to whether the same should be registered, entered, or noted or is in doubt in regard to any detail thereof, either the clerk or any party at interest may petition the judge of the court for direction. After it has appeared that the parties at interest have had reasonable notice, the judge may proceed to hear the matter and to give directions and instructions to the clerk; and it shall be the duty of the clerk to follow the directions and instructions of the court.

(d) In all matters required of the clerk under this article, he shall be subject to the direction and orders of the court. (Ga. L. 1917, p. 108, § 59; Code 1933, § 60-413.)

RESEARCH REFERENCES

Am. Jur. 2d. — 66 Am. Jur. 2d, Records and Recording Laws, § 173.

C.J.S. — 76 C.J.S., Registration of Land Titles, § 42.

ALR. — Transferees entitled to protection under Torrens Act certificate of title, 42 ALR2d 1387.

44-2-123. Clerk's duty to ensure proper execution of voluntary transfer; liability for damage or loss arising from registration of improperly executed transfer.

Before registering any voluntary transfer, the clerk shall satisfy himself that the same is witnessed and attested or acknowledged in accordance with law. The clerk and the sureties on his bond shall be liable for any loss or damage occasioned to any person through registration of a transfer not so executed. (Ga. L. 1917, p. 108, § 106; Code 1933, § 60-411.)

44-2-124. Performance of duties upon disqualification, death, or disability of clerk.

If a clerk of the superior court is disqualified by reason of relationship, interest, or any other cause or in case of the death or other disability of the clerk to act in any matter arising under this article, the duties required of the clerk may be performed either by the judge of the probate court of the county or by a special clerk appointed by the judge for that purpose. The entry of the appointment of the special clerk and of the purpose for which he is appointed shall be entered and recorded upon the minutes of the court. (Ga. L. 1917, p. 108, § 69; Code 1933, § 60-414.)

44-2-125. When recordation other than registration not required; filing instruments; admissibility of certified copies and use as evidence; recordation procedure when instrument is not in short form.

(a) Wherever a transfer, transfer as security for debt, or mortgage relating to an estate in registered land is executed in the form prescribed in this article and duly registered and noted in the register of titles and consists of nothing more than the filling in of the blanks on the prescribed form so that the entry of registration on the title register construed in connection with the prescribed form shows the full transaction, it shall not be necessary to record the transfer, security transfer, or mortgage other than by the registration in the title register. Such registration shall for all purposes take the place of recordation as to such instruments so executed. A certified copy of such registration shall be admissible in evidence on like terms and with like effect as a certified copy of a deed, mortgage, or other similar instrument. In such cases, the original instrument of transfer, together with the canceled owner's certificate, or the original instrument of transfer as security for debt, or the original mortgage, as the case may be, shall be numbered with the registration number of the title to which it relates and carefully filed away in such manner as to be of easy access and shall be preserved as a part of the records of the office of the clerk of the superior court. In case of a mortgage executed as indicated above, the clerk shall on request make a certified copy and deliver it to the mortgagee; and such certified copy shall stand for all purposes in lieu of the original and shall be original evidence to the same extent as is an original mortgage in any court.

(b) If the instrument of transfer is in the short form as indicated above, or if it contains any provisions not provided for in such form, or if it was executed for the purpose of transferring any estate or interest in the registered land in trust, upon any condition or upon any peculiar or unusual limitation, the details at variance with or additional to those provided for under the prescribed form need not be entered in full on the title register and the owner's certificate; but the clerk shall record such instrument in full on the deed book of the county in like manner as deeds to unregistered land are recorded and shall, after the general entry of the transfer on the title register and on the owner's certificate, add thereto a notation that the same is ''in trust,'' ''upon condition,'' or ''on special terms,'' as the case may be, followed by the words ''See deed book (or mortgage book, as the case may be) _____ page _____.'' Like procedure shall be followed in case of a transfer to secure debt or a mortgage not following the prescribed form, but in such cases the clerk shall not retain the original instrument but shall return the same to the creditor after it has been registered and recorded. (Ga. L. 1917, p. 108, § 38; Code 1933, § 60-403.)

RESEARCH REFERENCES

Am. Jur. 2d. — 66 Am. Jur. 2d, Registration of Land Titles, §§ 2, 3, 10.
C.J.S. — 76 C.J.S., Registration of Land Titles, §§ 19, 28, 30.
ALR. — Right of vendee to record title where vendor to covenants to furnish abstract showing title, 7 ALR 1166.

44-2-126. Notation of lien or encumbrance on certificate of title — In general.

Any writing or instrument for the purpose of encumbering or otherwise dealing with equitable interests in registered land or tending to show a claim of lien or encumbrance thereon or right therein may be noted on the certificate of title in the title register with such effect as it may be entitled to have. (Ga. L. 1917, p. 108, § 51; Code 1933, § 60-404.)

RESEARCH REFERENCES

Am. Jur. 2d. — 66 Am. Jur. 2d, Records and Recording Laws, §§ 45, 46.
C.J.S. — 76 C.J.S., Registration of Land Titles, §§ 27, 28.

44-2-127. Notation of lien or encumbrance on certificate of title — Registered encumbrances, rights, and adverse claims.

All registered encumbrances, rights, or adverse claims affecting registered estates shall continue to be noted upon every outstanding certificate of title and owner's certificate until they have been released or discharged unless they relate to only a particular portion of the property, in which case they shall be noted only upon those certificates and duplicate certificates which relate to that portion of the property. (Ga. L. 1917, p. 108, § 39; Code 1933, § 60-405.)

44-2-128. Registration of transactions affecting unregistered land as notice.

Every voluntary or involuntary transaction which if recorded, filed, or entered in any clerk's office would affect unregistered land shall, if duly registered on the title register, be notice to all persons from the time of such registration and shall operate in accordance with law and this article upon such registered land. (Ga. L. 1917, p. 108, § 40; Code 1933, § 60-406.)

RESEARCH REFERENCES

Am. Jur. 2d. — 66 Am. Jur. 2d, Registration of Land Titles, §§ 10, 20.
C.J.S. — 76 C.J.S., Registration of Land Titles, § 28.
ALR. — Failure properly to index conveyance or mortgage of realty as affecting constructive notice, 63 ALR 1057.

44-2-129. Registration of involuntary transactions on court's order; form.

Except as otherwise provided in this article, in cases of involuntary transactions no transfer of the title shall be registered except upon an order granted by the judge of the court in the form substantially provided in Code Section 44-2-244. (Ga. L. 1917, p. 108, § 41; Code 1933, § 60-407.)

RESEARCH REFERENCES

Am. Jur. 2d. — 66 Am. Jur. 2d, Records and Recording Laws, § 51.

C.J.S. — 76 C.J.S., Registration of Land Titles, § 38.

44-2-130. Cancellation of decedent's certificate and issuance of new certificate to personal representative.

Upon the grant of letters of administration or executorship by the probate court and upon presentation of a certified copy of the letters to the clerk of the superior court together with the presentation of the owner's certificate, the clerk shall make a special entry on the certificate of title on the title register showing the presentation of the letters of administration or executorship, the name of the representative, the court and county of his appointment, and the dates of the letters and of the transfer of the title to the representative. The clerk shall thereupon cancel the certificate of title and the owner's certificate outstanding in the name of the decedent and shall issue to the administrator or the executor, as the case may be, a new owner's certificate. If the decedent was the owner of only a fractional undivided interest in the title and the outstanding certificate stood in the name of the decedent and others or if from any other cause the decedent was not the sole owner of the certificate, the outstanding certificates shall nevertheless be canceled and a new certificate registered and a new owner's certificate issued with the name of the personal representative substituted for the name of the decedent. (Ga. L. 1917, p. 108, § 44; Code 1933, § 60-408.)

RESEARCH REFERENCES

Am. Jur. 2d. — 66 Am. Jur. 2d, Records and Recording Laws, § 45.

C.J.S. — 76 C.J.S., Registration of Land Titles, § 5.

44-2-131. Declaration of title by descent upon petition; service of petition and publication of notice; transfer of registered title and issuance of new certificates; rights of surviving spouse.

(a) Where the owner of registered land dies intestate and there is no administration upon the estate within 12 months from the date of his death or in the event administration shall terminate without the land being disposed of, the heirs at law of the intestate or any one or more of the persons who claim to be heirs at law of the intestate may petition the

superior court of the county to have their title by descent declared as to the registered land.

(b) The petition:

(1) Shall set forth the names of all persons who are alleged to be the heirs at law and, if all are not joined, process or notice shall be served upon all those not joined;

(2) Shall be verified by the affidavit of one of the petitioners;

(3) Shall set forth in detail the name and last known address of the decedent;

(4) Shall include a statement whether he was married, single, or a widower and, if married more than once, the names of all of his wives;

(5) Shall include the names of all children and descendants of children, if any, showing in detail whether the parents of such children are living or dead;

(6) Shall show in detail how and whether the persons who are alleged to be the heirs at law are in fact the heirs at law of such decedent under the rules of inheritance;

(7) Shall give the date of the death of the decedent;

(8) Shall set forth that the decedent died leaving no will; and

(9) Shall state that in the judgment of the applicant there is no need for administration upon the estate.

(c) Upon the petition being filed, the judge shall grant an order setting the petition down to be heard at the courthouse in the county where the land is located, on some day not less than 30 days from the date of the petition, and calling on all persons to show cause before the court on that day why the persons named as heirs at law in the petition should not be so declared to be by the judgment and decree of the court. A copy of the petition and the order of the court thereon shall be published in the newspaper in which the sheriff's sales of the county are advertised in like manner as sheriff's sales are advertised.

(d) On the day named for the hearing, unless the matter is continued by order or orders of the judge to some future time, the court shall proceed to hear and determine the question together with any objections which may be filed and to adjudge and decree that the alleged decedent is dead, that there is no administration on his estate, that he left no will, and who are his heirs at law; provided, however, if it appears that either the alleged decedent is not dead, or that there is administration upon the estate, or that an application for administration is pending, or that the decedent left a will, the petition shall be dismissed.

(e) Upon granting an order of heirship, the court shall order a transfer of the registered title from the decedent to the heirs at law; and, upon production of the owner's certificate of the decedent and the judge's order for a transfer, the clerk shall register the transfer, cancel the certificate registered in the name of the decedent, cancel the owner's certificate, and issue a new owner's certificate in the name of the persons declared to be the heirs at law.

(f) In the petition if the alleged heirs at law are of full age and under no disabilities and the same so appears to the court and if it further appears that they have voluntarily partitioned the land in kind among themselves, the court may, in connection with the order of transfer, direct that the certificate standing in the name of the decedent be canceled and that new certificates be registered and issued to each of the heirs for the particular parcel of land coming to each under the voluntary partition set forth in the petition.

(g) If the decedent has left a widow, she shall be a party to the proceedings. The court shall specifically provide what interest or estate she shall take under the decree of heirship; and, except where in the decree the land is partitioned into separate tracts, the court shall, in the decree of heirship and in the order of transfer, specifically set forth, except where the widow is the sole heir, what undivided interest each heir shall take.

(h) If the decedent is a female, the procedure shall be similar except insofar as the difference between the rights of the husband and wife upon the death of the spouse shall make changes necessary.

(i) Where the wife claims to be entitled to take possession of the estate without administration under Code Section 53-4-2 of the ''Pre-1998 Probate Code,'' if applicable, or Code Sections 53-1-7 and 53-2-1 of the ''Revised Probate Code of 1998,'' the procedure shall be substantially in the same manner. (Ga. L. 1917, p. 108, § 45; Code 1933, § 60-409; Ga. L. 1998, p. 128, § 44.)

RESEARCH REFERENCES

Am. Jur. 2d. — 66 Am. Jur. 2d, Registration of Land Titles, § 5.

C.J.S. — 76 C.J.S., Registration of Land Titles, § 2.

44-2-132. Compelling production of owner's certificate for registration of involuntary transfer; cancellation of certificate upon failure to produce it; notice of cancellation.

Whenever an involuntary transfer is sought to be registered under this article and the owner's certificate is not produced so that it can be attached to the order directing a transfer, the court shall have the power to issue a subpoena for the production of documentary evidence or any other process designed to compel the production of the owner's certificate, including

attachment for contempt. If, after the process issues, the owner's certificate is not produced or if it appears to the court that there is no practical means of compelling its production, the court may nevertheless grant the order of transfer but shall cause the clerk to enter a cancellation of the certificate of title on the title register and to give notice once a week for four weeks in the newspaper in which the sheriff's sales of the county are advertised that such certificate has been canceled; the cost of making the advertisement shall be deposited with the clerk before the judge shall grant the order of transfer without the production of the certificate. (Ga. L. 1917, p. 108, § 52; Code 1933, § 60-410.)

RESEARCH REFERENCES

ALR. — Lis pendens: grounds for cancellation prior to termination of underlying action, absent claim of delay, 49 ALR4th 242.

44-2-133. Procedure for obtaining duplicate of lost owner's certificate.

Whenever an owner's certificate of title is lost or destroyed, the owner or his personal representative may petition the court for the issuance of a duplicate. Notice of the petition shall be published once a week for four successive weeks in the newspaper in which the sheriff's sales of the county are published; provided, however, that the court may in any case order additional notice to be given, either by publication or otherwise, before directing the issuance of a duplicate certificate; and provided, further, that where the petition is presented by a personal representative of a deceased person claiming that the certificate was lost or destroyed while in the possession of the decedent, the notice of the petition shall be published once a week for eight successive weeks instead of the four weeks required in other cases. Upon satisfactory proof having been exhibited before it that the certificate has been lost or destroyed, the court may direct the issuance of a duplicate certificate which shall be appropriately designed and shall take the place of the original owner's certificate. (Ga. L. 1917, p. 108, § 58; Code 1933, § 60-412.)

44-2-134. Filing caveat objecting to entry in title register; show cause hearing upon caveat.

(a) If any person at interest objects to any entry, registration, or notation made by the clerk upon the title register, he may, unless such entry, registration, or notation has become conclusive by lapse of time under Code Section 44-2-122, file with the clerk of the superior court a caveat setting forth the entry, notation, or registration to which he objects, what interest he has in the subject matter, and the ground of his objection and praying for such relief as he desires and deems appropriate under the circumstances. The clerk shall note upon the title register the fact that a

caveat has been filed and by whom and to what entry, notation, or act of registration it applies.

(b) After the filing of the caveat has been noted, the matter shall be presented to the judge who shall order all persons at interest to show cause on a day named why the relief prayed for in the caveat should not be granted. Upon proof being made that due notice has been given to all parties at interest, the judge shall proceed to hear the matter and shall render a judgment of the court giving direction to the matter and may thereupon require such entry, registration, or notation to be canceled or modified and may require the outstanding certificate of title and owner's certificate to be modified accordingly. To that end the court may require the outstanding owner's certificate of title to be brought into court by subpoena for the production of documentary evidence or other process, including attachment for contempt; and, if the court finds that production of the certificate cannot be compelled, it shall provide for publication of notice of the court's action thereon for a period of time not less than once a week for four weeks in the newspaper in which the sheriff's sales of the county are advertised, the expense of making the publication to be provided for in such manner as the court shall order. (Ga. L. 1917, p. 108, § 60; Code 1933, § 60-416.)

JUDICIAL DECISIONS

Party to proceeding cannot go back to decree of registration. — Provisions for a caveat by any interested person objecting to any entry, notation, or registry made by the clerk, found in this statute, are not intended to and, as a matter of law cannot, authorize a party to the registration proceeding to go back to the decree of registration. Miller v. Turner, 209 Ga. 255, 71 S.E.2d 517 (1952) (see O.C.G.A. § 44-2-134).

Remedies in case of fraud. — In cases of fraud, the true owner, if the owner moves within 12 months, has a summary remedy under Ga. L. 1917, p. 108, § 60 (see O.C.G.A. § 44-2-134), or a remedy by plenary suit under Ga. L. 1917, p. 108, § 63 (see O.C.G.A. § 44-2-137). After the expiration of 12 months one can only resort to such plenary suit; but the existence of summary remedy does not preclude such owner from resorting to such plenary remedy, either within or after the expiration of such 12 month period, if one asserts such plenary remedy under the statute within seven years. Rock Run Iron Co. v. Miller, 156 Ga. 136, 118 S.E. 670 (1923).

Motion to cancel notice of lis pendens is not properly classifiable as caveat under O.C.G.A. § 44-2-134. Jay Jenkins Co. v. Financial Planning Dynamics, Inc., 256 Ga. 39, 343 S.E.2d 487 (1986).

Cited in Lankford v. Milhollin, 203 Ga. 491, 47 S.E.2d 70 (1948).

RESEARCH REFERENCES

Am. Jur. 2d. — 66 Am. Jur. 2d, Registration of Land Titles, § 10.

C.J.S. — 76 C.J.S., Registration of Land Titles, § 27.

44-2-135. Obtaining notations in title register.

In order to cause notations of judgments, liens, encumbrances, or special rights of any kind, other than voluntary transactions, claimed by any person against registered land to be made, the person desiring the notation shall, by himself, his agent, or his attorney, file, upon a form substantially in compliance with Code Sections 44-2-246 through 44-2-248, a request for the notation to be made setting forth the claim against the registered land; and, in case the lien or special rights relate to any other matter of record or court proceeding, he shall state the book and page where recorded and, if it relates to any special right, shall succinctly give the details of the right so claimed. In case the notation is for the purpose of protecting the lien of a judgment, the person making the application for the notation shall produce and exhibit to the clerk the execution or a certified copy of the judgment except in cases where the judgment is rendered in the superior court of the same county where the registration is made, in which event production of the execution or certified copy of the judgment shall not be required; but the clerk may act upon inspection of the original judgment on the minutes of his own court. (Ga. L. 1917, p. 108, § 61; Code 1933, § 60-417.)

JUDICIAL DECISIONS

Cited in Lankford v. Milhollin, 203 Ga. 491, 47 S.E.2d 70 (1948).

RESEARCH REFERENCES

Am. Jur. 2d. — 66 Am. Jur. 2d, Records and Recording Laws, § 39.

C.J.S. — 76 C.J.S., Registration of Land Titles, § 27.

44-2-136. Cancellation of mortgage, lien, equity, or lis pendens; entry of cancellation on title register and certificate; procedure upon refusal to authorize cancellation.

(a) Voluntary cancellations may be made of any mortgage, certificate of indebtedness, or any lien, equity, encumbrance, lis pendens, or other similar matter relating to registered land or any interest therein and may be entered by the clerk upon the title register and the owner's certificate. The entry, notation, or registry of such cancellation may be made upon the written authority of the person for whose benefit the original registration, notation, or entry was made or upon the written authority of his personal representative or his lawful assignee, in a form substantially in compliance with that prescribed in this article, and attested by any officer authorized to attest deeds; alternatively, it may be made upon order of the judge. In case of a creditor's certificate the same shall also be surrendered and canceled. Notations of delinquent taxes or assessments may be canceled upon the

production of a certificate of the proper tax officer showing that such taxes or assessments have been paid.

(b) If the holder of the mortgage, certificate of indebtedness, or any lien, equity, encumbrance, lis pendens, or other similar matter relating to the registered land or any interest therein refuses to give the requisite authority for the cancellation thereof if and when the debt has been paid or no longer exists or when it is no longer legal and equitable that the registered title should be encumbered by the same, any person adversely affected may petition the court for an involuntary cancellation of the same. In such case, the judge shall cause a rule nisi to be served upon such holder requiring him to show cause on a day set, which day shall be not less than 30 days from the date the rule was served, why the mortgage, certificate of indebtedness, lien, or other encumbrance on the registered title should not be canceled. The petition and rule nisi shall be served personally on such holder at least 15 days before the date set for the hearing if such service be practical; but, where it is made to appear to the court that personal service cannot be practically effected, the judge may pass an order providing how the service shall be made. In case the holder is not a resident of this state or is unknown, service by publication shall be made upon the order of the judge in the manner prescribed in Code Section 9-11-4. In case of minors and persons of unsound mind, guardians ad litem shall be appointed. If any issue of fact as to the right of the petition to have the cancellation made appears, such issue shall, upon demand of either party, be tried by jury, with right of the judge to grant a new trial. If it appears that the registered title should be freed from the encumbrance, the court shall decree accordingly and order the cancellation noted upon the certificate of title. The judge shall have power by attachment for contempt, if necessary, to compel the holder of the mortgage certificate of indebtedness or other instrument to surrender it for cancellation. The Supreme Court shall have jurisdiction for the correction of errors in the trial court. (Ga. L. 1917, p. 108, § 62; Code 1933, § 60-418; Ga. L. 1943, p. 326, § 1.)

JUDICIAL DECISIONS

Preservation for review on appeal. — Husband's motion on appeal for cancellation of a lis pendens entered in favor of his wife pursuant to O.C.G.A. § 44-2-136 was not considered because the propriety of the ruling by the trial court denying cancellation of the lis pendens was not enumerated as error on appeal, and the matter was not properly before the appellate court pursuant to O.C.G.A. § 5-6-34(d). Gardner v. Gardner, 276 Ga. 189, 576 S.E.2d 857 (2003).

Cited in Lankford v. Milhollin, 203 Ga. 491, 47 S.E.2d 70 (1948).

RESEARCH REFERENCES

C.J.S. — 76 C.J.S., Registration of Land Titles, § 27.

44-2-137. What adverse claims affect registered land; effect of fraud or forgery; limitations on actions to set aside.

(a) Except in cases of fraud or forgery to which he is a party or to which he is a privy without valuable consideration paid in good faith, every registered owner of any estate or interest in land brought under this article shall hold the land free from any and all adverse claims, rights, or encumbrances not noted on the certificate of title in the title register except:

(1) Liens, claims, or rights arising or existing under the laws or Constitution of the United States which the laws of this state cannot require to appear of record under registry laws;

(2) Taxes and levies assessed for the current calendar year;

(3) Any lease for a term not exceeding three years under which the land is actually occupied; and

(4) Highways in public use and railroads in actual operation.

(b) No proceedings to attack or to set aside any transaction for such fraud or such forgery referred to in this Code section shall be brought or be entertained by any court unless the same is brought within seven years from the date of the transaction or of the registration to which the same relates. Nothing in this subsection shall conflict with the provisions of this article allowing attack for good cause to be made upon a registration made by the clerk at any time within 12 months from the date of such registration. (Ga. L. 1917, p. 108, § 63; Code 1933, § 60-419.)

JUDICIAL DECISIONS

Statute makes no provision for existing claim to be subsequently recorded. Lankford v. Milhollin, 204 Ga. 193, 48 S.E.2d 729 (1948) (see O.C.G.A. § 44-2-137).

Allegations of true owner in setting aside registration of owner's lands in another. — As in cases of fraud or forgery, the decrees registering title are not conclusive upon adverse claimants. When the true owner files an equitable petition to set aside a registration of the owner's lands in the name of another, it is not incumbent upon the owner to allege that the owner was ignorant of the facts upon which the owner attacks the registration, or that the owner was prevented from making it by the fraud of the applicant, unmixed with fraud or negligence on the owner's part. Rock Run Iron Co. v. Miller, 156 Ga. 136, 118 S.E. 670 (1923).

Fraud cannot be based upon constructive notice and there must be actual notice of existent facts, concealment of which was used in effort to defraud. Thus, failure to disclose a fact of which one has no actual notice cannot constitute fraud merely because one to whom fraud was imputed did not exercise ordinary diligence to discover facts which might have been ascertained thereby. Hudson v. Varn Turpentine & Cattle Co., 176 Ga. 538, 168 S.E. 581 (1933).

Knowing registration under forged deed authorizes action to set aside. — Where an applicant for registration asserts title under a deed known by the applicant to be forged, and the application for registration is based on such deed, the applicant is guilty of such fraud as will authorize the true owner to institute an equitable action to set aside the certificate of registration. Rock Run Iron Co. v. Miller, 156 Ga. 136, 118 S.E. 670 (1923).

Cited in Couey v. Talalah Estates Corp., 183 Ga. 442, 188 S.E. 822 (1936).

RESEARCH REFERENCES

Am. Jur. 2d. — 66 Am. Jur. 2d, Registration of Land Titles, §§ 9, 20, 23.

C.J.S. — 76 C.J.S., Registration of Land Titles, §§ 19, 21, 22, 24.

ALR. — Effect of fraud to toll the period for bringing action prescribed in statute creating the right of action, 15 ALR2d 500.

Transferees entitled to protection under Torrens Act certificate of title, 42 ALR2d 1387.

Fraud as extending statutory limitations period for contesting will or its probate, 48 ALR4th 1094.

44-2-138. What limitations govern actions by injured party for fraud or negligence.

Notwithstanding any other provision of this article, any injured party may bring an action against any person or officer through whose fraud or negligence he may have suffered any loss or damage arising out of any acts of omission or of commission of such person or officer in connection with the matters and things arising from this article. All such actions shall be governed by the statutes of limitation which would otherwise relate to the transaction. (Ga. L. 1917, p. 108, § 84; Code 1933, § 60-420.)

RESEARCH REFERENCES

Am. Jur. 2d. — 66 Am. Jur. 2d, Registration of Land Titles, § 9.

C.J.S. — 76 C.J.S., Registration of Land Titles, § 24.

ALR. — Effect of fraud to toll the period for bringing action prescribed in statute creating the right of action, 15 ALR2d 500.

Fraud as extending statutory limitations period for contesting will or its probate, 48 ALR4th 1094.

44-2-139. Registration and title certificate to run with land.

Reserved. Repealed by Ga. L. 1989, p. 563, § 1, effective April 3, 1989.

Editor's notes. — This Code section was based on Ga. L. 1917, p. 108, § 64; Code 1933, § 60-421.

44-2-140. Availability of prescription or adverse possession against registered land.

Title to or right or interest in registered land in derogation of that of the registered owner may be acquired by prescription or adverse possession. (Ga. L. 1917, p. 108, § 66; Code 1933, § 60-423; Ga. L. 1989, p. 563, § 2.)

Law reviews. — For note on 1989 amendment to this Code section, see 6 Ga. St. U.L. Rev. 315 (1989).

JUDICIAL DECISIONS

Cited in Lankford v. Dockery, 85 Ga. App. 86, 67 S.E.2d 800 (1951).

RESEARCH REFERENCES

Am. Jur. 2d. — 66 Am. Jur. 2d, Registration of Land Titles, § 20.

C.J.S. — 76 C.J.S., Registration of Land Titles, § 25.

44-2-141. Rights, burdens, and incidents as to both registered and unregistered land; validity of transfers of title by last registered owner.

Except as otherwise specifically provided by this article, registered land and ownership therein shall be subject to the same rights, burdens, and incidents as unregistered land and may be dealt with by the owner and shall be subject to the jurisdiction of the courts in the same manner as if it had not been registered. Transfers of title made by the last registered owner as shown by the title register or said owner's representatives, heirs, or assigns and recorded in the deed records in the office of the clerk of superior court of the county in which the land is situated shall be valid transfers of title to the land so described. (Ga. L. 1917, p. 108, § 73; Code 1933, § 60-424; Ga. L. 1952, p. 164, § 2; Ga. L. 1989, p. 563, § 3.)

RESEARCH REFERENCES

Am. Jur. 2d. — 66 Am. Jur. 2d, Registration of Land Titles, § 20.

C.J.S. — 76 C.J.S., Registration of Land Titles, §§ 19, 25.

44-2-142. Notation of change of name on register and certificate.

Any person who has any interest in registered land and whose name has been changed by marriage or other cause may, by petition to the judge of the court and upon proof of the facts, obtain an order directing the clerk to note the change of name upon the title register and upon the owner's certificate upon its being produced. (Ga. L. 1917, p. 108, § 53; Code 1933, § 60-425.)

44-2-143. Notation of liens and lis pendens on register; effect absent notation.

No judgment, levy, or other lien except a lien for taxes for which special provision is made in this article shall be effective against registered land so as to affect any person taking a transfer thereof or obtaining any right or interest therein unless and until a notation of such judgment, levy, or lien is made upon the title register. The pendency of any action affecting the title to registered land or any interest therein shall not be held to be notice to any person other than the actual parties to such action unless a notation

of the pendency of such action is made upon the title register. (Ga. L. 1917, p. 108, § 54; Code 1933, § 60-426.)

JUDICIAL DECISIONS

Cited in Lankford v. Milhollin, 203 Ga. 491, 47 S.E.2d 70 (1948).

RESEARCH REFERENCES

Am. Jur. 2d. — 66 Am. Jur. 2d, Records and Recording Laws, §§ 39, 46.

C.J.S. — 76 C.J.S., Registration of Land Titles, §§ 22, 27.

ALR. — Lis pendens as affecting property in county or district other than that in which action is pending, 71 ALR 1085.

44-2-144. Freeing land from further registration; certificates as conclusive source of title; notation of encumbrances; when land automatically freed; registered land free of further registration; exception.

(a) The registered owner of the fee simple title to land may cause a transfer of the title to be registered to "himself, his heirs and assigns, free from further registration." Thereupon the land and the title thereto shall be free from the necessity of subsequent registration and shall, as to subsequent transactions, be exempt from this article so far as the interest of the person thus freeing it from registration and subsequent holders under him are concerned; but, as to such interest, the certificate of title and owner's certificate registered and issued on the last transfer shall stand as a conclusive source of subsequent title to the same extent as if it were a grant from the state. However, if the interest thus freed is, according to the title register, subject to liens, exceptions, encumbrances, trusts, or limitations of any kind, such liens, exceptions, encumbrances, trusts, or limitations shall not be affected but shall be noted on the owner's certificate as issued on the last transfer and shall be effective as long as they shall exist. If the fee simple is registered undividedly in the name of more than one person such as tenants in common or other like relationship of joint or common interest, it shall not be freed from registration except upon the unanimous action of the owners of the entire fee.

(b) A decree of registration rendered on or after February 15, 1952, shall operate to free the registered land from further registration unless it expressly provides that the land shall remain subject to this article.

(c) All lands heretofore registered in this state are declared to be free of further registration unless the order registering said title shall provide otherwise. The certificate of title and owner's certificate registered and issued on the last transfer shall stand as conclusive source of subsequent title. If the previously registered land has been devised, conveyed, or otherwise transferred by the last registered owner or said owner's represen-

tative, title shall vest in the party to whom the land was transferred or that party's heirs, successors, and assigns, notwithstanding the failure to have had the same transferred on the title register as provided in prior statutes; provided, however, if the land or interest freed is subject to a valid outstanding lien, exception, encumbrance, trust, or limitation according to the title register, the same shall not be affected but shall be effective as long as the same shall validly exist. (Ga. L. 1917, p. 108, § 65; Code 1933, § 60-422; Ga. L. 1952, p. 164, § 1; Ga. L. 1989, p. 563, § 4.)

Law reviews. — For note on 1989 amendment to this Code section, see 6 Ga. St. U.L. Rev. 315 (1989).

JUDICIAL DECISIONS

Cited in Lankford v. Dockery, 85 Ga. App. 86, 67 S.E.2d 800 (1951).

RESEARCH REFERENCES

Am. Jur. 2d. — 66 Am. Jur. 2d, Registration of Land Titles, § 10.

C.J.S. — 76 C.J.S., Registration of Land Titles, § 30.

ALR. — Transferees entitled to protection under Torrens Act certificate of title, 42 ALR2d 1387.

Part 5

Conveyance, Transfer, and Descent

44-2-160. Manner of recording deeds conveying title to registered land; validity of previous conveyances of registered land.

Deeds conveying title to all registered estates shall be recorded in the same manner as deeds conveying title to unregistered lands are recorded. All previous conveyances of interests in registered lands by the last registered owner or said owner's representatives, heirs, or assigns and recorded in the deed records in the office of the clerk of the superior court in which the land is situated shall be valid transfers of said interests. Upon request, the clerk of the superior court is authorized to note on the title register the information regarding the transfers and that the land is no longer required to be transferred on said register under this article, ''The Land Registration Law.'' (Ga. L. 1917, p. 108, § 30; Code 1933, § 60-501; Ga. L. 1982, p. 3, § 44; Ga. L. 1989, p. 563, § 5.)

The 1989 amendment, effective April 3, 1989, rewrote the section.

Law reviews. — For note on 1989 amendment to this Code section, see 6 Ga. St. U.L. Rev. 315 (1989).

RESEARCH REFERENCES

Am. Jur. 2d. — 66 Am. Jur. 2d, Registration of Land Titles, § 10.

C.J.S. — 76 C.J.S., Registration of Land Titles, § 30.

44-2-161. Partial transfer of registered land; undivided interest; interest in particular portion; notations on register; issuance of certificates.

(a) Whenever a part of any registered land is to be transferred or conveyed, such transfer or conveyance shall be in a form substantially the same as that used for a total transfer; but it shall set forth particularly and specifically the portion of the land transferred, if it is an undivided interest, or, if it is a particular portion of the tract, it shall describe the portion accurately and definitely.

(b) In case an undivided interest is transferred, upon presentation of the transfer together with the owner's certificate of title, the clerk shall not cancel the owner's certificate so presented nor the certificate of title on the title register but shall enter a notation of the partial transfer on the certificate of title, on the title register, and on the owner's certificate; and the clerk shall also register upon the title register a certificate of title in the name of the grantee of the undivided portion of the estate so transferred and shall issue him a corresponding owner's certificate setting out the part or amount of land transferred, as the case may be.

(c) If the transfer is of a divided part of the land, the clerk shall first enter the fact of the transfer upon the certificate of title on the title register and shall cancel the certificate of title on the title register and the owner's certificate of title. Thereupon, he shall register separate new certificates of title on the title register, one in the name of the transferee for the portion of the tract conveyed to him and the other in the name of the transferor for the portion retained; and the clerk shall also issue separate new owners' certificates accordingly.

(d) The clerk shall note upon the title register and the owners' certificates the reference and cross-reference to the certificates referred to in subsections (b) and (c) of this Code section. (Ga. L. 1917, p. 108, § 31; Code 1933, § 60-502.)

44-2-162. Subdivision of registered land; procedure.

The owner or owners of a tract of land embraced in a certificate may divide it into smaller tracts and, upon surrender of his or their owner's certificate, cause separate certificates to be issued for the respective smaller tracts. The procedure in such cases shall be for the owner or owners to petition the judge and to attach to or include within the petition a map or plat showing the tract as registered and the subdivision for which they desire the new certificates. The judge shall examine the petition and the plat and,

if he is not fully satisfied that the content of the original tract is exactly equivalent to the sum of the contents of the smaller tracts into which it is subdivided, may order a survey at the owner's expense. If and when the judge is satisfied on this subject, he shall pass an order directing the clerk to cancel the certificate of title on the record upon surrender of the outstanding owner's certificate and to issue new and separate certificates of title and owners' certificates for the smaller tracts into which the original tract is subdivided, all of which new certificates shall carry the same limitations and notations as the canceled certificate, as in the case of a transfer. (Ga. L. 1917, p. 121, § 31; Code 1933, § 60-502; Ga. L. 1943, p. 326, § 1.)

44-2-163. Conveyance to secure debt; form; notation and registration; creditor's certificate.

The owner of any registered land who desires to convey the land as security for debt and with power of sale without foreclosure may do so by a short form of transfer substantially in the form provided in Code Section 44-2-241. The form shall be signed and properly acknowledged or attested as if it were a deed to land and shall be presented together with the owner's certificate to the clerk. The clerk shall note on the owner's certificate and on the certificate of title in the title register the name of the creditor, the amount of debt, and the date of maturity of the debt and shall show that a creditor's certificate has been issued therefor. When only a part of the registered estate is so conveyed, the clerk shall note on the book and the owner's certificate the part so conveyed. The clerk shall retain, number, and file away the instrument of transfer and shall issue and deliver to the creditor a creditor's certificate, over his hand and seal, setting out the portion so conveyed. All registered encumbrances, rights, or adverse claims affecting the estate represented thereby which are in existence at the time the creditor's certificate is issued shall be noted thereon. (Ga. L. 1917, p. 108, § 32; Code 1933, § 60-503.)

RESEARCH REFERENCES

Am. Jur. 2d. — 66 Am. Jur. 2d, Records and Recording Laws, §§ 39, 45, 49.

C.J.S. — 76 C.J.S., Registration of Land Titles, §§ 27, 30, 31.

44-2-164. Assignment or negotiation of creditor's certificate; effect of transfer of indebtedness; surrender and cancellation of certificate; order of cancellation; notation.

The creditor's certificate shall be assignable or negotiable to the same extent as the note or other evidence of indebtedness secured thereby may be, but assignments or transfers of the creditor's certificate need not be noted on the title register. A transfer or assignment of the indebtedness shall operate to transfer the creditor's certificate securing the same in like

manner and to the same extent as is set forth in Code Section 10-3-1, relating to the case of transfer of indebtedness secured by mortgage, unless otherwise agreed between the parties. The creditor's certificate may be surrendered and canceled at any time by the owner thereof. It shall be the creditor's duty to surrender the certificate and give an order for cancellation of the same when the debt is paid. If he refuses, he may be compelled by the court to do so and in any proper case the judge may order a cancellation on the title register. Upon presentation of an order of cancellation with the surrendered creditor's certificate or upon presentation of the judge's order directing cancellation, the clerk shall enter a notation of the same in the register of titles and on the owner's certificate of title. (Ga. L. 1917, p. 108, § 33; Code 1933, § 60-504.)

RESEARCH REFERENCES

Am. Jur. 2d. — 66 Am. Jur. 2d, Records and Recording Laws, § 45.

C.J.S. — 76 C.J.S., Registration of Land Titles, §§ 28, 29.

44-2-165. Sale by holder of creditor's certificate; application for transfer to purchaser; opportunity to object to transfer; order of application of sale proceeds.

If the debt secured by a creditor's certificate or any part thereof becomes due and unpaid, the holder of the creditor's certificate may, after advertising the property for sale in the manner prescribed by law for advertising sheriff's sales of land, sell the property at auction before the courthouse door of the county and sell it to the highest and best bidder for cash. The sale need not be conducted by the creditor or holder of the creditor's certificate personally but may be conducted through any agent or attorney. The holder of the certificate, his agent, or his attorney shall thereupon make an oath to the facts and apply to the judge for an order of transfer to the purchaser. The application shall be accompanied by a certified copy of the certificate of title from the title register as of the date of the sale. The judge shall cause at least five days' notice to be given to the debtor and to any persons who, according to the title register, have acquired any interest in the property subsequent to the issuance of the creditor's certificate; and, if no objections are made or if objections are made after a hearing, the judge shall grant an order of transfer with such directions for cancellation of other certificates and entries and otherwise as shall be in accordance with the justice of the case and with the spirit of this article. The proceeds of the sale shall be applied first to the payment of the costs of advertising the sale and obtaining the judge's order of transfer, then to the payment of the debt, and any remainder shall be paid to the debtor or his order. (Ga. L. 1917, p. 108, § 35; Code 1933, § 60-505.)

44-2-166. Transfer to secure debt; notation of bond for title or to reconvey.

Nothing in this article shall prevent the owner of land from transferring his registered title as security for debt or from causing the title to be registered in the name of the creditor by transferring to the creditor as if he were an ordinary vendee of the registered title; and, if bond for title or bond to reconvey is given, it may be noted on the certificate of title on the title register and on the owner's certificate, provided it is attested or acknowledged as if it were a deed. (Ga. L. 1917, p. 108, § 36; Code 1933, § 60-506.)

44-2-167. Validity and priority of unrecorded transfers of owner's certificate to registered lands.

Unrecorded transfers of owner's certificate to registered lands shall have the same validity as unrecorded deeds of conveyance. The validity and priority of unrecorded transfers shall be governed by Code Sections 44-2-1, 44-2-3, and 44-2-4. (Ga. L. 1917, p. 108, § 37; Code 1933, § 60-507; Ga. L. 1989, p. 563, § 6.)

The 1989 amendment, effective April 3, 1989, rewrote the Code section.

Law reviews. — For note on 1989 amendment to this Code section, see 6 Ga. St. U.L. Rev. 315 (1989).

RESEARCH REFERENCES

Am. Jur. 2d. — 66 Am. Jur. 2d, Registration of Land Titles, § 10.

C.J.S. — 76 C.J.S., Registration of Land Titles, § 30.

44-2-168. Descent of registered land as personalty.

Reserved. Repealed by Ga. L. 1989, p. 563, § 7, effective April 3, 1989.

Editor's notes. — This Code section was based on Ga. L. 1917, p. 108, § 42, and Code 1933, § 60-508.

44-2-169. Personal representative as trustee; right of personal representative to a commission; power of heirs to require transfer.

Subject to the powers, rights, and duties of administration, the personal representative of the deceased owner shall hold registered real estate as trustee for the persons beneficially entitled thereto by law. Unless otherwise entitled by law to commissions, the personal representative shall be entitled to no commissions thereon except in cases of necessary sales in the due course of administration. The heirs at law or beneficiaries entitled by law to the real estate shall have the same power of requiring a transfer of such estate as if it were personal estate. (Ga. L. 1917, p. 108, § 43; Code 1933, § 60-509.)

RESEARCH REFERENCES

Am. Jur. 2d. — 66 Am. Jur. 2d, Records and Recording Laws, § 144.

C.J.S. — 76 C.J.S., Registration of Land Titles, § 36.

44-2-170. Right of personal representative to have registered land transferred to him where such land transferred to heirs before his appointment; action against heirs who have improperly appropriated land.

After a transfer of registered land has been made to the heirs at law or to the widow claiming to be the sole heir as stated in Code Section 44-2-131, a personal representative appointed at any time thereafter to administer the estate of the decedent shall not be entitled to have such registered land transferred to him for purposes of administration; but, if it appears that the heirs have appropriated to their use and ownership property which should have been appropriated to the purposes of administration, the personal representative of the decedent shall have a right of action against the heirs for the value of the property so appropriated, the judgment in such action to be molded according to the exigencies of the particular case, in accordance with the principles of equity. (Ga. L. 1917, p. 108, § 46; Code 1933, § 60-510.)

RESEARCH REFERENCES

Am. Jur. 2d. — 66 Am. Jur. 2d, Records and Recording Laws, § 144.

C.J.S. — 76 C.J.S., Registration of Land Titles, § 36.

44-2-171. Procedure for ascertaining, and transfer to, heirs or beneficiaries.

(a) Whenever an administrator who has caused registered land to be transferred into his name stands ready to be discharged, if it is not necessary to sell such registered land for the purposes of administration and it should properly go to the heirs at law of the decedent, such administrator may institute a proceeding substantially similar to that prescribed in Code Section 44-2-131 for the ascertainment of the heirs at law and for an order directing the transfer of such estate from him to such heirs.

(b) If a trustee holds title to registered land and the beneficiaries of the trust are not definitely and particularly disclosed, if it becomes appropriate that they be definitely ascertained, such trustee may in like manner petition the court, upon showing that the trust has become executed, for a decree settling and ascertaining who the beneficiaries are and directing a transfer to such beneficiaries. (Ga. L. 1917, p. 108, § 47; Code 1933, § 60-511.)

RESEARCH REFERENCES

Am. Jur. 2d. — 66 Am. Jur. 2d, Records and Recording Laws, § 144.

C.J.S. — 76 C.J.S., Registration of Land Titles, § 36.

44-2-172. Transfer by clerk pursuant to judgment; production of copy of decree and order.

Wherever, as the result of a proceeding in any court, it is adjudged that a transfer of registered land should be made, such transfer may be made by the clerk upon the production of a certified copy of the decree showing in what book and page of the minutes of the court the decree is recorded and an order of the judge of the superior court of the county in which the land is located directing the transfer to be made. Once the certified copy and the order are produced, the certificate of title on the register of titles and the owner's certificate shall be canceled and new certificates shall be registered and issued accordingly. Production of the certified copy of the decree shall not be required when it is rendered in the same court as that in which the title is registered, but the clerk shall act upon the judge's order of transfer and the inspection of his own minute book. (Ga. L. 1917, p. 108, § 49; Code 1933, § 60-513.)

RESEARCH REFERENCES

Am. Jur. 2d. — 66 Am. Jur. 2d, Records and Recording Laws, §§ 112, 172, 173.

C.J.S. — 76 C.J.S., Registration of Land Titles, § 42.

44-2-173. Petition for involuntary transfer; referral to examiner; notice; appointment of guardians ad litem; order of transfer.

Whenever it is desired to have an involuntary transfer registered, petition therefor shall be made to the judge of the court. The judge may hear the facts or, in his discretion, may refer the petition to an examiner of titles to hear and report the facts. The judge shall see to it that all parties at interest are given reasonable notice before any order of transfer is made. Whenever, in his judgment, the interests of justice so require, the judge shall cause notice of the petition to be published in the newspaper in which the sheriff's sales of the county are advertised for not less than four times in four separate weeks. Before granting an order directing the transfer, the judge shall fully satisfy himself that all parties who have or may have an interest in the matter of the transfer have been notified; that, in the case of minors or other persons under disability, guardians ad litem have been appointed to represent their interests; and that there is no valid reason why the order directing involuntary transfer should not be made. Thereupon, he shall enter a decree or judgment upon the minutes of the court, reciting the facts and stating that an order of transfer has been issued, and shall issue the order of transfer in substantially the form and manner prescribed in this article. (Ga. L. 1917, p. 108, § 50; Code 1933, § 60-514.)

JUDICIAL DECISIONS

Cited in Taylor v. Taylor, 186 Ga. 667, 198 S.E. 678 (1938).

RESEARCH REFERENCES

Am. Jur. 2d. — 66 Am. Jur. 2d, Records and Recording Laws, § 51.

C.J.S. — 76 C.J.S., Registration of Land Titles, § 38.

44-2-174. Attack on transfers made to hinder, delay, or defraud creditors; decree voiding such transfer; entry of cancellations and transfers on register and certificate.

Nothing in this article shall prevent any transfer or other dealing with registered land from being attacked in court as having been made for the purpose of hindering, delaying, or defrauding creditors; provided, however, that, upon the trial of the case, the court having jurisdiction finds that the person taking the transfer or the apparent beneficiary of the dealing took the benefit of the same with knowledge of the fact that the intention of the transaction was to hinder, delay, or defraud creditors; and provided, further, that none of the rights of innocent parties shall be affected. If, in the proceeding, the court having jurisdiction of the case finds that any transfer or other dealing with registered land was made for the purpose of hindering, delaying, or defrauding creditors and that the rights of no innocent parties will be prejudiced by the court's judgment or decree, the court may pass such judgment or decree as will void the transfer or the effect of such other transaction as may have been made to hinder, delay, or defraud creditors. Upon the decree or judgment of the court, the judge of the superior court of the county where the land is located, upon application as provided in Code Section 44-2-173, may direct such cancellations and transfers to be entered upon the title register and upon the owner's certificate as shall be necessary to carry the decree or judgment into effect. (Ga. L. 1917, p. 108, § 55; Code 1933, § 60-515.)

RESEARCH REFERENCES

Am. Jur. 2d. — 66 Am. Jur. 2d, Registration of Land Titles, § 9.

C.J.S. — 76 C.J.S., Registration of Land Titles, § 24.

44-2-175. Registering subsequent transfers or voluntary conveyances of land held in trust or otherwise restricted.

Whenever a writing or record is filed for the purpose of transferring registered land in trust, or upon any condition or unusual limitation expressed in the instrument, or with power given to sell, encumber, or deal with the land in any manner, no subsequent transfer or voluntary transaction purporting to be exercised under the powers given in the writing,

instrument, or record shall be registered on the title register or on the owner's certificate except upon application to the court and an order of direction from the judge to the clerk as to how the subsequent transaction shall be entered. (Ga. L. 1917, p. 108, § 56; Code 1933, § 60-516.)

44-2-176. Duty of tax officer to have delinquent taxes or assessments noted; effect of delinquencies prior to notation; liability of officer.

After December 31 of every year, it shall be the duty of every officer charged with the collection of any taxes or assessments charged upon any registered land or any interest therein which have not been paid when due to cause a notation of the fact that those taxes or assessments have not been paid to be entered upon the certificate of title on the title register along with the amount thereof. Unless such notation is made, the delinquent tax or assessment shall not affect any transfer or other dealing with the registered land; but the tax officer failing to perform such duty and his surety shall be liable for the payment of the taxes and assessments, with all lawful penalties and interest thereon, if any loss is occasioned to the state, county, municipality, or other political subdivision on account of such failure. (Ga. L. 1917, p. 108, § 57; Code 1933, § 60-517.)

RESEARCH REFERENCES

Am. Jur. 2d. — 66 Am. Jur. 2d, Records and Recording Laws, § 46.

C.J.S. — 76 C.J.S., Registration of Land Titles, § 22.

Part 6

Assurance Fund

JUDICIAL DECISIONS

Strictly construed. — This part is in derogation of the common law and must be strictly construed and followed. Grover v. Vintage Credit Corp., 155 Ga. App. 759, 272 S.E.2d 732 (1980).

44-2-190. Payment into assurance fund upon original registration; determination of amount.

Upon the original registration of any land under this article, there shall be paid to the clerk as an assurance fund one-tenth of 1 percent of the value of the land to be determined by the court. The fund shall be subject to the trusts and conditions set forth in this part for the uses and purposes of this article. (Ga. L. 1917, p. 108, § 74; Code 1933, § 60-701; Ga. L. 1982, p. 3, § 44.)

RESEARCH REFERENCES

Am. Jur. 2d. — 66 Am. Jur. 2d, Registration of Land Titles, §§ 2, 8.

C.J.S. — 76 C.J.S., Registration of Land Titles, § 41.

44-2-191. Separate account for assurance fund.

All money received by the clerk under Code Section 44-2-190 shall be kept in a separate account and paid promptly into the state treasury upon the special trust and condition that such moneys shall be set aside by the state treasurer in trust as a separate fund for the uses and purposes of this article, to be known as the ''Land Registration Assurance Fund,'' which fund is appropriated to the uses and purposes set forth in this article. (Ga. L. 1917, p. 108, § 75; Code 1933, § 60-702; Ga. L. 1993, p. 1402, § 18; Ga. L. 2010, p. 863, § 3/SB 296.)

The 2010 amendment, effective July 1, 2010, substituted ''state treasurer'' for ''director of the Office of Treasury and Fiscal Services'' in the middle of this Code section.

RESEARCH REFERENCES

Am. Jur. 2d. — 66 Am. Jur. 2d, Registration of Land Titles, §§ 2, 8.

C.J.S. — 76 C.J.S., Registration of Land Titles, § 41.

44-2-192. Investment of fund; application of income; transfer of excess.

The moneys collected pursuant to Code Section 44-2-190, insofar as they are not required to satisfy any judgment certified against the assurance fund under Code Section 44-2-195, shall be invested by the state treasurer in state bonds or validated county or municipal bonds in trust for the uses and purposes set forth in this article until the fund amounts to the sum of $500,000.00. The income or so much thereof as may be required may be applied towards the payment of the expenses of the administration of this article and the satisfaction of any such judgment. Whenever and so long as the face value of the bonds purchased shall equal the sum of $500,000.00, other money thereafter coming into the fund together with any income not required for the purposes set forth in this Code section shall be transferred from the Land Registration Assurance Fund to the general fund. (Ga. L. 1917, p. 108, § 76; Code 1933, § 60-703; Ga. L. 1982, p. 3, § 44; Ga. L. 1993, p. 1402, § 18; Ga. L. 2010, p. 863, § 3/SB 296.)

The 2010 amendment, effective July 1, 2010, substituted ''state treasurer'' for ''director of the Office of Treasury and Fiscal Services'' in the middle of the first sentence.

RESEARCH REFERENCES

Am. Jur. 2d. — 66 Am. Jur. 2d, Registration of Land Titles, §§ 2, 8.

C.J.S. — 76 C.J.S., Registration of Land Titles, § 41.

44-2-193. Action against fund — Limitations; defense by Attorney General; measure of damages; tolling of limitations during disability; notice to unknown persons.

(a) Any person entitled to notice who had no actual notice of any registration under this article depriving him of any estate or interest in land and who is without remedy under this article may, within two years after accrual to him or to some person through whom he claims the right to bring such action, bring an action against the state treasurer in the superior court in the county where such land is located for the recovery out of the assurance fund of any damages to which he may be entitled by reason of any such deprivation. The state treasurer shall be served by the second original of proceedings so filed, which service shall be sufficient.

(b) The assurance fund shall be defended in such action and in any appeal by the Attorney General. The measure of damages shall be the value of the property at the time the right to bring the action first accrued; and any judgment rendered therefor shall be paid as provided in Code Section 44-2-195.

(c) If any person entitled to bring such action shall be under the disability of infancy, insanity, imprisonment, or absence from the state in the service of the state or of the United States at the time the right to bring such action first accrued, the action may be brought by him or his privies within two years after the removal of such disability.

(d) Notwithstanding subsection (a) of this Code section, all nonresidents of the state and all persons who are described in the proceedings as being unknown, or of unknown address, or as to whom it appears from the record that they could not be found so as to be served shall be considered as having had actual notice when notice has been published in accordance with this article. (Ga. L. 1917, p. 108, § 77; Code 1933, § 60-704; Ga. L. 1993, p. 1402, § 18; Ga. L. 2010, p. 863, §§ 3, 4/SB 296.)

The 2010 amendment, effective July 1, 2010, in subsection (a), substituted ''state treasurer'' for ''director of the Office of Treasury and Fiscal Services'' in the middle of the first sentence, and substituted ''state treasurer'' for ''director'' near the beginning of the last sentence.

RESEARCH REFERENCES

Am. Jur. 2d. — 66 Am. Jur. 2d, Registration of Land Titles, §§ 2, 8.

C.J.S. — 76 C.J.S., Registration of Land Titles, § 41.

44-2-194. Action against fund — Parties defendant.

If an action contemplated by Code Section 44-2-193 is brought to recover for loss or damage arising only through the legal operation of this article, the state treasurer shall be the sole defendant. If the action is brought to

recover for loss or damage arising on account of any registration made or procured through fraud, neglect, or wrongful act of any person not exercising a judicial function, both the state treasurer and such person or persons shall be made parties defendant. (Ga. L. 1917, p. 108, § 78; Code 1933, § 60-705; Ga. L. 1993, p. 1402, § 18; Ga. L. 2010, p. 863, §§ 3, 4/SB 296.)

The 2010 amendment, effective July 1, 2010, substituted ''state treasurer'' for ''director of the Office of Treasury and Fiscal Services'' near the end of the first sentence, and substituted ''state treasurer'' for ''director'' near the end of the second sentence.

RESEARCH REFERENCES

Am. Jur. 2d. — 66 Am. Jur. 2d, Registration of Land Titles, §§ 2, 8.

C.J.S. — 76 C.J.S., Registration of Land Titles, § 41.

44-2-195. Action against fund — Execution on judgment; payment from fund; liability of other defendants to plaintiff and to fund.

If judgment shall be rendered for the plaintiff in any action brought pursuant to Code Section 44-2-193, execution shall issue against any defendants other than the state treasurer. If such execution is returned unsatisfied in whole or in part or if there are no such defendants, the clerk of the court in which the judgment was rendered shall certify to the state treasurer the amount due on the judgment; and the same shall be paid by the state treasurer out of the assurance fund under the special appropriation made of the fund for such purpose. Any person other than the state treasurer against whom any such judgment may have been rendered shall remain liable therefor or for so much thereof as may be paid out of the assurance fund; and the state treasurer may bring action at any time to enforce the lien of such judgment against such person or his estate for the recovery of the amount, with interest, paid out of the assurance fund. (Ga. L. 1917, p. 108, § 79; Code 1933, § 60-706; Ga. L. 1993, p. 1402, § 18; Ga. L. 2010, p. 863, §§ 3, 4/SB 296.)

The 2010 amendment, effective July 1, 2010, substituted ''state treasurer'' for ''director of the Office of Treasury and Fiscal Services'' at the end of the first sentence and substituted ''state treasurer'' for ''director'' four times in this Code section.

RESEARCH REFERENCES

Am. Jur. 2d. — 66 Am. Jur. 2d, Registration of Land Titles, §§ 2, 8.

C.J.S. — 76 C.J.S., Registration of Land Titles, § 41.

44-2-196. Action against fund — How judgments satisfied when fund insufficient; interest.

If, at any time, the assurance fund is insufficient to satisfy any judgments certified against it as provided in Code Section 44-2-195, the unpaid

amounts shall bear interest and shall be paid out of any money thereafter coming into the fund in the order in which they were accrued. (Ga. L. 1917, p. 108, § 81; Code 1933, § 60-708.)

RESEARCH REFERENCES

Am. Jur. 2d. — 66 Am. Jur. 2d, Registration of Land Titles, §§ 2, 8.

C.J.S. — 76 C.J.S., Registration of Land Titles, § 41.

44-2-197. Liability of fund for registered owner's breach of trust.

The assurance fund shall not under any circumstances be liable for any loss, damage, or deprivation occasioned by a breach of trust, whether express, implied, or constructive, on the part of the registered owner of any estate or interest in land. (Ga. L. 1917, p. 108, § 80; Code 1933, § 60-707.)

RESEARCH REFERENCES

Am. Jur. 2d. — 66 Am. Jur. 2d, Registration of Land Titles, §§ 2, 8.

C.J.S. — 76 C.J.S., Registration of Land Titles, § 41.

Part 7

Fees

44-2-210. Fees under article; deposit and payment of fees; award of costs.

(a) The fees payable under this article to the examiner of titles shall be as follows:

(1) For examining a title and making a report to the court, an examiner shall receive $1.00 per $1,000.00 or fraction thereof on the value of land, as determined by the court, not to exceed a maximum $100.00, and postage, plus $10.00; and

(2) In contested cases, for hearing the case and making a report to the court, the judge may, in his discretion, allow additional compensation but in an amount not exceeding the same fee as that allowed an auditor for reporting his findings in equity cases under subsection (a) of Code Section 9-7-22. The examiner shall not be paid extra for reporting the evidence; but when a stenographer is used by consent of the parties or order of the judge, the stenographer shall be paid his usual fee.

(b) The following fees shall be collected for the services of the sheriff under this article:

(1) For ascertaining and reporting to the courts the names and addresses of the persons actually occupying the premises described in the petition, a fee as provided in paragraph (1) of subsection (b) of Code Section 15-16-21 for each separate residence;

(2) For each service of process and notice required, a fee as provided in paragraph (1) of subsection (b) of Code Section 15-16-21; and

(3) For posting a copy of the petition upon the premises, fees as provided in paragraph (6) of subsection (b) of Code Section 15-16-21.

(c) For any other services of the clerk, the sheriff, or the surveyor which are not especially provided for in this Code section, a fee shall be fixed by the court to conform with what is usual and lawful for similar services rendered by such officer in ordinary cases.

(d) Upon filing each application for initial registration, the applicant shall pay to the clerk the fee for civil cases as provided in Code Section 15-6-77.

(e) In all contested cases and in all matters referred to the judge for his direction by any of the provisions of this article, the judge shall award the cost of the proceeding accordingly as in his discretion the justice of the case may dictate and, to that end, may assess all the costs against one of the parties or may divide the costs among the parties in such ratio as seems just. (Ga. L. 1917, p. 108, § 120; Code 1933, § 60-801; Ga. L. 1970, p. 497, § 11; Ga. L. 1991, p. 1324, § 8; Ga. L. 1992, p. 1311, § 3.)

Part 8

Forms

44-2-220. Power of judges to make general rules and forms for matters under this article; power to modify forms; uniformity of forms.

The judges of the superior courts may, from time to time, make general rules and forms for procedure relating to the subjects dealt with in this article and may modify the forms prescribed in this part. Such rules and forms shall be uniform throughout the state and shall be subject to this article and the general laws of this state. (Ga. L. 1917, p. 108, § 70; Code 1933, § 60-601.)

44-2-221. Petition to register land.

The following is prescribed as the form of petition to be used when application is made for the original register of lands:

IN THE SUPERIOR COURT OF _____ COUNTY

STATE OF GEORGIA

In re petition of _____	)	Civil action File no. _____

ORIGINAL PETITION FOR REGISTRATION OF LANDS

The petition of _____ shows:

The petitioner applies to have the land hereinafter described brought under the provisions of the Land Registration Law, and his title thereto confirmed and registered as provided therein, and under oath shows the following facts:

1.

Full name of each applicant _____

_____

2.

Residence of each applicant _____

_____

3.

Post office address of each applicant _____

_____

4.

The name and address of applicant's agent or attorney upon whom process or notices may be served (not required unless applicant is a nonresident) _____

_____

5.

Full description of the lands (giving also land district and lot numbers where the land lies in that portion of the state where the lands have been surveyed by districts and numbers; and if more than one parcel is included, describe each parcel separately and distinctly).

_____

_____

_____

containing _____ acres.

6.

What is the value thereof? $_____

7.

At what value was it last assessed for taxes? $_____

8.

What interest or estate does the applicant claim therein? _____

_____

9.

What is the value of the interest or estate claimed by the applicant?
$_____

10.

From whom did the applicant acquire the land? _____

_____

11.

Does the applicant claim title by prescription? _____

(If so, set forth fully the color of title, if any, under which the prescription is claimed, and state the details of the possession by which it is claimed prescription has ripened. If the color of title consists of one or more instruments of record on the public records of the county, such instruments need not be copied or exhibited to the application otherwise than by giving the name of the grantor and the grantee, the date and nature of the instrument, and a reference to the book and page where recorded.)

_____

_____

12.

Does applicant claim title by a complete chain of title from the state or other original source of title? _____

_____

13.

Is there a true and correct abstract of applicant's title papers attached hereto? _____

14.

Do you know, or have information, of any other deed, writing, document, judgment, decree, mortgage, or instrument of any kind not set forth in the abstract which relates to this land or any part thereof, or which might affect the title thereto or some interest therein? If so, state the same. _____

15.

Has the land, or any part thereof, ever been set apart as a homestead or exemption or as dower? If so, state particulars. _____

_____

16.

Who is now in possession of the land? _____

_____

17.

Do you know anyone else who claims to be in possession of the land or any part thereof? If so, give name and address. _____

_____

18.

Give name and address of each person occupying the land or any part thereof, and state by what right or claim of right such occupancy is held. _____

_____

19.

Give the name, residence, and address of each and every person, other than the applicants, who claim any interest, adverse or otherwise, vested or otherwise, in the land or any part thereof, stating the nature of the claim, and if any such persons are under disability of any kind, state the nature of the disability.

Name	Residence	Address	Disability (if any)	Nature of Claim

20.

Give the name, residence, and address of the holder of every known lien, whether considered by the applicant to be valid or not.

Name	Residence	Address	Nature of Lien

21.

Give the names and addresses of the owners and occupants of all adjoining lands. _____

22.

Is the land subject to any easement, except public highways and railroads in actual operation? If so, state fully. _____

23.

Give age of applicant. _____

24.

Is the applicant male or female? _____; married or single? _____; widow or widower? _____

25.

If married, give wife's (or husband's) name, and include her or him in the list of defendants. _____

26.

The applicant names as defendants the following persons whose names have been given above: _____

and also all other persons ''whom it may concern.''

Wherefore the applicant prays process and judgment accordingly.

_____
Petitioner's attorney

(To be sworn to by each applicant. Verification in case of a corporation may be made by any officer thereof; in case of minor or other persons under disability, by the person filing the petition in his behalf.)

I do swear that I have read the foregoing petition, and have examined the schedules thereto attached, and that the same are true to the best of my knowledge and belief, and that nothing has been withheld in the answers which would in anywise affect the title to the land or any interest therein or which would disclose any person claiming an adverse interest, valid or not. I do further swear that I bona fide believe that the applicant is the true owner of the estate he seeks to have registered.

_____

Petitioner

Sworn to and subscribed before
me, this _____ day of _____, _____.

_____

Notary

(If more than one applicant, they may verify jointly or by separate affidavits.)

EXHIBIT A

(Attach abstract of title)

(Ga. L. 1917, p. 108, § 86; Code 1933, § 60-602; Ga. L. 1982, p. 3, § 44; Ga. L. 1999, p. 81, § 44.)

44-2-222. Process.

The following is prescribed as the form of process to be attached to the petition:

IN THE SUPERIOR COURT OF _____ COUNTY

STATE OF GEORGIA

To the sheriffs of said state and their lawful deputies:

The respondents _____ and all other persons whom it may concern are required to show cause before said court, on the _____ day of _____, _____, (not less than 40 nor more than 50 days from date of process) why the prayers of the foregoing petition should not be granted, and why the court should not proceed to judgment in such cause.

Witness the Honorable _____, judge of said court, this the _____ day of _____, _____.

_____

Clerk

(Ga. L. 1917, p. 108, § 87; Code 1933, § 60-603; Ga. L. 1999, p. 81, § 44.)

44-2-223. Advertisement.

The advertisement to be inserted in the newspaper in which sheriff's sales of the county are advertised for four insertions in separate weeks should be substantially in the following form:

IN THE SUPERIOR COURT OF _____ COUNTY

STATE OF GEORGIA

In re petition	)	Civil action
of _____	)	File no. _____
	)	

To whom it may concern, and to (here insert the names of all respondents, if any, who reside beyond the limits of the state, or whose place of residence is unknown):

Take notice that _____ has filed in said court a petition seeking to register the following lands under the provisions of the Land Registration Law: (Here describe lands). You are warned to show cause to the contrary, if any you have, before said court on the _____ day of _____, _____.

This _____ day of _____, _____.

_____

Clerk

(Ga. L. 1917, p. 108, § 88; Code 1933, § 60-604; Ga. L. 1982, p. 3, § 44; Ga. L. 1999, p. 81, § 44.)

44-2-224. Acknowledgment of service.

Acknowledgment of service may be made in the following form, provided it is entered on the petition or entitled in the action and is signed in the presence of the judge, the clerk, the examiner, or any other person or official authorized by law to administer oaths, take acknowledgments, or act as a notary public or official witness and is attested by such officer:

Due and legal service of the within and foregoing petition for registration is acknowledged. Further service, process, and notice waived, this the _____ day of _____, _____.

_____

In the presence of _____.

(Ga. L. 1917, p. 108, § 89; Code 1933, § 60-605; Ga. L. 1945, p. 140, § 1; Ga. L. 1999, p. 81, § 44.)

44-2-225. Sheriff's return.

The sheriff's return should be made substantially in the following form and entered on or attached to the petition:

STATE OF GEORGIA,

_____ COUNTY

I have served copies of the within petition and process, or of the summons in substitute therefor, upon the following persons at the time and in the manner stated, as follows:

_____

_____

_____

_____

_____

I have also gone upon the land and posted in a conspicuous place on the land described herein and upon each separate tract thereof and upon every dwelling house and every building used as a place of business upon said land, a copy of the notice as required by law, and have taken the same into the custody of the court.

The following is the name and post office address of each and every person above the age of 14 years actually occupying the premises:

_____

_____

_____

_____

This _____ day of _____, _____.

_____

Sheriff

(Ga. L. 1917, p. 108, § 90; Code 1933, § 60-606; Ga. L. 1943, p. 326, § 1; Ga. L. 1999, p. 81, § 44.)

44-2-226. Certificate of mailing; entry of such certificate on petition.

The clerk should also enter on the petition a certificate substantially in the following form:

I certify that on the _____ day of _____, _____, I mailed to each of the following persons a copy of the within petition and process to his post office address as disclosed by the record:

_____

_____

_____

and that advertisement has been published in accordance with law, a copy of said advertisement being hereto attached.

This _____ day of _____, _____.

_____

Clerk

(Ga. L. 1917, p. 108, § 91; Code 1933, § 60-607; Ga. L. 1999, p. 81, § 44.)

44-2-227. Examiner's appointment.

A form reading substantially as follows should be used in appointing examiners:

IN THE SUPERIOR COURT OF _____ COUNTY

STATE OF GEORGIA

In re petition of _____	)))	Civil action File no. _____

ORDER

_____, a competent attorney at law, of good standing in his profession and of at least three years' experience, is hereby appointed an auditor in and for the _____ Judicial Circuit, to discharge the duties of examiner as provided in the Land Registration Law. This appointment is _____ (either general or for a particular case, as the case may be).

This _____ day of _____, _____.

_____

Judge, Superior Court

(Ga. L. 1917, p. 108, § 92; Code 1933, § 60-608; Ga. L. 1999, p. 81, § 44.)

44-2-228. Oath of examiner.

The examiner 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 his residence:

"I, _____, do swear that I will faithfully, well, and truly perform the duties of examiner under the Land Registration Law, according to law to the best of my skill and ability.

_____

Sworn to and subscribed

before me, this _____, _____.

_____''

(Ga. L. 1917, p. 108, § 93; Code 1933, § 60-609; Ga. L. 1992, p. 6, § 44; Ga. L. 1999, p. 81, § 44.)

44-2-229. Referral to examiner.

Upon the clerk's notifying the judge that a petition has been filed, the judge shall promptly refer the petition to an examiner in substantially the following form:

IN THE SUPERIOR COURT OF _____ COUNTY

STATE OF GEORGIA

In re petition of _____	)	Civil action File no. _____

ORDER

Application having been filed to register _____

_____ land, it is hereby ordered that this matter be and is referred to _____, as examiner for proceedings in conformity with the Land Registration Law.

This _____ day of _____, _____.

_____

Judge

(Ga. L. 1917, p. 108, § 94; Code 1933, § 60-610; Ga. L. 1999, p. 81, § 44.)

44-2-230. Preliminary report of examiner; schedules.

The following is suggested as the general form of the preliminary report of an examiner:

IN THE SUPERIOR COURT OF _____ COUNTY

STATE OF GEORGIA

In re petition of _____	)	Civil action File no. _____

PRELIMINARY REPORT

Application to register _____ _____ land having been duly considered, the undersigned, as examiner, makes the following preliminary report:

I have examined all records as required by the Land Registration Law.

I attach an abstract of the title (Schedule A) as shown on the public records and so far as obtainable from other trustworthy sources.

The names and addresses of all persons, so far as I have been able to ascertain, who have any interest in the land, are set out in Schedule B hereto, showing their several apparent or possible interests and indicating upon whom and in what manner service should be made. A like disclosure of all adjoining landowners is set out in Schedule C hereto.

I find the following to be a history of the possession _____

_____

Special attention is called to the following matters:

_____

_____

This _____ day of _____, _____.

_____

Examiner

SCHEDULE A

(Attach examiner's full abstract)

SCHEDULE B

Names and addresses of all persons having apparent or possible interests in the land, other than applicants, and indicating upon whom and in what manner further service, if any, should be made _____

_____

_____

SCHEDULE C

Names and addresses of all adjoining owners: _____

_____

(Ga. L. 1917, p. 108, § 95; Code 1933, § 60-611; Ga. L. 1999, p. 81, § 44.)

44-2-231. Final report of examiner.

The following is suggested as the general form of the examiner's final report:

IN THE SUPERIOR COURT OF _____ COUNTY

STATE OF GEORGIA

In re petition of _____	)	Civil action File no. _____

FINAL REPORT

Application to register _____

_____ land having been duly considered, the undersigned, as examiner, makes this his final report:

The preliminary report filed by the undersigned is made a part hereof, and is correct, except as herein otherwise stated. The following proceedings have occurred before the examiner, and accompanying herewith is a brief (or a stenographic) report of the evidence taken on the hearing:

_____

_____

In Exhibit _____, hereto, is a report of the matters ascertained by the independent examination of the examiner.

My conclusions of fact are set forth in Exhibit _____ hereto annexed.

My conclusions of law are set forth in Exhibit _____ hereto annexed.

I find the state of the title to be as follows: _____

_____

_____

_____

_____

I find that there are liens and encumbrances on the land as follows:

_____

_____

_____

This _____, _____.

_____

Examiner

(Ga. L. 1917, p. 108, § 96; Code 1933, § 60-612; Ga. L. 1999, p. 81, § 44.)

44-2-232. Decrees of title.

Decrees of title should be rendered in accordance with the following form:

IN THE SUPERIOR COURT OF _____ COUNTY

STATE OF GEORGIA

In re petition of _____	))))	Civil action File no. _____

DECREE OF TITLE

The above entitled action coming on to be heard and it appearing to the court that process has been served and notice given and publication made, all in full compliance with the Land Registration Law, and that all the requirements of said Law have been complied with, it is decreed, ordered, and adjudged that the title to the lands involved: (here describe lands) is held and owned as follows:

The fee simple belongs to _____

_____

subject to the following limitations and conditions: _____

_____

It is further ordered and decreed that said lands be and they are hereby brought under the operation and provisions of the Land Registration Law, and the title of the said _____ in and to the estate herein set forth above is confirmed and ordered registered; subject, however, to the following liens and encumbrances:

_____

_____

_____

and subject also to _____

_____

Let this decree be entered on the minutes of this court and on the register of decrees of title of said county.

In open court this _____ day of _____, _____.

_____

Judge

(Ga. L. 1917, p. 108, § 97; Code 1933, § 60-613; Ga. L. 1999, p. 81, § 44.)

44-2-233. Book of decrees; index.

(a) It is contemplated by this article that the book known as the register of decrees of title shall be made up in the following manner:

(1) It shall be of such size that each page may contain a full copy of the decree of title;

(2) Only one decree should be entered on any page;

(3) Each page should have printed thereon the form of the decree of title as prescribed in Code Section 44-2-232 with ample spacing left in the blanks;

(4) At the bottom of the page should be the words:

''Entered and registered this _____ day of _____, _____, at ____: ____ ____. M. and certificate of title No. _____ issued thereon.

_____

Clerk''

and

(5) At the top of the page and preceding the copy of the decree should be the words, ''Registered Title No. _____.'' The first decree entered is numbered ''Registered Title No. 1,'' the second ''Registered Title No. 2,'' and so on in continuous, consecutive order. The registered title number of a registered tract never changes though any number of subsequent certificates may be issued thereon; therefore, the registered title number and the certificate number will usually be different.

(b) Even though several separate tracts may be joined in the same application, the judge should render separate decrees as to each tract; and these decrees should be separately entered and given separate registered title numbers. Every certificate of title, owner's certificate, and creditor's certificate must carry on it, in addition to its own certificate number, the registered title number of the decree under which the tract to which it pertains was registered.

(c) A part of the register of decrees of title shall be an alphabetical index thereto which the clerk shall carefully keep. Whenever a decree is entered on the register of decrees of title, the clerk shall immediately index it in the name of the person in whose favor the title is registered under proper

alphabetical head, the name being followed by the registered title number. If the decree is in favor of more than one person, it shall be separately indexed under the name of each and every one of them, the name of each of said persons being shown under the proper alphabetical head. (Ga. L. 1917, p. 108, § 98; Code 1933, § 60-614; Ga. L. 1999, p. 81, § 44.)

RESEARCH REFERENCES

ALR. — Failure properly to index conveyance or mortgage of realty as affecting constructive notice, 63 ALR 1057.

44-2-234. Title register book; registered title number; index of title register.

(a) It is contemplated by this article that the title register shall be a well-bound book with pages not less than 18 inches wide. It shall be labeled on the back with the words ''Title Register'' followed by the name of the county. For convenience, additional labels may be used in order to show what certificates are included, for example, ''Certificates 1501-2000, inclusive,'' or other similar information. It shall be printed and ruled in substantially the following form:

TITLE REGISTER _____ COUNTY

Registered Title No Certificate of Title No

CERTIFICATE OF TITLE

STATE OF GEORGIA, County of _____

This is to certify that the title to the estate hereinafter mentioned in and to the following described tract of land, in said county, viz : _____

_____

is registered under the provisions of the Land Registration Law and thereby vested in _____

The estate owned by said _____ in said land is as follows: _____

subject to the following limitations, conditions, encumbrances, etc , viz : _____

and to any other that may be noted hereon Witness my hand and seal of office, this _____ day of _____, _____, at _____:_____ ____.M

(Official Seal) _____ Clerk Superior Court

Entered and Registered (on transfer from Certificate of Title No _____)*, this _____ day of _____, ____, at ____:____ ____.M

_____Clerk

TRANSFERS

TRANSFERRED TO	Date of Instrument	CONSIDERATION Total or Partial (If undivided interest, note here what interest is transferred.)	Voluntary or Involuntary (If involuntary, give reference to book and page where judgment on which order issued is recorded.)	If special or irregular, give reference to other records for particulars	No of the Certificate Issued to Transferee	REMARKS	ENTERED AND REGISTERED						CLERK'S SIGNATURE
							Yr.	Mo.	Da.	Hr.	M.	A.M. P.M.	

SPECIAL ENTRIES AND NOTATIONS

	Entered and Registered						CLERK'S SIGNATURE TO ENTRY	DATE CANCELED						CLERK'S SIGNATURE TO CANCELLATION
	Yr.	Mo.	Da.	Hr.	M.	A.M. P.M.		Yr.	Mo.	Da.	Hr.	M.	A.M. P.M.	

* In issuing first Certificate on a decree, strike the words in parenthesis

TITLE REGISTER _____ COUNTY

Registered Title No _____ Certificate of Title No _____

Liens, Encumbrances and Other Matters Affecting this Certificate

IN FAVOR OF	DATE	AMT	Nature of Instrument (If Mortgage or Creditor's Certificate, describe indebtedness If special give reference to record for details.)	REMARKS	ENTERED AND REGISTERED						CLERK'S SIGNATURE	DATE CANCELED						Clerk's Signature to Cancellation
					Yr.	Mo.	Da.	Hr.	M.	A.M. P.M.		Yr.	Mo.	Da.	Hr.	M.	A.M. P.M.	
Creditor's Certificates																		

This Certificate of Title Canceled, and Certificate of Title No _____ issued in lieu thereof, this _____ day of _____, ____, at ____ : ____ ____M

Owner's Duplicate Canceled* _____, Clerk

* In case Cancellation is by order of Judge, state that fact and give reference to book and page of the minutes

(b) The two pages facing each other on the register shall constitute the original certificate of title when the blanks are duly filled in and signed by the clerk. The first certificate of title in the book should be numbered ''Certificate No. 1,'' the next one ''Certificate No. 2,'' and so on, in continuous, consecutive order. If a new book is opened, the numbering therein should begin with the number next succeeding the last number in the book just completed.

(c) In registering a certificate of title, in addition to the certificate number, the registered title number should also be inserted. The registered title number is always the same as that which appears on the decree of title, by virtue of which the land to which the certificate relates was originally registered. Therefore, every certificate of title registered in the title register shall bear a different certificate number from every other certificate of title registered therein; but all certificates of title which refer to the same registered tract, no matter how many such certificates may be issued in the course of time, shall bear the same registered title number.

(d) The clerk shall keep an alphabetical index of the title register. This may most conveniently be kept in a separate book. Whenever a certificate of title is entered in the title register, the clerk shall insert in the index, under proper alphabetical head, the name of the person in whose favor the certificate is registered, the reference to the certificate number, and the reference to the registered title number. Whenever a certificate is entered in the name of more than one person, the name of each shall be likewise alphabetically indexed. (Ga. L. 1917, p. 108, § 99; Code 1933, § 60-615; Ga. L. 1999, p. 81, § 44.)

RESEARCH REFERENCES

Am. Jur. 2d. — 66 Am. Jur. 2d, Records and Recording Laws, § 73 et seq.

C.J.S. — 76 C.J.S., Registers of Deeds, § 9 et seq.

ALR. — Right of vendee to record title where vendor to covenants to furnish abstract showing title, 7 ALR 1166.

44-2-235. Duty of clerk to enter on new certificate all entries and notations of record.

When registering a certificate of title upon a transfer, the clerk shall bring forward and appropriately enter on the new certificate of title all entries and notations appearing on the certificate from which the transfer is made, except such as shall have been canceled. In transcribing entries brought forward, the clerk will note under the column headed ''Remarks'' against such entries the words ''Brought forward.'' (Ga. L. 1917, p. 108, § 100; Code 1933, § 60-616.)

44-2-236. Certified copies of certificates of title or entries thereon.

Upon request of any person and the payment of lawful fees, the clerk shall issue a certified copy of any certificate of title or of any entry thereon in like manner as he may issue certified copies of any other public record in his office; but, whenever he does so, he shall plainly mark in large legible letters across the face of the certificate the word ''copy.'' If a certified copy of a canceled certificate or entry is made, in addition to transcribing a copy of the entry of cancellation, the clerk shall also plainly mark the words ''canceled certificate'' or ''canceled entry,'' as the case may be, across the face of the copy. (Ga. L. 1917, p. 108, § 101; Code 1933, § 60-617.)

44-2-237. Recordation and notation of plat; attaching certified copy to certificate; fee.

Whenever a plat of the premises which is too large or too intricate for easy transcription on the register of decrees of title or on the certificate of title is a part of the description of the lands or is used to aid description, it shall not be necessary for the clerk to copy such plat on the register of decrees of title or on the certificate of title. In lieu of copying such plat, the clerk shall record it in one of the public record books in his office and shall note its existence together with a reference to the book and page where recorded. If the holder of the owner's certificate desires a copy of the plat to be attached as a part of his owner's certificate, the clerk shall make a certified copy and attach it upon payment of the fee provided for in paragraph (2) of subsection (f) of Code Section 15-6-77. (Ga. L. 1917, p. 108, § 102; Code 1933, § 60-618; Ga. L. 1981, p. 1396, § 3; Ga. L. 1992, p. 6, § 44.)

44-2-238. Recordation of lengthy description — Reference on title register; effect.

Whenever, in the registering of any certificate of title or any notation or entry on the title register, it is found that the description of the premises or the portion thereof involved or any other detail in connection with the transaction is too lengthy to be transcribed in full in the proper space on the register, it shall be permissible to record the instrument, document, or writing in which such lengthy detail or description is contained on some public record book of the county and, instead of setting forth the description or other detail, as the case may be, in extenso on the title register, to state it in general terms with the reference for further particulars to the public record where recorded as follows: ''For further detail, see Deed Book _____, page _____.'' Such registration shall be adequate to all intents and purposes, and the record thus made on the public record shall be considered as a part of the certificate of title contained on the title register. (Ga. L. 1917, p. 108, § 103; Code 1933, § 60-619.)

44-2-239. Recordation of lengthy description — Notation on owner's or creditor's certificate; attaching certified copy; fee.

Whenever any of the description or details of a certificate of title on the title register are set out in full in some other record of the clerk's office with reference thereto on the title register as provided in Code Section 44-2-238, like reference shall be made on the owner's certificate and on the creditor's certificate when thereafter issued; but, if the holder of the owner's certificate or creditor's certificate shall so require, the clerk shall make a full and complete copy of the record to which reference is made, certify it as such, and attach it to the owner's certificate or the creditor's certificate, as the case may be. For making and certifying such copy of the recorded document or writing and attaching it to the owner's certificate or creditor's certificate, as the case may be, the clerk shall be paid as provided for in paragraphs (4) and (5) of subsection (g) of Code Section 15-6-77, relating to the certification of records. (Ga. L. 1917, p. 108, § 104; Code 1933, § 60-620; Ga. L. 1981, p. 1396, § 4; Ga. L. 1992, p. 6, § 44.)

44-2-240. Owner's certificate of title.

(a) The form of the owner's certificate of title shall correspond in general with the certificate of title form except that it shall be headed with the words ''Owner's Certificate of Title.'' It is suggested that it be prepared on paper of suitable size which shall be folded into four pages. The first page shall contain the certificate proper omitting the notations and special entries. The inner pages, pages 2 and 3, shall be ruled and written or printed, preferably the latter, in conformity with the form shown in Code Section 44-2-234 for the printing and ruling of the title register for the entry of transfers, liens, encumbrances, creditors' certificates, and other like matters, these two pages being treated for this purpose as a single sheet so that ample space will thereby be given for the crosswise extension of the entries. The back, or fourth, page shall be endorsed as follows:

OWNER'S CERTIFICATE OF TITLE

Registered Title No. _____
Certificate No. _____
Issued to _____
_____

Georgia, _____ County

Entered and Registered (in lieu of certificate No. _____, which has been canceled).

This the _____ day of _____, _____, at ____:____ ____. M.

_____
Clerk, Superior Court

(b) In case of the first issuance of the owner's certificate on the granting of a decree of registration, the words shown in parenthesis in the endorsement should be omitted.

(c) It is suggested that convenience will be served by folding the certificate in the manner of folding documents written on legal cap or foolscap paper and by writing or printing the endorsement in the style and manner in which similar endorsements are usually put on legal documents. When printed blanks are prepared for use in this connection, it is also suggested that a blank form of transfer be printed on part of the fourth page other than that part used for the endorsement. However, space should be left on the fourth page for such entries as the clerk may be required to make, from time to time, under this article such as certifying that the certificate is valid with all entries noted to date. (Ga. L. 1917, p. 108, § 105; Code 1933, § 60-621; Ga. L. 1982, p. 3, § 44; Ga. L. 1999, p. 81, § 44.)

44-2-241. Transfer of whole of registered estates, undivided interests, divided portions, and to secure debt, with power of sale.

The following are prescribed as the regular forms of transfer, but other forms may be used in accordance with this article:

TRANSFER OF WHOLE OF REGISTERED ESTATE

In consideration of _____ the undersigned, _____ hereby transfers, sells, and conveys to _____ his entire right, title, estate, and interest in the tract of land described in the certificate of title No. _____, hereto attached, registered as Registered Title No. _____ in the office of the clerk of the Superior Court of _____ County, Georgia.

This _____ day of _____, _____.

_____

Signed, sealed, and delivered in the presence of:

_____

_____

TRANSFER OF UNDIVIDED INTEREST IN REGISTERED ESTATE

In consideration of _____, the undersigned, _____, hereby transfers, sells, and conveys to _____ an undivided _____ interest in the tract of land described in the certificate of title No.

_____ hereto attached, registered as Registered Title No. _____ in the office of the clerk of the Superior Court of _____ County, Georgia.

This _____ day of _____, _____.

_____

Signed, sealed, and delivered in the presence of:

_____

_____

TRANSFER OF DIVIDED PORTION OF
A REGISTERED ESTATE

In consideration of _____, the undersigned hereby transfers, sells, and conveys to _____ his entire right, title, interest, and estate in and to the following lands:

_____

_____,

being a divided portion of the tract of land described in the certificate of title No. _____ hereto attached, registered as Registered Title No. _____ in the office of the clerk of the Superior Court of _____ County, Georgia.

This _____ day of _____, _____.

_____

Signed, sealed, and delivered in the presence of:

_____

_____

TRANSFER TO SECURE DEBT, WITH POWER OF SALE

To secure a debt payable to _____ in the sum of _____

_____

evidenced as follows: _____

_____

_____

_____

_____

the undersigned hereby transfers, sells, and conveys to said _____

_____

all the title of the undersigned in and to the tract of land described in the certificate of title No. _____, herewith shown, registered as Registered Title No. _____ in the office of the clerk of the Superior Court of _____ County, Georgia, with power to sell the same after lawful advertisement, without foreclosure, in accor-

dance with the provisions of the Land Registration Law, if any part of said debt is not paid at maturity.

This _____ day of _____, _____.

_____

Signed, sealed, and delivered in the presence of:

_____

_____

(Ga. L. 1917, p. 108, § 107; Code 1933, § 60-622; Ga. L. 1999, p. 81, § 44.)

Code Commission notes. — Pursuant to Code Section 28-9-5, in 1999, commas were deleted after "delivered" in 2nd, 3rd, and 4th forms.

44-2-242. Creditor's certificate; endorsement of certificate.

(a) The following is a form of the creditor's certificate referred to in this article:

CREDITOR'S CERTIFICATE

State of Georgia, _____ County:

Registered Title No. _____

Certificate No. _____

I hereby certify that the title to the estate hereinafter mentioned in the following described land lying in said county, _____

_____

is registered under the provisions of the Land Registration Law and thereby vested in _____

_____

as security for a debt created by the holder of the owner's certificate of title to said estate, (here insert name of the holder of the owner's certificate); said debt being particularly described as follows: _____

_____

with power conferred to sell the same after lawful advertisement, without foreclosure, in accordance with the provisions of the Land Registration Law, if any part of said debt is not paid at maturity. The estate in said land so held is as follows: _____

_____

subject to the following limitations, conditions, encumbrances, etc.,

_____

and such other as may be noted hereon.

Witness my hand and seal of office, this _____ day of _____, _____, at __:__ __. M.

Clerk, Superior Court, _____
County

(Official Seal)

(b) All uncanceled entries appearing on the certificate of title at the time the creditor's certificate is issued shall be noted and entered on the creditor's certificate.

(c) The creditor's certificate shall bear an endorsement on its back in the following form:

CREDITOR'S CERTIFICATE

Registered Title No. _____

Certificate No. _____

On lands registered in the name of _____

_____

Issued to _____

Georgia, _____ County.

Entered and registered this _____ day of _____, _____, at __:__ __. M.

_____
Clerk, Superior Court

(Ga. L. 1917, p. 108, § 108; Code 1933, § 60-623; Ga. L. 1999, p. 81, § 44; Ga. L. 2000, p. 136, § 44.)

Code Commission notes. — Pursuant to Code Section 28-9-5, in 2000, a comma was deleted following "Clerk, Superior Court" at the end of subsection (c).

44-2-243. Transfer of portion or undivided interest to secure debt.

Where only a portion of the registered land or only an undivided interest is transferred to secure a debt, the instrument of transfer and the creditor's certificate may be in the same form as those prescribed in Code Sections 44-2-241 and 44-2-242 with the exception that the portion or the undivided interest shall be distinctly stated. (Ga. L. 1917, p. 108, § 109; Code 1933, § 60-624.)

44-2-244. Judge's order of transfer.

(a) Where the judge orders a transfer to be made under any of the provisions of this article, the judge's order of transfer shall be in the following form unless the exigencies of the case require a different form:

IN THE SUPERIOR COURT OF _____ COUNTY
STATE OF GEORGIA

In re petition of _____	)	Civil action File no. _____

JUDGE'S ORDER OF TRANSFER

For good cause shown to the court, the clerk is directed to cancel the Certificate of Title No. _____, Registered Title No. _____, standing in the name of _____ on the title register and to register a certificate of title in lieu thereof, as follows: in accordance with the decree of court rendered in the action of _____ v. _____ in _____ court; and transfer of title is accordingly ordered. You will enter this transfer upon the title register, noting upon the same a reference to the book and page upon which the above-recited order or decree may be found.

This order of transfer shall be effective upon the presentation of the outstanding owner's certificate, which you will cancel. * _____

_____

_____

This _____ day of _____, _____.

_____

Judge

(*If the court has not been able to require the production of the outstanding owner's certificate, the judge shall erase this sentence from the order and substitute in the blank space below it the following: ''You will cause notice to be published, in accordance with the law, that the certificate is canceled.'')

(b) If the exigencies of the case require a variation from the above prescribed form, the clerk shall also record the judge's order on the minutes of the court and, under the appropriate heading in the entry of transfer on the title register, write the words ''Special, See Minute Book _____, page _____.'' If the judge's order of transfer is made without obtaining production of the outstanding owner's certificate, the clerk, in entering the transfer, shall, under the heading ''Remarks,'' write ''Owner's certificate not produced, but canceled by publication.'' (Ga. L. 1917, p. 108, § 110; Code 1933, § 60-625; Ga. L. 1999, p. 81, § 44.)

44-2-245. Registration and recordation of mortgages.

(a) The regular form of mortgaging shall be as follows:

The undersigned _____ to

secure the following indebtedness _____
_____
_____
mortgages to _____
the estate, title, and interest of the undersigned in and to all of the tracts of land described in the certificate of title No. _____, herewith shown, registered as Registered Title No. _____ in the office of the clerk of the Superior Court of _____ County, Georgia.

_____

This _____ day of _____, _____.

Signed, sealed, and delivered, in the presence of:

_____
_____
_____

(b) If only a part or undivided interest is mortgaged, the word ''all'' shall be stricken and a particular description of the portion or interest mortgaged shall be inserted.

(c) Mortgages executed pursuant to this Code section may be registered as regular instruments as provided in this article. Mortgages in other forms and with other provisions may be registered but shall also be recorded in accordance with the provisions of this article regulating the registration of irregular instruments. (Ga. L. 1917, p. 108, § 111; Code 1933, § 60-626; Ga. L. 1999, p. 81, § 44.)

44-2-246. Notation of delinquent taxes or assessments.

Delinquent taxes and assessments shall be noted on the title register when the officer charged with the collection of taxes files with the clerk a certificate substantially in the following form:

NOTATION OF DELINQUENT TAXES

I certify that _____ (state, county, or city, as the case may be) has a lien for unpaid taxes (or assessments, as the case may be) for the year _____ against the land described in certificate No. _____, Registered Title No. _____, registered in the office of the clerk of the Superior Court of _____ County, in the amount of $_____. The clerk will please note the same on the title register.

This _____ day of _____, _____.

_____
Tax Collector

(Ga. L. 1917, p. 108, § 112; Code 1933, § 60-627; Ga. L. 1999, p. 81, § 44.)

44-2-247. Notation of judgment.

The regular form to be used for the notation of a judgment on the title register is as follows:

NOTATION OF JUDGMENT

To the clerk of the Superior Court, _____ County, Georgia:

Please note on certificate of title No. _____, Registered Title No. _____, a judgment issued from _____ Court of _____ in favor of _____ v. _____ for the amount of $_____.

This _____ day of _____, _____.

_____

(Ga. L. 1917, p. 108, § 113; Code 1933, § 60-628; Ga. L. 1999, p. 81, § 44.)

44-2-248. Notation of special right; notice of lis pendens; recordation and notation of lengthy descriptions.

(a) The regular form to be used where any person desires a notation to be made of any lien, encumbrance, or special right, other than voluntary transactions and other than those otherwise provided for in this part, is as follows:

REQUEST FOR NOTATIONS OF SPECIAL RIGHT

The undersigned _____ claims against the land described in certificate No. _____, Registered Title No. _____, registered in the office of the clerk of the Superior Court of _____ County, the following lien (encumbrance, equity, or special right, as the case may be):

_____

in proof of which reference is had to the following record or court proceeding _____.

Please note the same upon the register of title accordingly.

_____

Sworn to and subscribed before me this

_____ day of _____, _____.

_____

(b) The above form may be used to give notice of a lis pendens.

(c) If the description of the alleged encumbrance, equity, or special right is too lengthy to note with convenience on the blanks in the title register, the request for the notation of the same shall be recorded on the deed book of the county; and the clerk shall register only a general description of it but shall note under the appropriate column heading in the title register the reference ''Special, see Deed Book _____ page _____.'' (Ga. L. 1917, p. 108, § 114; Code 1933, § 60-629; Ga. L. 1982, p. 3, § 44; Ga. L. 1992, p. 6, § 44; Ga. L. 1999, p. 81, § 44.)

44-2-249. Cancellation of creditor's certificate.

The owner of a creditor's certificate may authorize the clerk to register the cancellation thereof by writing thereon ''Canceled. The clerk will please cancel the same on the title register'' and dating and signing the same in the presence of an officer authorized to attest deeds. If the person owning the creditor's certificate is not the person in whose name it was issued and if the original creditor has not endorsed it in blank, the owner signing the cancellation shall also make an affidavit that he is the owner of the creditor's certificate and entitled to cancel it. The creditor's certificate shall be surrendered to the clerk at the time of the registration of the cancellation. (Ga. L. 1917, p. 108, § 115; Code 1933, § 60-630.)

44-2-250. Request to cancel entries.

Authority for the clerk to cancel entries of other liens, mortgages, encumbrances, special claims, and like matters may be conferred by the execution by the person in whose favor such matters exist or his personal representative of a request as follows:

REQUEST TO CANCEL ENTRY

To the Clerk of the Superior Court of _____ County:

You are directed to cancel the entry registered in my favor on certificate of title No. _____, Registered Title No. _____, claiming the following lien (encumbrance or special right, as the case may be)

_____

This _____ day of _____, _____.

_____

(Ga. L. 1917, p. 108, § 116; Code 1933, § 60-631; Ga. L. 1999, p. 81, § 44.)

44-2-251. Registration and notation of other voluntary transactions.

Reserved. Repealed by Ga. L. 1989, p. 563, § 8, effective April 3, 1989.

Editor's notes. — This Code section was based on Ga. L. 1917, p. 108, § 117; Code 1933, § 60-632; Ga. L. 1982, p. 3, § 44.

44-2-252. Updating entries and notations on owner's certificate; clerk's endorsement.

The holder of an uncanceled owner's certificate of title may at any time present it to the clerk and have the clerk enter on the owner's certificate all entries and notations of every kind which appear on the certificate of title which have not already been entered on the owner's certificate. The clerk shall thereupon endorse on the owner's certificate the words "Valid, with all entries noted to this date. This _____ day of _____, _____, at __: __ __. M." and shall officially sign the endorsement. (Ga. L. 1917, p. 108, § 118; Code 1933, § 60-633; Ga. L. 1982, p. 3, § 44; Ga. L. 1999, p. 81, § 44.)

44-2-253. Filing cases; method of filing papers relating to registered lands.

The county governing authority shall furnish the clerk with the necessary durable filing cases. He shall carefully number and file away all papers relating to and dealing with registered lands. All the papers relating to each registered title shall be filed together and separately from the papers relating to any other registered title, in such regular consecutive numerical arrangement as to make them easily accessible at all times. (Ga. L. 1917, p. 108, § 119; Code 1933, § 60-634.)

RESEARCH REFERENCES

Am. Jur. 2d. — 66 Am. Jur. 2d, Records and Recording Laws, § 67.

C.J.S. — 76 C.J.S., Registers of Deeds, § 9 et seq.

CHAPTER 3

REGULATION OF SPECIALIZED LAND TRANSACTIONS

Article 1

Georgia Land Sales Act

Sec.
44-3-1. Short title.
44-3-2. Definitions.
44-3-3. Registration statement; accompanying documents; material changes; property report; lots or parcels subject to blanket encumbrances; records subject to inspection by purchaser; copy of property report to be given to prospective purchasers; sales contract; amendments to report.
44-3-4. Exemptions from Code Section 44-3-3.
44-3-4.1. Fees and expenses of commission [Repealed].
44-3-5. Violations of article.
44-3-6. Order prohibiting act, practice, or transaction in violation of article; injunctive relief.
44-3-7. Willful violation of article; effect on statutory or common-law right to punish violations; effect of article on administrator appointed under Title 10, Chapter 1, Article 15, Part 2.
44-3-8. Rights of buyer upon violation; persons liable for violations; limitation on actions; survival of actions; effect on statutory or common-law rights; exemption of advertisers from liability.
44-3-8.1. Denial of application, reprimand, suspension, civil penalty, or revocation of registration [Repealed].
44-3-9. Venue.
44-3-10. Business records required.
44-3-11. Certain waivers in contract void.
44-3-12. Burden of proof of exemption.
44-3-13. Application of prior law to actions, registrations, and orders prior to July 1, 1990.
44-3-13.1 through 44-3-13.3 [Repealed].
Sec.
44-3-14. Business records required.
44-3-15. Consent to service [Repealed].
44-3-16. Certain waivers in contract void [Renumbered.]
44-3-17. Immunity of commissioner and commission from liability and actions [Repealed].
44-3-18. Burden of proof of exemption; effect of certificate of commission stating compliance or noncompliance with article; admissibility of copies of documents. [Renumbered.]
44-3-19. Application of prior law to actions, registrations, and orders prior to July 1, 1990; application of Code Section 44-3-13 to review of orders not instituted by July 1, 1990. [Renumbered.]
44-3-20 through 44-3-27 [Repealed].

Article 2

Sales of Subdivided Out-of-State Lands

44-3-40 through 44-3-54 [Repealed].

Article 3

Condominiums

44-3-70. Short title.
44-3-71. Definitions.
44-3-72. Creation of condominium.
44-3-73. Sufficiency of descriptions of condominium units; description of undivided interest in common elements.
44-3-74. Recording condominium instruments, plats, plans, and encumbrances; record books.
44-3-75. Construction and validity of condominium instruments; conflicts and inconsistencies; severability.
44-3-76. Compliance with condominium instruments, rules, and regulations; means of enforcement.
44-3-77. Contents of declaration.
44-3-78. Allocation — Interests in common elements.
44-3-79. Allocation — Votes in associa-

Sec.
tion; how votes cast; majority vote requirements.
44-3-80. Allocation — Liability for common expenses; how assessments made.
44-3-81. Reallocation of interests in common elements, votes, and liability for common expenses.
44-3-82. Assignments and reassignments of limited common elements.
44-3-83. Recording of plats and plans; contents; completion of structural improvements; certification by registered architect or engineer.
44-3-84. Use of previously recorded plans in lieu of new plans.
44-3-85. Liability for failure to follow plats or plans; easements; liability for damage.
44-3-86. Leasehold condominiums; lessor's rights and powers; owner's rights and powers; liens; performance of covenants.
44-3-87. Conversion condominiums; notice; offer to convey; time periods; rights of tenant.
44-3-88. Conversion of convertible spaces; amendment to declaration effecting conversion; reallocation of sums assessed prior to conversion; treatment of convertible space not converted.
44-3-89. Expansion of condominium; amendment to declaration.
44-3-90. Alterations within units; combining two or more units.
44-3-91. Relocation of boundaries between units; application for relocation; amendment to declaration; plans and plats; recording.
44-3-92. Subdivision of units; application for subdivision; amendment to declaration; plans and plats; recordation.
44-3-93. Amendment of condominium instruments.
44-3-94. Damage or destruction of units; restoration; vote not to restore; allocation of insurance deductible.
Sec.
44-3-95. Effect of mortgages and liens; foreclosure; release.
44-3-96. Separate titles and taxation.
44-3-97. Eminent domain; compensation; reallocation of interests; court determination; amendment to declaration.
44-3-98. Termination of condominium; creation of tenancy in common; distribution of assets; transfer of mortgages and liens.
44-3-99. Withdrawal of submitted property; reallocation to remaining units of undivided interest in common elements; contents of amendment; transfer of mortgages and liens.
44-3-100. Incorporation of association; name; articles and bylaws; membership; organization.
44-3-101. Control of association by declarant; surrender of control to unit owners; liability for books and records; cancellation of leases and contracts.
44-3-102. Meetings of the association; notice; reports.
44-3-103. Quorums at meetings of association or board.
44-3-104. Directors and officers; eligibility.
44-3-105. Powers and duties as to upkeep of the condominium; access; liability for damage.
44-3-106. Powers and responsibilities of association; tort actions.
44-3-107. Insurance coverage.
44-3-108. Common profits; application to expenses; surplus.
44-3-109. Lien for assessments; personal obligation of unit owner; notice and foreclosure; lapse; right to statement of assessments; effect of failure to furnish statement.
44-3-110. Restraints on alienation and rights of first refusal; statement of waiver or failure to exercise rights or restraints; effect of failure to furnish statement.
44-3-111. Sales of residential condominium units for residential occupancy; information required to be furnished by seller; buyer's right to void contract; limita-

Sec.
tions period; attorney's fees; penalty for willful violation.
44-3-112. Escrow of deposits or other payments made prior to closing.
44-3-113. Applicability of this article; effect on existing condominiums.
44-3-114. Effect of article upon land use, zoning, building, and subdivision laws; effect of Code Section 44-3-92; applicability of land use and zoning ordinances or laws to expandable condominium.
44-3-115. Construction of this article; substantial compliance; procedure for curing defects in recorded instruments.
44-3-116. Limitations in certain restrictive covenants inapplicable.
44-3-117. Application to subcondominiums; creation of subcondominium; subassociation; insurance; effect of certain liens; eminent domain; description of certain units; assessments.

Article 4

Cemeteries

44-3-130 through 44-3-152 [Repealed].

Article 5

Time-Share Projects and Programs

PART 1

GENERAL PROVISIONS

44-3-160. Short title.
44-3-161. Purpose of article.
44-3-162. Definitions.
44-3-162.1. Time-share projects and programs; application of restrictive covenants; exceptions.
44-3-163. Time-share estate title; recording transfer or encumbrance; taxation.
44-3-164. Application of zoning and other local codes, ordinances, and regulations.

PART 2

ADMINISTRATION

44-3-165. Creation of time-share program; partition.
Sec.
44-3-166. Contents and recording of project and time-share instruments.
44-3-167. Time-share estate program management and operation.
44-3-168. Developer control period in time-share estate program.
44-3-169. Identification of time-share project, time-share units, and time periods.
44-3-170. Time-share use program management and operation.
44-3-171. Sale of time-share intervals and programs organized prior to July 1, 1983.

PART 3

DEVELOPERS AND EXCHANGE COMPANIES

44-3-172. Contents of public offering statement.
44-3-173. Annual reports filed by exchange companies and multilocation developers.
44-3-174. Public offering statement provided to purchasers; cancellation of sales agreement by purchaser or developer; statement acknowledging receipt.
44-3-175. Funds required to be escrowed by developer; exceptions; escrow agents.
44-3-176. Payments received by developer on uncompleted projects to be escrowed.
44-3-177. Exemption from other state laws requiring registration and public offering statements.
44-3-178. Exceptions to public offering statement requirement under this article.
44-3-179. Updating public offering statement required.
44-3-180. Purchase of interval is free of liens affecting that interval; exceptions.
44-3-181. Transfer of developer's entire interest.
44-3-182. Financial and other records of time-share project association or managing agent.
44-3-183. Remedy for violation of article; punitive damages; attorney's fees.

Sec.
44-3-184. Limitation of actions.

PART 4

ADVERTISING

44-3-185. False advertising prohibited.
44-3-186. Statements or representations which are prohibited.
44-3-187. Offer of gifts or prizes.

PART 5

FINANCING BY DEVELOPER

44-3-188. Developer's financial records; availability; periodic reports; transfer of developer's interest subject to debts.
44-3-189. Protection of purchasers from developer's underlying blanket encumbrance.

PART 6

REGISTRATION

44-3-190. Real estate broker's license requirement; collection of compensation for real estate brokerage services from persons reselling time-share intervals.
44-3-191. Requirements for out-of-state projects, managing agents, and exchange programs.
44-3-192. Exceptions from registration.

PART 7

MISCELLANEOUS

44-3-193. Modification of public offering statement; limitations on use of public offering statement.
44-3-194. Records required to be kept by developer or agents.
44-3-195. Criminal penalty for violation of article; injunction restraining prohibited conduct; liability for damages; attorney's fees.
44-3-196. Application of article to time-share programs created prior to or following July 1, 1983.
44-3-197. Exceptions from registration. [Renumbered.]
44-3-198. Powers and duties of the commission [Repealed].
44-3-199. Modification of public offering statement; limitations on use of public offering statement [Renumbered.]
44-3-200. Records required to be kept by developer or agents.
44-3-201. Investigation of developer, agent, or exchange program; report confidential; enumeration of grounds for reprimand or for suspension or revocation of registration; cease and desist order for failure to register [Repealed].
44-3-202. Criminal penalty for violation of article. [Renumbered.]
44-3-203 and 44-3-204 [Repealed].
44-3-205. Application of article to time-share programs created prior to or following July 1, 1983. [Renumbered.]

Article 6

Property Owners' Associations

44-3-220. Short title.
44-3-221. Definitions.
44-3-222. Creation of property owners' development; affirmative election to be governed by article.
44-3-223. Compliance with provisions of instrument and with rules and regulations; penalties for noncompliance.
44-3-224. Voting at association meetings.
44-3-225. Assessment of expenses; exemption from liability; liability for unpaid assessments.
44-3-226. Amendment of instrument; presumption of validity in court action.
44-3-227. Incorporation as prerequisite to submission to article; requirements as to corporate documents; board of directors.
44-3-228. Presence of quorums at meetings.
44-3-229. Persons deemed to be ''lot owner.''
44-3-230. Frequency of meetings; notice.
44-3-231. Powers and duties of association; legal actions against agent or employee of association.
44-3-232. Assessments against lot owners as constituting lien in favor of association; additional charges

Sec.
against lot owners; procedure for foreclosing lien; obligation to provide statement of amounts due.
44-3-233. Liberal construction of article; substantial compliance; curing of defects by amendment.
Sec.
44-3-234. Application of article.
44-3-235. Applicability of article.

Article 7

Specialized Land Transactions

44-3-250. Itemized reporting of expenses by developers.

Cross references. — Real estate brokers and salespersons, Ch. 40, T. 43.

Law reviews. — For article, ''Hazardous Waste Issues in Real Estate Transactions,'' see 38 Mercer L. Rev. 581 (1987).

RESEARCH REFERENCES

ALR. — Construction and effect of provision in contract for sale of realty by which purchaser agrees to take property ''as is'' or in its existing condition, 8 ALR5th 312.

ARTICLE 1

GEORGIA LAND SALES ACT

Cross references. — Georgia Uniform Securities, Ch. 5, T. 10.

Editor's notes. — Georgia Laws 1982, p. 1431, § 1, effective November 1, 1982, substituted this article for former Article 1 of this chapter, relating to sales in this state of subdivided lands, and for former Article 2 of this chapter, relating to sales of subdivided out-of-state lands.

Law reviews. — For note on 1995 amendments of sections in this article, see 12 Ga. St. U.L. Rev. 321 (1995).

OPINIONS OF THE ATTORNEY GENERAL

Editor's notes. — In light of the similarity of the provisions, opinions rendered under prior law and under Ga. L. 1971, p. 856 and Ga. L. 1972, p. 638, are included in the annotations for this Code section.

Sale of interest in land is sale of real property. — Contract for the sale and purchase of an interest in land is an agreement for the sale of real property. 1954-56 Op. Att'y Gen. p. 596. (decided under prior law).

Out-of-state developer. — An out-of-state developer who had filed and received approval to sell or offer to sell lands located outside the State of Georgia to Georgia residents prior to July 1, 1973, and now wishes to file a consolidation of the same property or subdivision, would be required to file under and meet the requirements of former Arts. 1 and 2 of this chapter. 1973 Op. Att'y Gen. No. 73-157 (decided under Ga. L. 1971, p. 856 and Ga. L. 1972, p. 638).

Corporation meeting the licensing requirements of this article must also qualify to do business under T. 14. 1973 Op. Att'y Gen. No. 73-140 (decided under Ga. L. 1971, p. 856 and Ga. L. 1972, p. 638).

Unless exempted by § 14-2-1501. — Foreign corporation that is licensed under the Out of State Land Sales Act, G.L. 1971, p. 856, is not required to comply with the provisions of former Code 1933, § 22-1401(a) (see now O.C.G.A § 14-2-1501) if the corporation would be otherwise exempt from that section pursuant to former Code 1933, § 22-1401 (see now O.C.G.A. § 14-2-1501). 1974 Op. Att'y Gen. No. 74-49 (decided under Ga. L. 1971, p. 856 and Ga. L. 1972, p. 638).

RESEARCH REFERENCES

ALR. — Failure to procure occupational or business license or permit as affecting validity or enforceability of contract, 30 ALR 834; 42 ALR 1226; 118 ALR 646.

Duty of vendor as to abstract of title, 52 ALR 1460.

Constitutionality, construction, and application of statutes regulating the subdivision or development of land for sale or lease in lots or parcels, 122 ALR 501.

Effect of action as an election of remedy or choice of substantive rights in case of fraud in sale of property, 123 ALR 378.

Real estate broker's right to commission on sale, exchange, or lease of property listed without statement of price or other terms, 169 ALR 380.

Venue of damage action for breach of real-estate sales contract, 8 ALR3d 489.

Variance between offer and acceptance in regard to title as affecting consummation of contract for sale of real property, 16 ALR3d 1424.

Rights and liabilities of parties to executory contract for sale of land taken by eminent domain, 27 ALR3d 572.

Mechanic's lien based on contract with vendor pending executory contract for sale of property as affecting purchaser's interest, 50 ALR3d 944.

Enforceability, landowner, of subdivision developer's oral promise to construct or improve roads, 41 ALR4th 573.

44-3-1. Short title.

This article shall be known and may be cited as the ''Georgia Land Sales Act.'' (Code 1981, § 44-3-1, enacted by Ga. L. 1982, p. 1431, § 1; Ga. L. 1990, p. 606, § 1; Ga. L. 1995, p. 993, § 1.)

JUDICIAL DECISIONS

Applicability. — Trial court properly granted summary judgment against a home buyer's claim that the sale of the property at issue failed to comply with the Georgia Land Sales Act (Act), O.C.G.A. § 44-3-1 et seq., as the property contained a house suitable for occupancy at the time of the sale; further, despite the buyer's argument that the statutory exemption under O.C.G.A. § 44-3-4(2) did not apply to residential property, giving the words of the exemption their plain and ordinary meaning, the exemption had to be read as excluding from the Act property upon which either a commercial building, an industrial building, a condominium, a shopping center, a house, or an apartment house was situated. Mancuso v. Steyaard, 280 Ga. App. 300, 640 S.E.2d 50 (2006).

44-3-2. Definitions.

As used in this article, the term:

(1) ''Agent'' means any person who represents, or acts for or on behalf of, a developer in selling or leasing or offering to sell or lease any lot or lots in a subdivision but shall not include an attorney at law whose representation of another person consists of rendering legal services.

(2) ''Blanket encumbrance'' means:

(A) Any deed to secure debt, trust deed, mortgage, mechanic's lien, or any other lien or financial encumbrance securing or evidencing money debt and affecting subdivided land or affecting more than one lot or parcel of subdivided land; or

(B) Any agreement affecting more than one such lot or parcel by which the subdivider holds such subdivided land under an option, contract to purchase, or trust agreement; provided, however, that taxes and assessments levied by public authority are not deemed to be encumbrances within the meaning of this paragraph.

(3) ''Business day'' means any calendar day except Sunday or any national legal public holiday.

(4) ''Common promotional plan'' means a plan undertaken by a single developer or a group of developers acting in concert to offer lots for sale or lease; where such land is offered for sale by such a developer or group of developers acting in concert and, where such land is contiguous or known, designated, or advertised as a common unit or by a common name, such land shall be presumed, without regard to the number of lots covered by each individual offering, as being offered for sale or lease as part of a common promotional plan.

(5) ''Conspicuous statement'' means a statement in boldface and conspicuous type which shall be a type size of at least ten points. Such statement shall always be shown larger than all other nonconspicuous statements in the body of the document in which it is required.

(6) ''Developer'' or ''subdivider'' or ''owner'' means any person who, directly or indirectly, sells or leases, or offers to sell or lease, or advertises for sale or lease any lots in a subdivision.

(7) ''Disposition'' or ''dispose of'' means any sale, exchange, lease, assignment, award by lottery, or other transaction designed to convey an interest in a subdivision or parcel, lot, or unit thereof, if undertaken for gain or profit.

(8) ''Offer'' means every inducement, solicitation, or attempt to bring about a disposition.

(9) ''Person'' means an individual, firm, company, association, corporation, government or governmental subdivision or agency, business trust, estate, trust, partnership, unincorporated association or organization, two or more of any of the foregoing having a joint or common interest, or any other legal or commercial entity.

(9.1) ''Property report'' means a written statement given to prospective purchasers by the developer or the developer's agent disclosing such information about the subdivision as required by this article.

(10) ''Purchaser'' means a person other than a developer or lender who acquires an interest in any lot, parcel, or unit in a subdivision.

(11) ''Sale'' means every sale, lease, assignment, award by lottery, solicitation, or offer to do any of the foregoing concerning a subdivision, if undertaken for gain or profit.

(12) ''Subdivision'' or ''subdivided land'' means:

(A) Any contiguous land which is divided or is proposed to be divided for the purpose of disposition into 50 or more lots, parcels, units, or interests; or

(B) Any land, whether contiguous or not, which is divided or proposed to be divided into 50 or more lots, parcels, units, or interests which are offered as a part of a common promotional plan. (Ga. L. 1971, p. 856, § 1; Ga. L. 1972, p. 638, § 1; Ga. L. 1975, p. 484, § 1; Code 1981, §§ 44-3-2, 44-3-41; Ga. L. 1982, p. 3, § 44; Ga. L. 1982, p. 1431, § 1; Ga. L. 1983, p. 3, § 33; Ga. L. 1990, p. 606, § 1; Ga. L. 1995, p. 993, § 1.)

JUDICIAL DECISIONS

Cited in Screamer Mt. Dev., Inc. v. Garner, 234 Ga. 590, 216 S.E.2d 801 (1975) (decided under Ga. L. 1971, p. 856, § 1).

RESEARCH REFERENCES

Am. Jur. 2d. — 64 Am. Jur. 2d, Public Securities and Obligations, §§ 2, 3. 66 Am. Jur. 2d, Registration of Land Titles, § 5.

44-3-3. Registration statement; accompanying documents; material changes; property report; lots or parcels subject to blanket encumbrances; records subject to inspection by purchaser; copy of property report to be given to prospective purchasers; sales contract; amendments to report.

(a)(1) It shall be unlawful for any person to offer for sale or to sell any subdivided land to any person in this state unless such offering complies with this article or is exempt under Code Section 44-3-4. Any person offering to sell any subdivided land shall provide each prospective purchaser a property report containing the following:

(A) Information about the subdivider to include the name, street address, form of organization, and telephone number of the subdivider; the state or foreign jurisdiction in which the subdivider is organized and the date of organization; a statement of authorization to do business in this state, if the subdivider is a foreign corporation; the name and address of the subdivider's resident agent; the name and address of the person to whom correspondence concerning the subdivider should be addressed; the name, address, and telephone number of the person or persons who are in charge of the subdivider's sales in this state; and a statement indicating where the subdivider's records are located;

(B) Information about the subdivided land to include the total acreage in the subdivision as a whole, including land held for future expansion; the number of lots, parcels, or tracts included in the filing; the number of acres in the filing; the size of the smallest parcel to be offered for sale; the county and state in which the land is located; the name of the nearest incorporated town; and the route and distance from the nearest incorporated town to the land;

(C) Information about the title of the subdivided land to include the name, address, and telephone number of the record titleholder;

(D) Information about any existing or contemplated future improvements to include statements of the condition of drainage control systems, streets, roads, sewage disposal facilities, sidewalks, electrical services, telephone connections, water supply, gas supply, clubhouses, golf courses, and other recreational facilities; a statement as to whether any performance bonds or other obligations have been posted with any public authority to assure the completion of any improvements; a statement as to whether the county or city wherein the land lies has agreed to accept maintenance of any improvements other than recreational facilities; a statement as to whether any contracts have been made with any public utility for the installation of any improvements; a statement as to the existence or contemplated future existence of any improvement maintenance charge; and a statement as to whether all improvements promised to purchasers are included in the sales contracts;

(E) The provisions of any zoning ordinances and regulations affecting the subdivided land and each lot or unit thereof;

(F) A statement of all existing taxes or assessments affecting the subdivided land;

(G) The terms and conditions of sales of the subdivided land and a statement which declares any sums which purchasers will be required to pay other than the actual purchase price, with interest, and any taxes or assessments validly imposed by any governmental authority;

(H) A statement which indicates whether the subdivision has been approved or disapproved for loans by any lending institutions or agencies;

(I) The names of the governmental authorities or private entities which will provide police protection, fire protection, and garbage collection;

(J) The name and address of the person who prepared the registration statement;

(K) A statement which indicates the use for which the property is offered;

(L) The estimated costs, dates of completion, and the party responsible for the construction and maintenance of all existing and proposed improvements which are referred to in connection with the offering or disposition of any interest in the subdivided land including such party's name and address;

(M) A conspicuous statement on the top two-thirds of the front cover of the property report which reads as follows:

"YOU MAY CANCEL WITHOUT PENALTY OR OBLIGATION ANY SALES AGREEMENT WHICH YOU HAVE SIGNED WITHIN SEVEN DAYS, SUNDAYS AND HOLIDAYS EXCEPTED, AFTER SIGNING ANY SALES AGREEMENT AND YOU ARE ENTITLED TO RECEIVE A REFUND. IF THIS PROPERTY REPORT WAS NOT GIVEN TO YOU BEFORE YOU SIGNED ANY SALES AGREEMENT, YOU MAY CANCEL THE SALES AGREEMENT WITHIN SEVEN DAYS, SUNDAYS AND HOLIDAYS EXCEPTED, AFTER YOUR RECEIPT OF THIS PROPERTY REPORT AND YOU ARE ENTITLED TO RECEIVE A REFUND. YOU MAY NOT GIVE UP OR WAIVE THIS RIGHT TO CANCEL. IF YOU DECIDE TO CANCEL A SALES AGREEMENT, YOU MUST NOTIFY THE DEVELOPER IN WRITING WITHIN THE CANCELLATION PERIOD OF YOUR INTENT TO CANCEL BY SENDING NOTICE BY CERTIFIED MAIL OR STATUTORY OVERNIGHT DELIVERY, RETURN RECEIPT REQUESTED, TO (insert the name and address of the developer or the developer's agent). YOUR NOTICE WILL BE EFFECTIVE ON THE DATE YOU MAIL IT."

(N) A conspicuous statement on the bottom third of the front cover of the property report which reads as follows:

"THE PURCHASER SHOULD READ THIS DOCUMENT BEFORE SIGNING ANYTHING";

(O)(i) Except as provided in division (ii) of this subparagraph, a conspicuous statement which reads as follows:

"THIS IS A REAL PROPERTY TRANSACTION. YOU OR YOUR ATTORNEY SHOULD REVIEW THE DOCUMENTS RELATING TO THIS TRANSACTION ON FILE IN THE SUPERIOR COURT OF THE COUNTY WHEREIN THE PROPERTY IS LOCATED."

(ii) If the subdivision is located outside the State of Georgia, then the conspicuous statement must read as follows:

"THIS IS A REAL PROPERTY TRANSACTION. YOU OR YOUR ATTORNEY SHOULD REVIEW THE DOCUMENTS RELATING TO THIS TRANSACTION ON FILE IN THE APPROPRIATE LAND RECORDS OF THE JURISDICTION IN WHICH THE PROPERTY IS LOCATED."

(2) Every subdivider shall make available at the project location to every purchaser for inspection thereof the following documents:

(A) A legal description of the subdivided land;

(B) A general map, drawn to scale, showing the total subdivided land area and its relation to the existing streets, roads, waterways, schools, churches, shopping centers, and bus and rail transportation in the immediate vicinity and showing all lands reserved for future expansion, if any;

(C) A copy of the conveyances by which the subdivider or owner acquired title to the land, with such copy bearing the public record book and page number;

(D) A copy of all instruments presently creating liens, mortgages, encumbrances, reservations, or defects upon the use of title of the subdivided land included in the filing;

(E) A copy of the title insurance policy or an attorney's title opinion for the subdivided land, issued within 30 days of the date of submission of the registration statement;

(F) A copy of each deed restriction, if any;

(G) A copy of the purchase agreement to be employed in the sales program;

(H) A copy of the deed to be employed in the sales program;

(I) Statements from the appropriate governmental agencies approving the installation of the improvements enumerated in subparagraph (D) of paragraph (1) of this subsection, including, but not limited to, a statement of approval from the state water quality control board concerning the sewage disposal facilities and siltation;

(J) A statement which indicates how streets and other public places in the subdivided land are to be maintained;

(K) A copy of any contract or franchise with a public utility company, if any;

(L) A copy of a plat of the subdivided land approved by the appropriate specified governmental agency and recorded in the appropriate specified public record book, with such copy bearing the public record book and page number;

(M) A copy of any performance bonds or agreements with the public authorities guaranteeing completion;

(N) A phased development schedule for all improvements promised by the subdivider and not completed, showing each type of improve-

ment and the month and year of the start of the improvement and the proposed completion;

(O) A statement by the subdivider of any additional and material facts that should be called to the attention of the purchaser;

(P) If the county or municipality in which the subdivision is located has a planning and zoning ordinance in effect, a certificate of approval or compliance from the local governing authority stating that the subdivision is in compliance with the applicable ordinance or, if the county or municipality in which the subdivision is located has no planning and zoning ordinance in effect, a certificate of approval from the appropriate regional commission; and

(Q) A statement of the terms of payment.

(b) The purchaser shall be informed by the subdivider of all material changes with respect to the subdivided land.

(c) The subdivider must update the property report whenever any material change occurs.

(d) The property report shall not be used for advertising purposes unless the report is used in its entirety. No portion of the report shall be underscored, italicized, or printed in larger or heavier type than the balance of the report unless specifically required by law or by this article or such emphasis is intended to call to a prospective purchaser's attention some risk or warning not otherwise readily observable.

(e) Where lots or parcels within a subdivision are subject to a blanket encumbrance, the developer shall ensure that such blanket encumbrance contains provisions evidencing the subordination of the lien of the holder or holders of the blanket encumbrance to the rights of those persons purchasing from the subdivider or provisions evidencing that the subdivider is able to secure releases from such blanket encumbrance with respect to the property.

(f) A copy of the instruments executed in connection with the sale of parcels within a subdivision shall be kept available by the subdivider and subject to inspection by the purchaser for a period of three years. The purchaser shall be notified of any change affecting the location of the records.

(g)(1) The subdivider shall cause a copy of the property report to be given to each prospective purchaser prior to the execution of any binding contract or agreement for the sale of any lot or parcel in a subdivision. If such a report is not given at least 48 hours prior to such execution, the purchaser may rescind the contract by written notice to the seller until midnight of the seventh day, Sundays and holidays excepted, following the signing of such contract or agreement. A receipt in duplicate shall be

taken from each purchaser evidencing compliance with this provision. Any such election by the purchaser to void the contract or agreement must be made within seven days, Sundays and holidays excepted, following the signing of such contract or agreement. Receipts taken for any published report shall be kept on file for three years from the date the receipt is taken. If such a report is never given prior to or after the execution of any binding contract or agreement for sale, the purchaser may have rights exercisable under Code Section 44-3-8 in addition to the right of rescission given in this paragraph.

(2) The receipt in duplicate required by this subsection must be signed by the purchaser upon receipt of a property report and must contain the following language:

> I hereby acknowledge that I have received the property report of (insert name of subdivision) on (insert date) at (time). If I receive the property report less than 48 hours prior to signing any contract or agreement, I understand that my right to cancel that contract or agreement is midnight of the seventh day, Sundays and holidays excepted, following the signing of such contract or agreement. I understand that I must notify the developer or the developer's agent in writing within the cancellation period of my intent to cancel by sending notice by certified mail or statutory overnight delivery, return receipt requested, to (insert name and address of developer or developer's agent). Notice will be effective on the date that it is mailed.

(h)(1) Every sales contract relating to the purchase of real property in a subdivision shall state clearly the legal description of the parcel being sold, the principal balance of the purchase price which is outstanding at the date of the sales contract after full credit has been given for the down payment, and the terms of the sales contract.

(2) Every sales contract relating to the purchase of real property in a subdivision shall provide that the purchaser shall receive a warranty deed to the property together with a copy of any purchase money deed to secure debt or purchase money mortgage as may be specified in the sales contract within not more than 180 days from the date of execution of the contract; provided, however, that, in the case of contracts to purchase dwelling units not yet completed, the warranty deed need not be delivered until 180 days after such completion.

(i) The developer must make any changes in the property report which are necessary to assure its truthfulness and accuracy at all times.

(j) When a subdivider offers additional subdivided land for sale, the subdivider shall amend the property report to include the additional subdivided land. (Ga. L. 1971, p. 856, § 8; Ga. L. 1972, p. 638, § 3; Ga. L. 1975, p. 484, §§ 2, 3, 6; Code 1981, §§ 44-3-4, 44-3-5, 44-3-48; Ga. L. 1982, p. 3, § 44; Code 1981, § 44-3-3, enacted by Ga. L. 1982, p. 1431, § 1; Ga. L.

1983, p. 3, § 33; Ga. L. 1984, p. 22, § 44; Ga. L. 1986, p. 10, § 44; Ga. L. 1987, p. 3, § 44; Ga. L. 1989, p. 1317, § 6.18; Ga. L. 1990, p. 606, § 1; Ga. L. 1995, p. 993, § 1; Ga. L. 1996, p. 6, § 44; Ga. L. 2000, p. 1589, § 3; Ga. L. 2008, p. 181, § 17/HB 1216.)

The 2008 amendment, effective July 1, 2009, substituted ''regional commission'' for ''regional development center'' near the end of subparagraph (a)(2)(P).

Cross references. — Approval of proposed subdivisions by Department of Transportation, § 32-6-150 et seq.

Editor's notes. — Ga. L. 2000, p. 1589, § 16, not codified by the General Assembly, provides that the amendment to this Code section is applicable with respect to notices delivered on or after July 1, 2000.

JUDICIAL DECISIONS

Certainty requirement for sales contract. — See Allen v. Youngblood, 231 Ga. 191, 200 S.E.2d 758 (1973); Buckner v. Mallett, 245 Ga. 245, 264 S.E.2d 182 (1980); McMichael Realty & Ins. Agency, Inc. v. Tysinger, 155 Ga. App. 131, 270 S.E.2d 88 (1980).

Construction. — Trial court properly granted summary judgment against a home buyer's claim that the sale of the property at issue failed to comply with the Georgia Land Sales Act (Act), O.C.G.A. § 44-3-1 et seq., as the property contained a house suitable for occupancy at the time of the sale; further, despite the buyer's argument that the statutory exemption under O.C.G.A. § 44-3-4(2) did not apply to residential property, giving the words of the exemption their plain and ordinary meaning, the exemption had to be read as excluding from the Act property upon which either a commercial building, an industrial building, a condominium, a shopping center, a house, or an apartment house was situated. Mancuso v. Steyaard, 280 Ga. App. 300, 640 S.E.2d 50 (2006).

OPINIONS OF THE ATTORNEY GENERAL

Former law construed. — For opinions construing the Georgia Land Sales Act of 1972, see 1973 Op. Att'y Gen. No. 73-157 (annual renewal fee); 1974 Op. Att'y Gen. No. 74-60 (annual renewal fee); 1976 Op. Att'y Gen. No. 76-82 (reporting of material change and liability for payment of annual renewal fee); 1979 Op. Att'y Gen. No. 79-76 (security requirement).

RESEARCH REFERENCES

Am. Jur. 2d. — 17A Am. Jur. 2d, Contracts, § 181 et seq. 66 Am. Jur. 2d, Registration of Land Titles, § 11. 82 Am. Jur. 2d, Zoning and Planning, § 118 et seq. 69 Am. Jur. 2d, Securities Regulation — State, §§ 1 et seq., 12, 25 et seq., 77 et seq., 152. 72 Am. Jur. 2d, States, Territories, and Dependencies, § 62.

C.J.S. — 17 C.J.S., Contracts, § 66 et seq. 79 C.J.S. Supp., Securities Regulation, §§ 245 et seq., 291 et seq., 297, 298, 302, 304. 101A C.J.S., Zoning and Land Planning, § 252 et seq. 81A C.J.S., States, § 244.

ALR. — Duty of purchaser of real property to disclose to the vendor facts or prospects affecting the value of the property, 56 ALR 429.

Vendee in possession under land contract as owner of crops planted or growing at time of default, 95 ALR 1127.

Duty of vendor of real property to disclose to purchaser condition of building thereon which affects health or safety of persons using same, 141 ALR 967.

Location of land as governing venue of action for damages for fraud in sale of real property, 163 ALR 1312.

Brokers' bought and sold notes as constituting the contract between buyer and seller, 169 ALR 197.

Specific performance of contract for sale of real property as affected by provision

making it conditional upon purchaser's obtaining loan, 5 ALR2d 287.

Joining in instrument as ratification of or estoppel as to prior ineffective instrument affecting real property, 7 ALR2d 294.

Rights as between vendor and vendee under land contract in respect of interest, 25 ALR2d 951.

Sufficiency, under the statute of frauds, of description or designation of land in contract or memorandum of sale which gives right to select the tract to be conveyed, 46 ALR2d 894.

Effect of failure to contract for sale or exchange of real estate to specify time for giving of possession, 56 ALR2d 1272.

Venue of action for rescission or cancellation of contract relating to interests in land, 77 ALR2d 1014.

Failure of vendor to comply with statute or ordinance requiring approval or recording of plat prior to conveyance of property as rendering sale void or voidable, 77 ALR3d 1058.

Validity and construction of condominium bylaws or regulations placing special regulations, burdens, or restrictions on nonresident unit owners, 76 ALR4th 295.

Vendor's obligation to disclose to purchaser of land presence of contamination from hazardous substances or wastes, 12 ALR5th 630.

44-3-4. Exemptions from Code Section 44-3-3.

Unless the method of sale is adopted for the purpose of evasion of this article or of the federal Interstate Land Sales Full Disclosure Act, the provisions of Code Section 44-3-3 shall not apply to offers or dispositions in an interest in land:

(1) By a purchaser of any subdivision, lot, parcel, or unit thereof for his or her own account in a single or isolated transaction;

(2) On which there is a commercial or industrial building, condominium, shopping center, house, or apartment house; or as to which there is a contractual obligation on the part of the subdivider to construct such a building within two years from date of disposition; or the sale or lease of which land is restricted by zoning ordinance, covenant, or other legally enforceable means to commercial or nonresidential purposes; or the sale or lease of which land is pursuant to a plan of development for commercial or nonresidential purposes;

(3) As cemetery lots or interests;

(4) Where the plan of sale for a subdivision is to dispose of all the interests to ten or fewer persons;

(5) Where each lot, parcel, or unit being offered or disposed of in any subdivision is five acres or more in size;

(6) To any person who is engaged in the business of the construction of residential, commercial, or industrial buildings for disposition;

(7) Where at least 95 percent of the lots or parcels of such subdivision are to be sold or leased only to persons who acquire such lots or parcels for the purpose of engaging in the business of constructing residences;

(8) Made pursuant to the order of any court of this state;

(9) Made by or to any government or government agency;

(10) Made as evidence of indebtedness secured by way of any deed to secure debt, mortgage, or deed of trust of real estate;

(11) As securities or units of interest issued by an investment trust regulated under the laws of the State of Georgia;

(12) Registered under the provisions of the federal Interstate Land Sales Full Disclosure Act;

(13) Of lots, parcels, or units contained in a recorded subdivision plat, if all of the following conditions exist:

(A) Each lot, parcel, or unit is situated on an existing paved and dedicated road or street constructed to the specifications of the board of county commissioners of the county or the governing body of the municipality, which board or governing body has voluntarily agreed to accept such road or street for maintenance and, if a waiting period is required, adequate assurances have been established with the county or municipality;

(B) The subdivision has drainage structures and fill necessary to prevent flooding, which structures and fill have been approved by the board of county commissioners of the county or the governing body of the municipality;

(C) Electric power is available at or near each lot, parcel, or unit;

(D) Domestic water supply and sanitary sewage disposal meeting the requirements of the applicable governmental authority are available at or near each lot, parcel, or unit;

(E) The subdivider is at all times prepared to convey title to the purchaser by general warranty deed unencumbered by any mortgages, deeds to secure debt, or other liens; and

(F) All promised improvements and amenities are complete;

(14) Of lots, parcels, or units contained in a subdivision plat that has been accepted by the board of county commissioners and properly recorded where:

(A) Each lot, parcel, or unit is situated on a road dedicated or approved by the board of county commissioners and arrangements acceptable to the commission have been made for the permanent maintenance of such roads;

(B) All promised improvements and amenities are complete;

(C) The promotional plan of sale is directed only to bona fide residents of this state whose primary residence is or will be located in the county in which the lots are platted of record;

(D) The method of sale is by cash or deed and first mortgage or deed to secure debt with all funds escrowed in this state prior to closing. Closing shall occur within 180 days after execution of the contract for purchase, at which time the purchaser shall receive a general warranty deed unencumbered by any mortgages or other liens except the mortgage or deed to secure debt given by the purchaser; and

(E) The purchaser has inspected the property to be purchased prior to the execution of the purchase contract and has so certified in writing;

(15) Where not more than 150 lots, parcels, units, or interests are offered for sale; or

(16) Where no representations, promises, or agreements are made that any improvements or amenities will be provided in the property by the subdivider but rather that any improvements or amenities will be furnished by the purchaser. (Ga. L. 1971, p. 856, § 2; Ga. L. 1972, p. 638, § 2; Code 1981, §§ 44-3-3, 44-3-42; Code 1981, § 44-3-4, enacted by Ga. L. 1982, p. 1431, § 1; Ga. L. 1983, p. 3, § 33; Ga. L. 1990, p. 606, § 1; Ga. L. 1995, p. 993, § 1.)

JUDICIAL DECISIONS

Application in "single or isolated transaction." — See Screamer Mt. Dev., Inc. v. Garner, 234 Ga. 590, 216 S.E.2d 801 (1975).

Construction. — Trial court properly granted summary judgment against a home buyer's claim that the sale of the property at issue failed to comply with the Georgia Land Sales Act (Act), O.C.G.A. § 44-3-1 et seq., as the property contained a house suitable for occupancy at the time of the sale; further, despite the buyer's argument that the statutory exemption under O.C.G.A. § 44-3-4(2) did not apply to residential property, giving the words of the exemption their plain and ordinary meaning, the exemption had to be read as excluding from the Act property upon which either a commercial building, an industrial building, a condominium, a shopping center, a house, or an apartment house was situated. Mancuso v. Steyaard, 280 Ga. App. 300, 640 S.E.2d 50 (2006).

RESEARCH REFERENCES

Am. Jur. 2d. — 15A Am. Jur. 2d, Condominiums and Cooperative Apartments, § 15. 69 Am. Jur. 2d, Securities Regulation — State, §§ 79-85.

C.J.S. — 79 C.J.S., Securities Regulation, §§ 254, 260.

44-3-4.1. Fees and expenses of commission.

Repealed by Ga. L. 1995, p. 993, § 1, effective July 1, 1995.

Editor's notes. — This Code section was based on Code 1981, § 44-3-4.1, enacted by Ga. L. 1990, p. 606, § 1.

44-3-5. Violations of article.

(a) It shall be unlawful for any person:

(1) To offer to sell or to sell any subdivided land in violation of any provision of this article;

(2) To offer to sell or to sell any subdivided land by means of any oral or written untrue statement of a material fact or any omission to state a material fact necessary in order to make the statements made in the light of the circumstances under which they are made not misleading, the purchaser not knowing of the untruth or omission, if such person shall not sustain the burden of proof that such person did not know and, in the exercise of reasonable care, could not have known of the untruth or omission; or

(3) To offer to sell or to sell any subdivided land by means of any property report except a property report which complies with this article unless the offer of disposition of an interest in land is exempt from the provisions of Code Section 44-3-3 pursuant to Code Section 44-3-4.

(b) It shall be unlawful for any person to make to any prospective purchaser any representation that any federal, state, county, or municipal agency, board, or commission has passed judgment in any way upon the truthfulness, completeness, or accuracy of a property report or upon the merits of such land, or has recommended or given approval to such land or transaction.

(c) It shall be unlawful for any person knowingly to cause to be made, in any document used under this article, any statement which is, at the time it is made and in light of the circumstances under which it is made, false or misleading in any material respect.

(d) It shall be unlawful for any person in connection with the offer, sale, or purchase of any subdivided land, directly or indirectly:

(1) To employ any device, scheme, or artifice to defraud; or

(2) To engage in any transaction, act, practice, or course of business which operates or would operate as a fraud or deceit upon the purchaser or seller. (Ga. L. 1971, p. 856, § 7; Code 1981, § 44-3-47; Code 1981, § 44-3-8, enacted by Ga. L. 1982, p. 1431, § 1; Ga. L. 1983, p. 3, § 33; Ga. L. 1988, p. 13, § 44; Ga. L. 1989, p. 14, § 44; Ga. L. 1990, p. 606, § 1; Code 1981, § 44-3-5, as redesignated by Ga. L. 1995, p. 993, § 1.)

Editor's notes. — Ga. L. 1995, p. 993, § 1, repealed former Code Section 44-3-5, relating to stop orders with respect to registration, notice of the stop order, summary postponement or suspension pending outcome of the proceeding, when the summary postponement or suspension is effective, and vacation or modification of the stop order, and renumbered former Code Section 44-3-8 as Code Section 44-3-5, effective July 1, 1995. Former Code Section 44-3-5 was based on Code 1981, § 44-3-5, enacted by

Ga. L. 1982, p. 1431, § 1; Ga. L. 1983, p. 3, § 33; Ga. L. 1990, p. 606, § 1.

RESEARCH REFERENCES

C.J.S. — 79 C.J.S., Securities Regulation, § 345 et seq.

44-3-6. Order prohibiting act, practice, or transaction in violation of article; injunctive relief.

(a) Whenever it appears to the district attorney or the Attorney General, either upon complaint or otherwise, that any person has engaged in, is engaging in, or is about to engage in any act, practice, or transaction which is prohibited by this article, the district attorney or the Attorney General, or both, may in their discretion apply to any court of competent jurisdiction in this state including the Superior Court of Fulton County for an injunction restraining such person and that person's agents, employees, partners, officers, and directors from continuing such act, practice, or transaction or from doing any acts in furtherance thereof and for the appointment of a receiver or an auditor and such other and further relief as the facts may warrant.

(b) In any proceedings for an injunction, the district attorney or the Attorney General may apply for and be entitled to have issued the court's subpoena requiring:

(1) The immediate appearance of any defendant and that defendant's agents, employees, partners, officers, or directors; and

(2) The production of such documents, books, and records as may appear necessary for the hearing upon the petition for an injunction.

(c) Upon proof of any of the offenses described in this Code section, the court may grant such injunction and appoint a receiver or an auditor and issue such other orders for the protection of purchasers as the facts may warrant. (Code 1981, § 44-3-9, enacted by Ga. L. 1982, p. 1431, § 1; Ga. L. 1983, p. 3, § 33; Ga. L. 1986, p. 10, § 44; Ga. L. 1990, p. 606, § 1; Ga. L. 1991, p. 94, § 44; Code 1981, § 44-3-6, as redesignated by Ga. L. 1995, p. 993, § 1.)

Editor's notes. — Ga. L. 1995, p. 993, § 1, repealed former Code Section 44-3-6, relating to administration of article by commission and real estate commissioner and renumbered former Code Section 44-3-9 as Code Section 44-3-6, effective July 1, 1995. Former Code Section 44-3-6 was based on Ga. L. 1971, p. 856, § 12; Ga. L. 1972, p. 638, § 12; Code 1981, §§ 44-3-23, 44-3-50; Code 1981, § 44-3-6, enacted by Ga. L. 1982, p. 1431, § 1; Ga. L. 1983, p. 3, § 33; Ga. L. 1990, p. 606, § 1.

OPINIONS OF THE ATTORNEY GENERAL

Liability for payment of annual renewal fee under Georgia Land Sales Act of 1972, see Op. Att'y Gen. No. 76-82.

RESEARCH REFERENCES

Am. Jur. 2d. — 69 Am. Jur. 2d, Securities Regulation — State, § 86 et seq. 72 Am. Jur. 2d, States, Territories, and Dependencies, § 62.

C.J.S. — 79 C.J.S., Securities Regulation, § 335 et seq. 81A C.J.S., States, § 252.

ALR. — Recovery back of money paid to unlicensed person required by law to have occupational or business license or permit to make contract, 74 ALR3d 637.

44-3-7. Willful violation of article; effect on statutory or common-law right to punish violations; effect of article on administrator appointed under Title 10, Chapter 1, Article 15, Part 2.

(a) Except as provided in subsection (b) of this Code section, any person who shall willfully violate any provision of this article shall be guilty of a misdemeanor and, upon conviction thereof, shall be subject to a fine of not more than $1,000.00 or imprisonment not to exceed 12 months, or both.

(b) Any person who shall willfully violate paragraph (2) of subsection (a) of Code Section 44-3-5 or subsection (d) of Code Section 44-3-5 shall be guilty of a felony and, upon conviction thereof, shall be punished by a fine of not more than $5,000.00 or imprisonment for not less than one and not more than five years, or both.

(c) Nothing in this article shall limit any statutory or common-law right of the state to punish any person for violation of any provision of any law.

(d) Nothing in this article shall be deemed to prohibit the administrator appointed under Part 2 of Article 15 of Chapter 1 of Title 10 from exercising any powers under Part 2 of Article 15 of Chapter 1 of Title 10 against any person. (Ga. L. 1972, p. 638, § 18; Code 1981, § 44-3-27; Code 1981, § 44-3-10, enacted by Ga. L. 1982, p. 1431, § 1; Ga. L. 1983, p. 3, § 33; Ga. L. 1990, p. 606, § 1; Code 1981, § 44-3-7, as redesignated by Ga. L. 1995, p. 993, § 1.)

Cross references. — Revocation of licenses of real estate brokers and salesmen, § 43-40-25.

Code Commission notes. — Pursuant to § 28-9-5, in 1985, in subsection (d), ''Part 2 of Article 15 of Chapter 1 of Title 10'' was substituted for ''said part'' the second time that phrase appears.

Editor's notes. — Ga. L. 1995, p. 993, § 1, repealed former Code Section 44-3-7, relating to investigations by the commission, on-site inspections and reinspections, and investigative hearings, and renumbered former Code Section 44-3-10 as Code Section 44-3-7, effective July 1, 1995. Former Code Section 44-3-7 was based on Ga. L. 1972, p. 638, § 10; Code 1981, § 44-3-12; Code 1981, § 44-3-7, enacted by Ga. L. 1982, p. 1431, § 1; Ga. L. 1983, p. 3, § 33; Ga. L. 1984, p. 22, § 44; Ga. L. 1990, p. 606, § 1.

RESEARCH REFERENCES

Am. Jur. 2d. — 69 Am. Jur. 2d, Securities Regulation — State, § 81.

C.J.S. — 79 C.J.S. Supp., Securities Regulation, §§ 275, 276.

44-3-8. Rights of buyer upon violation; persons liable for violations; limitation on actions; survival of actions; effect on statutory or common-law rights; exemption of advertisers from liability.

(a) Any person who violates any provision of Code Section 44-3-5 shall be liable to the person buying such land. Such buyer may bring an action in any court of competent jurisdiction to recover damages, even if that buyer no longer owns the land, or, upon tender of the land at any time before entry of judgment, to recover the consideration paid, or the fair value thereof at the time the consideration was paid if such consideration was not paid in cash, for the land with interest thereon at the rate of 7 percent per annum from the date of payment down to the date of repayment, together with all taxable court costs and reasonable attorney's fees.

(b) Every person who directly or indirectly controls a person liable under subsection (a) of this Code section, every general partner, executive officer, or director of such person liable under subsection (a) of this Code section, every person occupying a similar status or performing similar functions, and every person who participates in any material way in the sale is liable jointly and severally with and to the same extent as the person liable under subsection (a) of this Code section unless the person whose liability arises under the provisions of this subsection sustains the burden of proof that such person did not know and, in the exercise of reasonable care, could not have known of the existence of the facts by reason of which liability is alleged to exist. There is contribution as in the case of contract among several persons so liable.

(c) No person may bring an action under this Code section more than two years from the date of the contract for sale or sale if there is no contract for sale.

(d) Every cause of action under this article survives the death of any person who might have been a plaintiff or defendant.

(e) Nothing in this article shall limit any statutory or common-law right of any person in any court for any act involving the sale of land.

(f) The owner, publisher, licensee, or operator of any newspaper, magazine, visual or sound radio broadcasting station or network of stations, or the agents or employees of any such owner, publisher, licensee, or operator of such a newspaper, magazine, station or network of stations shall not be liable under this article for any advertising of any subdivision, lot, parcel, or unit in any subdivision carried in any such newspaper or magazine or by any such visual or sound radio broadcasting station or

network of stations, nor shall any of them be liable under this article for the contents of any such advertisement, unless the owner, publisher, licensee, or operator has actual knowledge of the falsity thereof. (Ga. L. 1972, p. 638, § 20; Ga. L. 1976, p. 676, § 1; Code 1981, §§ 44-3-21, 44-3-22; Code 1981, § 44-3-11, enacted by Ga. L. 1982, p. 1431, § 1; Ga. L. 1983, p. 3, § 33; Ga. L. 1990, p. 606, § 1; Code 1981, § 44-3-8, as redesignated by Ga. L. 1995, p. 993, § 1.)

Editor's notes. — Ga. L. 1995, p. 993, § 1, renumbered former Code Section 44-3-8 as present Code Section 44-3-5.

JUDICIAL DECISIONS

Constitutionality of former law. — Ga. L. 1968, pp. 1364 and 1365, relating to the rights of a purchaser upon violation by a subdivider, the subdivider's agents, or employees, did not violate the constitutional provision which prevents the enactment of legislation impairing the obligations of a contract. Screamer Mt. Dev., Inc. v. Garner, 234 Ga. 590, 216 S.E.2d 801 (1975).

Party defendant. — Insofar as the remedy sought under former Code 1933, § 84-6118 was for rescission of the purchase contract and return of moneys paid, the only logical party against whom the action might be brought was the subdivider with whom the purchaser had dealt. Elmblad v. Screamer Mt. Dev., Inc., 144 Ga. App. 146, 240 S.E.2d 239 (1977).

RESEARCH REFERENCES

Am. Jur. 2d. — 17A Am. Jur. 2d, Contracts, § 524 et seq. 51 Am. Jur. 2d, Limitation of Actions, § 1. 69 Am. Jur. 2d, Securities Regulation — State, § 10.

C.J.S. — 17A C.J.S., Contracts, §§ 421, 422. 79 C.J.S., Securities Regulation, § 263.

ALR. — Right of vendor and purchaser respectively to possession pending performance, but before default, of executory contract sale of real estate, 28 ALR 1069.

Duty of vendor as to abstract of title, 52 ALR 1460.

Effect of fraud to toll the period for bringing action prescribed in statute creating the right of action, 15 ALR2d 500.

What constitutes abandonment of land contract by vendee, 68 ALR2d 581.

Venue of action for rescission or cancellation of contract relating to interests in land, 77 ALR2d 1014.

Failure of vendor to comply with statute or ordinance requiring approval or recording of plat prior to conveyance of property as rendering sale void or voidable, 77 ALR3d 1058.

Practices forbidden by state deceptive trade practice and consumer protection acts, 89 ALR3d 449.

Modern status of defaulting vendee's right to recover contractual payments withheld by vendor as forfeited, 4 ALR4th 993.

Fraud as extending statutory limitations period for contesting will or its probate, 48 ALR4th 1094.

44-3-8.1. Denial of application, reprimand, suspension, civil penalty, or revocation of registration.

Repealed by Ga. L. 1995, p. 993, § 1, effective July 1, 1995.

Editor's notes. — This Code section was based on Code 1981, § 44-3-8.1, enacted by Ga. L. 1990, p. 606, § 1.

44-3-9. Venue.

Except as provided in Code Section 44-3-6, for the purposes of venue for any civil or criminal action under this article, any violation of this article or of any rule, regulation, or order promulgated under this article shall be considered to have been committed in any county in which any act was performed in furtherance of the transaction which violated the article, in the county of any violator's principal place of business, and in any county in which any violator had control or possession of any proceeds of said violation or of any books, records, documents, or other material or objects which were used in furtherance of said violation. (Code 1981, § 44-3-12, enacted by Ga. L. 1982, p. 1431, § 1; Ga. L. 1990, p. 606, § 1; Code 1981, § 44-3-9, as redesignated by Ga. L. 1995, p. 993, § 1.)

Editor's notes. — Ga. L. 1995, p. 993, § 1, renumbered former Code Section 44-3-9 as present Code Section 44-3-6. Former Code Section 44-3-9 related to order of commission prohibiting act, practice, or transaction in violation of article; injunctive relief; criminal proceedings; and penalty for failure to pay registration and inspection fees.

44-3-10. Business records required.

Any developer or its agents shall keep among its business records and make reasonably available for examination to a purchaser or the purchaser's agent the following:

(1) A copy of each item required in Code Section 44-3-3; and

(2) A copy of the sales agreement from each sale relating to the purchase of real property in a subdivision. (Code 1981, § 44-3-14, enacted by Ga. L. 1982, p. 1431, § 1; Ga. L. 1983, p. 3, § 33; Ga. L. 1990, p. 606, § 1; Code 1981, § 44-3-10, as redesignated by Ga. L. 1995, p. 993, § 1.)

Editor's notes. — Ga. L. 1995, p. 993, § 1, renumbered former Code Section 44-3-10 as present Code Section 44-3-7.

44-3-11. Certain waivers in contract void.

Any condition, stipulation, or provision binding any person who enters into a transaction subject to the provisions of this article which waives:

(1) Compliance with any provision of this article or of the rules and regulations promulgated under this article;

(2) Any rights provided by this article or by the rules and regulations promulgated under this article; or

(3) Any defenses arising under this article or under the rules and regulations promulgated under this article

shall be void. (Code 1981, § 44-3-16, enacted by Ga. L. 1982, p. 1431, § 1; Ga. L. 1990, p. 606, § 1; Code 1981, § 44-3-11, as redesignated by Ga. L. 1995, p. 993, § 1.)

Editor's notes. — Ga. L. 1995, p. 993, § 1, renumbered former Code Section 44-3-11 as present Code Section 44-3-8.

44-3-12. Burden of proof of exemption.

In any action, civil or criminal, where a defense is based upon any exemption provided for in this article, the burden of proving the existence of such exemption shall be upon the party raising such defense. (Code 1981, § 44-3-18, enacted by Ga. L. 1982, p. 1431, § 1; Ga. L. 1983, p. 3, § 33; Ga. L. 1990, p. 606, § 1; Code 1981, § 44-3-12, as redesignated by Ga. L. 1995, p. 993, § 1.)

Editor's notes. — Ga. L. 1995, p. 993, § 1, renumbered former Code Section 44-3-12 as present Code Section 44-3-9.

44-3-13. Application of prior law to actions, registrations, and orders prior to July 1, 1990.

Prior law exclusively governs all actions, prosecutions, or proceedings which are pending or may be initiated on the basis of facts or circumstances occurring before July 1, 1995, except that no civil actions may be maintained to enforce any liability under prior law unless brought within any period of limitation which applied when the cause of action accrued and, in any event, within two years of July 1, 1995. (Code 1981, § 44-3-19, enacted by Ga. L. 1982, p. 1431, § 1; Ga. L. 1983, p. 3, § 33; Ga. L. 1990, p. 606, § 1; Ga. L. 1991, p. 94, § 44; Code 1981, § 44-3-13, as redesignated by Ga. L. 1995, p. 993, § 1.)

Editor's notes. — Ga. L. 1995, p. 993, § 1, repealed former Code Section 44-3-13, relating to notices of opportunity for hearing; and hearings and judicial reviews in accordance with the "Georgia Administrative Procedure Act," and renumbered former Code Section 44-3-19 as Code Section 44-3-13, effective July 1, 1995. Former Code Section 44-3-13 was based on Code 1981, § 44-3-13, enacted by Ga. L. 1982, p. 1431, § 1; Ga. L. 1983, p. 3, § 33; Ga. L. 1984, p. 22, § 44; Ga. L. 1986, p. 10, § 44; Ga. L. 1990, p. 606, § 1.

44-3-13.1 through 44-3-13.3.

Repealed by Ga. L. 1995, p. 993, § 1, effective July 1, 1995.

Editor's notes. — These Code sections were based on Code 1981, § 44-3-13.1 through 44-3-13.3, enacted by Ga. L. 1990, p. 606, § 1.

44-3-14. Business records required.

Editor's notes. — Ga. L. 1995, p. 993, § 1, renumbered former Code Section 44-3-14 as present Code Section 44-3-10.

44-3-15. Consent to service.

Repealed by Ga. L. 1995, p. 993, § 1, effective July 1, 1995.

Editor's notes. — This Code section was based on Code 1981, § 44-3-15, enacted by Ga. L. 1982, p. 1431, § 1; Ga. L. 1983, p. 3, § 33; Ga. L. 1990, p. 606, § 1.

44-3-16. Certain waivers in contract void.

Editor's notes. — Ga. L. 1995, p. 993, § 1, renumbered former Code Section 44-3-16 as present Code Section 44-3-11.

44-3-17. Immunity of commissioner and commission from liability and actions.

Repealed by Ga. L. 1995, p. 993, § 1, effective July 1, 1995.

Editor's notes. — This Code section was based on Code 1981, § 44-3-17, enacted by Ga. L. 1982, p. 1431, § 1; Ga. L. 1983, p. 3, § 33; Ga. L. 1990, p. 606, § 1.

44-3-18. Burden of proof of exemption; effect of certificate of commission stating compliance or noncompliance with article; admissibility of copies of documents.

Editor's notes. — Ga. L. 1995, p. 993, § 1, renumbered former Code Section 44-3-18 as present Code Section 44-3-12. Former Code Section 44-3-18 related to burden of proof of exemption, effect of certificate of commission stating compliance or noncompliance with article, and admissibility of copies of documents.

44-3-19. Application of prior law to actions, registrations, and orders prior to July 1, 1990; application of Code Section 44-3-13 to review of orders not instituted by July 1, 1990.

Editor's notes. — Ga. L. 1995, p. 1260, § 1, renumbered former Code Section 44-3-19 as present Code Section 44-3-13. Former Code Section 44-3-19 related to application of prior law to actions, registrations, and orders prior to July 1, 1990, and application of former Code Section 44-3-13 to review of orders not instituted by July 1, 1990.

44-3-20 through 44-3-27.

Repealed by Ga. L. 1982, p. 1431, § 1, effective November 1, 1982.

Editor's notes. — These Code sections, pertaining to violations of this article, and regulations, appeals, applicability, and effect on the Out-of-State Land Sales Act, were

based on Ga. L. 1972, p. 638, §§ 12, 14, 15, 18, 20, 22; Ga. L. 1973, p. 578, § 1; Ga. L. 1976, p. 676, § 1; and Ga. L. 1982, p. 3, § 44.

ARTICLE 2

SALES OF SUBDIVIDED OUT-OF-STATE LANDS

44-3-40 through 44-3-54.

Repealed by Ga. L. 1982, p. 1431, § 1, effective November 1, 1982.

Editor's notes. — This article was based on Ga. L. 1971, p. 856, §§ 1-15, and Ga. L. 1982, p. 3, § 44.

ARTICLE 3

CONDOMINIUMS

Code Commission notes. — The Apartment Ownership Act, Ga. L. 1963, p. 561, has not been codified in light of § 44-3-113.

Law reviews. — For article, ''Condominium and Home Owner Associations: Formation and Development,'' see 24 Emory L.J. 977 (1975). For article surveying Georgia cases in the area of real property from June 1977 through May 1978, see 30 Mercer L. Rev. 167 (1978). For article surveying real property law, see 34 Mercer L. Rev. 255 (1982). For article, ''Representing Condominium Unit Purchasers,'' see 21 Ga. St. B.J. 6 (1984).

For note comparing scope of Georgia Apartment Ownership Act, prior to enactment of Condominium Act, with condominium litigation in other jurisdictions, see 23 Mercer L. Rev. 405 (1972). For note surveying revisions to Georgia Condominium Act between 1963 and 1975 regarding expansion, disclosure, liens, and incorporation, see 24 Emory L.J. 891 (1975).

RESEARCH REFERENCES

Am. Jur. Trials. — Litigation for Breach of Condominium Provisions, 31 Am. Jur. Trials 193.

Litigating Toxic Mold Cases, 91 Am. Jur. Trials 113.

Homeowners' Association Defense: Free Speech, 93 Am. Jur. Trials 293.

Condominium Construction Litigation: Community Association, 93 Am. Jur. Trials 405.

ALR. — Liability of vendor of condominiums for damage occasioned by defective condition thereof, 50 ALR3d 1071.

Erection of condominium as violation of restrictive covenant forbidding erection of apartment houses, 65 ALR3d 1212.

Enforceability of bylaw or other rule of condominium or cooperative association restricting occupancy by children, 100 ALR3d 241.

Validity, construction, and application of statutes, or of condominium association's bylaws or regulations, restricting number of units that may be owned by single individual or entity, 39 ALR4th 88.

Personal liability of owner of condominium unit to one sustaining personal injuries or property damage by condition of common areas, 39 ALR4th 98.

Liability of owner of unit in condominium, recreational development, time-share property, or the like, for assessment in support of common facilities levied against and unpaid by prior owner, 39 ALR4th 114.

Validity and enforceability of condominium owner's covenant to pay dues or fees to

sports or recreational facility, 39 ALR4th 129.

Standing to bring action relating to real property of condominium, 74 ALR4th 165.

44-3-70. Short title.

This article shall be known and may be cited as the ''Georgia Condominium Act.'' (Ga. L. 1975, p. 609, § 1.)

Law reviews. — For article, ''Recommended Changes in the Law Affecting Condominium and Homeowner Associations in Georgia,'' see 1 Ga. St. U.L. Rev. 185 (1985). For article, ''Georgia Condominium Law: Beyond the Condominium Act,'' see 13 Ga. St. B.J. 24 (2007).

JUDICIAL DECISIONS

Cited in Country Greens Village One Owner's Ass'n v. Meyers, 158 Ga. App. 609, 281 S.E.2d 346 (1981); Powers v. Jones, 185 Ga. App. 859, 366 S.E.2d 234 (1988); Walker v. 90 Fairlie Condo. Ass'n, 290 Ga. App. 171, 659 S.E.2d 412 (2008).

44-3-71. Definitions.

As used in this article, the term:

(1) ''Additional property'' means any property which may be added to an expandable condominium in accordance with the provisions of the declaration and this article.

(2) ''Association'' means a corporation formed for the purpose of exercising the powers of the association of any condominium created pursuant to this article.

(3) ''Board of directors'' or ''board'' means an executive and administrative body, by whatever name denominated, designated in the condominium instruments as the governing body of the association.

(4) ''Common elements'' means all portions of the condominium other than the units.

(5) ''Common expenses'' means all expenditures lawfully made or incurred by or on behalf of the association together with all funds lawfully assessed for the creation and maintenance of reserves pursuant to the provisions of the condominium instruments.

(6) ''Common profits'' means all income collected or accrued by or on behalf of the association other than income derived from assessments pursuant to Code Section 44-3-80.

(7) ''Condominium'' means the property lawfully submitted to this article by the recordation of condominium instruments pursuant to this article. No property shall be deemed to be a condominium within the meaning of this article unless undivided interests in common elements are vested in the unit owners.

(8) ''Condominium instruments'' means the declaration and plats and plans recorded pursuant to this article. Any exhibit, schedule, or certification accompanying a condominium instrument and recorded simultaneously therewith shall be deemed an integral part of that condominium instrument. Any amendment or certification of any condominium instrument shall, from the time of the recordation of such amendment or certification, be deemed an integral part of the affected condominium instrument so long as such amendment or certification was made in accordance with this article.

(9) ''Condominium unit'' means a unit, as defined in paragraph (28) of this Code section, together with the undivided interest in the common elements appertaining to that unit.

(10) ''Conversion condominium'' means a condominium all or part of which may be used for residential purposes, which condominium contains any building or portion thereof that at any time before the recording of the declaration was occupied wholly or partially by persons other than persons who, at the time of the recording, had contractual rights to acquire one or more units within the condominium. This paragraph shall not apply to any condominium created prior to July 1, 1980, or to the expansion of any such condominium.

(11) ''Convertible space'' means a portion of a structure within a condominium, which portion may be converted in accordance with this article into one or more units or common elements, including, but not limited to, limited common elements.

(12) ''Court'' means the superior court of the county where the condominium or any part thereof is located.

(13) ''Declarant'' means all owners and lessees of the property who execute the declaration or on whose behalf the declaration is executed; provided, however, that the phrase ''owner and lessees,'' as used in this Code section and in Code Sections 44-3-72 and 44-3-89, shall not include in his capacity as such any mortgagee, any lienholder, any person having an equitable interest under any contract for the sale or lease of a unit, or any lessee or tenant of a unit. From the time of the recordation of any amendment to the declaration expanding an expandable condominium, all persons who execute that amendment or on whose behalf that amendment is executed shall also come within the definition of ''declarant.'' Any successor-in-title of any owner or lessee referred to in this paragraph who comes to stand in the same relation to the condominium as his predecessor did shall also come within such definition.

(14) ''Declaration'' means the recordable instrument containing those matters required by Code Section 44-3-77 and any lawful amendments thereto.

(15) ''Expandable condominium'' means a condominium to which additional property may be added in accordance with the declaration and this article.

(16) ''Foreclosure'' means, without limitation, the judicial foreclosure of a mortgage and the exercise of a power of sale contained in any mortgage.

(17) ''Identifying number'' means one or more letters, numbers, symbols, words, or any combination thereof that identifies only one unit in the condominium.

(18) ''Leasehold condominium'' means a condominium in all or any portion of which each unit owner owns an estate for years or leasehold estate in his unit or in the property on or within which that unit is situated or both. A condominium including an estate for years in property, or an interest therein, on or within which no units are situated or to be situated shall not be deemed a leasehold condominium within the meaning of this article.

(19) ''Limited common element'' means a portion of the common elements reserved for the exclusive use of those entitled to the use of one or more, but less than all, of the units.

(19.1) ''Master association'' means an association of a master condominium.

(19.2) ''Master condominium'' means a condominium in which the condominium instruments permit one or more of the units to constitute a subcondominium.

(20) ''Mortgage'' means a mortgage, deed to secure debt, deed of trust, or other instrument conveying a lien upon or security title to property.

(21) ''Mortgagee'' means the holder of a mortgage.

(22) ''Officer'' means an officer of the association.

(23) ''Permanently assigned limited common element'' means a limited common element which cannot be reassigned or which can be reassigned only with the consent of the unit owner or owners of the unit or units to which it is assigned.

(24) ''Person'' means a natural person, corporation, partnership, association, trust, other entity, or any combination thereof.

(25) ''Property'' means any real property and any interest in real property, including, without limitation, parcels of air space.

(26) ''Record'' means to file for record in the office of the clerk of the superior court of all counties in which the condominium or any part thereof is located.

(26.1) ''Subassociation'' means an association of a subcondominium.

(26.2) ''Subcondominium'' means the property consisting of a unit of an existing condominium lawfully submitted under this article by the recordation of separate condominium instruments pursuant to this article.

(27) ''Submitted property'' means the property lawfully submitted to this article by the recordation of condominium instruments pursuant to this article. Additional property shall be deemed to be submitted property upon the expansion of a condominium pursuant to this article.

(27.1) ''Subunit'' means a unit that constitutes a portion of a subcondominium.

(28) ''Unit'' means a portion of the condominium intended for any type of independent ownership and use. For the purposes of this article, a convertible space shall also be deemed a unit.

(29) ''Unit owner'' means one or more persons, including the declarant, who own a condominium unit or, in the case of a leasehold condominium, whose leasehold interest or interests in the condominium extend for the entire balance of the unexpired term or terms. (Ga. L. 1975, p. 609, §§ 3, 6; Ga. L. 1980, p. 1406, § 1; Ga. L. 1982, p. 3, § 44; Ga. L. 1983, p. 3, § 33; Ga. L. 2007, p. 611, § 1/HB 383.)

Law reviews. — For article, ''Recommended Changes in the Law Affecting Condominium and Homeowner Associations in Georgia,'' see 1 Ga. St. U.L. Rev. 185 (1985).

JUDICIAL DECISIONS

''Unit owner.'' — Definition of ''owner'' in the bylaws of a condominium association as ''record title holder of a unit within the condominium but shall not mean a mortgage holder'' did not conflict with the definition of ''unit owner'', but was merely a more precise definition to facilitate the collection of assessments; thus, the vendor of a unit was liable for assessments until the deed was recorded. Casey v. North Decatur Courtyards Condominium Ass'n, 213 Ga. App. 190, 444 S.E.2d 361 (1994).

''Common element'' versus ''limited common element.'' — External water spigots were not ''limited common elements'' because the spigots were not assigned as such in the condominium documents, and use of the spigots could be restricted under O.C.G.A. § 44-3-76 to enforce condominium declarations. Frantz v. Piccadilly Place Condo. Ass'n, 278 Ga. 103, 597 S.E.2d 354 (2004).

Rooftop terrace declared common element versus limited common element. — Trial court properly granted a condominium association and the association's board summary judgment and properly declared a tenth-floor rooftop terrace a common element for all unit owners in a suit involving a dispute over the terrace because the express terms of the original declaration designated the terrace as a common element. Further, an amendment stating otherwise that was signed by a former managing member, and not the association, no longer controlled since the former managing member's control ended by the time the declarant sought to amend the declaration to assign the entire fenced area of the tenth-floor rooftop terrace as a limited common element benefitting only the penthouse unit. Walker v. 90 Fairlie Condo. Ass'n, 290 Ga. App. 171, 659 S.E.2d 412 (2008).

Cited in Powers v. Jones, 185 Ga. App. 859, 366 S.E.2d 234 (1988).

RESEARCH REFERENCES

Am. Jur. 2d. — 15A Am. Jur. 2d, Condominiums and Cooperative Apartments, §§ 1, 3.

44-3-72. Creation of condominium.

A condominium shall come into existence upon the recordation of the declaration pursuant to this article and of the plats and plans required by Code Section 44-3-83. The declaration shall be duly executed by or on behalf of all of the owners and lessees of the submitted property. (Ga. L. 1975, p. 609, § 9.)

Law reviews. — For comment, ''Proposed Legislation for Property's Twilight Zone: Time Sharing in Georgia,'' see 34 Mercer L. Rev. 403 (1982).

44-3-73. Sufficiency of descriptions of condominium units; description of undivided interest in common elements.

After the submission of any property to this article, no description of a condominium unit located thereon shall be deemed vague, uncertain, or otherwise insufficient if it sets forth the identifying number of that unit, the name of the condominium, the name of the county or counties in which the condominium is located, and the deed book and page number where the first page of the declaration is recorded. Any such description shall be deemed to include the undivided interest in the common elements appertaining to such unit even if such interest is not stated or referred to in the description. (Ga. L. 1975, p. 609, § 10.)

JUDICIAL DECISIONS

Description of parking units. — Because a condominium developer had not originally provided the buyers with a legal description of parking units the buyers were buying, but after the seller built the units the buyers notified the seller of their choice of units, the application of O.C.G.A. § 44-3-73 was not warranted as it would create an incongruous result: the purchase agreement would be enforceable as to the residential unit but unenforceable as to the parking units. Park Regency Ptnrs., L.P. v. Gruber, 271 Ga. App. 66, 608 S.E.2d 667 (2004).

RESEARCH REFERENCES

Am. Jur. 2d. — 15A Am. Jur. 2d, Condominiums and Cooperative Apartments, § 7 et seq.

C.J.S. — 52 C.J.S., Landlord and Tenant, § 412 et seq.

44-3-74. Recording condominium instruments, plats, plans, and encumbrances; record books.

(a) The declaration and any amendments thereto shall be entitled to recordation if executed in the manner required for recording deeds to real property. All condominium instruments and any amendments and certifications thereto shall set forth the name of the condominium; the name of the county or counties in which the condominium is located; and, except for the declaration itself, the deed book and page number where the first page of the declaration is recorded or the document number assigned to the declaration upon its recordation. All condominium instruments and all amendments and certifications thereto shall be recorded in every county where any portion of the condominium is located. The recordation shall not require the approval of any county or municipal authority or official except as to the manner of execution prescribed by this Code section.

(b) In addition to the records and indexes required to be maintained by the clerk of the superior court, such clerk shall maintain one or more separate plat books, entitled ''Condominium Plat Book,'' in which shall be recorded all plats required to be filed pursuant to this article. In addition to such plats, there shall also be entitled to be recorded in such plat books other plats, including site plans and plot plans, prepared by a registered land surveyor and affecting any condominium; but the same shall not constitute the recording of a plat pursuant to Code Section 44-3-83 unless they comply with all requirements thereof. The record of the declaration and of any amendment thereto shall contain a reference to the plat book and page number of the plat or plats recorded in connection therewith.

(c) The plans required to be recorded pursuant to Code Section 44-3-83 shall be kept by the clerk of the superior court in a separate file for each condominium and shall be indexed in the same manner as a conveyance entitled to record, numbered serially in the order of receipt, each designated ''Condominium Plans,'' with the name of the condominium, and each containing a reference to the deed book and page number where the first page of the declaration is recorded or the document number assigned to the declaration upon its recordation. The record of the declaration and of any amendment thereto shall contain a reference to the file number of the plans recorded in connection therewith.

(d) All deeds, mortgages, liens, leases, and encumbrances of any kind affecting any condominium unit or duplicate originals thereof or copies thereof certified by the clerk of the superior court in whose office the same are first recorded shall be recorded in all counties in which any part of the submitted property is located. (Ga. L. 1975, p. 609, § 11.)

RESEARCH REFERENCES

Am. Jur. 2d. — 15A Am. Jur. 2d, Condominiums and Cooperative Apartments, § 10.
C.J.S. — 51C C.J.S., Landlord and Tenant, § 232.
ALR. — Record of executory contracts for the sale of real estate, 26 ALR 1546.

44-3-75. Construction and validity of condominium instruments; conflicts and inconsistencies; severability.

(a) Except to the extent otherwise provided by the condominium instruments:

(1) The terms defined in Code Section 44-3-71 shall be deemed to have the meanings therein specified wherever they appear in the condominium instruments unless the context otherwise requires;

(2) To the extent that walls, floors, or ceilings are designated as the boundaries of the units or of any specified units, all doors and windows therein and all lath, wallboard, plasterboard, plaster, paneling, molding, tiles, wallpaper, paint, finished flooring, and any other materials constituting any part of the finished surfaces thereof shall be deemed a part of such units; but all other portions of such walls, floors, or ceilings shall be deemed a part of the common elements;

(3) If any chutes, flues, ducts, conduits, wires, bearing walls, bearing columns, or any other apparatus lies partially inside and partially outside of the designated boundaries of a unit, any portions thereof serving only that unit shall be deemed a part of that unit; but any portions thereof serving more than one unit or any portion of the common elements shall be deemed a part of the common elements;

(4) Subject to paragraph (3) of this subsection, all space, interior partitions, and other fixtures and improvements within the boundaries of a unit shall be deemed a part of that unit;

(5) Any shutters, awnings, window boxes, doorsteps, porches, balconies, patios, and any other apparatus designed to serve a single unit shall be deemed a limited common element appertaining to that unit exclusively; and

(6) The requirement of consent to or joinder in any act or instrument by any unit owner shall not be deemed to require the consent to or joinder in such act or instrument by any mortgagee of or the holder of any lien upon such unit owner's condominium unit except to the extent expressly required by this article.

(b) In the event that any allocation of undivided interest in the common elements, votes in the association, or liability for common expenses stated in any deed or mortgage to or of any condominium unit conflicts with the

allocations thereof as set forth in the declaration, the declaration shall control.

(c) In the event of any inconsistency between this article and the provisions of any declaration, this article shall control. Unless otherwise provided in the condominium instruments, in the event of any inconsistency between the declaration and the provisions of any bylaws of the association, the declaration shall control.

(d) The condominium instruments shall be construed together and shall be deemed to incorporate one another to the extent that any requirement of this article as to the content of one would be satisfied if any other condominium instrument were incorporated therein by reference.

(e) If any provision, sentence, clause, phrase, or word of any condominium instrument or the application thereof in any circumstances is held invalid, the validity of the remainder of the condominium instrument and of the application of any such provision, sentence, clause, phrase, or word in other circumstances shall not be affected thereby. (Ga. L. 1975, p. 609, § 12; Ga. L. 1990, p. 227, § 1.)

JUDICIAL DECISIONS

Rooftop terrace declared common element versus limited common element. — Trial court properly granted a condominium association and the association's board summary judgment and properly declared a tenth-floor rooftop terrace a common element for all unit owners in a suit involving a dispute over the terrace because the express terms of the original declaration designated the terrace as a common element. Further, an amendment stating otherwise that was signed by a former managing member, and not the association, no longer controlled since the former managing member's control ended by the time the declarant sought to amend the declaration to assign the entire fenced area of the tenth-floor rooftop terrace as a limited common element benefitting only the penthouse unit. Walker v. 90 Fairlie Condo. Ass'n, 290 Ga. App. 171, 659 S.E.2d 412 (2008).

RESEARCH REFERENCES

Am. Jur. 2d. — 15A Am. Jur. 2d, Condominiums and Cooperative Apartments, § 5 et seq. 23 Am. Jur. 2d, Deeds, § 192 et seq.

C.J.S. — 51C C.J.S., Landlord and Tenant, § 232.

ALR. — Validity and construction of condominium association's regulations governing members' use of common facilities, 72 ALR3d 308.

44-3-76. Compliance with condominium instruments, rules, and regulations; means of enforcement.

Every unit owner and all those entitled to occupy a unit shall comply with all lawful provisions of the condominium instruments. In addition, any unit owner and all those entitled to occupy a unit shall comply with any reasonable rules or regulations adopted by the association pursuant to the condominium instruments which have been provided to the unit owners

and with the lawful provisions of bylaws of the association. Any lack of such compliance shall be grounds for an action to recover sums due, for damages or injunctive relief, or for any other remedy available at law or in equity, maintainable by the association or, in any proper case, by one or more aggrieved unit owners, on their own behalf or as a class action. If and to the extent provided in the condominium instruments, the association shall be empowered to impose and assess fines, and suspend temporarily voting rights and the right of use of certain of the common elements in order to enforce such compliance; provided, however, that no such suspension shall deny any unit owner or occupants access to the unit owned or occupied nor cause any hazardous or unsanitary condition to exist. If the voting right of a unit owner has been suspended, then to the extent provided in the condominium instruments, that unit owner's vote shall not count for purposes of establishing a quorum or taking any action which requires a vote of the owners under this article or the condominium instruments. Notwithstanding any other provision of this Code section, to the extent provided in the condominium instruments, water, gas, electricity, heat, and air conditioning services being provided to a unit or unit owner by the association may be terminated for failure to pay assessments and other amounts due pursuant to subsection (a) of Code Section 44-3-109, subject to the suspension standards and notice requirements imposed on the institutional providers providing such services to the condominium development, only after a final judgment or final judgments in excess of a total of $750.00 are obtained in favor of the association from a court of competent jurisdiction. The utility services shall not be required to be restored until the judgment or judgments and any reasonable utility provider charges or other reasonable costs incurred in suspending and restoring such services are paid in full. All common expenses for termination and restoration of any services pursuant to this Code section shall be an assessment and a lien against the unit. (Ga. L. 1975, p. 609, § 13; Ga. L. 1982, p. 3, § 44; Ga. L. 1990, p. 227, § 2; Ga. L. 1994, p. 1943, § 2; Ga. L. 2004, p. 560, § 1.)

Law reviews. — For article, ''Recommended Changes in the Law Affecting Condominium and Homeowner Associations in Georgia,'' see 1 Ga. St. U.L. Rev. 185 (1985).

JUDICIAL DECISIONS

Exhaustion of alternative remedies not required. — Association was not required to exhaust alternative remedies as a condition precedent to the association's use of O.C.G.A. § 44-3-76 to enforce the payment of assessments. Fontaine Condominium Ass'n v. Schnacke, 230 Ga. App. 469, 496 S.E.2d 553 (1998).

Termination of common elements to enforce assessments. — Condominium association was entitled to alter the association's declaration to allow the association to terminate water service from common elements, such as exterior spigots, if a unit owner owed a certain amount in judgment, even though the amendment affected facts retrospectively. Since a unit owner owed more than that amount, the association was granted a preliminary injunction forbidding the unit owner from using any external water spigots and forbidding any other unit owner from allowing that unit owner to use such com-

mon element spigots. Frantz v. Piccadilly Place Condo. Ass'n, 278 Ga. 103, 597 S.E.2d 354 (2004).

Vehicle towing. — Trial court's grant of summary judgment to a condominium association and others in an action by a vehicle owner whose vehicle was towed from the common areas of the condominium complex was proper as the association had authority under the association's declaration as well as pursuant to O.C.G.A. § 44-3-76 to impose rules and regulations regarding the towing of vehicles, there was no showing that the association's rules were selectively enforced, and the notice requirements prior to the towing were complied with by the association. King v. Chism, 279 Ga. App. 712, 632 S.E.2d 463 (2006).

Cited in First Fed. Sav. Bank v. Eaglewood Court Condominium Ass'n, 186 Ga. App. 605, 367 S.E.2d 876 (1988); Spratt v. Henderson Mill Condominium Ass'n, 224 Ga. App. 761, 481 S.E.2d 879 (1997).

RESEARCH REFERENCES

Am. Jur. 2d. — 15A Am. Jur. 2d, Condominiums and Cooperative Apartments, § 5 et seq.

C.J.S. — 51C C.J.S., Landlord and Tenant, § 232.

ALR. — Validity and construction of condominium association's regulations governing members' use of common facilities, 72 ALR3d 308.

Standing to bring action relating to real property of condominium, 74 ALR4th 165.

Validity and construction of regulations of governing body of condominium or cooperative apartment pertaining to parking, 60 ALR5th 647.

44-3-77. Contents of declaration.

(a) The declaration for every condominium shall contain the following:

(1) The name of the condominium, which name shall include the word ''condominium'' or be followed by the words ''a condominium'';

(2) The name of the county or counties in which the condominium is located;

(3) A legal description by metes and bounds of the submitted property, including any horizontal, upper and lower, boundaries as well as the vertical, lateral, boundaries;

(4) A description or delineation of the boundaries of the units, including any horizontal, upper and lower, boundaries as well as the vertical, lateral, boundaries;

(5) A description or delineation of any limited common elements showing or designating the unit or units to which each is assigned;

(6) A description or delineation of all common elements which may subsequently be assigned as limited common elements together with a statement that they may be so assigned and a description of the method whereby any such assignments shall be made in accordance with Code Section 44-3-82;

(7) The allocation to each unit of an undivided interest in the common elements in accordance with Code Section 44-3-78;

(8) The allocation to each unit of a number of votes in the association in accordance with Code Section 44-3-79;

(9) The allocation to each unit of a share of the liability for common expenses in accordance with Code Section 44-3-80;

(10) Any limitations or restrictions on the powers of the association and the board of directors;

(11) The name and address of the attorney or other person who prepared the declaration;

(12) A statement of any and all restrictions on the general use of the condominium or a statement that there are no such restrictions; and

(13) Such other matters not inconsistent with this article as the declarant deems appropriate.

(b) If the condominium is an expandable condominium, the declaration shall also contain the following:

(1) The explicit reservation of an option or options to expand the condominium;

(2) A time limit or date not exceeding seven years from the recording of the declaration upon which all options to expand the condominium shall expire together with a statement of any circumstances which will terminate any such option prior to the expiration of the time limit so specified; provided, however, that, if the condominium instruments so provide, the unit owners of units to which two-thirds of the votes in the association appertain, exclusive of any vote or votes appurtenant to any unit or units then owned by the declarant, may consent to the extension of any such option within one year prior to the date upon which the option would otherwise have expired;

(3) A statement of any other limitations on the option or options or a statement that there are no such limitations;

(4) A legal description by metes and bounds of the additional property, including any horizontal, upper and lower, boundaries as well as the vertical, lateral, boundaries;

(5) A statement as to whether portions of the additional property may be added to the condominium at different times, together with any limitations fixing the boundaries of those portions by legal descriptions setting forth the metes and bounds thereof or regulating the order in which they may be added to the condominium, or a statement that there are no such limitations;

(6) A statement of any limitations as to the location of any improvements that may be made on any portions of the additional property or a statement that there are no such limitations;

(7) A statement of the maximum number of units that may be created on the additional property. If portions of the additional property may be added to the condominium and the boundaries of those portions are fixed in accordance with paragraph (5) of this subsection, the declaration shall also state the maximum number of units that may be created on each such portion added to the condominium. If portions of the additional property may be added to the condominium and the boundaries of those portions are not fixed in accordance with paragraph (5) of this subsection, then the declaration shall also state the maximum average number of units per acre that may be created on any such portion added to the condominium;

(8) With regard to the additional property, a statement of whether any units may be created therein that may not be restricted exclusively to residential use and, if so, a statement of the maximum extent thereof or a limitation as to the extent of such nonresidential use;

(9) A statement of the extent to which any structures erected on any portion of the additional property added to the condominium will be compatible with structures on the submitted property in terms of quality of construction, the principal materials to be used, and architectural style or a statement that no assurances are made in those regards;

(10) A description of all other improvements that will be made on any portion of the additional property added to the condominium, or a statement of any limitations as to what other improvements may be made thereon, or a statement that no assurances are made in that regard;

(11) A statement that any units created on any portion of the additional property added to the condominium will be substantially identical to the units on the submitted property, or a statement of any limitations as to what types of units may be created thereon, or a statement that no assurances are made in that regard;

(12) A description of the declarant's reserved right, if any, to create limited common elements within any portion of the additional property or to designate common elements therein which may subsequently be assigned as limited common elements, in terms of the types, sizes, and maximum number of such limited common elements within each such portion, or a statement that no limitations are placed on that right; and

(13) A statement of a formula, ratio, or other method whereby, upon the expansion of any expandable condominium, there shall be reallocated among the units the undivided interests in the common elements, the votes in the association, and the liability for common expenses.

Plats or plans may be recorded with the declaration of any amendment thereto and identified therein to supplement or provide information required to be furnished pursuant to this subsection; and provided, further,

that paragraph (8) of this subsection need not be complied with if none of the units on the submitted property are restricted exclusively to residential use.

(c) If the condominium contains any convertible space, the declaration shall also contain a statement of a formula, ratio, or other method whereby, upon the conversion of all or any portion of a convertible space, there shall be allocated among the units created therefrom such undivided interest in the common elements, such number of votes in the association, and such liability for common expenses as previously pertained to such convertible space.

(d) If the condominium is a leasehold condominium, with respect to any ground lease, other lease, or other instrument creating the estate for years, the expiration or termination of which may terminate or reduce the condominium, the declaration shall set forth the county or counties wherein the same are recorded and the deed book and page number where the first page of each such lease or other instrument is recorded. The declaration shall also contain the following:

(1) The date upon which such leasehold or estate for years is due to expire;

(2) A statement of whether any property will be owned by the unit owners in fee simple and, if so, a legal description by metes and bounds of any such property. With respect to any improvements owned by the unit owners in fee simple, the declaration shall contain a statement of any rights the unit owners shall have to remove the improvements after the expiration or termination of the leasehold or estate for years involved or a statement that they shall have no such rights;

(3) A statement of the name and address of the person or persons to whom payments of rent must be made by the unit owners unless such rent is collected from the unit owners as a part of the common expenses; and

(4) A statement of the share of liability for payments under any such lease or other instrument which are chargeable against each unit.

(e) Whenever this Code section requires a legal description by metes and bounds of submitted property or additional property, such requirement shall be deemed to include a requirement of a legally sufficient description of any easements that are submitted to this article or that may be added to the condominium, as the case may be. In the case of any such easement, the declaration shall contain the following:

(1) A description of the permitted use or uses;

(2) If the benefit of the easement does not inure to all units and their lawful occupants, a statement of the relevant restrictions and limitations on utilization; and

(3) If any person other than those entitled to occupy any unit may use the easement, a statement of the rights of others to such use.

Notwithstanding any other provision of this subsection, the foregoing requirements may be satisfied by attaching a true copy of any such easement to the declaration.

(f) Whenever this Code section requires a legal description by metes and bounds of submitted property or additional property, such requirement shall be deemed to include a separate legal description by metes and bounds of all property in which the unit owners collectively shall or may be tenants in common or joint tenants with any other persons. No units shall be situated on any such property, however, and the declaration shall describe the nature of the unit owners' estate therein. No such property shall be shown on the same plat or plats showing other portions of the condominium but shall be shown instead on separate plats unless such property is specifically shown and labeled as being owned subject to such a tenancy.

(g) Wherever this article requires a statement of a method for allocation or reallocation of undivided interests in the common elements, votes in the association, and the liability for common expenses, such method shall be so related to the physical characteristics of the units affected or otherwise so stated as to enable any person to determine the interest, vote, or share in such matters pertaining to any particular unit upon such allocation or reallocation. Certain spaces within the units, including, without limitation, attic, basement, and garage space, may but need not be omitted from such calculation or partially discounted by the use of a ratio so long as the same basis of calculation is employed for all units in the condominium. In the event that the declaration allocates or provides for the allocation to any unit of a different share of undivided interests in common elements than is allocated for liability for common expenses, such difference shall be based upon a good faith estimate of the declarant regarding the approximate relative maintenance or other costs occasioning such disparity, and the basis of such determination shall be stated in the declaration; provided, however, that no unit owner or other person may require any reallocation on account of any disparity between actual costs and the determination reflected in the declaration. Subject to the foregoing sentence of this subsection, nothing contained in this article shall be construed to require that the proportions of undivided interest in the common elements, of votes in the association, or of liability for common expenses assigned and allocated to each unit be equal, it being intended that such proportions may be independent. (Ga. L. 1975, p. 609, § 14; Ga. L. 1982, p. 3, § 44.)

JUDICIAL DECISIONS

Amendment to declaration binding. — An amendment to a declaration of condominium stating that 30 units were to be built on Phase IV of the development was a binding

restriction that prevented a buyer from building more than 30 units on Phase IV; both the amendment and the relevant plat had been properly recorded, and thus the buyer knew of the 30-unit restriction and knew that buyers of completed units in Phases I, II, and III and the condominium association had relied upon that restriction. Waterfront, LLP v. River Oaks Condo. Ass'n, 287 Ga. App. 442, 651 S.E.2d 481 (2007), cert. denied, 2008 Ga. LEXIS 78 (Ga. 2008).

RESEARCH REFERENCES

Am. Jur. 2d. — 15A Am. Jur. 2d, Condominiums and Cooperative Apartments, § 7 et seq. 23 Am. Jur. 2d, Deeds, § 192 et seq.

C.J.S. — 51C C.J.S., Landlord and Tenant, § 232.

44-3-78. Allocation — Interests in common elements.

(a) The declaration shall allocate to each unit depicted on plats or plans that comply with subsections (a) and (b) of Code Section 44-3-83 an undivided interest in the common elements. Such allocation may be by percentage, fraction, formula, or any other method which indicates the relative undivided interests in the common elements. If an equal undivided interest in the common elements is allocated to each unit, the declaration may merely so state.

(b) All of the undivided interests in the common elements shall be allocated to the units created by the declaration and shall be subject to reallocation as provided in this article.

(c) If the undivided interests allocated are other than equal, the undivided interest allocated to each unit shall be reflected by a table or provision in the declaration or by an exhibit or schedule accompanying the declaration and recorded simultaneously therewith identifying the units, listing them serially or grouping them together in the case of units to which identical undivided interests are allocated, and setting forth the fraction, percentage, or other statement of undivided interest in the common elements allocated thereto.

(d) Except to the extent otherwise expressly provided by this article, the undivided interest in the common elements allocated to any unit shall not be altered; and any purported transfer, encumbrance, or other disposition of that interest without the unit to which it pertains shall be void.

(e) The common elements shall not be subject to any action for partition except as provided in Code Sections 44-3-98 and 44-3-99.

(f) No undivided interest in the common elements shall be allocated to any unit unless such unit is depicted on plats or plans that comply with subsections (a) and (b) of Code Section 44-3-83. (Ga. L. 1975, p. 609, § 15.)

JUDICIAL DECISIONS

Combining parking units with residential units held proper. — Condominium declaration properly allocated interests in the common elements under O.C.G.A. § 44-3-78(a), and the votes in the condominium association under O.C.G.A. § 44-3-79(a), by combining parking units with residential units, because no provision of the Georgia Condominium Act, O.C.G.A. § 44-3-70 et seq., requires parking units to have voting rights or to have an interest in the common elements that is independent of or separate from the rights and interests of residential units or service units. Park Regency Ptnrs., L.P. v. Gruber, 271 Ga. App. 66, 608 S.E.2d 667 (2004).

Rooftop terrace declared common element versus limited common element. — Trial court properly granted a condominium association and the association's board summary judgment and properly declared a tenth-floor rooftop terrace a common element for all unit owners in a suit involving a dispute over the terrace because the express terms of the original declaration designated the terrace as a common element. Further, an amendment stating otherwise that was signed by a former managing member, and not the association, no longer controlled since the former managing member's control ended by the time the declarant sought to amend the declaration to assign the entire fenced area of the tenth-floor rooftop terrace as a limited common element benefitting only the penthouse unit. Walker v. 90 Fairlie Condo. Ass'n, 290 Ga. App. 171, 659 S.E.2d 412 (2008).

RESEARCH REFERENCES

Am. Jur. 2d. — 15A Am. Jur. 2d, Condominiums and Cooperative Apartments, § 29 et seq. 23 Am. Jur. 2d, Deeds, § 192 et seq.

C.J.S. — 51C C.J.S., Landlord and Tenant, § 232.

ALR. — Proper party plaintiff in action for injury to common areas of condominium development, 69 ALR3d 1148.

Validity and construction of condominium association's regulations governing members' use of common facilities, 72 ALR3d 308.

44-3-79. Allocation — Votes in association; how votes cast; majority vote requirements.

(a) The declaration shall allocate a number of votes in the association to each unit depicted on plats or plans that comply with subsections (a) and (b) of Code Section 44-3-83. The allocation of such votes may be by percentage, fraction, formula, or any other method which indicates the relative voting power allocated to each unit. If an equal vote is allocated to each unit, the declaration may merely so state. All of the votes in the association shall be allocated among the units depicted on such plats or plans and shall be subject to reallocation as provided in this article.

(b) Since a unit owner may be more than one person, if only one of those persons is present at a meeting of the association or is voting by proxy, ballot, or written consent, that person shall be entitled to cast the votes pertaining to that unit. However, if more than one of those persons is present or executes a proxy, ballot, or written consent, the vote pertaining to that unit shall be cast only in accordance with their unanimous agreement unless the condominium instruments expressly provide otherwise; and such consent shall be conclusively presumed if any one of them purports to cast the votes pertaining to that unit without protest being made

immediately by any of the others to the person presiding over the meeting or vote.

(c) The votes pertaining to any unit may, and, in the case of any unit owner not a natural person or persons, shall, be cast pursuant to a proxy or proxies duly executed by or on behalf of the unit owner or, in cases where the unit owner is more than one person, by or on behalf of the joint owners of the unit. No such proxy shall be revocable except as provided in Code Section 14-2-722 or 14-3-724 or by written notice delivered to the association by the unit owner or by any joint owners of a unit. Any proxy shall be void if it is not dated or if it purports to be revocable without such notice.

(d) Except in the case of any condominium of which no part is restricted exclusively to residential use, if 50 percent or more of the votes in the association pertain to 25 percent or less of the condominium units, then in any case where a majority vote is required by the condominium instruments or by this article the requirement for such a majority shall be deemed to include, in addition to the specified majority of the votes, assent by the unit owners of a like majority of the condominium units.

(e) Anything in this Code section to the contrary notwithstanding, no votes in the association shall be deemed to pertain to any condominium unit during such time as the unit owner thereof is the association nor shall any vote be allocated to any condominium unit unless the condominium unit is depicted on plats or plans that comply with subsections (a) and (b) of Code Section 44-3-83. Except to the extent otherwise expressly provided or permitted by this article, the votes allocated to any condominium unit shall not be altered. (Ga. L. 1975, p. 609, § 16; Ga. L. 1982, p. 3, § 44; Ga. L. 2004, p. 560, § 2.)

JUDICIAL DECISIONS

Combining parking units with residential units held proper. — Condominium declaration properly allocated interests in the common elements under O.C.G.A. § 44-3-78(a), and the votes in the condominium association under O.C.G.A. § 44-3-79(a), by combining parking units with residential units, because no provision of the Georgia Condominium Act, O.C.G.A. § 44-3-70 et seq., requires parking units to have voting rights or to have an interest in the common elements that is independent of or separate from the rights and interests of residential units or service units. Park Regency Ptnrs., L.P. v. Gruber, 271 Ga. App. 66, 608 S.E.2d 667 (2004).

RESEARCH REFERENCES

Am. Jur. 2d. — 15A Am. Jur. 2d, Condominiums and Cooperative Apartments, § 24 et seq. 23 Am. Jur. 2d, Deeds, § 192 et seq.

C.J.S. — 51C C.J.S., Landlord and Tenant, § 232.

44-3-80. Allocation — Liability for common expenses; how assessments made.

(a) Except to the extent that the condominium instruments provide otherwise, any common expenses associated with the maintenance, repair, renovation, restoration, or replacement of any limited common element shall be specially assessed against the condominium unit to which that limited common element was assigned at the time the expenses were made or incurred; however, if any limited common element was assigned at that time to more than one unit, the common expenses shall be specifically assessed against each condominium unit equally so that the total of the special assessments equals the total of the expenses.

(b) To the extent that the condominium instruments expressly so provide:

(1) Any other common expenses benefiting less than all of the units shall be specially assessed equitably among all of the condominium units so benefited;

(2) Any other common expenses occasioned by the conduct of less than all of those entitled to occupy all of the units or by the licensees or invitees of any such unit or units shall be specially assessed against the condominium unit or units, the conduct of any occupant, licensee, or invitee of which occasioned any such common expenses;

(3) Any other common expenses significantly disproportionately benefiting all of the units shall be assessed equitably among all of the condominium units; and

(4) Other than for limited common elements expressly designated as such in the condominium instruments and assigned to fewer than all units, nothing contained in paragraph (1) or (3) of this subsection shall permit an association to specially or disproportionately allocate common expenses for periodic maintenance, repair, and replacement of any portion of the common elements or the units which the association has the obligation to maintain, repair, or replace.

(c) The amount of all common expenses not specially assessed pursuant to subsection (a) or (b) of this Code section, less the amount of all undistributed and unreserved common profits, shall be assessed against the condominium units in accordance with the allocation of liability for common expenses set forth in the declaration. The allocation may be by percentage, fraction, formula, or any other method which indicates the relative liabilities for common expenses. If an equal liability for common expenses is allocated to each unit, the declaration may merely so state. The entire liability for common expenses shall be allocated among the units depicted on plats or plans that comply with subsections (a) and (b) of Code Section 44-3-83 and shall be subject to reallocation as provided in this

article. Except to the extent otherwise expressly provided or permitted by this article, the allocations of the liability shall not be altered; provided, however, that no reallocation shall affect any assessment or installation thereof becoming due and payable prior to reallocation. The assessments shall be made by the association annually or more often if the condominium instruments so provide and shall be payable in the manner determined by the association. Notwithstanding any unequal allocation of liabilities for common expenses pursuant to this subsection, this provision shall not preclude the association from levying charges equally among units for services or items provided to owners upon request, or which provide proportionate or uniform benefit to the units, including, but not limited to, uniform charges for pool keys or other common element entry devices.

(d)(1) The declarant shall pay for all common expenses until the first common expense assessment is due from any unit owner. Thereafter, no unit owner other than the association shall be exempted from any liability for any assessment under this Code section or under any condominium instrument for any reason whatsoever, including, without limitation, abandonment, nonuse, or waiver of the use or enjoyment of his or her unit or any part of the common elements.

(2) Notwithstanding paragraph (1) of this subsection, if authorized by the declaration, a declarant who is offering units for sale may elect to be excused from payment of assessments assessed pursuant to subsection (c) of this Code section against those unsold and unoccupied units for a stated period of time after the original declaration is recorded, not to exceed 24 months after the date the original declaration is recorded; provided, however, that as to assessments assessed pursuant to subsection (c) of this Code section, the declarant must pay common expenses incurred during such period which exceed the amounts assessed against other unit owners in the same condominium. During any period in which the declarant is excused from payment of assessments assessed pursuant to subsection (c) of this Code section:

(A) No capital contributions, start-up funds, initiation fees, or contributions to capital reserve accounts which are receivable from unit purchasers or unit owners and payable to the association at closing may be used for payment of common expenses;

(B) No portion of the payment of assessments collected from owners intended to be utilized for reserves for deferred maintenance, reserves for depreciation, or other reserves, as shown on the operating budget for the condominium, may be used for payment of common expenses; and

(C) No prepayments of assessments made by owners shall be used for the payment of common expenses prior to the time the assessments would otherwise be due.

(3) If during the period that the declarant is excused from payment of assessments as provided in paragraph (2) of this subsection common expenses are incurred resulting from a casualty which is not covered by proceeds from insurance maintained by the association, such common expenses shall be assessed against all unit owners owning units on the date of such casualty, and their respective successors and assigns, including the declarant with respect to units owned by the declarant. In the event of such an assessment, all units shall be assessed in accordance with the allocation of the liability for common expenses set forth in the declaration as provided in subsection (c) of this Code section.

(4) During any such time as the declarant has the right to control the association pursuant to Code Section 44-3-101, any capital contributions, start-up funds, initiation fees, or contributions to capital reserve accounts which are receivable from unit purchasers or unit owners and payable to the association at closing and any portion of the payment of assessments collected from owners intended to be utilized for reserves for deferred maintenance, reserves for depreciation, or other reserves, as shown on the operating budget for the condominium, shall be deposited into one or more separate reserve accounts and shall not be used to pay for any common expenses, without the agreement of the unit owners of units to which two-thirds of the votes in the association pertain, exclusive of any vote or votes appurtenant to any unit or units then owned by the declarant. No waiver of the right of any unit owner to grant or withhold consent to such agreement shall be valid.

(e) Unless otherwise provided in the condominium instruments and except as provided in subsection (f) of this Code section, the grantee in a conveyance of a condominium unit shall be jointly and severally liable with the grantor thereof for all unpaid assessments against the latter up to the time of the conveyance without prejudice to the grantee's right to recover from the grantor the amounts paid by the grantee therefor; provided, however, that, if the grantor or grantee shall request a statement from the association as provided in Code Section 44-3-109, such grantee and his successors, successors-in-title, and assigns shall not be liable for nor shall the condominium unit conveyed be subject to a lien for any unpaid assessments against such grantor in excess of any amount set forth in the statement.

(f) In the event that the holder of a first priority mortgage or a secondary purchase money mortgage of record, provided that neither the grantee nor any successor grantee on the secondary purchase money mortgage is the seller of the unit, or any other person acquires title to any condominium unit as a result of foreclosure of any such mortgage, such holder or other person and successors, successors-in-title, and assigns shall not be liable for nor shall the condominium unit be subject to a lien for any assessment under this Code section or under any condominium instrument chargeable to the condominium unit on account of any period prior to the

acquisition of title; provided, however, that the unpaid share of an assessment or assessments shall be deemed to be common expenses collectable from all of the unit owners, including such holder or other person and successors, successors-in-title, and assigns.

(g) A condominium instrument recorded on or after July 1, 1990, shall not authorize the board of directors to impose:

(1) Except as provided in subsections (a) and (b) of this Code section and subsections (a) and (b) of Code Section 44-3-109, a special assessment fee per unit in excess of an average of $200.00 per fiscal year without the approval of a majority of the unit owners; or

(2) A monthly maintenance fee increase in excess of the percentage equal to the annual rate of inflation as measured by the Consumer Price Index for All Urban Consumers for the immediately preceding 12 month period may be disapproved by unit owners holding a majority of the association vote. (Ga. L. 1975, p. 609, § 17; Ga. L. 1990, p. 227, § 3; Ga. L. 1994, p. 1943, §§ 3, 4; Ga. L. 2004, p. 560, § 3; Ga. L. 2007, p. 611, § 2/HB 383.)

Law reviews. — For article, ''Recommended Changes in the Law Affecting Condominium and Homeowner Associations in Georgia,'' see 1 Ga. St. U.L. Rev. 185 (1985).

JUDICIAL DECISIONS

Liability of unit owner for assessment. — Language of subsection (d) of O.C.G.A. § 44-3-80 is plain and susceptible of only one interpretation, that there is no legal justification for a condominium owner to fail to pay valid condominium assessments; this reflects a clear choice by the legislature that the owner's obligation to pay assessments be absolute and a condominium unit owner involved in a dispute with the condominium association about the association's services and operations may not exert leverage in that controversy by withholding payment but must seek another remedy. Forest Villas Condominium Ass'n v. Camerio, 205 Ga. App. 617, 422 S.E.2d 884 (1992).

Collective owners of a condominium unit are liable for the unit's portion of the total assessment levied on all units, not just to the extent of their individual ownership; thus, an owner of a one percent interest in a unit was jointly and severally liable for all assessments levied while the person was a co-owner. Chattahoochee Chase Condominium Ass'n v. Ruben, 221 Ga. App. 724, 472 S.E.2d 520 (1996).

While O.C.G.A. § 44-3-80 provides a mechanism to impose a special assessment to the extent that the condominium instruments expressly so provide, when none of the condominium instruments provided for a special assessment against some but not all of the unit owners, general assessments were not invalid, and the trial court erred in denying the condominium association's motion for summary judgment. Atlanta Georgetown Condominium Ass'n v. Chaplin, 235 Ga. App. 460, 509 S.E.2d 729 (1998).

Liability of foreclosing mortgagee. — While a foreclosing mortgagee is clearly not liable nor is its property interest subject to a lien for any assessment, it is obligated to pay a pro rata amount of that ''unpaid share'' which becomes a part of the common expenses, but the condominium association would not be entitled to recover from the foreclosing mortgagee a pro rata share of the elements enumerated in O.C.G.A. § 44-3-109(b) because those elements arise only from the lien which results from the failure to make a timely payment of assessments. First Fed. Sav. Bank v. Eaglewood

Court Condominium Ass'n, 186 Ga. App. 605, 367 S.E.2d 876, cert. denied, 186 Ga. App. 918, 367 S.E.2d 876 (1988).

Liability of secondary purchase-money mortgagee. — Even though a secondary purchase-money mortgagee did not sell the condominium unit directly to the debtor who eventually failed to pay the mortgage or condominium fees and assessments, the association's lien was superior to the mortgage, and the mortgagee, as the seller of the unit, was liable for preforeclosure fees and assessments. Dunhill Condominium Ass'n v. Gregory, 228 Ga. App. 494, 492 S.E.2d 242 (1997).

Characterization of payments as other than assessments. — Condominium association may not sidestep the clear dictates of O.C.G.A. § 44-3-80 by merely characterizing payments asked for as something other than condominium assessments. The expenditures, whatever called, are the type of payments covered by the statute. Accordingly, the trial court concluded that the association's complaint was preempted by O.C.G.A. § 44-3-80 and granted defendant's motion to dismiss with prejudice. Kingsmill Village Condominium Ass'n v. Homebanc Fed. Sav. Bank, 204 Ga. App. 900, 420 S.E.2d 771 (1992).

Procedural fairness. — When a condominium's board of directors determined that owners received a benefit from the services of a contractor in attempting to maintain certain occupancy rates, and no evidence was submitted showing the board's decision was procedurally unfair, unreasonable, or made in bad faith, the trial court erred in denying the condominium association's motion for summary judgment. Atlanta Georgetown Condominium Ass'n v. Chaplin, 235 Ga. App. 460, 509 S.E.2d 729 (1998).

Cited in Casey v. North Decatur Courtyards Condominium Ass'n, 213 Ga. App. 190, 444 S.E.2d 361 (1994).

RESEARCH REFERENCES

Am. Jur. 2d. — 15A Am. Jur. 2d, Condominiums and Cooperative Apartments, § 29 et seq. 23 Am. Jur. 2d, Deeds, § 192 et seq.

C.J.S. — 51C C.J.S., Landlord and Tenant, § 232.

ALR. — Proper party plaintiff in action for injury to common areas of condominium development, 69 ALR3d 1148.

Expenses for which condominium association may assess unit owners, 77 ALR3d 1290.

44-3-81. Reallocation of interests in common elements, votes, and liability for common expenses.

(a) Interests in the common elements shall not be allocated to any units to be created within any additional property until plats or plans depicting the same are recorded pursuant to subsection (c) of Code Section 44-3-83. Upon the submission of any additional property, the declarant shall execute and record an amendment to the declaration reallocating undivided interests in the common elements, votes in the association, and liabilities for common expenses in the manner provided in the declaration.

(b) If all of a convertible space is converted into common elements, including, without limitation, limited common elements, the undivided interest in the common elements pertaining to such convertible space shall then pertain to the remaining units and shall be allocated among them in proportion to their undivided interests in the common elements. In the case of the conversion of all or any portion of any convertible space into one or more units or common elements, including, without limitation, limited common elements, the undivided interests in the common elements, the

votes in the association, and the liability for common expenses shall be reallocated in the manner provided in the declaration. The declarant shall immediately prepare, execute, and record an amendment to the declaration effecting the reallocation of undivided interests produced thereby.

(c) In the case of a leasehold condominium, upon the expiration or termination of any leasehold or estate for years with respect to any land upon or within which any unit exists, every such unit together with all common elements located upon or within such leasehold or estate for years shall be deemed to have been withdrawn from the condominium unless the declaration provides for the termination of the condominium in such event. The undivided interest in the common elements pertaining to any unit thereby withdrawn from the condominium shall then pertain to the remaining units and shall be allocated among them in proportion to their undivided interests in the common elements. The association shall immediately prepare, execute, and record an amendment to the declaration effecting the reallocation of undivided interests produced thereby. In the case of the reduction of a condominium on account of the expiration or termination of a leasehold or estate for years, all votes attributable to any unit located upon such property immediately prior to such reduction shall thereby be eliminated; in addition, the liability for common expenses pertaining to any such unit shall be allocated to the remaining units in proportion to their relative liabilities for common expenses. (Ga. L. 1975, p. 609, § 18.)

RESEARCH REFERENCES

Am. Jur. 2d. — 15A Condominiums and Cooperative Apartments, § 32 et seq. 23 Am. Jur. 2d, Deeds, § 221 et seq.

C.J.S. — 51C C.J.S., Landlord and Tenant, § 232.

ALR. — Validity and construction of condominium association's regulations governing members' use of common facilities, 72 ALR3d 308.

44-3-82. Assignments and reassignments of limited common elements.

(a) All assignments and reassignments of limited common elements shall be made or provided for in the condominium instruments. No limited common element shall be assigned or reassigned except in accordance with this article. No amendment to any condominium instrument shall alter any rights or obligations with respect to any limited common element without the consent of all unit owners whose use of the limited common element is or may be directly affected by the assignment or reassignment, as evidenced by their execution of the amendment, except to the extent that the condominium instruments expressly provided otherwise prior to or simultaneously with the first assignment of the limited common element.

(b) Unless expressly prohibited by the condominium instruments, a limited common element may be reassigned upon written application to

the association by the owners of units to which the limited common element appertains and the owners of units to which the limited common element is being reassigned. The association shall immediately prepare and execute an amendment to the declaration reassigning all rights and obligations with respect to the limited common element involved. Such amendment shall be delivered immediately to the owners of the units to which the limited common element appertains and the owners of units to which the limited common element is being reassigned and upon payment by them of all reasonable costs for the preparation, execution, and recordation thereof. The amendment shall become effective when the association and the owners of the units to which the limited common element appertains and the owners of units to which the limited common element is being reassigned have executed and recorded the same. No vote of the unit owners shall be necessary for the amendment provided in this Code section to be executed by the association.

(c) A common element not previously assigned as a limited common element shall be so assigned only pursuant to the declaration. The amendment to the declaration making such an assignment shall be prepared and executed by the association. The amendment shall be delivered to the unit owner or owners to whose unit the assignment is being made upon payment by them of all reasonable costs for the preparation, execution, and recordation thereof. The amendment shall become effective after execution by the association and such unit owner or owners and recordation, and the recordation thereof shall be conclusive evidence that the method prescribed pursuant to the declaration was adhered to. Unless otherwise required by the condominium instruments, no vote of the unit owners shall be necessary for the amendment provided in this Code section to be executed by the association. (Ga. L. 1975, p. 609, § 19; Ga. L. 1990, p. 227, § 4; Ga. L. 1994, p. 1943, § 5.)

Law reviews. — For article, ''Recommended Changes in the Law Affecting Condominium and Homeowner Associations in Georgia,'' see 1 Ga. St. U.L. Rev. 185 (1985).

JUDICIAL DECISIONS

Defining "common element" versus "limited common element." — External water spigots were not ''limited common elements'' because the spigots were not assigned as such in the condominium documents as required by O.C.G.A. § 44-3-82. Since the spigots were not ''limited common elements,'' use of the spigots could be restricted under O.C.G.A. § 44-3-76 to enforce condominium declarations. Frantz v. Piccadilly Place Condo. Ass'n, 278 Ga. 103, 597 S.E.2d 354 (2004).

Rooftop terrace declared common element versus limited common element. — Trial court properly granted a condominium association and the association's board summary judgment and properly declared a tenth-floor rooftop terrace a common element for all unit owners in a suit involving a dispute over the terrace because the express terms of the original declaration designated the terrace as a common element. Further, an amendment stating otherwise that was signed by a former managing member, and not the association, no longer controlled since the former managing member's control ended by the time the declarant sought to amend the declaration to assign the entire

fenced area of the tenth-floor rooftop terrace as a limited common element benefitting only the penthouse unit. Walker v. 90 Fairlie Condo. Ass'n, 290 Ga. App. 171, 659 S.E.2d 412 (2008).

Exclusive use of courtyard. — Under O.C.G.A. § 44-3-82(a), a title insurer could be found to have insured an exclusive interest in a condominium courtyard by the owners of Unit 5 only if the condominium declaration assigned the courtyard to Unit 5 as a limited common element; as the declaration did not do so, the title policy did not insure the unit owners for an exclusive interest in the courtyard. Anderson v. Commonwealth Land Title Ins. Co., 284 Ga. App. 572, 644 S.E.2d 414 (2007).

RESEARCH REFERENCES

Am. Jur. 2d. — 6 Am. Jur. 2d, Assignments, §§ 1 et seq., 9 et seq. 15A Am. Jur. 2d, Condominiums and Cooperative Apartments, § 29 et seq. 23 Am. Jur. 2d, Deeds, § 192 et seq.

C.J.S. — 6A C.J.S., Assignments, §§ 1 et seq., 123 et seq. 51C C.J.S., Landlord and Tenant, § 232.

44-3-83. Recording of plats and plans; contents; completion of structural improvements; certification by registered architect or engineer.

(a) Prior to the first conveyance of a condominium unit, there shall be recorded one or more plats of survey showing the location and dimensions of the submitted property; the location and dimensions of all structural improvements located on any portion of the submitted property; the intended location and dimensions of all contemplated structural improvements committed to be provided by the declaration on any portion of the submitted property; and, to the extent feasible, the location and dimensions of all easements appurtenant to the submitted property or otherwise submitted to this article as part of the common elements. With respect to all such structural improvements, the plats shall indicate which, if any, have not been begun by use of the phrase ''NOT YET BEGUN.'' No structural improvement which contains or constitutes all or part of any unit or units and which is located on any portion of the submitted property shall be commenced on any portion of the submitted property after the recording of the plats. The declarant shall complete all structural improvements depicted on the plats, subject only to such limitations, if any, as may be expressly stated in the declaration with respect to those labeled ''NOT YET BEGUN'' on the plats, provided that, within six months after written notice from the association, the declarant shall be obligated to complete within a reasonable time every structural improvement actually commenced on the submitted property, notwithstanding any provision of the declaration, unless the declarant removes within a reasonable time all portions of any such structural improvement and restores the surface of the land affected thereby to substantially the same condition as that which existed prior to commencement of any such structural improvement; and provided, further, that nothing contained in this sentence shall exempt the declarant from any contractual liability to complete any such structural improvement. If the submitted property consists of noncontiguous parcels, the plats shall

indicate the approximate distances between such parcels unless such information is disclosed in the declaration. If, with respect to any portion or portions, but less than all, of the submitted property, the unit owners are to own only a leasehold or estate for years, the plats shall show the location and dimensions of any such portion or portions and shall label each such portion by use of the phrase ''LEASED LAND.'' To the extent feasible, the plats shall show all easements to which the submitted property or any portion thereof is subject. The plats shall also show all encroachments by or on any operation of the submitted property. In the case of any units which have vertical boundaries lying wholly or partially outside of structures for which plans pursuant to subsection (b) of this Code section are recorded, the plats shall show the location and dimensions of the vertical boundaries to the extent that they are not shown on the plans; and the units or portions thereof thus depicted shall bear their identifying numbers. Each plat shall be certified as to its accuracy and compliance with this subsection by a registered land surveyor. The specification within this subsection of items that shall be shown on the plats shall not be construed to mean that the plats shall not also show all other items customarily shown or required by law to be shown for land title surveys.

(b) There shall be recorded prior to the first conveyance of a condominium unit:

(1) Plans which have been prepared, signed, and sealed by a registered architect or registered engineer of every structure which contains or constitutes all or part of any unit or units located on or within any portion of the submitted property, which plans shall show:

(A) The location and dimensions of the exterior walls and roof of such structures;

(B) The walls, partitions, floors, and ceilings as constitute the horizontal boundaries, if any, and the vertical boundaries of each unit, including convertible space, to the extent that such boundaries lie within or coincide with the boundaries of such structures; and

(C) The identifying numbers of all units or portions thereof depicted on the plans; and

(2) A certification by such architect or engineer to the effect that he has visited the site and viewed the property and that, to the best of his knowledge, information, and belief:

(A) The exterior walls and roof of each structure are in place as shown on the plans; and

(B) Such walls, partitions, floors, and ceilings, to the extent shown on said plans, as constitute the horizontal boundaries, if any, and the vertical boundaries of each unit, including convertible space, have

been sufficiently constructed so as to establish clearly the physical boundaries of such unit.

In addition, each convertible space depicted in the plans shall be labeled as such by use of the phrase ''CONVERTIBLE SPACE.'' Unless the condominium instruments expressly provide otherwise, it shall be presumed that, in the case of any unit not wholly contained within or constituting one or more of the structures, the horizontal boundaries extend, in the case of each unit, at the same elevation with regard to any part of such unit lying outside of such structures, subject to the following exception: in the case of any unit which does not lie over any other unit other than basement units, it shall be presumed that the lower horizontal boundary, if any, of that unit lies at the level of the ground with regard to any part of that unit lying outside of the structures. This subsection shall apply to any condominium created on or after July 1, 1980, or to the expansion of any such condominium.

(b.1) There shall be recorded prior to the first conveyance of a condominium unit plans of every structure which contains or constitutes all or part of any unit or units located on or within any portion of the submitted property and a certification by a registered architect or registered engineer to the effect that he has visited the site and viewed the property and that, to the best of his knowledge, information, and belief:

(1) The foundation, structural members, exterior walls, and roof of each such structure are complete and in place as shown on the plans;

(2) The walls, partitions, floors, and ceilings, to the extent shown on the plans, as constituting or coinciding with the vertical and horizontal boundaries of each unit, including convertible space, within each such structure, are sufficiently complete and in place to establish clearly the physical boundaries of such unit and that such physical boundaries are as shown on the plans; and

(3) Each such structure, to the extent of its stage of completion at that time, is constructed substantially in accordance with such plans.

The plans shall show the location and dimensions of the horizontal boundaries, if any, and the vertical boundaries of each unit to the extent that such boundaries lie within or coincide with the boundaries of such structures, and the units, or portions thereof, thus depicted shall bear their identifying numbers. In addition, each convertible space depicted in the plans shall be labeled as such by use of the phrase ''CONVERTIBLE SPACE.'' Unless the condominium instruments expressly provide otherwise, it shall be presumed that, in the case of any unit not wholly contained within or constituting one or more of the structures, the horizontal boundaries extend, in the case of each unit, at the same elevation with regard to any part of such unit lying outside of such structures, subject to the following exception: in the case of any unit which does not lie over any other unit other than basement units, it shall be presumed that the lower

horizontal boundary, if any, of that unit lies at the level of the ground with regard to any part of that unit lying outside of the structures. This subsection shall apply to any condominium created prior to July 1, 1980, or to the expansion of any such condominium.

(c) Prior to the first conveyance of a condominium unit located on any portion of any additional property being or having been added to an expandable condominium, there shall be recorded new plats of survey conforming to the requirements of subsection (a) of this Code section and, with regard to any structures on the property being or having been added, plans conforming to the requirements of subsection (b) of this Code section or certifications, conforming to the certification requirements of subsection (b) of this Code section, of plans previously recorded pursuant to Code Section 44-3-84.

(d) When converting all or any portion of any convertible space into one or more units or limited common elements, the declarant shall record, with regard to the structure or portion thereof constituting that convertible space, plans showing the location and dimensions of the horizontal boundaries, if any, and the vertical boundaries of each unit formed out of such space. The plans shall be certified by a registered architect or registered engineer in accordance with the certification requirements of subsection (b) of this Code section.

(e) When any portion of the submitted property is withdrawn, there shall be recorded a plat or plats showing the portion of the submitted property withdrawn and the remaining submitted property, which plat or plats shall be certified as provided in subsection (a) of this Code section. (Ga. L. 1975, p. 609, § 20; Ga. L. 1980, p. 1406, § 3; Ga. L. 1982, p. 3, § 44; Ga. L. 1983, p. 3, § 33; Ga. L. 1984, p. 22, § 44.)

JUDICIAL DECISIONS

Applicability. — There was no merit to a condominium development buyer's argument that the third amendment to the declaration of condominium, which restricted building on Phase IV of the development to 30 units, was a nullity because it did not comply with O.C.G.A. § 44-3-83; the requirements of § 44-3-83 had to be met prior to the first conveyance of a unit, and as there was no evidence of any attempted conveyance of any of the proposed units in Phase IV, the buyer's contention was premature. Waterfront, LLP v. River Oaks Condo. Ass'n, 287 Ga. App. 442, 651 S.E.2d 481 (2007), cert. denied, 2008 Ga. LEXIS 78 (Ga. 2008).

Subsequent use not misappropriation. — Subsequent use of architect's design plans by owners was authorized by the terms of their contract with the architects and was not a misappropriation. Wright v. Tidmore, 208 Ga. App. 150, 430 S.E.2d 72 (1993).

Adaptation of plans not misappropriation. — Adaptation of plans in order to satisfy the requirements of subsection (b) of O.C.G.A. § 44-3-83 were minimal, and in no way plagiarized the mental labors of architects making the plans. Wright v. Tidmore, 208 Ga. App. 150, 430 S.E.2d 72 (1993).

44-3-84. Use of previously recorded plans in lieu of new plans.

Plans previously recorded pursuant to subsection (b) of Code Section 44-3-77 may be used in lieu of new plans to satisfy in whole or in part the requirements of Code Section 44-3-89 if certifications thereof are recorded by the declarant in accordance with subsection (c) of Code Section 44-3-83. (Ga. L. 1975, p. 609, § 21.)

44-3-85. Liability for failure to follow plats or plans; easements; liability for damage.

(a) The purpose of this Code section is to protect the unit owners, except in cases of willful and intentional misconduct by them or their agents or employees, and not to relieve the declarant or any contractor, subcontractor, or materialman of any liability which any of them may have by reason of any failure to adhere to the plats or plans.

(b) To the extent that any unit or common element encroaches on any other unit or common element, whether by reason of any deviation from the plats or plans in the construction, repair, renovation, restoration, or repair of any improvement or by reason of the settling or shifting of any land or improvement, a valid easement for such encroachment shall exist.

(c) The declarant and his duly authorized agents, representatives, and employees shall have an easement for the maintenance of sales offices and model units on the submitted property so long as the declarant owns any condominium unit primarily for the purpose of sale.

(d) Subject to any restrictions and limitations which the condominium instruments may specify, the declarant shall have a transferable easement on and over the common elements for the purpose of making improvements contemplated by the condominium instruments on the submitted property and any additional property and for the purpose of doing all things reasonably necessary and proper in connection therewith.

(e) This Code section shall not be construed so as to prohibit the reservation to the declarant of other easements by means of the condominium instruments or otherwise.

(f) To the extent that damage is inflicted on any part of the condominium by the declarant or by any contractor, subcontractor, or materialman utilizing the easements reserved by the condominium instruments to the declarant or created by this Code section, the declarant together with the person or persons causing the damage shall be jointly and severally liable for the prompt repair thereof and for the restoration of the same to a condition compatible with the remainder of the condominium. (Ga. L. 1975, p. 609, § 22; Ga. L. 1982, p. 3, § 44.)

44-3-86. Leasehold condominiums; lessor's rights and powers; owner's rights and powers; liens; performance of covenants.

(a) As used in this Code section, the term ''lessor'' means any lessor, sublessor, or grantor of an estate for years.

(b) In the case of any leasehold condominium:

(1) After the recording of the declaration, no lessor who executed the declaration and no successor-in-interest to the lessor shall have any right or power to terminate all or any part of the leasehold interest of any unit owner so long as the condominium shall exist;

(2) In the event that any such lessor shall acquire title to or any other interest in any unit by any method whatsoever, the undivided interest thereby acquired by the lessor in the common elements shall not be merged with the lessor's underlying interest in the submitted property; but the two estates shall remain separate and divided so long as the condominium shall exist;

(3) If provided for in the condominium instruments, the obligation of each unit owner to pay rents and any other amounts under any lease from any lessor shall be secured by a lien upon the condominium unit of the unit owner. The lien shall be prior to all other liens and encumbrances on that condominium unit except liens for ad valorem taxes; and any other lien or encumbrance which the condominium instruments provide shall be superior thereto. The lien shall secure all costs incurred, including, without limitation, reasonable attorney's fees, in connection with the foreclosure thereof and may be foreclosed by action, judgment, and foreclosure in the same manner as is provided for any other lien for the improvement of real property;

(4) Unless otherwise provided in the condominium instruments and except as provided in paragraph (5) of this Code section, no unit owner shall be obligated to pay any amount in excess of the rents due and payable under any lease multiplied by the percentage or other proportion of the unit owner's liability for the rents as set forth in the declaration;

(5) Unless otherwise provided in the condominium instruments, no lessor shall be entitled to require performance by any unit owner of any covenant of any such lease in any form other than by the payment of money by the unit owner; provided, however, that, in the event of any default under any lease other than default in the payment of money, the lessor shall be entitled to perform any defaulted covenant and charge all reasonable costs incurred in connection with performance, including, without limitation, reasonable attorney's fees, against the unit owners in proportion to their liability for the rents, which costs shall be considered

rent for purposes of the lien provided for in paragraph (3) of this Code section; and

(6) Except as limited in this Code section, in the condominium instruments, or by law, any lessor shall have all rights and powers provided by law or by his lease. (Ga. L. 1975, p. 609, § 23; Ga. L. 1982, p. 3, § 44.)

44-3-87. Conversion condominiums; notice; offer to convey; time periods; rights of tenant.

(a) The declarant of a conversion condominium shall deliver notice of the conversion to each tenant in possession of a unit which is subject to this article. The notice must be delivered at least 120 days before the declarant will require the tenant to vacate the unit. The notice must set forth generally the rights of tenants under this Code section. The tenant may not be required by the declarant to vacate the unit at any time during the 120 day period except by reason of nonpayment of rent, waste, or conduct which disturbs other tenants' peaceful enjoyment of the premises, and the terms of the tenancy may not be altered during said period; provided, however, that any notice which, under the terms of such tenancy, is required to be given to prevent the automatic renewal or extension of the term of such tenancy may be given during said period. Failure of the declarant to give notice as required by this Code section shall constitute a defense to an action by the declarant for possession initiated less than 120 days after proper delivery of such a notice.

(b) Within 60 days after delivery of the notice described in subsection (a) of this Code section, the declarant shall deliver to the tenant an offer to convey the unit to the tenant at a specified price and on specified terms. If the tenant fails to deliver to the declarant acceptance of the offer within 60 days after delivery of the offer to the tenant, the declarant may not offer to convey the unit, during the 120 days following the date on which delivery is made of the offer to convey to the tenant, at a price or on terms more favorable to the offeree than the price or terms offered to the tenant, without first delivering the same offer to the tenant, who shall have at least ten days within which to deliver to the declarant acceptance of such offer.

(c) Notices and offers required or permitted to be delivered to a tenant by subsections (a) and (b) of this Code section may be hand delivered to the tenant, hand delivered to the unit, or posted in the United States mail, postage prepaid, or sent by statutory overnight delivery, addressed to the tenant at the address of the unit. Acceptances permitted to be delivered to a declarant by subsection (b) of this Code section may be hand delivered to the declarant, hand delivered to an authorized representative of the declarant, or posted in the United States mail, postage prepaid, addressed to the declarant at the address specified in the offer made by the declarant. Any notices, offers, or acceptances sent by registered or certified mail or

statutory overnight delivery, return receipt requested, shall be presumed conclusively to have been delivered when posted in the United States mail or delivered to the commercial delivery company, postage and fees prepaid, addressed as provided in this subsection, in which event the postmark date or date of receipt by the commercial delivery company of any such registered or certified mail or statutory overnight delivery or any receipt related thereto shall be the date of delivery for purposes of this Code section.

(d) Subsections (a) and (b) of this Code section shall not apply to any unit in a conversion condominium if the boundaries of the unit do not substantially conform to the boundaries of the unit before conversion. Subsections (a) and (b) of this Code section shall apply only to tenants who are not in default under valid and subsisting leases with the declarant or a predecessor in title of the declarant and who are in possession of and are actually occupying for residential purposes units within the conversion condominium both at the time of recording of the declaration and at the time the notice provided for in subsection (a) of this Code section are delivered.

(e) Prior to or simultaneously with delivery of the offer of sale of a unit to a tenant as provided in subsection (b) of this Code section, the declarant shall deliver to the tenant the items required to be furnished to a prospective purchaser by subsection (b) of Code Section 44-3-111.

(f) If a declarant conveys a unit to a purchaser in violation of subsection (b) of this Code section, recordation of the deed conveying the unit shall extinguish any right a tenant may have under subsection (b) of this Code section to purchase the unit but shall not affect any rights of any person to recover damages from the declarant for a violation of subsection (b) of this Code section.

(g) If the notice of conversion should specify a date by which the unit must be vacated, the notice will also constitute demand for possession pursuant to Code Section 44-7-50.

(h) Nothing in this Code section permits termination of a lease by a declarant in violation of its terms.

(i) The rights and obligations of the declarant and the tenant during any period of extended occupancy by the tenant pursuant to subsection (a) of this Code section shall be the same as the rights and obligations of said persons prior to any such period of extended occupancy.

(j) This Code section shall not apply to any condominium created prior to July 1, 1980, or to the expansion of any such condominium. (Ga. L. 1980, p. 1406, § 4; Ga. L. 1982, p. 3, § 44; Ga. L. 1983, p. 3, § 33; Ga. L. 2000, p. 1589, § 11.)

Editor's notes. — Ga. L. 2000, p. 1589, § 16, not codified by the General Assembly, provides that the amendment to this Code section is applicable with respect to notices delivered on or after July 1, 2000.

Code Commission notes. — Pursuant to § 28-9-5, in 1988, a comma was inserted following ''representative of the declarant'' near the end of the second sentence of subsection (c).

RESEARCH REFERENCES

ALR. — Validity and construction of law regulating conversion of rental housing to condominiums, 21 ALR4th 1083.

44-3-88. Conversion of convertible spaces; amendment to declaration effecting conversion; reallocation of sums assessed prior to conversion; treatment of convertible space not converted.

(a) With the consent of the mortgagees thereof, the declarant may convert all or any portion of any convertible space into one or more units or common elements, including, without limitation, limited common elements, subject to any restrictions and limitations which the condominium instruments may specify. Any conversion shall be deemed to have occurred at the time of the recordation of appropriate instruments pursuant to subsection (b) of this Code section and subsection (d) of Code Section 44-3-83.

(b) The declarant and all mortgagees of the convertible space shall execute and the declarant shall record an amendment to the declaration effecting the conversion. The amendment shall assign an identifying number to each unit formed out of a convertible space and shall allocate among the unit or units and the remaining convertible space, if any, the undivided interest in the common elements, the number of votes in the association, and the share of the liability for future common expenses pertaining to the convertible space immediately prior to the conversion. All sums assessed against a convertible space prior to its conversion may be reallocated by the amendment to the units and the remaining convertible space, if any. In the event that no reallocation is effected, however, the lien for the assessments shall continue as to all of the space notwithstanding the conversion. The amendment shall describe or delineate the limited common elements, if any, formed out of the convertible space and shall indicate the unit or units to which each is assigned or provide a method for such assignment.

(c) Any convertible space not converted in accordance with this Code section or any portion or portions thereof not so converted shall be treated for all purposes as a single unit unless and until it is so converted; and this article shall be deemed applicable to any space or portion or portions thereof as though the same were a unit. (Ga. L. 1975, p. 609, § 24.)

RESEARCH REFERENCES

Am. Jur. 2d. — 15A Am. Jur. 2d, Condominiums and Cooperative Apartments, § 5 et seq. 23 Am. Jur. 2d, Deeds, § 192 et seq.

C.J.S. — 51C C.J.S., Landlord and Tenant, § 232.

44-3-89. Expansion of condominium; amendment to declaration.

No condominium shall be expanded except in accordance with the provisions of the declaration and this article. Any expansion shall be deemed to have occurred at the time of the recordation of plats or plans pursuant to subsection (c) of Code Section 44-3-83 and an amendment to the declaration effecting the expansion duly executed by the declarant, all other owners or lessees of the additional property being added to the condominium, and all mortgages of the additional property being added to the condominium. The amendment shall contain a legal description by metes and bounds of the additional property being added to the condominium and shall reallocate undivided interests in the common elements, votes in the association, and liabilities for future common expenses all in accordance with the provisions of the declaration. (Ga. L. 1975, p. 609, § 25.)

RESEARCH REFERENCES

Am. Jur. 2d. — 15A Am. Jur. 2d, Condominiums and Cooperative Apartments, § 5 et seq. 23 Am. Jur. 2d, Deeds, § 192 et seq.

C.J.S. — 51C C.J.S., Landlord and Tenant, § 232.

44-3-90. Alterations within units; combining two or more units.

(a) Except to the extent prohibited by the condominium instruments and subject to any restrictions and limitations specified therein, any unit owner may make any improvements or alterations within his unit that do not materially impair the structural integrity of any structure or otherwise materially lessen the support of any portion of the condominium. No unit owner shall do anything which would change the exterior appearance of his unit or of any other portion of the condominium except to such extent and subject to any conditions which the condominium instruments may specify.

(b) If a unit owner acquires an adjoining unit, the unit owner shall have the right to remove all or any part of any intervening partition or to create doorways or other apertures therein, notwithstanding the fact that the partition may in whole or in part be a common element, so long as no portion of any bearing wall or bearing column is materially weakened or removed and no portion of any common elements other than that partition, and other than any chutes, flues, ducts, conduits, wires, or other apparatus contained in the partition which must be relocated by the unit owner if they serve any other part of the condominium, is damaged,

destroyed, or endangered. Alterations permitted by this Code section shall not be deemed an alteration of boundaries within the meaning of Code Section 44-3-91. (Ga. L. 1975, p. 609, § 26.)

RESEARCH REFERENCES

Am. Jur. 2d. — 15A Am. Jur. 2d, Condominiums and Cooperative Apartments, § 5 et seq. 23 Am. Jur. 2d, Deeds, § 192 et seq.

C.J.S. — 51C C.J.S., Landlord and Tenant, § 232.

44-3-91. Relocation of boundaries between units; application for relocation; amendment to declaration; plans and plats; recording.

(a) If the condominium instruments expressly permit the relocation of boundaries between adjoining units, the boundaries between those units may be relocated in accordance with this Code section and any restrictions and limitations which the condominium instruments may specify.

(b) If the unit owners of adjoining units whose respective boundaries may be relocated desire to relocate those boundaries, the association shall, upon written application of the unit owners and the written consent of the mortgagees of the units involved, immediately prepare and execute appropriate instruments pursuant to subsections (c) and (d) of this Code section. No vote of the unit owners shall be necessary for the amendments provided in this Code section to be executed by the association.

(c) An amendment to the declaration shall identify the units involved and shall state that the boundaries between those units are being relocated by agreement of the unit owners thereof. The unit owners of the units involved shall specify in their written application that there shall be no such reallocation or shall specify reallocations between the units involved of the aggregate undivided interest in the common elements, votes in the association, and liabilities for common expenses, or any one or more thereof, pertaining to those units. The amendment to the declaration shall reflect such reallocations or the absence thereof if deemed reasonable by the board of directors. If the reallocations specified by the unit owners of the units involved or the absence thereof is deemed unreasonable by the board of directors, it shall so notify such unit owners and permit them to amend their written application so as to specify reallocations acceptable to the board of directors.

(d) Any plats or plans necessary to show the altered boundaries between the units involved, together with their other boundaries, shall be prepared; and the units depicted thereon shall bear their identifying numbers. The plats or plans shall indicate the new dimensions of the units involved. The plats or plans shall be certified as to their accuracy and compliance with this subsection by a registered land surveyor in the case of any plat and by a registered architect or registered engineer in the case of any plan.

(e) When appropriate instruments have been prepared and executed by the association in accordance with subsections (a) through (d) of this Code section, they shall be delivered immediately to the unit owners of the units involved upon payment by them of all reasonable costs for the preparation, execution, and recordation thereof. The instruments shall become effective when the unit owners of the units involved and the mortgagees of the units have executed them and they have been recorded. The recording of such instruments shall be conclusive evidence that any reallocations made pursuant to subsection (c) of this Code section were reasonable and were approved by the board of directors. Upon recordation, the instruments shall effectuate conveyancing by and between the unit owners of the units involved regardless of whether the instruments contain or provide for the use of conveyancing language.

(f) Any relocation of boundaries between adjoining units shall be governed by this Code section and not by Code Section 44-3-92. Code Section 44-3-92 shall apply only to the subdivision of units which are intended to result in the creation of two or more new units in place of the subdivided unit. (Ga. L. 1975, p. 609, § 27; Ga. L. 1990, p. 227, § 5; Ga. L. 1991, p. 94, § 44.)

RESEARCH REFERENCES

Am. Jur. 2d. — 15A Am. Jur. 2d, Condominiums and Cooperative Apartments, § 5 et seq. 23 Am. Jur. 2d, Deeds, § 192 et seq.

C.J.S. — 51C C.J.S., Landlord and Tenant, § 232.

44-3-92. Subdivision of units; application for subdivision; amendment to declaration; plans and plats; recordation.

(a) If the condominium instruments expressly permit the subdivision of any units, the units may be subdivided in accordance with this Code section and any restrictions and limitations which the condominium instruments may specify.

(b) If the unit owner of any unit which may be subdivided desires to subdivide the unit, the association, upon written application of the subdivider, as the unit owner shall henceforth be referred to in this Code section, and the written consent of the mortgagees of the unit, shall immediately prepare and execute appropriate instruments pursuant to subsections (c) and (d) of this Code section. No vote of the unit owners shall be necessary for the amendments provided in this Code section to be executed by the association.

(c) An amendment to the declaration shall assign identifying numbers to the units created by the subdivision of a unit and shall allocate among those units on a reasonable basis acceptable to the subdivider and the board of directors all of the undivided interest in the common elements, votes in the association, and liabilities for common expenses pertaining to the subdi-

vided unit immediately prior to the subdivision. With regard to any limited common elements assigned to the subdivided unit, the units created by the subdivision shall jointly share all rights and shall be liable equally for all obligations so that the total of the assessments therefor equals the total of the common expenses attributable to such limited common elements, except to the extent that the subdivider may have specified in his written application that all or any portion or portions of any limited common element assigned to the subdivided unit should be assigned exclusively to one or more, but less than all, of the units created by the subdivision, in which case the amendment to the declaration shall reflect the desires of the subdivider as expressed in the written application.

(d) Any plats or plans necessary to show the boundaries separating the units created by the subdivision, together with their other boundaries, shall be prepared; and the units created by the subdivision depicted thereon shall bear their identifying numbers. The plats or plans shall indicate the dimensions of the units created by the subdivision. The plats or plans shall be certified as to their accuracy and compliance with this subsection by a registered land surveyor in the case of any plat and by a registered architect or registered engineer in the case of any plan.

(e) When appropriate instruments in accordance with subsections (a) through (d) of this Code section have been prepared and executed by the association, they shall be delivered immediately to the subdivider upon payment by the subdivider of all reasonable costs for the preparation, execution, and recordation thereof. The instruments shall become effective when the subdivider and all mortgagees of the unit have executed them and they have been recorded. The recordation of such instruments shall be conclusive evidence that any reallocations made pursuant to subsection (c) of this Code section were reasonable and were approved by the board of directors.

(f) This Code section shall have no application to convertible spaces which shall be governed by Code Section 44-3-88. (Ga. L. 1975, p. 609, § 28; Ga. L. 1990, p. 227, § 6.)

44-3-93. Amendment of condominium instruments.

(a)(1) Except to the extent expressly permitted or required by other provisions of this article, the condominium instruments shall be amended only by the agreement of unit owners of units to which two-thirds of the votes in the association pertain or such larger majority as the condominium instruments may specify; provided, however, that, during any such time as there shall exist an unexpired option to add any additional property to the condominium or during any such time as the declarant has the right to control the association pursuant to Code Section 44-3-101, the agreement shall be that of the declarant and the

unit owners of units to which two-thirds of the votes in the association pertain, exclusive of any vote or votes appurtenant to any unit or units then owned by the declarant, or a larger majority as the condominium instruments may specify.

(2) Except to the extent expressly permitted or required by other provisions of this article, from and after July 1, 1990, no amendment of a condominium instrument shall require approval of unit owners to which more than 80 percent of the association vote pertains and the mortgagees holding 80 percent of the voting interest of mortgaged units; provided, however, that the provisions of any condominium instruments in effect on July 1, 1990, which provide for a majority in excess of 80 percent shall not be affected or modified by the provisions of this paragraph if by July 1, 1991, the association and those mortgagees permitted to vote on amendments voted by the majority required for an amendment as specified in the condominium instrument to retain the existing requirements for amendments; and provided, further, if no such vote by the required majority occurred, those provisions requiring more than 80 percent shall be deemed to require only 80 percent of the voting interest. The approval of any proposed amendment by a mortgagee shall be deemed implied and consented to if the mortgagee fails to submit a response to any written proposal for an amendment within 30 days after the mortgagee receives notice of the proposed amendment sent by certified or registered mail or statutory overnight delivery, return receipt requested. This paragraph shall not be deemed to eliminate or modify any right of the declarant provided for in the condominium instruments to approve amendments to the condominium instruments so long as the declarant owns any unit primarily for the purpose of sale and, furthermore, this paragraph shall not be construed as modifying or altering the rights of a mortgagee set forth elsewhere in this article.

(b) If none of the units in the condominium is restricted exclusively to residential use, the condominium instruments may specify a majority smaller than the minimum specified by subsection (a) of this Code section.

(c) Except to the extent expressly permitted or required by other provisions of this article or agreed upon by all unit owners and the mortgagees of all condominium units, no amendment to the condominium instruments shall change the boundaries of any unit, the undivided interest in the common elements pertaining thereto, the number of votes in the association pertaining thereto, or the liability for common expenses pertaining thereto.

(d) Agreement of the required majority of unit owners to any amendment of the condominium instruments shall be evidenced by their execution of the amendment. In the alternative, provided that the declarant does not then have the right to control the association pursuant to Code Section 44-3-101, the sworn statement of the president, of any vice-president, or of

the secretary of the association attached to or incorporated in an amendment executed by the association, which sworn statement states unequivocally that agreement of the required majority was otherwise lawfully obtained and that any notices required under this article were properly given, shall be sufficient to evidence the required agreement. Any such amendment of the condominium instruments shall become effective only when recorded or at such later date as may be specified in the amendment itself.

(e) In any court suit or action where the validity of the adoption of an amendment to a condominium instrument is in issue, the adoption of the amendment shall be presumed valid if the suit is commenced more than one year after the recording of the amendment on the public record. In such cases, the burden of proof shall be upon the party challenging the validity of the adoption of the amendment. (Ga. L. 1975, p. 609, § 29; Ga. L. 1982, p. 3, § 44; Ga. L. 1990, p. 227, § 7; Ga. L. 1991, p. 94, § 44; Ga. L. 1994, p. 1943, §§ 6, 7; Ga. L. 2000, p. 1589, § 4.)

Editor's notes. — Ga. L. 2000, p. 1589, § 16, not codified by the General Assembly, provides that the amendment to this Code section is applicable with respect to notices delivered on or after July 1, 2000.

Law reviews. — For article, ''Recommended Changes in the Law Affecting Condominium and Homeowner Associations in Georgia,'' see 1 Ga. St. U.L. Rev. 185 (1985).

JUDICIAL DECISIONS

Effect of recording condominium declaration. — Condominium declaration does not become an ''instrument'' until the declaration is recorded; before the declaration is recorded, O.C.G.A. § 44-3-111, which sets forth the information that sellers are required to furnish buyers as well as the rights of buyers generally, applies to the transaction, not O.C.G.A. § 44-3-93(c). Park Regency Ptnrs., L.P. v. Gruber, 271 Ga. App. 66, 608 S.E.2d 667 (2004).

Rooftop terrace declared common element versus limited common element. — Trial court properly granted a condominium association and the association's board summary judgment and properly declared a tenth-floor rooftop terrace a common element for all unit owners in a suit involving a dispute over the terrace because the express terms of the original declaration designated the terrace as a common element. Further, an amendment stating otherwise that was signed by a former managing member, and not the association, no longer controlled since the former managing member's control ended by the time the declarant sought to amend the declaration to assign the entire fenced area of the tenth-floor rooftop terrace as a limited common element benefitting only the penthouse unit. Walker v. 90 Fairlie Condo. Ass'n, 290 Ga. App. 171, 659 S.E.2d 412 (2008).

RESEARCH REFERENCES

Am. Jur. 2d. — 15A Am. Jur. 2d, Condominiums and Cooperative Apartments, § 5 et seq.

C.J.S. — 51C C.J.S., Landlord and Tenant, § 232.

ALR. — Validity and construction of condominium association's regulations governing members' use of common facilities, 72 ALR3d 308.

44-3-94. Damage or destruction of units; restoration; vote not to restore; allocation of insurance deductible.

Unless otherwise provided in the condominium instruments, in the event of damage to or destruction of any unit by a casualty covered under insurance required to be maintained by the association pursuant to Code Section 44-3-107, the association shall cause the unit to be restored. Unless otherwise provided in the condominium instruments, any funds required for such restoration in excess of the insurance proceeds attributable thereto shall be paid by the unit owner of the unit; provided, however, that, in the event that the unit owner of the unit together with the unit owners of other units to which two-thirds of the votes in the association pertain agree not to restore the unit, the unit shall not be restored and the entire undivided interest in the common elements pertaining to that unit shall then pertain to the remaining units, to be allocated to them in proportion to their undivided interests in the common elements, and the remaining portion of that unit shall thenceforth be a part of the common elements. Votes in the association and liability for future common expenses shall thereupon pertain to the remaining units, being allocated to them in proportion to their relative voting strength in the association and liability for common expenses, respectively. To the extent provided for in the condominium instruments, the association may allocate equitably the payment of a reasonable insurance deductible between the association and the unit owners affected by a casualty against which the association is required to insure; provided, however, that the amount of deductible which can be allocated to any one unit owner shall not exceed $2,500.00 per casualty loss covered under any insurance required to be maintained by the association under this article. The existence of a reasonable deductible in any required insurance policy shall not be deemed a failure to maintain insurance as required by this Code section. (Ga. L. 1975, p. 609, § 7; Ga. L. 1983, p. 3, § 33; Ga. L. 1990, p. 227, § 8; Ga. L. 2004, p. 560, § 4.)

JUDICIAL DECISIONS

Cited in Powers v. Jones, 185 Ga. App. 859, 366 S.E.2d 234 (1988).

RESEARCH REFERENCES

ALR. — Liability of vendor of condominiums for damage occasioned by defective condition thereof, 50 ALR3d 1071.

Proper party plaintiff in action for injury to common areas of condominium development, 69 ALR3d 1148.

44-3-95. Effect of mortgages and liens; foreclosure; release.

(a) In the event of the foreclosure of any mortgage or lien which is subordinate to the declaration or from which any condominium unit has been released, the foreclosure shall not terminate the condominium; and,

upon his purchase, the mortgagee, lienholder, or other purchaser at foreclosure shall become the owner of all condominium units which had not been released from the mortgage or lien prior to the purchase. In the event of the foreclosure of any mortgage or lien which is not subordinate to the declaration and from which no condominium unit has been released, the foreclosure of the mortgage or lien shall terminate the condominium unless the foreclosing mortgagee or lienholder subordinates to the declaration prior to foreclosure or forecloses subject to the declaration. For the purposes of this Code section, a lien for labor or services performed or for materials furnished in the improvement of property, either before or after it becomes submitted property, recorded upon the submitted property as a whole after the recordation of the declaration, shall be subordinate to the declaration.

(b) Any other provision of law to the contrary notwithstanding, liens for labor and services performed and for materials furnished for the improvement of property either before or after it becomes submitted property, which labor, services, and materials were performed or used in the original construction of any portion of a condominium or additional property of an expandable condominium, may be recorded against the submitted property as a whole; provided, however, that any such lien shall constitute a valid lien only against those units which have not been conveyed by the declarant to any person in a bona fide sale and purchase transaction prior to the recording of the lien. For those units which have been so conveyed, the lien shall be inapplicable and unenforceable.

(c) Subsequent to the creation of the condominium and as long as the submitted property remains subject to this article, no lien shall arise or, except as provided in subsections (a) and (b) of this Code section, be effective against the submitted property as a whole. During such period of submission to this article and except as provided in this subsection, liens or encumbrances shall arise or be created or effective only against each condominium unit in the same manner and under the same conditions in every respect as liens or encumbrances may arise or be created upon or be effective against any other separate parcel of real property subject to individual ownership; provided, however, that labor or services performed or materials furnished for improvement of the common elements, if duly authorized by the association, shall be deemed to be performed or furnished with the express consent of each unit owner and shall, if other applicable provisions of law are complied with and subject to the limitations thereof, create a lien upon all of the condominium units subject to subsection (d) of this Code section.

(d) In the event that any lien for labor or services performed or materials furnished for improvement of the common elements becomes effective subsequent to the creation of the condominium, any unit owner may remove that lien from his condominium unit by the payment of the

amount attributable to his condominium unit. The amount shall be computed by reference to the liability for common expenses pertaining to that condominium unit pursuant to subsection (c) of Code Section 44-3-80. Subsequent to the payment, discharge, or other satisfaction, the unit owner of that condominium unit shall be entitled to have that lien released as to his condominium unit in accordance with applicable provisions of law; and, notwithstanding anything to the contrary in Code Sections 44-3-80 and 44-3-109, the association shall not assess or have a valid lien against that condominium unit for any portion of the common expenses incurred in connection with that lien. (Ga. L. 1975, p. 609, § 8.)

RESEARCH REFERENCES

ALR. — Enforceability of mechanic's lien attached to leasehold estate against landlord's fee, 74 ALR3d 330.

44-3-96. Separate titles and taxation.

For all purposes, each condominium unit shall constitute a separate parcel of real property which shall be distinct from all other condominium units. If there is any unit owner other than the declarant, no tax or assessment shall be levied on the condominium as a whole but only on the individual condominium units. (Ga. L. 1975, p. 609, § 4; Ga. L. 1982, p. 3, § 44.)

JUDICIAL DECISIONS

Cited in Powers v. Jones, 185 Ga. App. 859, 366 S.E.2d 234 (1988).

RESEARCH REFERENCES

Am. Jur. 2d. — 15A Am. Jur. 2d, Condominiums and Cooperative Apartments, §§ 48-50. 71 Am. Jur. 2d, State and Local Taxation, § 21.

C.J.S. — 84 C.J.S., Taxation, § 494 et seq.

ALR. — Real estate taxation of condominiums, 71 ALR3d 952.

44-3-97. Eminent domain; compensation; reallocation of interests; court determination; amendment to declaration.

(a) If any portion of the common elements is taken by eminent domain, the award therefor shall be allocated to the unit owners in proportion to their respective undivided interests in the common elements unless otherwise provided in the condominium instruments; provided, however, that the portion of the award attributable to the taking of any permanently assigned limited common element shall be allocated to the unit owner of the unit to which that limited common element was so assigned at the time of the taking. If any limited common element is permanently assigned to

more than one unit at the time of the taking, the portion of the award attributable to the taking thereof shall be allocated in equal shares to the unit owners of the units to which it was so assigned or in such other shares as the declaration may specify for this purpose.

(b) If one or more units are taken by eminent domain, the undivided interest in the common elements pertaining to any such units shall then pertain to the remaining units to be allocated to them in proportion to their respective undivided interests in the common elements. The court shall enter a decree reflecting the reallocation of undivided interests produced thereby; and the award shall include, without limitation, just compensation to the unit owner of any unit taken for his undivided interest in the common elements as well as for his unit.

(c) If a portion of any unit is taken by eminent domain, the court shall determine the fair market value of the portion of such unit not taken; and the undivided interest in the common elements pertaining to any such unit shall be reduced, in the case of each such unit, in proportion to the diminution in the fair market value of such unit resulting from the taking. The portion of undivided interest in the common elements thereby divested from the unit owner of any such unit shall be reallocated among that unit and the other units in the condominium in proportion to their respective undivided interests in the common elements. Any units partially taken shall participate in such reallocation on the basis of their undivided interests as reduced in accordance with the preceding sentence. The court shall enter a decree reflecting the reallocation of undivided interests produced thereby; and the award shall include, without limitation, just compensation to the unit owner of any unit partially taken for that portion of his undivided interest in the common elements divested from him by operation of the first sentence of this subsection and not revested in him by operation of the second sentence of this subsection as well as for that portion of his unit taken by eminent domain.

(d) If the taking of a portion of any unit makes it impractical to use the remaining portion of that unit for the primary purpose permitted by the condominium instruments, the entire undivided interest in the common elements pertaining to that unit shall then pertain to the remaining units, to be allocated to them in proportion to their respective undivided interests in the common elements, and the remaining portion of that unit shall thenceforth be a part of the common elements. The court shall enter a decree reflecting the reallocation of the undivided interests produced thereby; and the award shall include, without limitation, just compensation to the unit owner of such unit for his entire undivided interest in the common elements and for his entire unit.

(e) Votes in the association and liability for future common expenses pertaining to any unit or units taken or partially taken by eminent domain shall then pertain to the remaining units, to be allocated to them in

proportion to their relative voting strength in the association and liability for common expenses, respectively, with any unit partially taken participating in such reallocation as though its voting strength and its liability for common expenses in the association had been reduced in proportion to the reduction in its undivided interest in the common elements and the decree of the court shall provide accordingly.

(f) Any or all of the matters which, under this Code section, are prescribed for the determination of the court may instead be resolved by amendment to the declaration agreed to by unit owners to which more than 50 percent of the votes in the association pertain, including the unit owner of all units wholly or partially taken, or to which there is appurtenant any permanently assigned limited common element wholly or partially taken, together with the mortgagee of each such unit. (Ga. L. 1975, p. 609, § 6.)

RESEARCH REFERENCES

Am. Jur. 2d. — 27 Am. Jur. 2d, Eminent Domain, § 220 et seq.

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

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

Condemnation of Easements, 22 Am. Jur. Trials 743.

Landowner's Evidence of Market Value in Eminent Domain Proceeding, 60 Am. Jur. Trials 447.

Condemnation of Leasehold Interests, 96 Am. Jur. Trials 211.

C.J.S. — 29A C.J.S., Eminent Domain, § 100 et seq.

44-3-98. Termination of condominium; creation of tenancy in common; distribution of assets; transfer of mortgages and liens.

(a) The condominium shall be terminated only by the agreement of unit owners of units to which four-fifths of the votes in the association pertain and all mortgagees of such units or such larger majority as the condominium instruments may specify; provided, however, that during such times, if any, as there shall exist an unexpired option to add any additional property to the condominium or during such time, if any, as the declarant has the right to control the association pursuant to Code Section 44-3-101, the agreement shall be that of the declarant and the unit owners of units to which four-fifths of the votes in the association pertain, exclusive of any vote or votes appurtenant to any unit or units then owned by the declarant, and the mortgagees of those units or the larger majority that the condominium instruments may specify.

(b) If none of the units in the condominium are restricted exclusively to residential use, the condominium instruments may specify a majority smaller than the minimum specified by subsection (a) of this Code section.

(c) Agreement of the required majority of unit owners and their mortgagees to termination of the condominium shall be evidenced by their execution of a termination agreement. Any termination agreement shall

become effective only when recorded or at such later date as may be specified therein. For the purposes of this Code section, a termination agreement shall be deemed a condominium instrument subject to Code Section 44-3-74.

(d) Upon the effective date of a termination agreement, all of the property constituting the condominium shall be owned by the unit owners as tenants in common and shall be in proportion to their respective undivided interests in the common elements immediately prior to the effective date. As long as the tenancy in common lasts, however, each unit owner and his heirs, representatives, successors, and assigns shall have the same right of occupancy and use of that portion of the property which formerly constituted his unit and the limited common elements appurtenant thereto, if any, as existed immediately prior to termination and a nonexclusive right to use that portion of the property which formerly constituted common elements other than limited common elements.

(e) Upon the effective date of a termination agreement, any rights the unit owners may have to the assets of the association shall be in proportion to their respective undivided interests in the common elements immediately prior to the effective date; and any distribution thereof to the unit owners shall be to such owners and to their mortgagees as their interests may appear.

(f) Upon the effective date of a termination agreement, mortgages and liens affecting each unit shall be deemed to be transferred, in accordance with their existing priorities, to the undivided interest of the unit owner in the property which formerly constituted the condominium.

(g) After the effective date of a termination agreement and except as otherwise expressly provided in this Code section, the property which formerly constituted the condominium and the rights and obligations of the former unit owners with respect thereto shall be subject to and governed by the laws of this state pertaining to tenancies in common for as long as the tenancy in common lasts. (Ga. L. 1975, p. 609, § 30; Ga. L. 1982, p. 3, § 44.)

RESEARCH REFERENCES

Am. Jur. 2d. — 15A Am. Jur. 2d, Condominiums and Cooperative Apartments, § 51 et seq.

C.J.S. — 51C C.J.S., Landlord and Tenant, § 232.

44-3-99. Withdrawal of submitted property; reallocation to remaining units of undivided interest in common elements; contents of amendment; transfer of mortgages and liens.

(a) Unless the condominium instruments expressly prohibit the withdrawal of any submitted property from the condominium, submitted

property may be withdrawn but only in accordance with this Code section and any restrictions or limitations which the condominium instruments may specify, the property being withdrawn hereinafter being referred to as the ''withdrawn property''; provided, however, that no unit or limited common element may be withdrawn in part.

(b) Submitted property may be withdrawn from the condominium only by an amendment to the condominium instruments agreed to by the following required persons:

(1) The owner of each unit which is being withdrawn;

(2) The owner of each unit to which pertains any limited common element which is being withdrawn;

(3) The declarant, if, at the time of the withdrawal there shall exist any unexpired option to add any additional property to the condominium, or if, at the time of the withdrawal, the declarant has the right to control the association pursuant to Code Section 44-3-101;

(4) The owners of the units to which pertain four-fifths of the votes in the association or such larger majority as may be specified in the condominium instruments, exclusive of the votes appertaining to the units owned by the persons required in paragraphs (1) through (3) of this subsection. If none of the units in the condominium are restricted exclusively to residential use, the condominium instruments may specify a majority smaller than four-fifths; and

(5) Each mortgagee of the units owned by the required persons set forth in paragraphs (1) through (4) of this subsection.

(c) If the withdrawn property includes any unit, the amendment effectuating the withdrawal shall specify the reallocation to the remaining units of the undivided interest in the common elements, the number of votes in the association, and the share of liability for common expenses pertaining to the unit or units being withdrawn. The reallocation of each item shall be in proportion to the allocation of the item among the remaining units immediately prior to the effectuation of the withdrawal.

(d) If the withdrawn property does not include any unit or any limited common element, the withdrawn property shall, upon the effective date of the amendment, be owned by the unit owners as tenants in common in proportion to their respective undivided interest in the common elements immediately prior to the effective date.

(e) If any unit or any limited common element is included in the withdrawn property, the amendment shall allocate to the owner of each such unit or of each unit to which each such limited common element pertains, as the case may be, an undivided interest in the withdrawn property in consideration for the withdrawal of the unit or limited common

element. The remaining undivided interest in the withdrawn property shall be allocated among the unit owners, including the owners of any unit or units to which there are appurtenant limited common elements which are being withdrawn, in proportion to their respective undivided interests in the common elements immediately preceding the effective date of the amendment.

(f) The amendment to the declaration effectuating the withdrawal of submitted property shall be executed by those persons whose agreement thereto is required under subsection (b) of this Code section and shall include:

(1) A legal description by metes and bounds of the withdrawn property;

(2) A legal description by metes and bounds of the remaining submitted property;

(3) The effective date of the amendment if subsequent to the date of recording the amendment;

(4) The undivided interest in the withdrawn property being allocated to each unit owner; and

(5) The undivided interest in the common elements, the number of votes in the association, and the share of liability for common expenses pertaining to each unit remaining in the condominium.

The amendment shall become effective only when it and all plats required in connection therewith under subsection (e) of Code Section 44-3-83 shall have been recorded or at such later date as may be specified therein.

(g) Upon the effective date of the amendment, the withdrawn property shall be owned by the unit owners as tenants in common having the undivided interests set forth in the amendment. As long as the tenancy in common lasts, however, each unit owner and his heirs, representatives, successors, and assigns shall have the same right of occupancy and use of that portion of the withdrawn property which formerly constituted his unit and the limited common elements appurtenant thereto, if any, as existed immediately prior to the withdrawal and a nonexclusive right to use that portion of the withdrawn property which formerly constituted common elements other than limited common elements.

(h) Upon the effective date of the amendment, mortgages and liens of unit owners theretofore affecting any portion of the withdrawn property shall, regarding the withdrawn property, be deemed to be transferred in accordance with their existing priorities to the undivided interests of the respective owners in the withdrawn property. Mortgages and liens of the unit owners theretofore affecting any portion of the remaining submitted property shall, regarding such remaining submitted property, not be

affected by the withdrawal and shall continue in full force and effect; provided, however, that, in the case of mortgages or liens theretofore affecting only a condominium unit or units which are included within the withdrawn property, the lien of such mortgage or lien shall be transferred wholly to the undivided interest of the owner or owners of such unit or units in the withdrawn property, including both the undivided interest allocated in consideration of the withdrawal of said units and the undivided interest allocated in common to all unit owners, and the lien of such mortgage or lien shall not thereafter affect or be applicable to any portion of the remaining submitted property.

(i) After the effective date of the amendment and except as otherwise expressly provided in this Code section, the withdrawn property and the rights and obligations of the unit owners with respect thereto shall be subject to and governed by the laws of this state pertaining to tenancies in common for as long as the tenancy in common lasts. (Ga. L. 1975, p. 609, § 31.)

RESEARCH REFERENCES

Am. Jur. 2d. — 15A Am. Jur. 2d, Condominiums and Cooperative Apartments, § 53 et seq.

C.J.S. — 51C C.J.S., Landlord and Tenants, § 232.

44-3-100. Incorporation of association; name; articles and bylaws; membership; organization.

(a) Prior to recording the declaration, the declarant shall cause the association to be duly incorporated either as a business corporation under Chapter 2 of Title 14 or as a nonprofit membership corporation under Chapter 3 of Title 14. The corporate name of the association shall include the phrase ''unit owners' association'' or the phrase ''condominium association'' and shall otherwise comply with applicable laws regarding corporate names. The articles of incorporation of the association and the bylaws adopted by the association shall contain provisions not inconsistent with applicable law, including, but not limited to, this article, or with the declaration, as may be required by this article or by the declaration and as may be deemed appropriate or desirable for the proper management and administration of the association. Each unit owner shall automatically be a member of the association. The term ''member'' shall include a shareholder in the event the association is a business corporation or issues stock. Membership shall continue during the period of ownership by such unit owner.

(b) Prior to the first conveyance of a condominium unit, the declarant shall cause the first board of directors to be duly appointed, the officers to be elected, and the organization of the association to be effectuated.

(c) True and correct copies of the articles of incorporation and bylaws of the association and all amendments thereto shall be maintained at the principal and the registered offices of the association and at the sales office of the declarant so long as the declarant has the right to control the association pursuant to Code Section 44-3-101; and copies thereof shall be furnished to any unit owner on request upon payment of a reasonable charge therefor. (Ga. L. 1975, p. 609, § 32.)

Law reviews. — For article, ''Georgia Condominium Law: Beyond the Condominium Act,'' see 13 Ga. St. B.J. 24 (2007).

JUDICIAL DECISIONS

Cited in Equitable Life Assurance Soc'y v. Tinsley Mill Village, 249 Ga. 769, 294 S.E.2d 495 (1982).

RESEARCH REFERENCES

Am. Jur. 2d. — 18 Am. Jur. 2d, Corporations, § 44 et seq. 18A Am. Jur. 2d, Corporations, § 228 et seq.

C.J.S. — 7 C.J.S., Associations, § 106 et seq.

ALR. — Adequacy and application of guidelines relating to condominium association's requisite approval of individual unit owner's improvement or decoration, 25 ALR4th 1059.

44-3-101. Control of association by declarant; surrender of control to unit owners; liability for books and records; cancellation of leases and contracts.

(a) If provided for in the condominium instruments and subject to any limitations contained in the condominium instruments, the association's articles of incorporation, the association's bylaws, or this article with respect thereto, the declarant shall be authorized to appoint and remove any member or members of the board of directors and any officer or officers of the association. The declarant's authority to appoint and remove members of the board of directors and officers of the association shall in no event extend beyond and shall in all cases expire immediately upon the occurrence of any of the following:

(1) The expiration of any time limit specified for such purpose in the condominium instruments, which time limit may not be enlarged or extended after the conveyance by the declarant of a condominium unit without the express consent of all unit owners;

(2) Unless the declarant at that time has an unexpired option to add additional property, the date as of which units to which four-fifths of the undivided interests in the common elements pertain shall have been conveyed by the declarant to unit owners other than a person or persons constituting the declarant;

(3) The expiration of seven years after the recording of the declaration in the case of an expandable condominium or the expiration of three years after the recording of the declaration in the case of any other type of condominium; or

(4) The surrender by the declarant of the authority to appoint and remove members of the board of directors and officers of the association by an express amendment to the declaration which is executed and recorded by the declarant.

No formal or written proxy or power of attorney need be required of the unit owners to vest such authority to appoint and remove members of the board of directors and officers of the association in the declarant, the acceptance of a conveyance of a condominium unit being wholly sufficient for such purpose.

(b) Upon the expiration of the period of the declarant's right to control the association pursuant to subsection (a) of this Code section, the right to control shall automatically pass to the unit owners, including the declarant if the declarant then owns one or more condominium units. The declarant shall be jointly responsible and liable with the members of the board of directors and the officers of the association to the unit owners for ensuring that the books, records, and accounts of the association are in proper order, that the association is in good standing under the laws of this state, and that the affairs of the association have been conducted in a prudent and businesslike manner, all as of the date upon which the declarant's right to control the association expires. The declarant shall not be insulated against liability to the unit owners because any act, omission, or matter complained of during such period of control may have been done, omitted, or permitted by or on behalf of the association as a corporate entity. Nothing contained in this Code section shall make any successor to the declarant responsible or subject to liability by operation of law or through the purchase of the declarant's interest in the property or any part thereof at foreclosure for any act, omission, or matter occurring or arising from any act, omission, or matter occurring prior to the time the successor succeeded to the interest of the declarant.

(c) In addition to any right of termination set forth therein, any management contract, any lease of recreational area or facilities, or any other contract or lease executed by or on behalf of the association during the period of the declarant's right to control the association pursuant to subsection (a) of this Code section shall be subject to cancellation and termination at any time during the 12 months following the expiration of such control period by the affirmative vote of the unit owners of units to which a majority of the votes in the association pertain, unless the unit owners by a like majority shall have theretofore, following the expiration of such control period, expressly ratified and approved the same. (Ga. L. 1975, p. 609, § 33; Ga. L. 1990, p. 227, § 9.)

JUDICIAL DECISIONS

Rooftop terrace declared common element versus limited common element. — Trial court properly granted a condominium association and the association's board summary judgment and properly declared a tenth-floor rooftop terrace a common element for all unit owners in a suit involving a dispute over the terrace because the express terms of the original declaration designated the terrace as a common element. Further, an amendment stating otherwise that was signed by a former managing member, and not the association, no longer controlled since the former managing member's control ended by the time the declarant sought to amend the declaration to assign the entire fenced area of the tenth-floor rooftop terrace as a limited common element benefitting only the penthouse unit. Walker v. 90 Fairlie Condo. Ass'n, 290 Ga. App. 171, 659 S.E.2d 412 (2008).

RESEARCH REFERENCES

Am. Jur. 2d. — 15A Am. Jur. 2d, Condominiums and Cooperative Apartments, § 5 et seq.

C.J.S. — 51C C.J.S., Landlord and Tenant, § 232.

44-3-102. Meetings of the association; notice; reports.

Meetings of the members of the association shall be held in accordance with the provisions of the association's bylaws and in any event shall be called not less frequently than annually. A condominium instrument recorded on or after July 1, 1990, shall also provide for the calling of a meeting upon the written request of at least 15 percent of the unit owners. Notice shall be given to each unit owner at least 21 days in advance of any annual or regularly scheduled meeting and at least seven days in advance of any other meeting and shall state the time, place, and purpose of such meeting. Such notice shall be delivered personally, sent by United States mail, postage prepaid, statutory overnight delivery, or issued electronically in accordance with Chapter 12 of Title 10, the ''Uniform Electronic Transactions Act,'' to all unit owners of record at such address or addresses as any of them may have designated or, if no other address has been so designated, at the address of their respective units. At the annual meeting, comprehensive reports of the affairs, finances, and budget projections of the association shall be made to the unit owners. (Ga. L. 1975, p. 609, § 34; Ga. L. 1990, p. 227, § 10; Ga. L. 2004, p. 560, § 5; Ga. L. 2009, p. 698, § 2/HB 126.)

The 2009 amendment, effective July 1, 2009, substituted ''Uniform Electronic Transactions Act'' for ''Georgia Electronic Records and Signatures Act'' in the middle of the fourth sentence.

RESEARCH REFERENCES

Am. Jur. 2d. — 15A Am. Jur. 2d, Condominiums and Cooperative Apartments, §§ 11, 39 et seq.

C.J.S. — 51C C.J.S., Landlord and Tenant, § 232.

44-3-103. Quorums at meetings of association or board.

Unless the condominium instruments or bylaws provide otherwise, a quorum shall be deemed present throughout any meeting of the members of the association if persons entitled to cast more than one-third of the votes are present at the beginning of the meeting. Unless the condominium instruments or bylaws specify a larger percentage, the presence of persons entitled to cast one-half of the votes of the board of directors shall constitute a quorum for the transaction of any business at any meeting of the board. (Ga. L. 1975, p. 609, § 35; Ga. L. 1994, p. 1943, § 8; Ga. L. 2004, p. 560, § 6.)

RESEARCH REFERENCES

Am. Jur. 2d. — 15A Am. Jur. 2d, Condominiums and Cooperative Apartments, § 11.

C.J.S. — 51C C.J.S., Landlord and Tenant, § 232.

44-3-104. Directors and officers; eligibility.

If the condominium instruments provide that any member of the board of directors or any officer of the association must be a unit owner, then, notwithstanding paragraph (1) of subsection (a) of Code Section 44-3-75, the term ''unit owner'' in such context shall, unless the condominium instruments otherwise provide, be deemed to include, without limitation, any shareholder, director, officer, partner in, or trustee of any person who is, either alone or in conjunction with any other person or persons, a unit owner. Any individual who would not be eligible to serve as a member of the board of directors or officer were he not a shareholder, director, officer, partner in, or trustee of such a person shall be deemed to have disqualified himself from continuing in office if he ceases to have any such affiliation with that person. (Ga. L. 1975, p. 609, § 36.)

RESEARCH REFERENCES

Am. Jur. 2d. — 15A Am. Jur. 2d, Condominiums and Cooperative Apartments, § 24 et seq.

C.J.S. — 19 C.J.S., Corporations, §§ 532, 533.

44-3-105. Powers and duties as to upkeep of the condominium; access; liability for damage.

Except to the extent otherwise provided by the condominium instruments, all powers and responsibilities with regard to maintenance, repair, renovation, restoration, and replacement shall pertain to the association in the case of the common elements other than limited common elements and to the individual unit owner in the case of any unit and the limited common elements, if any, appurtenant thereto. Each unit owner shall afford to the other unit owners, to the association, and to any agents or employees of either such access through his unit as may be reasonably necessary to enable them to exercise and discharge their respective powers and responsibilities. To the extent that damage is inflicted on the common elements, including, without limitation, limited common elements, or on any unit through which access is taken, the association or unit owner occasioning the same, whether by itself or himself or through agents, employees, or others, shall be liable for the prompt repair thereof. (Ga. L. 1975, p. 609, § 37.)

Law reviews. — For article, ''Recommended Changes in the Law Affecting Condominium and Homeowner Associations in Georgia,'' see 1 Ga. St. U.L. Rev. 185 (1985).

JUDICIAL DECISIONS

Freedom of parties to contract. — Condominium association's duty to the association's members only pursuant to O.C.G.A. § 51-3-1 with regard to the common elements of a condominium property may be circumscribed by the terms of the condominium instruments/contract, and a court must look to the terms of the contract, as well as O.C.G.A. § 44-3-70 et seq., in order to determine an association's duties. In that regard, it is the paramount public policy of Georgia that courts will not lightly interfere with the freedom of parties to contract as a contracting party may waive or renounce that which the law has established in his or her favor, when it does not thereby injure others or affect the public interest. Bradford Square Condo. Ass'n v. Miller, 258 Ga. App. 240, 573 S.E.2d 405 (2002).

Upkeep didn't include security from third party criminal acts. — Like other statutes which are in derogation of the common law, the Georgia Condominium Act (the Act), O.C.G.A. § 44-3-70 et seq., must be strictly construed and limited to its explicit terms, and, in that regard, the Act does not in any fashion speak to providing security from third party criminal acts as a part of a condominium's ''upkeep,'' meaning maintenance, repair, renovation, restoration, and replacement. Bradford Square Condo. Ass'n v. Miller, 258 Ga. App. 240, 573 S.E.2d 405 (2002).

RESEARCH REFERENCES

Am. Jur. 2d. — 15A Am. Jur. 2d, Condominiums and Cooperative Apartments, § 33.

C.J.S. — 51C C.J.S., Landlord and Tenant, § 232.

ALR. — Right of condominium association's management or governing body to inspect individual units, 41 ALR4th 730.

44-3-106. Powers and responsibilities of association; tort actions.

(a) Except to the extent prohibited by the condominium instruments and subject to any restrictions and limitations specified therein, the association shall have the power to:

(1) Employ, retain, dismiss, and replace agents and employees to exercise and discharge the powers and responsibilities of the association;

(2) Make or cause to be made additional improvements on and as a part of the common elements; and

(3) Grant or withhold approval of any action by one or more unit owners or other persons entitled to occupancy of any unit if such action would change the exterior appearance of any unit or of any other portion of the condominium or elect or provide for the appointment of an architectural control committee to grant or withhold such approval.

(b) Except to the extent prohibited by the condominium instruments and subject to any restrictions and limitations specified therein, the association shall have the irrevocable power, as attorney in fact on behalf of all unit owners and their successors in title, to grant easements, leases, and licenses through or over the common elements, to accept easements, leases, and licenses benefiting the condominium or any portion thereof, and to acquire or lease property in the name of the association as nominee for all unit owners. Property so acquired by the association as nominee for the unit owners, upon the recordation of the deed thereto or other instrument granting the same, shall automatically and without more, and for all purposes, including, without limitation, taxation, be a part of the common elements. The association shall also have the power to acquire, lease, and own in its own name property of any nature, real, personal, or mixed, tangible or intangible; to borrow money; and to pledge, mortgage, or hypothecate all or any portion of the property of the association for any lawful purpose within the association's inherent or expressly granted powers. Any third party dealing with the association shall be entitled to rely in good faith upon a certified resolution of the board of directors of the association authorizing any such act or transaction as conclusive evidence of the authority and power of the association so to act and of full compliance with all restraints, conditions, and limitations, if any, upon the exercise of such authority and power. The provisions of Code Section 44-2-2 notwithstanding, any such actions taken by the association as attorney in fact on behalf of all unit owners and their successors in title shall be effective record notice to third parties if recorded in the name of the association as that name is reflected in the recorded declaration or any recorded amendments thereto. Such recorded document shall not require a listing of the names of the unit owners or their successors in title or assigns.

(c) The association shall have the power to amend the condominium instruments, the articles of incorporation, and the bylaws of the association

or any of them in such respects as may be required to conform to mandatory provisions of this article or of any other applicable law without a vote of the unit owners.

(d) In addition to any other duties and responsibilities as this article or the condominium instruments may impose, the association shall keep:

(1) Detailed minutes of all meetings of the members of the association and of the board of directors;

(2) Detailed and accurate financial records, including itemized records of all receipts and expenditures; and

(3) Any books and records as may be required by law or be necessary to reflect accurately the affairs and activities of the association.

(e) This Code section shall not be construed to prohibit the grant or imposition of other powers and responsibilities to or upon the association by the condominium instruments.

(f) Except to the extent otherwise expressly required by this article, by Chapter 2 or 3 of Title 14, by the condominium instruments, by the articles of incorporation, or by the bylaws of the association, the powers inherent in or expressly granted to the association may be exercised by the board of directors, acting through the officers, without any further consent or action on the part of the unit owners.

(g) A tort action alleging or founded upon negligence or willful misconduct by any agent or employee of the association or in connection with the condition of any portion of the condominium which the association has the responsibility to maintain shall be brought against the association. No unit owner shall be precluded from bringing such an action by virtue of his ownership of an undivided interest in the common elements or by virtue of his membership in the association. A judgment against the association arising from a tort action shall be a lien against the property of the association.

(h) The association shall have the capacity, power, and standing to institute, intervene in, prosecute, represent in, or defend, in its own name, litigation, administrative or other proceedings of any kind concerning claims or other matters relating to any portions of the units or common elements which the association has the responsibility to administer, repair, or maintain. (Ga. L. 1975, p. 609, § 38; Ga. L. 1990, p. 227, § 11; Ga. L. 1994, p. 1943, § 9.)

Law reviews. — For article, "Recommended Changes in the Law Affecting Condominium and Homeowner Associations in Georgia," see 1 Ga. St. U.L. Rev. 185 (1985).

JUDICIAL DECISIONS

Upkeep didn't include security from third party criminal acts. — Like other statutes which are in derogation of the common law, the Georgia Condominium Act (the Act), O.C.G.A. § 44-3-70 et seq., must be strictly construed and limited to its explicit terms, and, in that regard, the Act does not in any fashion speak to providing security from third party criminal acts as a part of a condominium's "upkeep," meaning maintenance, repair, renovation, restoration, and replacement. Bradford Square Condo. Ass'n v. Miller, 258 Ga. App. 240, 573 S.E.2d 405 (2002).

Approval of actions of owners. — Paragraph (a)(3) of O.C.G.A. § 44-3-106 constitutes a delegation of authority to the condominium association and must be construed strictly against the party seeking to restrict the use of property. Piccadilly Place Condominium Ass'n v. Frantz, 210 Ga. App. 676, 436 S.E.2d 728 (1993).

Installation of burglar bars on the interior of the windows of a condominium unit did not constitute alteration of the exterior of the unit within the prohibition of paragraph (a)(3) of O.C.G.A. § 44-3-106. Piccadilly Place Condominium Ass'n v. Frantz, 210 Ga. App. 676, 436 S.E.2d 728 (1993).

Standing of association to sue. — An amendment to a condominium declaration removing a prohibition against the condominium association's filing suits for damages based on condominium defects did not confer standing on the association to sue for damages based on alleged defects in the construction of the condominium's common areas since the amendment was made after the suit was filed. Phoenix on Peachtree Condo. Ass'n v. Phoenix on Peachtree, LLC, 294 Ga. App. 447, 669 S.E.2d 229 (2008).

RESEARCH REFERENCES

Am. Jur. 2d. — 15A Am. Jur. 2d, Condominiums and Cooperative Apartments, §§ 44, 56 et seq.

C.J.S. — 7 C.J.S., Associations, § 71 et seq.

ALR. — Liability of condominium association or corporation for injury allegedly caused by condition of premises, 45 ALR3d 1171.

Proper party plaintiff in action for injury to common areas of condominium development, 69 ALR3d 1148.

Self-dealing by developers of condominium project as affecting contracts or leases with condominium association, 73 ALR3d 613.

Expenses for which condominium association may assess unit owners, 77 ALR3d 1290.

Construction of contractual or state regulatory provisions respecting formation, composition, and powers of governing body of condominium association, 13 ALR4th 598.

Condominium association's liability to unit owner for injuries caused by third person's criminal conduct, 59 ALR4th 489.

44-3-107. Insurance coverage.

(a) The association shall obtain:

(1) A property insurance policy or policies affording fire and extended coverage insurance for and in an amount consonant with the full insurable replacement cost, less deductibles, of all buildings and structures within the condominium. Regardless of the boundaries of the condominium units, the insurance required by this paragraph shall include, without limitation, all portions of each building which are common elements including limited common elements, all foundations, roofs, roof structures, and exterior walls, including windows and doors and the framing therefor, and all convertible space within the building.

Such insurance shall cover the following items with respect to each condominium unit regardless of who is responsible for maintaining them under the condominium instruments:

(A) The HVAC system serving the condominium unit;

(B) All Sheetrock and plaster board comprising the walls and ceilings of the condominium unit; and

(C) The following items within the condominium unit of the type and quality initially installed, or replacements thereof of like kind and quality in accordance with the original plans and specifications, or as they existed at the time the condominium unit was initially conveyed if the original plans and specifications are not available: floors and subfloors; wall, ceiling, and floor coverings; plumbing and electrical lines and fixtures; built-in cabinetry and fixtures; and appliances used for refrigeration, cooking, dishwashing, and laundry.

Unless otherwise provided in the declaration, with respect to unfinished shell units conveyed by the declarant, the items in subparagraph (C) of this paragraph shall be insured by the condominium unit owner and the coverage required by this paragraph shall repair or reconstruct only those portions of the shell unit constructed by the declarant. With respect to any condominium units which have not been conveyed by the declarant at the time of an insured loss, the coverage required by this paragraph shall repair or reconstruct such units as they exist at the time of such loss. The association may exclude from coverage required by this paragraph improvements made by the condominium unit owners and structures covered by builder's risk insurance, such coverage to be in an amount consonant with the full replacement value thereof, but only during such period of time as the builder's risk insurance remains in full force and effect and only on the condition that the association is named as an additional named insured;

(2) A commercial general liability insurance policy or policies affording coverage for bodily injury and property damage in an amount not less than $1 million for a single occurrence and $2 million aggregate. The policy or policies shall cover the association, the board of directors and the officers of the association, all agents and employees of the association, and all unit owners and other persons entitled to occupy any unit or other portion of the condominium for occurrences commonly insured against arising out of or in connection with the use, ownership, or maintenance of the common elements or other portion of the condominium which the association has the responsibility to maintain; and

(3) Any additional types and amounts of insurance coverage as may be specified in the condominium instruments.

(b) The association may obtain additional types and amounts of insurance as may be authorized by the board of directors. (Ga. L. 1975, p. 609, § 39; Ga. L. 1990, p. 227, § 12; Ga. L. 2008, p. 1030, § 1/HB 1121.)

The 2008 amendment, effective July 1, 2008, designated the existing provisions as subsection (a), rewrote subsection (a), and added subsection (b).

Law reviews. — For article, "Recommended Changes in the Law Affecting Condominium and Homeowner Associations in Georgia," see 1 Ga. St. U.L. Rev. 185 (1985).

JUDICIAL DECISIONS

Discretion of condominium board of directors. — In the condominium declaration, the purchase of additional insurance coverage was specified to be within the discretion of the board of directors, thus the board's decision not to maintain structural insurance coverage clearly fell within the parameters of that discretion. Fleetwood v. Wieuca N. Condominium Ass'n, 182 Ga. App. 15, 354 S.E.2d 623 (1987) (applying former Georgia Apartment Ownership Act).

Cited in Henning v. Continental Cas. Co., 254 F.3d 1291 (11th Cir. 2001).

RESEARCH REFERENCES

Am. Jur. 2d. — 15A Am. Jur. 2d, Condominiums and Cooperative Apartments, § 27. 43 Am. Jur. 2d, Insurance, §§ 489 et seq., 667 et seq.

C.J.S. — 45 C.J.S., Insurance, § 762 et seq.

44-3-108. Common profits; application to expenses; surplus.

The common profits shall be applied to the payment of common expenses, and the rights in any surplus remaining after such payment shall pertain to the condominium units in proportion to the liability for common expenses pertaining to each such unit. The surplus shall be accordingly distributed to or credited to the next assessments chargeable to the unit owners except to such extent as the condominium instruments may require or permit the same to be added to reserves maintained pursuant to those instruments. (Ga. L. 1975, p. 609, § 40.)

RESEARCH REFERENCES

Am. Jur. 2d. — 15A Am. Jur. 2d, Condominiums and Cooperative Apartments, § 34.

C.J.S. — 51C C.J.S., Landlord and Tenant, § 232.

44-3-109. Lien for assessments; personal obligation of unit owner; notice and foreclosure; lapse; right to statement of assessments; effect of failure to furnish statement.

(a) All sums lawfully assessed by the association against any unit owner or condominium unit, whether for the share of the common expenses pertaining to that condominium unit, for fines, or otherwise, and all reasonable charges made to any unit owner or condominium unit for materials furnished or services rendered by the association at the owner's request to or on behalf of the unit owner or condominium unit, shall, from the time the same become due and payable, be the personal obligation of

the unit owner and constitute a lien in favor of the association on the condominium unit prior and superior to all other liens whatsoever except:

(1) Liens for ad valorem taxes on the condominium unit;

(2) The lien of any first priority mortgage covering the unit and the lien of any mortgage recorded prior to the recording of the declaration;

(3) The lessor's lien provided for in Code Section 44-3-86; and

(4) The lien of any secondary purchase money mortgage covering the unit, provided that neither the grantee nor any successor grantee on the mortgage is the seller of the unit.

The recording of the declaration pursuant to this article shall constitute record notice of the existence of the lien, and no further recordation of any claim of lien for assessments shall be required.

(b) To the extent that the condominium instruments provide, the personal obligation of the unit owner and the lien for assessments shall also include:

(1) A late or delinquency charge not in excess of the greater of $10.00 or 10 percent of the amount of each assessment or installment thereof not paid when due;

(2) At a rate not in excess of 10 percent per annum, interest on each assessment or installment thereof and any delinquency or late charge pertaining thereto from the date the same was first due and payable;

(3) The costs of collection, including court costs, the expenses of sale, any expenses required for the protection and preservation of the unit, and reasonable attorney's fees actually incurred; and

(4) The fair rental value of the condominium unit from the time of the institution of an action until the sale of the condominium at foreclosure or until the judgment rendered in the action is otherwise satisfied.

(c) Not less than 30 days after notice is sent by certified mail or statutory overnight delivery, return receipt requested, to the unit owner both at the address of the unit and at any other address or addresses which the unit owner may have designated to the association in writing, the lien may be foreclosed by the association by an action, judgment, and foreclosure in the same manner as other liens for the improvement of real property, subject to superior liens or encumbrances, but any such court order for judicial foreclosure shall not affect the rights of holders of superior liens or encumbrances to exercise any rights or powers afforded to them under their security instruments. The notice provided for in this subsection shall specify the amount of the assessments then due and payable together with authorized late charges and the rate of interest accruing thereon. No foreclosure action against a lien arising out of this subsection shall be

permitted unless the amount of the lien is at least $2,000.00. Unless prohibited by the condominium instruments, the association shall have the power to bid on the unit at any foreclosure sale and to acquire, hold, lease, encumber, and convey the same. The lien for assessments shall lapse and be of no further effect, as to assessments or installments thereof, together with late charges and interest applicable thereto, four years after the assessment or installment first became due and payable.

(d) Any unit owner, mortgagee of a unit, person having executed a contract for the purchase of a condominium unit, or lender considering the loan of funds to be secured by a condominium unit shall be entitled upon request to a statement from the association or its management agent setting forth the amount of assessments past due and unpaid together with late charges and interest applicable thereto against that condominium unit. Such request shall be in writing, shall be delivered to the registered office of the association, and shall state an address to which the statement is to be directed. Failure on the part of the association to mail or otherwise furnish such statement regarding amounts due and payable at the expiration of such five-day period with respect to the condominium unit involved to such address as may be specified in the written request therefor within five business days from the receipt of such request shall cause the lien for assessments created by this Code section to be extinguished and of no further force or effect as to the title or interest acquired by the purchaser or lender, if any, as the case may be, and their respective successors and assigns, in the transaction contemplated in connection with such request. The information specified in such statement shall be binding upon the association and upon every unit owner. Payment of a fee not exceeding $10.00 may be required as a prerequisite to the issuance of such a statement if the condominium instruments so provided.

(e) Nothing in this Code section shall be construed to prohibit actions maintainable pursuant to Code Section 44-3-76 to recover sums for which subsection (a) of this Code section creates a lien. (Ga. L. 1975, p. 609, § 41; Ga. L. 1982, p. 3, § 44; Ga. L. 1990, p. 227, §§ 13, 14; Ga. L. 1994, p. 1943, § 10; Ga. L. 2000, p. 1589, § 3; Ga. L. 2004, p. 560, § 7; Ga. L. 2008, p. 1135, § 1/HB 422.)

The 2008 amendment, effective July 1, 2008, added the third sentence in subsection (c).

Editor's notes. — Ga. L. 2000, p. 1589, § 16, not codified by the General Assembly, provides that the amendment to this Code section is applicable with respect to notices delivered on or after July 1, 2000.

Law reviews. — For article surveying recent legislative and judicial developments in Georgia's real property laws, see 31 Mercer L. Rev. 187 (1979). For article, ''Recommended Changes in the Law Affecting Condominium and Homeowner Associations in Georgia,'' see 1 Ga. St. U.L. Rev. 185 (1985).

JUDICIAL DECISIONS

Applicability. — As an assignee of a condominium association's interest in unpaid condominium assessments and liens in a unit presented no evidence that the declaration of condominium, recorded before enactment of the Georgia Condominium Act, O.C.G.A. § 44-3-70 et seq., was amended to submit the condominium to the Act, the assignee failed to show that the lien priority provisions of O.C.G.A. § 44-3-109 of the Act applied. Therefore, upon a creditor's foreclosure of the creditor's deed to secure debt, the provisions of the declaration operated to extinguish the assignee's lien for condominium assessments. Denhardt v. 7 Bay Traders LLC, 296 Ga. App. 122, 673 S.E.2d 621 (2009).

Provision added by 1990 amendment inapplicable. — The 1990 amendment of subsection (a) of O.C.G.A. § 44-3-109, adding the proviso at the end of the provision that all assessments due and payable from the unit owner constitutes a lien against the unit superior to all other liens, except the lien of any secondary purchase money mortgage covering the unit, provided that neither the grantee nor any successor grantee on the mortgage is the seller of the unit, did not apply when a secondary purchase money mortgage was made prior to the effective date of the amendment, but was not recorded until after that date. North Decatur Courtyards Condominium Ass'n v. Casey, 217 Ga. App. 716, 458 S.E.2d 676 (1995).

Foreclosure proceedings. — Sole requirements for creation of the lien for assessments are contained in this statute, and it is only the actual foreclosure proceedings which must be in the same manner as other liens for the improvement of real property. Propes v. Stonington Homeowners Ass'n, 149 Ga. App. 135, 253 S.E.2d 813 (1979) (see O.C.G.A. § 44-3-109).

Ga. L. 1975, p. 609, § 41 (see O.C.G.A. § 44-3-109) does not require procedural compliance with former Code 1933, § 67-2301 (see O.C.G.A. § 44-14-530) which provided for the enforcement of mechanics liens. Propes v. Stonington Homeowners Ass'n, 149 Ga. App. 135, 253 S.E.2d 813 (1979).

Liability of secondary purchase-money mortgagee. — Even though a secondary purchase-money mortgagee did not sell the condominium unit directly to the debtor who eventually failed to pay the mortgage or condominium fees and assessments, the association's lien was superior to the mortgage, and the mortgagee, as the seller of the unit, was liable for preforeclosure fees and assessments. Dunhill Condominium Ass'n v. Gregory, 228 Ga. App. 494, 492 S.E.2d 242 (1997).

Limitation on fees found in O.C.G.A. § 13-1-11(a)(2) is inapplicable to an action enforcing a condominium association's right to a lien for assessments. Wehunt v. Wren's Cross of Atlanta Condominium Ass'n, 175 Ga. App. 70, 332 S.E.2d 368 (1985).

Foreclosing mortgagee not entitled to pro rata share of lien elements. — While a foreclosing mortgagee is clearly not liable nor is its property interest subject to a lien for any assessment, it is obligated to pay a pro rata amount of that ''unpaid share'' which becomes a part of the common expenses, but the condominium association would not be entitled to recover from the foreclosing mortgagee a pro rata share of the elements enumerated in subsection (b) of O.C.G.A. § 44-3-109 because those elements arise only from the lien which results from the failure to make a timely payment of assessments. First Fed. Sav. Bank v. Eaglewood Court Condominium Ass'n, 186 Ga. App. 605, 367 S.E.2d 876, cert. denied, 186 Ga. App. 918, 367 S.E.2d 876 (1988).

Attorney fees. — Evidence showing no more than the amount billed by plaintiff's attorney was insufficient to establish the reasonableness of the claimed attorney fees. Hershiser v. Yorkshire Condominium Ass'n, 201 Ga. App. 185, 410 S.E.2d 455 (1991).

Court costs and attorney fees were appropriately awarded to a condominium association pursuant to O.C.G.A. § 44-3-109 and condominium documents. Atlanta Georgetown Condominium Ass'n v. Chaplin, 235 Ga. App. 460, 509 S.E.2d 729 (1998).

Condominium association was not entitled to all of the fees requested under O.C.G.A. § 44-3-109(b)(3) in the association's attempt to collect a default judgment entered against the debtor because the association incurred far more fees and expenses than necessary in an ill-considered and inef-

fective effort to collect through garnishment when the debtor, although failing to communicate with the association, acknowledged the debt and had made attempts to pay the past due assessments; the association was entitled to the fees in the association's attempt to obtain the default judgment as established by the state court and for fees for pre-bankruptcy legal services and private investigator expenses, but the other expenses and fees were thus not reasonable. Jacobs v. Vineyards Condo. Ass'n, Inc. (In re Jacobs), 324 B.R. 402 (Bankr. N.D. Ga. 2005).

Because attorney fees incurred on appeal were contemplated by O.C.G.A. § 44-3-109(b)(3) and a homeowners association's bylaws, the trial court erred by failing to hold a hearing as to the reasonable amount of attorney fees incurred by the association. Springside Condo. Ass'n, Inc. v. Harpagon Co., 298 Ga. App. 39, 679 S.E.2d 85 (2009).

Cited in Casey v. North Decatur Courtyards Condominium Ass'n, 213 Ga. App. 190, 444 S.E.2d 361 (1994).

RESEARCH REFERENCES

Am. Jur. 2d. — 15A Am. Jur. 2d, Condominiums and Cooperative Apartments, §§ 35, 36, 45 et seq.

C.J.S. — 53 C.J.S., Liens, §§ 1 et seq. 44.

44-3-110. Restraints on alienation and rights of first refusal; statement of waiver or failure to exercise rights or restraints; effect of failure to furnish statement.

Any rights of first refusal or other restraints on free alienability of the condominium units created by the condominium instruments shall be void unless the condominium instruments make provision for furnishing upon request to any unit owner or person who has executed a contract for the purchase of a condominium unit a recordable statement certifying to any waiver of or failure or refusal to exercise such rights and restraints whenever such waiver, failure, or refusal has occurred. Failure or refusal to furnish that statement within 30 days or such lesser period as the condominium instruments may specify shall cause all such rights and restraints to be inapplicable to the disposition of the condominium unit in contemplation of which such statement was requested. Any such statement shall be binding on the association and on every unit owner. Payment of a fee not exceeding $25.00 may be required as a prerequisite to the issuance of such a statement if the condominium instruments so provide. (Ga. L. 1975, p. 609, § 42.)

JUDICIAL DECISIONS

Cited in Hill v. Fontaine Condominium Ass'n, 255 Ga. 24, 334 S.E.2d 690 (1985).

RESEARCH REFERENCES

Am. Jur. 2d. — 15A Am. Jur. 2d, Condominiums and Cooperative Apartments, § 42.

C.J.S. — 31 C.J.S., Estates, § 145 et seq.

44-3-111. Sales of residential condominium units for residential occupancy; information required to be furnished by seller; buyer's right to void contract; limitations period; attorney's fees; penalty for willful violation.

(a) This Code section shall apply only to the first bona fide sale of each residential condominium unit for residential occupancy by the buyer, any member of the buyer's family, or any employee of the buyer. This Code section shall apply to any such sale regardless of whether the seller is the declarant, the association, or any other person. A contract for a sale to which this Code section is applicable is referred to in this Code section as a ''covered contract.''

(b) Any covered contract shall be voidable by the buyer until at least seven days after the seller has furnished to the prospective buyer the documents specified in this subsection. The copy of any such document which must be executed in order to be effective shall be a copy of the executed document. The documents required under this subsection to be furnished to the prospective buyer are the following:

(1) A copy of the floor plan of the unit which is the subject of the covered contract;

(2) A copy of the declaration and of each amendment thereto as of that time;

(3) A copy of the articles of incorporation and bylaws of the association and of each amendment to either as of that time;

(4) A copy of any ground lease or other underlying lease of all or any part of the condominium;

(5) A copy of every management, maintenance, and other contract for the management and operation of either the association, the condominium, or the facilities to be used by the unit owners having a term in excess of one year; contracts renewable without the consent of the association shall be deemed to have a term in excess of one year;

(6) The estimated or actual operating budget for the condominium for the current year containing the matters set forth in subparagraph (A) of this paragraph and a schedule of estimated or actual expenses pertaining to each condominium unit for the current year containing the matters set forth in subparagraph (B) of this paragraph:

(A) Expenses of the association for:

(i) Administration;

(ii) Management fees;

(iii) Maintenance;

(iv) Rent for recreational and other commonly used facilities;

(v) Taxes on property of the association;

(vi) Insurance;

(vii) Security provisions;

(viii) Other expenses;

(ix) Operating capital;

(x) Reserve for deferred maintenance;

(xi) Reserve for depreciation; and

(xii) Other reserves; and

(B) Expenses of the unit owner for:

(i) Assessments to cover association expenses;

(ii) Rent for the unit if part of a leasehold condominium; and

(iii) Rent, fees, or charges payable by the unit owner directly to the lessor or the lessor's agent under any recreational lease or lease for the use of commonly used facilities, which leases are and payment is a mandatory condition of ownership and which payment is not included in the assessments paid by the unit owner to the association;

(7) A copy of any lease of recreational or other facilities that will be used only by the unit owners;

(8) A copy of any lease of recreational or other facilities that will or may be used by unit owners in common with any other person;

(9) A copy of a statement setting forth the extent of and conditions or limitations applicable to the declarant's commitment to build and submit additional units, additional recreational or other facilities, or additional property; and

(10) If the covered contract applies to a condominium unit which is part of a conversion condominium:

(A) A statement by the declarant, based on a report prepared by an independent, registered architect or engineer, describing the present condition of all structural components and mechanical and electrical systems, excluding fixtures and appliances within the units, material to the use and enjoyment of the condominium;

(B) A statement by the declarant of the expected useful life of each item reported on as provided in subparagraph (A) of this paragraph or a statement that no representations are made in that regard; and

(C) A list of any outstanding notices of uncured violations of building code or other county or municipal regulations together with the estimated cost of curing those violations.

This paragraph shall not apply to any condominium created prior to July 1, 1980, or to the expansion of any such condominium.

The items required by this subsection shall be bound or stapled into a single package and covered by an index sheet listing each item required by this subsection and showing either that the same is attached or does not exist. A nonrefundable deposit not in excess of $25.00 may be required of the recipient of the documents required by this Code section, such deposit to be applied to the purchase price of the condominium unit in the event of purchase by the recipient. A dated, written acknowledgment of receipt of all items required by this subsection, executed by the recipient, shall be prima-facie evidence of the date of delivery of said items.

(c)(1) Any covered contract shall be voidable by the buyer until at least seven days after the seller has furnished to the buyer all of the items required to be furnished under this Code section. This subsection may not be waived. The contract shall contain within the text the following legend in boldface type or capital letters no smaller than the largest type in the text:

''THIS CONTRACT IS VOIDABLE BY BUYER UNTIL AT LEAST SEVEN DAYS AFTER ALL OF THE ITEMS REQUIRED UNDER CODE SECTION 44-3-111 OF THE 'GEORGIA CONDOMINIUM ACT' TO BE DELIVERED TO BUYER HAVE BEEN RECEIVED BY BUYER. THE ITEMS SO REQUIRED ARE: (1) A FLOOR PLAN OF THE UNIT, (2) THE DECLARATION AND AMENDMENTS THERETO, (3) THE ASSOCIATION'S ARTICLES OF INCORPORATION AND BYLAWS AND AMENDMENTS THERETO, (4) ANY GROUND LEASE, (5) ANY MANAGEMENT CONTRACT HAVING A TERM IN EXCESS OF ONE YEAR, (6) THE ESTIMATED OR ACTUAL BUDGET FOR THE CONDOMINIUM, (7) ANY LEASE OF RECREATIONAL OR OTHER FACILITIES THAT WILL BE USED ONLY BY THE UNIT OWNERS, (8) ANY LEASE OF RECREATIONAL OR OTHER FACILITIES THAT WILL OR MAY BE USED BY THE UNIT OWNERS WITH OTHERS, (9) A STATEMENT SETTING FORTH THE EXTENT OF THE SELLER'S COMMITMENT TO BUILD OR SUBMIT ADDITIONAL UNITS, ADDITIONAL RECREATIONAL OR OTHER FACILITIES, OR ADDITIONAL PROPERTY, AND (10) IF THIS CONTRACT APPLIES TO A CONDOMINIUM UNIT WHICH IS PART OF A CONVERSION CONDOMINIUM, A STATEMENT DESCRIBING THE CONDITION OF CERTAIN COMPONENTS AND SYSTEMS, A STATEMENT REGARDING THE EXPECTED USEFUL LIFE OF CERTAIN COMPONENTS AND SYSTEMS, AND CERTAIN INFORMATION REGARDING ANY NOTICES

OF VIOLATIONS OF COUNTY OR MUNICIPAL REGULATIONS. A DATED, WRITTEN ACKNOWLEDGMENT OF RECEIPT OF ALL SAID ITEMS SIGNED BY THE BUYER SHALL BE PRIMA-FACIE EVIDENCE OF THE DATE OF DELIVERY OF SAID ITEM.''

This paragraph shall apply to any condominium created on or after July 1, 1980, or to the expansion of any such condominium.

(2) No covered contract executed prior to the expiration of seven days after the actual delivery to the prospective purchaser of the items required to be furnished by subsection (b) of this Code section shall be of any force or effect whatsoever. This subsection may not be waived. The contract shall contain within the text the following legend in boldface type or capital letters no smaller than the largest type in the text:

''UNLESS ALL OF THE ITEMS REQUIRED UNDER CODE SECTION 44-3-111 OF THE 'GEORGIA CONDOMINIUM ACT' TO BE DELIVERED TO BUYER HAVE BEEN RECEIVED BY BUYER AT LEAST SEVEN DAYS PRIOR TO BUYER'S EXECUTION OF THIS CONTRACT, THIS CONTRACT IS OF NO FORCE OR EFFECT AND SHALL NOT BE BINDING ON ANY PARTY. THE ITEMS SO REQUIRED ARE: (1) A FLOOR PLAN OF THE UNIT, (2) THE DECLARATION AND AMENDMENTS THERETO, (3) THE ASSOCIATION'S ARTICLES OF INCORPORATION AND BYLAWS AND AMENDMENTS THERETO, (4) ANY GROUND LEASE, (5) ANY MANAGEMENT CONTRACT HAVING A TERM IN EXCESS OF ONE YEAR, (6) THE ESTIMATED OR ACTUAL BUDGET FOR THE CONDOMINIUM, (7) ANY LEASE OF RECREATIONAL OR OTHER FACILITIES THAT WILL BE USED ONLY BY THE UNIT OWNERS, (8) ANY LEASE OF RECREATIONAL OR OTHER FACILITIES THAT WILL OR MAY BE USED BY THE UNIT OWNERS WITH OTHERS, AND (9) A STATEMENT SETTING FORTH THE EXTENT OF THE SELLER'S COMMITMENT TO BUILD OR SUBMIT ADDITIONAL UNITS, ADDITIONAL RECREATIONAL OR OTHER FACILITIES, OR ADDITIONAL PROPERTY. A DATED, WRITTEN ACKNOWLEDGMENT OF RECEIPT OF ALL SAID ITEMS SIGNED BY THE BUYER SHALL BE PRIMA-FACIE EVIDENCE OF THE DATE OF DELIVERY OF SAID ITEMS.''

This paragraph shall apply to any condominium created prior to July 1, 1980, or to the expansion of any such condominium.

(d) The items required to be furnished or made available to a prospective buyer under this Code section shall constitute a part of each covered contract; and no change may be made in any of such items which would materially affect the rights of the prospective buyer or the value of the unit without the approval of the prospective buyer except to the extent that such items by their own terms, by the express terms of such covered contract, or

by the provisions of this article may be changed without the consent of any unit owner or prospective buyer.

(e) In addition to provisions elsewhere required, a covered contract shall include the following provisions:

(1) A caveat in boldface type or capital letters no smaller than the largest type on the page shall be placed upon the first page of the contract in the following words:

''ORAL REPRESENTATIONS CANNOT BE RELIED UPON AS CORRECTLY STATING THE REPRESENTATIONS OF THE SELLER. FOR CORRECT REPRESENTATIONS, REFERENCE SHOULD BE MADE TO THIS CONTRACT AND THE DOCUMENTS REQUIRED BY CODE SECTION 44-3-111 OF THE 'GEORGIA CONDOMINIUM ACT' TO BE FURNISHED BY A SELLER TO A BUYER.'';

(2) If the contract applies to a condominium unit which is part of an expandable condominium, the contract shall contain within the text the following statement in boldface type or capital letters no smaller than the largest type in the text:

''THIS CONTRACT APPLIES TO A CONDOMINIUM UNIT WHICH IS PART OF AN EXPANDABLE CONDOMINIUM.'';

(3) If the contract applies to a condominium unit which includes a leasehold estate or estate for years in property and if, upon the expiration of such leasehold or estate, the unit will be deemed to have been withdrawn pursuant to subsection (c) of Code Section 44-3-81 or the condominium will be terminated, the contract shall contain within the text a statement in the following words in boldface type or capital letters no smaller than the largest type in the text:

''THIS CONTRACT IS FOR THE TRANSFER OF A CONDOMINIUM UNIT SUBJECT TO A LEASE THAT EXPIRES _____, AND THE LESSEE'S INTEREST WILL TERMINATE UPON EXPIRATION OF THE LEASE.'';

(4) If the contract applies to a condominium unit that is subject to a lien for rent payable under a lease of a recreational facility or other commonly used facility, the contract shall contain within the text a statement in the following words in boldface type or capital letters no smaller than the largest type in the text:

''THIS CONTRACT IS FOR THE TRANSFER OF A CONDOMINIUM UNIT THAT IS SUBJECT TO A LIEN FOR RENT PAYABLE UNDER A LEASE OF A RECREATIONAL FACILITY, AND FAILURE TO PAY THIS RENT MAY RESULT IN FORECLOSURE OF THE LIEN.'';

(5) If, but only if, any applicable statute, ordinance, rule, or regulation requires, permits, or provides for the issuance of a certificate of occu-

pancy by any officer, department, or agency of any governmental entity, the contract shall contain an express obligation on the part of the seller to furnish to the buyer at or prior to closing a true, correct, and complete copy of a duly issued certificate of occupancy covering the unit which is the subject matter of the covered contract unless the buyer executes a separate agreement at or before closing setting forth that the contract applies to a condominium unit for which the seller is not obligated to obtain a certificate of occupancy before conveyance of the unit to the buyer and such agreement contains the following statement in at least 14-point boldface type or capital letters:

''THE SELLER IS NOT OBLIGATED TO OBTAIN A CERTIFICATE OF OCCUPANCY BEFORE CONVEYANCE OF THE UNIT TO THE BUYER. THE LACK OF A CERTIFICATE OF OCCUPANCY SHALL NOT EXCUSE THE BUYER FROM ANY OBLIGATION TO PAY ASSESSMENTS TO THE ASSOCIATION.''; and

(6) If the contract applies to a condominium unit which is part of a conversion condominium, the contract shall contain within the text the following statement in boldface type or capital letters no smaller than the largest type in the text:

''THIS CONTRACT APPLIES TO A CONDOMINIUM UNIT WHICH IS PART OF A CONVERSION CONDOMINIUM.''

This paragraph shall not apply to any condominium created prior to July 1, 1980, or to the expansion of any such condominium.

(f) If any condominium unit is offered for sale prior to the completion of the construction or remodeling of that unit or of improvements which shall constitute common elements, the seller shall make available to each prospective buyer for his inspection at a place convenient to the site a copy of the existing plans and specifications for the construction or remodeling of that unit and of the improvements which shall constitute common elements, whichever is not then complete.

(g) Any sales brochures describing the condominium and the units to be sold shall include a description and location of the recreational facilities proposed to be provided by the seller, the parking facilities, and other commonly used facilities together with a statement indicating:

(1) Which of the facilities will be owned by the unit owners as part of the common elements and which of the facilities will be owned by others;

(2) Whether, with respect to each facility so shown, the seller is obligated to complete the same; and

(3) The limitations or conditions, if any, on the seller's obligation to complete the same.

A caveat in boldface type or capital letters no smaller than the largest type of text material shall be conspicuously placed on the inside front cover of

the sales brochure or on the first page containing text material or shall be otherwise conspicuously displayed and shall contain the following words:

> ''ORAL REPRESENTATIONS CANNOT BE RELIED UPON AS CORRECTLY STATING REPRESENTATIONS OF THE SELLER. FOR CORRECT REPRESENTATIONS, REFERENCE SHOULD BE MADE TO THIS BROCHURE AND TO THE DOCUMENTS REQUIRED BY CODE SECTION 44-3-111 OF THE 'GEORGIA CONDOMINIUM ACT' TO BE FURNISHED BY THE SELLER TO A BUYER.''

(h) If condominium units are sold subject to a lease, all written or printed advertising of the units shall contain a statement in the following words in boldface type or capital letters no smaller than the largest type in the context where used:

> ''THESE CONDOMINIUM UNITS WILL BE TRANSFERRED SUBJECT TO A LEASE.''

(i) Any person who, in reasonable reliance upon any false or misleading material statement or information published by or under authority from the seller in advertising and promotional materials, including, but not limited to, the items required to be furnished by this Code section, brochures, and newspaper advertising, or who, without having been furnished with all of the information required to be furnished by this Code section, pays anything of value toward the purchase of a condominium unit located in this state shall be entitled to bring an action against the seller for damages under this Code section at any time prior to the expiration of one year after the date upon which the last of the events described in paragraphs (1) through (5) of this subsection shall occur:

(1) The closing of the transaction;

(2) The first issuance by the applicable governmental authority of a certificate of occupancy or other evidence of sufficient completion of construction of the building containing the unit to allow lawful occupancy of the unit. In counties or municipalities in which certificates of occupancy or other evidence of completion sufficient to allow lawful occupancy are not customarily issued, for the purpose of this Code section, evidence of lawful occupancy shall be deemed to have been given or issued upon the date that such lawful occupancy of the unit may first be allowed under prevailing applicable laws, ordinances, or statutes;

(3) The completion of the common elements and any recreational facilities, whether or not the same are common elements, which the seller is obligated to complete or to provide under the terms of the written contract for the sale of the unit;

(4) As to claims relating to the common elements and other portions of the condominium which are the responsibility of the association to

maintain, the date upon which the declarant's right to control the association terminates as provided in Code Section 44-3-101; or

(5) In the event there shall not be a written contract for the sale of the unit, then the completion of the common elements and such recreational facilities, whether or not the same are common elements, which the seller would be obligated to complete under any rule of law applicable to the seller's obligation.

(j) Under no circumstances shall a cause of action created or recognized under this Code section survive for a period of more than five years after the closing of the transaction. Any person who has a right of action for damages as provided in this subsection shall have the additional right to rescind any contract for the purchase of a condominium unit at any time prior to the closing of the transaction. In any action for relief under this Code section, the prevailing party shall be entitled to recover reasonable attorney's fees.

(k) Willful violation of any of the requirements of this Code section by the declarant, the seller, any sales agent or broker, or any other person shall constitute a misdemeanor. (Ga. L. 1975, p. 609, § 43; Ga. L. 1980, p. 487, §§ 1, 2; Ga. L. 1980, p. 1406, §§ 5-7; Ga. L. 1982, p. 3, § 44; Ga. L. 1983, p. 3, § 33; Ga. L. 1986, p. 942, § 1; Ga. L. 1990, p. 227, § 15; Ga. L. 1991, p. 94, § 44; Ga. L. 2007, p. 611, § 3/HB 383; Ga. L. 2010, p. 878, § 44/HB 1387.)

The 2010 amendment, effective June 3, 2010, part of an Act to revise, modernize, and correct the Code, revised language in the last sentence of the undesignated paragraph at the end of subsection (b), and in the contract language in paragraphs (c)(1) and (c)(2).

Law reviews. — For article, ''Recommended Changes in the Law Affecting Condominium and Homeowner Associations in Georgia,'' see 1 Ga. St. U.L. Rev. 185 (1985). For article, ''Georgia Condominium Law: Beyond the Condominium Act,'' see 13 Ga. St. B.J. 24 (2007).

JUDICIAL DECISIONS

No misappropriation to furnish plans to buyers. — Any seller of a condominium may furnish prospective buyers with various documents, including a copy of the floor plan of the unit and a copy of the condominium declaration, and such will not constitute a misappropriation. Wright v. Tidmore, 208 Ga. App. 150, 430 S.E.2d 72 (1993).

Change in number of units built. — Seller did not violate the buyers' rights by reducing the number of condominium units the seller built, as the seller retained the right to do so, and decreasing the number of units increased, rather than diluted, the buyer's voting power. Park Regency Ptnrs., L.P. v. Gruber, 271 Ga. App. 66, 608 S.E.2d 667 (2004).

Changes to disclosure documents held proper. — As condominium buyers acknowledged the seller's limited right to make certain changes to the disclosure documents without the buyer's consent, prior to the recordation of the declaration in the declaration's final form, by making such changes, the seller did not violate O.C.G.A. § 44-3-111(d). Park Regency Ptnrs., L.P. v. Gruber, 271 Ga. App. 66, 608 S.E.2d 667 (2004).

Effect of recording declaration. — Condominium declaration does not become an ''instrument'' until the declaration is recorded; before the declaration is recorded, O.C.G.A. § 44-3-111, which sets forth the information that sellers are required to fur-

nish buyers as well as the rights of buyers generally, applies to the transaction, not O.C.G.A. § 44-3-93(c). Park Regency Ptnrs., L.P. v. Gruber, 271 Ga. App. 66, 608 S.E.2d 667 (2004).

Cited in McKnight v. Golden Isles Marina, Inc., 186 Ga. App. 228, 366 S.E.2d 830 (1988).

RESEARCH REFERENCES

Am. Jur. 2d. — 15A Am. Jur. 2d, Condominiums and Cooperative Apartments, § 14 et seq.

C.J.S. — 51C C.J.S., Landlord and Tenant, § 232.

ALR. — Self-dealing by developers of condominium project as affecting contracts or leases with condominium association, 73 ALR3d 613.

Expenses for which condominium association may assess unit owners, 77 ALR3d 1290.

Validity and construction of regulations of governing body of condominium or cooperative apartment pertaining to parking, 60 ALR5th 647.

44-3-112. Escrow of deposits or other payments made prior to closing.

(a) Any deposit or other payment made prior to closing with respect to the first bona fide sale of each residential condominium unit for residential occupancy by the buyer, any member of the buyer's family, or any employee of the buyer shall be held in escrow until it is delivered at closing, delivered to the seller in accordance with subsection (b) of this Code section, or delivered to the person or persons entitled thereto upon breach of the contract for the sale. Such escrow funds shall be deposited in a separate account designated for this purpose; provided, however, that, in the event any such deposit is held by a real estate broker licensed under the laws of this state, such funds may be placed in such broker's escrow account instead of a separately designated account.

(b) If the contract for sale of the condominium unit so provides and the purchase price of the condominium unit is not less than $150,000.00, the seller may withdraw escrow funds in excess of 1 percent of the purchase price from the escrow account required by subsection (a) of this Code section when the construction of improvements has commenced. The seller shall only use the funds in the actual construction and development of the condominium property in which the unit to be sold is located. However, no part of these funds may be used for salaries, commissions, expenses of real estate licensees, or advertising purposes. A contract which permits use of the advance payments for these purposes shall be initialed by the buyer and include the following caveat in boldfaced type or capital letters no smaller than the largest type on the first page of the contract: ANY PAYMENT IN EXCESS OF 1 PERCENT OF THE PURCHASE PRICE MADE TO THE SELLER PRIOR TO CLOSING PURSUANT TO THIS CONTRACT MAY BE USED FOR CONSTRUCTION PURPOSES BY THE SELLER. (Ga. L. 1975, p. 609, § 44; Ga. L. 2006, p. 548, § 2/SB 573.)

Editor's notes. — Ga. L. 2006, p. 548, § 3, not codified by the General Assembly, provides: ''This Act shall only apply with respect to causes of actions or claims arising on or after the effective date of this Act, and any prior causes of action or claims shall continue to be governed by prior law.''

RESEARCH REFERENCES

Am. Jur. 2d. — 28 Am. Jur. 2d, Escrow, § 6 et seq.

C.J.S. — 30A C.J.S., Escrows, §§ 1, 8.

44-3-113. Applicability of this article; effect on existing condominiums.

(a) This article shall apply to all property which is submitted to this article and shall also apply to any condominium created prior to October 1, 1975, pursuant to the ''Apartment Ownership Act'' if the instruments creating such condominium are amended in accordance with their terms in order to submit the condominium to this article.

(b) Existing condominiums created pursuant to the ''Apartment Ownership Act'' may amend the instruments creating them in certain respects in order to avail themselves of this article; provided, however, that any amendment must conform the instrument or instruments creating the condominium to this article in all necessary respects and the condominium shall thereafter be deemed to be submitted to this article. No condominium shall be established under the ''Apartment Ownership Act'' on or after October 1, 1975. Nothing contained in this article shall be construed to affect the validity of any provision of any instrument recorded prior to October 1, 1975. (Ga. L. 1975, p. 609, § 2.)

Code Commission notes. — The Apartment Ownership Act, Ga. L. 1963, p. 561, has not been codified in view of the provisions of this Code section.

JUDICIAL DECISIONS

Georgia Condominium Act held inapplicable. — As an assignee of a condominium association's interest in unpaid condominium assessments and liens in a unit presented no evidence that the declaration of condominium, recorded before enactment of the Georgia Condominium Act, O.C.G.A. § 44-3-70 et seq., was amended to submit the condominium to the Act, the assignee failed to show that the lien priority provisions of O.C.G.A. § 44-3-109 of the Act applied. Therefore, upon a creditor's foreclosure of its deed to secure debt, the provisions of the declaration operated to extinguish the assignee's lien for condominium assessments. Denhardt v. 7 Bay Traders LLC, 296 Ga. App. 122, 673 S.E.2d 621 (2009).

Cited in Devins v. Leafmore Forest Condominium Ass'n, 200 Ga. App. 158, 407 S.E.2d 76 (1991).

44-3-114. Effect of article upon land use, zoning, building, and subdivision laws; effect of Code Section 44-3-92; applicability of land use and zoning ordinances or laws to expandable condominium.

(a) No zoning, subdivision, building code, or other real estate use law, ordinance, or regulation shall prohibit the condominium form of owner-

ship or impose any requirement upon a condominium which it does not impose upon a physically identical development under a different form of ownership. No subdivision law, ordinance, or regulation shall apply to any condominium or to any subdivision of any convertible space or unit. Except as stated in this Code section, no provision of this article invalidates or modifies any provision of any zoning, subdivision, building code, or other real estate use law, ordinance, or regulation; and nothing contained in this Code section shall be construed to amend, supersede, or invalidate any provision of Article 1 of this chapter nor shall Code Section 44-3-92 be construed to override any lawful density requirement imposed by any zoning, building, or land use law, ordinance, or regulation. This subsection shall apply to any condominium created on or after July 1, 1980, or to the expansion of any such condominium.

(b) No subdivision law, ordinance, or regulation shall apply to any subdivision of any convertible space or unit as defined in this article. Notwithstanding the foregoing provisions of this subsection, however, nothing contained in this subsection shall be construed to amend, repeal, supersede, or invalidate any provision of Article 1 of this chapter nor shall Code Section 44-3-92 be construed to override any lawful density requirement imposed by any zoning, building, or land use law, ordinance, or regulation. This subsection shall apply to any condominium created prior to July 1, 1980, or to the expansion of any such condominium.

(c) No subdivision law, ordinance, or regulation shall apply to the additional property of an expandable condominium for so long as the additional property may be added to the expandable condominium in accordance with the provisions of this article and the declaration. If the additional property is not deemed separate from the submitted property under any zoning, land use, subdivision, building, or life safety law, code, regulation, or ordinance at the time of the establishment of the condominium, the additional property shall not be deemed separate from the submitted property under any zoning, land use, subdivision, building, or life safety law, code, regulation, or ordinance so long as the additional property may be added by the declarant to the expandable condominium in accordance with the provisions of this article and the declaration. (Ga. L. 1975, p. 609, § 5; Ga. L. 1980, p. 1406, § 2; Ga. L. 1983, p. 3, § 33; Ga. L. 2007, p. 611, § 4/HB 383.)

RESEARCH REFERENCES

Am. Jur. 2d. — 15A Am. Jur. 2d, Condominiums and Cooperative Apartments, § 18 et seq. 82 Am. Jur. 2d, Zoning and Land Planning, § 1.

C.J.S. — 101A C.J.S., Zoning and Land Planning, §§ 52, 53, 56, 57, 74, 207, 208, 261.

ALR. — Retroactive effect of zoning regulation, in absence of saving clause, on pending application for building permit, 50 ALR3d 596.

Zoning or building regulations as applied to condominiums, 71 ALR3d 866.

44-3-115. Construction of this article; substantial compliance; procedure for curing defects in recorded instruments.

The provisions of this article and of condominium instruments recorded pursuant thereto shall be liberally construed in favor of the valid establishment of a condominium pursuant to this article with respect to the submitted property. Substantial compliance with the requirements of this article for the establishment of a condominium shall suffice to bring property described in condominium instruments recorded pursuant to this article within the purview and application of this article; and any defects in such instruments or want of conformity with this article may be cured by an amendment thereto duly executed by the association and recorded or, upon application of any unit owner, with notice to the declarant, the association, and all other unit owners, by decree of the court. (Ga. L. 1975, p. 609, § 45.)

RESEARCH REFERENCES

Am. Jur. 2d. — 17A Am. Jur. 2d, Contracts, §§ 340, 341, 367.

C.J.S. — 17A C.J.S., Contracts, § 332.

44-3-116. Limitations in certain restrictive covenants inapplicable.

The limitations provided in subsection (b) and in paragraphs (1), (2), and (4) of subsection (d) of Code Section 44-5-60 shall not apply to any covenants contained in any condominium instrument created pursuant to this article. (Code 1981, § 44-3-116, enacted by Ga. L. 1990, p. 227, § 16; Ga. L. 1994, p. 1943, § 11.)

RESEARCH REFERENCES

ALR. — Erection of condominium as violation of restrictive covenant forbidding erection of apartment houses, 65 ALR3d 1212.

44-3-117. Application to subcondominiums; creation of subcondominium; subassociation; insurance; effect of certain liens; eminent domain; description of certain units; assessments.

(a) Except as otherwise set forth in this Code section, the creation of a subcondominium shall not limit the application of this article in its entirety to such subcondominium.

(b) To the extent permitted in the condominium instruments, a condominium unit may be submitted by the owner thereof to a subcondominium and such owner shall thereafter be deemed the declarant, as such term is defined in paragraph (13) of Code Section 44-3-71, of such subcondominium.

(c) Upon the creation of a subcondominium:

(1) No tax or governmental assessment shall be levied against the unit as a whole but instead shall only be levied on the subunits;

(2) The subassociation shall represent and be responsible for acting on behalf of the subunit owners in discharging the rights and obligations of the unit owner as a member of the master association, including, without limitation, voting the interests of the unit in the master association and paying assessments owing on the unit to the master association;

(3) The insurance required in paragraph (1) of Code Section 44-3-107 may be obtained by either the subassociation or the master association for the condominium in which the subcondominium is a unit;

(4) No lien for labor or services performed or materials furnished in the improvement of the unit shall be filed against the subcondominium as a whole but shall only be filed against the subunits, and such lien may be discharged by the owner of any subunit in the same manner provided in subsection (d) of Code Section 44-3-95;

(5) If a subassociation has been created for property affected by an eminent domain proceeding, no eminent domain action shall be brought against the subassociation as a whole but only against the subunit owners thereof; and

(6) No description of a subunit shall be deemed to be vague, uncertain or otherwise insufficient if the description complies with Code Section 44-3-73.

(d) The description of submitted property or additional property to a subcondominium required by this article shall be valid if described by a legal description by metes and bounds or by a description of a unit in a master condominium in the manner provided for in Code Section 44-3-73.

(e) All sums lawfully assessed by a master association against a subassociation shall have the same effect as provided in subsection (a) of Code Section 44-3-109.

The recording of the declaration for a subcondominium pursuant to this article shall constitute record notice of the existence of the lien, and no further recordation of any claim of lien for assessments shall be required.

(f) In the event any lien becomes effective against a subunit as provided in subsection (e) of this Code section, the subassociation may remove that lien from the subunits by:

(1) The payment of the amount attributable to the subunits, or

(2) Bonding of the amount assessed against the subassociation

or any subunit owner may remove that lien from his or her subunit by the payment of the amount attributable to his or her subunit. The amount shall be computed by reference to the liability for common expenses pertaining

to that condominium unit pursuant to subsection (c) of Code Section 44-3-80. Subsequent to the payment, discharge, or other satisfaction of such amount, the subunit owner of that subunit shall be entitled to have that lien released as to his or her subunit in accordance with applicable provisions of law, and notwithstanding anything to the contrary in Code Sections 44-3-80 and 44-3-109, the master association shall not assess or have a valid lien against that subunit for any portion of the common expenses incurred by the master association in connection with that lien.

(g) Not less than 30 days after notice is sent by certified mail or statutory overnight delivery, return receipt requested, to the subunit owner both at the address of the subunit and at any other address or addresses which the subunit owner may have designated to the master association in writing, the lien of the master association may be foreclosed by the master association by an action, judgment, and foreclosure in the same manner as other liens for the improvement of real property, subject to superior liens or encumbrances, but any such court order for judicial foreclosure shall not affect the rights of holders of superior liens or encumbrances to exercise any rights or powers afforded to them under their security instruments. The notice provided for in this subsection shall specify the amount of the assessments then due and payable together with authorized late charges and the rate of interest accruing thereon. No foreclosure action against a lien arising out of this subsection shall be permitted unless the amount of the lien is at least $2,000.00. Unless prohibited by the master condominium instruments, the master association shall have the power to bid on the subunit at any foreclosure sale and to acquire, hold, lease, encumber, and convey the same. The lien for assessments shall lapse and be of no further effect, as to assessments or installments thereof, together with late charges and interest applicable thereto, four years after the assessment or installment first became due and payable.

(h) Any subunit owner, mortgagee of a subunit, person having executed a contract for the purchase of a subunit, or lender considering the loan of funds to be secured by a subunit shall be entitled upon request to a statement from the subassociation or its management agent setting forth the amount of assessments past due and unpaid together with late charges and interest applicable owed by the subassociation to the master association. If the subassociation or its management agent states an amount less than the amount actually owed by the subassociation to the master association, the lien created by Code Section 44-3-109 for any amounts in excess of the stated amount shall be subordinate to the lien of any first priority mortgage covering the subunit.

(i) In addition to the documents required to be furnished to the prospective buyer under subsection (b) of Code Section 44-3-111, if the covered contract applies to a condominium unit which is part of a subcondominium, the following shall be provided to the prospective buyer:

(1) A copy of the declaration for the master condominium, and a copy of each amendment thereto; and

(2) A copy of the articles of incorporation and bylaws of the master association, and of each amendment to either. (Code 1981, § 44-3-117, enacted by Ga. L. 2007, p. 611, § 5/HB 383.)

ARTICLE 4

CEMETERIES

44-3-130 through 44-3-152.

Reserved. Repealed by Ga. L. 2000, p. 882, § 5, effective July 1, 2000.

Editor's notes. — This article consisted of Code Sections 44-3-130 through 44-3-152, relating to cemeteries, and was based on Ga. L. 1983, p. 1508, § 1; Ga. L. 1984, p. 22, § 44; Ga. L. 1985, p. 149, § 44; Ga. L. 1986, p. 10, § 44; Ga. L. 1986, p. 1468, §§ 1-9; Ga. L. 1987, p. 3, § 44; Ga. L. 1992, p. 6, § 44; Ga. L. 1992, p. 2397, § 1; Ga. L. 1994, p. 329, § 1; Ga. L. 1998, p. 128, § 44; Ga. L. 2000, p. 1589, § 3. For present comparable provisions, see Chapter 14 of Title 10.

ARTICLE 5

TIME-SHARE PROJECTS AND PROGRAMS

Law reviews. — For article discussing provisions pertaining to the regulation of time shared interests in property ownership, see 12 Ga. St. B.J. 75 (1975). For annual survey of real property law, see 35 Mercer L. Rev. 257 (1983).

For comment, ''Proposed Legislation for Property's Twilight Zone: Time Sharing in Georgia,'' see 34 Mercer L. Rev. 403 (1982).

OPINIONS OF THE ATTORNEY GENERAL

Use of campground on first-come, first-serve basis. — Since the General Assembly contemplated the recognition and regulation of the purchase and sale of interests, whether contractual or real property, which entitled the purchaser to the use of property for a time period, it was not the intention of the General Assembly to regulate the sale of the right to use a campground which entitled the user to no specific time period of use, but only a right to use, common among other purchasers, on a first-come, first-serve basis. 1984 Op. Att'y Gen. No. 84-81.

Part 1

General Provisions

44-3-160. Short title.

This article shall be known and may be cited as the ''Georgia Time-Share Act.'' (Code 1981, § 44-3-160, enacted by Ga. L. 1983, p. 1255, § 1; Ga. L. 1984, p. 22, § 44; Ga. L. 1995, p. 1260, § 1.)

44-3-161. Purpose of article.

The purposes of this article are to:

(1) Give statutory recognition to real property timesharing in this state;

(2) Regulate developers of time-share estate and time-share use projects located in this state and outside this state when offered for sale in this state;

(3) Require that developers of time-share projects:

(A) Make certain disclosures to purchasers and prospective purchasers through the use of a public offering statement;

(B) Deposit trust funds with an escrow agent;

(C) Utilize only licensed real estate brokers as sales agents if required by Chapter 40 of Title 43; and

(D) Comply with promotional advertising standards;

(4) Establish operating standards for time-share project managing agents and exchange programs operating in this state; and

(5) Provide for sanctions for violations of any provisions of this article which will permit:

(A) Courts of competent jurisdiction to impose fines or imprisonment for misdemeanors and felonies; and

(B) A claim for appropriate relief by any person adversely affected. (Code 1981, § 44-3-161, enacted by Ga. L. 1983, p. 1255, § 1; Ga. L. 1995, p. 1260, § 1.)

44-3-162. Definitions.

As used in this article, the term:

(1) ''Agent'' means a person authorized by the developer to act for such developer in offering to the public or managing time-share intervals including but not limited to employees or independent contractors of the developer, managing agents, sales agents, and escrow agents.

(2) ''Conspicuous statement'' means a statement in boldface and conspicuous type of at least ten points, such statements always being larger than all other statements, except for other conspicuous statements, in the body of the document in which they are required.

(3) ''Developer'' means, in the case of any given property, any person or entity which is in the business of creating or which is in the business of

selling its own time-share intervals in any time-share program. This definition shall not mean a person acting solely as a sales agent.

(4) ''Developer control period'' means the period of time during which the developer or managing agent selected by the developer may manage the time-share program and the units in the time-share program.

(5) ''Development,'' ''project,'' or ''property'' means all of the real property subject to a project instrument and which contains more than one unit.

(6) ''Escrow agent'' means a licensed real estate broker, an attorney who is a member of the State Bar of Georgia, a title company, or a banking institution or savings and loan company having trust powers and located in this state who is entrusted with the deposit of trust funds with instructions to carry out the provisions of an agreement or contract.

(7) ''Exchange company'' means any person owning or operating an exchange program.

(8) ''Exchange program'' means any arrangement whereby owners may exchange occupancy rights with persons owning other time-share intervals or units or other rights of possession; provided, however, that an exchange program shall not exist if all of the occupancy rights which may be exchanged are in the same time-share property.

(9) ''Managing agent'' means a person who undertakes the duties, responsibilities, and obligations of the management of a time-share program.

(10) ''Multilocation developer'' means a developer creating or selling its own time-share intervals in a multilocation plan.

(11) ''Multilocation plan'' means a time-share plan respecting more than one time-share property pursuant to which owners may or may not obtain use rights in a specific time-share property and may, by reservation or other similar procedure, become entitled to occupy time-share units in more than one time-share property.

(12) ''Offering'' means any offer to sell, solicitation, inducement, or advertisement whether by radio, television, newspaper, magazine, or mail whereby a person is given an opportunity to acquire a time-share interval.

(12.1) ''Owners' association'' means an association made up of all owners of time-share intervals in a time-share program.

(13) ''Person'' means one or more natural persons, corporations, partnerships, associations, trusts, other entities, or any combination thereof.

(14) ''Project'' means development.

(15) ''Project instrument'' means one or more recordable documents applicable to the whole project by whatever name denominated, containing restrictions or covenants regulating the use, occupancy, or disposition of an entire project including any amendments to the document excluding any law, ordinance, or governmental regulation.

(16) ''Property'' means development.

(17) ''Public offering statement'' means a written statement given to prospective purchasers by the developer or the developer's agent disclosing such information about the time-share project as required by this article.

(18) ''Purchaser'' means any person other than a developer or lender who acquires an interest in a time-share interval.

(19) ''Sales agent'' means a person who for another, for a fee, commission, or any other valuable consideration or with the intent or expectation of receiving the same from another, negotiates or attempts to negotiate the sale or lease of a time-share interval in a time-share program.

(20) ''Sales agreement'' means that contract, agreement, lease, or other written instrument by which a purchaser contracts to acquire or acquires, in the event there is no contract to acquire, an interest in a time-share interval.

(21) ''Time-share estate'' means an ownership or leasehold interest in real property divided into measurable chronological periods, including real property interests held in irrevocable trust wherein all owners of the time-share program or the owners' association of the time-share program are express beneficiaries of such trust and the trustee is independent of the developer; provided, however, that if such real property interests are held in trust, conveyance of the property to the trust shall be free of all financial liens and encumbrances or shall include a recorded nondisturbance agreement.

(22) ''Time-share instrument'' means any document, by whatever name denominated, creating or regulating time-share programs excluding any law, ordinance, or governmental regulation.

(23) ''Time-share interval'' means a time-share estate or a time-share use.

(24) ''Time-share program'' means any arrangement for time-share intervals in a time-share project whereby the use, occupancy, or possession of real property has been made subject to either a time-share estate or time-share use whereby such use, occupancy, or possession circulates among purchasers of the time-share intervals according to a fixed or floating time schedule on a periodic basis occurring annually over any period of time in excess of one year in duration.

(25) ''Time-share project'' means any real property that is subject to a time-share program.

(26) ''Time-share use'' means any contractual right of exclusive occupancy which does not fall within the definition of a time-share estate including, without limitation, a vacation license, prepaid hotel reservation, club membership, limited partnership, or vacation bond.

(27) ''Unit'' means the real property or real property improvement in a project which is divided into time-share intervals. (Code 1981, § 44-3-162, enacted by Ga. L. 1983, p. 1255, § 1; Ga. L. 1986, p. 10, § 44; Ga. L. 1989, p. 321, § 1; Ga. L. 1990, p. 227, § 17; Ga. L. 1995, p. 1260, § 1; Ga. L. 2009, p. 332, § 1/HB 608.)

The 2009 amendment, effective July 1, 2009, added paragraph (12.1) and, in paragraph (21), added '', including real property interests held in irrevocable trust wherein all owners of the time-share program or the owners' association of the time-share program are express beneficiaries of such trust and the trustee is independent of the developer; provided, however, that if such real property interests are held in trust, conveyance of the property to the trust shall be free of all financial liens and encumbrances or shall include a recorded nondisturbance agreement''.

44-3-162.1. Time-share projects and programs; application of restrictive covenants; exceptions.

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

(1) ''Private residence club'' means an improvement located on real property, including, but not limited to, a single-family residence, the title to which is held by a maximum of eight individuals as tenants in common in fee simple or by a limited liability company containing not greater than eight members, and the use of such improvement or residence includes, without limitation, exclusive occupancy for certain time periods which are determined among the titleholders or limited liability company members by project instrument, including, but not limited to, a declaration of restrictive covenants, a contract, or otherwise. A private residence club may or may not be located in a private residence club development.

(2) ''Private residence club development'' means a development of at least two private residence clubs in which the titleholders or members of the limited liability company, as respects to each private residence club, contractually agree by project instrument, contract, or otherwise to permit occupancy for certain time periods to the titleholders or members of the limited liability company as exist with respect to any or all of the private residence clubs in the private residence club development.

(b) Neither a private residence club nor a private residence club development shall be considered a time-share estate, time-share program, time-share project, or time-share use under this article, and this article shall not be applicable to private residence clubs or private residence club

developments; provided, however, that, notwithstanding the foregoing, if there exists a restrictive covenant on real estate that restricts or prohibits time-share estates, time-share programs, time-share projects, or time-share uses, such restrictive covenants shall equally restrict or prohibit a private residence club and a private residence club development unless such restrictive covenant expressly states that it does not apply to private residence clubs and private residence club developments. No zoning, subdivision, or building code or other real estate use ordinance or regulation shall prohibit a private residence club form of ownership or impose any requirement upon a private residence club which it does not impose upon a physically identical improvement or development under a different form of ownership. No subdivision law, ordinance, or regulation shall apply to any division of an improvement, including a single-family residence, into a private residence club or private residence club development. (Code 1981, § 44-3-162.1, enacted by Ga. L. 2009, p. 689, § 1/HB 492.)

Effective date. — This Code section became effective May 5, 2009.

44-3-163. Time-share estate title; recording transfer or encumbrance; taxation.

(a) A time-share estate is an estate in real property and has the character and incidents of an estate in fee simple at common law or estate for years, if a leasehold, except as expressly modified by this article. This subsection shall supersede any contrary rule at common law.

(b) A document transferring or encumbering a time-share estate in real property shall not be rejected for recordation because of the nature or duration of that estate or interest, provided there is compliance with all requirements necessary to make an instrument recordable.

(c) For purposes of title, each time-share estate constitutes a separate estate or interest in property.

(d) For purposes of local real property taxation, each time-share unit, other than a unit operated for time-share use, shall be valued in the same manner as if such unit were owned by a single taxpayer. The total cumulative purchase price paid by the time-share owners for a unit shall not be utilized by the commissioner of revenue or other local assessing officers as a factor in determining the assessed value of such unit. A unit operated as a time-share use, however, may be assessed the same as other income-producing and investment property. Tax records in a time-share unit shall be in the name of the association or the managing agent. (Code 1981, § 44-3-163, enacted by Ga. L. 1983, p. 1255, § 1; Ga. L. 1989, p. 321, § 2; Ga. L. 1995, p. 1260, § 1.)

Code Commission notes. — Pursuant to § 28-9-5, in 1985, in the second sentence of subsection (a) ''subsection'' was substituted for ''rule''.

RESEARCH REFERENCES

ALR. — Property taxation of residential time-share or interval-ownership units, 80 ALR4th 950.

44-3-164. Application of zoning and other local codes, ordinances, and regulations.

No zoning, subdivision, or building code or other real estate use ordinance or regulation shall prohibit the time-share interval form of ownership or use or impose any requirement upon the time-share project which it does not impose upon a physically identical improvement or development under a different form of ownership. No subdivision law, ordinance, or regulation shall apply to any division of an improvement or unit into a time-share project or time-share intervals. (Code 1981, § 44-3-164, enacted by Ga. L. 1983, p. 1255, § 1; Ga. L. 1995, p. 1260, § 1.)

Part 2

Administration

44-3-165. Creation of time-share program; partition.

(a) A time-share program may be created in any unit, unless expressly prohibited by the project instruments.

(b) No action for partition of a unit may be maintained except as permitted by the time-share instrument. (Code 1981, § 44-3-165, enacted by Ga. L. 1983, p. 1255, § 1; Ga. L. 1995, p. 1260, § 1.)

44-3-166. Contents and recording of project and time-share instruments.

(a) Project instruments and time-share instruments creating time-share estates located in the State of Georgia shall be recorded in the superior court of the county in which the project is located and shall contain the following:

(1) The name of the county in which the property is situated;

(2) The legal description, street address, or other description sufficient to identify the property;

(3) Identification of time periods by letter, name, number, or combination thereof;

(4) Identification of time-share estates and, where applicable, the method whereby additional time-share estates may be created;

(5) The formula, fraction, or percentage of the common expenses and any voting rights assigned to each time-share estate and, where applicable, to each unit in a project that is not subject to the time-share program;

(6) Any restrictions on the use, occupancy, alteration, or alienation of time-share intervals; and

(7) The ownership interest, if any, in personal property and provisions for care and replacement.

(b) For time-share projects located outside the State of Georgia, project instruments therefor shall be recorded as required by the law of the jurisdiction in which such time-share project is located. (Code 1981, § 44-3-166, enacted by Ga. L. 1983, p. 1255, § 1; Ga. L. 1995, p. 1260, § 1.)

44-3-167. Time-share estate program management and operation.

The time-share instruments for a time-share estate program shall prescribe reasonable arrangements for management and operation of the time-share program and for the maintenance, repair, and furnishing of units, which shall include the following:

(1) Creation of an association organization of time-share estate owners;

(2) Adoption of bylaws for organizing and operating the association organization;

(3) Payment of costs and expenses of operating the time-share program and of owning and maintaining the units;

(4) Employment and termination of employment of the managing agent for the association organization;

(5) Preparation and dissemination to owners of an annual budget and of operating statements and other financial information including, but not limited to, the current status of payments under any security deed, contracts for improvements, or other encumbrances concerning the time-share program;

(6) Adoption of standards and rules of conduct for the use and occupancy of units by owners;

(7) Collection of assessments from owners to defray the expenses of management of the time-share program and maintenance of the units;

(8) Comprehensive general liability insurance for death, bodily injury, and property damage arising out of or in connection with the use of units by owners, their guests, and others and extended coverage casualty insurance;

(9) Methods for providing compensating use periods or monetary compensation to an owner if a unit cannot be made available for the

period to which the owner is entitled by schedule or by confirmed reservation;

(10) Procedures for imposing a monetary penalty or suspension of an owner's rights and privileges in the time-share program for failure of the owner to comply with provisions of the time-share instruments or the rules of the association organization with respect to the use of the units. Under these procedures, an owner must be given notice and the opportunity to refute or explain the charges against him or her in person or in writing to the governing body of the association organization before a decision to impose discipline is rendered;

(11) Employment of attorneys, accountants, and other professional persons as necessary to assist in the management of the time-share program and the units; and

(12) Procedures for the developer to obtain the consent of a majority of the existing owners of the time-share estates before encumbering the time-share project for the purpose of making additional improvements to the project. (Code 1981, § 44-3-167, enacted by Ga. L. 1983, p. 1255, § 1; Ga. L. 1995, p. 1260, § 1.)

Cross references. — Financial and other records of time-share project association or managing agent, § 44-3-182. Developer's financial records required, § 44-3-188.

44-3-168. Developer control period in time-share estate program.

(a) The time-share instruments for a time-share estate program may provide for a developer control period.

(b) If the time-share instruments for a time-share estate program provide for the establishment of a developer control period, they shall include provisions for the following:

(1) Termination of the developer control period by action of the association;

(2) Termination of contracts for goods and services for the time-share program or for units in the time-share program entered into during the developer control period; and

(3) A regular accounting by the developer to the association as to all matters that significantly affect the interests of owners in the time-share program including, but not limited to, the current status of payments under any security deed, contracts for improvements, or other encumbrances. (Code 1981, § 44-3-168, enacted by Ga. L. 1983, p. 1255, § 1; Ga. L. 1986, p. 10, § 44; Ga. L. 1995, p. 1260, § 1.)

44-3-169. Identification of time-share project, time-share units, and time periods.

Project instruments and time-share instruments creating time-share uses shall contain the following:

(1) Identification by name of the time-share project and street address where the time-share project is situated;

(2) Identification of the time periods, type of units, and the units that are in the time-share program and the length of time that the units are committed to the time-share program; and

(3) In case of a time-share project, identification of which units are in the time-share program and the method whereby any other units may be added, deleted, or substituted. (Code 1981, § 44-3-169, enacted by Ga. L. 1983, p. 1255, § 1; Ga. L. 1989, p. 321, § 3; Ga. L. 1990, p. 227, § 18; Ga. L. 1995, p. 1260, § 1.)

44-3-170. Time-share use program management and operation.

The time-share instruments for a time-share use program shall prescribe reasonable arrangements for management and operation of the time-share program and for the maintenance, repair, and furnishing of units which shall include the following:

(1) Standards and procedures for upkeep, repairs, and interior furnishing of units;

(2) Adoption of standards and rules of conduct governing the use and occupancy of units by owners;

(3) Payment of the costs and expenses of operating the time-share program and owning and maintaining the units;

(4) Selection of a managing agent to act on behalf of the developer;

(5) Preparation and dissemination to owners of an annual budget and of operating statements and other financial information concerning the time-share program;

(6) Procedures for establishing the rights of owners to the use of units by prearrangement or under a first reserved, first served priority system;

(7) Organization of a management advisory board or board of directors consisting of time-share use owners including an enumeration of rights and responsibilities of the board;

(8) Procedures for imposing and collecting assessments or use fees from time-share use owners as necessary to defray costs of management of the time-share program and in providing materials and services to the units;

(9) Comprehensive general liability insurance for death, bodily injury, and property damage arising out of or in connection with the use of units by time-share use owners, their guests, and others and extended coverage casualty insurance;

(10) Methods for providing compensation use periods or monetary compensation to an owner if a unit cannot be made available for the period to which the owner is entitled by schedule or by a confirmed reservation;

(11) Procedures for imposing a monetary penalty or suspension of an owner's rights and privileges in the time-share program for failure of the owner to comply with the provisions of the time-share instruments or the rules established by the developer with respect to the use of the units. The owner shall be given notice and the opportunity to refute or explain the charges in person or in writing to the management advisory board before a decision to impose discipline is rendered;

(12) Annual dissemination to all time-share use owners by the developer or by the managing agent of a list of the names and mailing addresses of all current time-share use owners in the time-share program;

(13) Procedures for the developer to obtain the consent of a majority of the existing owners of the time-share uses before encumbering the time-share project for the purpose of making additional improvements to the project;

(14) A definition of what shall constitute the facilities being available for use; and

(15) An owners' association shall act as a fiduciary to the purchasers of a time-share program. (Code 1981, § 44-3-170, enacted by Ga. L. 1983, p. 1255, § 1; Ga. L. 1995, p. 1260, § 1; Ga. L. 2009, p. 332, § 2/HB 608.)

The 2009 amendment, effective July 1, 2009, deleted ''and'' at the end of paragraph (13); substituted ''; and'' for a period at the end of paragraph (14); and added paragraph (15).

Cross references. — Financial and other records of time-share project association or managing agent, § 44-3-182.

44-3-171. Sale of time-share intervals and programs organized prior to July 1, 1983.

In the event that:

(1) Time-share intervals in a time-share program have been sold in this state to a resident of this state prior to July 1, 1983;

(2) The time-share instruments and project instruments creating such program do not provide for or contain the provisions required by Code Sections 44-3-166 through 44-3-170; and

(3) The developer does not control a sufficient number of votes in the time-share program to amend the time-share instruments and project instruments to provide for the inclusion of the provisions required by Code Sections 44-3-166 through 44-3-170 without the vote of any other time-share interval owners,

then the developer shall include in the public offering statement a listing of those provisions required by Code Sections 44-3-166 through 44-3-170 but not included in the instruments. (Code 1981, § 44-3-171, enacted by Ga. L. 1983, p. 1255, § 1; Ga. L. 1985, p. 149, § 44; Ga. L. 1986, p. 10, § 44; Ga. L. 1989, p. 321, § 4; Ga. L. 1990, p. 227, § 19; Ga. L. 1995, p. 1260, § 1.)

Cross references. — Application of article to time-share programs created prior to or following effective date of law, § 44-3-205.

Part 3

Developers and Exchange Companies

44-3-172. Contents of public offering statement.

(a) A public offering statement must be provided to each purchaser of a time-share interval. Prospective purchasers receiving a copy of the public offering statement shall sign a statement acknowledging receipt of the public offering statement and such receipt shall be kept at the principal office of the developer for three years from the date of receipt.

(1) The public offering statement must contain or fully and accurately disclose the following information:

(A) The name of the developer, the principal address of the developer, the address of the time-share intervals offered in the statement, and a description of the developer's ownership interest in the time-share project;

(B) The nature of the interest in the time-share interval being offered whether it involves real property ownership, leasehold interest, right to use or occupy the facility, or some other interest being offered;

(C) A general description of the units including, without limitation, the developer's contemplated schedule of commencement and completion of all buildings, units, and amenities or, if completed, a statement that they have been completed;

(D) As to all units offered by the developer in the same time-share project:

(i) The types and number of units;

(ii) Identification of units that are subject to time-share intervals; and

(iii) The estimated number of units that may become subject to time-share intervals;

(E) A brief description of the project;

(F) Any current budget or a projected budget for the time-share intervals for one year after the date of the first transfer to a purchaser. The budget must include, without limitation:

(i) A statement of the amount or a statement that there is no amount included in the budget as a reserve for repairs and replacement;

(ii) The projected common expense liability, if any, by category of the expenditures for the time-share intervals;

(iii) The projected common expense liability for all time-share intervals; and

(iv) A statement of any services not reflected in the budget that the developer provides or expenses that he or she pays;

(G) Any initial or special fee for the use of the unit or amenities due from the purchaser at closing together with a description of the purpose and method of calculating the fee;

(H) A description of any liens, defects, or encumbrances on or affecting the title to the time-share intervals;

(I) A description of any financing offered by the developer;

(J) A statement of any pending actions material to the time-share intervals of which a developer has actual knowledge;

(K) Any restraints on alienation of any number or portion of any time-share intervals;

(L) A description of the insurance coverage or a statement that there is no insurance coverage provided for the benefit of time-share interval owners including specific statements on the amount of comprehensive general liability insurance and extended coverage casualty insurance;

(M) Any current or expected fees or charges to be paid by time-share interval owners for the use of any facilities related to the property;

(N) Whether financial arrangements have been provided for and with whom financial arrangements have been made for the completion of all promised or proposed improvements and the proposed date of completion;

(O) The extent to which a time-share unit may become subject to a tax or other lien arising out of claims against other owners of the same unit;

(P) A conspicuous statement on the cover page as follows:

''YOU MAY CANCEL WITHOUT PENALTY OR OBLIGATION ANY SALES AGREEMENT WHICH YOU HAVE SIGNED FOR THE PURCHASE OR LEASE OF A TIME-SHARE INTERVAL WITHIN SEVEN DAYS, SUNDAYS AND HOLIDAYS EXCEPTED, AFTER SIGNING ANY SALES AGREEMENT AND RECEIVE A REFUND. IF THIS PUBLIC OFFERING STATEMENT WAS NOT GIVEN TO YOU BEFORE YOU SIGNED ANY SALES AGREEMENT, YOU MAY CANCEL THE SALES AGREEMENT WITHIN SEVEN DAYS, SUNDAYS AND HOLIDAYS EXCEPTED, AFTER YOUR RECEIPT OF THIS PUBLIC OFFERING STATEMENT AND RECEIVE A REFUND. YOU MAY NOT GIVE UP OR WAIVE THIS RIGHT TO CANCEL. IF YOU DECIDE TO CANCEL A SALES AGREEMENT, YOU MUST NOTIFY THE DEVELOPER IN WRITING WITHIN THE CANCELLATION PERIOD OF YOUR INTENT TO CANCEL BY SENDING NOTICE BY CERTIFIED MAIL OR STATUTORY OVERNIGHT DELIVERY, RETURN RECEIPT REQUESTED, TO (insert the name and address of the developer or the developer's agent). YOUR NOTICE WILL BE EFFECTIVE ON THE DATE YOU MAIL IT.'';

(Q) When a time-share use is offered, a conspicuous statement as follows:

''YOU MAY CANCEL ANY SALES AGREEMENT WHICH YOU HAVE SIGNED FOR THE PURCHASE OF A TIME-SHARE USE AT ANY TIME THE FACILITY IS NOT MADE AVAILABLE FOR USE ACCORDING TO AGREED UPON TERMS. YOU MAY NOT GIVE UP OR WAIVE THIS RIGHT TO CANCEL.'';

(R) A schedule for refunding any funds due the purchaser if the time-share project is not completed or if the purchaser exercises cancellation rights;

(S) The name and address of the escrow agent;

(T) A conspicuous statement as follows:

''ANY QUESTIONS ABOUT THE LEGAL ASPECTS OF THE PURCHASE OR LEASE OF A TIME-SHARE INTERVAL SHOULD BE REFERRED TO AN ATTORNEY.'';

(U) A conspicuous statement on the cover page as follows:

''PURCHASER SHOULD READ THIS DOCUMENT BEFORE SIGNING ANYTHING.'';

(V)(i) Except as otherwise provided in division (ii) of this subparagraph, a conspicuous statement as follows:

''THIS IS A REAL PROPERTY TRANSACTION. YOU OR YOUR ATTORNEY SHOULD REVIEW THE DOCUMENTS RELATING TO THIS TRANSACTION ON FILE IN THE SUPERIOR COURT OF THE COUNTY WHEREIN THE PROPERTY IS LOCATED.''

(ii) If the time-share project is located outside this state, then the conspicuous statement must read as follows:

''THIS IS A REAL PROPERTY TRANSACTION. YOU OR YOUR ATTORNEY SHOULD REVIEW THE DOCUMENTS RELATING TO THIS TRANSACTION ON FILE IN THE APPROPRIATE LAND RECORDS OF THE JURISDICTION IN WHICH THE PROPERTY IS LOCATED.''; and

(W) A description of the exact procedure that will be used by the developer for closing sales of time-share intervals including, but not limited to, the procedures for conveying title to the time-share intervals, the procedures for delivery and recording of deeds, and the procedures for disbursing funds held by the escrow agent.

(2) If the owners of time-share intervals are offered an opportunity to become members of or to participate in any program for the exchange of occupancy rights among themselves or with the owners of time-share intervals of other time-share projects, or both, the public offering statement or a supplement delivered therewith must fully and accurately disclose the following information:

(A) The name and address of the exchange company;

(B) The names of all officers, directors, and shareholders owning 5 percent or more of the outstanding stock of the exchange company;

(C) Whether the exchange company or any of its officers or directors has any legal or beneficial interest in any developer or managing agent for any time-share project participating in the exchange program and, if so, the name and location of the time-share project and the nature of the interest;

(D) Unless the exchange company is also the developer or an affiliate, a statement that the purchaser's contract with the exchange company is a contract separate and distinct from the sales agreement;

(E) Whether the purchaser's participation in the exchange program is dependent upon the continued affiliation of the time-share project with the exchange program;

(F) Whether the purchaser's membership or participation, or both, in the exchange program is voluntary or mandatory;

(G) A complete and accurate description of the terms and conditions of the purchaser's contractual relationship with the exchange company and the procedure by which changes thereto may be made;

(H) A complete and accurate description of the procedure to qualify for and effectuate exchanges;

(I) A complete and accurate description of all limitations, restrictions, or priorities employed in the operation of the exchange program, including, but not limited to, limitations on exchanges based on seasonableness, unit size, or levels of occupancy, expressed in a conspicuous statement, and, in the event that such limitations, restrictions, or priorities are not uniformly applied by the exchange program, a clear description of the manner in which they are applied;

(J) Whether exchanges are arranged on a space-available basis and whether any guarantees of fulfillment of specific requests for exchanges are made by the exchange program;

(K) Whether and under what circumstances an owner, in dealing with the exchange company, may lose the use and occupancy of such owner's time-share interval in any properly applied for exchange without such owner being provided with substitute accommodations by the exchange company;

(L) The fees or range of fees for participation by owners in the exchange program, a statement whether any such fees may be altered by the exchange company, and the circumstances under which alterations may be made;

(M) The name and address of the site of each time-share property, accommodation, or facility which is participating in the exchange program;

(N) The number of units in each property participating in the exchange program which are available for occupancy and which qualify for participation in the exchange program, expressed within the following numerical groupings: 1-5, 6-10, 11-20, 21-50, and 51 and over;

(O) The number of owners with respect to each time-share project or other property which are eligible to participate in the exchange program expressed within the following numerical groupings: 1-100, 101-249, 250-499, 500-999, and 1,000 and over, and a statement of the criteria used to determine those owners who are currently eligible to participate in the exchange program;

(P) The disposition made by the exchange company of time-share intervals deposited with the exchange program by owners eligible to participate in the exchange program and not used by the exchange company in effecting exchanges;

(Q) The following information, which, except as provided in subparagraph (S) of this paragraph, shall be independently audited by a certified public accountant or accounting firm in accordance with the

standards of the Accounting Standards Board of the American Institute of Certified Public Accountants and included in the public offering statement for each year no later than July 1 of the succeeding year, beginning no later than July 1, 1983:

(i) The number of owners eligible to participate in the exchange program. Such number shall disclose the relationship between the exchange company and owners as being either fee-paying or gratuitous in nature;

(ii) The number of time-share properties, accommodations, or facilities eligible to participate in the exchange program categorized by those having a contractual relationship between the developer or the association and the exchange company and those having solely a contractual relationship between the exchange company and owners directly;

(iii) The percentage of confirmed exchanges, which shall be the number of exchanges confirmed by the exchange company divided by the number of exchanges properly applied for, together with a complete and accurate statement of the criteria used to determine whether an exchange request was properly applied for;

(iv) The number of time-share intervals for which the exchange company has an outstanding obligation to provide an exchange to an owner who relinquished a time-share interval during the year in exchange for a time-share interval in any future year; and

(v) The number of exchanges confirmed by the exchange company during the year;

(R) A conspicuous statement to the effect that the percentage described in division (iii) of subparagraph (Q) of this paragraph is a summary of the exchange requests entered with the exchange company in the period reported and that the percentage does not indicate a purchaser's or owner's probabilities of being confirmed to any specific choice or range of choices, since availability at individual locations may vary; and

(S) The information required by this paragraph shall be accurate as of a date which is not more than 30 days prior to the date on which the information is delivered to the purchaser, except that the information required by subparagraphs (B), (C), (M), (N), (O), and (Q) of this paragraph shall be provided as of December 31 of the year preceding the year in which the information is delivered, except for information delivered within the first 180 days of any calendar year which shall be provided as of December 31 of the year preceding the year in which the information is delivered. All references in this Code section to the word ''year'' shall mean calendar year;

(3) A multilocation developer shall include in the public offering statement or a supplement delivered therewith the following information:

(A) A complete and accurate description of the procedure to qualify for and effectuate use rights in time-share units in the multilocation plan;

(B) A complete and accurate description of all limitations, restrictions, or priorities employed in the operation of the multilocation plan, including, but not limited to, a conspicuous statement of limitations on reservations, use or entitlement rights based on seasonableness, unit size, levels of occupancy or class of owner, and, in the event that such limitations, restrictions, or priorities are not uniformly applied by the multilocation plan, a clear description of the manner in which they are applied;

(C) Whether use is arranged on a space-available basis and whether any guarantees of fulfillment of specific requests for use are made by the multilocation developer;

(D) The name and address of the site of each time-share property included in the multilocation plan;

(E) The number of time-share units in each time-share property which are available for occupancy and, with respect to each such time-share unit, the interest, such as fee ownership, leasehold, or option to purchase, which the multilocation developer has therein; a statement of all relevant terms of the multilocation developer's interest if such interest is less than fee ownership; and whether the time-share unit may be withdrawn from the multilocation plan;

(F) The following information, which, except as provided in subparagraph (H) of this paragraph, shall be independently audited by a certified public accountant or accounting firm in accordance with the standards of the Accounting Standards Board of the American Institute of Certified Public Accountants and included in the public offering statement for each year on or before July 1 of the succeeding year beginning no later than July 1, 1983:

(i) The number of owners in the multilocation plan;

(ii) For each time-share property in the multilocation plan, the number of properly made requests for use of time-share units in such time-share property; and

(iii) For each time-share property, the percentage of owners who properly requested use of a time-share unit in such time-share property who received the right to use a time-share unit in such time-share property;

(G) A conspicuous statement to the effect that the percentages described in subparagraph (F) of this paragraph do not indicate a purchaser's or owner's probabilities of being able to use any time-share unit since availability at individual locations may vary; and

(H) The information required by this paragraph shall be provided as of a date which is no more than 30 days prior to the date on which the information is delivered to the purchaser, except that the information required by subparagraphs (D), (E), and (F) of this paragraph shall be provided as of December 31 of the year preceding the year in which the information is delivered, except for information delivered within the first 180 days of any calendar year which shall be provided as of December 31 of the year preceding the year in which the information is delivered.

(b) In the event an exchange company offers an exchange program directly to the purchaser or owner, the exchange company shall deliver to each purchaser or owner, prior to the execution of any contract between the purchaser or owner and the company offering the exchange program, the information set forth in paragraph (2) of subsection (a) of this Code section. The requirements of paragraph (2) of subsection (a) of this Code section shall not apply to any renewal of a contract between an owner and an exchange company.

(c) Each exchange company offering an exchange program to purchasers in this state must include the statement set forth in subparagraph (a)(2)(R) of this Code section on all promotional brochures, pamphlets, advertisements, or other materials disseminated by the exchange company which also contain the percentage of confirmed exchanges described in division (a)(2)(Q)(iii) of this Code section. (Code 1981, § 44-3-172, enacted by Ga. L. 1983, p. 1255, § 1; Ga. L. 1984, p. 22, § 44; Ga. L. 1985, p. 149, § 44; Ga. L. 1985, p. 856, § 1; Ga. L. 1992, p. 6, § 44; Ga. L. 1995, p. 1260, § 1; Ga. L. 1996, p. 6, § 44; Ga. L. 2000, p. 1589, § 3.)

Code Commission notes. — Pursuant to § 28-9-5, in 1985, in subparagraph (a)(2)(R) ''division (iii) of subparagraph (Q) of this paragraph'' was substituted for ''division (a)(2)(Q)(iii) of this Code section''.

Pursuant to § 28-9-5, in 1988, the correct spelling of ''number'' was substituted in division (a)(2)(Q)(iv).

Editor's notes. — Ga. L. 2000, p. 1589, § 16, not codified by the General Assembly, provides that the amendment to this Code section is applicable with respect to notices delivered on or after July 1, 2000.

44-3-173. Annual reports filed by exchange companies and multilocation developers.

(a) An exchange company whose exchange program is offered to purchasers in connection with the offer or disposition of time-share intervals in this state shall, on or before July 1 of each year, file with the

secretary of the association for the time-share program in which the time-share intervals are offered or disposed, the information required by paragraph (2) of subsection (a) of Code Section 44-3-172 with respect to the preceding year. If any of the information supplied fails to meet the requirements of this Code section, the district attorney or Attorney General may undertake enforcement action against the exchange company in accordance with the provisions of this article in either the superior court of the county wherein the time-share accommodations or facilities are located or in the Superior Court of Fulton County. No developer shall have any liability arising out of the use, delivery, or publication by the developer of any information provided to it by the exchange company pursuant to this Code section. Except as provided in this Code section, no exchange company shall have any liability with respect to (1) any representation made by the developer relating to the exchange program or exchange company, or (2) the use, delivery, or publication by the developer of any information relating to the exchange program or exchange company. An exchange company shall only be liable for written information provided to the developer by the exchange company. The failure of the exchange company to observe the requirements of this Code section, or the use by it of any unfair or deceptive act or practice in connection with the operation of the exchange program, shall be a violation of this article.

(b) A multilocation developer which offers or disposes of time-share intervals in this state shall, on or before July 1 of each year, file with the secretary of the association for the time-share program the information required by paragraph (3) of subsection (a) of Code Section 44-3-172 with respect to the preceding year. If at any time any of the information supplied fails to meet the requirements of this Code section, the district attorney or Attorney General may undertake enforcement action against the multilocation developer in accordance with the provisions of this article in either the superior court of the county wherein the time-share accommodations or facilities are located or in the Superior Court of Fulton County. The failure of a multilocation developer to observe the requirements of this Code section, or the use by it of any unfair or deceptive act or practice in connection with the operation of the exchange program, shall be a violation of this article. (Code 1981, § 44-3-173, enacted by Ga. L. 1983, p. 1255, § 1; Ga. L. 1985, p. 149, § 44; Ga. L. 1995, p. 1260, § 1.)

44-3-174. Public offering statement provided to purchasers; cancellation of sales agreement by purchaser or developer; statement acknowledging receipt.

(a) Before transfer of a time-share interval and no later than the date of any sales agreement, the developer shall provide the intended transferee with a copy of the public offering statement and any amendments and supplements thereto. The sales agreement is voidable by the purchaser for

seven days, Sundays and holidays excepted, after receipt of the public offering statement or for seven days, Sundays and holidays excepted, after signing any sales agreement, whichever is later. Cancellation is without penalty or obligation, and all payments made by the purchaser before cancellation must be refunded within 30 days after receipt of the notice of cancellation.

(b) In addition to the rights of the developer provided in the sales agreement, up to seven days, Sundays and holidays excepted, after the signing of any sales agreement, the developer may cancel the sales agreement without penalty or obligation to either party. The developer shall return all payments made by the purchaser within 30 days after canceling the agreement and the purchaser shall return all materials received in good condition, reasonable wear and tear excepted.

(c) If a time-share use is being conveyed, a purchaser shall have the right to cancel the transaction at any time after the facilities are no longer available for use.

(d) The rights of cancellation provided for in subsections (a), (b), and (c) of this Code section shall not be waivable by any purchaser.

(e) Any sales agreement must contain a conspicuous statement as follows:

''YOU MAY CANCEL WITHOUT PENALTY OR OBLIGATION THIS SALES AGREEMENT FOR THE PURCHASE OR LEASE OF A TIME-SHARE INTERVAL WITHIN SEVEN DAYS, SUNDAYS AND HOLIDAYS EXCEPTED, AFTER SIGNING AND RECEIVE A REFUND OF ANY FUNDS PAID. IF YOU DID NOT RECEIVE A PUBLIC OFFERING STATEMENT PRIOR TO SIGNING THIS SALES AGREEMENT, YOU MAY CANCEL THIS SALES AGREEMENT WITHIN SEVEN DAYS, SUNDAYS AND HOLIDAYS EXCEPTED, AFTER RECEIPT OF A PUBLIC OFFERING STATEMENT. YOU MAY NOT GIVE UP OR WAIVE THIS RIGHT TO CANCEL. IF YOU DECIDE TO CANCEL, YOU MUST NOTIFY THE DEVELOPER IN WRITING WITHIN THE CANCELLATION PERIOD OF YOUR INTENT TO CANCEL BY SENDING NOTICE BY CERTIFIED MAIL OR STATUTORY OVERNIGHT DELIVERY, RETURN RECEIPT REQUESTED, TO (insert the name and address of the developer or the developer's agent). YOUR NOTICE WILL BE EFFECTIVE UPON THE DATE YOU SEND IT.''

(f) Prospective purchasers receiving a copy of the public offering statement shall sign a conspicuous statement acknowledging receipt of the public offering statement which shall be kept at the principal office of the developer for a period of three years from the date of receipt. Said statement shall read as follows:

''I HEREBY ACKNOWLEDGE THAT I HAVE RECEIVED THE PUBLIC OFFERING STATEMENT OF (insert name of project) ON (insert

date) AND I UNDERSTAND THAT MY RIGHT TO CANCEL ANY SALES AGREEMENT TO PURCHASE A TIME-SHARE INTERVAL EXPIRES ON (insert date), WHICH IS SEVEN DAYS, SUNDAYS AND HOLIDAYS EXCEPTED, AFTER SIGNING ANY SALES AGREEMENT OR SEVEN DAYS, SUNDAYS AND HOLIDAYS EXCEPTED, AFTER RECEIPT OF THE PUBLIC OFFERING STATEMENT, WHICHEVER IS LATER.'' (Code 1981, § 44-3-174, enacted by Ga. L. 1983, p. 1255, § 1; Ga. L. 1985, p. 856, § 2; Ga. L. 1995, p. 1260, § 1; Ga. L. 2000, p. 1589, § 3.)

Code Commission notes. — Pursuant to § 28-9-5, in 1987, ''canceling'' was substituted for ''cancelling'' in the second sentence of subsection (b).

Editor's notes. — Ga. L. 2000, p. 1589, § 16, not codified by the General Assembly, provides that the amendment to this Code section is applicable with respect to notices delivered on or after July 1, 2000.

44-3-175. Funds required to be escrowed by developer; exceptions; escrow agents.

(a) A developer of a time-share program shall:

(1) Deposit with an escrow agent 100 percent of all funds which are received during the seven-day cancellation period provided for in this article. The deposit of such funds shall be evidenced by an executed escrow agreement between the escrow agent and the developer, the provisions of which shall include:

(A) That its purpose is to protect the purchaser's right to a refund if he or she cancels the sales agreement for a time-share interval within a seven-day cancellation period;

(B) That funds may be disbursed to the developer by the escrow agent from the escrow account only after expiration of the purchaser's seven-day cancellation period and in accordance with the sales agreement; and

(C) That the escrow agent may release funds to the developer from the escrow account only after receipt of a sworn statement from the developer that no cancellation notice was received before expiration of the seven-day period;

(2) Deposit with an escrow agent after the seven-day cancellation period 100 percent of all funds which are received from purchasers of time-share uses. The deposit of such funds shall be evidenced by an executed escrow agreement between the escrow agent and the developer, the provisions of which shall include:

(A) That its purpose is to protect the purchaser's right to a refund, at any time the accommodations or facilities are no longer available as provided in the sales agreement entered into by the developer and the purchaser in an amount provided for in subparagraph (B) of this paragraph;

(B) That funds may be disbursed to the developer by the escrow agent from the escrow account periodically in the ratio of the amount of time the purchaser has already used or had the right to use the accommodations or facilities of the time-share use at the time of the disbursement in relation to the total time sold to the purchaser; and

(C) That the escrow agent may release funds to the developer from the escrow account only after receipt of a statement signed by the purchaser indicating that such purchaser has used or has had the right to use a specific number of days out of the total time period purchased. If a purchaser refuses to sign such a statement when tendered, the developer may submit a sworn statement to the escrow agent that the purchaser used or had the right to use a specific number of days, but that the purchaser refused to sign a statement to that effect;

(3) Place 100 percent of all funds received from purchasers of such time-share intervals, after the seven-day cancellation periods have ended, in an escrow account when interests in real property are being sold, according to a sales agreement which will transfer title to the purchasers. The establishment of such an escrow account shall be evidenced by an executed escrow agreement between the escrow agent and the developer, the provisions of which shall include:

(A) That its purpose is to protect all deposits and payments made by a purchaser toward the purchase price until the deed is delivered to the purchaser, whether physically or by recording the same, or until the purchaser and developer enter into a sales agreement which will transfer title to the purchaser; and

(B) That funds may be disbursed to the developer by the escrow agent from the escrow account only after title has been delivered to the purchaser physically or delivered for recording to the clerk of the superior court in the county where the real property underlying the time-share project is located or at such other time as may be agreed upon in writing by the purchaser and developer. However, in the case of a time-share estate sold by agreement for deed, funds may only be disbursed to the developer after recording of the agreement for deed and, if necessary, a notice to creditors with secured interests in the property underlying the time-share project and, if the property is encumbered by a deed to secure debt or mortgage instrument, a nondisturbance instrument has been recorded in the public records of the county or counties in which the time-share is located; or alternatively, after the developer records a notice to the aforesaid creditors and obtains a release of lien for a time-share interval, funds may be disbursed pertaining to that time-share interval; and

(4) Place any funds escrowed pursuant to this Code section with an escrow agent who shall be one of the following: an attorney in this state,

a bank or savings and loan company having trust powers in this state, a title company in this state, or a real estate broker in this state. In lieu of the foregoing, the funds may be escrowed in an account required by the jurisdiction in which the sale of the time-share took place. The developer must notify the purchaser of the name and address of the escrow agent or the name, address, and account number of the bank or savings and loan company where the developer maintains the funds. Maintenance of trust funds and disbursements by an escrow agent in another state must be in accordance with the provisions of this article. The escrow agreement shall authorize the purchaser or the purchaser's representative to examine said trust account.

(b) An escrow agent holding funds escrowed pursuant to this Code section may invest such escrowed funds in securities of the United States government, or any agency thereof, or in savings or time deposits in institutions insured by an agency of the United States government. The right to receive the interest generated by any such investments shall be as specified by a written agreement between the developer and the purchaser.

(c) Each escrow agent shall maintain separate books and records for each time-share project and shall maintain such books and records according to generally accepted accounting principles. (Code 1981, § 44-3-175, enacted by Ga. L. 1983, p. 1255, § 1; Ga. L. 1995, p. 1260, § 1.)

44-3-176. Payments received by developer on uncompleted projects to be escrowed.

(a) If a developer enters into a sales agreement to sell a time-share interval and the construction, furnishing, and landscaping of the time-share project have not been substantially completed in accordance with the representations made by the developer in the disclosures required by this article, the developer shall deposit with an escrow agent all payments received by the developer from the purchaser towards the sales price until the project is substantially complete. Funds shall be released from escrow as follows:

(1) If a purchaser properly terminates the sales agreement pursuant to its terms or pursuant to this article, the funds shall be paid to the purchaser together with any interest earned;

(2) If the purchaser defaults in the performance of such purchaser's obligations under the sales agreement, the funds shall be paid to the developer together with any interest earned; or

(3) If the funds of a purchaser have not been previously disbursed in accordance with the provisions of this subsection, they may be disbursed to the developer in accordance with this article by the escrow agent upon substantial completion of the time-share project.

(b) In lieu of any escrows required by subsection (a) of this Code section, the purchasers shall have the discretion to accept in writing other financial assurances including, but not limited to, a performance bond or an irrevocable letter of credit in an amount equal to the cost to complete the time-share project.

(c) For the purpose of this Code section, ''substantially completed'' means that all amenities, furnishings, appliances, and structural components and mechanical systems of buildings are completed and provided as represented in the public offering statement and that the premises are ready for occupancy. (Code 1981, § 44-3-176, enacted by Ga. L. 1983, p. 1255, § 1; Ga. L. 1992, p. 6, § 44; Ga. L. 1995, p. 1260, § 1.)

44-3-177. Exemption from other state laws requiring registration and public offering statements.

(a) Any time-share program registered under this article in which a public offering statement has been prepared shall not require registration under any of the following:

(1) Article 1 of this chapter;

(2) Chapter 5 of Title 10; or

(3) Any other state law which requires the preparation of a public offering statement or substantially similar document for distribution to purchasers.

(b) Any time-share program registered under this article that fails to restrict the price at which an owner may sell or exchange such owner's time-share interval shall not by virtue of such failure cause the time-share interval to become a security under Chapter 5 of Title 10; nor shall an exchange program offering such a time-share interval for exchange be construed to be offering a security under Chapter 5 of Title 10. (Code 1981, § 44-3-177, enacted by Ga. L. 1983, p. 1255, § 1; Ga. L. 1995, p. 1260, § 1.)

44-3-178. Exceptions to public offering statement requirement under this article.

(a) In lieu of the public offering statement required by this article, the developer may give prospective purchasers a public offering statement or similar disclosure document which meets the requirements of the Federal Securities and Exchange Act of 1933 or, if the time-share project is located in another state, a public offering statement or similar disclosure document which that state may require to be prepared and provided to purchasers.

(b) A public offering statement need not be prepared or delivered in the case of:

(1) A transfer of a time-share interval by any time-share interval owner or user other than the developer or such developer's agent;

(2) A disposition pursuant to court order;

(3) A disposition by a government or governmental agency;

(4) A disposition by foreclosure or deed in lieu of foreclosure;

(5) A disposition of a time-share interval in a time-share project situated wholly outside this state, provided that all solicitations and negotiations took place wholly outside this state and the sales agreement was executed wholly outside this state;

(6) A gratuitous transfer of a time-share interval; or

(7) Group reservations made for 15 or more people as a single transaction between a hotel and travel agent or travel groups for hotel accommodations when deposits are made and held for more than three years in advance. (Code 1981, § 44-3-178, enacted by Ga. L. 1983, p. 1255, § 1; Ga. L. 1984, p. 22, § 44; Ga. L. 1995, p. 1260, § 1.)

44-3-179. Updating public offering statement required.

The developer shall immediately amend or supplement the public offering statement to report any material change in the information required by Code Section 44-3-172. As to any exchange program, the developer shall use the current written materials that are supplied to it for distribution to the time-share interval owners as it is received. (Code 1981, § 44-3-179, enacted by Ga. L. 1983, p. 1255, § 1; Ga. L. 1995, p. 1260, § 1.)

44-3-180. Purchase of interval is free of liens affecting that interval; exceptions.

(a) Unless the purchaser expressly agrees in the sales agreement to accept such purchaser's interest subject to a lien or by assuming a lien prior to transferring a time-share interval other than by deed in lieu of foreclosure, the developer shall record or furnish to the purchaser releases of all liens affecting that time-share interval or shall provide a surety bond or insurance against the lien, as provided for liens on real estate in this state. In lieu of the foregoing, a lienholder may agree to repurchase in the amount agreed to by the parties but in no event less than the amount actually paid by the purchaser a purchaser's time-share interval in the event the lienholder comes into possession of the time-share project; or the lienholder may agree to allow the continued right of quiet enjoyment to the purchaser.

(b) Unless a time-share interval owner or such owner's predecessor in title agrees otherwise with the lienor, if a lien other than an underlying

mortgage or security deed becomes effective against more than one time-share interval in a time-share project, any time-share interval owner is entitled to a release of such owner's time-share interval from the lien upon payment of the amount of the lien attributable to such owner's time-share interval. The amount of the payment must be proportionate to the ratio that the time-share interval owner's liability bears to the liabilities of all time-share interval owners whose interests are subject to the lien. Upon receipt of payment, the lienholder shall promptly deliver to the time-share interval owner a release of the lien covering that time-share interval. After payment, the managing entity may not assess or have a lien against that time-share interval for any portion of the expenses incurred in connection with that lien. (Code 1981, § 44-3-180, enacted by Ga. L. 1983, p. 1255, § 1; Ga. L. 1995, p. 1260, § 1.)

Cross references. — Protection of purchasers from developer's underlying blanket encumbrances, § 44-3-189.

44-3-181. Transfer of developer's entire interest.

The developer shall not sell, lease, assign, or otherwise transfer the entire interest of the developer, other than as a transfer of a time-share interval in the normal course of marketing, in the time-share program or the accommodations or facilities to a third party when such a sale, lease, assignment, or other transfer substantially affects the rights of other owners of the time-share units, unless:

(1) The third party agrees in writing to honor fully the rights of purchasers of the time-share intervals to occupy and use the accommodations or facilities or agrees in writing to purchase the interval in an amount equal to the amount actually paid by the purchaser toward the purchase price of the time-share interval;

(2) The third party agrees in writing to honor fully the rights of purchasers of the time-share intervals to cancel their sales agreement and receive any refunds due;

(3) The third party agrees in writing to comply with the provisions of this article for as long as the third party continues to sell the time-share project or for as long as purchasers of the time-share project are entitled to occupy the accommodations or use the facilities, whichever is longer in time; and

(4) Written notice is given to the association and notice shall be sent by certified mail or statutory overnight delivery within 30 days of the sale, lease, assignment, or other transfer. (Code 1981, § 44-3-181, enacted by Ga. L. 1983, p. 1255, § 1; Ga. L. 1995, p. 1260, § 1; Ga. L. 2000, p. 1589, § 3.)

Editor's notes. — Ga. L. 2000, p. 1589, § 16, not codified by the General Assembly, provides that the amendment to this Code section is applicable with respect to notices delivered on or after July 1, 2000.

44-3-182. Financial and other records of time-share project association or managing agent.

The person or entity responsible for making or collecting common expense assessments or maintenance assessments shall keep detailed financial records and shall keep said funds in a designated trust account. All financial and other records shall be made reasonably available for examination by any time-share interval owner in the program, by the time-share program's association, or by the authorized agent of such owner or association upon reasonable request.

(1) The developer of a time-share program shall maintain the following records for a period of three years. Said records shall be made available for inspection by any time-share interval owner in the program, by the time-share program's association, or by the authorized agent of such owner or association upon reasonable request:

(A) A copy of the escrow agreement for each time-share interval sold or, if alternative arrangements are made, a copy of the documents relating to those arrangements;

(B) Copies of lien releases, surety bonds, or other financial assurances executed by the developer to protect purchasers against any claims against the time-share program;

(C) Copies of management agreements entered into with managing agents for the management of the time-share program;

(D) Copies of agreements entered into with exchange programs for the inclusion of the time-share project in the exchange program's available facilities; and

(E) For multilocation developers, copies of certified public accountants' reports required by subparagraph (a)(3)(F) of Code Section 44-3-172.

(2) The managing agent of a time-share program shall maintain the following records for a period of three years. Said records shall be made available for inspection by any time-share interval owner in the program, by the time-share program's association, or by the authorized agent of such owner or association upon reasonable request:

(A) Copies of management agreements entered into with developers for the management of time-share programs; and

(B) Copies of budgets and statements sent to developers and time-share interval owners accounting for common expense and maintenance assessments.

(3) Exchange programs shall maintain the following records for a period of three years. Said records shall be made available for inspection by any time-share interval owner in the program, by the time-share program's association, or by the authorized agent of such owner or association upon reasonable request:

(A) Copies of agreements with developers for the inclusion of their projects in the exchange program's available facilities;

(B) Copies of agreements with time-share interval owners for their membership in the exchange program; and

(C) Copies of certified public accountants' reports as required by subparagraph (a)(2)(Q) of Code Section 44-3-172. (Code 1981, § 44-3-182, enacted by Ga. L. 1983, p. 1255, § 1; Ga. L. 1995, p. 1260, § 1.)

44-3-183. Remedy for violation of article; punitive damages; attorney's fees.

If a developer or any other person subject to this article violates any provision of this article or any provision of the project instruments, any person or class of persons adversely affected by the violation has a claim for appropriate relief. Punitive damages may be awarded for a willful violation of this article. The court may also award reasonable attorney's fees. (Code 1981, § 44-3-183, enacted by Ga. L. 1983, p. 1255, § 1; Ga. L. 1995, p. 1260, § 1.)

44-3-184. Limitation of actions.

A judicial proceeding where the accuracy of the public offering statement or validity of any sales agreement is an issue and a rescission of the sales agreement is sought or damages are sought must be commenced within one year after the date upon which the last of the events described in paragraphs (1) through (3) of this Code section shall occur:

(1) The closing of the transaction;

(2) The first issuance by the applicable governmental authority of a certificate of occupancy or other evidence of sufficient completion of construction of the building containing the unit to allow lawful occupancy of the unit. In counties or municipalities in which certificates of occupancy or other evidence of completion sufficient to allow lawful occupancy are not customarily issued, for the purpose of this Code section, evidence of lawful occupancy shall be deemed to have been given or issued upon the date that such lawful occupancy of the unit may first be allowed under prevailing applicable laws, ordinances, or statutes; or

(3) The completion of the common elements and any recreational facilities, whether or not the same are common elements, which the seller

is obligated to complete or to provide under the terms of the written contract for the sale of the unit. (Code 1981, § 44-3-184, enacted by Ga. L. 1983, p. 1255, § 1; Ga. L. 1995, p. 1260, § 1.)

Part 4

Advertising

44-3-185. False advertising prohibited.

(a) It shall be unlawful for any person, directly or indirectly, to sell or offer for sale time-share intervals in this state by authorizing, using, directing, or aiding in the dissemination, publication, distribution, or circulation of any statement, advertisement, radio broadcast, or telecast concerning the time-share project in which the time-share intervals are offered, which contains any statement or sketch which is false or misleading or contains any representation or pictorial representation of proposed improvements or nonexistent scenes without clearly indicating that the improvements are proposed and the scenes do not exist.

(b) Nothing in this Code section shall be construed to hold the publisher or employee of any newspaper, or any job printer, or any broadcaster or telecaster, or any magazine publisher, or any of the employees thereof, liable for any publication referred to in subsection (a) of this Code section unless the publisher, employee, or printer has actual knowledge of the falsity thereof or has an interest either as an owner or agent in the time-share project so advertised. (Code 1981, § 44-3-185, enacted by Ga. L. 1983, p. 1255, § 1; Ga. L. 1987, p. 1386, § 4; Ga. L. 1995, p. 1260, § 1.)

Code Commission notes. — Pursuant to § 28-9-5, in 1988, a comma was deleted following "contains any statement" near the middle of subsection (a).

44-3-186. Statements or representations which are prohibited.

No advertising for the sale or offer for sale of time-share intervals shall:

(1) Contain any representation as to the availability of a resale program or rental program offered by or on behalf of the developer or its affiliate unless the resale program or rental program has been made a part of the offering;

(2) Contain an offer or inducement to purchase which purports to be limited as to quantity or restricted as to time unless the numerical quantity or time applicable to the offer or inducement is clearly and conspicuously disclosed;

(3) Contain statements concerning the availability of time-share intervals at a particular minimum price if the number of time-share intervals available at that price comprises less than 10 percent of the unsold

inventory of the developer, unless the number of time-share intervals then for sale at the minimum price is set forth in the advertisement;

(4) Contain any statement that the time-share interval being offered for sale can be further divided unless a full disclosure is included as the legal requirements for further division of the time-share interval;

(5) Contain any asterisk or other reference symbol as a means of contradicting or changing the ordinary meaning of any previously made statement in the advertisement in such a manner as to mislead the public;

(6) Misrepresent the size, nature, extent, qualities, or characteristics of the accommodations or facilities which comprise the time-share project;

(7) Misrepresent the nature or extent of any services incident to the time-share project;

(8) Misrepresent or imply that a facility or service is available for the exclusive use of purchasers or owners if a public right of access or of use of the facility or service exists;

(9) Make any misleading or deceptive representation with respect to the registration of the time-share project, the sales agreement, the purchaser's rights, privileges, benefits, or obligations under the sales agreement or this article;

(10) Misrepresent the conditions under which a purchaser or owner may participate in an exchange program;

(11) Purport to have resulted through a referral unless the name of the person making the referral can be produced upon demand of any prospective purchaser or the time-share program's association;

(12) Describe any proposed or uncompleted private facilities over which the developer has no control or documented right of use unless the estimated date of completion is set forth and evidence can be produced upon the demand of any prospective purchaser or the time-share program's association that the completion and operation of the facilities are reasonably assured within the time represented in the advertisement or that no assurances of completion are provided;

(13) Contain any statement that the developer plans to affiliate with an exchange program;

(14) Represent that any federal, state, county, or municipal agency, board, or commission has recommended the time-share project or any of its documents; or

(15) Contain any statement guaranteeing or offering to guarantee the sale or resale of any time-share interval. (Code 1981, § 44-3-187, enacted by Ga. L. 1983, p. 1255, § 1; Ga. L. 1987, p. 1386, § 4; Code 1981, § 44-3-186, as redesignated by Ga. L. 1995, p. 1260, § 1.)

Editor's notes. — This Code section formerly pertained to the filing of advertising materials with the commission in connection with the sale of time-share intervals. The former Code section was based on Ga. L. 1983, p. 1255, § 1.

44-3-187. Offer of gifts or prizes.

Any person who offers a gift, prize, award, or other item, or any other promotional contest or giveaway in connection with the sale or offer to sell of time-share intervals under this article must comply with all of the provisions of paragraph (16) of subsection (b) of Code Section 10-1-393, relating to promotional contests and giveaways in general. (Code 1981, § 44-3-188, enacted by Ga. L. 1983, p. 1255, § 1; Ga. L. 1986, p. 1313, § 5; Ga. L. 1987, p. 3, § 44; Ga. L. 1987, p. 1386, § 4; Ga. L. 1988, p. 13, § 44; Code 1981, § 44-3-187, as redesignated by Ga. L. 1995, p. 1260, § 1.)

Code Commission notes. — The amendment of this Code section by Ga. L. 1987, p. 3, § 44, irreconcilably conflicted with and was treated as superseded by Ga. L. 1987, p. 1386, § 4. See County of Butts v. Strahan, 151 Ga. 417 (1921); Keener v. McDougall, 232 Ga. 273 (1974)

Editor's notes. — Ga. L. 1995, p. 1260, § 1, renumbered former Code Section 44-3-187 as present Code Section 44-3-186.

Part 5

Financing by Developer

44-3-188. Developer's financial records; availability; periodic reports; transfer of developer's interest subject to debts.

In the developer's financing of a time-share program, the developer shall retain financial records of the schedule of payments required to be made and the payments made to any person or entity which is the holder of an underlying blanket mortgage, deed of trust, contract of sale, or other lien or encumbrance which is not subordinated to the time-share program and shall make the same available upon reasonable request to owners of time-share intervals in the time-share program and the time-share program's association. The time-share program's association, in its discretion, may require the developer to submit periodic, written reports from the mortgagee, lienholder, or other creditor of the status of payments made on any underlying blanket mortgage, deed of trust, contract of sale, or other lien or encumbrance which is not subordinated in the time-share program. Any transfer of the developer's interest in the time-share program to any third person shall be subject to the obligations of the developer. (Code 1981, § 44-3-189, enacted by Ga. L. 1983, p. 1255, § 1; Code 1981, § 44-3-188, as redesignated by Ga. L. 1995, p. 1260, § 1.)

Editor's notes. — Ga. L. 1995, p. 1260, § 1, renumbered former Code Section 44-3-188 as present Code Section 44-3-187.

44-3-189. Protection of purchasers from developer's underlying blanket encumbrance.

The developer whose project is subject to an underlying blanket lien or encumbrance shall protect nondefaulting purchasers from foreclosure by the lienholder by obtaining from the lienholder a nondisturbance clause, subordination agreements, partial release of the lien as the time-share intervals are sold, or an agreement in writing that the lienholder will purchase nondefaulting purchasers' intervals in an amount equal to the amount agreed to by the parties but in no event less than the amount actually paid by the purchaser toward the purchase price of the time-share interval. (Code 1981, § 44-3-190, enacted by Ga. L. 1983, p. 1255, § 1; Ga. L. 1984, p. 22, § 44; Code 1981, § 44-3-189, as redesignated by Ga. L. 1995, p. 1260, § 1.)

Cross references. — Purchase of time-share interval is free of liens, § 44-3-180.

Editor's notes. — Ga. L. 1995, p. 1260, § 1, renumbered former Code Section 44-3-189 as present Code Section 44-3-188.

Part 6

Registration

44-3-190. Real estate broker's license requirement; collection of compensation for real estate brokerage services from persons reselling time-share intervals.

(a) It shall be unlawful for any person to engage in the business of, act in the capacity of, advertise, or assume to act as a sales agent or managing agent within this state without first obtaining a license to act as a real estate broker if required by Chapter 40 of Title 43.

(b) Prior to the closing of a resale of a time-share interval owned by a person other than the developer of the time-share program, no person may charge or collect any compensation for real estate brokerage services from the person reselling the time-share interval; provided, however, that such person providing real estate brokerage services may charge an advertising fee if:

(1) Such person can document that said advertising fee was paid to a firm which regularly provides advertising services to promote the sale of real property and with which such person providing real estate brokerage services has no personal, familial, or business relationship; and

(2) The party reselling the time-share interval signs an agreement authorizing the advertising fee and such agreement identifies the party to whom the advertising fee will be paid.

If the person offering real estate brokering services on the resale of a time-share interval also offers a guaranteed sale of the interval, such person

may not charge or collect any compensation for any purpose prior to the closing of the resale of the time-share interval. (Code 1981, § 44-3-192, enacted by Ga. L. 1983, p. 1255, § 1; Code 1981, § 44-3-190, as redesignated by Ga. L. 1995, p. 1260, § 1.)

Cross references. — Financial requirements for licensing and registration, § 7-1-1003.2. Application for registration, § 7-1-1003.3.

Editor's notes. — Ga. L. 1995, p. 1260, § 1, renumbered former Code Section 44-3-190 as present Code Section 44-3-189.

44-3-191. Requirements for out-of-state projects, managing agents, and exchange programs.

(a) Time-share projects located outside this state and offered for sale in this state must comply with such time-share regulations as exist in the situs state unless the provisions of this article are more restrictive, and then the provisions of this article shall be equally applicable. A time-share project located outside this state may supplement its disclosure materials in that situs state with an added disclosure addendum to be applicable to sales occurring in this state, which disclosure addendum incorporates the law of this state if more restrictive.

(b) Managing agents and exchange programs located outside this state and operating in this state must comply with all of the provisions of this article. (Code 1981, § 44-3-194, enacted by Ga. L. 1983, p. 1255, § 1; Code 1981, § 44-3-191, as redesignated by Ga. L. 1995, p. 1260, § 1.)

Editor's notes. — Ga. L. 1995, p. 1260, § 1, repealed former Code Section 44-3-191, relating to requirement of registration of time-share programs, agents, and exchange companies and grounds for reprimand, or for denial, suspension, or revocation of registration, effective July 1, 1995, and renumbered former Code Section 44-3-194 as Code Section 44-3-191. Former Code Section 44-3-191 was based on Code 1981, § 44-3-191, enacted by Ga. L. 1983, p. 1255, § 1.

44-3-192. Exceptions from registration.

Compliance with this article shall not be required in the case of:

(1) Any transfer of a time-share interval by any time-share interval owner other than the developer or such developer's agent;

(2) Any disposition pursuant to court order;

(3) A disposition by a government or governmental agency;

(4) A disposition by foreclosure or deed in lieu of foreclosure;

(5) A disposition of a time-share interval in a time-share project situated wholly outside this state, provided that all solicitations and negotiations took place wholly outside this state and the sales agreement was executed wholly outside this state;

(6) A gratuitous transfer of a time-share interval; or

(7) Group reservations made for 15 or more people as a single transaction between a hotel and travel agent or travel groups for hotel accommodations when deposits are made and held for more than three years in advance. (Code 1981, § 44-3-197, enacted by Ga. L. 1983, p. 1255, § 1; Ga. L. 1984, p. 22, § 44; Code 1981, § 44-3-192, as redesignated by Ga. L. 1995, p. 1260, § 1.)

Editor's notes. — Ga. L. 1995, p. 1260, § 1, renumbered former Code Section 44-3-192 as present Code Section 44-3-190. Former Code Section 44-3-192 related to real estate broker's license requirement.

Part 7

Miscellaneous

44-3-193. Modification of public offering statement; limitations on use of public offering statement.

(a) A developer must alter or supplement the form of or information contained in the public offering statement to assure that the public offering statement adequately and accurately discloses to prospective purchasers the material required to be disclosed by this article.

(b) The public offering statement shall not be used for any promotional purposes unless it is used in its entirety. No person shall advertise or represent that any federal, state, county, or municipal agency, board, or commission has approved or recommended the time-share program, its disclosure statement, or any of its documents. (Code 1981, § 44-3-199, enacted by Ga. L. 1983, p. 1255, § 1; Code 1981, § 44-3-193, as redesignated by Ga. L. 1995, p. 1260, § 1.)

Editor's notes. — Ga. L. 1995, p. 1260, § 1, repealed former Code Section 44-3-193, relating to contents of application for registration of time-share program, effective July 1, 1995, and renumbered former Code Section 44-3-199 as Code Section 44-3-193. Former Code Section 44-3-193 was based on Code 1981, § 44-3-193, enacted by Ga. L. 1983, p. 1255, § 1; Ga. L. 1984, p. 22, § 44; Ga. L. 1985, p. 856, § 3.

44-3-194. Records required to be kept by developer or agents.

Any developer or its agents shall keep among its business records and make reasonably available for examination to the purchaser or the time-share program's association or its authorized agent the following:

(1) A copy of each item required by this article;

(2) A copy of the sales agreement from each sale of a time-share interval in the time-share project, which sales agreement shall be retained for a period of at least three years after parties to the sale have completely performed all of their obligations thereunder; and

(3) A list of all employees or independent contractors, including their last known mailing address, which list shall include all current and previous employees or independent contractors whose employment or contract has been terminated within the preceding three years. (Code 1981, § 44-3-200, enacted by Ga. L. 1983, p. 1255, § 1; Code 1981, § 44-3-194, as redesignated by Ga. L. 1995, p. 1260, § 1; Ga. L. 1996, p. 6, § 44.)

Cross references. — Financial and other records to be kept by project association or managing agent, § 44-3-182.

Editor's notes. — Ga. L. 1995, p. 1260, § 1, renumbered former Code Section 44-3-194 as present Code Section 44-3-191.

44-3-195. Criminal penalty for violation of article; injunction restraining prohibited conduct; liability for damages; attorney's fees.

(a) Except that violations of Code Section 44-3-188 shall be subject only to the remedies available under paragraph (16) of subsection (b) of Code Section 10-1-393, any person who shall willfully and intentionally violate any provision of this article shall be guilty of a misdemeanor except in the case the violation causes loss in excess of $5,000.00, then said person shall be guilty of a felony and, upon conviction thereof, shall be punished by a fine not to exceed $5,000.00 or by imprisonment for not less than one nor more than three years. Each violation of this article shall constitute a separate offense.

(b) Whenever it appears to the district attorney or the Attorney General, either upon complaint or otherwise, that any person has engaged in, is engaging in, or is about to engage in any act, practice, or transaction which is prohibited by this article, the district attorney or Attorney General or both may in his or her discretion apply to any court of competent jurisdiction in this state, including the Superior Court of Fulton County, for an injunction restraining such person and that person's agents, employees, partners, officers, and directors from continuing such act, practice, or transaction or doing any acts in furtherance thereof and for the appointment of a receiver or an auditor and such other and further relief as the facts may warrant.

(c) Any person who violates this article shall be liable in damages to any person or class of persons injured thereby. Punitive damages may be awarded for a willful violation of this article. The court may also award reasonable attorney's fees. (Code 1981, § 44-3-202, enacted by Ga. L. 1983, p. 1255, § 1; Code 1981, § 44-3-195, as redesignated by Ga. L. 1995, p. 1260, § 1.)

Editor's notes. — Ga. L. 1995, p. 1260, § 1, repealed former Code Section 44-3-195, relating to authority to establish fees, effective July 1, 1995, and renumbered former Code Section 44-3-202 as Code Section 44-3-195. Former Code Section 44-3-195 was based on Code 1981, § 44-3-195, enacted by Ga. L. 1983, p. 1255, § 1.

44-3-196. Application of article to time-share programs created prior to or following July 1, 1983.

The provisions of this article shall apply to any time-share program located in this state or outside this state when offered for sale in this state created or commenced after July 1, 1983, and 180 days after July 1, 1983, as to any time-share program heretofore created or commenced. (Code 1981, § 44-3-205, enacted by Ga. L. 1983, p. 1255, § 1; Ga. L. 1984, p. 22, § 44; Ga. L. 1989, p. 321, § 5; Ga. L. 1990, p. 227, § 20; Code 1981, § 44-3-196, as redesignated by Ga. L. 1995, p. 1260, § 1.)

Editor's notes. — Ga. L. 1995, p. 1260, § 1, repealed former Code Section 44-3-196, relating to effective date of registration, administrative review of denial of registration, use of proper forms, and deficiencies in making applications, effective July 1, 1995, and renumbered former Code Section 44-3-205 as Code Section 44-3-196. Former Code Section 44-3-196 was based on Code 1981, § 44-3-196, enacted by Ga. L. 1983, p. 1255, § 1; Ga. L. 1985, p. 856, § 4.

44-3-197. Exceptions from registration.

Editor's notes. — Ga. L. 1995, p. 1260, § 1, renumbered former Code Section 44-3-197 as present Code Section 44-3-192.

44-3-198. Powers and duties of the commission.

Repealed by Ga. L. 1995, p. 1260, § 1, effective July 1, 1995.

Editor's notes. — This Code section was based on Code 1981, § 44-3-198, enacted by Ga. L. 1983, p. 1255, § 1.

44-3-199. Modification of public offering statement; limitations on use of public offering statement.

Editor's notes. — Ga. L. 1995, p. 1260, § 1, renumbered former Code Section 44-3-199 as present Code Section 44-3-193.

44-3-200. Records required to be kept by developer or agents.

Editor's notes. — Ga. L. 1995, p. 1260, § 1, renumbered former Code Section 44-3-200 as present Code Section 44-3-194.

44-3-201. Investigation of developer, agent, or exchange program; report confidential; enumeration of grounds for reprimand or for suspension or revocation of registration; cease and desist order for failure to register.

Repealed by Ga. L. 1995, p. 1260, § 1, effective July 1, 1995.

Editor's notes. — This Code section was based on Code 1981, § 44-3-201, enacted by Ga. L. 1983, p. 1255, § 1; Ga. L. 1984, p. 22, § 44; Ga. L. 1985, p. 856, § 5.

44-3-202. Criminal penalty for violation of article.

Editor's notes. — Ga. L. 1995, p. 1260, § 1, renumbered former Code Section 44-3-202 as present Code Section 44-3-195. Former Code Section 44-3-202 related to criminal penalty for violation of article.

44-3-203 and 44-3-204.

Repealed by Ga. L. 1995, p. 1260, § 1, effective July 1, 1995.

Editor's notes. — These Code sections were based on Ga. L. 1981, §§ 44-3-203 and 44-3-204, enacted by Ga. L. 1983, p. 1255, § 1.

44-3-205. Application of article to time-share programs created prior to or following July 1, 1983.

Editor's notes. — Ga. L. 1995, p. 1260, § 1, renumbered former Code Section 44-3-205 as present Code Section 44-3-196.

ARTICLE 6

PROPERTY OWNERS' ASSOCIATIONS

RESEARCH REFERENCES

Am. Jur. Trials. — Homeowners' Association Defense: Free Speech, 93 Am. Jur. Trials 293.

44-3-220. Short title.

This article shall be known and may be cited as the ''Georgia Property Owners' Association Act.'' (Code 1981, § 44-3-220, enacted by Ga. L. 1994, p. 1879, § 1.)

44-3-221. Definitions.

As used in this article, the term:

(1) ''Board of directors'' or ''board'' means an executive and administrative body, by whatever name denominated, designated in the instrument as the governing body of the association.

(2) ''Common area'' means all real and personal property submitted to the declaration which is owned or leased by the association for common use and enjoyment of the members.

(3) ''Common expenses'' means all expenditures lawfully made or incurred by or on behalf of the association together with all funds lawfully assessed for the creation and maintenance of reserves pursuant to the provisions of the instrument.

(4) ''Court'' means the superior court of the county where the development or any part thereof is located.

(5) ''Declarant'' means all owners and lessees of the property who execute the declaration or on whose behalf the declaration is executed; provided, however, that the phrase ''owners and lessees,'' as used in this article, shall not include in his or her capacity as such any mortgagee, any lien holder, any person having an equitable interest under any contract for the sale or lease of a lot, or any lessee or tenant of a lot. From the time of the recordation of any amendment to the declaration expanding an expandable property owners' development, all persons who execute that amendment or on whose behalf that amendment is executed shall also come within the definition of ''declarant.'' Any successors-in-title of any owner or lessee referred to in this paragraph who comes to stand in the same relation to the property owners' development as his or her predecessor did shall also come within such definition.

(6) ''Declaration'' means the recordable instrument creating covenants upon property which covenants are administered by a property owners' association in which membership is mandatory for all owners of lots in the property owners' development.

(7) ''Foreclosure'' means, without limitation, the judicial foreclosure of a mortgage and the exercise of a power of sale contained in any mortgage.

(8) ''Limited common areas'' means a portion of the common area reserved for the exclusive use of those entitled to occupy one or more, but less than all, of the lots.

(9) ''Lot'' means any plot or parcel of land, other than a common area, designated for separate ownership and occupancy shown on a recorded subdivision plat for a development and subject to a declaration. Where the context indicates or requires, the term lot includes any structure on the lot. With respect to a property owners' development which includes a condominium, and to the extent provided for in the instrument, each condominium unit, as defined in paragraph (28) of Code Section 44-3-71, shall be deemed a separate lot.

(10) ''Lot owner'' means one or more persons who are record title owners of a lot.

(11) ''Mortgage'' means a mortgage, deed to secure debt, deed of trust, or other instrument conveying a lien upon or security title to property.

(12) ''Mortgagee'' means the holder of a mortgage.

(13) ''Officer'' means an officer of the association.

(14) ''Person'' means a natural person, corporation, partnership, association, trust, other entity, or any combination thereof.

(15) ''Property'' means any real property and any interest in real property, including, without limitation, parcels of air space.

(16) ''Property owners' association'' or ''association'' means a corporation formed for the purpose of exercising the powers of the property owners' association created pursuant to this article.

(17) ''Property owners' association instrument'' or ''instrument'' means the declaration, plats, and plans recorded pursuant to this article. Any exhibit, schedule, or certification accompanying an instrument and recorded simultaneously therewith shall be deemed an integral part of that instrument. Any amendment or certification of any instrument shall, from the time of the recordation of such amendment or certification, be deemed an integral part of the affected instrument so long as such amendment or certification was made in accordance with this article.

(18) ''Property owners' development'' or ''development'' means real property which contains lots and which may contain common area located within Georgia and subject to a declaration and submitted to this article. (Code 1981, § 44-3-221, enacted by Ga. L. 1994, p. 1879, § 1; Ga. L. 2004, p. 560, § 8.)

44-3-222. Creation of property owners' development; affirmative election to be governed by article.

A property owners' development shall come into existence upon either the recordation of the declaration pursuant to this article or the amendment of a recorded declaration in accordance with Code Section 44-3-235. Any declaration or amendment intending to bring or avail a development of the benefits and provisions of this article shall state an affirmative election to be so governed. Any original declaration shall be duly executed by or on behalf of all of the owners of the submitted property. Any such amendment to an existing declaration shall be executed in accordance with the terms of the recorded declaration being amended thereby. (Code 1981, § 44-3-222, enacted by Ga. L. 1994, p. 1879, § 1.)

44-3-223. Compliance with provisions of instrument and with rules and regulations; penalties for noncompliance.

Every lot owner and all those entitled to occupy a lot shall comply with all lawful provisions of the property owners' association instrument. In addition, any lot owner and all those entitled to occupy a lot shall comply with

any reasonable rules or regulations adopted by the association pursuant to the instrument which have been provided to the lot owners and with the lawful provisions of the bylaws of the association. Any lack of such compliance shall be grounds for an action to recover sums due, for damages or injunctive relief, or for any other remedy available at law or in equity, maintainable by the association or, in any proper case, by one or more aggrieved lot owners on their own behalf or as a class action. If and to the extent provided in the instrument, the association shall be empowered to impose and assess fines and suspend temporarily voting rights and the right of use of certain of the common areas and services paid for as a common expense in order to enforce such compliance; provided, however, that no such suspension shall deny any lot owner or occupants access to the lot owned or occupied. (Code 1981, § 44-3-223, enacted by Ga. L. 1994, p. 1879, § 1.)

JUDICIAL DECISIONS

Power to collect dues and assessments. — Georgia Property Owners' Association Act, O.C.G.A. § 44-3-223, gives covenants the force of law, and a homeowners' association acted with privilege when the association exercised the power to collect dues and assessments granted to the association under the covenants; the association was therefore not a stranger to the contracts or the relationship between a developer and lot buyers, and thus was not liable for tortious interference with those contracts or that relationship. Carey Station Vill. Home Owners Ass'n v. Carey Station Vill., Inc., 268 Ga. App. 461, 602 S.E.2d 233 (2004).

44-3-224. Voting at association meetings.

(a) Since a lot owner may be more than one person, if only one of those persons is present at a meeting of the association, or is voting by proxy, ballot, or written consent, that person shall be entitled to cast the votes pertaining to that lot. However, if more than one of those persons is present, or executes a proxy, ballot, or written consent, the vote pertaining to that lot shall be cast only in accordance with their unanimous agreement unless the instrument expressly provides otherwise; and such consent shall be conclusively presumed if any one of them purports to cast the votes pertaining to that lot without protest being made immediately by any of the others to the person presiding over the meeting or vote.

(b) The votes pertaining to any lot may, and, in the case of any lot owner not a natural person or persons, shall, be cast pursuant to a proxy or proxies duly executed by or on behalf of the lot owner or, in cases where the lot owner is more than one person, by or on behalf of the joint owners of the lot. No such proxy shall be revocable except as provided in Code Section 14-2-722 or Code Section 14-3-724 or by written notice delivered to the association by the lot owner or by any joint owners of a lot. Any proxy shall be void if it is not dated or if it purports to be revocable without such notice. (Code 1981, § 44-3-224, enacted by Ga. L. 1994, p. 1879, § 1; Ga. L. 2004, p. 560, § 9.)

44-3-225. Assessment of expenses; exemption from liability; liability for unpaid assessments.

(a) To the extent that the instrument expressly so provides:

(1) Any common expenses benefiting less than all of the lots shall be specially assessed equitably among all of the lots so benefited, as determined by the board;

(2) Any common expenses occasioned by the conduct of less than all of those entitled to occupy all of the lots or by the licensees or invitees of any such lot or lots shall be specially assessed against the lot or lots, the conduct of any occupant, licensee, or invitee of which occasioned any such common expenses;

(3) Any common expenses significantly disproportionately benefiting all of the lots shall be assessed equitably among all of the lots in the development as determined by the board; and

(4) Other than for limited common areas expressly designated as such in the instrument and assigned to fewer than all lots, nothing contained in paragraph (1) or (3) of this subsection shall permit an association to specially or disproportionately allocate common expenses for periodic maintenance, repair, and replacement of any portion of the common area or the lots which the association has the obligation to maintain, repair, or replace.

(b) No lot owner other than the association shall be exempted from any liability for any assessment under this Code section or under any instrument for any reason whatsoever, including, without limitation, abandonment, nonuse, or waiver of the use or enjoyment of his or her lot or any part of the common area except to the extent that any lot, upon request by the owner of the lot, expressly may be made exempt from assessments and thus denied voting rights of the lot under the instrument until a certificate of occupancy is issued by the governing authority for a dwelling on such lot.

(c) Unless otherwise provided in the instrument and except as provided in subsection (d) of this Code section, the grantee in a conveyance of a lot shall be jointly and severally liable with the grantor thereof for all unpaid assessments against the latter up to the time of the conveyance without prejudice to the grantee's right to recover from the grantor the amounts paid by the grantee; provided, however, that if the grantor or grantee shall request a statement from the association as provided in subsection (d) of Code Section 44-3-232, such grantee and his or her successors, successors-in-title, and assigns shall not be liable for nor shall the property owners' association lot conveyed be subject to a lien for any unpaid assessments against such grantor in excess of any amount set forth in the statement.

(d) In the event that the holder of a first priority mortgage or secondary purchase money mortgage of record, provided that neither the grantee nor any successor grantee on the secondary purchase money mortgage is the seller of the lot, or in the event that any other person acquires title to any lot as a result of foreclosure of any such mortgage, such holder or other person and his or her successors, successors-in-title, and assigns shall not be liable for nor shall the lot be subject to any lien for assessments under this Code section or under any instrument chargeable to the lot on account of any period prior to the acquisition of title; provided, however, that the unpaid share of an assessment or assessments shall be deemed to be a common expense collectable from all of the lot owners, including such holder or other person and his or her successors, successors-in-title, and assigns. (Code 1981, § 44-3-225, enacted by Ga. L. 1994, p. 1879, § 1; Ga. L. 2004, p. 560, § 10.)

Code Commission notes. — Pursuant to Code Section 28-9-5, in 2004, ''nonuse'' was substituted for ''nonuser'' in the middle of subsection (b).

44-3-226. Amendment of instrument; presumption of validity in court action.

(a) Except to the extent expressly permitted or required by other provisions of this article, the instrument shall be amended only by the agreement of lot owners of lots to which two-thirds of the votes in the association pertain or such larger majority as the instrument may specify; provided, however, that, during any such time as there shall exist an unexpired option to add any additional property to the property owners' association or during any such time as the declarant has the right to control the association under the instrument, the agreement shall be that of the declarant and the lot owners of lots to which two-thirds of the votes in the association pertain, exclusive of any vote or votes appurtenant to any lot or lots then owned by the declarant, or a larger majority as the instrument may specify. Notwithstanding any other provisions of this subsection, during such time as the declarant shall own at least one lot primarily for the purpose of sale of such lot, no amendment shall be made to the instrument without the written agreement of the declarant if such amendment would impose a greater restriction on the use or development by the declarant of the lot or lots owned by the declarant.

(b) No amendment of an instrument shall require approval of lot owners to which more than 80 percent of the association vote pertains and the mortgagees holding 80 percent of the voting interest of mortgaged lots; any property owners' association which exists prior to July 1, 1994, and amends its documents to avail itself of the provisions of this article shall be deemed to have amended the association instrument to conform to this limitation. This subsection shall not be deemed to eliminate or modify any right of the declarant provided for in the instrument to approve amendments to the

instrument so long as the declarant owns any lot primarily for the purpose of sale and, furthermore, this Code section shall not be construed as modifying or altering the rights of a mortgagee set forth elsewhere in this article.

(c) Except to the extent expressly permitted or required by other provisions of this article, or agreed upon or permitted by the instrument concerning submission of additional property to this article by the declarant or the association, or agreed upon by all lot owners and the mortgagees of all lots, no amendment to the instrument shall change the boundaries of any lot, the number of votes in the association pertaining thereto, or the liability for common expenses pertaining thereto.

(d) Agreement of the required majority of lot owners to any amendment of the instrument shall be evidenced by their execution of the amendment. In the alternative, provided that the declarant does not then have the right to control the association pursuant to the instrument, the sworn statement of the president, of any vice president, or of the secretary of the association attached to or incorporated in an amendment executed by the association, which sworn statement states unequivocally that agreement of the required majority was otherwise lawfully obtained and that all notices required by this article were properly given, shall be sufficient to evidence the required agreement. Any such amendment of the instrument shall become effective only when recorded or at such later date as may be specified in the amendment itself.

(e) Notwithstanding anything to the contrary in this article or in the instrument, the approval of any proposed amendment by a mortgagee shall be deemed implied and consented to if the mortgagee fails to submit a response to any written proposal for an amendment within 30 days after the mortgagee receives notice of the proposed amendment sent by certified mail or statutory overnight delivery, return receipt requested.

(f) In any court suit or action where the validity of the adoption of an amendment to an instrument is at issue, the adoption of the amendment shall be presumed valid if the suit is commenced more than one year after the recording of the amendment on the public record. In such cases, the burden of proof shall be upon the party challenging the validity of the adoption of the amendment. (Code 1981, § 44-3-226, enacted by Ga. L. 1994, p. 1879, § 1; Ga. L. 1995, p. 10, § 44; Ga. L. 2000, p. 1589, § 3.)

Editor's notes. — Ga. L. 2000, p. 1589, § 16, not codified by the General Assembly, provides that the amendment to this Code section is applicable with respect to notices delivered on or after July 1, 2000.

44-3-227. Incorporation as prerequisite to submission to article; requirements as to corporate documents; board of directors.

(a) Prior to submission to this article, the association shall be duly incorporated either as a business corporation under Chapter 2 of Title 14 or as a nonprofit membership corporation under Chapter 3 of Title 14, as amended. The corporate name of the association shall include the word or words ''homeowners,'' ''property owners,'' ''community,'' ''club,'' or ''association'' and shall otherwise comply with applicable laws regarding corporate names. The articles of incorporation of the association and the bylaws adopted by the association shall contain provisions not inconsistent with applicable law including but not limited to this article or with the declaration as may be required by this article or by the declaration and as may be deemed appropriate or desirable for the proper management and administration of the association. The term ''member'' shall include a shareholder in the event the association is a business corporation or issues stock. Membership shall continue during the period of ownership by such lot owner.

(b) Prior to the first conveyance of a property owners' association lot, the declarant shall cause the first board directors to be duly appointed, the officers to be elected, and the organization of the association to be effectuated.

(c) True and correct copies of the articles of incorporation and bylaws of the association and all amendments thereto shall be maintained at the principal and the registered offices of the association and at the sales office of the declarant so long as the declarant has the right to control the association pursuant to the instrument; and copies thereof shall be furnished to any lot owner on request upon payment of a reasonable charge therefor. (Code 1981, § 44-3-227, enacted by Ga. L. 1994, p. 1879, § 1; Ga. L. 2004, p. 560, § 11.)

44-3-228. Presence of quorums at meetings.

Unless the instrument or bylaws provide otherwise, a quorum shall be deemed present throughout any meeting of the members of the association if persons entitled to cast more than one-third of the votes are present at the beginning of the meeting. Unless the instrument or bylaws specify a larger percentage, the presence of persons entitled to cast one-half of the votes of the board of directors shall constitute a quorum for the transaction of business at any meeting of the board. (Code 1981, § 44-3-228, enacted by Ga. L. 1994, p. 1879, § 1; Ga. L. 2004, p. 560, § 12.)

44-3-229. Persons deemed to be "lot owner."

If the instrument provides that any member of the board of directors or any officer of the association must be a lot owner, then, notwithstanding

Code Section 44-3-221, the term ''lot owner'' in such context shall, unless the instrument otherwise provides, be deemed to include, without limitation, any shareholder, director, officer, partner in, or trustee of any person who is, either alone or in conjunction with any other person or persons, a lot owner. Any individual who would not be eligible to serve as a member of the board of directors or officer were he or she not a shareholder, director, officer, partner in, or trustee of such a person shall be deemed to have disqualified himself or herself from continuing in office if he or she ceases to have any such affiliation with that person. (Code 1981, § 44-3-229, enacted by Ga. L. 1994, p. 1879, § 1.)

44-3-230. Frequency of meetings; notice.

Meetings of the members of the association shall be held in accordance with the provisions of the association's bylaws and in any event shall be called not less frequently than annually. Notice shall be given to each lot owner at least 21 days in advance of any annual or regularly scheduled meeting and at least seven days in advance of any other meeting and shall state the time, place, and, for any special meeting, purpose of such meeting. Such notice shall be delivered personally or sent by United States mail, postage prepaid, statutory overnight delivery, or issued electronically in accordance with Chapter 12 of Title 10, the ''Uniform Electronic Transactions Act,'' to all lot owners of record at such address or addresses as designated by such lot owners or, if no other address has been so designated, at the address of their respective lots. At the annual meeting, comprehensive reports of the affairs, finances, and budget projections of the association shall be made to the lot owners. (Code 1981, § 44-3-230, enacted by Ga. L. 1994, p. 1879, § 1; Ga. L. 1995, p. 10, § 44; Ga. L. 2004, p. 560, § 13; Ga. L. 2009, p. 698, § 2/HB 126.)

The 2009 amendment, effective July 1, 2009, substituted ''Uniform Electronic Transactions Act'' for ''Georgia Electronic Records and Signatures Act'' in the middle of the third sentence.

44-3-231. Powers and duties of association; legal actions against agent or employee of association.

(a) Except to the extent prohibited by the instrument and subject to any restrictions and limitations specified therein, the association shall have the power to:

(1) Employ, retain, dismiss, and replace agents and employees to exercise and discharge the powers and responsibilities of the association;

(2) Make or cause to be made additional improvements on and as a part of the common area; and

(3) Grant or withhold approval of any action by one or more lot owners or other persons entitled to occupancy of any lot if such action

would change the exterior appearance of any lot, or any structure thereon, or of any other portion of the development or elect or provide for the appointment of an architectural control committee to grant or withhold such approval.

(b) Except to the extent prohibited by the instrument and subject to any restrictions and limitations specified therein, the association shall have the power to grant easements, leases, and licenses through or over the common area, to accept easements, leases, and licenses benefiting the development or any portion thereof, and to acquire or lease property in the name of the association. Property so acquired by the association upon the recordation of the deed thereto or other instrument granting the same and designating property as common area shall, for all purposes including without limitation taxation, be a part of the common area. The association shall also have the power to acquire, lease, and own in its own name property of any nature, real, personal, or mixed, tangible or intangible; to borrow money; and to pledge, mortgage, or hypothecate all or any portion of the property of the association for any lawful purpose within the association's inherent or expressly granted powers. Any third party dealing with the association shall be entitled to rely in good faith upon a certified resolution of the board of directors of the association authorizing any such act or transaction as conclusive evidence of the authority and power of the association so to act and of full compliance with all restraints, conditions, and limitations, if any, upon the exercise of such authority and power.

(c) The association shall have the power to amend the instrument, the articles of incorporation, and the bylaws of the association in such respects as may be required to conform to mandatory provisions of this article or of any other applicable law without a vote of the lot owners.

(d) In addition to any other duties and responsibilities as this article or the instrument may impose, the association shall keep:

(1) Detailed minutes of all meetings of the members of the association and of the board of directors;

(2) Detailed and accurate financial records, including itemized records of all receipts and expenditures; and

(3) Any books and records as may be required by law or be necessary to reflect accurately the affairs and activities of the association.

(e) This Code section shall not be construed to prohibit the grant or imposition of other powers and responsibilities to or upon the association by the instrument.

(f) Except to the extent otherwise expressly required by this article, by Chapter 2 or 3 of Title 14, by the instrument, by the articles of incorporation, or by the bylaws of the association, the powers inherent in or expressly granted to the association may be exercised by the board of directors, acting

through the officers, without any further consent or action on the part of the lot owners.

(g) A tort action alleging or founded upon negligence or willful misconduct by any agent or employee of the association or in connection with the conditions of any portion of the instrument which the association has the responsibility to maintain shall be brought against the association. No lot owner shall be precluded from bringing such an action by virtue of his membership in the association. A judgment against the association arising from a tort action shall be a lien against the assets of the association.

(h) The association shall have the capacity, power, and standing to institute, intervene, prosecute, represent, or defend in its own name litigation or administrative or other proceedings of any kind concerning claims or other matters relating to any portion of the lots or common area which the association has the responsibility to administer, repair, or maintain. (Code 1981, § 44-3-231, enacted by Ga. L. 1994, p. 1879, § 1.)

JUDICIAL DECISIONS

Actions against owners' associations. — In a personal injury action filed by owners of a parcel of land in a community against the community owners' association, a restrictive covenant which shifted the duty to inspect the community's common areas from the association to owners of parcels in the community was not void as against public policy on the ground that O.C.G.A. § 44-3-231(g) of the Georgia Property Owners' Association Act (Act) pronounced a public policy against precluding owners from bringing tort actions against owners' associations; § 44-3-231(g) concededly did not apply to the action because the covenant was recorded before the Act became effective, the Act reflected a policy of deference toward parties' freedom to contract by making § 44-3-231(g) applicable only where a recorded declaration affirmatively stated such an intention, and the covenant at issue did not violate § 44-3-231(g), which simply identified the proper defendant in certain tort claims against owners' associations. Hayes v. Lakeside Vill. Owners Ass'n, 282 Ga. App. 866, 640 S.E.2d 373 (2006).

44-3-232. Assessments against lot owners as constituting lien in favor of association; additional charges against lot owners; procedure for foreclosing lien; obligation to provide statement of amounts due.

(a) All sums lawfully assessed by the association against any lot owner or property owners' association lot, whether for the share of the common expenses pertaining to that lot, fines, or otherwise, and all reasonable charges made to any lot owner or lot for materials furnished or services rendered by the association at the owner's request to or on behalf of the lot owner or lot, shall, from the time the sums became due and payable, be the personal obligation of the lot owner and constitute a lien in favor of the association on the lot prior and superior to all other liens whatsoever except:

(1) Liens for ad valorem taxes on the lot;

(2) The lien of any first priority mortgage covering the lot and the lien of any mortgage recorded prior to the recording of the declaration; or

(3) The lien of any secondary purchase money mortgage covering the lot, provided that neither the grantee nor any successor grantee on the mortgage is the seller of the lot.

The recording of the declaration pursuant to this article shall constitute record notice of the existence of the lien, and no further recordation of any claim of lien for assessments shall be required.

(b) To the extent that the instrument provides, the personal obligation of the lot owner and the lien for assessments shall also include:

(1) A late or delinquency charge not in excess of the greater of $10.00 or 10 percent of the amount of each assessment or installment thereof not paid when due;

(2) At a rate not in excess of 10 percent per annum, interest on each assessment or installment thereof and any delinquency or late charge pertaining thereto from the date the same was first due and payable;

(3) The costs of collection, including court costs, the expenses required for the protection and preservation of the lot, and reasonable attorney's fees actually incurred; and

(4) The fair rental value of the lot from the time of the institution of an action until the sale of the lot at foreclosure or until judgment rendered in the action is otherwise satisfied.

(c) Not less than 30 days after notice is sent by certified mail or statutory overnight delivery, return receipt requested, to the lot owner both at the address of the lot and at any other address or addresses which the lot owner may have designated to the association in writing, the lien may be foreclosed by the association by an action, judgment, and court order for foreclosure in the same manner as other liens for the improvement of real property, subject to superior liens or encumbrances, but any such court order for judicial foreclosure shall not affect the rights of holders of superior liens or encumbrances to exercise any rights or powers afforded to them under their security instruments. The notice provided for in this subsection shall specify the amount of the assessments then due and payable together with authorized late charges and the rate of interest accruing thereon. No foreclosure action against a lien arising out of this subsection shall be permitted unless the amount of the lien is at least $2,000.00. Unless prohibited by the instrument, the association shall have the power to bid on the lot at any foreclosure sale and to acquire, hold, lease, encumber, and convey the same. The lien for assessments shall lapse and be of no further effect, as to assessments or installments thereof, together with late charges and interest applicable thereto, four years after the assessment or installment first became due and payable.

(d) Any lot owner, mortgagee of a lot, person having executed a contract for the purchase of a lot, or lender considering the loan of funds to be secured by a lot shall be entitled upon request to a statement from the association or its management agent setting forth the amount of assessments past due and unpaid together with late charges and interest applicable thereto against that lot. Such request shall be in writing, shall be delivered to the registered office of the association, and shall state an address to which the statement is to be directed. Failure on the part of the association, within five business days from the receipt of such request, to mail or otherwise furnish such statement regarding amounts due and payable at the expiration of such five-day period with respect to the lot involved to such address as may be specified in the written request therefor shall cause the lien for assessments created by this Code section to be extinguished and of no further force or effect as to the title or interest acquired by the purchaser or lender, if any, as the case may be, and their respective successors and assigns, in the transaction contemplated in connection with such request. The information specified in such statement shall be binding upon the association and upon every lot owner. Payment of a fee not exceeding $10.00 may be required as a prerequisite to the issuance of such a statement if the instrument so provides.

(e) Nothing in this Code section shall be construed to prohibit actions maintainable pursuant to Code Section 44-3-223 to recover sums for which subsection (a) of this Code section creates a lien. (Code 1981, § 44-3-232, enacted by Ga. L. 1994, p. 1879, § 1; Ga. L. 1995, p. 10, § 44; Ga. L. 2000, p. 1589, § 3; Ga. L. 2004, p. 560, § 14; Ga. L. 2005, p. 60, § 44/HB 95; Ga. L. 2008, p. 1135, § 2/HB 422.)

The 2008 amendment, effective July 1, 2008, added the third sentence in subsection (c).

Editor's notes. — Ga. L. 2000, p. 1589, § 16, not codified by the General Assembly, provides that the amendment to this Code section is applicable with respect to notices delivered on or after July 1, 2000.

44-3-233. Liberal construction of article; substantial compliance; curing of defects by amendment.

The provisions of this article and of an instrument recorded pursuant thereto shall be liberally construed in favor of the valid establishment of property owners' association pursuant to this article with respect to the submitted property. Substantial compliance with the requirements of this article for the establishment of a property owners' association shall suffice to being property described in an instrument recorded pursuant to this article within the purview and application of this article; and any defects in such instrument or want of conformity with this article may be cured by an amendment thereto duly executed by the association and recorded or, upon application of any lot owner, with notice to the declarant, the association, and all other lot owners, by decree of the court. (Code 1981, § 44-3-233, enacted by Ga. L. 1994, p. 1879, § 1.)

44-3-234. Application of article.

The limitations provided in subsection (b) and paragraphs (1), (2), and (4) of subsection (d) of Code Section 44-5-60 shall not apply to any covenants contained in any instrument created pursuant to or submitted to this article. (Code 1981, § 44-3-234, enacted by Ga. L. 1994, p. 1879, § 1.)

44-3-235. Applicability of article.

(a) This article shall apply to all property which is submitted to this article. This article shall also apply to any association of owners subject to a recorded declaration of covenants upon property, which covenants are administered by an owners' association in which membership is mandatory for all owners of lots in the development, which declaration is amended in accordance with Code Section 44-3-222 in order to submit the property owners' association to this article; provided, however, that any amendment must conform the instrument creating the property owners' association to this article, and the property owners' development shall thereafter be deemed to be submitted to this article.

(b) This article shall not apply to associations created pursuant to Article 3 of this chapter, the ''Georgia Condominium Act,'' except to the extent that a property owners' development created under this article includes a condominium, together with other real property, as provided in paragraph (9) of Code Section 44-3-221.

(c) This article shall not be construed to affect the validity of any instrument recorded before or after July 1, 1994, but benefits derived from or based upon this article may only be claimed by developments submitted to this article. (Code 1981, § 44-3-235, enacted by Ga. L. 1994, p. 1879, § 1; Ga. L. 2004, p. 560, § 15.)

ARTICLE 7

SPECIALIZED LAND TRANSACTIONS

Effective date. — This article became effective July 1, 2009.

44-3-250. Itemized reporting of expenses by developers.

Any developer that directly manages a homeowners' or condominium owners' association whose annual assessment fee is $500.00 or more in a development or subdivision with 20 or more homes shall provide a report itemizing the expenses for such homeowners' or condominium owners' association to each homeowner or condominium owner not later than 60 days after the end of the year for which fees were assessed. This Code section shall not apply to any development that has been made a property

owners' development in accordance with Article 6 of this chapter, the ''Georgia Property Owners' Association Act.'' (Code 1981, § 44-3-250, enacted by Ga. L. 2009, p. 326, § 1/HB 528.)

CHAPTER 4

DETERMINATION OF BOUNDARIES

Article 1

Processioning

Sec.

44-4-1. Appointment of processioners; term of office; vacancies.

44-4-2. Application for new survey and marking of lines; notice to owners of adjoining lands.

44-4-3. Duty of surveyor and processioners; preparation and certification of plat; delivery of copy to applicant; evidentiary effect of plat; admissibility.

44-4-4. Processioner's return.

44-4-5. Disputed lines; rules for determining.

44-4-6. General reputation as evidence; acquiescence.

44-4-7. Effect of adverse possession for more than seven years.

44-4-8. Treatment of land cut off by watercourse.

44-4-9. Adjoining landowner's protest; trial of case in superior court; scope of verdict and judgment.

44-4-10. Compensation of processioners; costs of protest.

Article 2

Coordinate System

Sec.

44-4-20. Designation of Georgia Coordinate System and Georgia Coordinate System of 1985; East and West Zones.

44-4-21. Names of East and West Zones.

44-4-22. Alternative plane coordinates for expressing location of a point for Georgia Coordinate System and Georgia Coordinate System of 1985.

44-4-23. Description of land extending from one zone to another.

44-4-24. Zones precisely defined.

44-4-25. Recordation of coordinates of point prohibited unless connected by survey to monumented horizontal control station.

44-4-26. Use of terms limited.

44-4-27. Use of terms ''Grid North, Georgia East Zone'' and ''Grid North, Georgia West Zone.''

44-4-28. Conversion of distances between meters and feet.

44-4-29. Use of system not mandatory.

44-4-30. Validation of use of Georgia Coordinate System.

44-4-31. Use of Georgia Coordinate System prohibited after January 1, 1990.

Cross references. — Data required to be included in maps or plats recorded with clerk of superior court, § 15-6-67. County surveyor, Ch. 7, T. 36. Professional engineers and land surveyors, Ch. 15, T. 43.

RESEARCH REFERENCES

Am. Jur. Proof of Facts. — Surveyor's Failure to Exercise Due Care in Making Survey, 11 POF2d 397.

Change in Shoreline by Accretion or Avulsion, 21 POF2d 147.

Malicious Design and Construction of Fence, 22 POF2d 683.

Agreement of Adjoining Landowners Fixing Common Boundary, 34 POF2d 317.

Permissive Possession or Use of Land as Defeating Claim of Adverse Possession or Prescriptive Easement, 68 POF3d 239.

Proof of Adjoining Landowner's Malicious or Unreasonable Construction of Fence, 73 POF3d 1.

Proof of Accretion or Avulsion in Title and Boundary Disputes over Additions to Riparian Land, 73 POF3d 167.

Proof of Boundary Established by Parol Agreement or Acquiescence of Adjoining Landowners, 82 POF3d 227.

ARTICLE 1

PROCESSIONING

Administrative rules and regulations. — Technical standards for property surveys, Official Compilation of the Rules and Regulations of the State of Georgia, Rules of State Board of Registration for Professional Engineers and Land Surveyors, Chapter 180-7.

JUDICIAL DECISIONS

Applicability to lands in cities and towns. — Law authorizes proceedings thereunder to mark land lines of rural land, but not of lands located inside the corporate limits of cities or towns. In actions to recover land, whether rural or city, when title is otherwise shown, acquiescence by acts or declarations for seven years in a dividing line by adjacent owners establishes such line as the true line. Former Code 1933, § 85-1602 (see O.C.G.A. § 44-4-6) was applicable in such cases. Veal v. Barber, 197 Ga. 555, 30 S.E.2d 252 (1944).

Applicable only to rural divisions. — It is a misapplication of statutory law to use the law for ascertaining boundaries between town lots and an adjacent tract, these laws being intended for operation upon the boundaries dividing rural lands only. Christian v. Weaver, 79 Ga. 406, 7 S.E. 261 (1887).

Processioners' duty is to mark existing lines, not establish new ones. — Processioners are not to run and mark lines which at some previous time were located and established. Processioners may seek and find lines already existing, but cannot bring into existence any which have not been before designated on the surface of the earth. Lines merely drawn on paper, or in the minds of contracting parties are not ready for the search or services of processioners. Standard Oil Co. v. Altman, 173 Ga. 777, 161 S.E. 353 (1931).

It is the duty of the processioners together with the surveyor to run and mark anew the original line between the lots as set out in the application, subject to all the rules and regulations set forth in statute, as construed by the courts. Welch v. Haley, 83 Ga. App. 492, 64 S.E.2d 364 (1951).

Surveyor and processioners have no authority to make and establish new lines, but their duty is to trace and mark anew old lines or those that can be taken as having been formerly located and established. Welch v. Haley, 83 Ga. App. 492, 64 S.E.2d 364 (1951).

It is the province and duty of the processioners and surveyor in a processioning proceeding to run and mark anew a line or lines as the lines actually exist. Processioners have no authority under the law to mark new lines. Greenway v. Altman, 89 Ga. App. 557, 80 S.E.2d 89 (1954).

Processioners can function even when established boundaries not marked in entirety. — While it is the duty of processioners to mark anew established lines, and not to locate the line as the line originally ought to have been laid out, with the result that the processioners cannot mark anew lines which have never in a legal sense been established, this does not mean that when established enclosing boundaries are not physically marked in their entirety, processioners cannot function. Byrd v. McLucas, 194 Ga. 40, 20 S.E.2d 597 (1942).

Processioning determines boundaries, not title. — Since the object of the summary processioning laws is to settle disputes of boundary lines between coterminous landowners, and the proceeding is not designed as a substitute for an action in ejectment to settle title, which is not directly involved, it will be presumed that the processioners would not undertake to exercise jurisdiction to pass upon or determine any question involving a disputed title, but will confine themselves solely to the fixing of boundaries between the adjacent claimants, leaving undetermined any question relating to conflict-

ing claims as to the title itself. Osborne v. Thompson, 154 Ga. App. 215, 267 S.E.2d 852 (1980).

Processioners must rely on corners, landmarks, and lines of demarcation where they exist. — Even though the course and extent of the lines themselves may not have been physically marked out in their entirety upon the earth's surface, if there should exist a sufficient number of physically established corners or landmarks, the mere connecting of which by straight lines would suffice to complete the boundaries, or if there be an established line of demarcation, such as an abandoned roadbed of a railroad, and if parallel boundaries of the railroad right of way can be actually determined by courses and distances with respect thereto, it would be the duty of processioners, to so ascertain and establish the courses and distances, but respecting always any rights had under actual possession, as defined by former Code 1933, § 85-1603 (see O.C.G.A. § 44-4-7). Byrd v. McLucas, 194 Ga. 40, 20 S.E.2d 597 (1942).

Land need not be completely measured nor marked in particular way. — Nothing in the statute makes any requirement respecting the placing of line or corner markers or requires that such markers be placed on any particular interval or spacing and nothing in the law as the law presently exists requires that every foot or inch of a line be drawn on the face or surface of the earth, or that the processioners or a majority of the processioners actually walk over or along the entire line without omitting any interval in so doing. Hackle v. Bowen, 89 Ga. App. 799, 81 S.E.2d 294 (1954); Chapman v. Joyce, 155 Ga. App. 129, 270 S.E.2d 336 (1980).

Lines need only be located with some definiteness. — All that is required of the processioners and the surveyor is that the lines be traced and marked anew so as to locate the lines with some definiteness. Chapman v. Joyce, 155 Ga. App. 129, 270 S.E.2d 336 (1980).

Use of illegal or erroneous method to locate line. — Fact that processioners may have used an erroneous or illegal or improper method in ascertaining the location of the line would not subject their return to dismissal, but would merely authorize a jury finding against the line as run. Chapman v. Joyce, 155 Ga. App. 129, 270 S.E.2d 336 (1980).

Processioners' plat and return prima facie evidence of boundary. — Landowner made a prima facie case as to the location of a boundary by introducing the plat and return of the processioners. Nichols v. Purvis, 178 Ga. App. 826, 344 S.E.2d 692 (1986).

When dispute is between two adjoining landowners, a survey of other boundaries is unnecessary. Nichols v. Purvis, 178 Ga. App. 826, 344 S.E.2d 692 (1986).

Protest to proceedings under § 44-2-77. — Former Code 1933, § 60-217 (see O.C.G.A. § 44-2-77) stated that the judge, or the examiner with the approval of the judge, may require the land to be surveyed by some competent surveyor after due notice to the adjoining landowners, who, if dissatisfied with the survey, may file a protest with the court, whereupon the issues thus made would be tried as in case of a protest to the return of land processioners as authorized by statute. Harris v. Ernest L. Miller Co., 213 Ga. 748, 101 S.E.2d 715 (1958).

Testimony by petitioner's own surveyor. — When no survey such as provided for in former Code 1933, § 60-217 (see O.C.G.A. § 44-2-77) was ordered, but the petitioner introduced in evidence the testimony and survey of the petitioner's own surveyor, who testified as to the location of the land lines, corners, and landmarks of the property, the evidence offered was competent and not subject to the objection that the petitioner's survey did not comply with that statute or other statutory provisions. Harris v. Ernest L. Miller Co., 213 Ga. 748, 101 S.E.2d 715 (1958).

Line found by processioners not authorized by evidence. — When the evidence on the trial of a processioning proceeding is not sufficient to authorize the establishment of the line between conterminous owners of adjacent land lots as located by the processioners, it is nevertheless error to dismiss the entire proceeding on the ground that it is the province of the processioners to survey and mark anew established lines as those lines actually exist and that the processioners are without authority to run a new line, since the evidence as a whole authorizes the jury to establish such dividing line other than as located by the processioners. Rodgers v. Beavers, 76 Ga. App. 16, 45 S.E.2d 74 (1947).

When evidence sufficient for verdict, dismissal is error. — When the evidence was

sufficient to have authorized a verdict determining the rights of the parties in the premises, the dismissal of the proceedings was error. Rodgers v. Beavers, 76 Ga. App. 16, 45 S.E.2d 74 (1947).

Jurisdiction. — Court of Appeals, rather than the Supreme Court, had jurisdiction over a processioning action because processioning actions are statutory in nature and not intended to establish title. Elder v. Merritt, 204 Ga. App. 163, 418 S.E.2d 774 (1992).

Writ of error lies to Court of Appeals, not to the Supreme Court to correct the judgment of the superior court in a proceeding instituted under former Civil Code 1910, § 3817 et seq. (see O.C.G.A. § 44-4-1 et seq.). Elkins v. Merritt, 146 Ga. 647, 92 S.E. 51 (1917); Guarantee Trust & Banking Co. v. Dickson, 148 Ga. 311, 96 S.E. 561 (1918).

Cited in Edenfield v. Lanier, 203 Ga. 348, 46 S.E.2d 582 (1948); Edenfield v. Lanier, 206 Ga. 696, 58 S.E.2d 188 (1950); Dean v. Jackson, 219 Ga. 552, 134 S.E.2d 601 (1964); Holmes v. Blount, 245 Ga. 757, 267 S.E.2d 228 (1980).

OPINIONS OF THE ATTORNEY GENERAL

Article fails to mention costs. — Statute enumerates the various duties of the ordinary (now probate judge) and requires that the ordinary (now probate judge) record the actions of the processioners. However, it fails to set the costs of the ordinary (now probate judge) for performing such acts. 1950-51 Op. Att'y Gen. p. 269.

RESEARCH REFERENCES

ALR. — Establishment of boundary line by oral agreement or acquiescence, 69 ALR 1430; 113 ALR 421.

Boundary under conveyance of land bordering on railroad right of way, 85 ALR 404.

Property rights in respect of building, fence, or other structure placed upon another's land through mistake as to boundary or location, 130 ALR 1034.

Presumption that description by reference to highway carries fee to center thereof, as affected by presence of water system or other apparatus under highway, 147 ALR 667.

Adverse possession involving ignorance or mistake as to boundaries — modern views, 80 ALR2d 1171.

Boundaries: measurement in horizontal line or along surface or contour, 80 ALR2d 1208.

Encroachment of trees, shrubbery, or other vegetation across boundary line, 65 ALR4th 603.

Sufficiency of showing, in establishing boundary by parol agreement, that boundary was uncertain or in dispute before agreement, 72 ALR4th 132.

44-4-1. Appointment of processioners; term of office; vacancies.

Every other year, the judge of the probate court of each county shall appoint three suitable persons in every militia district in the county who shall be processioners of land for that district until their successors are appointed. In the event the judge of the probate court is unable to find three persons in a militia district to serve as processioners or in the event a processioner disqualifies himself or refuses to serve and the judge of the probate court is unable to find a person to serve in his place in such militia district, the judge of the probate court may appoint a processioner or processioners, as the case may be, from a different militia district. Vacancies may be filled at any time in the same manner as appointments are made. If no processioners are thus appointed, the judge of the probate court shall appoint processioners at any regular term on the application of any landowner. The power to appoint processioners under this Code section is

expressly removed from the board of commissioners in each and every county of this state having such a board. (Laws 1798, Cobb's 1851 Digest, p. 716; Laws 1850, Cobb's 1851 Digest, p. 719; Ga. L. 1853-54, p. 76, § 1; Code 1863, § 2352; Code 1868, § 2349; Code 1873, § 2384; Code 1882, § 2384; Civil Code 1895, § 3243; Civil Code 1910, § 3817; Code 1933, § 85-1604; Ga. L. 1953, Jan.-Feb. Sess., p. 202, § 1; Ga. L. 1956, p. 326, § 1.)

JUDICIAL DECISIONS

Powers and duties imposed on processioners appointed under former Civil Code 1910, § 3817 (see O.C.G.A. § 44-4-1) were quasi-judicial, and the body of processioners in a given district was a ''commission'' within the meaning of former Civil Code 1910, § 4642 (see O.C.G.A. § 15-1-8). Tucker v. Roberts, 151 Ga. 753, 108 S.E. 222 (1921).

Processioners of land have neither express nor implied power to administer oath to anyone, for any purpose whatever. Dalton v. Higgins, 34 Ga. 433 (1866).

Role of processioners. — Georgia law provides that in cases of disputed lines individuals appointed as processioners may, along with a county surveyor, mark the lines anew, and in such a case it is the duty of the processioners to fix and determine the boundaries as the boundaries actually exist; and to that end, the processioners shall run and mark anew those lines which can be taken as having been formerly located and established, and not undertake to locate the lines as the processioners might think they should originally have been laid out. Howell v. United States, 519 F. Supp. 298 (N.D. Ga. 1981).

De facto processioners. — Where persons holding office as processioners in a militia district in a particular county in this state entertain an application by a landowner to survey and mark a land line as authorized by statute, and after surveying and making the line, file their report with the ordinary (now probate judge) as required by statute, such persons are officers de facto even if the individuals do not hold office under lawful appointment, and the report filed by the individuals should not be set aside on the ground that the appointment of the officers was unauthorized by law. Tucker v. Roberts, 151 Ga. 753, 108 S.E. 222 (1921).

Since the ordinary (now probate judge), under the law, has the right to appoint a processioner, an appointment by the ordinary (now probate judge), although not made at the term of court, or otherwise, as provided by law, orally made outside the court house, while the ordinary (now probate judge) is on the street, by addressing the appointee and telling the appointee that the ordinary (now probate judge) is appointed processioner for the designated district of the county, is sufficient to give the appointee who, pursuant to such appointment, assumes office and exercises the duties thereof, the apparent right or color of title to the office, and thereby to constitute oneself an officer de facto. The acts of an officer de facto in discharging the duties of the office are good and cannot be collaterally attacked. Usry v. Hadden, 65 Ga. App. 227, 15 S.E.2d 629 (1941).

Processioner related to a party. — When a processioner in a proceeding to procession land lines is related within the fourth degree by consanguinity or affinity to the applicant alone, or to either the applicant or protestant, the processioner is disqualified, and such disqualification is sufficient ground for setting aside a return of the processioners in which the processioner participated. Tucker v. Roberts, 151 Ga. 753, 108 S.E. 222 (1921).

When, in a processioning proceeding, a processioner was disqualified by reason of relationship to one or both of the parties, such relationship rendered the return of the processioners void, and could be dismissed on motion for that reason, although not made until after the processioners had made the processioners' return. Riner v. Flanders, 173 Ga. 43, 159 S.E. 693 (1931).

Cited in Benton v. Horsley, 71 Ga. 619 (1883); Philpot v. Wells, 69 Ga. App. 489, 26 S.E.2d 155 (1943); Anthony v. Wright, 76 Ga. App. 425, 46 S.E.2d 194 (1948); Shelton v. Long, 177 Ga. App. 534, 339 S.E.2d 788 (1986).

44-4-2. Application for new survey and marking of lines; notice to owners of adjoining lands.

Every owner of land, any portion of which lies in any militia district even if the remainder lies in an adjoining district or an adjoining county, who desires the lines around his entire tract to be resurveyed and re-marked shall apply to the processioners of the district to appoint a day when a majority of them, along with the county surveyor, will trace and mark the lines. Ten days' written notice of the time of the running and marking shall be given to all the owners of adjoining lands if they are residents of this state; and the processioners shall not proceed to run and mark the lines until satisfactory evidence of the service of the notice is presented to them. (Laws 1799, Cobb's 1851 Digest, p. 717; Code 1863, § 2353; Code 1868, § 2350; Code 1873, § 2385; Code 1882, § 2385; Civil Code 1895, § 3244; Civil Code 1910, § 3818; Code 1933, § 85-1605; Ga. L. 1982, p. 3, § 44.)

JUDICIAL DECISIONS

Purpose of processioning. — Processioning was designed to prevent controversies concerning boundaries of land between adjacent owners, by having the lines around an entire tract surveyed and marked, which must be done in order to make the lines between adjacent owners prima facie correct and admissible in evidence without further proof. When it is apparent on the face of the papers that the processioners have not complied with this requirement, the processioners' return is without legal effect under the processioning laws. Watson v. Bishop, 69 Ga. 51 (1882).

Established lines, not new ones, are to be fixed and determined; the location of lines, not as the lines ought to be, but as the lines actually exist, is to be sought. It is not the duty of the processioners to adjudicate land titles. Amos v. Parker, 88 Ga. 754, 16 S.E. 200 (1892); Bowen v. Jackson, 101 Ga. 817, 29 S.E. 40 (1897); Crawford v. Wheeler, 111 Ga. 870, 36 S.E. 954 (1900); Cosby v. Reid, 21 Ga. App. 604, 94 S.E. 824 (1904); Wheeler v. Thomas, 139 Ga. 598, 77 S.E. 817 (1913); Boyce v. Cooke, 140 Ga. 360, 78 S.E. 1057 (1913); Elkins v. Merritt, 20 Ga. App. 737, 93 S.E. 236 (1917); Walker v. Boyer, 121 Ga. 300, 48 S.E. 916 (1918); McAlpin v. Thompson, 29 Ga. App. 495, 116 S.E. 64 (1923); Mattox v. DeLoach, 32 Ga. App. 454, 123 S.E. 624 (1924).

It is not the function of processioners to ascertain and fix new lines; the processioners' duty is only to run and mark anew those which can be taken as having been formerly located and established. Pearre v. Wilkinson, 181 Ga. 619, 183 S.E. 626 (1936); Jarrard v. Wildes, 87 Ga. App. 30, 73 S.E.2d 116 (1952).

Duty of processioners appointed under authority of this statute is to survey and mark anew established lines as the lines actually exist, and not as the lines ought to have been laid out originally. Hall v. Browning, 71 Ga. App. 694, 32 S.E.2d 126 (1944); Rodgers v. Beavers, 76 Ga. App. 16, 45 S.E.2d 74 (1947) (see O.C.G.A. § 44-4-2).

It is the plain duty of processioners to survey and trace and mark anew existing land lines, that is, old lines already established; and processioners have no right, power, or authority to make or fix new dividing lines between adjoining landowners. Georgia Marble Co. v. Voyles, 74 Ga. App. 312, 39 S.E.2d 488 (1946).

Where a boundary line is sufficiently definite in every way to establish a true dividing line between the parties, the processioners' attempt to run a straight line, which traversed the established line, is invalid since processioners have no authority under the law to do other than to mark anew established lines as those lines actually exist; processioners have no right to run a line where processioners think the line should be in order to make the line straight. Bostick v. Yaughn, 79 Ga. App. 180, 53 S.E.2d 223 (1949).

Under the law of processioning, it is the duty of the processioners, together with the county surveyor, to retrace and mark anew established lines, not to run new lines. Processioners have no authority under the law to run and set up a line where the processioners think the line ought to be, but where in fact no line existed or had been established before the processioners' survey. Palmer v. Jackson, 82 Ga. App. 702, 62 S.E.2d 366 (1950).

Processioners must find the old lines already established, and processioners have no right, power, or authority to make or find new dividing lines between adjoining landowners. Watkins v. Chappell, 173 Ga. App. 819, 328 S.E.2d 223 (1985).

Processioners cannot ignore long-established markers and actual possession. — Processioners staked out a property line in an apparent attempt to establish the line where the line ought to have been, in strict compliance with titles and plats. In doing so, the processioners ignored long-established markers and the protesting landowners' actual possession of land under a claim of right as evidenced by the landowners' fences and cultivation of land. Thus, the court did not err in finding against the return of the processioners. Page v. Guin, 187 Ga. App. 143, 369 S.E.2d 517 (1988), aff'd, 190 Ga. App. 357, 378 S.E.2d 736 (1989).

Processioners bound by §§ 44-4-5, 44-4-6, and 44-4-7. — In processioning and marking anew established lines, the processioners are bound by the rules which the law prescribed. These general principles were set out in former Code 1933, §§ 85-1601, 85-1602, and 85-1603 (see O.C.G.A. §§ 44-4-5, 44-4-6, and 44-4-7). Hall v. Browning, 71 Ga. App. 694, 32 S.E.2d 126 (1944); Rodgers v. Beavers, 76 Ga. App. 16, 45 S.E.2d 74 (1947).

Whole tract must be marked. — Where lands are to be processioned, it is necessary to survey and mark the entire tract of land belonging to and possessed by the owner; it is not sufficient to survey and mark one lot alone, held by grant from the state, it being the lot where the line is uncertain or disputed. Martin v. Cauthen, 77 Ga. 491 (1886).

Failure to mark whole tract is grounds for dismissal. — When it appeared that the lines around the entire tract of the applicant were not surveyed and marked anew as required by law, it was proper to dismiss the entire proceeding, on motion of the protestants. Gillis v. Taylor, 127 Ga. 676, 56 S.E. 992 (1907).

Land having county line as boundary. — Lot of land having for the lot's boundary a land-lot line which is also a divisional line between counties, is not, on account of such coincidence, excluded from the operation of law relating to the processioning of land. Caverly v. Stovall, 143 Ga. 705, 85 S.E. 844 (1915).

Location of a county line under former Civil Code 1910, § 472 (see O.C.G.A. § 36-3-20 et seq.) did not nullify a prior judgment in a processioning case. Caverly v. Stovall, 143 Ga. 705, 85 S.E. 844 (1915).

Application in writing required. — Phrase "shall apply to the processioners," as used in this statute, authorizing proceedings for the processioning of land, necessarily refers to an application in writing, and it follows that without such an application there can be no lawful proceedings under this statute. Ballard v. Haines, 115 Ga. 847, 42 S.E. 218 (1902) (see O.C.G.A. § 44-4-2).

When there was no written application, the trial court did not err in sustaining a motion to dismiss the case, based on the ground, among others, of the insufficiency of the proceedings. Ballard v. Haines, 115 Ga. 847, 42 S.E. 218 (1902).

There is presumption that proper application in writing was made to processioners by the applicant before the processioners acted in the premises. Caverly v. Stovall, 134 Ga. 677, 68 S.E. 442 (1910).

When, on the trial of an issue made by a protest filed by adjoining owners to the return of the processioners, there is no proof that an application in writing was made, but there is a recital in the return of the processioners that the processioners were applied to by the applicant to trace and mark anew the lines around a certain tract of land, the presumption is that a proper application in writing was made to the processioners by the applicant. Philpot v. Wells, 69 Ga. App. 489, 26 S.E.2d 155 (1943).

Procedure for application. — It is proper that one application be addressed to all three processioners; but the proceedings will not be unlawful if the applicant addresses a separate application to each of the processioners. Caverly v. Stovall, 134 Ga. 677, 68 S.E. 442 (1910).

It is sufficient if applications are sent to processioners and received by the processioners through the United States mail. Caverly v. Stovall, 134 Ga. 677, 68 S.E. 442 (1910).

Original application for processioning is admissible in evidence along with the return of the processioners and the plat of the surveyor, and the jury may consider the application along with the other evidence. Palmer v. Jackson, 82 Ga. App. 702, 62 S.E.2d 366 (1950).

Testimony following loss of application. — After proof of the loss of the application was made to the court it was not error to admit in evidence the testimony of the processioners that the application was made in writing and complied with the requirements of the statute. McCool v. Wilcher, 27 Ga. App. 96, 107 S.E. 365 (1921).

Effect of death of applicant. — Where application is made by a life tenant who dies, the suit may be continued in the name of the persons succeeding to the life tenant's interest, the remaindermen. McCool v. Wilcher, 27 Ga. App. 96, 107 S.E. 365 (1921).

Sufficiency of notice. — When the notice served on an adjoining landowner sufficiently indicates that a boundary line between the landowner's land and that of the applicant was to be marked anew, such notice need not necessarily contain such a minute and particular description as is contained in a deed, and it is not subject to the objection that the notice fails to indicate the line to be marked anew. McAlpin v. Thompson, 29 Ga. App. 495, 116 S.E. 64 (1923).

Failure to give adjoining landowner notice as required by law would not work a dismissal of the proceeding as to the adjoining landowners who had been given the required notice, but such proceeding would not be binding on an owner not having due notice thereof. Pearre v. Wilkinson, 54 Ga. App. 638, 188 S.E. 553 (1936).

No provision for further notice where processioning postponed. — If, on the day appointed, severity of the weather necessitates postponement of processioning, this statute provides for no further notice. Phillips v. Chapman, 78 Ga. 163, 1 S.E. 427 (1886) (see O.C.G.A. § 44-4-2).

Processioning proceedings will not be held necessarily void and subject to dismissal on motion because on the face of the return it does not appear that an owner of adjoining land was notified of the day to which the matter was postponed. Garrett v. Massee & Felton Lumber Co., 134 Ga. 442, 67 S.E. 1036 (1910).

Verbal notice of postponement of processioning sufficient. — Where written notice is given of the time fixed for tracing a line by processioners, and, on assembling at that time, for some reason the processioning cannot then be done, and the matter is postponed to a later day, verbal notice of such postponement may be given to the landowners interested, and further written notice is not required. Garrett v. Massee & Felton Lumber Co., 134 Ga. 442, 67 S.E. 1036 (1910).

Time fixed by the written notice may be postponed, and merely verbal notice of the new date fixed may be given to the interested landowners. Reynolds v. Kinsey, 50 Ga. App. 385, 178 S.E. 200 (1935).

Waiver of irregularity in notice by landowner. — Even though written notice may incorrectly state the time when the lines are to be run and marked, and only oral notice be given to a landowner as to the time to which the meeting of the processioners is postponed (more than ten days after such written and oral notice to the landowner), the landowner will be deemed to have waived any irregularity in the landowner's notice, where the landowner meets with the processioners and the surveyor at the time fixed, files a protest to the processioners' return and to the plat of the surveyor, and participates in a trial in the superior court on the merits of the landowner's protest. Reynolds v. Kinsey, 50 Ga. App. 385, 178 S.E. 200 (1935).

Superior court jurisdiction over protest. — In order to give superior court jurisdiction over protest to return of processioners, it is necessary that a majority of the processioners with the surveyor shall have actually traced and marked the disputed boundary lines. Reynolds v. Kinsey, 50 Ga. App. 385, 178 S.E. 200 (1935).

When there was no county surveyor the processioners may, under the provisions of former Civil Code 1910, §§ 603 and 604 (see O.C.G.A. § 36-7-13), specially engage any competent person, a citizen of the county, to perform the processioners' duties, provided such person was first properly sworn or, in

default of such person, the county surveyor of an adjoining county may officiate. Tisinger v. Ellerbee, 37 Ga. App. 391, 140 S.E. 522 (1927).

Failure to file application with plat. — When the application to the processioners was duly made in writing and acted upon by the processioners, who made the processioners' report and filed the report with the plat of the surveyor as required by law, the fact that the application was not also filed with the report, because lost, did not furnish a good ground for dismissal of the proceedings. Caverly v. Stovall, 134 Ga. 677, 68 S.E. 442 (1910); McCool v. Wilcher, 27 Ga. App. 96, 107 S.E. 365 (1921).

Return and plat identical to previous invalid return and plat. — Where a majority of the processioners meet with the surveyor and actually trace and mark the disputed boundary lines, the proceedings are not invalidated by the fact that the lines as fixed in the return and plat may be the same as those in a previous return and plat, which was invalid because of insufficient notice to the parties, or that the last survey may be a resurvey of the lines as formerly surveyed. Reynolds v. Kinsey, 50 Ga. App. 385, 178 S.E. 200 (1935).

Dismissal for failure to include tenants in common as parties. — When it appeared from an application for processioning that the applicants and other persons, not named in the application, were tenants in common of the land around which it was sought to have the lines surveyed and marked anew, it was error to overrule a motion of a protestant to dismiss the application on the ground that the other tenants in common were not parties thereto. Carmichael v. Jordan, 131 Ga. 514, 62 S.E. 810 (1908).

Charge to jury in language of section held not misleading. — See McCollum v. Thomason, 32 Ga. App. 160, 122 S.E. 800 (1924) (see O.C.G.A. § 44-4-2).

Cited in Smith v. McCranie, 182 Ga. 588, 186 S.E. 191 (1936); Russell v. Radford, 76 Ga. App. 302, 45 S.E.2d 705 (1947); Anthony v. Wright, 76 Ga. App. 425, 46 S.E.2d 194 (1948); Edenfield v. Lanier, 77 Ga. App. 535, 48 S.E.2d 777 (1948); Hackle v. Bowen, 89 Ga. App. 799, 81 S.E.2d 294 (1954); Railey v. Heath, 92 Ga. App. 123, 88 S.E.2d 194 (1955); Oliver v. Irvin, 105 Ga. App. 844, 125 S.E.2d 695 (1962); Shipp v. Rakestraw, 241 Ga. 8, 243 S.E.2d 52 (1978).

OPINIONS OF THE ATTORNEY GENERAL

In processioning proceedings, county surveyor and processioners have no authority to make and establish new lines, but their duty is to trace and mark anew old lines or those that can be taken as having been formerly located and established; it is the duty of the processioners and county surveyor in a processioning proceeding to follow this statute. 1965-66 Op. Att'y Gen. No. 65-108 (see O.C.G.A. § 44-4-2).

44-4-3. Duty of surveyor and processioners; preparation and certification of plat; delivery of copy to applicant; evidentiary effect of plat; admissibility.

It shall be the duty of the county surveyor and the processioners to take all due precautions to arrive at the true lines and to trace out and plainly mark the same. The surveyor shall make out and certify a plat of the true lines and deliver a copy thereof to the applicant; and, in all future boundary disputes with any owner of adjoining lands who had due notice of the processioning, the certified plat and the lines so marked shall be prima facie correct; and the certified plat shall be admissible in evidence without further proof. (Orig. Code 1863, § 2354; Code 1868, § 2351; Code 1873, § 2386; Code 1882, § 2386; Civil Code 1895, § 3245; Civil Code 1910, § 3819; Code 1933, § 85-1606.)

JUDICIAL DECISIONS

Processioners' return and surveyor's plat filed with a probate court was not a conclusive adjudication of a boundary question, but was only evidence; res judicata was inapplicable, and a trial court's judgment holding that the evidence presented overcame a processioners' return was affirmed. Sacks v. Jordan, 265 Ga. App. 723, 595 S.E.2d 571 (2004).

Subject matter of this statute is the effect to be given to a plat made by the surveyor under the superintendence of the processioners, and filed as provided by law in subsequent disputes between the coterminous landowners. Darnell v. Betty's Creek Baptist Church, 230 Ga. 461, 197 S.E.2d 714 (1973) (see O.C.G.A. § 44-4-3).

Processioners and surveyor are to retrace existing lines. — Under the law of processioning, it is the duty of the processioners, together with the county surveyor, to retrace and mark anew established lines, not to run new lines. Palmer v. Jackson, 82 Ga. App. 702, 62 S.E.2d 366 (1950); Hackle v. Bowen, 89 Ga. App. 799, 81 S.E.2d 294 (1954).

All that is required of the processioners and the surveyor is that the lines be traced and marked anew so as to locate the lines with some definiteness. Boatright v. Tyre, 112 Ga. App. 179, 144 S.E.2d 471 (1965).

Power and authority of processioners extends to retracing and establishing old lines, already existing. Jarrard v. Wildes, 87 Ga. App. 30, 73 S.E.2d 116 (1952).

Function of processioners is only to run and mark anew land lines which at some previous time were located and established. Boatright v. Tyre, 112 Ga. App. 179, 144 S.E.2d 471 (1965).

Processioners only have authority to mark anew a dividing line in order to reestablish a dividing line which was previously established and recognized as such by the adjoining owners. Processioners have no authority to locate any other line. Davis v. Terrell, 70 Ga. App. 478, 28 S.E.2d 590 (1944).

Processioners must find the old lines already established; processioners have no right, power, or authority to make or find new dividing lines between adjoining landowners. Watkins v. Chappell, 173 Ga. App. 819, 328 S.E.2d 223 (1985).

Processioners have no authority to establish new lines. — Processioners and the county surveyor have no authority under the law to run and set up a line where the processioners think the line ought to be, where in fact no line existed or had been established before the processioners' survey. Palmer v. Jackson, 82 Ga. App. 702, 62 S.E.2d 366 (1950); Hackle v. Bowen, 89 Ga. App. 799, 81 S.E.2d 294 (1954).

Processioners cannot establish new lines. Jarrard v. Wildes, 87 Ga. App. 30, 73 S.E.2d 116 (1952).

To ascertain and fix new lines is not within the power or functions of processioners. Their vocation is to run and mark lines which at some previous time were located and established. Processioners seek and find lines already existing, but cannot bring into existence any which have not been before designated on the surface of the earth. Milligan v. Hale, 88 Ga. App. 70, 76 S.E.2d 29 (1953).

Processioners cannot bring into existence lines which have not been theretofore designated on the surface of the earth, or establish a line as shown merely in a deed or plat. Boatright v. Tyre, 112 Ga. App. 179, 144 S.E.2d 471 (1965).

No duty to indicate physical marks along line. — Law does not impose a duty on the surveyor to indicate the existence of any physical marks along the line adopted by the processioners as the true line. Norman, Timmons & Co. v. Smith, 131 Ga. 69, 61 S.E. 1039 (1908).

Sufficiency of plat. — Plat is sufficient if so made that lines can be definitely located. Norman, Timmons & Co. v. Smith, 131 Ga. 69, 61 S.E. 1039 (1908).

Duty to reestablish lines from existing corners or landmarks. — If there are enough physically established corners or landmarks, the mere connecting of which by straight lines, or from which the projecting of the courses and distances shown by the plat, would be enough to complete the boundary, it is the duty of the processioners to ascertain, mark, and establish the lines, respecting always the rights had under actual possession. Howell v. United States, 519 F. Supp. 298 (N.D. Ga. 1981).

Line and corner markers not required. — Nothing in the law sets forth any require-

ment respecting the placing of line or corner markers or requires that such markers be placed on any particular interval or spacing. Boatright v. Tyre, 112 Ga. App. 179, 144 S.E.2d 471 (1965).

No requirement that whole line be drawn or walked. — Nothing in the law requires that every foot or inch of a line be drawn on the face or surface of the earth, or that the processioners or a majority of the processioners actually walk over or along the entire line without omitting any interval. Boatright v. Tyre, 112 Ga. App. 179, 144 S.E.2d 471 (1965).

Plat should be clearly identified. — Plat should not only be certified by the surveyor, but should be clearly identified as the one in question. Reynolds v. Kinsey, 50 Ga. App. 385, 178 S.E. 200 (1935).

Plat need not be attached to return. — It is unnecessary, however, that the plat should be attached to the return, even though the return may refer to the plat as ''attached hereto,'' if it is sufficiently verified and filed with the ordinary (now judge of the probate court) within the statutory 30 days. Reynolds v. Kinsey, 50 Ga. App. 385, 178 S.E. 200 (1935).

Applicability of rules of court to surveys. — Rules of court do not apply to surveys made by the county surveyor acting with processioners under an application of the owner of land to the processioners to have the lines around the same surveyed and marked anew. Caverly v. Stovall, 134 Ga. 677, 68 S.E. 442 (1910).

Burden of proof where return protested. — When a protest is filed to the return of processioners, the burden is on the applicant to make out a prima facie case. Davis v. Terrell, 70 Ga. App. 478, 28 S.E.2d 590 (1944).

Admissibility of return and plat. — Return of the processioners and the plat of the surveyor are admissible in evidence in the trial of an issue formed by a protest to the processioners' return. Darnell v. Betty's Creek Baptist Church, 230 Ga. 461, 197 S.E.2d 714 (1973).

Processing proceedings establish prima facie case. — In an action of complaint for land, a certified copy of a plat made by the county surveyor in a processioning proceeding under the statute is prima facie, not conclusive, evidence of the true line between adjoining landowners. Hearn v. King, 69 Ga. 751 (1882); McGraw v. Crosby, 129 Ga. 780, 59 S.E. 898 (1907); Chambers v. Netherland, 145 Ga. 52, 88 S.E. 545 (1916).

Introduction of the processioning proceedings, including the notice, plat, etc., properly certified, is sufficient to establish a prima facie case. Davis v. Terrell, 70 Ga. App. 478, 28 S.E.2d 590 (1944).

Applicant for processioning makes out a prima facie case for the boundary line found by the processioners by filing their return and plat, without further proof. Wood v. Hamilton, 109 Ga. App. 608, 137 S.E.2d 61 (1964).

Which authorizes verdict sustaining return in absence of other evidence. — Return of the processioners and the surveyor's plat serve to make out a prima facie case, and, in the absence of any other evidence, would authorize a verdict sustaining the return. Darnell v. Betty's Creek Baptist Church, 230 Ga. 461, 197 S.E.2d 714 (1973).

Admissibility of surveyor's testimony. — Where the location of the dividing line between the parties litigant is relevant to the matter in controversy, the testimony of the county surveyor that the surveyor ran the line pending the suit, that defendant was present when this was done, and that a certain map of the survey is correct, is admissible evidence for the plaintiff, notwithstanding the surveyor also testifies that the surveyor's work was done in the course of processioning the land in accordance with law. Gunn v. Harris, 88 Ga. 439, 14 S.E. 593 (1892).

Must consider possession. — In a boundary line dispute, when the processioners did not consider possession or use of the property in preparing the processioners' return, the entry of a directed verdict against the return of the processioners was proper. Elder v. Merritt, 204 Ga. App. 163, 418 S.E.2d 774 (1992).

Charging section in trial of protest to return. — This statute is inapplicable to the issue before the court formed by a protest to the processioners' return, but giving this statute in charge is not prejudicial to the losing party, because in the trial of an issue formed by a protest, the processioners' return is to be deemed prima facie correct. Georgia Talc Co. v. Cohutta Talc Co., 140 Ga. 245, 78 S.E. 905 (1913); McCollum v.

Thomason, 32 Ga. App. 160, 122 S.E. 800 (1924) (see O.C.G.A. § 44-4-3).

Parties may submit plat reflecting court's findings. — Where the line described by the court's order is supported by the evidence adduced at trial, but it is not sufficiently specific to serve as a processioning line, an order permitting either party to submit a plat reflecting the findings of the court is appropriate and promotes judicial economy and efficiency. Page v. Guin, 187 Ga. App. 143, 369 S.E.2d 517 (1988), aff'd, 190 Ga. App. 357, 378 S.E.2d 736 (1989).

Judgment binding on protestant. — When a protest is filed and a judgment is entered thereon in superior court, the judgment is binding on the protestant and the protestant's privies. Holmes v. Blount, 245 Ga. 757, 267 S.E.2d 228 (1980).

Cited in Howland v. Brown, 92 Ga. 513, 17 S.E. 806 (1893); Martin v. Pattillo, 126 Ga. 436, 55 S.E. 240 (1906); Montgomery v. Robertson, 134 Ga. 66, 67 S.E. 431 (1910); Garrett v. Massee & Felton Lumber Co., 134 Ga. 442, 67 S.E. 1036 (1910); Stovall v. Caverly, 139 Ga. 243, 77 S.E. 29 (1913); Chambers v. Netherland, 145 Ga. 52, 88 S.E. 545 (1916); Tucker v. Roberts, 151 Ga. 753, 108 S.E. 222 (1921); Fortson v. Caudell, 74 Ga. App. 276, 39 S.E.2d 579 (1946); Russell v. Radford, 76 Ga. App. 302, 45 S.E.2d 705 (1947); Anthony v. Wright, 76 Ga. App. 425, 46 S.E.2d 194 (1948); McCann Lumber Co. v. Hall, 77 Ga. App. 455, 49 S.E.2d 150 (1948); Irby v. Raley, 88 Ga. App. 807, 78 S.E.2d 72 (1953).

44-4-4. Processioner's return.

The processioners shall make a return of their acts within 30 days, together with the plat of the surveyor, to the judge of the probate court of the county to be kept on file in his office. (Laws 1799, Cobb's 1851 Digest, p. 718; Code 1863, § 2360; Code 1868, § 2357; Code 1873, § 2392; Code 1882, § 2392; Civil Code 1895, § 3251; Ga. L. 1905, p. 83, § 1; Civil Code 1910, § 3825; Code 1933, § 85-1607.)

JUDICIAL DECISIONS

Return, properly construed, officially does no more than mark anew the boundary line indicated in the application and the return of the processioners with the plat attached. McAlpin v. Thompson, 29 Ga. App. 495, 116 S.E. 64 (1923).

Return entered on the plat is satisfactory. International Paper Co. v. Kight, 239 Ga. 551, 238 S.E.2d 88 (1977).

Return need not be sworn. — There is no law requiring that the return of processioners be sworn to. Philpot v. Wells, 69 Ga. App. 489, 26 S.E.2d 155 (1943).

Description of land in return and attached plat sufficiently identifies land described in application. McAlpin v. Thompson, 29 Ga. App. 495, 116 S.E. 64 (1923).

Plat and return both necessary to proceedings. — Plat of the surveyor and the return of the processioners are both necessary parts of the proceedings, and neither is complete without the other. It is therefore error to reject the return of the processioners, and admit the plat of the surveyor, but this rejection furnishes no ground for reversal on behalf of the party at whose instance it was done. Rattaree v. Morrow, 71 Ga. 528 (1883).

Failure to file application with return and plat. — It is proper that the processioners file the application to the processioners, together with the processioners' report and the plat of the surveyor, with the ordinary (now probate judge), but a failure to thus file such application will not afford a good ground upon which to dismiss the proceedings. Caverly v. Stovall, 134 Ga. 677, 68 S.E. 442 (1910); McCool v. Wilcher, 27 Ga. App. 96, 107 S.E. 365 (1921).

Failure to actually physically mark portion of line. — Return of processioners is not subject to dismissal merely because the processioners may have failed to actually physically mark or trace a portion of the line shown as run on the plat attached to the processioners' return, provided the return,

together with the plat, shows a substantial performance of the duties imposed upon the processioners'. Hackle v. Bowen, 89 Ga. App. 799, 81 S.E.2d 294 (1954).

Use of erroneous, illegal, or improper method to locate line. — Fact that the processioners may have used an erroneous, illegal, or improper method in ascertaining the location of a line would not subject the processioners' return to dismissal, but would merely authorize a jury finding against the line as run. Hackle v. Bowen, 89 Ga. App. 799, 81 S.E.2d 294 (1954).

Parties may submit plat reflecting court's findings. — When the line described by the court's order is supported by the evidence adduced at trial, but it is not sufficiently specific to serve as a processioning line, an order permitting either party to submit a plat reflecting the findings of the court is appropriate and promotes judicial economy and efficiency. Page v. Guin, 187 Ga. App. 143, 369 S.E.2d 517 (1988), aff'd, 190 Ga. App. 357, 378 S.E.2d 736 (1989).

Cited in Tucker v. Roberts, 151 Ga. 753, 108 S.E. 222 (1921); Russell v. King, 180 Ga. 271, 178 S.E. 706 (1935); Anthony v. Wright, 76 Ga. App. 425, 46 S.E.2d 194 (1948); Edenfield v. Lanier, 77 Ga. App. 535, 48 S.E.2d 777 (1948); Jarrard v. Wildes, 87 Ga. App. 30, 73 S.E.2d 116 (1952); Irby v. Raley, 88 Ga. App. 807, 78 S.E.2d 72 (1953).

RESEARCH REFERENCES

Am. Jur. 2d. — 15A Am. Jur. 2d, Condominiums and Cooperative Apartments, § 51 et seq. 23 Am. Jur. 2d, Deeds, § 192 et seq.

C.J.S. — 51C C.J.S., Landlord and Tenant, § 232.

44-4-5. Disputed lines; rules for determining.

In all cases of disputed lines, the following rules shall apply:

(1) Natural landmarks, being less liable to change and not capable of counterfeiting, shall be the most conclusive evidence;

(2) Ancient or genuine landmarks such as corner stations or marked trees shall control the course and distances called for by the survey;

(3) If the corners are established and the lines are not marked, a straight line as required by the plat shall be run but an established marked line, though crooked, shall not be overruled; and

(4) Courses and distances shall be resorted to in the absence of higher evidence. (Orig. Code 1863, § 2355; Code 1868, § 2352; Code 1873, § 2387; Code 1882, § 2387; Civil Code 1895, § 3246; Civil Code 1910, § 3820; Code 1933, § 85-1601.)

Cross references. — Removal or destruction of survey monuments, § 44-1-15.

Law reviews. — For annual survey of zoning and land use law, see 58 Mercer L. Rev. 477 (2006). For annual survey of real property law, see 58 Mercer L. Rev. 367 (2006). For survey article on real property law, see 60 Mercer L. Rev. 345 (2008). For annual survey on real property law, see 61 Mercer L. Rev. 301 (2009).

JUDICIAL DECISIONS

Analysis

General Consideration
Landmarks

LINES
COURSES AND DISTANCES

General Consideration

Section applies to suits for land. — This statute, laying down the rule for determining a disputed land line between coterminous owners, should have equal application in a suit for land where a recovery depends upon the determination of such a disputed land line. Jackson v. Sanders, 199 Ga. 222, 33 S.E.2d 711 (1945) (see O.C.G.A. § 44-4-5).

Rule applies to descriptions in deeds and to ejectment. — Recognized rule of law to the effect that in determining boundaries to premises in dispute, courses and distances must yield to permanent physical monuments, natural or artificial, has application to descriptions contained in deeds, and has been applied to description of land in dispute in actions in ejectment. Land v. Moore, 201 Ga. 661, 40 S.E.2d 729 (1946).

Section applies where ejectment action centers on boundary. — When the principal issue in an ejectment case is the determination of a land lot line, it was not error for the trial judge to charge the jury the rules prescribed in former Code 1933, §§ 85-1601 and 85-1602 (see O.C.G.A. §§ 44-4-5 and 44-4-6). Wood v. Elliott, 114 Ga. App. 612, 152 S.E.2d 595 (1966).

Section inapplicable to boundaries between town lots. — To charge jury in language of former Code 1933, §§ 85-1601, 85-1602, and 85-1603 (see O.C.G.A. §§ 44-4-5, 44-4-6, and 44-4-7) was error in an ejectment action to determine boundaries between two town lots, since these sections apply to rural land boundaries only. Standard Oil Co. v. Altman, 173 Ga. 777, 161 S.E. 353 (1931).

Rules for ascertaining location of disputed land lines generally. — In processioning and marking anew established lines, the processioners were bound by the rules which the law prescribed. These general principles were set out in former Code 1933, §§ 85-1601, 85-1602, and 85-1603 (see O.C.G.A. §§ 44-4-5, 44-4-6, and 44-4-7). Hall v. Browning, 71 Ga. App. 694, 32 S.E.2d 126 (1944).

Rules to be followed by processioners in ascertaining the location of disputed land lines and by juries in the trial of processioning cases are set forth by former Code 1933, §§ 85-1601, 85-1602, and 85-1603 (see O.C.G.A. §§ 44-4-5, 44-4-6, and 44-4-7). Hackle v. Bowen, 89 Ga. App. 799, 81 S.E.2d 294 (1954).

When equity jurisdiction exercised. — Section provides an adequate remedy at law by processioning for ascertaining and settling the location of boundary lines between coterminous landowners. But where the boundaries between two adjacent parcels of land, even when held by their respective owners under purely legal titles, have become confused and obscure, equity has, from an early period, exercised a jurisdiction to ascertain and settle them if, in addition to a naked confusion of the controverted boundaries, there is involved in the litigation some other equity which has arisen from the conduct, situation, or relations of the parties. Nottingham v. Elliott, 209 Ga. 481, 74 S.E.2d 93 (1953).

When in doubt construction favorable to grantee prevails. — If all other means of ascertaining the true construction of a deed fails, and a doubt still remains, that construction is rather to be preferred which is most favorable to the grantee. Holder v. Jordan Realty Co., 163 Ga. 645, 136 S.E. 907 (1927).

Completion of boundary by connecting corners and landmarks. — Even though the course and extent of the line itself may not have been actually marked out upon the earth's surface, if there should exist a sufficient number of physically established corners or landmarks, the mere connecting of which by straight lines, or from which the projecting of the courses and distances shown by the plat would suffice to complete the boundary, it would be the duty of processioners, in accordance with the provisions of former Civil Code 1910, § 3820 (see O.C.G.A. § 44-4-5), so to ascertain, mark, and establish the boundary, respecting always the rights had under actual possession as defined by former Civil Code 1910, § 3822 (see O.C.G.A. § 44-4-7). Cosby v. Reid, 21 Ga. App. 604, 94 S.E. 824 (1918); Dodson v. Knox, 89 Ga. App. 760, 81 S.E.2d 211 (1954).

Court of Appeals may establish line but must follow Supreme Court. — It is the duty

General Consideration (Cont'd)

of the Court of Appeals to follow the precedents and the ancient landmarks of the law as declared by the Supreme Court in tracing landmarks. If the line leading from precedent to a particular point has not been marked, the Court of Appeals may establish what they find to be a straight line, but have no power to overrule a line set up by the Supreme Court. Minor v. City of Atlanta, 7 Ga. App. 817, 68 S.E. 314 (1910).

When processioning proceeding is not res judicata. — When the processioners find only three of five corners and then, by the use of certain dimensions, place iron pins at two other points in order to connect up the dividing lines by and between the parties, and do not establish anew the lines as required by the processioning law, the processioning proceeding is not res judicata. Purcell v. C. Goldstein & Sons, 166 Ga. App. 547, 305 S.E.2d 10 (1983).

Cited in Cleveland v. Treadwell, 68 Ga. 835 (1882); Tucker v. Roberts, 151 Ga. 753, 108 S.E. 222 (1921); Cherokee Ochre Co. v. Georgia Ochre Co., 162 Ga. 620, 134 S.E. 616 (1926); Blackwell v. Houston County, 168 Ga. 248, 147 S.E. 574 (1929); Brown v. Hester, 169 Ga. 410, 150 S.E. 556 (1929); Booker v. Booker, 41 Ga. App. 380, 153 S.E. 94 (1930); Long v. Robertson, 41 Ga. App. 712, 154 S.E. 464 (1930); Smith v. Brinson, 43 Ga. App. 248, 158 S.E. 454 (1931); Branon v. Hunter, 177 Ga. 759, 171 S.E. 291 (1933); Reynolds v. Kinsey, 50 Ga. App. 385, 178 S.E. 200 (1935); Pearre v. Wilkinson, 54 Ga. App. 638, 188 S.E. 553 (1936); Smith v. Bailey, 183 Ga. 869, 189 S.E. 905 (1937); Warsaw Turpentine Co. v. Fort Barrington Club, 185 Ga. 540, 195 S.E. 755 (1937); Hayes v. Wilson, 60 Ga. App. 731, 5 S.E.2d 97 (1939); Kinsey v. Avans, 196 Ga. 428, 26 S.E.2d 787 (1943); Veal v. Barber, 197 Ga. 555, 30 S.E.2d 252 (1944); Stewart v. Latimer, 197 Ga. 735, 30 S.E.2d 633 (1944); Barron v. Chamblee, 199 Ga. 591, 34 S.E.2d 828 (1945); Fortson v. Caudell, 74 Ga. App. 276, 39 S.E.2d 579 (1946); Rodgers v. Beavers, 76 Ga. App. 16, 45 S.E.2d 74 (1947); Anthony v. Wright, 76 Ga. App. 425, 46 S.E.2d 194 (1948); Bostick v. Yaughn, 79 Ga. App. 180, 53 S.E.2d 223 (1949); Ledford v. Hill, 82 Ga. App. 299, 60 S.E.2d 555 (1950); Jarrard v. Wildes, 87 Ga. App. 30, 73 S.E.2d 116 (1952); Milligan v. Hale, 88 Ga. App. 70, 76 S.E.2d 29 (1953); Dodson v. Knox, 89 Ga. App. 760, 81 S.E.2d 211 (1954); Railey v. Heath, 92 Ga. App. 123, 88 S.E.2d 194 (1955); McGinty v. Interstate Land & Imp. Co., 92 Ga. App. 770, 90 S.E.2d 42 (1955); White v. Gordon, 213 Ga. 730, 101 S.E.2d 759 (1958); Dixon v. Dixon, 97 Ga. App. 54, 102 S.E.2d 74 (1958); Woodcock v. Rayonier, Inc., 97 Ga. App. 133, 102 S.E.2d 93 (1958); Brantley v. Thompson, 102 Ga. App. 355, 116 S.E.2d 300 (1960); Wood v. Hamilton, 109 Ga. App. 608, 137 S.E.2d 61 (1964); Goodson v. Pope, 112 Ga. App. 71, 143 S.E.2d 779 (1965); Warren v. Anderson, 221 Ga. 533, 145 S.E.2d 536 (1965); Patterson v. Bailey, 114 Ga. App. 659, 152 S.E.2d 427 (1966); Johnson v. Franklin, 232 Ga. 227, 206 S.E.2d 19 (1974); Akins v. Tucker, 132 Ga. App. 66, 207 S.E.2d 625 (1974); Freeman v. Nelson, 138 Ga. App. 697, 227 S.E.2d 475 (1976); Frost v. Williamson, 239 Ga. 266, 236 S.E.2d 615 (1977); Forte v. Lewis, 241 Ga. 109, 243 S.E.2d 38 (1978); Banks v. Myrick, 149 Ga. App. 252, 253 S.E.2d 873 (1979); Finley v. Sutton, 245 Ga. 813, 267 S.E.2d 252 (1980); Page v. Guin, 187 Ga. App. 143, 369 S.E.2d 517 (1988); Efstathiou v. Sanders, 189 Ga. App. 470, 376 S.E.2d 413 (1988); Lynburn Enters., Inc. v. Lawyers Title Ins. Corp., 191 Ga. App. 710, 382 S.E.2d 599 (1989).

Landmarks

Plat may be considered together with landmarks. — In a processioning case, the processioners have the right to consult the plat and consider the plat together with the physical landmarks. Dally v. Arnold, 91 Ga. App. 395, 85 S.E.2d 808 (1955).

Natural boundaries are most conclusive evidence. — Although courses and distances shall be resorted to in the absence of higher evidence, natural boundaries shall be taken as the most conclusive evidence. Varnell v. O'Bryant, 198 Ga. 352, 31 S.E.2d 661 (1944).

Natural boundaries have greater weight than artificial ones. Thompson v. Hill, 137 Ga. 308, 73 S.E. 640 (1912).

Monuments control over courses and distances. — When a deed conveying a tract of land locates the boundaries by physical monuments, natural or artificial, such as public roads, and by courses and distances, and there is a discrepancy between the monu-

ments and the courses and distances, the location by monuments will prevail. Barrett v. Dodd, 206 Ga. 840, 59 S.E.2d 395 (1950).

When the calls of a deed are for artificial monuments as well as courses and distances, if there is a conflict between the two, the courses and distances must be disregarded. Atlanta Trailer Mart, Inc. v. Ashmore Foods, Inc., 247 Ga. 254, 275 S.E.2d 336 (1981); Morris v. Monroe, 165 Ga. App. 788, 302 S.E.2d 704 (1983).

Reference in a deed to the "center line of a ditch" prevailed over an inconsistent provision in the deed giving metes and bounds for property lines because the ditch was a natural landmark. Kobryn v. McGee, 232 Ga. App. 754, 503 S.E.2d 630 (1998).

Artificial monument that had existed since 1885 is sufficient to serve as a fixed monument which controls the course and distance called for by a survey. Smith v. Willoughby, 207 Ga. 91, 60 S.E.2d 155 (1950).

Whether street used as monument existed at time of deed is jury question. — When a deed conveying a tract of land locates the boundaries both by monuments and by distance, and there is a discrepancy between the two, the location by monuments will prevail. If in such a case one of the monuments is a street, and there is, in a suit brought to recover the land, a dispute as to whether there was, at the date of the deed, such a street in existence, this question should be submitted to a jury under proper instructions. Hammond v. George, 116 Ga. 792, 43 S.E. 53 (1902).

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, 2008 Ga. LEXIS 237 (Ga. 2008).

For jury charge as to section where large rock claimed to be boundary corner, see Butler v. Lovelace-Eubanks Lumber Co., 37 Ga. App. 74, 139 S.E. 83 (1927).

Lines

Lines are certain which may be made certain through key to identification in record. — Upon ascertaining the location of either terminus as alleged in the protest, the course of the line toward the other terminus being shown, the latter could be also determined under this statute. That is certain which may be made certain. In such a case the line is sufficiently definite, where a key to the identification is shown in the record. Price v. Gross, 148 Ga. 137, 96 S.E. 4 (1918); Boyd v. Sanders, 148 Ga. 839, 98 S.E. 490 (1919); McCollum v. Thomason, 32 Ga. App. 160, 122 S.E. 800 (1924) (see O.C.G.A. § 44-4-5).

Line established merely by compromise or by taking from one in one place and giving to the other is not shown to be the true line. Hackle v. Bowen, 89 Ga. App. 799, 81 S.E.2d 294 (1954).

Iron pin markers as evidence of line that runs between the markers. — In a statutory proceeding involving location of a boundary line, evidence that iron pin markers were at each end of the line is some evidence that the line originally lay in a straight line between the markers. Railey v. Heath, 92 Ga. App. 123, 88 S.E.2d 194 (1955).

Charge that established, marked line, though crooked, shall not be overruled. — In a suit for injunction and other relief, where one of the issues for determination is the location of an original line of a particular lot of land, but when there is no pleading or evidence to authorize a charge to the jury that an established, marked line, though crooked, shall not be overruled; it is not error to refuse a request for instruction containing this language, even though the entire charge as requested was based on this statute. Davis v. Guffey, 196 Ga. 816, 27 S.E.2d 689 (1943) (see O.C.G.A. § 44-4-5).

Iron pipes, fence line, hedgerow, and acquiescence in boundary was sufficient evidence for court. — While no natural landmarks established the disputed boundary between property belonging to the parties, other evidence did, including iron pipes

Lines (Cont'd)

marking the corners of the property, a fence line, a hedgerow, and acquiescence in the boundary, and the failure in the landowners' deed to reference the land lot where the disputed acreage was did not determine the result; sufficient evidence supported the trial court's findings as to the location of the boundary line. Sledge v. Peach County, 276 Ga. App. 780, 624 S.E.2d 288 (2005).

Sufficient evidence presented that old fence line established boundaries. — Trial court properly entered a judgment against plaintiffs in a quiet title action and established the boundary lines between the parties by use of an old fence line that had been embedded in trees and was marked by bent axles since all of the parties, except for plaintiffs, and all of the testifying experts, including plaintiffs' expert, testified that the old fence line established the boundary lines. Blair v. Bishop, 290 Ga. App. 721, 660 S.E.2d 35 (2008), cert. denied, 2008 Ga. LEXIS 793 (Ga. 2008).

Evidence sufficient to support boundary established by trial court. — Applying the rules for determining disputed boundary lines, while no natural landmarks established a boundary between multiple parcels of land, it was undisputed that a spring was not on the neighbor's land to whom the first parcel had been deeded by the original common grantor, and as there was some evidence from which the factfinder could establish measurements for the neighbor's parcel, the boundary line so established was supported by the evidence. Gibson v. Rustin, 297 Ga. App. 169, 676 S.E.2d 799 (2009).

Courses and Distances

Absent higher proof, courses and distances are resorted to under this statute. Addison v. Edwards, 138 Ga. 623, 75 S.E. 648 (1912) (see O.C.G.A. § 44-4-5).

Course and distance, depending for their correctness on a great variety of circumstances, are constantly liable to be incorrect. Differences in the instrument used, and in the care of surveyors and their assistants, lead to different results. Howell v. United States, 519 F. Supp. 298 (N.D. Ga. 1981).

Courses and distances occupy the lowest grade, instead of the highest, in the scale of evidence as to identity of land. Howell v. United States, 519 F. Supp. 298 (N.D. Ga. 1981).

Courses and distances yield to natural, visible, and ascertained objects. Accordingly, when in the description of land in a deed known monuments are referred to as boundaries, those monuments must usually govern, although neither courses nor distances nor the computed contents correspond therewith. Thompson v. Hill, 137 Ga. 308, 73 S.E. 640 (1912).

RESEARCH REFERENCES

ALR. — Distance as determined by straight line or other method, 54 ALR 781.

Rights as between grantees in severalty of lots or parts of same tract, where actual measurements vary from those given in deeds or indicated on the map or plat, 97 ALR 1227.

Sufficiency of description in standing timber deed or contract, 35 ALR2d 1422.

Description with reference to highway as carrying title to center or side of highway, 49 ALR2d 982.

Boundaries: measurement in horizontal line or along surface or contour, 80 ALR2d 1208.

Fence as a factor in fixing location of boundary line — Modern cases, 7 ALR4th 53.

44-4-6. General reputation as evidence; acquiescence.

General reputation in the neighborhood shall be evidence as to ancient landmarks of more than 30 years' standing. Acquiescence for seven years by acts or declarations of adjoining landowners shall establish a dividing line. (Orig. Code 1863, § 2356; Code 1868, § 2353; Code 1873, § 2388; Code

1882, § 2388; Civil Code 1895, § 3247; Civil Code 1910, § 3821; Code 1933, § 85-1602.)

Cross references. — Removal or destruction of survey monuments, § 44-1-15.

Law reviews. — For annual survey on law of real property, see 42 Mercer L. Rev. 389 (1990). For annual survey article on real property law, see 50 Mercer L. Rev. 307 (1998). For annual survey of zoning and land use law, see 57 Mercer L. Rev. 447 (2005). For annual survey of real property law, see 58 Mercer L. Rev. 367 (2006).

JUDICIAL DECISIONS

Analysis

General Consideration
General Reputation as to Ancient Landmarks
Acquiescence
1. In General
2. Proof of Agreement and Acquiescence
3. Marking of Line
4. Processioning
5. Jury Instructions

General Consideration

Acquiescence rule in this statute cannot be used to establish title. Gauker v. Eubanks, 230 Ga. 893, 199 S.E.2d 771 (1973); Burkett v. Hatch, 146 Ga. App. 2, 245 S.E.2d 318 (1978) (see O.C.G.A. § 44-4-6).

Acquiescence will not create title to land not described in deeds. — Acquiescence will not establish a divisional line, in disregard of definite boundaries fixed by deeds, and thus operate to create title to lands not embraced by a fair construction within the description in the deeds. Gauker v. Eubanks, 230 Ga. 893, 199 S.E.2d 771 (1973); Burkett v. Hatch, 146 Ga. App. 2, 245 S.E.2d 318 (1978).

Applicability to city lot in action to enjoin trespass, establish boundary, and decree title. — In suit by the owners of a lot of land located within the corporate limits of a city against the owner of an adjoining city lot to enjoin a trespass, establish a dividing line, and have title to the land up to the dividing line decreed in petitioners, the provisions of this statute in reference to acquiescence in a dividing line are applicable when there is evidence of acquiescence by declarations and acts of the owners for more than seven years. Thus, the court does not err in charging on acquiescence. Veal v. Barber, 197 Ga. 555, 30 S.E.2d 252 (1944) (see O.C.G.A. § 44-4-6).

Section inapplicable to lines already established. — This statute refers to ''establishing'' and not ''reestablishing'' a dividing line between adjacent lands, and if the dividing line between coterminous owners is established already, the rule for establishing the line by acquiescence is inapplicable. Horn v. Preston, 217 Ga. 165, 121 S.E.2d 775 (1961) (see O.C.G.A. § 44-4-6).

Where boundary between coterminous grantees of a common grantor is definite and ascertainable, this statute has no application. Horn v. Preston, 217 Ga. 165, 121 S.E.2d 775 (1961) (see O.C.G.A. § 44-4-6).

Section inapplicable in trespass action where deeds fix definite boundary. — When the description of the respective lots in an action for trespass in the deeds to the plaintiff, and to the defendants' predecessor in title from a common grantor, fixed a definite and ascertainable boundary line between the respective lots of the plaintiff and the defendants, this statute had no application. Kerce v. Bell, 208 Ga. 131, 65 S.E.2d 592 (1951) (see O.C.G.A. § 44-4-6).

Application to ejection action involving town lots is error. — To charge jury in language of former Civil Code 1910, §§ 3820, 3821, and 3822 (see O.C.G.A. §§ 44-4-5, 44-4-6, and 44-4-7) was error in ejectment action to determine boundaries between two town lots, since these sections apply to rural land boundaries only. Standard Oil Co. v. Altman, 173 Ga. 777, 161 S.E. 353 (1931). But see Veal v. Barber, 197 Ga.

General Consideration (Cont'd)

555, 30 S.E.2d 252 (1944).

For criticism of view that statute applies only to rural land, see Veal v. Barber, 197 Ga. 555, 30 S.E.2d 252 (1944) (see O.C.G.A. § 44-4-6).

Iron pipes, fence line, hedgerow, and acquiescence in boundary was sufficient evidence for court. — While no natural landmarks established the disputed boundary between property belonging to the parties, other evidence did including iron pipes marking the corners of the property, a fence line, a hedgerow, and acquiescence in the boundary, and the failure in the landowners' deed to reference the land lot where the disputed acreage was did not determine the result; sufficient evidence supported the trial court's findings as to the location of the boundary line. Sledge v. Peach County, 276 Ga. App. 780, 624 S.E.2d 288 (2005).

Sufficient evidence presented that old fence line established boundaries. — Trial court properly entered a judgment against plaintiffs in a quiet title action and established the boundary lines between the parties by use of an old fence line that had been embedded in trees and was marked by bent axles since all of the parties, except for plaintiffs, and all of the testifying experts, including plaintiffs' expert, testified that the old fence line established the boundary lines. Blair v. Bishop, 290 Ga. App. 721, 660 S.E.2d 35 (2008), cert. denied, 2008 Ga. LEXIS 793 (Ga. 2008).

Cited in Glover v. Wright, 82 Ga. 114, 8 S.E. 452 (1882); Camp v. Cochrane, 71 Ga. 865 (1883); Tucker v. Roberts, 151 Ga. 753, 108 S.E. 222 (1921); Tyson v. Anderson, 164 Ga. 673, 139 S.E. 410 (1927); Long v. Robertson, 41 Ga. App. 712, 154 S.E. 464 (1930); Collins v. Rebb, 174 Ga. 250, 162 S.E. 676 (1932); Reynolds v. Kinsey, 50 Ga. App. 385, 178 S.E. 200 (1935); Pearre v. Wilkinson, 54 Ga. App. 638, 188 S.E. 553 (1936); Warsaw Turpentine Co. v. Fort Barrington Club, 185 Ga. 540, 195 S.E. 755 (1937); Crawford v. Taliaferro, 187 Ga. 381, 200 S.E. 776 (1938); McNeal v. Carter, 191 Ga. 441, 12 S.E.2d 332 (1940); Anderson v. Black, 191 Ga. 627, 13 S.E.2d 650 (1941); Watkins v. Sailers, 65 Ga. App. 77, 15 S.E.2d 306 (1941); Barnes v. Avery, 192 Ga. 874, 16 S.E.2d 861 (1941); Hicks v. Cherry, 193 Ga. 4, 17 S.E.2d 60 (1941); Hardy v. Brannen, 194 Ga. 252, 21 S.E.2d 417 (1942); Jackson v. Sanders, 199 Ga. 222, 33 S.E.2d 711 (1945); Pope v. Beasley, 200 Ga. 656, 38 S.E.2d 300 (1946); Hutchins v. McDowell, 202 Ga. 1, 41 S.E.2d 300 (1947); Smith v. Lanier, 202 Ga. 165, 42 S.E.2d 495 (1947); Rodgers v. Beavers, 76 Ga. App. 16, 45 S.E.2d 74 (1947); Anthony v. Wright, 76 Ga. App. 425, 46 S.E.2d 194 (1948); Burgin v. Pickron, 76 Ga. App. 803, 47 S.E.2d 195 (1948); Ledford v. Hill, 82 Ga. App. 299, 60 S.E.2d 555 (1950); Bennett v. Perry, 207 Ga. 331, 61 S.E.2d 501 (1950); Welch v. Haley, 83 Ga. App. 492, 64 S.E.2d 364 (1951); Jackson v. Beameguard, 208 Ga. 773, 69 S.E.2d 772 (1952); Plambeck v. Bailey, 211 Ga. 200, 84 S.E.2d 572 (1954); Banks v. Lane, 92 Ga. App. 155, 88 S.E.2d 312 (1955); Phillips v. Wheeler, 212 Ga. 603, 94 S.E.2d 732 (1956); White v. Gordon, 213 Ga. 730, 101 S.E.2d 759 (1958); Seaboard A.L.R.R. v. Taylor, 214 Ga. 212, 104 S.E.2d 106 (1958); Clay v. Stanfield, 216 Ga. 785, 119 S.E.2d 564 (1961); Durand v. Reeves, 217 Ga. 492, 123 S.E.2d 552 (1962); Little v. Weatherby, 220 Ga. 274, 138 S.E.2d 380 (1964); Green v. Hollaway, 220 Ga. 819, 142 S.E.2d 242 (1965); Howard v. Perkins, 229 Ga. 279, 191 S.E.2d 46 (1972); Young v. Wiggins, 229 Ga. 392, 191 S.E.2d 863 (1972); Carter v. Chambers, 230 Ga. 179, 195 S.E.2d 918 (1973); Carter v. Parson, 230 Ga. 177, 196 S.E.2d 19 (1973); Seaboard Coast Line R.R. v. Carter, 231 Ga. 5, 200 S.E.2d 113 (1973); Akins v. Tucker, 132 Ga. App. 66, 207 S.E.2d 625 (1974); Rutland v. Taylor, 232 Ga. 893, 209 S.E.2d 218 (1974); Wright v. Thompson, 236 Ga. 655, 225 S.E.2d 226 (1976); Frost v. Williamson, 239 Ga. 266, 236 S.E.2d 615 (1977); Banks v. Myrick, 149 Ga. App. 252, 253 S.E.2d 873 (1979); Killingsworth v. Willis, 244 Ga. 662, 261 S.E.2d 613 (1979); Page v. Guin, 184 Ga. App. 143, 369 S.E.2d 517 (1988); Bell v. Owens, 230 Ga. App. 826, 497 S.E.2d 591 (1998); KDS Properties, Inc. v. Sims, 234 Ga. App. 395, 506 S.E.2d 903 (1998); Clark v. Stafford, 239 Ga. App. 69, 522 S.E.2d 6 (1999); Buchheit v. Gillis, 246 Ga. App. 838, 541 S.E.2d 441 (2000); Dover v. Higgins, 287 Ga. App. 861, 652 S.E.2d 829 (2007).

General Reputation as to Ancient Landmarks

Iron pin corners as evidence of line between pins. — Evidence, in a statutory pro-

ceeding involving location of a boundary line, that iron pin corners are at each end of the line is some evidence that the line originally lay in the straight line between the pins. Railey v. Heath, 92 Ga. App. 123, 88 S.E.2d 194 (1955).

Evidence as to what specific persons said about marker is hearsay. — When the evidence offered is not as to the general reputation of a boundary pin or as to the witness's knowledge of the pin, but is what specific persons said about a specific pin, it is clear that such testimony, being hearsay and inadmissible, is properly ruled out. Collier v. Stokes, 213 Ga. 464, 99 S.E.2d 821 (1957).

Acquiescence

1. In General

Disputed or uncertain boundaries may be settled by agreement or acquiescence. — There is another well-established rule of law in this state, independent of this statute, that when the boundary line between adjoining landowners is indefinite or unascertained, the coterminous proprietors may, by parol agreement, establish a dividing line, and if the agreement is accompanied by possession to the agreed line, or is otherwise duly executed, such agreement will be valid and binding and the line thus fixed will thereafter control their deeds, and the agreement may be executed by the erection of physical monuments on the agreed line or by the marking of trees indicating the line, when this is done with the knowledge and mutual assent of the adjoining landowners. Swinson v. Jones, 66 Ga. 598, 18 S.E.2d 646 (1942) (see O.C.G.A. § 44-4-6).

Where land lines are in dispute, or unascertained, or the parties are uncertain as to their location, adjoining landowners may establish such disputed or unascertained boundaries by one of two methods: (1) by oral agreement, if the agreement is executed by actual possession to the agreed line or by some other method such as marking or laying out the line on the face of the earth and erecting monuments thereon, or (2) by acquiescence for seven years by the acts or declarations of the owners of adjoining lands. Dye v. Dotson, 201 Ga. 1, 39 S.E.2d 8 (1946); Croft v. Beverley, 202 Ga. 210, 43 S.E.2d 93 (1947); Hickox v. Griffin, 205 Ga. 859, 55 S.E.2d 351 (1949); Myers v. Jackson, 87 Ga. App. 161, 73 S.E.2d 220 (1952); Stone v. Jernigan, 214 Ga. 249, 104 S.E.2d 101 (1958); Collins v. Burchfield, 215 Ga. 322, 110 S.E.2d 368 (1959); Peacock v. Boatright, 221 Ga. 661, 146 S.E.2d 745 (1966); Carter v. Wyatt, 113 Ga. App. 235, 148 S.E.2d 74 (1966); Hethcock v. Padgett, 217 Ga. 328, 122 S.E.2d 213 (1961), criticized, United States v. Williams, 441 F.2d 637 (5th Cir. 1971); Cothran v. Burk, 234 Ga. 460, 216 S.E.2d 319 (1975); Kendall v. Curtis, 194 Ga. App. 37, 389 S.E.2d 550 (1989).

An unascertained or disputed boundary line between coterminous proprietors may be established by oral agreement, provided such agreement is accompanied by actual possession to the agreed line or is otherwise executed; or such line may be established by acquiescence for seven years, by acts or declarations of the adjoining landowners. Howell v. United States, 519 F. Supp. 298 (N.D. Ga. 1981).

There must be actual agreement or acquiescence by acts or declarations. — When there is room for controversy as to the location of a dividing line, the coterminous proprietors, independent of this statute, may orally agree upon the line, and if the agreement is accompanied by possession to the agreed line, or is otherwise duly executed, such agreement will be valid and binding, and the line thus defined will thereafter control their deeds. It is not necessary that possession under the agreed line should be had for 20 years to give validity to the agreement, though the agreement derives additional weight from long acquiescence. Tietjen v. Dobson, 170 Ga. 123, 152 S.E. 222 (1930) (see O.C.G.A. § 44-4-6).

An unascertained or disputed boundary line between coterminous proprietors may be established by oral agreement, if the agreement is accompanied by actual possession to the agreed line, or is otherwise duly executed. Tietjen v. Dobson, 170 Ga. 123, 152 S.E. 222 (1930).

While a line established by agreement or acquiescence is binding upon the coterminous proprietors and their grantees, yet, under the first method there must be an actual agreement between coterminous proprietors, and under the second method there must be acquiescence by the acts or declarations of both the adjoining landowners. Bradley v. Shelton, 189 Ga. 696, 7 S.E.2d 261 (1940).

Acquiescence (Cont'd)
1. In General (Cont'd)

Independently of the rule laid down in this statute, a parol agreement between coterminous proprietors that a certain line is the true dividing line is valid and binding as between the proprietors, if the agreement is accompanied by possession of the agreed line or is otherwise duly executed, and if the boundary line between the two tracts is indefinite, unascertained, or disputed. Payne v. Green, 84 Ga. App. 689, 67 S.E.2d 195 (1951) (see O.C.G.A. § 44-4-6).

Boundary must be in dispute, uncertain, or unascertained. — Before the dividing line can be established by express agreement of the adjoining owners, it must be in dispute, uncertain, or unascertained. Warwick v. Ocean Pond Fishing Club, 206 Ga. 680, 58 S.E.2d 383 (1950); Brand v. Garner, 114 Ga. App. 578, 152 S.E.2d 2 (1966); Kiker v. Anderson, 226 Ga. 121, 172 S.E.2d 835 (1970).

Acquiescence for the period required by this statute would be conclusive evidence of a previous agreement, though there may in fact have been none. But an actual agreement in fact, whether in writing or parol, takes the place of acquiescence and becomes binding from the time the agreement is made. Sound logic compels the conclusion that the dividing line is in both instances established by proof that the adjoining owners agreed thereto, the agreement being expressed in one case and conclusively implied in the other, and therefore the requirement that the line be in dispute, uncertain, or unascertained is essential in both cases alike. Warwick v. Ocean Pond Fishing Club, 206 Ga. 680, 58 S.E.2d 383 (1950) (see O.C.G.A. § 44-4-6).

Before a dividing line between coterminous owners can be established either by acquiescence or by an executed oral agreement the line's location must be uncertain, unascertained, or in dispute. Horn v. Preston, 217 Ga. 165, 121 S.E.2d 775 (1961).

Proprietor must know or reasonably believe boundary disputed. — Coterminous proprietors must know or reasonably believe a boundary is disputed or unascertained before the proprietors can orally agree to or acquiesce in a new line. Otherwise, the proprietors' agreement, whether express or implied, runs afoul of former Code 1933, § 20-401 (see O.C.G.A. § 13-5-30). United States v. Williams, 441 F.2d 637 (5th Cir. 1971).

Statute becomes operative only if the boundary line between coterminous owners who acquired their titles from a common grantor is indefinite and unascertainable. United States v. Williams, 441 F.2d 637 (5th Cir. 1971) (see O.C.G.A. § 44-4-6).

A line may not be established by acquiescence unless there is some contention between the landowners over the location of the line as a result of which a boundary is established in which the landowners subsequently acquiesce. Cothran v. Burk, 234 Ga. 460, 216 S.E.2d 319 (1975).

Applicable in actions for land. — There is nothing which would prevent the rule of law declared in this statute from being applied in actions for land when the evidence shows the acquiescence therein mentioned and the paper title of the litigants embraces the land to the line thus established. Calhoun v. Babcock Bros. Lumber Co., 198 Ga. 74, 30 S.E.2d 872 (1944) (see O.C.G.A. § 44-4-6).

Applicable to injunction actions for trespass. — While this rule is applicable in processioning proceedings, it is likewise applicable in an action seeking to enjoin a trespass and to establish the dividing line. Warwick v. Ocean Pond Fishing Club, 206 Ga. 680, 58 S.E.2d 383 (1950).

Section applicable to actions to recover nonrural land where title otherwise shown. — This statute and other sections as to processioning authorize proceedings thereunder to mark land lines of rural land, but not of lands located inside the corporate limits of cities or towns. In action to recover land, whether rural or city, when title is otherwise shown, acquiescence by acts or declarations for seven years in a dividing line by adjacent owners establishes such line as the true line, and this statute is applicable in such cases. Veal v. Barber, 197 Ga. 555, 30 S.E.2d 252 (1944) (see O.C.G.A. § 44-4-6).

Issue is acquiescence for required period. — On a trial, when a dividing line is an issue and it is claimed that such dividing line is established by acquiescence for a period of more than seven years, the question is whether or not there has been acquiescence by both parties in a dividing line for the required period of time. Watts v. Pettigrew,

207 Ga. 654, 63 S.E.2d 897 (1951).

Acquiescence establishes true line whether or not the original line. — Acquiescence by acts and declarations for more than seven years in the dividing line contended for by one of the parties would establish the true line between the adjoining owners, whether it is the original line or not. Rogers v. Moore, 207 Ga. 182, 60 S.E.2d 359 (1950).

Fact that the line described in the plaintiff's petition as extending along a stated course from one point to another is also alleged to be the original land lot line does not prevent the party claiming the line as the boundary line from proving that it has been acquiesced in by the opposite party and that party's predecessor in title for seven years. Peacock v. Boatright, 221 Ga. 661, 146 S.E.2d 745 (1966).

Acquiescence and proof of title together fix dividing line. — Acquiescence rule will in no case create or establish title, but where a proven title by a fair construction will embrace the lands up to the line established by acquiescence, then title comes from the source proven, and the acquiescence fixes the dividing line. Veal v. Barber, 197 Ga. 555, 30 S.E.2d 252 (1944); Dye v. Dotson, 201 Ga. 1, 39 S.E.2d 8 (1946); Harrison v. Morris, 108 Ga. App. 566, 133 S.E.2d 899 (1963).

Distinction between establishment of line by agreement and by acquiescence. — Rules with reference to a line established by acquiescence and a line established by parol agreement differ in two respects: (1) a divisional line, in order to be established by parol agreement, must be one established in consequence of an indefinite, unascertained, or disputed line, which is unnecessary in the case of acquiescence; and (2) a divisional line, in order to be established by acquiescence, must have existed for a period of more than seven years by virtue of the acts or declarations of the adjoining landowners, while this is unnecessary in the case of an agreed line. Smith v. Lanier, 199 Ga. 255, 34 S.E.2d 91 (1945). But see Warwick v. Ocean Pond Fishing Club, 206 Ga. 680, 58 S.E.2d 383 (1950); Brand v. Garner, 114 Ga. App. 578, 152 S.E.2d 2 (1966); Kiker v. Anderson, 226 Ga. 121, 172 S.E.2d 835 (1970); United States v. Williams, 441 F.2d 637 (5th Cir. 1971); Cothran v. Burk, 234 Ga. 460, 216 S.E.2d 319 (1975).

Establishment of boundary by parol agreement. — When the boundary line between two estates are indefinite or unascertained, the owners may by parol agreement establish a division line, and the line thus established will afterwards control their deeds, notwithstanding the statute of frauds. Brown v. Hester, 169 Ga. 410, 150 S.E. 556 (1929).

Line acquiesced to is binding without regard to previous parol agreement. — Acquiescence in a dividing line for a period of seven years or more will operate to establish the line, without regard to any previous parol agreement between the parties as to the line. Brown v. Hester, 169 Ga. 410, 150 S.E. 556 (1929).

Acquiescence or agreement establishes dividing line notwithstanding statute of frauds. — Acquiescence for seven years, by acts or declarations of adjoining landowners, shall establish a dividing line just as effectually as where the boundary line between two estates is indefinite or unascertained, the owners may by parol agreement establish a division line. In either case, the line thus established will afterwards control their deeds, notwithstanding the statute of frauds. Etheridge v. Gillen, 199 Ga. 242, 34 S.E.2d 105 (1945).

Boundary agreement not within statute of frauds since no conveyance involved. — Independent of the rule laid down in this statute, a parol agreement between coterminous proprietors, that a certain line is the true dividing line, is valid and binding as between the proprietors, if the agreement is accompanied by possession of the agreed line or is otherwise duly executed, and if the boundary line between the two tracts is indefinite, unascertained, or disputed. Such an agreement is not within the statute of frauds because it does not operate as a conveyance of land, but merely as an agreement with respect to what has already been conveyed. Farr v. Woolfolk, 118 Ga. 277, 45 S.E. 230 (1903); Bennett v. Swafford, 146 Ga. 473, 91 S.E. 553 (1917); Barfield v. Birrick, 151 Ga. 618, 108 S.E. 43 (1921); Childers v. Dedman, 157 Ga. 632, 122 S.E. 45 (1924) (see O.C.G.A. § 44-4-6).

It is necessary in order to establish a dividing line between coterminous landowners by parol agreement alone that there shall be a line which is unascertained, uncertain, or disputed and the only basis for ruling that such an agreement is not within the statute of frauds is that in instances where it is applicable it does not operate as a convey-

Acquiescence (Cont'd)
1. In General (Cont'd)

ance of land, but merely as an agreement with respect to what has already been conveyed. Smith v. Lanier, 199 Ga. 255, 34 S.E.2d 91 (1945).

Proprietors hold up to agreement by virtue of their title deeds. — When a boundary line is established by consent, the coterminous proprietors hold up to it by virtue of their title deeds, and not by virtue of a parol transfer of title. Shahan v. Watkins, 194 Ga. 164, 21 S.E.2d 58 (1942).

Mere acquiescence insufficient to set up equitable title in ejectment action. — When the defendant contends simply that the land in controversy was given to the defendant by parol agreement, but that for some reason the land was not included in the defendant's deed, in order to set up an equitable title in defense of an ejectment action, it is necessary for the defendant to show more than mere acquiescence for seven years by acts or declarations of adjoining landowners in order to take the case out of the operation of the statute of frauds. Smith v. Lanier, 199 Ga. 255, 34 S.E.2d 91 (1945).

Agreement as to dividing line arising out of dispute. — An agreement as to a line entered into between abutting landowners as a result of a dispute between the landowners as to the location of the dividing line between the landowners is an agreement as to a dividing line and needs no construction as to what kind of line it is. Freeman v. Nelson, 138 Ga. App. 697, 227 S.E.2d 475 (1976).

Effect of agreement which disregards boundary defined in prior deed. — Agreement which utterly disregards a boundary defined in a prior deed, and which contravenes that deed, is ineffectual against a subsequent purchaser without notice. United States v. Williams, 441 F.2d 637 (5th Cir. 1971).

Effect of acquiescence on other landowners. — Acquiescence of certain landowners, whose lands are bounded by a county line, as to the location of such boundary, will not be binding on other landowners not holding under the landowners, and whose lands touch the county line at another place. Farr v. Woolfolk, 118 Ga. 277, 45 S.E. 230 (1903); Ivey v. Cowart, 124 Ga. 159, 52 S.E. 436, 110 Am. St. R. 160 (1905).

Proof of boundary by donee of parol gift of land. — When one coterminous landowner makes a parol gift of land to an adjoining landowner, thus changing the divisional line between the properties of the coterminous proprietors, the donee cannot hold the property as against a legal title by merely showing acquiescence in the new line established by virtue of the parol gift. One must go further, and bring oneself within the rules governing parol gifts. Smith v. Lanier, 199 Ga. 255, 34 S.E.2d 91 (1945).

Parties and successors in title are bound by agreement. — When a line has been located by an executed parol agreement between the coterminous proprietors, or established by seven years acquiescence, the line thus located and established is binding on the grantee of the coterminous proprietors. Osteen v. Wynn, 131 Ga. 209, 62 S.E. 37, 127 Am. St. R. 212 (1908); Gornto v. Wilson, 141 Ga. 597, 81 S.E. 860 (1914); Shiver v. Hill, 148 Ga. 616, 97 S.E. 676 (1918); Booker v. Booker, 36 Ga. App. 738, 138 S.E. 251, cert. denied, 36 Ga. App. 825, (1927); Lockwood v. Daniel, 193 Ga. 122, 17 S.E.2d 542 (1941); McGill v. Dowman, 195 Ga. 357, 24 S.E.2d 195 (1943).

An agreement between coterminous owners of land as to an unascertained boundary line, with seven years acquiescence by all the parties as to the boundary agreed upon, effectively fixes the boundary line and is binding on the parties to the agreement and their successors in title. Hethcock v. Padgett, 217 Ga. 328, 122 S.E.2d 213 (1961), criticized, United States v. Williams, 441 F.2d 637 (5th Cir. 1971).

Acts of acquiescence or declarations by both landowners bind their respective successors in title. Robertson v. Abernathy, 195 Ga. 704, 25 S.E.2d 424 (1943).

Line established by acquiescence binding on grantees. — Line established by acquiescence for seven years by acts or declarations of adjoining landowners is binding on the grantees of the coterminous proprietors. Booker v. Booker, 41 Ga. App. 380, 153 S.E. 94 (1930); Swinson v. Jones, 66 Ga. App. 598, 18 S.E.2d 646 (1942); Foster v. Thomas, 193 Ga. 823, 20 S.E.2d 80 (1942); Dye v. Dotson, 201 Ga. 1, 39 S.E.2d 8 (1946); Croft v. Beverley, 202 Ga. 210, 43 S.E.2d 93 (1947); Peacock v. Boatright, 221 Ga. 661, 146 S.E.2d 745 (1966).

Relation of principal and agent may exist between husband and wife as to establishment of a boundary line. Barron v. Chamblee, 199 Ga. 591, 34 S.E.2d 828 (1945).

Lessor and lessee of property, who are owners of adjacent properties, can acquiesce or agree to the dividing line between their properties. Everett v. Culberson, 215 Ga. 577, 111 S.E.2d 367 (1959).

Conclusiveness of agreement and ripening into perfect title. — Where an agreement establishing a dividing line between adjoining properties is followed by acquiescence and possession, the parties are concluded by their agreement, and when the acquiescence and possession have continued for the period of time prescribed by the statute of limitations, a perfect title by adverse possession is acquired. Greenway v. Griffith, 225 Ga. 632, 170 S.E.2d 423 (1969).

Acquiescence for 20 or more years conclusive on parties. — Boundary line acquiesced in by coterminous owners and their possession regulated by it for 20 or more years is conclusive upon the parties and those claiming under those parties. Dye v. Dotson, 201 Ga. 1, 39 S.E.2d 8 (1946).

Agreement or acquiescence between landowner and one not the owner of adjoining lands was not conclusive, the parties not being coterminous owners. It was a declaration by a person in possession in disparagement of that person's title, under former Code 1933, § 38-308 (see O.C.G.A. § 24-3-7), and its probative value was for the jury. Payne v. Green, 84 Ga. App. 689, 67 S.E.2d 195 (1951).

Doctrine of prescription is not involved in establishing dividing line by acquiescence of adjoining landowners for a period of more than seven years, and whether or not the dividing line arose permissively is likewise not involved. Watts v. Pettigrew, 207 Ga. 654, 63 S.E.2d 897 (1951).

Tenant can have adverse possession. — There can be adverse possession, whether under color of title, or acquiescence in a line, by an owner of adjacent property who is also tenant of an adjacent property owner during such term as the tenancy is in effect. Everett v. Culberson, 215 Ga. 577, 111 S.E.2d 367 (1959).

When directed verdict not proper. — When there is evidence that the line claimed by defendant to be the true line had been in existence for more than seven years, but there is no evidence which conclusively shows that the plaintiffs, or anyone under whom the plaintiffs claim, ever knew of the existence of this line, the case is one for the jury, and not one for direction of a verdict. Norman, Timmons & Co. v. Smith, 131 Ga. 69, 61 S.E. 1039 (1908).

Denial of new trial upheld on review if evidence sufficient, despite evidence to contrary. — Since the evidence as to the location of the dividing line between the properties of the parties was conflicting, the Supreme Court would not reverse the judgment of the trial court in overruling a motion for new trial on general grounds only, when there was sufficient evidence to show the establishment of a dividing line which had been acquiesced in by acts or declarations of the owners for more than 30 years, although there was other evidence to the contrary. Hendrix v. Pirkle, 209 Ga. 882, 76 S.E.2d 769 (1953).

2. Proof of Agreement and Acquiescence

Establishment of dividing line by acquiescence is bottomed upon conclusive proof of agreement and stands upon the same basis as the establishment of such a line by express agreement. Warwick v. Ocean Pond Fishing Club, 206 Ga. 680, 58 S.E.2d 383 (1950); Brand v. Garner, 114 Ga. App. 578, 152 S.E.2d 2 (1966).

Acquiescence for seven years is conclusive evidence of agreement. — Fundamental basic principle upon which this statute rests is that acquiescence by acts or declarations for a period of seven years is conclusive evidence of an agreement of the adjoining owners. Warwick v. Ocean Pond Fishing Club, 206 Ga. 680, 58 S.E.2d 383 (1950) (see O.C.G.A. § 44-4-6).

Trial court erred in finding as a matter of law that the boundary line at issue had not been established by acquiescence under O.C.G.A. § 44-4-6 or by agreement; owners at time of purchase mutually understood boundary line was that marked and blazed a few months earlier and honored this line for more than seven years. Gillis v. Buchheit, 232 Ga. App. 126, 500 S.E.2d 38 (1998).

Pursuant to O.C.G.A. § 44-4-6, a line of blue-marked trees, not the edge of a river swamp described in plats and deeds, was the

Acquiescence (Cont'd)
2. Proof of Agreement and Acquiescence (Cont'd)

common boundary of the parties' tracts because the evidence showed the blue line had been marked with the knowledge and consent of adjacent landowners more than 30 years earlier. McDilda v. Norman W. Fries, Inc., 278 Ga. App. 51, 628 S.E.2d 195 (2006).

Acquiescence for seven years establishes line, absent parol agreement. — Acquiescence in a dividing line for a period of seven years or more will operate to establish the line, without regard to any previous parol agreement between the parties as to the line. Hatch v. Miller, 179 Ga. 629, 176 S.E. 631 (1934); Williamson v. Prather, 188 Ga. 545, 4 S.E.2d 140 (1939).

When evidence relied on covers less than seven years, it does not suffice to establish the line between the adjoining landowners. Green v. Stafford, 206 Ga. 836, 59 S.E.2d 244 (1950).

Acquiescence by conduct for a period of time less than seven years will not suffice to establish a dividing line between adjoining landowners. Osteen v. Wynn, 131 Ga. 209, 62 S.E. 37, 127 Am. St. R. 212 (1908); McAleer v. Glover, 146 Ga. 369, 91 S.E. 114 (1917); Sapp v. Odom, 165 Ga. 437, 141 S.E. 201 (1928).

Seven year requirement not met where action in ejectment brought in less than seven years. — When evidence in ejectment shows that a survey forms the basis of the claim of acquiescence and the petition alleges that since a date less than seven years later, the defendant in ejectment has been in possession of the claimed property, it affirmatively appears that, if acquiescence was shown, it could not have been for the required period of seven years. Green v. Stafford, 206 Ga. 836, 59 S.E.2d 244 (1950).

Acquiescence must be shown by acts or declarations. — When it is sought to establish the dividing line between two tracts of land by acquiescence of the adjoining landowners, without reference to the line called for in the deeds of division, the line is not established as the dividing line in the absence of acts or declarations by the landowners of both tracts establishing it as the dividing line. Southern Timber Co. v. Bland, 32 Ga. App. 658, 124 S.E. 359 (1924).

To establish a line by acquiescence, it must appear that the owners of the property to be affected thereby either acted in such a manner or made such declarations for a period of seven years as to show that the line claimed was the true line between their lands. Greenway v. Altman, 89 Ga. App. 557, 80 S.E.2d 89 (1954).

Acquiescence essential to the establishment of a line must be not only for the period fixed in the statute, but be shown by acts or declarations. Scales v. Wood, 100 Ga. App. 836, 112 S.E.2d 670 (1959).

To establish a line by acquiescence, it must appear that the owners of the property to be affected thereby either acted in such a manner or made such declarations for a period of seven years as to show that the line claimed was the true line between their lands. Actual possession by the respective owners up to the line may show acquiescence in the line. Stripland v. Nalley, 108 Ga. App. 311, 132 S.E.2d 849 (1963).

To establish a line by acquiescence, it must appear that the owners of the property to be affected acted in such a manner for a space of seven years, or made such declarations during the continuance of that period, as to show that the line claimed was the true line between the estates. Catoosa Springs Co. v. Webb, 123 Ga. 33, 50 S.E. 942 (1905); Tietjen v. Dobson, 170 Ga. 123, 152 S.E. 222 (1930); Adair v. Atlanta Jewish Community, Inc., 228 Ga. 422, 185 S.E.2d 921 (1971).

All the adjoining landowners must acquiesce. — In order for a boundary line to be established by acquiescence for seven years, such acquiescence must be by the acts or declarations of all the adjoining landowners. Robertson v. Abernathy, 192 Ga. 694, 16 S.E.2d 584 (1941), later appeal, 195 Ga. 704, 25 S.E.2d 424 (1943).

Establishment of a line by acquiescence can be accomplished only by the acts of declarations of both adjoining owners. Carter v. Wyatt, 113 Ga. App. 235, 148 S.E.2d 74 (1966).

Passive conduct insufficient for acquiescence. — Acts or declarations by the adjoining landowner are necessary elements under the statutory definition of acquiescence. Mere passive conduct and nothing more will not suffice. Binion v. First Fed. Sav. & Loan Ass'n, 259 Ga. 170, 377 S.E.2d 858 (1989).

Passive acquiescence insufficient. — There must be, in order to establish a divid-

ing line by acquiescence, acts or declarations by both adjoining landowners and mere passive acquiescence will not suffice. Gordon v. Georgia Kraft Co., 217 Ga. 500, 123 S.E.2d 540 (1962).

Mere passive acquiescence is not sufficient to establish a dividing line. Adair v. Atlanta Jewish Community, Inc., 228 Ga. 422, 185 S.E.2d 921 (1971).

Acquiescence need not be evidenced by conventional agreement. — In order that a line may be established by acquiescence for seven years by the acts or declarations of the owners of adjoining land, it is not essential that the acquiescence be manifested by a conventional agreement. Osteen v. Wynn, 131 Ga. 209, 62 S.E. 37, 127 Am. St. R. 212 (1908); Zachery v. Hudson, 138 Ga. 85, 74 S.E. 768 (1912); Sapp v. Odom, 165 Ga. 437, 141 S.E. 201 (1928); Lockwood v. Daniel, 193 Ga. 122, 17 S.E.2d 542 (1941); Swinson v. Jones, 66 Ga. App. 598, 18 S.E.2d 646 (1942); McGill v. Dowman, 195 Ga. 357, 24 S.E.2d 195 (1943); Robertson v. Abernathy, 195 Ga. 704, 25 S.E.2d 424 (1943); Watts v. Pettigrew, 207 Ga. 654, 63 S.E.2d 897 (1951).

Adjoining landowner must know of boundary claim. — It must appear that as to the line sought to be established by a coterminous owner, the owner's claim of it as a line must have been made known to the adjoining owner, for one cannot acquiesce in something of which one has no knowledge. Carter v. Wyatt, 113 Ga. App. 235, 148 S.E.2d 74 (1966).

Fact that protestants had claimed an old fence as the dividing line for more than seven years, or more than 20 years, without a showing that the claim was made known to the adjoining owner could not establish the fence as the line. Carter v. Wyatt, 113 Ga. App. 235, 148 S.E.2d 74 (1966).

Actual possession by respective owners up to the line may show acquiescence in the line. Dye v. Dotson, 201 Ga. 1, 39 S.E.2d 8 (1946); Browne v. Johnson, 204 Ga. 634, 51 S.E.2d 416 (1949).

Possession is not sole means of showing acquiescence. — Statute does not declare that actual possession by both parties up to the line for the prescribed period is the only way of showing acquiescence in a dividing line. Tietjen v. Dobson, 170 Ga. 123, 152 S.E. 222 (1930) (see O.C.G.A. § 44-4-6).

Occupancy not indispensable to agreement. — Actual occupancy to the agreed line, by cultivation or the erection of fences on the line, is not indispensable to the due execution of the parol agreement. Payne v. Green, 84 Ga. App. 689, 67 S.E.2d 195 (1951).

Nor acquiescence. Tietjen v. Dobson, 170 Ga. 123, 152 S.E. 222 (1930); Greenway v. Altman, 89 Ga. App. 557, 80 S.E.2d 89 (1954); Greenway v. Griffith, 225 Ga. 632, 170 S.E.2d 423 (1969); Brewer v. Head, 233 Ga. 585, 212 S.E.2d 772 (1975).

When other party permitted to occupy over line, absent physical markers, no agreement shown. — While actual possession by cultivation or the erection of fences on the line is not indispensable to the due execution of a parol agreement, nevertheless, when the evidence shows that one of the parties did not so occupy to the line allegedly agreed on, but permitted the other party to continue to occupy over the line claimed, and fails to show that the agreement on the line was executed by the erection of monuments or other physical evidence of the actual location of the line by concert of the parties to the dispute, there was no evidence of a legal agreement executed. Myers v. Jackson, 87 Ga. App. 161, 73 S.E.2d 220 (1952).

When parties maintained actual possession up to certain road as a dividing line, the evidence was sufficient to establish the line by acquiescence. Tietjen v. Dobson, 170 Ga. 123, 152 S.E. 222 (1930).

Title to disputed property could be established by a deed which encompassed the disputed land while the exact boundary could be established through acquiescence or, alternatively, through agreement by physical marking of the property. Dunn v. Lightle, 223 Ga. App. 137, 476 S.E.2d 776 (1996).

Acquiescence to line fixed by indefinite terms of mutual conveyance. — Acquiescence for more than seven years of the coterminous landowners of the line fixed by the indefinite terms of mutual conveyances is sufficient to establish the validity of the line. Etheridge v. Gillen, 199 Ga. 242, 34 S.E.2d 105 (1945).

Fence as line acquiesced to by parties. — When evidence shows that the applicant and the protestant have been in possession of their respective lands up to the fence for many years, the processioners are required

Acquiescence (Cont'd)
2. Proof of Agreement and Acquiescence (Cont'd)

to mark the line along the fence. Acquiescence in that line for seven years established the line at the fence. Acquiescence in such a line for more than seven years is conclusive evidence of an agreement between coterminous landowners as to the location of the line. Brantley v. Thompson, 102 Ga. App. 355, 116 S.E.2d 300 (1960).

Plat boundary line not dispositive. — Even if 1944 subdivision plat had specified the boundary line, such description would not be dispositive, if a subsequent line had been established by acquiescence or agreement. Gillis v. Buchheit, 232 Ga. App. 126, 500 S.E.2d 38 (1998).

Failure to dispute location of a fence is not necessarily acquiescence in a boundary since a fence may be placed for purposes other than fixing the boundary. Cothran v. Burk, 234 Ga. 460, 216 S.E.2d 319 (1975). But see Smith v. Lanier, 199 Ga. 255, 34 S.E.2d 91 (1945).

Placement of a fence does not necessarily indicate acquiescence in a boundary. Waters v. Spell, 190 Ga. App. 790, 380 S.E.2d 55 (1989).

That fence "weeded" to on either side is some evidence of acquiescence. — In a statutory proceeding involving a boundary line, testimony of processioner that, in laying out the boundary, a fence had been ''weeded'' to by the proprietors on each side of the fence, and apparently had stood long enough to be considered a line acquiesced in by both parties, was some evidence that the line had been acquiesced in by both parties. Railey v. Heath, 92 Ga. App. 123, 88 S.E.2d 194 (1955).

Line established through encroachment, cultivation, and cutting of timber. — When one of two adjoining landowners encroaches upon the land of the other and cultivates the land and cuts timber therefrom, and in so doing establishes a definite and ascertainable line between the land thus encroached upon and the remaining portion of the land of the adjoining landowner, acquiescence in this established line by both the landowners for a period of seven years establishes this line as the true dividing line between the two tracts and the line so established by acquiescence is such an established line as may be marked out by the processioners as the true dividing line between the two tracts. Brogdon v. Cooper, 41 Ga. App. 88, 151 S.E. 834 (1930).

Cutting timber up to old fence not sufficient. — That protestants may have sold and caused timber to be cut up to an old fence is not alone a sufficient act or declaration to establish the old fence as a dividing line by acquiescence. Carter v. Wyatt, 113 Ga. App. 235, 148 S.E.2d 74 (1966).

Effect of encroachment not acquiescenced to for statutory period. — When the parties have not actually agreed upon the line and there has been no establishment of the line by acquiescence of both coterminous owners for seven years, if one of the coterminous owners encroaches beyond one's true boundary, though one does so in good faith and as a result of honest mistake, one has only a bare possessio pedis beyond one's true boundary, and cannot ripen any title thereby in less than 20 years. Spillers v. Jordan, 96 Ga. App. 426, 100 S.E.2d 483 (1957).

For low-water mark in pond as boundary, see Boardman v. Scott, 102 Ga. 404, 30 S.E. 982, 51 L.R.A. 178 (1897).

Burden of proving ownership to designated boundary. — One claiming land to a designated boundary line has the burden of showing that one owns such line, either by showing by means of a survey or like means that the land claimed is actually included within one's title, or by showing such actual physical possession of the plot as would entitle one to prescriptive ownership. Spillers v. Jordan, 96 Ga. App. 426, 100 S.E.2d 483 (1957).

3. Marking of Line

Agreed line should be marked to permit identification. — Agreement, to be duly executed, must at the very least mark out or blaze a boundary so that it can be physically identified by the parties. An agreement not so executed does not so fix and establish a boundary line. Payne v. Green, 84 Ga. App. 689, 67 S.E.2d 195 (1951).

Line may be marked by physical monuments or marked trees. — Agreement may be executed by the erection of physical monuments upon the agreed line, or by the marking of trees plainly indicating the line,

if such erection of monuments or marking of trees is done with the knowledge and mutual assent of the respective proprietors. Barron v. Chamblee, 199 Ga. 591, 34 S.E.2d 828 (1945); Greenway v. Griffith, 225 Ga. 632, 170 S.E.2d 423 (1969).

An oral agreement establishing a boundary may be duly executed by marking the line with monuments or blazes with the consent of the adjoining landowners. Cothran v. Burk, 234 Ga. 460, 216 S.E.2d 319 (1975).

Erecting monuments will amount to practical location. — If adjoining proprietors deliberately erect monuments or fences or make improvements on a line between their lands upon the understanding that it is the true line, it will amount to a practical location. Greenway v. Griffith, 225 Ga. 632, 170 S.E.2d 423 (1969).

Single stake makes line ascertainable but does not ascertain line. — Putting down of a single stake and agreeing that the district line should be the line, leaves the boundary line, while easily ascertainable, still not physically ascertained, and the most that could be said for the single marker put down at that time was that it was an agreement as to a corner. Payne v. Green, 84 Ga. App. 689, 67 S.E.2d 195 (1951).

Strands of wire imbedded in trees and remains of fence insufficient notice to purchaser. — Strands of wire imbedded in several old trees and the remains of a fence, which were all that remained of an alleged boundary when the property was purchased does not constitute possession which would give notice of the purported agreement to a bona fide purchaser. United States v. Williams, 441 F.2d 637 (5th Cir. 1971).

Markings did not support adverse possession claim. — Surveying of a disputed tract of land and marking of drill rods and pins found thereon did not amount to an adverse possession; additionally, these acts did not become an adverse possession merely because the acts were done in the presence of the true owner and consistent with the owner's indications of the property boundaries. Henson v. Tucker, 278 Ga. App. 859, 630 S.E.2d 64 (2006).

4. Processioning

Section sets forth rules for processioners and jury. — Rules to be followed by processioners in ascertaining the location of disputed land lines and by juries in the trial of processioning cases were set forth by former Code 1933, §§ 85-1601, 85-1602, and 85-1603 (see O.C.G.A. §§ 44-4-5, 44-4-6, and 44-4-7). Hackle v. Bowen, 89 Ga. App. 799, 81 S.E.2d 294 (1954).

Processioners bound by section. — In processioning and marking anew established lines, the processioners were bound by the rules which the law prescribed. These general principles were set out in former Code 1933, §§ 85-1601, 85-1602, and 85-1603 (see O.C.G.A. §§ 44-4-5, 44-4-6, and 44-4-7). Hall v. Browning, 71 Ga. App. 694, 32 S.E.2d 126 (1944).

Processioners shall respect actual possession under claim of right for more than seven years. — Location of lines, not as the lines ought to be, but as the lines actually exist, is to be sought; and, if one has been in actual possession of land for more than seven years, under a claim of right, such claim shall be respected by the processioners, even though the land so possessed should be found to be within the original line of the opposing party. Milligan v. Hale, 88 Ga. App. 70, 76 S.E.2d 29 (1953).

Established lines include those acquiesced in for processioning purposes. — While processioners can mark out only established land lines, an established land line may be one established by acquiescence for a period of seven years, evidenced by acts or declarations of the adjoining landowners. Brogdon v. Cooper, 41 Ga. App. 88, 151 S.E. 834 (1930).

Lines established by processioners may be changed by subsequent agreement or acquiescence. — Boundary line run by processioners, to which no protest is filed, fixes the dividing line between the properties at that time, but the parties can still by subsequent agreement or acts of acquiescence establish another or different dividing line between their properties. Allen v. Bone, 202 Ga. 349, 43 S.E.2d 311 (1947).

When agreed line between owners holding under common feoffor is disregarded, the line run is illegal. Cleveland v. Treadwell, 68 Ga. 835 (1882).

Jury charge in processioning proceeding. — It was not error for the judge in a processioning proceeding to instruct the jury on former Code 1933, §§ 85-1602 and

Acquiescence (Cont'd)
4. Processioning (Cont'd)

85-1603 (see O.C.G.A. §§ 44-4-6 and 44-4-7) and to instruct the jury to apply the portions of the charge the jury deem applicable and to disregard the inapplicable portions. Fraser v. Kichline, 108 Ga. App. 701, 134 S.E.2d 492 (1963).

5. Jury Instructions

Section, if charged, should be given substantially if not literally. — When the principle of law embodied in this statute is applicable under the evidence, and the court undertakes to give the statute in charge to the jury, it should be given substantially if not literally. Cassels v. Mays, 147 Ga. 224, 93 S.E. 199 (1917); O'Neal v. Ward, 148 Ga. App. 62, 95 S.E. 709 (1918) (see O.C.G.A. § 44-4-6).

Section must be charged where boundary in dispute. — When the true location of the dividing line between the lands of the plaintiff and the defendants is a matter of dispute, and under the pleadings and evidence there is a question of whether a line had been established by acquiescence by acts and declarations of the parties or their predecessors, or by actual possession of the defendants and their predecessors for a term of seven years. It is the duty of the court, without request, to charge the law on that subject. Brookman v. Rennolds, 148 Ga. 721, 98 S.E. 543 (1919).

When evidence would authorize finding of acquiescence, statute must be charged. — When there is evidence from which the jury would be authorized to find that there has been seven years acquiescence, by acts or declarations, in the line as contended for by the defendant, the court should charge this statute. Hailey v. McMullan, 144 Ga. 147, 86 S.E. 315 (1915) (see O.C.G.A. § 44-4-6).

General instructions. — On the trial of a case involving the establishment of a dividing line between coterminous landowners it is not error under the facts for the court to instruct the jury: "Where an agreement establishing a dividing line between adjoining properties is followed by acquiescence and possession, the parties are concluded by their agreement; and when the acquiescence and possession have continued for the period of time prescribed by the statute of limitations, a perfect title by adverse possession is acquired. If adjoining proprietors deliberately erect monuments or fences or make improvements on a line between their lands upon the understanding that it is the true line, it will amount to a practical location." Henderson v. Walker, 157 Ga. 856, 122 S.E. 613 (1924).

Charge that, where a boundary line between adjoining landowners is indefinite or unascertained, coterminous proprietors may by parol agreement establish a dividing line, and if the agreement is accompanied by possession to an agreed line, or is otherwise duly executed, such agreement will be valid and binding, states a correct abstract principle of law and is not error. Griner v. Lindsey, 210 Ga. 563, 81 S.E.2d 802 (1954).

Instruction to leave parties as parties are when testimony conflicts and claims not established. — When the line contended for by protestants has not been established by acquiescence and when there is some conflict in the testimony as to the markings on the line contended for by applicant, a third verdict could be rendered leaving the parties where the parties are, and the jury should be properly instructed as to that as well as on the possible verdicts for each party. Carter v. Wyatt, 113 Ga. App. 235, 148 S.E.2d 74 (1966).

Omission of instruction as to knowledge of acquiescing party. — When the trial court's charge defines acquiescence as meaning "to rest, to submit without opposition or question, to yield assent," it is not error to omit an instruction that knowledge, on the part of the party to be charged with acquiescing, is an essential element of acquiescence, absent any request therefor. Carter v. Wyatt, 113 Ga. App. 235, 148 S.E.2d 74 (1966).

Error to omit charge as to acts or declarations of adjoining landowners. Cassels v. Mays, 147 Ga. 224, 93 S.E. 199 (1917); O'Neal v. Ward, 148 Ga. App. 62, 95 S.E. 709 (1918); Veal v. Barber, 197 Ga. 555, 30 S.E.2d 252 (1944).

This omission constituted material error, as the jury might think that mere passive acquiescence would suffice to establish a dividing line, whereas acquiescence of that character is not sufficient. Cassels v. Mays, 147 Ga. 224, 93 S.E. 199 (1917); O'Neal v. Ward, 148 Ga. App. 62, 95 S.E. 709 (1918).

Charge as to number of years acquiescence must exist. — An instruction applying these rules was not cause for new trial because the court referred to the line of acquiescence and actual possession as ''a term of years as the law prescribes'' and ''a number of years,'' where in immediate connection therewith the court also instructed the jury in the language of former Civil Code 1910, §§ 3821 and 3822 (see O.C.G.A. §§ 44-4-6 and 44-4-7), that such acquiescence or actual possession must exist for seven years. The evidence authorized the charge complained of. Georgia Talc Co. v. Cohutta Talc Co., 140 Ga. 245, 78 S.E. 905 (1913).

Omission of seven-year requirement in charge. — When the trial court charged the jury in the language of this statute that ''acquiescence for seven years by acts or declarations of adjoining landowners, shall establish a dividing line,'' and added immediately thereafter, ''in other words, acquiescence by acts or declarations of adjoining landowner, shall establish a dividing line,'' the latter statement standing alone was inapt, but was so closely connected with the above quotation from the statute that the jury could not have been misled or confused by the court's failure to repeat the words, ''for seven years.'' Griner v. Lindsey, 210 Ga. 563, 81 S.E.2d 802 (1954) (see O.C.G.A. § 44-4-6).

Erroneous reference in instruction to "original line" rather than "dividing line". — No prejudice to the defendant in a suit to determine a boundary line appeared in the inaccurate instruction to the jury that the line which might be fixed by acquiescence was the ''original line,'' instead of referring to the line, as described in this statute, as the ''dividing line,'' where under the evidence for the plaintiff, the original line and the acquiesced line were the same. Robertson v. Abernathy, 195 Ga. 704, 25 S.E.2d 424 (1943) (see O.C.G.A. § 44-4-6).

Instruction as to location of line by means of monuments or improvements. — The following charge to the jury is correct: If the plaintiff and defendant, or those under whom they claim, established a fence as the line between the plaintiff's and defendant's two pieces of property, and it had been acquiesced in by the parties for seven years, then it would be the dividing line, regardless of recitals in a deed with regard to the number of feet. Zachery v. Hudson, 138 Ga. 85, 74 S.E. 768 (1912).

It is not error for the court to charge the jury as follows: ''If you find this fence was established by the predecessors in title of these parties, and that the fence was on a line agreed upon (and as to that the court expresses no opinion), and that the fence has been acquiesced in by both parties for more than seven years, it would become the legal line between the parties.'' Henderson v. Walker, 157 Ga. 856, 122 S.E. 613 (1924).

Trial court's charge that if adjoining property owners deliberately erect monuments or fences or make improvements on a line between their lands, upon the understanding that it is the true line, then it will amount to a true location is erroneous where nothing in the evidence supports any agreement or understanding between the parties, or their predecessors in title, that the monument, fence, or improvement is on the true line. Carter v. Wyatt, 113 Ga. App. 235, 148 S.E.2d 74 (1966).

Charging of §§ 44-4-5 and 44-4-6 in ejectment action. — When the principal issue in an ejectment action is the determination of a land lot line, it is not error for the trial judge to charge the jury the rules prescribed in § 44-4-5 and this section. Wood v. Elliott, 114 Ga. App. 612, 152 S.E.2d 595 (1966).

OPINIONS OF THE ATTORNEY GENERAL

New survey does not operate to change boundary acquiesced in for ten years. — When the boundary line between state property and that of an adjoining landowner has been plainly marked with concrete markers for ten years and acquiesced in by the adjoining landowner, a new survey conducted by the landowner indicating that the landowner should originally have had more of the land will not operate to give the landowner title to the land. 1971 Op. Att'y Gen. No. U71-18.

RESEARCH REFERENCES

ALR. — Establishment of boundary line by oral agreement or acquiescence, 113 ALR 421.

Sufficiency of description in standing timber deed or contract, 35 ALR2d 1422.

44-4-7. Effect of adverse possession for more than seven years.

When actual possession has been had under a claim of right for more than seven years, such claim shall be respected; and the lines shall be marked so as not to interfere with such possession. (Orig. Code 1863, § 2357; Code 1868, § 2354; Code 1873, § 2389; Code 1882, § 2389; Civil Code 1895, § 3248; Civil Code 1910, § 3822; Code 1933, § 85-1603.)

Cross references. — Nature of title by prescription, § 44-5-160 et seq.

JUDICIAL DECISIONS

Analysis

General Consideration
Acquiescence
Jury Charge
Verdict

General Consideration

Processioners and juries to follow law. — In processioning and marking anew established lines, the processioners were bound by the rules which the law prescribed. These general principles were set out in former Code 1933, §§ 85-1601, 85-1602, and 85-1603 (see O.C.G.A. §§ 44-4-5, 44-4-6, and 44-4-7). Hall v. Browning, 71 Ga. App. 694, 32 S.E.2d 126 (1944).

Rules to be followed by processioners in ascertaining the location of disputed land lines and by juries in the trial of processioning cases were set forth by former Code 1933, §§ 85-1601, 85-1602, and 85-1603 (see O.C.G.A. §§ 44-4-5, 44-4-6, and 44-4-7). Hackle v. Bowen, 89 Ga. App. 799, 81 S.E.2d 294 (1954).

Section inapplicable to town lots. — To charge jury in language of former Civil Code 1910, §§ 3820, 3821, and 3822 (see O.C.G.A. §§ 44-4-5, 44-4-6, and 44-4-7) was error in ejectment suit to determine boundaries between two town lots, since these sections apply to rural land boundaries only. Standard Oil Co. v. Altman, 173 Ga. 777, 161 S.E. 353 (1931).

Section contemplates a line established by adverse possession of one of the owners under a bona fide claim of right for a period of seven years. Watkins v. Sailers, 65 Ga. App. 77, 15 S.E.2d 306 (1941) (see O.C.G.A. § 44-4-7).

Actual possession under claim of right for more than seven years will establish marked lines. Pope v. Beasley, 200 Ga. 656, 38 S.E.2d 300 (1946).

Section deals with boundaries, not title. — Provisions of this statute do not relate to the determination of prescriptive title, but merely to the fixing of prescriptive boundaries as between coterminous claimants. Byrd v. McLucas, 194 Ga. 40, 20 S.E.2d 597 (1942); Osborne v. Thompson, 154 Ga. App. 215, 267 S.E.2d 852 (1980) (see O.C.G.A. § 44-4-7).

Section inapplicable when title is determining factor involved and not the true location of a boundary line. Harrison v. Morris, 108 Ga. App. 566, 133 S.E.2d 899 (1963) (see O.C.G.A. § 44-4-7).

Processioners not to determine conflicting claims to title. — Since the object of the summary processioning laws is to settle disputes of boundary lines between coterminous landowners, and the proceed-

ing is not designed as a substitute for an action in ejectment to settle title, which is not directly involved, it will be presumed that the processioners would not undertake to exercise jurisdiction to pass upon or determine any question involving a disputed title, but will confine themselves solely to the fixing of boundaries between the adjacent claimants, leaving undetermined any question relating to conflicting claims as to the title itself. Osborne v. Thompson, 154 Ga. App. 215, 267 S.E.2d 852 (1980).

Question not one of prescription, but duration of claim must be determined. — Question with which processioners deal is not one of prescription, but of boundary; but processioners are to determine the question of fact as to whether possession has been held for seven years under a claim of right. Aderhold v. Lambert, 67 Ga. App. 166, 19 S.E.2d 538 (1942).

Processioners not to determine where lines should be absent adverse possession. — When a claim is made by a coterminous owner of actual possession under a claim of right for more than seven years to a portion of the land found to be outside of the true original line, processioners are not to declare where the lines ought to be without regard to adverse possession, but where they really are. Aderhold v. Lambert, 67 Ga. App. 166, 19 S.E.2d 538 (1942).

Acts of parties or operation of law considered. — Processioners are not charged with ascertaining and marking such lines as were originally fixed between subdivisions of land, to the exclusion of such lines as have been, before the time of processioning, established either by the act of the parties or by operation of law. Aderhold v. Lambert, 67 Ga. App. 166, 19 S.E.2d 538 (1942).

Processioners must respect actual possession under claim of right. — Any actual possession under a claim of right, which has continued for more than seven years, is to be respected by processioners. Aderhold v. Lambert, 67 Ga. App. 166, 19 S.E.2d 538 (1942).

If actual possession has been had under a claim of right for more than seven years, such claim shall be respected, and the lines so marked by the processioners as not to interfere with such possession. Aderhold v. Lambert, 67 Ga. App. 166, 19 S.E.2d 538 (1942).

Possession existing at time lines marked considered. — Possession which this statute requires processioners to respect is a possession existing at the time the lines are marked. Riddle v. Sheppard, 119 Ga. 930, 47 S.E. 201 (1904) (see O.C.G.A. § 44-4-7).

Whether it originated in prescription or not. — Any actual possession under a claim of right, which has continued for more than seven years, is to be respected by processioners, whether it originated in permission or not. The question with which processioners deal is not one of prescription, but of boundary. Christian v. Weaver, 79 Ga. 406, 7 S.E. 261 (1887).

Effect of possession of land found to be within original line of opposing party. — Under the law of processioning as the law exists in this state, established lines, and not new ones, are to be fixed and determined. The location of lines, not as the lines ought to be, but as the lines actually exist, is to be sought. When one has been in actual possession of land for more than seven years, under a claim of right, such claim shall be respected by the processioners, even though the land so possessed should be found to be within the original line of the opposing party. Aderhold v. Lambert, 67 Ga. App. 166, 19 S.E.2d 538 (1942); Milligan v. Hale, 88 Ga. App. 70, 76 S.E.2d 29 (1953); Osborne v. Thompson, 154 Ga. App. 215, 267 S.E.2d 852 (1980).

Possession must be under color of title for seven-year period to apply. — In order for prescription to be a foundation of a valid title, there must be actual adverse possession for the period of 20 years, unless such possession is under color of title, in which case the period of time is reduced to seven years. In the event possession is asserted to have been under color of title, the actual limits described in the writing set up as color will not be extended to embrace other land, not included in the writing, merely because such land lying beyond the limits described in the writing has been taken possession of under a mistake and occupied for over seven years, though the party seeking to prescribe acted in good faith in extending one's possession beyond the limits of the tract of land actually defined in one's conveyance to contiguous land. Wight v. Davis, 202 Ga. 239, 42 S.E.2d 641 (1947).

Mere naked possession, with no intention of asserting ownership, is not such actual

General Consideration (Cont'd)

possession under a claim of right as is contemplated by law. Riddle v. Sheppard, 119 Ga. 930, 47 S.E. 201 (1904).

Party to decree fixing lines cannot by adverse possession establish different line. — Party to a decree fixing the dividing lines cannot, by seven years adverse possession alone, establish a different line from the one fixed by the decree. Watkins v. Sailers, 65 Ga. App. 77, 15 S.E.2d 306 (1941).

Effect of running line through property adversely held. — When the muniments of title of the adjacent landowners call for a line which is the land-lot line between two lots of land, and such line as run by the processioners passes in part through lands adversely held for seven years by one of the parties, the entire proceeding is not per se void. Stewart v. Jackson, 144 Ga. 501, 87 S.E. 656 (1916); Burdette v. Coleman, 31 Ga. App. 553, 121 S.E. 143 (1924).

When possession partial, original line controls rest of boundary. — Party who has been in actual possession of a strip of land for more than seven years under a claim of right should prevail as to that part of the line, and the rest of the line should be the original land-lot line between the two lots of land. Burdette v. Coleman, 31 Ga. App. 553, 121 S.E. 143 (1924).

Procedure where lines not marked but corners and landmarks exist. — Even though the course and extent of the lines themselves may not have been physically marked out in their entirety upon the earth's surface, yet if there should exist a sufficient number of physically established corners or landmarks, the mere connecting of which by straight lines would suffice to complete the boundaries it would be the duty of processioners to so ascertain and establish the boundaries, but respecting always any rights had under actual possession. Dodson v. Knox, 89 Ga. App. 760, 81 S.E.2d 211 (1954).

Coterminous proprietors may execute agreement by erection of physical monuments. — An unascertained or disputed boundary line between coterminous proprietors may be established by oral agreement, if the agreement be accompanied by actual possession to the line, or is otherwise duly executed. In such instance the agreement may be executed by the erection of physical monuments upon the agreed line, or by the marking of trees plainly indicating the line, if such erection of monuments or marking of trees is done with the knowledge and mutual assent of the respective proprietors. Greenway v. Griffith, 225 Ga. 632, 170 S.E.2d 423 (1969).

Which amount to a practical location. — If adjoining proprietors deliberately erect monuments or fences or make improvements on a line between their lands upon the understanding that it is the true line, it will amount to a practical location. Greenway v. Griffith, 225 Ga. 632, 170 S.E.2d 423 (1969).

Enclosure and cultivation of tract as establishing line. — Jury verdict in favor of the line claimed by the protestant is authorized by evidence of enclosure of the tract in question and cultivation of a part thereof for a period of more than 20 years upon which possession title by prescription may be founded. Payne v. Green, 84 Ga. App. 689, 67 S.E.2d 195 (1951).

Mere use of property for cattle range, with occasional cutting of timber, is not sufficient to constitute adverse possession. Dixon v. Dixon, 97 Ga. App. 54, 102 S.E.2d 74 (1958).

Survey of tract not evidence to support adverse possession. — Resurvey of a tract of land, or entering on a tract of land for the purpose of making a survey, is not evidence to support an adverse possession. Dillon v. Mattox, 21 Ga. 113 (1857).

Return rejected where processioners and surveyor ignore claims and possession of parties. — If the processioners and surveyor testify that the processioners and surveyor ignored the claims of both sides, and paid no attention to the possession of the parties, although the parties actually claim such possession, the processioners' and surveyor's return must be rejected. Welch v. Haley, 83 Ga. App. 492, 64 S.E.2d 364 (1951).

Burden of proof is on one claiming possession. — Burden is on defendant to show that the defendant is in possession under a claim of right. If the defendant is relying on this statute, the burden is on the defendant to show not only actual possession for seven years, but that the actual possession had been under a claim of right for that length of time. Norman, Timmons & Co. v. Smith, 131 Ga. 69, 61 S.E. 1039 (1908) (see O.C.G.A. § 44-4-7).

One claiming land to a designated boundary line has the burden of showing that one owns land to such line, either by showing by means of a survey or like means that the land claimed is actually included within one's title, or by showing such actual physical possession of the plot as would entitle one to prescriptive ownership. Spillers v. Jordan, 96 Ga. App. 426, 100 S.E.2d 483 (1957).

Adverse possession, acquiescence, and acts of landowners control over conflicting prior deed. — Actual adverse possession, acquiescence, and the acts of the adjoining landowners in thus impliedly establishing for more than seven years a dividing line, will control the boundary, even though it may conflict with recitals in an otherwise controlling prior deed of one of the parties. Reynolds v. Kinsey, 50 Ga. App. 385, 178 S.E. 200 (1935).

Cited in Camp v. Cochrane, 71 Ga. 865 (1883); Johnson v. Reeves, 133 Ga. 822, 66 S.E. 1081 (1910); Stewart v. Smith, 135 Ga. 390, 69 S.E. 540 (1910); Cosby v. Reid, 21 Ga. App. 604, 94 S.E. 824 (1918); Tucker v. Roberts, 151 Ga. 753, 108 S.E. 222 (1921); Wiggins v. James, 30 Ga. App. 52, 116 S.E. 547 (1923); Burdette v. Coleman, 31 Ga. App. 553, 121 S.E. 130 (1924); Yarbrough v. Stuckey, 39 Ga. App. 265, 145 S.E. 160 (1929); Hill v. Snellings, 41 Ga. App. 585, 154 S.E. 156 (1930); Long v. Robertson, 41 Ga. App. 712, 154 S.E. 464 (1930); Reynolds v. Kinsey, 50 Ga. App. 385, 178 S.E. 200 (1935); Pearre v. Wilkinson, 54 Ga. App. 638, 188 S.E. 553 (1936); Barnes v. Avery, 192 Ga. 874, 16 S.E.2d 861 (1941); Hicks v. Cherry, 193 Ga. 4, 17 S.E.2d 60 (1941); Veal v. Barber, 197 Ga. 555, 30 S.E.2d 252 (1944); Smith v. Lanier, 199 Ga. 255, 34 S.E.2d 91 (1945); Rodgers v. Beavers, 76 Ga. App. 16, 45 S.E.2d 74 (1947); Anthony v. Wright, 76 Ga. App. 425, 46 S.E.2d 194 (1948); Bostick v. Yaughn, 79 Ga. App. 180, 53 S.E.2d 223 (1949); Rogers v. Moore, 207 Ga. 182, 60 S.E.2d 359 (1950); Ledford v. Hill, 82 Ga. App. 299, 60 S.E.2d 555 (1950); Tolbert v. Free, 111 Ga. App. 811, 143 S.E.2d 440 (1965); Howell v. Baynes, 225 Ga. 164, 166 S.E.2d 359 (1969); Morgan v. Livsey, 122 Ga. App. 644, 178 S.E.2d 303 (1970); Murphy v. Stringer, 126 Ga. App. 40, 189 S.E.2d 881 (1972); Banks v. Myrick, 149 Ga. App. 252, 253 S.E.2d 873 (1979); Page v. Guin, 187 Ga. App. 143, 369 S.E.2d 517 (1988); Henson v. Tucker, 278 Ga. App. 859, 630 S.E.2d 64 (2006).

Acquiescence

Establishment of line by acquiescence generally. — To establish a line by acquiescence, it must appear that the owners of the property to be affected thereby either acted in such a manner or made such declarations for a period of seven years as to show that the line claimed was the true line between their lands. Greenway v. Altman, 89 Ga. App. 557, 80 S.E.2d 89 (1954); Greenway v. Griffith, 225 Ga. 632, 170 S.E.2d 423 (1969).

Agreement followed by acquiescence and possession for statutory period perfects title. — When an agreement establishing a dividing line between adjoining properties is followed by acquiescence and possession, the parties are concluded by their agreement, and when the acquiescence and possession have continued for the period of time prescribed by the statute of limitations, a perfect title by adverse possession is acquired. Greenway v. Griffith, 225 Ga. 632, 170 S.E.2d 423 (1969).

Adjoining landowners may agree upon the dividing line between the landowners, and each will own up to the agreed line as fully as if it were a natural boundary or as if the landowners respective deeds or grants called for it. Such agreement may be implied as well as expressed, and in either case the definite settlement of the boundary line not previously defined is a good and sufficient consideration to uphold the agreement. When an agreement establishing a dividing line between adjoining property owners is followed by acquiescence and possession, the parties are concluded by the parties' agreement, and when the acquiescence and possession have continued for seven years, a perfect title by adverse possession is acquired. McGinty v. Interstate Land & Imp. Co., 92 Ga. App. 770, 90 S.E.2d 42 (1955).

Actual possession up to line not indispensable to show acquiescence. — Actual possession by the respective owners up to the line may show acquiescence in the line, but such actual possession is not indispensable to show acquiescence in the line. Greenway v. Griffith, 225 Ga. 632, 170 S.E.2d 423 (1969).

Line established by acquiescence binding on grantees. — Line established by acquiescence for seven years, by acts or declarations

Acquiescence (Cont'd)

of adjoining landowners, is binding on the grantees of the coterminous proprietors. Booker v. Booker, 41 Ga. App. 380, 153 S.E. 94 (1930).

Jury Charge

Jury charge under statute not objectionable on grounds that it is inapplicable to processioning. — Court's instruction to the jury that ''when one has been actually in possession of land for more than seven years under a claim or right, such claim shall be respected by the processioners'' is not objectionable on the ground that this charge is not applicable to processioning cases. Johnson v. Reeves, 133 Ga. 822, 66 S.E. 1081 (1910); Heath v. Clark, 141 Ga. 65, 80 S.E. 288 (1913).

Not error to instruct as to statute and to disregard inapplicable portions. — It is not error for the judge in a processioning proceeding to instruct the jury on this section and § 44-4-6 and to instruct the jury to apply the portions of the charge the jury deem applicable and to disregard the inapplicable portions. Fraser v. Kichline, 108 Ga. App. 701, 134 S.E.2d 492 (1963).

Charge that jury should determine if claimed line is "true line" is erroneous. — It is error to instruct the jury as follows: ''If you believe from the evidence that the protestant had the exclusive and continuous possession of this property to the line which he claims, and that it is the true line, for seven years, and had it up until this line was run by the processioners, then the court charges you that the processioners had no right to interfere with that line; that is the simple question for you to determine — which is the true line.'' The phrase ''and that it is the true line'' is erroneous as it qualifies the provisions of this statute. Williams v. Giddens, 132 Ga. 342, 64 S.E. 64 (1909) (see O.C.G.A. § 44-4-7).

Failure to instruct jury without request, see Jones v. Harris, 169 Ga. 665, 151 S.E. 343 (1930).

No error in not charging § 44-4-6 if no evidence of acquiescence. — When there was no evidence adduced upon the trial, or any contention by the protestant in one's protest filed to the return of the processioners, of seven years' acquiescence in a dividing line by acts or declarations of the adjoining landowners, as provided in former Civil Code 1910, § 3821 (see O.C.G.A. § 44-4-6), the court did not err in failing to give such theory in charge to the jury. McAlpin v. Thompson, 29 Ga. App. 495, 116 S.E. 64 (1923).

Charge as to acquisition of perfect title may include charge as to acquiescence under § 44-4-6. — Trial court correctly charged in processioning case that when acquiescence and possession have continued for a seven year period, a perfect title by adverse possession was acquired. The charge was not subject to criticism in also including the principles of law relating to the fixing of a boundary line by agreement, although there was no evidence of any express agreement between the parties, since acquiescence for the period required by former Code 1933, § 85-1602 (see O.C.G.A. § 44-4-6) would be conclusive evidence of a previous agreement, though there may in fact have been none. McGinty v. Interstate Land & Imp. Co., 92 Ga. App. 770, 90 S.E.2d 42 (1955).

Verdict

Contrary verdict set aside if evidence shows section met. — When the undisputed evidence shows that the protestant had for more than seven years been in the actual possession of the tract bounded by the lines claimed by the protestant, under a claim of right, a verdict in favor of the applicant was contrary to law and the evidence, and should have been set aside on motion for a new trial. Robson v. Shelnutt, 122 Ga. 322, 50 S.E. 91 (1905). See also Cartledge v. Seago, 141 Ga. 113, 80 S.E. 290 (1913); Langley v. Woodruff, 144 Ga. 702, 87 S.E. 1054 (1916).

Verdict set aside where processioners ignore claim of actual possession. — Since protestants had been in actual possession of land, under claim of right, for more than seven years, up to line claimed by protestants, which was marked or designated by a rock dam, a deep ditch, and a turnrow, and processioners and surveyor disregarded the possession by protestants of the land in question and undertook to locate the original line between the lots, the verdict of the jury in favor of the applicant, approving the line thus established by the processioners was unauthorized under the law and the

evidence. Aderhold v. Lambert, 67 Ga. App. 166, 19 S.E.2d 538 (1942).

When the processioners ignore a claim of actual possession based on this statute and concern themselves instead only with the original line, the jury's verdict upholding the processioners' return must be set aside. Osborne v. Thompson, 154 Ga. App. 215, 267 S.E.2d 852 (1980) (see O.C.G.A. § 44-4-7).

RESEARCH REFERENCES

ALR. — Adverse possession involving ignorance or mistake as to boundaries — modern views, 80 ALR2d 1171.

Grazing of livestock or gathering of natural crop as fulfilling traditional elements of adverse possession, 48 ALR3d 818.

44-4-8. Treatment of land cut off by watercourse.

When a watercourse is one of the boundary lines of a tract of land and its course has been changed by nature or by man so that its present channel cuts off a part of the land, the processioners and the surveyor shall certify the fact; and the plat of the surveyor shall plainly mark the original and present channels and shall designate the exact quantity of land so cut off. (Laws 1818, Cobb's 1851 Digest, p. 719; Code 1863, § 2361; Code 1868, § 2358; Code 1873, § 2393; Code 1882, § 2393; Civil Code 1895, § 3252; Civil Code 1910, § 3826; Code 1933, § 85-1608.)

JUDICIAL DECISIONS

Cited in Anthony v. Wright, 76 Ga. App. 425, 46 S.E.2d 194 (1948).

RESEARCH REFERENCES

Am. Jur. 2d. — 15A Am. Jur. 2d, Condominiums and Cooperative Apartments, § 45 et seq. 51 Am. Jur. 2d, Liens, § 52 et seq. 55 Am. Jur. 2d, Mortgages, § 552 et seq.

C.J.S. — 53 C.J.S., Liens, §§ 1 et seq., 26, 44. 59 C.J.S., Mortgages, §§ 616 et seq., 769 et seq.

ALR. — Right to follow accretions across division line previously submerged by action of water, 41 ALR 395.

Sufficiency of description in standing timber deed or contract, 35 ALR2d 1422.

44-4-9. Adjoining landowner's protest; trial of case in superior court; scope of verdict and judgment.

Any owner of adjoining lands who is dissatisfied with the lines run and marked by the processioners and the surveyor may file his protest to their findings with the judge of the probate court within 30 days after the processioners have filed their returns and shall specify in his protest the lines objected to and the true lines as claimed by him. Upon the filing of a protest, it shall be the duty of the judge of the probate court to return all the papers, including the plat made by the surveyor, and the protest to the clerk of the superior court of the county or counties where the disputed land lies; and copies shall be sent to the adjoining counties. The clerk shall

enter the protest on the issue docket to be tried in the same manner and under the same rules as other cases. The verdict of the jury and the judgment of the superior court shall be framed to meet the issue tried and decided; provided, however, it shall not be necessary to run any lines between adjoining landowners except the lines in dispute. (Orig. Code 1863, § 2358; Code 1868, § 2355; Code 1873, § 2390; Code 1882, § 2390; Civil Code 1895, § 3249; Ga. L. 1901, p. 39, § 1; Civil Code 1910, § 3823; Code 1933, § 85-1609; Ga. L. 1982, p. 3, § 44.)

JUDICIAL DECISIONS

Analysis

General Consideration
Protest
Trial in Superior Court
Appeal

General Consideration

History of requirements for processioners. — Prior to Ga. L. 1901, p. 39, § 1, it was necessary for the processioners and the surveyor to trace and mark anew the lines around the entire tract of the applicant for processioning before the plat certified by the surveyor and the lines so marked should be prima facie correct. Such plat was admissible in evidence without further proof. When it appeared that the lines around the entire tract of the applicant were not surveyed and marked anew, it was proper to dismiss the entire proceeding on motion of the protestants. Russell v. Radford, 76 Ga. App. 302, 45 S.E.2d 705 (1947).

Language of statute is not mandatory. Holmes v. Blount, 245 Ga. 757, 267 S.E.2d 228 (1980) (see O.C.G.A. § 44-4-9).

Status of parties. — Applicants for a survey stand in the position of plaintiffs, and protestants are in the position of defendants. Moore v. Georgia Power Co., 122 Ga. App. 54, 176 S.E.2d 236 (1970).

Processioning not employed to determine title. — Remedy afforded by the law of processioning assumes that each of the contending parties has title to that party's property, and is never employed to determine that one of the parties has and the other has not title. Boatright v. Tyre, 112 Ga. App. 179, 144 S.E.2d 471 (1965).

Processioners cannot establish new lines. Processioners power and authority extends to retracing and establishing old lines, already existing. Jarrard v. Wildes, 87 Ga. App. 30, 73 S.E.2d 116 (1952).

Until line is run and marked by processioners, no protest can be made. Amos v. Parker, 88 Ga. 754, 16 S.E. 200 (1892); Russell v. Radford, 76 Ga. App. 302, 45 S.E.2d 705 (1947).

Survey of other boundaries unnecessary. — When the only dispute is over the dividing line between two tracts of land, a survey of other boundaries is unnecessary. Groover v. Durrence, 36 Ga. App. 543, 137 S.E. 299 (1927).

Complete surveys of entire tracts not objectionable. — When the application to the processioners was to mark anew only the boundary line between two tracts, and the notice to the adjoining landowner, who is the protestant, indicated that such boundary line only was to be marked anew, it is no objection to the return of the processioners that the processioners made complete surveys of the entire tracts. McAlpin v. Thompson, 29 Ga. App. 495, 116 S.E. 64 (1923).

Plat and return both essential. — Plat of the surveyor and the return of the processioners are both necessary parts of the proceedings, and neither is complete without the other. This is especially true if the return is incomplete in itself and refers to the plat for a description of the boundary line fixed by the processioners. Reynolds v. Kinsey, 50 Ga. App. 385, 178 S.E. 200 (1935).

Inconsistency with deed. — What appears in a deed in a party's chain of title is not always indicative of those physical facts in

accordance with which processioners must perform the processioners' duty of remarking lines previously designated upon the earth's surface. Such instruments then may be inconsistent with the line remarked, but not at all in a legal sense inconsistent with the result of the trial of a protest to a return of processioners. Boatright v. Tyre, 112 Ga. App. 179, 144 S.E.2d 471 (1965).

Spouses both bound where joint owners. — Where a husband and wife were in possession as joint owners of a life estate in land, and due notice was served on the wife alone, by the owner of adjoining lands, of the adjoining landowner's intention to have the lines between the respective lands marked by processioners and on the appointed day the processioners proceeded to locate the line, and the husband, who was without due notice, was present and protested against the legality of the proceeding and afterwards the wife filed a protest, the husband was present at trial and testified as a witness, both will be bound by the judgment. By the terms of this statute the husband, if dissatisfied, could have filed his protest or intervened on the trial of the issue formed by the protest of the wife. Cartledge v. Ashford, 152 Ga. 674, 110 S.E. 907 (1922) (see O.C.G.A. § 44-4-9).

Res judicata effect of processioning. — When a property owner never makes an effective protest, the processioning acquires no res judicata effect. Purcell v. C. Goldstein & Sons, 166 Ga. App. 547, 305 S.E.2d 10 (1983).

Property owner was not entitled to rely on the property line established by the processioners when erecting a fence, even though abutting owners failed to protest the processioners' return. O.C.G.A. § 44-4-9 is not mandatory and no protest having been filed, the processioning acquired no res judicata effect. Thus, reliance on the processioners' lines did not shield the owner from liability for trespass. Wisenbaker v. Warren, 196 Ga. App. 551, 396 S.E.2d 528 (1990).

Cited in Tucker v. Roberts, 151 Ga. 753, 108 S.E. 222 (1921); McAlpin v. Thompson, 29 Ga. App. 495, 116 S.E. 64 (1923); McCollum v. Thomason, 32 Ga. App. 160, 122 S.E. 800 (1924); Groover v. Durrence, 36 Ga. App. 543, 137 S.E. 299 (1927); Milligan v. Hale, 88 Ga. App. 70, 76 S.E.2d 29 (1953); Irby v. Raley, 88 Ga. App. 807, 78 S.E.2d 72 (1953); Oliver v. Irvin, 105 Ga. App. 844, 125 S.E.2d 695 (1962); Darnell v. Betty's Creek Baptist Church, 230 Ga. 461, 197 S.E.2d 714 (1973); Watkins v. Chappell, 173 Ga. App. 819, 328 S.E.2d 223 (1985); Shelton v. Long, 177 Ga. App. 534, 339 S.E.2d 788 (1986).

Protest

Protest irrelevant when return not used to establish lines. — When the identity of a parcel of land is in question, if one party should, in order to prove the location of the land lines, offer a report of processioners, it would be relevant for the opposite party to show that the party had filed a protest to the return, and that the issue thus arising had not been determined. However, the protest is without relevancy when no effort is made to establish the lines by the return of the processioners, though the surveyor and others who assisted in the processioning are sworn as witnesses and testify as to facts as to which they acquired information by reason of the survey. Hunter v. State, 7 Ga. App. 668, 67 S.E. 894 (1910).

Protest must be filed with probate judge, not superior court clerk. — Requirement of filing a protest with the ordinary (now probate judge) within 30 days after the processioners had filed their returns was not complied with by filing such a protest with the clerk of the superior court, although the ordinary (now probate judge) may have told the dissatisfied landowner to file the protest with the clerk if the ordinary (now probate judge) should be busy. A protest so filed, and which was never filed with the ordinary (now probate judge), should have been dismissed on motion. Moore v. Hood, 131 Ga. 479, 62 S.E. 586 (1908).

Judge need only transmit papers and is presumed to have done so. — When a protest is filed to the return of processioners, it is not necessary that the ordinary (now probate judge) should make any written report of the transmission of the papers to the clerk of the superior court, but it is only necessary that the ordinary (now probate judge) perform the physical act of such transmission. The presumption is that the ordinary (now probate judge) did the duty in respect thereto. Norman, Timmons & Co. v. Smith, 131 Ga. 69, 61 S.E. 1039 (1908).

Protest (Cont'd)

Protest legally sufficient. — Protest set forth what the true line was alleged to be, namely, that line shown on an earlier recorded plat. Therefore, the protest was legally sufficient. Page v. Guin, 187 Ga. App. 143, 369 S.E.2d 517 (1988), aff'd, 190 Ga. App. 357, 378 S.E.2d 736 (1989).

Protest amendable at any stage of proceedings. — Right of amendment exists at any stage of the cause, in all respects, whether in matter of form or substance. Rattaree v. Morrow, 71 Ga. 528 (1883); Ogletree v. Cathrall, 110 Ga. App. 100, 137 S.E.2d 799 (1964).

Protest, like any other defensive pleading, may be amended at any stage of the cause. Earney v. Owen, 213 Ga. 412, 99 S.E.2d 201 (1957).

Landowner may not protest loss of land called for in deed. — Landowner affected by the return of processioners cannot, when protesting against the return, be heard to complain that, as a result of the land lines marked anew as previously established, the landowner is deprived of land to which the landowner is entitled and which the landowner's deed calls for. McAlpin v. Thompson, 29 Ga. App. 495, 116 S.E. 64 (1923).

Improper dismissal for trial court's invalid styling of case. — When the only pleadings plaintiff filed prior to the superior court's docketing of the case consisted of the application for processioning and other papers in the probate court properly alleging defendant in the natural person of the executrix of adjoining estate, and it was the trial court which docketed the case under an invalid case style and not the plaintiff, it was error to dismiss the case on the ground that the case was not filed against a legal entity since the style of the case was apparently chosen by the superior court itself and could have been amended to reflect the true status of the litigation. Bennett v. L.L. Blocker Estate, 207 Ga. App. 760, 429 S.E.2d 147 (1993).

Trial in Superior Court

Requirements for jurisdiction over protest. — Until a line is run and marked by the processioners, no protest can be made, and without such protest duly made there is no authority of law for returning the papers to the superior court or for any trial in that court touching the action of the processioners. The consent of the parties will not dispense with an actual running and marking of the line. Amos v. Parker, 88 Ga. 754, 16 S.E. 200 (1892).

In order to give the superior court jurisdiction over a protest to a return of processioners, it is necessary that a majority of the processioners with the surveyor shall have actually traced and marked the disputed boundary lines. Russell v. Radford, 76 Ga. App. 302, 45 S.E.2d 705 (1947).

Without protest duly made there is no authority of law for returning the papers to the superior court, or for any trial in that court touching the action of the processioners. Amos v. Parker, 88 Ga. 754, 16 S.E. 200 (1892); Russell v. Radford, 76 Ga. App. 302, 45 S.E.2d 705 (1947).

Effect on jurisdiction of return when portion of line not surveyed and marked anew. — It may be that if the return of the processioners, including the plat, showed a failure to ascertain the boundaries of the entire tract, and mark the boundaries, the court would have no jurisdiction to take further cognizance of the case. Rattaree v. Morrow, 71 Ga. 528 (1883).

When it appears from the evidence on the trial of the issues made by a protest to the return of processioners that the processioners and surveyor did not survey and mark anew a portion of the line in dispute described in the application to the processioners, their return is without legal effect under the provisions of the processioning law, and the superior court is without jurisdiction to establish any dividing line between the parties. Russell v. Radford, 76 Ga. App. 302, 45 S.E.2d 705 (1947).

Remarking of old line is sole issue. — In the trial of a protest to a return of processioners the issue is solely as to the remarking of the old line. Boatright v. Tyre, 112 Ga. App. 179, 144 S.E.2d 471 (1965).

Protest not specifying desired changes in lines subject to dismissal. — Protest which fails to specify therein the lines objected to and which fails to specify the true lines as claimed by the protestant is subject to general demurrer (now motion to dismiss) and is properly dismissed by the trial court on oral motion of counsel for the applicant. Edenfield v. Lanier, 77 Ga. App. 535, 48 S.E.2d 777 (1948).

Case remains pending although protest dismissed. — Dismissal of a protest is substantially equivalent to the dismissal of an answer and leaves the case still pending in the superior court until disposed of by entry of the final judgment. Moore v. Georgia Power Co., 122 Ga. App. 54, 176 S.E.2d 236 (1970).

When issues of fact exist dismissal is error. — When issues of fact are involved as to the true land line between adjoining landowners, it is error to sustain general demurrers (now motions to dismiss) of the applicant to written protest by landowners to the return of the processioners and for the court not to hear evidence on the issues thus formed. Hitchcock v. Defreese, 99 Ga. App. 700, 109 S.E.2d 631 (1959).

Applicant may open and conclude argument. — In the trial of a protest to the return of processioners, the applicant for processioning stands in the place of a plaintiff or movant in an ordinary cause, and is entitled to open and conclude the argument. Reynolds v. Kinsey, 50 Ga. App. 385, 178 S.E. 200 (1935).

Deeds in chain of title admissible. — In the trial of a protest to a return of processioners, deeds in a party's chain of title to land the boundary line of which is in dispute are generally admissible into evidence as bearing upon the question of the identity and location of the boundary between the coterminous owners. Boatright v. Tyre, 112 Ga. App. 179, 144 S.E.2d 471 (1965).

Admissibility of return where variance exists as to description of processioners' district. — In an issue formed upon a protest to the return of processioners, it was not error to refuse to exclude the return from evidence on the ground that the protestant exhibited a notice as having been served on the protestant, in which notice the processioners were described as being of ''the 1146th district,'' when it appeared from the return that the processioners were of the ''1146th district originally, now the 1642nd,'' no point being raised as to the processioners authority to act. Stewart v. Jackson, 144 Ga. 501, 87 S.E. 656 (1916).

Plat and return make prima facie case. — Return of the processioners and the surveyor's plat attached thereto as a part of the return, introduced in evidence by the applicants, plaintiffs in the case, constitute a prima facie case. Reynolds v. Kinsey, 50 Ga. App. 385, 178 S.E. 200 (1935); Philpot v. Wells, 69 Ga. App. 489, 26 S.E.2d 155 (1943); Boatright v. Tyre, 112 Ga. App. 179, 144 S.E.2d 471 (1965).

Plat attached to the return of the processioners, together with the return, when introduced in evidence in the trial in the superior court, by the person notified, makes a prima facie case in favor of the line marked by the processioners. Crowley v. Varn, 90 Ga. App. 646, 84 S.E.2d 89 (1954).

Return of processioners is deemed prima facie correct. Crowley v. Varn, 90 Ga. App. 646, 84 S.E.2d 89 (1954).

Return not conclusive. — When the processioners file a plat and return and no protest is made to the plat, such plat and the lines marked thereon are only prima facie correct. Moore v. Georgia Power Co., 122 Ga. App. 54, 176 S.E.2d 236 (1970).

Burden on applicant to make prima facie case. — On the issue formed by a protest to the return of processioners, the burden is on the applicant to make a prima facie case. Crowley v. Varn, 90 Ga. App. 646, 84 S.E.2d 89 (1954).

Both parties have burden if each claims specific line is boundary. — When, in a processioning case, the applicant and respondent contend that the line follows a specific course shown in their respective pleadings or evidence, and the issue is whether the line runs along the course contended for by the applicant or that which the respondent maintains is correct, each party has the burden throughout the trial to prove the correctness of the party's contentions. Dally v. Arnold, 91 Ga. App. 395, 85 S.E.2d 808 (1955).

Introduction of processioners' return shifts burden to protestant. — Burden of going forward with the evidence is shifted to the protestant, who then has the burden of showing that the line marked by the processioners is not the true line. Crowley v. Varn, 90 Ga. App. 646, 84 S.E.2d 89 (1954).

Absent any other evidence, plat and return authorize verdict sustaining return. Reynolds v. Kinsey, 50 Ga. App. 385, 178 S.E. 200 (1935).

Processioner may testify even if finding thereby impeached. — An objection that one of the processioners was not competent

Trial in Superior Court (Cont'd)

as a witness to prove certain facts because it was in the nature of impeaching the witness's finding, is without merit. Garrett v. Massee & Felton Lumber Co., 134 Ga. 442, 67 S.E. 1036 (1910).

Evidence of protestant's presence or absence during processioning. — On the trial of a protest to the return of the processioners there is no error in admitting evidence to show that in fact the protestant was present on the day first set and when the postponement was made, and was also present when the work began, but left before the work's completion because the protestant was dissatisfied with the line which was being run and marked. Garrett v. Massee & Felton Lumber Co., 134 Ga. 442, 67 S.E. 1036 (1910).

Judge need only charge issue, not contentions of parties. — When the issue is correctly stated, a failure to affirmatively state the contentions of the parties is not a ground for a new trial, and hence, in processioning proceedings, if the ultimate contentions of the parties and the rules of law governing the issue are correctly stated, and no request for more explicit instructions is made, it is not error to fail to charge in detail the basis of the parties' respective claims. Payne v. Green, 84 Ga. App. 689, 67 S.E.2d 195 (1951).

When all evidence supports one party judge may charge return of verdict in that party's favor. — When all of the evidence in the case supports finding for either the contentions of the processioners or the protestant, it is not error requiring reversal to charge the jury that the jury should find in favor of the contentions of one or the other of the parties. McGinty v. Interstate Land & Imp. Co., 92 Ga. App. 770, 90 S.E.2d 42 (1955).

Effect of failure to expressly charge protestant's burden of proving protestant's claim as to true line. — If the court has charged the jury that the issue is whether the line marked by the processioners, as shown by their plat, is the true line or whether the line claimed by the protestant, as shown by the plat filed with the protestant's protest, is the true line, the exception to the charge that when the applicant makes out a prima facie case the burden of proof then shifts to the protestant to show by a preponderance of the evidence that the return of the processioners is incorrect is not confusing or misleading to the jury on the ground that the court failed to charge further on the burden of proof on the protestant to prove that the line claimed by the protestant was the true line, that being the intendment of the charge as a whole. Payne v. Green, 84 Ga. App. 689, 67 S.E.2d 195 (1951).

Instruction that line found by processioners might not be true one. — When it is not disputed that the processioners followed an illegal procedure in finding the line or a portion thereof by means of compromise, it is not error for the judge to instruct the jury that a line so found might not be the true line. Hackle v. Bowen, 89 Ga. App. 799, 81 S.E.2d 294 (1954).

Evidence supporting line distinct from that in return. — When there is evidence to support a line distinct from that in the processioners' return, it is not error to refuse to limit the jury's deliberations to the issue of the validity of the processioners' return. Efstathiou v. Sanders, 189 Ga. App. 470, 376 S.E.2d 413 (1988).

Charge if part of line protested. — If the protest sets up that a particular portion of the line as run by the processioners passed through land of the protestant which had been in the protestant's actual possession for more than seven years under a claim of right, it is not error to instruct the jury that if such is the case, the protestant must prevail as to that part of the line, and that as to the remainder of the line their verdict should be according to their finding whether the line run by the processioners or that claimed by the protestant was the true line. Stewart v. Jackson, 144 Ga. 501, 87 S.E. 656 (1916).

No judgment as matter of law if substantial fact questions unresolved. — Moving party is not entitled to a judgment as a matter of law if there remain substantial issues of fact to be determined. Morgan v. Livsey, 122 Ga. App. 644, 178 S.E.2d 303 (1970).

When directed verdict authorized. — When evidence upon the trial of a protest shows a substantial performance of the processioners' duties, and in the absence of evidence to the contrary and in the absence of any evidence showing that the line re-

marked is not the true line, the direction of a verdict for the applicant is authorized. Boatright v. Tyre, 112 Ga. App. 179, 144 S.E.2d 471 (1965).

Protestant may obtain verdict as to true line. — Issue in a case is not necessarily confined to the question of whether the line as marked by the processioners should be sustained, but it is permissible for the protestant to obtain a verdict setting up the true line as declared in the protestant's protest, if the evidence shall so warrant. Robson v. Shelnutt, 122 Ga. 322, 50 S.E. 91 (1905); Norman, Timmons & Co. v. Smith, 131 Ga. 69, 61 S.E. 1039 (1908); Parrish v. Castleberry, 142 Ga. 115, 82 S.E. 520 (1914); Stewart v. Jackson, 144 Ga. 501, 87 S.E. 656 (1916); McCollum v. Thomason, 32 Ga. App. 160, 122 S.E. 800 (1924); Reynolds v. Kinsey, 50 Ga. App. 385, 178 S.E. 200 (1935); Dodson v. Knox, 89 Ga. App. 760, 81 S.E.2d 211 (1954); Earney v. Owen, 213 Ga. 412, 99 S.E.2d 201 (1957).

Verdict binds parties and privies in title. — On the trial of the issue formed by the filing of the protest, a verdict which is made the judgment of the court is conclusive upon the parties and their privies in title. Moore v. Georgia Power Co., 122 Ga. App. 54, 176 S.E.2d 236 (1970).

Appeal

Applicant for processioning may appeal, if dissatisfied. Miller v. Medlock, 68 Ga. 822 (1882).

Writ of error will not lie to the Supreme Court to correct the judgment of the superior court in a proceeding of processioning land instituted under this statute. When a writ of error in a case of that character is brought to this court, it will, in conformity with the constitution of this state, be transferred to the Court of Appeals. Elkins v. Merritt, 146 Ga. 647, 92 S.E. 51 (1917); Guarantee Trust & Banking Co. v. Dickson, 148 Ga. 311, 96 S.E. 561 (1918) (see O.C.G.A. § 44-4-9).

Which has no jurisdiction. — An application for processioning to determine a disputed land line and a protest thereto is not a case respecting title to land so as to give the Supreme Court jurisdiction. Fulford v. Johnson, 221 Ga. 338, 144 S.E.2d 526 (1965).

Verdict upheld absent objection that lines were not all surveyed and marked. — Since only one line was run and marked, and the case was tried in the court below upon an issue as to the correctness of the line so marked, and no objection was made on account of the failure to survey and mark all of the lines, after a verdict finding in favor of the line surveyed and marked, the Supreme Court will not set aside such verdict as contrary to law and evidence on the ground that such failure existed in fact as shown by the evidence. Rattaree v. Morrow, 71 Ga. 528 (1883) (case decided prior to creation of Court of Appeals).

Procedure after reversal on appeal. — When a dividing line established by processioners cannot be legally sustained for the reason that the processioners did not survey and mark anew a portion of such line, the appellate court will not refer the case back to the processioners to complete their survey or to make a new survey, but will reverse the case with direction that the trial judge enter an order dismissing the entire proceedings. Russell v. Radford, 76 Ga. App. 302, 45 S.E.2d 705 (1947).

RESEARCH REFERENCES

Am. Jur. 2d. — 15A Am. Jur. 2d, Condominiums and Cooperative Apartments, § 5 et seq.

C.J.S. — 76 C.J.S., Records, §§ 1, 2.

ALR. — Necessary or proper parties to suit or proceeding to establish private boundary line, 73 ALR3d 948.

44-4-10. Compensation of processioners; costs of protest.

The applicant shall pay to each of the processioners not less than $6.00 per day for his services. If a protest is filed, the costs of the court shall abide the issue. The judge of the probate court is authorized to fix the

compensation of the processioners at the time of making the biennial appointment of processioners as provided in Code Section 44-4-1; but the compensation he fixes shall not be less than the compensation specified in this Code section. (Laws 1818, Cobb's 1851 Digest, p. 719; Code 1863, § 2359; Code 1868, § 2356; Code 1873, § 2391; Code 1882, § 2391; Civil Code 1895, § 3250; Civil Code 1910, § 3824; Ga. L. 1912, p. 70, § 1; Ga. L. 1929, p. 167, § 1; Code 1933, § 85-1610; Ga. L. 1953, Jan.-Feb. Sess., p. 202, § 2.)

Cross references. — County surveyor's fees, § 36-7-9.

OPINIONS OF THE ATTORNEY GENERAL

Section not in conflict with § 36-7-9. — There does not appear to be any conflict between former Code 1933, §§ 23-1109 and 85-1610 (see O.C.G.A. § 36-7-9 and 44-4-10), but, even if there were one, former Code 1933, § 23-1109, being based upon a more recent statute, would apparently govern. 1971 Op. Att'y Gen. No. U71-45.

Section establishes a minimum fee. It does not imply that a greater fee is prohibited. 1971 Op. Att'y Gen. No. U71-45.

Payment of fees by county. — County may not pay the processioners' fees in a processioning proceeding unless it is the applicant; otherwise, the payment would constitute a gratuity to the applicant. 1971 Op. Att'y Gen. No. U71-45.

ARTICLE 2

COORDINATE SYSTEM

Editor's notes. — Ga. L. 1985, p. 650, § 1, effective July 1, 1985, repealed the prior Article 2 and enacted the current Article 2. The Act had the effect of rewriting and redesignating the Code sections in the prior Article 2, as shown in the following table:

Current	Prior
44-4-20	44-4-20
44-4-21	44-4-23
44-4-22	44-4-22
44-4-23	44-4-24
44-4-24	44-4-21
44-4-25	None
44-4-26	44-4-25
44-4-27	None
44-4-28	None
44-4-29	44-4-26
44-4-30	None
44-4-31	None

The current Article 2 Code sections listed in this table have been treated as amending the corresponding Code sections from the prior article. All Code sections in the current article not corresponding to a Code section in the prior article are treated as wholly new Code sections.

44-4-20. Designation of Georgia Coordinate System and Georgia Coordinate System of 1985; East and West Zones.

(a) The systems of plane coordinates which have been established by the National Ocean Survey/National Geodetic Survey, formerly the United States Coast and Geodetic Survey, or its successors for defining and stating the geographic positions or locations of points on the surface of the earth within the State of Georgia are hereafter to be known and designated as the

''Georgia Coordinate System'' and the ''Georgia Coordinate System of 1985.''

(b) For the purpose of the use of these systems, the state is divided into an ''East Zone'' and a ''West Zone'':

(1) The area now included in the following counties shall constitute the East Zone: Appling, Atkinson, Bacon, Baldwin, Brantley, Bryan, Bulloch, Burke, Camden, Candler, Charlton, Chatham, Clinch, Coffee, Columbia, Dodge, Echols, Effingham, Elbert, Emanuel, Evans, Franklin, Glascock, Glynn, Greene, Hancock, Hart, Jeff Davis, Jefferson, Jenkins, Johnson, Laurens, Liberty, Lincoln, Long, McDuffie, McIntosh, Madison, Montgomery, Oglethorpe, Pierce, Richmond, Screven, Stephens, Taliaferro, Tattnall, Telfair, Toombs, Treutlen, Ware, Warren, Washington, Wayne, Wheeler, Wilkes, and Wilkinson; and

(2) The area now included in the following counties shall constitute the West Zone: Baker, Banks, Barrow, Bartow, Ben Hill, Berrien, Bibb, Bleckley, Brooks, Butts, Calhoun, Carroll, Catoosa, Chattahoochee, Chattooga, Cherokee, Clark, Clay, Clayton, Cobb, Colquitt, Cook, Coweta, Crawford, Crisp, Dade, Dawson, Decatur, DeKalb, Dooly, Dougherty, Douglas, Early, Fannin, Fayette, Floyd, Forsyth, Fulton, Gilmer, Gordon, Grady, Gwinnett, Habersham, Hall, Haralson, Harris, Heard, Henry, Houston, Irwin, Jackson, Jasper, Jones, Lamar, Lanier, Lee, Lowndes, Lumpkin, Macon, Marion, Meriwether, Miller, Mitchell, Monroe, Morgan, Murray, Muscogee, Newton, Oconee, Paulding, Peach, Pickens, Pike, Polk, Pulaski, Putnam, Quitman, Rabun, Randolph, Rockdale, Schley, Seminole, Spalding, Stewart, Sumter, Talbot, Taylor, Terrell, Thomas, Tift, Towns, Troup, Turner, Twiggs, Union, Upson, Walker, Walton, Webster, White, Whitfield, Wilcox, and Worth. (Ga. L. 1945, p. 218, § 1; Ga. L. 1985, p. 650, § 1.)

Cross references. — Description of boundaries of state, § 50-2-1 et seq.

44-4-21. Names of East and West Zones.

(a) As established for use in the East Zone, the Georgia Coordinate System or the Georgia Coordinate System of 1985 shall be named; and, in any land description in which it is used, it shall be designated the ''Georgia Coordinate System East Zone'' or the ''Georgia Coordinate System of 1985 East Zone.''

(b) As established for use in the West Zone, the Georgia Coordinate System or the Georgia Coordinate System of 1985 shall be named; and, in any land description in which it is used, it shall be designated the ''Georgia Coordinate System West Zone'' or the ''Georgia Coordinate System of 1985 West Zone.'' (Ga. L. 1945, p. 218, § 2; Code 1981, § 44-4-21, enacted by Ga. L. 1985, p. 650, § 1.)

RESEARCH REFERENCES

Am. Jur. 2d. — 12 Am. Jur. 2d, Boundaries, § 53.

44-4-22. Alternative plane coordinates for expressing location of a point for Georgia Coordinate System and Georgia Coordinate System of 1985.

The plane coordinate values for a point on the earth's surface, used to express the geographic position or location of such point in the appropriate zone of this system, shall consist of two distances expressed in U.S. Survey feet and decimals of a foot when using the Georgia Coordinate System and expressed in either meters and decimals of a meter or, following conversion as provided in Code Section 44-4-28, in American Survey feet and decimals of a foot when using the Georgia Coordinate System of 1985. One of these distances, to be known as the ''x-coordinate,'' shall give the position in an east-and-west direction; the other, to be known as the ''y-coordinate,'' shall give the position in a north-and-south direction. These coordinates shall be made to depend upon and conform to plane rectangular coordinate values for the monumented points of the North American Horizontal Geodetic Control Network as published by the National Ocean Survey/National Geodetic Survey, formerly the United States Coast and Geodetic Survey, or its successors, and whose plane coordinates have been computed on the systems defined in this article. Any such control monument may be used for establishing a survey connection to either Georgia Coordinate System. (Ga. L. 1945, p. 218, § 3; Ga. L. 1985, p. 650, § 1; Ga. L. 1990, p. 168, § 1.)

44-4-23. Description of land extending from one zone to another.

When any tract of land to be defined by a single description extends from one into the other of the above coordinate zones, the positions of all points on its boundaries may be referred to either of the two zones, the zone which is used being specifically named in the description. (Ga. L. 1945, p. 218, § 4; Code 1981, § 44-4-23, enacted by Ga. L. 1985, p. 650, § 1.)

44-4-24. Zones precisely defined.

(a) For purposes of more precisely defining the Georgia Coordinate System, the following definition of the United States Coast and Geodetic Survey, now National Ocean Survey/National Geodetic Survey, is adopted:

(1) The ''Georgia Coordinate System East Zone'' is a transverse Mercator projection of the Clarke spheroid of 1866, having a central meridian eighty-two degrees ten minutes west of Greenwich, on which meridian the scale is set one part in 10,000 too small. The origin of coordinates is at the intersection of the meridian eighty-two degrees ten

minutes west of Greenwich and the parallel thirty degrees north latitude. This origin is given the coordinates: x = 500,000 feet and y = 0 feet; and

(2) The ''Georgia Coordinate System West Zone'' is a transverse Mercator projection of the Clarke spheroid of 1866, having a central meridian eighty-four degrees ten minutes west of Greenwich, on which meridian the scale is set one part in 10,000 too small. The origin of coordinates is at the intersection of the meridian eighty-four degrees ten minutes west of Greenwich and the parallel thirty degrees north latitude. This origin is given the coordinates: x = 500,000 feet and y = 0 feet.

(b) For purposes of more precisely defining the Georgia Coordinate System of 1985, the following definition by the National Ocean Survey/ National Geodetic Survey is adopted:

(1) The ''Georgia Coordinate System of 1985 East Zone'' is a transverse Mercator projection of the North American Datum of 1983, having a central meridian eighty-two degrees ten minutes west of Greenwich, on which central meridian the scale is set one part in 10,000 too small. The origin of coordinates is at the intersection of the central meridian eighty-two degrees ten minutes west of Greenwich and the parallel thirty degrees north latitude. This origin is given the coordinates: x = 200,000 meters and y = 0.000 meters; and

(2) The ''Georgia Coordinate System of 1985 West Zone'' is a transverse Mercator projection of the North American Datum of 1983, having a central meridian eighty-four degrees ten minutes west of Greenwich, on which central meridian the scale is set one part in 10,000 too small. The origin of coordinates is at the intersection of the central meridian eighty-four degrees ten minutes west of Greenwich and the parallel thirty degrees north latitude. This origin is given the coordinates: x = 700,000 meters and y = 0.000 meters. (Ga. L. 1945, p. 218, § 5; Code 1981, § 44-4-24, enacted by Ga. L. 1985, p. 650, § 1.)

44-4-25. Recordation of coordinates of point prohibited unless connected by survey to monumented horizontal control station.

No coordinates based on either Georgia Coordinate System purporting to define the position of a point on a land boundary shall be presented to be recorded in any public land records or deed records unless such point has been connected by survey to a monumented horizontal control station that is identified and has been established in conformity with the standards of accuracy and specifications as prepared and published by the Federal Geodetic Control Committee of the United States Department of Commerce. Standards and specifications of the Federal Geodetic Control Committee or its successors in force on the date of said survey shall apply. The publishing of the existing control stations, or the acceptance with intent to publish the newly established control stations, by the National

Ocean Survey/National Geodetic Survey will constitute evidence of adherence to the Federal Geodetic Control Committee specifications. (Code 1981, § 44-4-25, enacted by Ga. L. 1985, p. 650, § 1; Ga. L. 1986, p. 10, § 44.)

44-4-26. Use of terms limited.

The use of the term ''Georgia Coordinate System East Zone,'' ''Georgia Coordinate System of 1985 East Zone,'' ''Georgia Coordinate System West Zone,'' or ''Georgia Coordinate System of 1985 West Zone'' on any map, report of survey, or other document shall be limited to coordinates based on the Georgia Coordinate Systems as defined in this article. (Ga. L. 1945, p. 218, § 6; Code 1981, § 44-4-26, enacted by Ga. L. 1985, p. 650, § 1.)

RESEARCH REFERENCES

Am. Jur. 2d. — 12 Am. Jur. 2d, Boundaries, § 70.

44-4-27. Use of terms "Grid North, Georgia East Zone" and "Grid North, Georgia West Zone."

The term ''Grid North, Georgia East Zone'' refers to the fixed north direction in the East Zone, being Geodetic North for the central meridian eighty-two degrees ten minutes west of Greenwich. The term ''Grid North, Georgia West Zone'' refers to the fixed north direction in the West Zone, being Geodetic North for the central meridian eighty-four degrees ten minutes west of Greenwich. The applicable Grid North term and the basis of orientation shall appear on maps of survey that are purported oriented to a Georgia Coordinate System zone. (Code 1981, § 44-4-27, enacted by Ga. L. 1985, p. 650, § 1.)

44-4-28. Conversion of distances between meters and feet.

Any conversion of distances between the meter and the American Survey foot will be based upon the length of the meter (exactly) equals 39.37 inches or 3.2808333333 1/3 feet. (Code 1981, § 44-4-28, enacted by Ga. L. 1985, p. 650, § 1.)

44-4-29. Use of system not mandatory.

Nothing contained in this article shall require any purchaser or mortgagee to rely on a description, any part of which depends exclusively upon the Georgia Coordinate System or the Georgia Coordinate System of 1985. Nothing in this article shall be so construed as to require any person, firm, or corporation to use these systems of coordinates to obtain or secure a legal description of land or real estate. (Ga. L. 1945, p. 218, § 7; Code 1981, § 44-4-29, enacted by Ga. L. 1985, p. 650, § 1.)

44-4-30. Validation of use of Georgia Coordinate System.

(a) Any legal description prepared under the provisions of the Georgia Coordinate System provided by an Act approved March 6, 1945 (Ga. L. 1945, p. 218), and continued as a part of this Code until July 1, 1985, shall not be invalid.

(b) Any continual use of legal descriptions prepared under the terms of the Georgia Coordinate System provided by an Act approved March 6, 1945 (Ga. L. 1945, p. 218), and continued as a part of this Code until July 1, 1985, which have been recorded or filed in official records within the State of Georgia, shall not be invalid. (Code 1981, § 44-4-30, enacted by Ga. L. 1985, p. 650, § 1.)

Code Commission notes. — Pursuant to § 28-9-5, in 1985, ''July 1, 1985,'' was substituted for ''the effective date of this article'' in subsection (a) and for ''the effective date of this article,'' in subsection (b).

44-4-31. Use of Georgia Coordinate System prohibited after January 1, 1990.

The Georgia Coordinate System provided for in the Act approved March 6, 1945 (Ga. L. 1945, p. 218), shall not be used after January 1, 1990; the Georgia Coordinate System of 1985 will be the sole system after said date. (Code 1981, § 44-4-31, enacted by Ga. L. 1985, p. 650, § 1.)

CHAPTER 5

ACQUISITION AND LOSS OF PROPERTY

Article 1

Grants from State

Sec.
44-5-1. Origin of title to land.
44-5-2. How land in state held.
44-5-3. Form of grants; substantial compliance.
44-5-4. Correctable errors in grants.
44-5-5. Application to Governor for correction of errors; notice to interested parties; evidence of error or mistake; order for correction of errors.
44-5-6. When correction refused.
44-5-7. Trial in superior court.
44-5-8. Filing and preserving papers and evidence.
44-5-9. Advertising prior to issuing corrected grant where original lost.
44-5-10. Effect of corrected grant; notation of correction.
44-5-11. Grounds for setting aside grants.
44-5-12. Impeachment of grants; grounds; effect of irregularities or misnomer.
44-5-13. Grants by implication; presumptions favor grants.
44-5-14. Presumption of grant on 20 years' possession.

Article 2

Conveyances

44-5-30. Requisites of deed to lands; inquiry into consideration.
44-5-31. Requisites of deed to personalty; necessity for deed.
44-5-32. Requisites of instruments other than deeds.
44-5-33. Form of deed.
44-5-34. Construction of inconsistent clauses in deed; ascertainment of intention of parties.
44-5-35. Apportionment of price for deficiency in number of acres; rescission.
44-5-36. Purchaser's remedies for loss of land due to title defect.
Sec.
44-5-37. Applicability of Code Sections 53-2-112 through 53-2-114 to elections under or against deed.
44-5-38. Effect of recital in deed of receipt of purchase money.
44-5-39. Binding effect of covenants on grantee who accepts deed.
44-5-40. Conveyance of future interests or estates.
44-5-41. Voidance and ratification of conveyance to or by a minor.
44-5-42. Delivery of deed to third party as escrow; possession as proof of delivery.
44-5-43. Effect of adverse possession on making of deed.
44-5-44. Estoppel from claiming adversely to own deed.
44-5-45. When ancient deed admissible without proof of execution.
44-5-46. Establishment of copy of deed upon loss of original; effect of copy.
44-5-47. Liability of purchaser for costs of conveyance.
44-5-48. Deeds conveying interest in real property used as commercial landfill.

Article 3

Covenants and Warranties

44-5-60. Covenants running with land; effect of zoning laws; covenants and scenic easements for use of public; renewal of certain covenants; costs.
44-5-61. Implied warranty of title.
44-5-62. General warranty — Scope.
44-5-63. General warranty — Defects known to purchaser.
44-5-64. Action for breach of warranty — Burden of proof.
44-5-65. Action for breach of warranty — Necessity for offer to rescind; mitigation of damages.
44-5-66. Action for breach of warranty — Measure of damages.

Sec.
44-5-67. Breach of bond for title to land; measure of damages.

Article 4

Gifts Generally

PART 1

INTER VIVOS GIFTS

44-5-80. Criteria for making valid inter vivos gift.
44-5-81. When acceptance presumed; acceptance for minors and corporations.
44-5-82. Delivery; constructive delivery.
44-5-83. Written gift.
44-5-84. Presumption of gift arising from delivery of personalty by parent to child living separate from parent.
44-5-85. Rebuttable presumption of gift of lands belonging to parent but in possession of child for seven years.
44-5-86. Gifts by person subject to undue influence; avoidance.
44-5-87. Implied trust on failure of specific purpose for which gift made.
44-5-88. Gifts void against creditors and bona fide purchasers.
44-5-89. Donation of blood by persons over 17 years of age.

PART 2

GIFTS CAUSA MORTIS

44-5-100. Criteria for making valid gift causa mortis.

Article 5

The Georgia Transfers to Minors Act

44-5-110. Short title.
44-5-111. Definitions.
44-5-112. Applicability of article.
44-5-113. Nomination of custodian.
44-5-114. Irrevocable gift or exercise of power of appointment made under Code Section 44-5-119.
44-5-115. Irrevocable transfer by personal representative or trustee to custodian for minor's benefit.
44-5-116. Irrevocable transfer by personal representative, trustee, or guardian to custodian.
44-5-117. Transfers by other persons to custodian.
44-5-118. Effect of custodian's written acknowledgment of delivery.
44-5-119. Creation and transfer of custodial property.
44-5-120. Single custodianship.
44-5-121. Validity of transfer.
44-5-122. Powers and duties of custodian; name in which registered securities to be held; commingling with personal assets.
44-5-123. Custodian's rights, powers, and authority over custodial property; liability for breach of Code Section 44-5-122.
44-5-124. Custodial discretion in transfers of custodial property for support, maintenance, education, and general use and benefit of minor.
44-5-125. Compensation; expenses of custodian; bond.
44-5-126. Liability of third person for dealings with person purporting to act in capacity of custodian.
44-5-127. Assertion of claim arising out of custodial relationship.
44-5-128. Appointment of successor custodian.
44-5-129. Accounting by custodian; petition for accounting.
44-5-130. Transfer of custodial property by custodian to minor or minor's estate.
44-5-131. Applicability to transfers made after July 1, 1990.
44-5-132. Applicability to transfers made prior to July 1, 1990.
44-5-133. Uniform applicability of article.
44-5-134. Exceptions to article.

Article 6

Revised Uniform Anatomical Gifts

44-5-140. Short title.
44-5-141. Definitions.
44-5-142. Anatomical gifts during life of donor.
44-5-143. Method to make an anatomical gift.

Sec.
44-5-144. Amending, or revoking an anatomical gift.
44-5-145. Refusal to make an anatomical gift.
44-5-146. Role and authority of people other than donor.
44-5-147. Classes of persons available to make donations; priority.
44-5-148. Signed writing or oral communication required for gift of document.
44-5-149. Recipients of anatomical gifts of procurement organizations.
44-5-150. Search and notification for information identifying donor status.
44-5-151. Delivery of document.
44-5-152. Rights and duties of procurement organizations.
44-5-153. Coordination of procurement and use.
44-5-154. Limited prohibition on sale or purchase of body parts.
44-5-155. Penalties.
44-5-156. Immunity.
44-5-157. Requirements for validity of document of gift; governing law.
44-5-158. Donor registry.
44-5-159. Impact of anatomical gift on an advance directive for health care.
44-5-159.1. Cooperation between medical examiners and procurement organizations.
44-5-159.2. Role of medical examiner.
44-5-159.3. Application.
44-5-159.4. Construction with federal law.

Article 7

Prescription

44-5-160. Nature of title by prescription.
44-5-161. Adverse possession; effect of permissive possession.
44-5-162. Effect of fraud on prescription.
44-5-163. When adverse possession for 20 years confers title.
44-5-164. When adverse possession for seven years confers title.
44-5-165. How actual possession of lands evidenced.
Sec.
44-5-166. Constructive possession of lands; effect of constructive possession of same land by adjacent owners.
44-5-167. Extent of constructive possession under deed; judicial notice.
44-5-168. Adverse possession of mineral rights under certain conditions; procedure to obtain title.
44-5-169. Possession of land as notice; presumption from possession of husband and wife.
44-5-170. Effect of disabilities on commencement of prescription.
44-5-171. Effect of intervening disabilities; tacking.
44-5-172. Tacking of successive possessions.
44-5-173. Prescription involving unrepresented estates, joint tenancies, or dismissed actions.
44-5-174. Tacking of prior possession originating in fraud.
44-5-175. Prescription involving incorporeal rights.
44-5-176. Effect on prescription of notice of instrument creating a lien.
44-5-177. Adverse possession of personal property.

Article 8

Escheat

44-5-190 through 44-5-199 [Repealed].

Article 9

Forfeiture

44-5-210. Lien of state for costs of prosecution.
44-5-211. Forfeiture of abandoned cemetery lots; proceedings for reclamation and subsequent sale; disposition of proceeds.

Article 10

Dedication

44-5-230. Dedication of lands to public use.

RESEARCH REFERENCES

Am. Jur. Proof of Facts. — Procurement of Purchaser of Real Estate, 4 POF2d 225.

Payment Made for Unexercised Option to Purchase Rather Than as Down Payment, 9 POF2d 495.

Racial Discrimination in Sale of Real Estate, 14 POF2d 511.

Real Property Contracts — Specific Performance with Abatement of Purchase Price, 19 POF3d 543.

Real Estate Broker's Misrepresentation or Nondisclosure as to Condition or Value of Realty, 39 POF3d 309.

Real Estate Purchaser's Rights and Remedies Where Seller is Unable to Convey Marketable Title, 52 POF3d 429.

Proof of Circumstances Establishing Purchaser's Abandonment of Real Estate Contract, 56 POF3d 335.

Optionee's Timely Exercise of Option to Purchase Realty, 60 POF3d 255.

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

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

Condemnation of Easements, 22 Am. Jur. Trials 743.

Landowner's Evidence of Market Value in Eminent Domain Proceeding, 60 Am. Jur. Trials 447.

Condemnation of Leasehold Interests, 96 Am. Jur. Trials 211.

ARTICLE 1

GRANTS FROM STATE

Law reviews. — For survey of Georgia cases in the area of real property from June 1977 through May 1978, see 30 Mercer L. Rev. 167 (1978).

RESEARCH REFERENCES

ALR. — Grant, reservation, or exception as creating separate and independent legal estate in solid minerals or as passing only incorporeal privilege or license, 66 ALR2d 978.

Validity and effect of provision in deed attempting to make reservation or exception in favor of grantor's spouse, 52 ALR3d 753.

44-5-1. Origin of title to land.

The title to all lands originates in grants from the Government and, since its independence, from the state. (Orig. Code 1863, § 2322; Code 1868, § 2319; Code 1873, § 2350; Code 1882, § 2350; Civil Code 1895, § 3210; Civil Code 1910, § 3798; Code 1933, § 85-301.)

JUDICIAL DECISIONS

When grant from state introduced, no proof of possession required. — When a grant from the state is introduced to show origin of title, no proof of possession is required. It is when the chain of title is not connected with a grant from the state that possession in one of the grantors in the chain must be shown. Ryals v. Wilson, 152 Ga. 757, 111 S.E. 414 (1922).

Cited in United States v. Patterson, 206 F.2d 345 (5th Cir. 1953).

RESEARCH REFERENCES

Am. Jur. 2d. — 63A Am. Jur. 2d, Public Lands, §§ 3 et seq., 76, 77, 48 et seq. 72 Am. Jur. 2d, States, Territories, and Dependencies, §§ 64, 65.

C.J.S. — 73A C.J.S., Public Lands, § 86 et seq. 73B C.J.S., Public Lands, §§ 249, 250, 264 et seq., 296, 297.

44-5-2. How land in state held.

All realty in this state is held under the state as the original owner thereof. It is free from all rent or service and is limited only by the right of eminent domain which remains in the state. (Orig. Code 1863, § 2200; Code 1868, § 2195; Code 1873, § 2221; Code 1882, § 2221; Civil Code 1895, § 3051; Civil Code 1910, § 3623; Code 1933, § 85-202.)

Cross references. — State ownership of wildlife found in state, § 27-1-3.

RESEARCH REFERENCES

Am. Jur. 2d. — 26 Am. Jur. 2d, Eminent Domain, §§ 1 et seq., 20. 28 Am. Jur. 2d, Estates, § 7. 63A Am. Jur. 2d, Public Lands, §§ 3, 118 et seq. 72 Am. Jur. 2d, States, Territories, and Dependencies, § 64 et seq.

C.J.S. — 29A C.J.S., Eminent Domain, §§ 3, 21. 73B C.J.S., Public Lands, §§ 249, 250, 264 et seq. 81A C.J.S., States, § 263.

ALR. — Right of public in shore of inland navigable lake between high- and low-water marks, 40 ALR3d 776.

44-5-3. Form of grants; substantial compliance.

The form of grants heretofore used in this state is established, and a substantial compliance with such form shall be held sufficient. (Orig. Code 1863, § 2323; Code 1868, § 2320; Code 1873, § 2351; Code 1882, § 2351; Civil Code 1895, § 3211; Civil Code 1910, § 3799; Code 1933, § 85-302.)

RESEARCH REFERENCES

Am. Jur. 2d. — 63A Am. Jur. 2d, Public Lands, §§ 3 et seq., 76, 77, 118 et seq.

C.J.S. — 73B C.J.S., Public Lands, § 264 et seq.

44-5-4. Correctable errors in grants.

The following errors in the issuing and recording of grants may be corrected:

(1) Any error in the name or residence of the grantee; or in the location, character, or boundary of the land; or in any other matter or thing connected with the application for or issuing of the grant;

(2) Any error in recording or transcribing the names of applicants for draws or the names of fortunate drawers in the several land lotteries, or

any omission by any of the officers or on the part of any of the agents of the state, or any other mistake in recording the grant; or

(3) Any other error whereby the true grantee is deprived of or jeopardized in his right. (Laws 1827, Cobb's 1851 Digest, p. 656; Laws 1828, Cobb's 1851 Digest, p. 657; Laws 1837, Cobb's 1851 Digest, p. 658; Ga. L. 1851-52, p. 247, § 1; Code 1863, § 2324; Code 1868, § 2321; Code 1873, § 2352; Code 1882, § 2352; Civil Code 1895, § 3212; Civil Code 1910, § 3800; Code 1933, § 85-303.)

JUDICIAL DECISIONS

Amendment of section in 1837 unconstitutional. — Georgia Laws 1837, p. 658, authorizing and requiring the Governor and the Secretary of State, Surveyor and Comptroller General to correct errors in grants and to issue alias grants, was held to be unconstitutional so far as the rights of third persons, other than the state and the original grantee are concerned. Hilliard v. Doe, 7 Ga. 172 (1849).

Grant valid although uncorrected, and cannot be "collaterally" attacked. — Nowhere is it intimated that the grant is not to be deemed valid as long as the grant remains uncorrected — unannulled. It does not give any countenance to the idea that a grant may be "collaterally" attacked. Vickery v. Scott, 20 Ga. 795 (1856); Houston v. State, 124 Ga. 417, 52 S.E. 757 (1905).

RESEARCH REFERENCES

Am. Jur. 2d. — 13 Am. Jur. 2d, Cancellation of Instruments, §§ 6, 31 et seq. 63A Am. Jur. 2d, Public Lands, §§ 11, 120 et seq., 124, 128 et seq. 66 Am. Jur. 2d, Reformation of Instruments, §§ 1, 3, 28, 30, 48, 69, 70. 72 Am. Jur. 2d, States, Territories, and Dependencies, § 67.

C.J.S. — 26A C.J.S., Deeds, §§ 43, 53 et seq. 73B C.J.S., Public Lands, §§ 264 et seq.

44-5-5. Application to Governor for correction of errors; notice to interested parties; evidence of error or mistake; order for correction of errors.

In all cases where errors in issuing or recording grants are sought to be corrected, an application shall be made in writing to the Governor showing that notice in writing of the nature and time of the application has been served upon every person who may be in any manner interested in the question. If no objection is filed and satisfactory evidence of the error or mistake is produced and submitted in writing, the Governor may pass an order requiring the error to be corrected and, if necessary, requiring a new grant to be issued upon delivery of the first grant for cancellation. (Laws 1828, Cobb's 1851 Digest, p. 657; Laws 1843, Cobb's 1851 Digest, p. 658; Laws 1845, Cobb's 1851 Digest, p. 659; Code 1863, § 2325; Code 1868, § 2322; Code 1873, § 2353; Code 1882, § 2353; Civil Code 1895, § 3213; Civil Code 1910, § 3801; Code 1933, § 85-304.)

JUDICIAL DECISIONS

Best evidence in respect to written notice upon parties in interest is to be procured by getting a certified copy of the proceedings from the Governor's office, and as the presumption is that the Governor did the Governor's duty, the defendant will not be heard to deny that the defendant had notice of the proceedings to correct a grant by defendant's own oath as a witness, until the defendant has exhausted the better evidence which the certified copy would afford. Williams v. Goodall, 60 Ga. 482 (1878).

Grant not subject to collateral attack. — If a grant for land issued from the state to one who was not the fortunate drawer in a lottery, that fact cannot be shown collaterally on the trial of an action of ejectment, but the original grant should be corrected by a proceeding instituted for that purpose, in accordance with the laws of the state. Roe v. Doe, 37 Ga. 560 (1868).

RESEARCH REFERENCES

Am. Jur. 2d. — 63A Am. Jur. 2d, Public Lands, §§ 11, 128 et seq. 66 Am. Jur. 2d, Reformation of Instruments, §§ 1, 3, 28, 30, 48, 69, 70. 72 Am. Jur. 2d, States, Territories, and Dependencies, § 67.

C.J.S. — 73B C.J.S., Public Lands, § 282 et seq.

44-5-6. When correction refused.

If objections are filed to the proceedings instituted pursuant to Code Section 44-5-5 and it appears that the proposed correction will interfere with the vested rights of other bona fide claimants, the Governor shall refuse to make such correction and shall leave the parties to their judicial remedies. (Orig. Code 1863, § 2326; Code 1868, § 2323; Code 1873, § 2354; Code 1882, § 2354; Civil Code 1895, § 3214; Civil Code 1910, § 3802; Code 1933, § 85-305.)

RESEARCH REFERENCES

Am. Jur. 2d. — 63A Am. Jur. 2d, Public Lands, §§ 11, 128 et seq.

C.J.S. — 73B C.J.S., Public Lands, § 282 et seq.

44-5-7. Trial in superior court.

If it is unclear whether the proposed correction would interfere with the vested rights of others, the Governor may cause an issue to be made and certify the same to the superior court of the county where the land is located, requiring the court to cause the issue to be tried before a jury and have its verdict certified to him. (Orig. Code 1863, § 2327; Code 1868, § 2324; Code 1873, § 2355; Code 1882, § 2355; Civil Code 1895, § 3215; Civil Code 1910, § 3803; Code 1933, § 85-306.)

RESEARCH REFERENCES

ALR. — Loss of easement by adverse possession, or nonuser, 1 ALR 884; 66 ALR 1099; 98 ALR 1291; 25 ALR2d 1265.

44-5-8. Filing and preserving papers and evidence.

All the papers and evidence upon every application made pursuant to Code Section 44-5-5 shall be filed and preserved in the office of the Governor. (Orig. Code 1863, § 2329; Code 1868, § 2326; Code 1873, § 2357; Code 1882, § 2357; Civil Code 1895, § 3216; Civil Code 1910, § 3804; Code 1933, § 85-307.)

JUDICIAL DECISIONS

Best evidence of notice under former Code 1873, § 2353 (see O.C.G.A. § 44-5-5) was certified copy of proceedings from executive office. Williams v. Goodall, 60 Ga. 482 (1878).

44-5-9. Advertising prior to issuing corrected grant where original lost.

If the applicant for a corrected grant is not able to produce the original grant to be canceled, the Governor may issue the corrected grant after advertising for six months, at the expense of the applicant, for any objection to be filed. (Laws 1837, Cobb's 1851 Digest, p. 658; Code 1863, § 2330; Code 1868, § 2327; Code 1873, § 2358; Code 1882, § 2358; Civil Code 1895, § 3217; Civil Code 1910, § 3805; Code 1933, § 85-308.)

RESEARCH REFERENCES

Am. Jur. 2d. — 13 Am. Jur. 2d, Cancellation of Instruments, §§ 6, 31 et seq. 52 Am. Jur. 2d, Lost and Destroyed Instruments, § 1 et seq.

44-5-10. Effect of corrected grant; notation of correction.

(a) All corrected grants shall take effect from the time of the issuance of the original grant but shall not affect the vested rights of bona fide purchasers without notice.

(b) Corrected grants shall bear upon their face a notation of the correction made and the date of the executive order under which it was made. (Orig. Code 1863, § 2331; Code 1868, § 2328; Code 1873, § 2359; Code 1882, § 2359; Civil Code 1895, § 3218; Civil Code 1910, § 3806; Code 1933, § 85-309.)

RESEARCH REFERENCES

Am. Jur. 2d. — 63A Am. Jur. 2d, Public Lands, § 128 et seq.

C.J.S. — 26A C.J.S., Deeds, § 43.

44-5-11. Grounds for setting aside grants.

Upon a writ of scire facias, grants issued by the state may be set aside by the superior court of the county where the land is located on the ground:

(1) That they were obtained by fraud or willful misrepresentations to the officers of the state by the grantee or those in privity with him;

(2) Of collusion between the grantee and the officers of the state; or

(3) Of fraud, accident, or mistake by the officers of the state, which fraud, accident, or mistake was known to the grantee. (Orig. Code 1863, § 2332; Code 1868, § 2329; Code 1873, § 2360; Code 1882, § 2360; Civil Code 1895, § 3219; Civil Code 1910, § 3807; Code 1933, § 85-310.)

JUDICIAL DECISIONS

Writ of scire facias can only be resorted to by state, not private citizen. — Without legislation, the courts could not acquire jurisdiction by process of scire facias over disputed questions relative to grants. This difficulty was met by the adoption of this statute, and now there can be no doubt that the state can, in the state's own name and in the state's own right, resort to the writ of scire facias in order to effect a repeal of a grant improvidently issued. It is equally true, however, that there is an entire absence of legislation conferring upon a private citizen the right to institute such a proceeding in the citizen's own name under any circumstances. Calhoun v. Cawley, 104 Ga. 335, 30 S.E. 773 (1898) (see O.C.G.A. § 44-5-11).

RESEARCH REFERENCES

Am. Jur. 2d. — 63A Am. Jur. 2d, Public Lands, §§ 5 et seq., 98, 105, 120 et seq., 124. 72 Am. Jur. 2d, States, Territories, and Dependencies, §§ 66, 67.

C.J.S. — 73B C.J.S., Public Lands, §§ 268 et seq., 279, 282 et seq.

44-5-12. Impeachment of grants; grounds; effect of irregularities or misnomer.

Grants may be impeached before the courts where they are:

(1) Void upon their face;

(2) Issued without authority of law or against a prohibition in a law; or

(3) Issued for property to which the state had no title.

However, mere irregularities in the proceedings to obtain grants shall not be inquired into nor may a mistake in the name of the grantee be proved by parol. (Ga. L. 1857, p. 58, § 1; Code 1863, § 2333; Code 1868, § 2330;

Code 1873, § 2361; Code 1882, § 2361; Civil Code 1895, § 3220; Civil Code 1910, § 3808; Code 1933, § 85-311.)

JUDICIAL DECISIONS

Grant from state cannot be set aside in proceeding to which state is not party. Parker v. Hughes, 25 Ga. 374 (1858) (case distinguished from Dart v. Orme, 41 Ga. 376 (1870), in Calhoun v. Cawley, 104 Ga. 335, 30 S.E. 773 (1898)).

Parol evidence admissible to show proper name if patent ambiguity. — While a mistake in the name of a grantee of land from the state cannot be proved by parol when it is offered in evidence, yet if there was a patent ambiguity, parol testimony was admissible to show the proper name. Ferrell v. Hurst, 68 Ga. 132 (1881).

Parol evidence admissible where latent ambiguity exists. — Grant was issued to a certain person. There was no such person. This made a latent ambiguity, and aliunde evidence was admissible to show who was the person meant. Bowen v. Slaughter, 24 Ga. 338, 71 Am. Dec. 135 (1858).

In the case of a latent ambiguity, parol evidence is admissible, not to prove a mistake in the name of the grantee, but to give effect to the grant, by showing the person intended as the grantee. Walker v. Wells, 25 Ga. 141, 71 Am. Dec. 164 (1858); Brooking v. Dearmond, 27 Ga. 58 (1859); Roe v. Doe, 32 Ga. 348 (1861).

Grant cannot be collaterally impeached by proof that the grant was issued through mistake to the wrong person. Martin v. Anderson, 21 Ga. 301 (1857).

Grant issued under "head-right laws". — Grant under the ''head-right laws,'' which is apparently issued conformably with law, is not open to collateral attack. Houston v. State, 124 Ga. 417, 52 S.E. 757 (1905) (''Head-right Acts,'' contained in former Code 1895, §§ 3223-3236, were repealed by Ga. L. 1909, pp. 115, 116).

RESEARCH REFERENCES

Am. Jur. 2d. — 63A Am. Jur. 2d, Public Lands, §§ 5 et seq., 98, 105, 120 et seq., 124. 72 Am. Jur. 2d, States, Territories, and Dependencies, §§ 66, 67.

C.J.S. — 73B C.J.S., Public Lands, §§ 268 et seq., 282 et seq.

44-5-13. Grants by implication; presumptions favor grants.

A grantee of lands or a franchise takes nothing by implication but is confined to the terms of his grant; but every presumption is in favor of a grant. (Orig. Code 1863, § 2334; Code 1868, § 2331; Code 1873, § 2362; Code 1882, § 2362; Civil Code 1895, § 3221; Civil Code 1910, § 3809; Code 1933, § 85-312.)

JUDICIAL DECISIONS

Grant to maintain turnpike road strictly construed in favor of public. — Grant to a company incorporating them to construct and maintain a turnpike road, whether it be of property or franchises, is to be construed strictly in favor of the public, and nothing passes but what is granted in clear and explicit terms. Vernon Shell Rd. Co. v. Mayor of Savannah, 95 Ga. 387, 22 S.E. 625 (1895).

Authority to extend railroad into city not found. — An Act authorizing a railroad ''to extend their road from any point at or in the City of Savannah to the island of Tybee'' does not authorize the railroad to extend their road into the city, in a direction differing from that to Tybee Island, and to lay their track through the entire length of one of the streets, with a grade requiring deep

excavations and high embankments. Savannah, A. & G.R.R. v. Shields, 33 Ga. 601 (1863).

RESEARCH REFERENCES

Am. Jur. 2d. — 63A Am. Jur. 2d, Public Lands, §§ 3 et seq., 124.

C.J.S. — 73B C.J.S., Public Lands, § 278.

ALR. — Reservation in grant of land of right to hunt and fish with like right to the grantee, as limiting the right of the grantee actual owners of the land, 32 ALR 1533.

Release of power of appointment of property, 76 ALR 1430.

Width of way created by express grant, reservation, or exception not specifying width, 28 ALR2d 253.

Validity and effect of provision in deed attempting to make reservation or exception in favor of grantor's spouse, 52 ALR3d 753.

Liability for interference with franchise, 97 ALR3d 890.

44-5-14. Presumption of grant on 20 years' possession.

When the land is subject to entry and grant, 20 years' possession of land under a claim of right shall authorize the courts to presume a grant. (Orig. Code 1863, § 2335; Code 1868, § 2332; Code 1873, § 2363; Code 1882, § 2363; Civil Code 1895, § 3222; Civil Code 1910, § 3810; Code 1933, § 85-313.)

Cross references. — Conferring title after 20 years' adverse possession, § 44-5-163.

JUDICIAL DECISIONS

Allegations sufficient to satisfy requirements. — Bill alleging that the complainant and its predecessors in title have been in possession for 20 to 50 years, and that such possession has been public, continuous, open, notorious, exclusive, uninterrupted, and peaceable, and accompanied by a claim of right, satisfies this and other sections on the subject. Western Union Tel. Co. v. Georgia R.R. & Banking Co., 227 F. 276 (S.D. Ga. 1915).

RESEARCH REFERENCES

Am. Jur. 2d. — 3 Am. Jur. 2d, Adverse Possession, §§ 7, 8. 63A Am. Jur. 2d, Public Lands, § 77.

C.J.S. — 73B C.J.S., Public Lands, § 267.

ALR. — Writing as essential to color of title in adverse occupant of land, 2 ALR 1457.

ARTICLE 2

CONVEYANCES

Cross references. — Real estate transfer taxes, § 48-6-1 et seq.

RESEARCH REFERENCES

ALR. — Effect of designating grantee in deed or mortgage by firm name, 1 ALR 564; 8 ALR 493.

Parol evidence to prove title to real property when the title is only collaterally involved, 1 ALR 1143.

Test of conveyance as quitclaim or otherwise, 3 ALR 945.

Bona fides of purchaser of note on an executory consideration, performance of which is a condition precedent, 3 ALR 987; 100 ALR 1357.

Specific performance of land contract where there is a deed blank as to grantee in chain of title, 4 ALR 408.

Time for performance of contract for sale or exchange of land where time fixed by contract has been waived, 4 ALR 815.

Property included in a lease of premises described by street number, 8 ALR 673.

What are ''minerals'' within deed, lease, or license, 17 ALR 156; 86 ALR 983.

Validity and effect of deed to ''heirs'' of living person, 22 ALR 713.

Understatement by vendor of real property as to yearly taxes, 29 ALR 621.

Validity and effect of deed executed in blank as to name of grantee, 32 ALR 737; 175 ALR 1294.

Taking or remaining in possession under executory contract for the purchase of land as waiver of right to complain of defects in or failure of vendor's title, 34 ALR 1321.

Effect of unauthorized delivery or fraudulent procurement of escrow on title or interest in property, 48 ALR 405; 54 ALR 1246.

Questions arising in connection with possibilities of reverter, 51 ALR 1473.

Quantum of estate passing to grantee as affected by language in deed purporting to express his intention that property is to go to third person upon his death, 52 ALR 540.

Validity, construction, and effect of provision in real estate mortgage as to rents and profits, 55 ALR 1020; 87 ALR 625; 91 ALR 1217.

Duty of purchaser of real property to disclose to the vendor facts or prospects affecting the value of the property, 56 ALR 429.

Marketable title, 57 ALR 1253; 81 ALR2d 1020.

Rule that particular description in deed prevails over general description, 72 ALR 410.

Deed of one acquiring vendor's title as meeting vendor's obligation, 109 ALR 182.

Right of vendee prior to time fixed by contract for conveyance to complain of encumbrances or defects in title, 109 ALR 242.

Validity and effect of deed which purports to convey specified acreage or quantity of land out of a larger tract, with or without a right of selection expressed, 117 ALR 1071.

Inconsistency between description of land in instruments conveying same or affecting title thereto and description in another instrument referred to therein, 134 ALR 1041.

Effect of provision in deed purporting to except or reserve a right in the grantor in respect of land or interest which he does not own, 136 ALR 644.

Reformation on ground of mutual mistake regarding character or extent of estate or title imported by language used in instrument, 141 ALR 826.

Rights or interests covered by quitclaim deed, 162 ALR 556.

Effectiveness of reservation of vendor's crop rights in land contract in absence of such reservation in deed later executed, 8 ALR2d 565.

Nature of deed which may be required of vendor who is unable to convey title for which he has contracted, 13 ALR2d 1462.

Who are within gift or grant to ''offspring,'' 23 ALR2d 842.

Width of way created by express grant, reservation, or exception not specifying width, 28 ALR2d 253.

Conveyance of real property to mortgagee or lienholder as constituting ''sale or exchange'' rendering owner liable for commissions to broker having exclusive agency or exclusive right to sell, 46 ALR2d 1116.

Measure of vendee's recovery in action for damages for vendor's delay in conveying real property, 74 ALR2d 578.

Deeds: meaning of term ''dwelling'' or ''dwelling house'' or ''house,'' as used in the conveyance or exception or reservation clauses, 38 ALR3d 1419.

Property owner's liability for unpaid taxes following acquisition of property by another at tax sale, 100 ALR3d 593.

Restrictive covenants as to height of structures or buildings, 1 ALR4th 1021.

Liability to real-property purchaser for negligent appraisal of property's value, 21 ALR4th 867.

Option to purchase real property as affected by optionor's receipt of offer for, or sale of, larger tract which includes the optioned parcel, 34 ALR4th 1217.

Construction and effect of provision in contract for sale of realty by which purchaser agrees to take property "as is" or in its existing condition, 8 ALR5th 312.

44-5-30. Requisites of deed to lands; inquiry into consideration.

A deed to lands must be in writing, signed by the maker, and attested by at least two witnesses. It must be delivered to the purchaser or his representative and be made on a good or valuable consideration. The consideration of a deed may always be inquired into when the principles of justice require it. (Laws 1785, Cobb's 1851 Digest, p. 164; Code 1863, § 2649; Code 1868, § 2648; Code 1873, § 2690; Code 1882, § 2690; Civil Code 1895, § 3599; Civil Code 1910, § 4179; Code 1933, § 29-101.)

JUDICIAL DECISIONS

Analysis

General Consideration
Writing
Signing
Attestation
Delivery
1. Essentiality
2. Acceptance
3. Intent
4. When Made
5. Presumptions
6. Jury Questions
7. Jury Findings
Consideration
1. Value
2. Inquiry
Description
1. Applicability of Definiteness Requirement
2. Test as to Sufficiency
3. Key to Location
Seal
Petition to Cancel or Void Deed

General Consideration

Application and definition of "deed". — Requisites of "a deed to lands" have been defined in this section, thus indicating a recognition, as other courts have defined, that the word "deed" is one of wide application and of definition other than a narrow one whereby lands are conveyed. This is true, although when used in this state it is usually understood in the more limited and restricted sense as referring to land conveyances. Powell v. Powell, 196 Ga. 694, 27 S.E.2d 393 (1943).

Deed ineligible for recordation. — Deed was materially altered when an attachment containing the description of one of two parcels of property was removed, the deed was ineligible for recordation, and the buyer's failure to object to the recording of the

altered deed did not support a finding that the buyer accepted the altered deed without objection as: (1) the seller did not re-sign the deed and it was not re-attested; (2) the buyer was not sent the altered deed or land description; (3) there was no evidence that the buyer consented to the alteration or that the buyer otherwise agreed to accept only one parcel of land; (4) the delivery of the altered deed to the bank's attorney was not constructive delivery to the buyer as the attorney represented the bank and the buyer had not authorized the attorney to accept and retain the recorded deed on the buyer's behalf; and (5) the buyer never received a copy of the altered deed or land description before or after the deed was recorded. Z & Y Corp. v. Indore C. Stores, Inc., 282 Ga. App. 163, 638 S.E.2d 760 (2006).

Intention of parties. — Crucial test to determine whether deed conveys title to, or creates an easement in, land is the intention of the parties, which is determined by looking to the whole deed, and not merely upon disjointed parts of the deed; the recitals in the deed, the contract, the subject matter, the object, purpose, and nature of restrictions or limitations, and the attendant facts and circumstances of the parties at the time of making the deed are to be considered. Rogers v. Pitchford, 181 Ga. 845, 184 S.E. 623 (1936).

Livery of seisin is no longer necessary in this state. Gresham v. Webb, 29 Ga. 320 (1859).

Valid and binding deed. — Limited warranty deed signed by the seller, which contained a description of two parcels of property, was valid and binding between the parties and the seller's failure to read the deed did not affect the conveyance of title as: (1) the seller signed the deed without reading the deed; (2) the seller's signature was notarized; (3) the deed was delivered to the buyer; and (4) there was no allegation that the seller could not read or that the buyer defrauded the seller or otherwise prevented the seller from reading the deed before the seller signed the deed. Z & Y Corp. v. Indore C. Stores, Inc., 282 Ga. App. 163, 638 S.E.2d 760 (2006).

Deed not recorded if not executed in manner prescribed. — Penalty for failure to execute the deed in the manner prescribed by law is a refusal to admit the deed to record. Hoover v. Mobley, 198 Ga. 68, 31 S.E.2d 9 (1944).

Deed not executed in precisely the manner prescribed in O.C.G.A. § 44-5-30 is not properly recordable and therefore does not give constructive notice to all the world. Duncan v. Ball, 172 Ga. App. 750, 324 S.E.2d 477 (1984).

Cited in Sutton v. Aiken, 62 Ga. 733 (1879); Sterling v. Park, 129 Ga. 309, 58 S.E. 828, 121 Am. St. R. 224, 13 L.R.A. (n.s.) 298, 12 Ann. Cas. 201 (1907); Morehead v. Allen, 131 Ga. 807, 63 S.E. 507 (1909); Thrower v. Baker, 144 Ga. 372, 87 S.E. 301 (1915); Coles v. Mozley, 148 Ga. 21, 95 S.E. 963 (1918); Gammage v. Perry, 29 Ga. App. 427, 116 S.E. 126 (1923); Newsom v. Reynolds Chevrolet Co., 43 Ga. App. 376, 158 S.E. 763 (1931); Parker v. Wellons, 43 Ga. App. 721, 160 S.E. 109 (1931); Carder v. Arundel Mtg. Co., 47 Ga. App. 309, 170 S.E. 312 (1933); Charles Broadway Rouss, Inc. v. First Nat'l Bank, 180 Ga. 244, 178 S.E. 732 (1935); Lovett v. H.C. Arnall Merchandise Co., 182 Ga. 356, 185 S.E. 315 (1936); Armour Fertilizer Works v. Maxwell, 186 Ga. 801, 199 S.E. 120 (1938); First Nat'l Bank v. Harmon, 186 Ga. 847, 199 S.E. 223 (1938); Trustees of Jesse Parker Williams Hosp. v. Nisbet, 189 Ga. 807, 7 S.E.2d 737 (1940); Atkinson v. England, 194 Ga. 854, 22 S.E.2d 798 (1942); Avary v. Avary, 202 Ga. 22, 41 S.E.2d 314 (1947); Warwick v. Ocean Pond Fishing Club, 206 Ga. 680, 58 S.E.2d 383 (1950); Dodson v. Phagan, 227 Ga. 480, 181 S.E.2d 366 (1971); Top Quality Homes, Inc. v. Jackson, 231 Ga. 844, 204 S.E.2d 600 (1974); Dawson v. Keitt, 232 Ga. 10, 205 S.E.2d 309 (1974); Smith v. Smith, 145 Ga. App. 816, 244 S.E.2d 917 (1978); Moister v. Citizens Trust Bank (In re Truitt), 11 Bankr. 15 (Bankr. N.D. Ga. 1981); Management Assistance, Inc. v. Computer Dimensions, Inc., 546 F. Supp. 666 (N.D. Ga. 1982); Barkley v. National Sec. Fire & Cas. Co., 170 Ga. App. 17, 315 S.E.2d 923 (1984); Gay v. First Nat'l Bank, 184 Ga. App. 340, 361 S.E.2d 492 (1987); Sewell v. OK Oil, Inc., 203 Ga. App. 701, 417 S.E.2d 408 (1992); Hopkins v. Virginia Highland Assocs., L.P., 247 Ga. App. 243, 541 S.E.2d 386 (2000); Jackson v. Tolliver, 277 Ga. 58, 586 S.E.2d 321 (2003).

Writing

Law favors title to realty being evidenced by written instruments; conversely, the law

Writing (Cont'd)

does not favor title to realty being evidenced by parol agreements. Freeman v. Saxton, 243 Ga. 571, 255 S.E.2d 28 (1979).

Sale of standing timber. — Since standing timber is realty, the sale of standing timber must be in writing. Foy v. Scott, 197 Ga. 138, 28 S.E.2d 107 (1943).

Signing

Grantor's signature made by another. — Signature of a grantor to a deed made by another in the grantor's presence and at the grantor's request is a valid execution of the instrument and would bind the grantor, especially when the deed was delivered. Guthrie v. Gaskins, 171 Ga. 303, 155 S.E. 185 (1930).

If grantor's name and mark appear in instrument, section complied with. — Under this statute, the signature, or mark of one unable to make a signature need not be at the end of the instrument, nor need the name and the mark be in immediate proximity to each other. If, in the body of the instrument, the name of the grantor and the grantor's mark appear and the latter is made for the purpose of adopting the instrument as the grantor's act, this statute will be sufficiently complied with. Horton v. Murden, 117 Ga. 72, 43 S.E. 786 (1903) (see O.C.G.A. § 44-5-30).

Attestation

Requirement of two witnesses is to be taken to apply to a ''perfect deed,'' which on recordation will be constructive notice to all the world. In this respect, this statute does not change the common law. Gardner, Dexter & Co. v. Moore, Trimble & Co., 51 Ga. 268 (1874) (see O.C.G.A. § 44-5-30).

Requirement of two witnesses is to be taken to apply to a ''perfect deed,'' which on recordation will be constructive notice to all the world. Citizens' Bank v. Taylor, 169 Ga. 203, 149 S.E. 861 (1929).

Unattested deed not void. — Phrase ''a deed to lands must be in writing, signed by the maker, attested by at least two witnesses'' is a statement of a requirement of law necessary to be met in order to entitle a deed to record, and does not declare that, unless so attested, a deed is void. Hoover v. Mobley, 198 Ga. 68, 31 S.E.2d 9 (1944).

Unattested deed valid as between parties. — As between the parties, a deed is valid though attested by but one witness. Downs v. Yonge, 17 Ga. 295 (1855); Lowe v. Allen, 68 Ga. 225 (1881).

Deed without witnesses is legal and binding between the parties thereto, and those claiming under the parties as mere volunteers. Citizens' Bank v. Taylor, 169 Ga. 203, 149 S.E. 861 (1929); Hoover v. Mobley, 198 Ga. 68, 31 S.E.2d 9 (1944).

It has been held that, as between the two parties, a deed is valid, though attested by but one witness. But the requirement as to two witnesses is to be taken to apply to a ''perfect deed,'' which on recordation will be constructive notice to all the world. Worley v. Planters' Cotton Oil Co., 180 Ga. 81, 178 S.E. 289 (1935).

Unattested deed cannot constitute constructive notice. — Registry of a deed not attested, or not proved or acknowledged according to law, is not constructive notice to a subsequent purchaser. Citizens' Bank v. Taylor, 169 Ga. 203, 149 S.E. 861 (1929).

Deed not properly attested or acknowledged, as required by statute, is ineligible for recording and, even if recorded, does not constitute constructive notice. Higdon v. Gates, 238 Ga. 105, 231 S.E.2d 345 (1976).

Pecuniarily interested party is disqualified from witnessing a deed's execution. Hoover v. Mobley, 198 Ga. 68, 31 S.E.2d 9 (1944).

Pecuniary interest must exist at time of execution. — To render ineffective for that purpose a recorded instrument relied on as ''constructive notice'' to the public because an official witness was pecuniarily interested, such pecuniary interest must be shown to have existed at the time of the execution of the instrument. Worley v. Planters' Cotton Oil Co., 180 Ga. 81, 178 S.E. 289 (1935).

Attesting clause reciting delivery raises presumption deed delivered. — When a deed was duly attested by two witnesses, one of whom was an official so authorized by law, and the attesting clause recited delivery, this was sufficient to raise a prima facie presumption that the deed was delivered. Grice v. Grice, 197 Ga. 686, 30 S.E.2d 183 (1944).

Delivery

1. Essentiality

Without delivery, a deed conveys no title. Maddox v. Gray, 75 Ga. 452 (1885).

Deed that is not delivered does not operate to convey title out of the grantor thereof merely because of the deed's proper execution. Plowden v. Plowden, 52 Ga. App. 741, 184 S.E. 343 (1935).

Delivery of a deed is essential to the conveyance of title thereby. Hall v. Metropolitan Life Ins. Co., 192 Ga. 805, 16 S.E.2d 576 (1941).

Deed passes no title unless and until delivered. Brown v. Brown, 192 Ga. 852, 16 S.E.2d 853 (1941).

Delivery is essential to the passing of the title by a deed. Foy v. Scott, 197 Ga. 138, 28 S.E.2d 107 (1943).

Delivery of deed essential to validity. — Delivery to the grantee named in a deed to land is essential to the deed's validity. Daniel v. Stinson, 179 Ga. 701, 177 S.E. 590 (1934), later appeal, 193 Ga. 844, 20 S.E.2d 257 (1942).

Delivery of a deed to land is essential to the deed's validity as a conveyance. Calhoun v. Dowdy, 207 Ga. 584, 63 S.E.2d 373 (1951).

Delivery of a deed conveying realty is essential to the deed's validity. Kirby v. Johnson, 208 Ga. 190, 65 S.E.2d 811 (1951).

Trial court did not err in denying the niece's motion for directed verdict under O.C.G.A. § 9-11-50(a) as some evidence supported the finding that the deed naming the niece as grantee was never delivered to the niece as required under O.C.G.A. § 44-5-30; there was evidence that the original deed was found in the decedent's safe deposit box and that the key to the box had been in the decedent's control when the decedent died. Robinson v. Williams, 280 Ga. 877, 635 S.E.2d 120 (2006).

Grantor defrauding creditors may question deed's delivery and validity. — Doctrine that the grantor in a deed made for the purpose of hindering, delaying, or defrauding the grantor's creditors, or one claiming in the grantor's right, cannot be heard to question the validity of such deed does not apply if the deed is not in fact delivered. Fuller v. Fuller, 211 Ga. 201, 84 S.E.2d 665 (1954).

As to what constitutes delivery, see Puett v. Strickland, 144 Ga. 193, 86 S.E. 547 (1915).

Enforcement of foreclosure provision barred by lack of delivery. — Trial court did not err in finding that the foreclosure provisions of the deed to secure debt could not be enforced because the deed had never been delivered and recorded. Jones v. Phillips, 227 Ga. App. 94, 488 S.E.2d 692 (1997).

Foreclosure sale. — Principle that, for title to real property to pass, a deed must be delivered, applies in the case of a foreclosure sale. Gooden v. Buffalo Sav. Bank, 21 Bankr. 456 (Bankr. N.D. Ga. 1982).

2. Acceptance

Delivery is complete only when the deed is accepted. Plowden v. Plowden, 52 Ga. App. 741, 184 S.E. 343 (1935).

Delivery by the grantor necessarily includes acceptance by the grantee. Stallings v. Newton, 110 Ga. 875, 36 S.E. 227 (1900). (See also answer of court in Beardsley v. Hilson, 94 Ga. 50, 20 S.E. 272 (1894), to contrary dictum in Ross v. Campbell, 73 Ga. 309 (1884)).

Delivery of a deed is essential to the deed's validity and it is complete only when the deed is accepted. The delivery may be actual or constructive. The record of a properly attested deed purporting on the deed's face to have been delivered is prima facie or presumptive evidence of delivery which, of course, is rebuttable. Domestic Loans of Wash., Inc. v. Wilder, 113 Ga. App. 803, 149 S.E.2d 717 (1966).

When delivery and acceptance of deed complete. — Delivery of a deed is complete as against the maker at the moment when the deed is in the hands or in the power of a grantee or donee or some one for the grantee, with the consent of the grantor and with the intention that the grantee shall hold the deed as a muniment of title. National Fire Ins. Co. v. Thompson, 51 Ga. App. 625, 181 S.E. 101 (1935); First Nat'l Bank v. Kelly, 190 Ga. 603, 10 S.E.2d 66 (1940); Giuffrida v. Knight, 210 Ga. 128, 78 S.E.2d 29 (1953).

Delivery of a deed is complete as against the maker only when the deed is in the hands of or in the power of the grantee or some one authorized to act for the grantee, with the consent of the grantor, and with the intention that the grantee hold the deed as a muniment of title. Keesee v. Collum, 208 Ga. 382, 67 S.E.2d 120 (1951).

Delivery may be to third person. — Deed by a father to his minor child may be delivered by the grantor to a third person for the

Delivery (Cont'd)
2. Acceptance (Cont'd)

child. First Nat'l Bank v. Kelly, 190 Ga. 603, 10 S.E.2d 66 (1940).

Delivery of a deed to another, to be delivered on certain conditions to the grantee, was in escrow under former Code 1933, § 29-105 (see O.C.G.A. § 44-5-42). But the second delivery by the escrowee to the grantee, and not the first by the grantor to the escrowee, was the one rendering the conveyance valid and complete and under which title past. Foy v. Scott, 197 Ga. 138, 28 S.E.2d 107 (1943).

While it is true that to be valid a deed must be delivered, such delivery does not have to be to the grantee personally. The deed may be received by another authorized to do so by the grantee or may be received by a third person whose actions are later ratified by the grantee. Barrett v. Simmons, 235 Ga. 600, 221 S.E.2d 25 (1975).

Grantor's death revokes agency. — Deed delivered to a third person, as agent of the grantor, to be kept by the third person and delivered to the grantees after the grantor's death, was not a present deed of the grantor, and the death of the grantor revoked the agency, thus preventing effectual delivery. Cooper v. Littleton, 197 Ga. 381, 29 S.E.2d 606 (1944).

3. Intent

Mere manual delivery to grantee is insufficient, unless intention to surrender dominion is also present. Grice v. Grice, 197 Ga. 686, 30 S.E.2d 183 (1944).

Mere manual transition of a paper to the obligee, without a mutual intent to give validity to the paper, but with a mutual intent to the contrary, does not constitute delivery. Peacock v. Horne, 159 Ga. 707, 126 S.E. 813 (1925).

Mere manual delivery to the grantee is not sufficient if the intention of the grantor to surrender dominion is not present. Keesee v. Collum, 208 Ga. 382, 67 S.E.2d 120 (1951).

Intent of grantor to reserve locus penitentiae. — When one executes a deed, the true test of delivery of a deed of conveyance is whether or not the grantor intended to reserve to oneself the locus penitentiae. Giuffrida v. Knight, 210 Ga. 128, 78 S.E.2d 29 (1953).

Intent gathered from circumstances under which delivery made. — Question of the completed and effectual delivery of a deed is one of the intent of the grantor, and this intent to irretrievably part with control of the deed is to be gathered from the circumstances under which the delivery was made. Stinson v. Daniel, 193 Ga. 844, 20 S.E.2d 257 (1942).

4. When Made

Delivery must be in the lifetime of the grantor. Hill v. Hill, 149 Ga. 509, 101 S.E. 121 (1919).

Delivery, actual or constructive, must be made during the lifetime of the grantor. Daniel v. Stinson, 179 Ga. 701, 177 S.E. 590 (1934), later appeal, 193 Ga. 844, 20 S.E.2d 257 (1942).

Delivery of a deed must be made during the lifetime of the grantor. Hall v. Metropolitan Life Ins. Co., 192 Ga. 805, 16 S.E.2d 576 (1941).

Delivery, to be effectual, must be made in the lifetime of the grantor. Stinson v. Daniel, 193 Ga. 844, 20 S.E.2d 257 (1942).

Delivery to third person, handed to grantee after grantor's death, effectual. — While it is true that a delivery, to be effectual, must be made during the lifetime of the grantor, it is not here ruled that the delivery would be ineffectual if the paper did not actually reach the grantee until after the grantor's death, provided the latter in the grantor's lifetime had actually delivered the paper to a third person for the purpose of having the paper handed to the actual grantee, though this latter act was not consummated until after the grantor's death. Stinson v. Daniel, 193 Ga. 844, 20 S.E.2d 257 (1942).

5. Presumptions

No presumption of delivery found. — There was no presumption that a deed was delivered merely because of the deed's execution before two witnesses, one of whom was an officer authorized to attest deeds, since the deed was never recorded during the grantor's lifetime, was found attached to the grantor's will, which was executed the same day, among the grantor's papers after the grantor's death and in a locked box to which no one but the grantor had access,

and where the grantor retained possession of the premises and treated the premises as the grantor's own. Plowden v. Plowden, 52 Ga. App. 741, 184 S.E. 343 (1935).

When deed executed and recorded, delivery presumed. — When a deed properly executed and recorded purports on the deed's face to have been delivered, delivery will be presumed. Shelton v. Edenfield, 148 Ga. 128, 96 S.E. 3 (1918); Garnett v. Royal Ins. Co., 23 Ga. App. 432, 98 S.E. 363 (1919).

When the deed is properly executed, recited delivery, and an entry of record appears, in the absence of rebutting evidence, these facts are sufficient to prove delivery of the deed. Daniel v. Stinson, 179 Ga. 701, 177 S.E. 590 (1934), later appeal, 193 Ga. 844, 20 S.E.2d 257 (1942).

When a deed introduced in evidence showed that the deed had been recorded, this raised a prima facie presumption of delivery. Grice v. Grice, 197 Ga. 686, 30 S.E.2d 183 (1944).

Fact that deeds to secure debt were duly witnessed, recited delivery, and were properly recorded raised a prima facie presumption of delivery. Fuller v. Fuller, 213 Ga. 103, 97 S.E.2d 306 (1957).

Presumption of delivery rebuttable. — Act of registering a deed does not amount necessarily to a delivery. When placed on record by the grantor or by the grantor's direction, it is only prima facie evidence of delivery, and it may be explained or rebutted. Presumption of delivery is not conclusive as between the parties to the instrument. Daniel v. Stinson, 179 Ga. 701, 177 S.E. 590 (1934), later appeal, 193 Ga. 844, 20 S.E.2d 257 (1942).

Formal execution of the deed raises a prima facie presumption that the deed was delivered. This presumption is rebuttable. Stinson v. Daniel, 193 Ga. 844, 20 S.E.2d 257 (1942).

Though the grantor by reserving a life interest in the property raised a prima facie presumption of delivery, such presumption, like the presumption from the execution of a deed or the record thereof, is one that may be rebutted. Keesee v. Collum, 208 Ga. 382, 67 S.E.2d 120 (1951).

Though a presumption of delivery arises from the due attestation and registration of a deed, such presumption may be rebutted by proof that the deed was never delivered. Fuller v. Fuller, 211 Ga. 201, 84 S.E.2d 665 (1954).

When evidence raises conflict, jury decides issue. — Presumptions in favor of the delivery of a deed arising from the deed's possession by the grantee, the deed's due recordation, the deed's attestation by an officer, and the possession of the premises conveyed under the deed are evidence of delivery, but, since these presumptions are rebuttable ones, the evidence of an unimpeached witness that the deed was not delivered raises a conflict between such presumptive evidence of delivery and such direct evidence of nondelivery, which can only be decided by the jury. National Fire Ins. Co. v. Thompson, 51 Ga. App. 625, 181 S.E. 101 (1935).

While the due registration of a deed is presumptive evidence of the deed's delivery, this presumption is rebuttable, and when evidence is introduced which would authorize the jury to find that this presumption has been rebutted and that the deed has not been delivered, an issue of fact is thereby made and it is the sole province of the jury to decide that issue. Allen v. Bemis, 193 Ga. 556, 19 S.E.2d 516 (1942).

6. Jury Questions

Whether deed delivered question for jury. — Whether the facts constitute a delivery of the deed is a question of law; whether such facts exist is a question for the jury. Stinson v. Daniel, 193 Ga. 844, 20 S.E.2d 257 (1942).

Undisputed facts demand directed verdict. — Whether a deed has in fact been delivered is a question for the jury, unless the proof is so complete and undisputed that a verdict is demanded thereunder for one or the other party. National Fire Ins. Co. v. Thompson, 51 Ga. App. 625, 181 S.E. 101 (1935).

Whether the facts constitute a delivery of a deed is a question of law; whether such facts exist is a question for the jury. When the undisputed facts are insufficient to constitute a delivery of the deed, the court need not submit the issue of delivery to the jury. Giuffrida v. Knight, 210 Ga. 128, 78 S.E.2d 29 (1953).

7. Jury Findings

Grantee's act may constitute ratification of delivery. — Evidence demanded a finding

Delivery (Cont'd)
7. Jury Findings (Cont'd)

that the grantee had exercised acts of ownership over the property and had ratified the delivery of the deed thereto by the grantee's execution of an affidavit and notice endeavoring to stop a levy on the property. McKenzie v. Alston, 58 Ga. App. 849, 200 S.E. 518 (1938).

Evidence sufficient to support finding of nondelivery. — When it was shown that a deed was made, and that the grantor said that the land belonged to the grantee, but it was proved that the deed never was recorded, and was found by the grantee among the papers of the grantor after the grantor's death, there was no sufficient evidence of delivery, and a verdict finding against a title set up under such a deed was correct. Hall v. Metropolitan Life Ins. Co., 192 Ga. 805, 16 S.E.2d 576 (1941).

Evidence that, though the grantor, three days before the grantor's death, intended to give the grantor's four children equal parts of a cash fund and to deliver separate deeds to three of the children, but before the grantor had done so the grantor became ill, saying, ''I will fix the rest tomorrow, I have got to lay down, put them all up,'' and pursuant to this direction the cash and deeds were returned to the grantor's trunk, authorized the jury, under the circumstances, to find that the maker did not intend to surrender dominion over the deed. Keesee v. Collum, 208 Ga. 382, 67 S.E.2d 120 (1951).

Consideration

1. Value

Good consideration sufficient. — Valuable consideration is not necessarily required; a good consideration is sufficient. Byrd v. Byrd, 44 Ga. 258 (1871); Boyd v. Sanders, 148 Ga. 839, 98 S.E. 490 (1919).

Deed based upon no consideration stands as a voluntary conveyance. Finch v. Woods, 113 Ga. 996, 39 S.E. 418 (1901); American Ins. Co. v. Bagley, 6 Ga. App. 736, 65 S.E. 787 (1909).

Failure of consideration. — Seal raises presumption of consideration at the time the contract was entered into, but not that the consideration has not since failed either wholly or in part, and while want of consideration cannot be pleaded, failure may. Parrott v. Baker, 82 Ga. 364, 9 S.E. 1068 (1889); Sivell v. Hogan, 119 Ga. 167, 46 S.E. 67 (1903).

Delivery of deed to father, in consideration of affection, evidence of delivery to infant son. — When a grantor executes and delivers to the father of an infant of tender years, in consideration of love and affection, a deed conveying to the infant son of the father title to a described tract of land, delivery to the father and his possession of the deed is evidence of delivery to the infant. Montgomery v. Reeves, 167 Ga. 623, 146 S.E. 311 (1929).

Promise to pay constitutes consideration and a failure to pay the consideration promised, although it constitutes a breach, does not render the conveyance invalid for lack of consideration. Barrett v. Simmons, 235 Ga. 600, 221 S.E.2d 25 (1975).

Failure to pay creates liability. — Fact that the consideration is not actually paid does not render void the conveyance, but creates a liability upon the purchaser, which may be enforced in an action at law. Morris v. Johnson, 219 Ga. 81, 132 S.E.2d 45 (1963).

Debt liability is valuable consideration. — When a married woman entitled to certain undistributed funds from her deceased father's estate, and having on hand certain money derived from the same source, died leaving her husband and their minor children as her only heirs at law, and the husband became guardian of the persons and property of the children, and took possession of the money on hand and used the money individually, the father became individually liable to the children for their distributive shares of the money left by their mother; where, before the children attained majority, the father, having married again, executed, without a court order, a deed purporting to convey described realty to the children in payment of the debt, such liability was a valuable consideration for the deed. First Nat'l Bank v. Kelly, 190 Ga. 603, 10 S.E.2d 66 (1940).

Exchange of an undivided one-fifth interest for a life estate was a valuable consideration; and where a substantial part of the consideration has not failed, the grantor's remedy would not be cancellation, but an action for damages for the breach of partial

failure of consideration. Cordell v. Cordell, 206 Ga. 214, 56 S.E.2d 251 (1949).

2. Inquiry

Consideration of a deed is always a legitimate subject of inquiry and the true consideration may be proved by parol evidence. Sawyer v. Foremost Dairy Prods., Inc., 176 Ga. 854, 169 S.E. 115 (1933).

Consideration may be inquired into when the principles of justice so require. Alexander v. Dinwiddie, 214 Ga. 441, 105 S.E.2d 451 (1958).

Statement as to consideration merely by way of recital. — Ordinarily, if the statement in a deed as to a consideration is merely by way of recital, the actual consideration of the deed is subject to explanation. But if the consideration is referred to in the deed in such a way as to make it one of the terms or conditions of the contract, it cannot be varied by parol. This statement, in connection with the rule against permitting the terms of a written contract to be changed by parol, will serve to reconcile a number of rulings where evidence has been admitted to show what was the consideration of the deed or contract with others in which it has been rejected. As illustrations of cases of the first character mentioned, see Horn v. Ross & Leitch, 20 Ga. 210, 65 Am. Dec. 621 (1856); Burke v. Napier, 106 Ga. 327, 32 S.E. 134 (1898); Stone v. Minter, 111 Ga. 45, 36 S.E. 321, 50 L.R.A. 356 (1900); Martin v. White, 115 Ga. 866, 42 S.E. 279 (1902); Goette v. Sutton, 128 Ga. 179, 57 S.E. 308 (1907); Southern Bell Tel. & Tel. Co. v. Smith, 129 Ga. 558, 59 S.E. 215 (1907); Pavlovski v. Klassing, 134 Ga. 704, 68 S.E. 511 (1910). For cases of the latter character, see Atlas Tack Co. v. Exchange Bank, 111 Ga. 703, 36 S.E. 939 (1900); Wellmaker v. Wheatley, 123 Ga. 201, 51 S.E. 436 (1905); Louisville & N.R.R. v. Holland, 132 Ga. 173, 63 S.E. 898 (1909); Louisville & N.R.R. v. Willbanks, 133 Ga. 15, 65 S.E. 86, 24 L.R.A. (n.s.) 374, 17 Ann. Cas. 860 (1909); Coldwell Co. v. Cowart, 138 Ga. 233, 75 S.E. 425 (1912). See also Young v. Young, 150 Ga. 515, 104 S.E. 149 (1920); Sikes v. Sikes, 162 Ga. 302, 133 S.E. 239 (1926).

If the statement in a deed as to a consideration is merely by way of recital, the actual consideration of the deed is subject to explanation; but if the consideration is referred to in the deed in such a way as to make it one of the terms or conditions of the contract, it cannot be varied by parol. Shapiro v. Steinberg, 179 Ga. 18, 175 S.E. 1 (1934).

As between the parties to the contract, the consideration of a deed can generally be inquired into whenever the principles of justice require it, if the consideration is expressed in the instrument merely by way of recital, and not in such a manner as to make it one of the terms and conditions of the deed, and when the consideration is expressed only by way of recital, it is permissible to show by parol testimony that the true consideration is in fact different from that expressed in the deed. Stonecypher v. Georgia Power Co., 183 Ga. 498, 189 S.E. 13 (1936).

Consideration of a deed when stated merely by recital may always be inquired into when the principles of justice require it. Guffin v. Kelly, 191 Ga. 880, 14 S.E.2d 50 (1941).

When the consideration is expressed merely by way of recital, it is permissible to show by parol evidence that the real consideration is in fact different from that expressed in the instrument. McCann v. Glynn Lumber Co., 199 Ga. 669, 34 S.E.2d 839 (1945).

When the consideration in a deed is expressed merely by way of recital, it is permissible to show by parol testimony that the true consideration is in fact different from that expressed in the instrument, but when the consideration is so expressed as to make it one of the terms and conditions of the deed, one of the parties thereto cannot, under the guise of inquiring into its consideration, alter the terms of the instrument. Taylor v. Ross, 74 Ga. App. 750, 41 S.E.2d 330 (1947).

When expressed only by way of recital, parol evidence is admissible to show that the true consideration of the deed is in fact different from the one stated merely by way of recital. However, one of the parties to a deed cannot, under the guise of inquiring into the deed's consideration, engraft upon the instrument a new condition or covenant which imposes an additional affirmative obligation upon the other party. Awtrey v. Awtrey, 225 Ga. 666, 171 S.E.2d 126 (1969).

Parol evidence admissible when consideration in dispute. — When a deed on the deed's face does not show itself to be com-

Consideration (Cont'd)
2. Inquiry (Cont'd)

plete, certain, and unambiguous, parol evidence is admissible to show the actual consideration for the deed, and this is true when the consideration is in dispute, as this may always be inquired into when the principles of justice require it. Knight v. Munday, 152 Ga. App. 406, 263 S.E.2d 188 (1979).

If consideration is not stated in deed, parol evidence may be received to prove the consideration. Shapiro v. Steinberg, 179 Ga. 18, 175 S.E. 1 (1934).

Inquiry by fraudulent grantor. — Principles of justice neither require nor allow an inquiry at the instance of fraudulent grantor. Parrott v. Baker, 82 Ga. 364, 9 S.E. 1068 (1889).

Party cannot vary expressly stated consideration. — Party may not, under the guise of inquiring into the consideration of a deed, contradict or vary by parol evidence the consideration expressly stated in the deed. Zorn v. Robertson, 237 Ga. 395, 228 S.E.2d 804 (1976).

Parol evidence of different consideration not admissible. — One of the parties to a deed cannot, under the guise of inquiring into the deed's consideration, alter the terms of the instrument, and when proof of a consideration different from the one expressed would have the effect of altering the terms and conditions imposed by the deed, it is not permissible to set up by parol another and different consideration for the purpose of showing a failure of the latter. Stonecypher v. Georgia Power Co., 183 Ga. 498, 189 S.E. 13 (1936).

If an instrument states the consideration, not merely by way of recital, but in such a way as to constitute it a part of the terms and conditions of the agreement itself, then it is not permissible, even under the guise of inquiring into the consideration, to set up a new and different consideration, and in this way to incidentally modify the terms and conditions of the written contract, but this rule does not have application where a total lack or a total failure of consideration is shown in which event the instrument can be attacked irrespectively of how or in what manner the consideration may be expressed. Pittman v. Pittman, 196 Ga. 397, 26 S.E.2d 764 (1943).

Party may not vary affirmative obligations. — Suit for damages for breach of an oral agreement cannot be maintained when, in order to establish such an agreement, it is necessary to vary the terms of a deed by imposing additional affirmative obligations upon one of the parties to the instrument. Awtrey v. Awtrey, 225 Ga. 666, 171 S.E.2d 126 (1969).

Although deed purports to have valuable consideration, the deed may be shown to be voluntary only. Roop Grocery Co. v. Gentry, 195 Ga. 736, 25 S.E.2d 705 (1943).

Parol evidence showing voluntary deed of gift. — When a deed from an insured to a third person is relied on as showing that the insured was not sole owner of the property at the time of the fire, it may be shown by parol to be a voluntary deed of gift, notwithstanding a recital in the deed of a monetary consideration. Pooser v. Norwich Union Fire Ins. Soc'y, Ltd., 51 Ga. App. 962, 182 S.E. 44 (1935).

Whether a deed which expresses as a consideration love and affection and a small sum of money is a voluntary conveyance depends upon the intention of the parties, and this intention is to be ascertained by an inquiry into all the facts and circumstances at the time of the deed's execution, which will throw light upon the question as to whether the deed was executed as the consummation of a sale or as the evidence of a gift. Mercantile Nat'l Bank v. Aldridge, 233 Ga. 318, 210 S.E.2d 791 (1974).

Statute of frauds is not violated by showing that consideration is performance of parol agreement. Duggan v. Dennard, 171 Ga. 622, 156 S.E. 315 (1930).

Evidence on positive instructions and statements of deed of maker properly considered. — When the evidence was not as material to the intention of the maker as the evidence was to the positive instructions and statements of the maker of the deed to incorporate certain provisions therein, the evidence may be properly considered. Ward v. Ward, 176 Ga. 849, 169 S.E. 120 (1933).

Allegations sufficient to show necessity for inquiry. — Allegations of a petition seeking payment of the balance due on a note made by the seller of a business which the defendant-purchaser assumed and agreed to pay when defendant purchased the assets of the business were sufficient to show the

necessity for an inquiry into the consideration for the contract. Alexander v. Dinwiddie, 214 Ga. 441, 105 S.E.2d 451 (1958).

Subsequent parol agreement cannot make deed to secure particular debt security for other debts. — It would be competent to introduce evidence to show that the actual consideration of a deed at the time of the deed's execution covered not only the securing of the debt then due but also the securing of future advances to be made. But if, when the deed was made, it was to secure a particular debt, it could not be made a security for other debts by a subsequent parol agreement. Hester v. Gairdner, 128 Ga. 531, 58 S.E. 165 (1907); Neal v. Neal, 153 Ga. 44, 111 S.E. 387 (1922).

When consideration not ambiguous, error to admit parol evidence to show parties' intention. — Timber lease, as properly construed, granted the right to cut and remove all the timber of stated kinds and dimensions on the described tract of land, at and for a stipulated price per 1,000 feet, subject only to the expiration of the lease on a date therein fixed, and did not limit the amount of timber that might be so cut by recital of a certain consideration, and the judge erred in holding that the contract was ambiguous on the point at issue, and in admitting over appropriate objection parol evidence offered to show an intention of the parties that only a certain quantity of timber could be so cut and removed under the right granted. McCann v. Glynn Lumber Co., 199 Ga. 669, 34 S.E.2d 839 (1945).

Description

1. Applicability of Definiteness Requirement

Applicability to contract for sale of land. — Same rule requiring definiteness of description in deed for land is applicable to a contract for the sale or purchase of land. Haygood v. Duncan, 204 Ga. 540, 50 S.E.2d 214 (1948).

Deed void for failure of description. — Trial court did not err in granting summary judgment to siblings in the siblings' action to set aside a quitclaim deed that their father had made to their sister prior to the father's death as the deed did not meet the necessary formality requirements since the deed did not contain a description of the property that was purportedly transferred; the fact that a third page was attached which had a property description was not sufficient to satisfy the formality requirements as there was no reference in the body of the deed to an attachment, and the third page did not reference itself as an attachment or appendix to the deed. Field v. Mednikow, 279 Ga. App. 380, 631 S.E.2d 395 (2006).

2. Test as to Sufficiency

Test of sufficiency of the description of property contained in a deed is whether or not the description discloses with sufficient certainty what the intention of the grantor was with respect to the quantity and location of the land therein referred to so that the land's identification is practicable. Gainesville M.R.R. v. Tyner, 204 Ga. 535, 50 S.E.2d 108 (1948); Haygood v. Duncan, 204 Ga. 540, 50 S.E.2d 214 (1948).

Test as to the sufficiency of the description of property contained in a deed is whether or not the deed discloses with sufficient certainty what the intention of the grantor was with respect to the quantity and location of the land therein referred to, so that the land's identification is practicable, but when the descriptive averments are so indefinite and uncertain that no particular tract or quantity of land is described thereby or pointed out with certainty by the instrument itself, the description must be held defective and therefore insufficient to pass title. Smith v. Wilkinson, 208 Ga. 489, 67 S.E.2d 698 (1951).

When descriptions so indefinite that lands cannot be located, deed void. — When the description in a deed is indefinite, and contains no descriptive terms by the use of which the lands intended to be conveyed can be definitely located and identified, such deed is fatally defective and void. Laurens County Bd. of Educ. v. Stanley, 187 Ga. 389, 200 S.E. 294 (1938), later appeal, 188 Ga. 581, 4 S.E.2d 164 (1939).

Deed purporting to convey land, which is so indefinite in description that the land is incapable of being located, is inoperative either as a conveyance of title or as color of title. Stanley v. Laurens County Bd. of Educ., 188 Ga. 581, 4 S.E.2d 164 (1939).

Description (Cont'd)

3. Key to Location

Deed furnishing key to land's identification not void. — Deed to land will not be declared void for uncertainty of description, if the description is certain, or if the deed furnishes the key to the identification of the land intended to be conveyed by the grantor. Smith v. Federal Land Bank, 181 Ga. 1, 181 S.E. 149 (1935).

Deed is not void for the want of description if the deed furnishes the key to the identification of the land intended to be conveyed. Laurens County Bd. of Educ. v. Stanley, 187 Ga. 389, 200 S.E. 294 (1938), later appeal, 188 Ga. 581, 4 S.E.2d 164 (1939).

Deed is sufficient to pass title, and will not be declared void for uncertainty of description, if the descriptive averments contained therein are certain, or if the averments afford a key by which the land can be definitely located by the aid of extrinsic evidence. Gainesville M.R.R. v. Tyner, 204 Ga. 535, 50 S.E.2d 108 (1948); Smith v. Wilkinson, 208 Ga. 489, 67 S.E.2d 698 (1951).

Deed to land will not be declared void for uncertainty of description if the deed furnishes a key for the identification of the land intended to be conveyed. Sharpe v. Savannah River Lumber Corp., 211 Ga. 570, 87 S.E.2d 398 (1955), later appeal, 213 Ga. 72, 97 S.E.2d 303 (1957).

When deed admissible in evidence. — When the description in a deed furnishes a key which, when aided by parol evidence, can fit the description, the deed is admissible in evidence. Dorsey v. Dorsey, 189 Ga. 662, 7 S.E.2d 273 (1940).

Key must locate boundaries at time of conveyance's execution. — Insofar as the identity of the land attempted to be conveyed is concerned, the key must lead to the establishment and the location of the boundaries as of the time of the execution of the conveyance; a survey to be made in the future does not do so. Laurens County Bd. of Educ. v. Stanley, 187 Ga. 389, 200 S.E. 294 (1938), later appeal, 188 Ga. 581, 4 S.E.2d 164 (1939).

Key to location must be found in instrument itself. — When a key is relied upon for descriptive purposes, either in a deed or in a contract for the sale of land, the key to be used for that purpose must be found in the instrument itself, and not elsewhere. Smith v. Wilkinson, 208 Ga. 489, 67 S.E.2d 698 (1951).

Seal

Under this statute, a deed to lands is not required to be under seal. Vizard v. Moody, 119 Ga. 918, 47 S.E. 348 (1904); Atlanta, K. & N. Ry. v. McKinney, 124 Ga. 929, 53 S.E. 701, 110 Am. St. R. 215, 6 L.R.A. (n.s.) 436 (1906); Henderson v. Howard, 147 Ga. 371, 94 S.E. 251 (1917); Patterson v. Burns, 150 Ga. 198, 103 S.E. 241 (1920); United Leather Co. v. Proudfit, 151 Ga. 403, 107 S.E. 327 (1921); Bank of Manchester v. Birmingham Trust & Sav. Co., 156 Ga. 486, 119 S.E. 603 (1923); Citizens & S. Bank v. Farr, 164 Ga. 880, 139 S.E. 658 (1927) (see O.C.G.A. § 44-5-30).

Deed under seal not binding when under unsealed power of attorney. — Deed under seal is not binding on a grantor when signed by a person under an alleged power of attorney from the grantor, which power is itself not under seal. Pollard & Co. v. Gibbs, 55 Ga. 45 (1875); Lynch v. Poole, 138 Ga. 303, 75 S.E. 158 (1912); Neely & Co. v. Stevens, 138 Ga. 305, 75 S.E. 159 (1912); Henderson v. Howard, 147 Ga. 371, 94 S.E. 251 (1917).

Authority to fill in names in blanks left by grantor need not be under seal. Bowen v. Gaskins, 144 Ga. 1, 85 S.E. 1007 (1915).

Petition to Cancel or Void Deed

Petition found to set out cause of action. — It is essential to the validity of a deed that the deed be delivered, and a petition brought by the administrator seeking cancellation of the deed in which the deceased grantor had conveyed certain property, while reserving a life estate for the grantor, on the grounds that the deed had not been delivered by the grantor during the grantor's lifetime, set out a cause of action. Childs v. Mitchell, 204 Ga. 542, 50 S.E.2d 216 (1948).

Petition for the cancellation of a deed, alleging that a mother, the owner of described realty, executed a voluntary deed to her children giving the children a remainder interest, when in fact she intended to execute a will, and alleging that she has retained

possession of the deed and continued in possession of the land since the deed's execution, is sufficient to set forth a cause of action. Kirby v. Johnson, 208 Ga. 190, 65 S.E.2d 811 (1951).

Petition seeking to cancel two security deeds, which alleged that the deeds were executed without any consideration, that the deeds, though recorded, had never been delivered to the grantee, and that the defendant had never had possession of the properties described in the deeds, stated a cause of action, though it was alleged in the petition that the grantor executed the deeds for the purpose of hindering, delaying, and defrauding the grantor's creditors. Fuller v. Fuller, 211 Ga. 201, 84 S.E.2d 665 (1954).

Deed made in consideration of promise to support grantor canceled where appears grantee insolvent. — An absolute deed made in consideration of a promise by the grantee to support the grantor for life may be canceled by the superior court in the exercise of the court's equitable powers on a petition brought by the grantor for this purpose when it is made to appear that the grantee has breached the grantee's agreement and is insolvent, and this does not contravene the rule prevailing in this state that an absolute deed of conveyance will not, at the instance of the grantor, be canceled merely because of a breach by the grantee of a promise made by the grantee, in consideration of which the deed was executed. Schneider v. Smith, 189 Ga. 704, 7 S.E.2d 76 (1940).

Deed executed by one non compos mentis, but not adjudged insane, is voidable, and can be so declared at the instance of one's heirs in a suit brought for that purpose. Simpson v. Simpson, 180 Ga. 645, 180 S.E. 126 (1935).

Deed found void for indefiniteness. — Tax deed purporting to convey a designated number of acres ''more or less,'' which did not purport to designate the eastern boundary, was void for indefiniteness in the description. Holloway v. Key, 188 Ga. 423, 4 S.E.2d 167 (1939).

Deed found not void for failure of description. — When a deed headed, ''State of Georgia, _____ County,'' named the grantor as a resident of that county, and described the land by giving the lot number, the district, and the names of the adjoining landowners on all sides, recited that the described land was ''known as [grantor] home place,'' and was recorded in the deed records of the county, it was not void for the failure of the description to state the county and the state in which the land was located. Dorsey v. Dorsey, 189 Ga. 662, 7 S.E.2d 273 (1940).

Parties. — Grantor and grantee are indispensable parties in an action for cancellation of a deed. Tabernacle Baptist Church v. Dorsey, 247 Ga. 675, 278 S.E.2d 378 (1981).

RESEARCH REFERENCES

Am. Jur. 2d. — 23 Am. Jur. 2d, Deeds, § 87 et seq. 72 Am. Jur. 2d, Statute of Frauds, § 221.

C.J.S. — 26A C.J.S., Deeds, § 19 et seq.

ALR. — Description with reference to highway as carrying title to center or side of highway, 2 ALR 6; 49 ALR2d 982.

Deposit of deed in mail as a delivery, 5 ALR 1664.

Validity and effect of deed to ''heirs'' of living person, 22 ALR 713.

Severance of title or rights to oil and gas in place from title to surface, 29 ALR 586; 146 ALR 880.

Reservation of vendor's lien as preventing severance of estate in mineral from estate in surface by deed otherwise having that effect, 29 ALR 618.

Sufficiency of certificate of acknowledgment, 29 ALR 919.

Conclusiveness of manual delivery of deed to grantee as an effective legal delivery, 56 ALR 746; 141 ALR 305.

Marketable title, 57 ALR 1253; 81 ALR2d 1020.

Acknowledgment or oath over telephone, 58 ALR 604.

Conveyance in consideration of support as creating lien or charge upon the land conveyed, 64 ALR 1250.

Execution of deed in respective or fiduciary capacity as estoppel of one in his individual capacity, 64 ALR 1556.

Value of property as factor in determining whether deed intended as mortgage, 90 ALR 953; 89 ALR2d 1040.

Undelivered deed or escrow, pursuant to oral contract, as satisfying Statute of Frauds, 100 ALR 196.

Presumption of delivery where deed is given by grantor to third person or comes into possession of grantee through third person, 124 ALR 462.

Delivery of a deed without manual transfer or record, 129 ALR 11; 87 ALR2d 787.

Delivery of deed as conditioned on obtaining signature of another as grantor, 140 ALR 265.

Death, or extinction of corporate existence, of grantee, or one of the grantees, prior to execution of deed, 148 ALR 252.

Delivery of deed or mortgage by one or more but not all of the grantors or mortgagors, 162 ALR 892.

Validity and effect of deed executed in blank as to name of grantee, 175 ALR 1294.

Effect of supplying of description of property conveyed after manual delivery of deed or mortgage, 11 ALR2d 1372.

Knowledge or notice of inadequacy of consideration for conveyance in chain of title as affecting bona fide status of purchaser, 42 ALR2d 1088.

Conveyance of real property to mortgagee or lienholder as constituting ''sale or exchange'' rendering owner liable for commissions to broker having exclusive agency or exclusive right to sell, 46 ALR2d 1116.

Presumption of consideration from revenue stamps on deed, 51 ALR2d 1004.

What constitutes acceptance of deed by grantee, 74 ALR2d 992.

Description with reference to highway as carrying title to center or side of highway, 49 ALR2d 982.

Party walls and party-wall agreements as affecting marketability of title, 81 ALR2d 1020.

Sufficiency of delivery of deed where grantor retains, or recovers, physical possession, 87 ALR2d 787.

Value of property as factor in determining whether deed was intended as mortgage, 89 ALR2d 1040.

What constitutes a ''structure'' within restrictive covenant, 75 ALR3d 1095.

44-5-31. Requisites of deed to personalty; necessity for deed.

A deed to personalty needs no attesting witness to make it valid; in other respects, the principles applicable to deeds to lands are applicable to deeds to personalty. However, generally a deed is not necessary to convey title to personalty. (Orig. Code 1863, § 2655; Code 1868, § 2654; Code 1873, § 2696; Code 1882, § 2696; Civil Code 1895, § 3606; Civil Code 1910, § 4186; Code 1933, § 29-108.)

JUDICIAL DECISIONS

Cited in Larkin v. City of Darien, 69 Ga. 727 (1882); Haas & Howell v. Godby, 33 Ga. App. 218, 125 S.E. 897 (1924); A.O. Blackmar Co. v. NCR, 64 Ga. App. 739, 14 S.E.2d 153 (1941).

RESEARCH REFERENCES

Am. Jur. 2d. — 23 Am. Jur. 2d, Deeds, § 97 et seq.

C.J.S. — 33 C.J.S., Exchange of Property, § 29.

44-5-32. Requisites of instruments other than deeds.

Every bond for title, bond to reconvey realty, contract to sell or to convey realty or any interest therein and every transfer or assignment of any of such instruments shall, except as between the parties thereto, be executed with

the same formality as is required for the execution of deeds conveying realty. (Ga. L. 1921, p. 157, § 1; Code 1933, § 29-114.)

Law reviews. — For comment on Chase v. Endsley, 165 Ga. 292, 140 S.E. 876 (1927), see 1 Ga. L. Rev. No. 3, p. 49 (1927).

JUDICIAL DECISIONS

Grantor in possession under bond can lease timber rights when grantee's security not impaired. — Grantor, who was in possession of timberland under a bond for title, could lease the timber rights, and, so long as the grantor remained in possession, extend the term of the lease so long as the security of the grantee was not impaired. Chisem v. Kirby-Evans Material Co., 209 Ga. 342, 72 S.E.2d 305 (1952).

Cited in Mangum v. Jones, 205 Ga. 661, 54 S.E.2d 603 (1949).

RESEARCH REFERENCES

Am. Jur. 2d. — 23 Am. Jur. 2d, Deeds, §§ 1, 4.

44-5-33. Form of deed.

No prescribed form is essential to the validity of a deed to lands or personalty. If the deed is sufficient in itself to make known the transaction between the parties, no want of form will invalidate it. (Laws 1768, Cobb's 1851 Digest, p. 163; Laws 1785, Cobb's 1851 Digest, p. 164; Code 1863, § 2651; Code 1868, § 2650; Code 1873, § 2692; Code 1882, § 2692; Civil Code 1895, § 3602; Civil Code 1910, § 4182; Code 1933, § 29-104.)

JUDICIAL DECISIONS

Analysis

General Consideration
Language
Signature
Attestation
Intent
Description
1. Sufficiency
2. Key to Identification

General Consideration

Deed sufficient if makes known transaction between parties. — If the deed is sufficient in itself to make known the transaction between the parties, no want of form will invalidate the deed. Very informal instruments have been held sufficient under this statute to pass title. Horton v. Murden, 117 Ga. 72, 43 S.E. 786 (1903); Caraker v. Brown, 152 Ga. 677, 111 S.E. 51 (1922). See also Sterling v. Park, 129 Ga. 309, 58 S.E. 828, 121 Am. St. R. 224, 13 L.R.A. (n.s.) 298, 12 Ann. Cas. 201 (1907); Price v. Gross, 148 Ga. 137, 96 S.E. 4 (1918); Nasworthy v. James, 152 Ga. 368, 110 S.E. 7 (1921) (see O.C.G.A. § 44-5-33).

Form found sufficient in Caldwell v. Hammons, 40 Ga. 342 (1869); Allgood v. State, 87 Ga. 668, 13 S.E. 569 (1891); Vizard v. Moody, 119 Ga. 918, 47 S.E. 348 (1904);

General Consideration (Cont'd)

Georgia & A. Ry. v. Shiver, 121 Ga. 708, 49 S.E. 700 (1905); Reeves v. Allgood & Co., 133 Ga. 835, 67 S.E. 81 (1910); Swint v. Swint, 147 Ga. 467, 94 S.E. 571 (1917); Boyd v. Sanders, 148 Ga. 839, 98 S.E. 490 (1919); Nasworthy v. James, 152 Ga. 368, 110 S.E. 7 (1921); Crider v. Woodward, 162 Ga. 743, 135 S.E. 95 (1926), later appeal, 165 Ga. 407, 141 S.E. 76 (1927); Citizens & S. Bank v. Farr, 164 Ga. 880, 139 S.E. 658 (1927).

Valid and binding deed. — Limited warranty deed signed by the seller, which contained a description of two parcels of property, was valid and binding between the parties and the seller's failure to read the deed did not affect the conveyance of title as: (1) the seller signed the deed without reading the deed; (2) the seller's signature was notarized; (3) the deed was delivered to the buyer; and (4) there was no allegation that the seller could not read or that the buyer defrauded the seller or otherwise prevented the seller from reading the deed before the seller signed it. Z & Y Corp. v. Indore C. Stores, Inc., 282 Ga. App. 163, 638 S.E.2d 760 (2006).

Cited in O'Neill v. Myers, 148 Ga. App. 749, 252 S.E.2d 638 (1979).

Language

Technical terms not necessary to create estate. — No particular form is essential to the validity of a deed, and technical words are not necessary to create an estate in land. On the other hand, such an estate will not be created by the mere use of technical terms, if from the instrument construed as a whole it is apparent that the parties did not so intend. P.H. Snook & Austin Furn. Co. v. Steiner & Emery, 117 Ga. 363, 43 S.E. 775 (1903).

Deed conveying property described, but not containing formal language, sufficient. — When a debtor gave a security deed to the debtor's creditor which did not contain formal language, but did convey the property described in the deed, the deed was sufficient to invest the creditor with such title that the creditor could execute a valid reconveyance to the debtor for the purpose of levy and sale. Woodward v. La Porte, 181 Ga. 731, 184 S.E. 280 (1936).

Signature

Signature upon note related to deed by internal references applicable to entire contract. — Note and a security deed were so related by internal references that the signature upon the note should, as between the parties and in equity, be treated as applying to the entire contract, including the part contained in the security deed. Cocke v. Bank of Dawson, 180 Ga. 714, 180 S.E. 711 (1935).

Attestation

As between parties, deed binding without witnesses. — In order that a deed may be properly entered of record, it must be executed in the presence of at least two witnesses, but, as between the parties, the deed is binding without witnesses. Blue Ridge Apt. Co. v. Telfair Stockton & Co., 205 Ga. 552, 54 S.E.2d 608 (1949).

Assumption that deed attested when appears duly recorded. — When it appears that a deed was duly recorded, it will be assumed that the deed was properly executed and attested. Tietjen v. Meldrim, 172 Ga. 814, 159 S.E. 231 (1931).

Intent

Deed cannot convey title without language indicating intent to transfer. — Function of a deed is to convey title in presenti, and this cannot be accomplished without the use of language indicating an intention to transfer title. Horton v. Murden, 117 Ga. 72, 43 S.E. 786 (1903); Caldwell v. Caldwell, 140 Ga. 736, 79 S.E. 853 (1913). See also Bell v. McDuffie, 71 Ga. 264 (1883).

Necessity of language not dispensed with by law. — This statute does not dispense with the necessity of using language indicating an intention of the maker to convey a present estate in specific land to a named grantee. Caldwell v. Caldwell, 140 Ga. 736, 79 S.E. 853 (1913); Tyson v. Hutchinson, 164 Ga. 661, 139 S.E. 519 (1927) (see O.C.G.A. § 44-5-33).

Description

1. Sufficiency

Test as to the sufficiency of the description of property contained in a deed is

whether or not the deed discloses with sufficient certainty what the intention of the grantor was with respect to the quantity and location of the land therein referred to, so that the land's identification is practicable. Gainesville M.R.R. v. Tyner, 204 Ga. 535, 50 S.E.2d 108 (1948).

Description of the land in a deed must be sufficiently certain to effect the means of identification. A deed lacking in such certainty of description, standing alone, is inoperative either as a conveyance of title or as color of title. Allen v. Smith, 169 Ga. 395, 150 S.E. 584 (1929).

Description of the property conveyed in a deed is sufficiently certain when the description shows the intention of the grantor as to what property is conveyed and makes the property's identification practicable. Holder v. Jordan Realty Co., 170 Ga. 764, 154 S.E. 353 (1930).

2. Key to Identification

Deed not void if deed affords key by which land definitely located. — Deed is sufficient to pass title, and will not be declared void for uncertainty of description, if the descriptive averments contained therein are certain, or if the averments afford a key by which the land can be definitely located by the aid of extrinsic evidence. Gainesville M.R.R. v. Tyner, 204 Ga. 535, 50 S.E.2d 108 (1948).

Descriptive words in a deed, to be sufficient as a key, must lead unerringly to the land in question. Savannah River Lumber Corp. v. Sharpe, 213 Ga. 72, 97 S.E.2d 303 (1957).

Key must locate boundaries at time of conveyance's execution. — Insofar as the identity of the land attempted to be conveyed is concerned, the key must lead to the establishment and the location of the boundaries as of the time of the execution of the conveyance. McMichael Realty & Ins. Agency, Inc. v. Tysinger, 155 Ga. App. 131, 270 S.E.2d 88 (1980).

Provision in a deed for a subsequent survey does not cure indefinite description. McMichael Realty & Ins. Agency, Inc. v. Tysinger, 155 Ga. App. 131, 270 S.E.2d 88 (1980).

Identification may be supplied by extrinsic evidence. Holder v. Jordan Realty Co., 170 Ga. 764, 154 S.E. 353 (1930).

No identification key furnished where demarcation line between lands not established. — Deed which purported to convey ''all of the river swamp land'' located on a larger tract of land was not sufficient to furnish a key to identification when the verbal testimony was not sufficient to establish a line of demarcation between ''river swamp lands'' and other lands. Savannah River Lumber Corp. v. Sharpe, 213 Ga. 72, 97 S.E.2d 303 (1957).

No action on purchase option when no key to land's identification. — Neither specific performance, nor damages for its breach, will be decreed in an action on a written option to purchase land since the land is so vaguely described that the writing furnishes no key to the land's identification. McMichael Realty & Ins. Agency, Inc. v. Tysinger, 155 Ga. App. 131, 270 S.E.2d 88 (1980).

RESEARCH REFERENCES

Am. Jur. 2d. — 23 Am. Jur. 2d, Deeds, § 12 et seq.

C.J.S. — 26A C.J.S., Deeds, § 34 et seq.

ALR. — Effect of designating grantee in deed or mortgage by firm name, 1 ALR 564; 8 ALR 493.

Validity and effect of deed to ''heirs'' of living person, 22 ALR 713.

Validity and effect of deed executed in blank as to name of grantee, 32 ALR 737; 175 ALR 1294.

Sufficiency and construction of description in deed or mortgage as ''all'' of grantor's property, or ''all'' of his property in certain locality, 55 ALR 162.

Acknowledgment or oath over telephone, 58 ALR 604.

Sufficiency of execution of instrument by agent or attorney in fact in name of principal without his own name appearing, 96 ALR 1251.

Fee simple conditional, 114 ALR 602.

Time limitation for attack on tax title as affected by defective description of property in the assessment or the tax deed, 133 ALR 570.

Validity and effect of deed which identifies tract conveyed only by reference to its area and a specified corner or other part of a larger tract from which it is to be taken, 139 ALR 1180.

Deed or mortgage as affected by uncertainty of description of excepted area, 162 ALR 288.

Record of instrument without sufficient acknowledgment as notice, 59 ALR2d 1299.

44-5-34. Construction of inconsistent clauses in deed; ascertainment of intention of parties.

If two clauses in a deed are utterly inconsistent, the former shall prevail; but the intention of the parties should, if possible, be ascertained from the whole instrument and carried into effect. (Orig. Code 1863, § 2656; Code 1868, § 2655; Code 1873, § 2697; Code 1882, § 2697; Civil Code 1895, § 3607; Civil Code 1910, § 4187; Code 1933, § 29-109.)

JUDICIAL DECISIONS

Analysis

General Consideration
Rules of Construction
Parties' Intention

General Consideration

Cited in Maxwell v. Hoppie, 70 Ga. 152 (1882); West v. Randle, 79 Ga. 28, 3 S.E. 454 (1887); McDonough v. Martin, 88 Ga. 675, 16 S.E. 59, 18 L.R.A. 343 (1892); Bray v. McGinty, 94 Ga. 192, 21 S.E. 284 (1894); Baxter v. Mattox, 106 Ga. 344, 32 S.E. 94 (1898); Rogers v. Highnote, 126 Ga. 740, 56 S.E. 93 (1906); Cobb v. Wrightsville & T.R.R., 129 Ga. 377, 58 S.E. 862 (1907); Lewman v. Owens, 132 Ga. 484, 64 S.E. 544 (1909); Aiken v. Wallace, 134 Ga. 873, 68 S.E. 937 (1910); Walker v. Walker, 139 Ga. 547, 77 S.E. 795 (1913); Parker v. Smith, 140 Ga. 789, 80 S.E. 12 (1913); Stamey v. McGinnis, 145 Ga. 226, 88 S.E. 935 (1916); Shewmake v. Robinson, 148 Ga. 287, 96 S.E. 564 (1918); Stanley v. Reeves, 149 Ga. 151, 99 S.E. 376 (1919); Keith v. Chastain, 157 Ga. 1, 121 S.E. 233 (1923); Simpson v. Powell & Co., 158 Ga. 516, 123 S.E. 741 (1924); White v. Cook, 171 Ga. 663, 156 S.E. 657 (1931); Moore v. Moore, 188 Ga. 314, 4 S.E.2d 18 (1939); Bienvenu v. First Nat'l Bank, 193 Ga. 101, 17 S.E.2d 257 (1941); English v. Davis, 195 Ga. 89, 23 S.E.2d 394 (1942); Mendenhall v. Holtzclaw, 198 Ga. 95, 31 S.E.2d 171 (1944); Padgett v. Hatton, 200 Ga. 209, 36 S.E.2d 664 (1946); Sampson v. General Elec. Supply Corp., 78 Ga. App. 2, 50 S.E.2d 169 (1948); Chance v. Buxton, 177 F.2d 297 (5th Cir. 1949); Stanley v. Greenfield, 207 Ga. 390, 61 S.E.2d 818 (1950); Floyd v. Carswell, 211 Ga. 36, 83 S.E.2d 586 (1954); McVay v. Anderson, 221 Ga. 381, 144 S.E.2d 741 (1965); Conyers v. Fulton County, 117 Ga. App. 649, 161 S.E.2d 347 (1968); Corley v. Parson, 233 Ga. 845, 213 S.E.2d 693 (1975); DOT v. Knight, 238 Ga. 225, 232 S.E.2d 72 (1977); Hardman v. Dahlonega-Lumpkin County Chamber of Commerce, 238 Ga. 551, 233 S.E.2d 753 (1977); Latham Homes Sanitation, Inc. v. CSX Transp., Inc., 245 Ga. App. 573, 538 S.E.2d 107 (2000).

Rules of Construction

Each part of deed given effect, if possible. — Trend of the modern authorities is toward the restriction of the rule that when there are two utterly inconsistent clauses in a deed, the former must prevail; each part of a deed is given effect, if possible. Skinner v. Bearden, 77 Ga. App. 325, 48 S.E.2d 574 (1948).

Inconsistency, to be void, must be totally inconsistent, it must destroy the estate; if it only fetters it or qualifies it, it is still good. Aetna Ins. Co. v. Brodinax, 48 F. 892 (C.C.S.D. Ga. 1883), aff'd, 128 U.S. 236, 9 S. Ct. 61, 32 L. Ed. 445 (1888). See also Central R.R. & Banking Co. v. Mayor of Macon, 43

Ga. 605 (1871); White v. Hopkins, 80 Ga. 154, 4 S.E. 863 (1887); Burnett v. Summerlin, 110 Ga. 349, 35 S.E. 655 (1900).

Granting clause in a deed does not control other clauses. Cole v. Thrasher, 246 Ga. 683, 272 S.E.2d 696 (1980).

Conveying clause prevails over habendum clause. — All the provisions of a deed should be given effect and made to harmonize when possible, but if there should be any repugnancy between the conveying clause and the habendum clause, the conveying clause will prevail. Guess v. Morgan, 196 Ga. 265, 26 S.E.2d 424 (1943).

Particular description prevails over general one. — When a deed contains two descriptions of the land conveyed, one general and the other particular, if there is any repugnance, the particular description will prevail. Harlan v. Ellis, 198 Ga. 678, 32 S.E.2d 389 (1944).

Most material and certain part of description prevails. — In construing conveyances of land, effect is to be given to every part of the description, if practicable, but if the thing intended to be granted appears clearly and satisfactorily from any part of the description, and other circumstances of the description are mentioned which are not applicable to that thing, the grant will not be defeated, but those circumstances will be rejected as false or mistaken. What is most material and most certain in a description shall prevail over that which is less material and less certain. Patrick v. Sheppard, 182 Ga. 788, 187 S.E. 379 (1936).

Distances and computed contents yield to ascertained boundaries and monuments. — In construing a deed to land, that which is most material and most certain should prevail over that which is less material and less certain, and distances and computed contents should yield to ascertained boundaries and monuments. Stewart v. Latimer, 197 Ga. 735, 30 S.E.2d 633 (1944).

Extrinsic evidence can aid court in fitting description to property. — Description of the land is not too indefinite if the court can, with the aid of extrinsic evidence which does not add to, enlarge, or in any way change the description, fit it to the property conveyed by the deed. Patrick v. Sheppard, 182 Ga. 788, 187 S.E. 379 (1936).

Description by plat controls over descriptive words. — When the descriptive clauses in a deed contain particular words of description, and also refer to a plat, and the plat is more definite than the particular words of description, the description by plat shall control as to the property conveyed. Patrick v. Sheppard, 182 Ga. 788, 187 S.E. 379 (1936).

Prior or contemporaneous oral agreement fixing different metes and bounds not competent evidence. — While extrinsic evidence may in a proper case be admitted for the purpose of applying a description to subject matter, it is not competent to show that there was an oral agreement between the grantor and the grantee in a deed of conveyance, made prior to or contemporaneously with the deed's execution, fixing metes and bounds different from those specifically set forth in the deed itself. Stewart v. Latimer, 197 Ga. 735, 30 S.E.2d 633 (1944).

Deeds are to be taken most strongly against the agent or contractor, inasmuch as the instinct of self-preservation will always make men sufficiently careful to protect themselves — verba fortius accipiuntur contro proferentem. Harmon v. First Nat'l Bank, 50 Ga. App. 3, 176 S.E. 833 (1934).

Construction favoring grantee preferred. — When all other means of ascertaining the true construction of a deed fail, and a doubt still remains, that construction is rather to be preferred which is most favorable to the grantee. Harmon v. First Nat'l Bank, 50 Ga. App. 3, 176 S.E. 833 (1934).

As to construction of bill of sale, see Felder v. Middleton Hdwe. Co., 66 Ga. App. 572, 18 S.E.2d 574 (1942).

Effect of § 44-5-60 on easements. — After the State Highway Department obtained a right-of-way over a strip of land, and the plaintiff's predecessor in title reserved a parking easement, the parties to the 1954 conveyance intended an appurtenant easement in favor of the land. Thus, the trial court erred in granting the Department of Transportation's motion for summary judgment because the limitation period of O.C.G.A. § 44-5-60(b) applies to restrictive covenants not easements such as in this case. Brown v. DOT, 195 Ga. App. 262, 393 S.E.2d 36 (1990).

Parties' Intention

Controlling rule is to ascertain intention of parties to deed. — In the construction of

Parties' Intention (Cont'd)

deeds, as well as other contracts, the paramount, essential, and controlling rule is to ascertain the intention of the parties. If that intention is plain from the language of the deed as a whole, and the intention contravenes no rule of law, the deed should be given effect, regardless of mere literal repugnancies in different clauses of the conveyance. Aycock v. Williams, 185 Ga. 585, 196 S.E. 54 (1938); Guess v. Morgan, 196 Ga. 265, 26 S.E.2d 424 (1943).

In the construction of deeds, as well as other contracts, the paramount, essential, and controlling rule is to ascertain the intention of the parties. If that intention is plain from the language of the deed as a whole, and the intention contravenes no rule of law, the deed should be given effect. Moore v. Wells, 212 Ga. 446, 93 S.E.2d 731 (1956).

In the construction of deeds, as well as other contracts, the paramount, essential, and controlling rule is to ascertain the intention of the parties. Prescott v. Herring, 212 Ga. 571, 94 S.E.2d 417 (1956).

Cardinal rule for the construction of a deed is to ascertain the intention of the parties. The whole instrument is to be construed together, so as to give effect, if possible, to the entire deed, and in this way ascertain from the instrument's terms the real intention of the parties; and the construction which will uphold a deed in whole and in every part is to be preferred. Leavell v. State Hwy. Dep't, 121 Ga. App. 112, 173 S.E.2d 124 (1970).

Determining whether grant is easement or fee. — Grant, whether of easement or fee, should be construed to carry out intentions of parties. Georgia Power Co. v. Leonard, 187 Ga. 608, 1 S.E.2d 579 (1939).

Intention of parties crucial test in determining whether instrument grants easement or title. — In determining whether an instrument grants an easement in, or conveys title to, land, the crucial test is the intention of the parties, and the whole instrument must be looked to, and recitals in the instrument, subject matter, object, purpose, and nature of restrictions or limitations, if any, or the absence of such, and attendant facts and circumstances of the parties at the time of making the instrument are all to be considered. Danielsville & Comer Tel. Co. v. Sanders, 209 Ga. 144, 71 S.E.2d 226 (1952).

Substance, rather than technical nicety in the location of clauses in a deed, is controlling, the intention of the parties being the cardinal rule of construction. Cole v. Thrasher, 246 Ga. 683, 272 S.E.2d 696 (1980).

Deed construed as whole. — One of the most important rules in the construction of deeds is to so construe the deeds that no part or words shall be rejected. The courts lean to such a construction as reconciles the different parts, and reject the construction which leads to a contradiction. Of course, a deed or other contract should be construed as a whole, and in its entirety, in order to find the true intention of the parties. Skinner v. Bearden, 77 Ga. App. 325, 48 S.E.2d 574 (1948).

In construing a deed, effect must be given, if practicable, to every part of the description of the land conveyed, and if two clauses in a deed are utterly inconsistent, the former shall prevail, but the intention of the parties from the whole instrument should, if possible, be ascertained and carried into effect. Prescott v. Herring, 212 Ga. 571, 94 S.E.2d 417 (1956).

Doctrine of repugnant clauses is not favored; the terms of the whole instrument are to be construed together to give effect to the entire deed and to uphold the intention of the grantor. Cole v. Thrasher, 246 Ga. 683, 272 S.E.2d 696 (1980).

If intent obvious, repugnant parts of description rejected. — Trend of modern authorities is to give effect to every part of a deed if possible, and if this cannot be done, and there is an obvious intent derivable from the face of the instrument, the tendency is to reject only superadded parts which are repugnant thereto, if it can be done without violating some rule of law. Thompson v. Hill, 137 Ga. 308, 73 S.E. 640 (1912). See also Hatton v. Johnson, 157 Ga. 313, 121 S.E. 404 (1924); Clark v. Robinson, 162 Ga. 395, 134 S.E. 72 (1926); Holder v. Jordan Realty Co., 163 Ga. 645, 136 S.E. 907 (1927).

In construing conveyances of land, effect is to be given to every part of the description, if practicable, but if the thing intended to be granted appears clearly and satisfactorily from any part of the description, and other circumstances of description are mentioned which are not applicable to that thing, the

grant will not be defeated, but those circumstances will be rejected as false or mistaken. What is most material and most certain in a description shall prevail over that which is less material and less certain. Prescott v. Herring, 212 Ga. 571, 94 S.E.2d 417 (1956).

Court looks at surrounding facts. — Recitals in a deed are inconsistent or repugnant, the first recital does not necessarily prevail over the latter, but the whole language of the deed is to be construed together in order that the true construction may be ascertained; in such a case, the court will look into the surrounding facts, and will adopt that construction which is the most definite and certain, and which will carry out the evident intention of the parties. Stewart v. Latimer, 197 Ga. 735, 30 S.E.2d 633 (1944); Floral Hills Memory Gardens, Inc. v. Robb, 227 Ga. 470, 181 S.E.2d 373 (1971).

Recitals in a deed, the contract, the subject matter, the object, purposes, and nature of the restrictions or limitations, if any, or the absence of such, and the attendant facts and circumstances of the parties at the time of the making of the conveyance are all to be considered in arriving at the intention of the parties. Jackson v. Rogers, 205 Ga. 581, 54 S.E.2d 132 (1949).

Poorly drawn contract not defeated when intent discoverable. — When the contract was admittedly poorly drawn, this alone would not defeat the contract's purpose if the parties intended that the plaintiff retain title until the purchase money was paid. However unskillfully a deed may be prepared, it is the duty of the courts to discover and give effect, if possible, to the intent of the parties. Skinner v. Bearden, 77 Ga. App. 325, 48 S.E.2d 574 (1948).

OPINIONS OF THE ATTORNEY GENERAL

"And/or" clause interpreted. — Clause ''and/or her daughter'' in a deed would be interpreted to pass a free title to the taxpayer and her daughter as equal tenants in common. 1965-66 Op. Att'y Gen. No. 66-148.

RESEARCH REFERENCES

Am. Jur. 2d. — 23 Am. Jur. 2d, Deeds, § 192 et seq.

C.J.S. — 26A C.J.S., Deeds, § 188 et seq.

ALR. — Rule that particular description in deed prevails over general description, 72 ALR 410.

Conflict between granting and habendum clauses as to estate conveyed, 84 ALR 1054; 58 ALR2d 1374.

Phrase ''from and after'' death of life beneficiary as affecting character of remainder as vested or contingent, 103 ALR 598.

Meaning of term ''issue'' when used as a word of purchase, 117 ALR 691.

Reference in deed or mortgage to proportion of larger tract, inconsistent with other terms descriptive of property covered, 127 ALR 1040.

Deed as conveying fee or easement, 136 ALR 379.

Water as within term ''minerals'' in deed, lease, or license, 148 ALR 780.

Rules as to interpretation of description of real property as applicable to description in judgment, 150 ALR 773.

Validity of reservation of oil and gas or other mineral rights in deed of land, as against objection of repugnancy to the grant, 157 ALR 485.

Use of word ''joint'' or ''jointly'' in provision of deed other than the granting or habendum clause as indicating intent to create a joint tenancy rather than one in common between the grantees, 157 ALR 566.

Judgment based on construction of instrument as res judicata of its validity, 164 ALR 873.

Construction and effect of provision of deed for sharing of profits in event of discovery of minerals, oil, or gas, 173 ALR 1104.

Construction and application of provision of deed, mortgage, lease, or land contract covering personal property on, attached or used in connection with the premises, 175 ALR 404.

Construction and application of covenant restricting use of property to ''residence'' or ''residential purposes'', 175 ALR 1191.

What constitutes oil or gas ''royalty,'' or ''royalties,'' within language of conveyance,

exception, reservation, devise, or assignment, 4 ALR2d 492.

Written matter as controlling printed matter in construction of deed, 37 ALR2d 820.

Oil and gas as ''minerals'' within deed, lease, or license, 37 ALR2d 1440.

Quantum or character of estate or interest created by language providing premises as a home, or giving or granting same for such use, 45 ALR2d 699.

Description with reference to highway as carrying title to center or side of highway, 49 ALR2d 982.

Conflict between granting and habendum clauses as to estate conveyed, 58 ALR2d 1374.

Construction and effect of provision for payment of damages to ''crops'' or ''growing crops'' in mineral deed or lease, or in conveyance of pipeline or other underground easement, 87 ALR2d 235.

Value of property as factor in determining whether deed was intended as mortgage, 89 ALR2d 1040.

Estate created by deed to one and his ''blood heirs'' or ''blooded heirs,'' 89 ALR2d 1222.

Deed to railroad company as conveying fee or easement, 6 ALR3d 973.

Time to which condition of remainderman's death refers, under gift or grant to one for life or term of years and then to remainderman, but if remainderman dies without issue, then over to another, 26 ALR3d 407.

Which of conflicting descriptions in deeds or mortgages of fractional quantity of interest intended to be conveyed prevails, 12 ALR4th 795.

44-5-35. Apportionment of price for deficiency in number of acres; rescission.

In a sale of lands, if the purchase is per acre, a deficiency in the number of acres may be apportioned in the price. If the sale is by the tract or the entire body, a deficiency in the quantity sold cannot be apportioned. If the sale is by a quantity of acres with the qualification ''more or less'' added, any deficiency is not apportionable unless the deficiency is so great as to constitute a willful deception or mistake amounting to fraud. In this event, the purchaser may demand a rescission of the sale or an apportionment of the purchase price. (Orig. Code 1863, § 2598; Code 1868, § 2600; Code 1873, § 2642; Code 1882, § 2642; Civil Code 1895, § 3542; Civil Code 1910, § 4122; Code 1933, § 29-201; Ga. L. 1983, p. 3, § 33.)

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

Analysis

General Consideration
Applicability
Sale by Acre
Sale by Tract
Quantity Specified as ''More or Less''
Deception or Fraud
1. Actual Fraud
2. Suspicion of Fraud
3. Previous Knowledge of Land
4. Jury Questions
5. Remedies
6. Illustrative Cases

General Consideration

There is no room for holding that this statute modified the previous existing rule. Walton v. Ramsey, 50 Ga. 618 (1874); Finney v. Morris, 116 Ga. 758, 42 S.E. 1020 (1902) (see O.C.G.A. § 44-5-35).

When section applies. — Statute deals with matter of deficiency of quantity of land under three sets of circumstances: (1) where the sale is made by the acre; (2) where it is by the entire tract or body; (3) where the quantity is specified as ''more or less.'' Kendall v. Wells, 126 Ga. 343, 55 S.E. 41 (1906); Marchman v. Security Loan & Abstract Co., 45 Ga. App. 625, 165 S.E. 884 (1932) (see O.C.G.A. § 44-5-35).

Cited in Rigdon v. Barfield, 194 Ga. 77, 20 S.E.2d 587 (1942); Farrar v. Vanpelt, 96 Ga. App. 244, 99 S.E.2d 738 (1957); U.S. Life Title Ins. Co. v. Hutsell, 164 Ga. App. 443, 296 S.E.2d 760 (1982).

Applicability

Bulk sale of fertilizer. — Statute does not apply to a sale in bulk of fertilizer. Navassa Guano Co. v. Commercial Guano Co., 93 Ga. 92, 18 S.E. 1000 (1894) (see O.C.G.A. § 44-5-35).

Sale of growing timber. — Statute does not apply to a sale of timber growing upon land, when there is no deficiency in the quantity of land, but only a misrepresentation as to quantity and character of timber. Martin v. Harwell, 115 Ga. 156, 41 S.E. 686 (1902) (see O.C.G.A. § 44-5-35).

When vendor lacks title, title defect exists rather than deficiency. — When a certain tract of land is described in a contract of sale by definite boundaries, and it later appears that the vendor has no title to a portion of the tract contained within the described boundaries, this is a defect in the vendor's title rather than a deficiency in quantity. Lawton v. Byck, 217 Ga. 676, 124 S.E.2d 369 (1962), later appeal, 218 Ga. 858, 131 S.E.2d 176 (1963).

When a certain tract of land was described in a contract of sale by definite boundaries, and it later appeared that the vendor had no title to a portion of the tract contained within the described boundaries, this was a defect in the vendor's title, as contemplated by former Code 1933, § 29-202 (see O.C.G.A. § 44-5-36), rather than a deficiency in quantity, as contemplated by former Code 1933, § 29-201 (see O.C.G.A. § 44-5-35). Lunsford v. King, 132 Ga. App. 749, 209 S.E.2d 27 (1974); Etheridge v. Fried, 183 Ga. App. 842, 360 S.E.2d 409 (1987).

Section not applicable when purchaser seeks to mark notes "satisfied" on ground title has failed. — When a purchaser of land sought to have delivered up and marked as ''satisfied'' certain notes given by the purchaser for deferred payments, on the ground that title to certain of the land so purchased had failed, the issue as to whether or not it was a sale by the tract or by the acre was not involved; in such a case the applicable law was that contained in former Code 1933, § 29-202 (see O.C.G.A. § 44-5-36) and not in former Code 1933, § 29-201 (see O.C.G.A. § 44-5-35). Miller v. Minhinnette, 185 Ga. 490, 195 S.E. 425 (1938).

Not applicable when sued purchaser sets up defense that vendor cannot make title. — When a purchaser under a bond for title does not hold possession of all the land described in the bond, and is sued on notes representing the unpaid purchase price, the purchaser is permitted to set up as a defense the fact that the purchaser holds possession of only a part and that the vendor cannot make title to the other part, and that, as a consequence of the defect in the title, the purchaser is entitled to a reduction in the purchase price; this statute having no application. Pope v. Williams, 70 Ga. App. 834, 29 S.E.2d 808 (1944) (see O.C.G.A. § 44-5-35).

Vendee in "undisturbed possession" cannot defeat vendor's action on same ground. — Vendee in ''undisturbed possession'' of lands cannot defeat an action by the vendor for the purchase price of the lands on the ground that the vendor did not have good title to such lands. McConnell v. White, 91 Ga. App. 92, 85 S.E.2d 75 (1954).

Material breach of contract as to title to portion of tract entitles purchaser to rescission. — Contract of sale of a tract of land described therein as measuring a certain number of feet in width and in depth binds the obligor to make title to the entire tract so described, and if the obligor has no title to a portion of the land, this is a material breach of the contract, entitling the purchaser to a rescission of the contract of sale at the purchaser's election. Coppage v. King, 96

Applicability (Cont'd)

Ga. App. 192, 99 S.E.2d 541 (1957).

If vendee takes portion of land, proportion of price abated. — When land described by metes and bounds is sold and the vendor has no title to a part of the land, the vendee, if the vendee elects to take the remaining portion to which the vendor has title, can have an abatement of the price proportionate to the value of that which the vendor cannot convey. O'Farrell v. Willoughby, 171 Ga. 149, 154 S.E. 911 (1930).

Sale by Acre

Whether sale is by acre or tract determined by examining instrument. — All preliminary negotiations must be said to be merged in the deed which is accepted by the purchaser, and whether a sale was made by the tract must be determined from an examination of the instrument. Kytle v. Collins, 67 Ga. App. 98, 19 S.E.2d 754 (1942).

Whether sale is by acre or tract depends upon whether land quantity of essence of contract. — Proper solution of the question whether a sale of land is by the tract or by the acre depends upon whether the quantity of land is of the essence of the contract. If, after a description of a tract of land which otherwise identifies the premises either by metes and bounds or by monuments, there appears a statement of the quantity of the land as so many acres more or less, such a sale would be a sale by the tract, but where in a conveyance the usual reference to the land as ''all that tract or parcel of land,'' etc., or ''a tract of land'' is omitted and the first statement as to the land is a covenant to sell a definite and exact number of acres of land, neither more nor less, the description thereafter following not stating any metes or bounds, it must be adjudged that the quantity of land being first mentioned is of the essence of the contract. Roberts v. Groover, 156 Ga. 386, 119 S.E. 696 (1923).

When a deed is so worded as to show that the number of acres is made the essence of the contract, it will be taken as evidencing a sale by the acre and not by the tract. Kytle v. Collins, 67 Ga. App. 98, 19 S.E.2d 754 (1942).

Description cannot defeat covenant to sell exact number of acres. — Description of land which merely enables one to find and measure the number of acres precisely defined and fixed by the contract cannot defeat the covenant to sell an exact number of acres. Roberts v. Groover, 156 Ga. 386, 119 S.E. 696 (1923).

When deed showed sale by tract, parol evidence to contrary incompetent and insufficient. — When deed showed a sale of land by the tract, under the facts as disclosed by the record, parol evidence, to the effect that the land was offered for sale and was bid off by the purchaser at a named price per acre, was incompetent and insufficient to show that the sale was by the acre. Kytle v. Collins, 67 Ga. App. 98, 19 S.E.2d 754 (1942).

Fraud held immaterial to recovery. — In a sale by number of acres, the question of fraud is immaterial to recovery. Kytle v. Collins, 67 Ga. App. 98, 19 S.E.2d 754 (1942).

Apportionment for deficiency made. — Generally, if land is sold by the acre, an apportionment for a deficiency is to be made proportionate to the number of acres in the deficiency. Kendall v. Wells, 126 Ga. 343, 55 S.E. 41 (1906).

Apportionment for deficiency in acreage bargained for and purchased. — When it is certain that appellant bargained for and paid $440.00 per acre for 718 acres precisely, not ''more or less,'' based on a calculation of acres and not on the description of a tract, and appellant did not get 718 acres in appellant's purchase, then obviously a mistake was made; and since appellant bargained and paid for 718 acres, appellant is entitled to apportionment under O.C.G.A. § 44-5-35. Boswell v. Bryans, 159 Ga. App. 724, 285 S.E.2d 74 (1981).

Deficiency provision not applicable to administrator's sale. — Doctrine of caveat emptor applies to administrators' sales. Therefore, the provision of this statute for apportionment of the purchase price on account of a deficiency of acreage in a sale of land where the purchase is by the acre has no application to an administrator's sale. Greer v. McDonald, 141 Ga. 309, 80 S.E. 1002 (1914); McKinnon & McCarthy v. Sheffield, 149 Ga. 219, 99 S.E. 855 (1919) (see O.C.G.A. § 44-5-35).

In sale of timber upon land sold per acre, deficiency in acres may be apportioned to the price, and this is true though both

parties have an equal opportunity to judge as to the number of acres. Martin v. Peddy, 120 Ga. 1079, 48 S.E. 420 (1904).

For cases where sale of land by acre found, see Strickland v. Hutchinson, 123 Ga. 396, 51 S.E. 348 (1905); Bentley v. Barrett, 26 Ga. App. 527, 106 S.E. 815 (1921); Roberts v. Groover, 156 Ga. 386, 119 S.E. 696 (1923).

Sale by Tract

"By tract or entire body" defined. — Sale "by the tract or entire body," as the words are used in this statute, means where a tract or body of land is sold as such, and not at so much per acre according to the acres which it may contain. Thus, if a tract of land should be described in a bond for title by metes and bounds, or by some descriptive name or designation which would describe it as a whole, and the number of acres should merely be stated as an additional description, this would be a sale by the tract or entire body. Turner v. Rives, 75 Ga. 606 (1885); Walker v. Bryant, 112 Ga. 412, 37 S.E. 749 (1900); Strickland v. Hutchinson, 123 Ga. 396, 51 S.E. 348 (1905) (see O.C.G.A. § 44-5-35).

If sale in gross intended, mere mention of acres not covenant on quantity. — If the sale is intended to be in gross, the authorities are unanimous in holding that the mere mention of acres, or of feet, after certain other descriptions, such as metes and bounds, is not a covenant as to the quantity to be conveyed. Land Trust Co. v. Morgan, 22 Ga. App. 388, 95 S.E. 1006 (1918); Holliday v. Ashford, 163 Ga. 505, 136 S.E. 524 (1927), later appeal, 169 Ga. 237, 149 S.E. 790 (1929).

Deficiency in land sold is primary issue. — It is only when there is a deficiency in the quantity of land sold that it becomes material to inquire whether or not it was a sale by the tract. Washington Mfg. Co. v. Wickersham, 201 Ga. 635, 40 S.E.2d 206 (1946).

When deficiency cannot be apportioned. — If sale of land is by the tract, deficiency in the acreage cannot be apportioned. Baker v. Corbin, 148 Ga. 267, 96 S.E. 428 (1918); Appleby v. Tomlinson, 31 Ga. App. 771, 122 S.E. 93 (1924).

Deficiency apportioned when fraud is shown. Finney v. Morris, 116 Ga. 758, 42 S.E. 1020 (1902); White v. Adams, 7 Ga. App. 764, 68 S.E. 271 (1910); Milner v. Tyler, 9 Ga. App. 659, 71 S.E. 1123 (1911).

If a sale of land is by the tract rather than by the acre, a deficiency in the acreage cannot be apportioned in the absence of actual or moral fraud on the part of the vendor. Bivins v. Tucker, 41 Ga. App. 771, 154 S.E. 820 (1930).

In a sale of land by the tract, and not by the acre, a deficiency in the number of acres specified, there being no fraud alleged, is no ground for an apportionment of the purchase price. Security Loan & Abstract Co. v. Marchman, 41 Ga. App. 808, 154 S.E. 822 (1930).

For cases when sale by tract found, see Longino v. Latham, 93 Ga. 274, 20 S.E. 308 (1893); Maxwell v. Willingham, 101 Ga. 55, 28 S.E. 672 (1897); White v. Adams, 7 Ga. App. 764, 68 S.E. 271 (1910); Rawlings v. Cohen, 143 Ga. 726, 85 S.E. 851 (1915); Mayo v. Bowen, 26 Ga. App. 539, 106 S.E. 596 (1921).

Quantity Specified as "More or Less"

Sale of land containing "approximate" number of acres sale in gross. — Sale of all the sawmill timber on a bounded tract of land containing "approximately 100 acres in timber" is a sale of timber in gross. Kendall v. Wells, 126 Ga. 343, 55 S.E. 41 (1906).

Clause "approximately 100 acres" means the same as 100 acres, "more or less". Stockburger v. Brooker, 33 Ga. App. 676, 127 S.E. 663 (1925).

Section not applicable to sale by metes and bounds. — Contention that any shortage in land sold is taken care of by the phrase "more or less" in the acreage description is without merit since this statute does not apply to sales of land by metes and bounds; further, description by metes and bounds controls over the quantity specified in the deed. McConnell v. White, 91 Ga. App. 92, 85 S.E.2d 75 (1954) (see O.C.G.A. § 44-5-35).

Deed describing premises by giving boundaries and estimating area conveys all land embraced in calls. — Deed which described the premises, giving the boundaries and estimating the area as containing a certain number of acres, "more or less," conveys all the land embraced in the calls, although the acreage may exceed the esti-

Quantity Specified as "More or Less" (Cont'd)

mate. McDonald v. Taylor, 200 Ga. 445, 37 S.E.2d 336 (1946).

Words "more or less" do not give a superior right of apportionment for a deficiency than exists without those words. To so hold would reduce the provisions of this statute to an absurdity. Marchman v. Security Loan & Abstract Co., 45 Ga. App. 625, 165 S.E. 884 (1932) (see O.C.G.A. § 44-5-35).

Words "more or less" protect the seller against a small deficiency when there is an approximation to the quantity of acres mentioned. Kendall v. Wells, 126 Ga. 343, 55 S.E. 41 (1906).

Words cover any deficiency not so gross as to amount to deception or fraud. — In a conveyance of land by the tract the qualifying words ''more or less'' will cover any deficiency not so gross as to justify the suspicion of willful deception or mistake amounting to fraud; in this event, the deficiency is apportionable. Perkins Mfg. Co. v. Williams, 98 Ga. 388, 25 S.E. 556 (1896); Baker v. Corbin, 148 Ga. 267, 96 S.E. 428 (1918); Wimpee v. Burt, 148 Ga. 418, 96 S.E. 993 (1918); Mayo v. Bowen, 26 Ga. App. 539, 106 S.E. 596 (1921).

Principle not affected by the existence of legal fraud. Wylly v. Gazan, 69 Ga. 506 (1882).

Omission of "more or less" does not prevent purchaser from claiming apportionment for gross deficiency. Marchman v. Security Loan & Abstract Co., 45 Ga. App. 625, 165 S.E. 884 (1932).

No apportionment if both parties may inspect land, and both act in good faith. — If a lot of land is sold in a body as containing a certain area ''more or less,'' and both parties have an equal opportunity to judge for themselves, and both act in good faith, a deficiency in the quantity sold will not be apportioned. Walton v. Ramsey, 50 Ga. 618 (1874).

If a purchaser has equal opportunities with the vendor for discovering the contents of a lot sold, the purchaser is bound to avail oneself of those opportunities. If the purchaser fails to do so, and on account of the purchaser's own gross negligence the purchaser is injured, relief will not be granted to the purchaser. Wylly v. Gazan, 69 Ga. 506 (1882).

When vendor is guilty of actual fraud in representing area, the rule is different. Kendall v. Wells, 126 Ga. 343, 55 S.E. 41 (1906); Rosenthal v. Gordon, 142 Ga. 682, 83 S.E. 511 (1914); Black v. Chapman, 33 Ga. App. 509, 126 S.E. 877 (1925).

When a lot of land is sold in a body as containing a certain area, ''more or less,'' and both parties have an equal opportunity to judge for themselves, and both act in good faith, a deficiency in the quantity sold will not be apportioned. But if the vendor, in the consummation of the sale, is guilty of actual fraud in representing the area, the result is different, and the land will be apportioned. Dorsett v. Roberds, 172 Ga. 545, 158 S.E. 236 (1931).

If a lot of land is sold in a body as containing a frontage of a certain number of feet, ''more or less,'' and both parties have equal opportunity to judge for themselves, and both act in good faith, a deficiency in the quantity sold will not be apportioned; aliter where the vendor in the course of the sale is guilty of actual fraud in representing the frontage. Halliburton v. Collier, 75 Ga. App. 316, 43 S.E.2d 339 (1947).

When sale by tract, parol evidence not admissible to show sale by acre. — When a written contract covered the tract as a whole, although it may have contained more than the number of acres specified, parol evidence is not admissible to show that the tract was at a given price per acre, there being no allegation of fraud in the writing and no attempt to reform the allegation. Turner v. Rives, 75 Ga. 606 (1885).

When a bond for title recited that the obligor had sold to the obligee a definitely described lot of land, containing a specified number of acres, ''more or less,'' for a designated sum, parol evidence was not admissible to show that the sale of the land was ''by the acre'' and not ''by the tract.'' Walker v. Bryant, 112 Ga. 412, 37 S.E. 749 (1900).

Parol evidence admissible to determine number of acres. — In case the words ''more or less'' are used, parol evidence is admissible to determine the number of acres. Kirkland v. Brewton, 32 Ga. App. 128, 122 S.E. 814 (1924).

Deception or Fraud

1. Actual Fraud

Actual fraud or great deficiency necessary to obtain apportionment where words "more

or less" used. — Principle recognized by this statute is that if there is actual fraud and deception on the part of the vendor of land sold with the words "more or less," or the deficiency is so great as to be evidence of it, then the deficiency may be apportioned, but not otherwise. Finney v. Morris, 116 Ga. 758, 42 S.E. 1020 (1902) (see O.C.G.A. § 44-5-35).

When the words "more or less" are used, the deficiency must be so great as that a mere comparison of the quantity stated in the description and the actual quantity will suffice to suggest fraud. When these words are not used, this is not so. But the existence of actual fraud or gross mistake amounting to fraud, in order to obtain an apportionment, is necessary in either case. Kendall v. Wells, 126 Ga. 343, 55 S.E. 41 (1906).

When land sold by tract, actual fraud must be shown. — When the vendee desires, in a suit against the vendor in a sale in gross, to claim compensation for a deficiency in quantity, the vendee must allege that in making the contract of sale the vendor was guilty of actual fraud in misrepresenting the quantity. Emlen v. Roper, 133 Ga. 726, 66 S.E. 934 (1910); Williams v. Smith Bros., 135 Ga. 335, 69 S.E. 480 (1910); Kirkland v. Brewton, 32 Ga. App. 128, 122 S.E. 814 (1924).

When land is sold by the tract, and described in the conveyance as so many acres "more or less," a deficiency in the number of acres actually conveyed to the purchaser will not authorize an apportionment in the price agreed to be paid, if the purchaser admits that there was no intentional fraud upon the part of the vendor. Keiley v. Citizens' Sav. Bank & Trust Co., 173 Ga. 11, 159 S.E. 527 (1931).

It is only in cases of actual fraud that a purchaser of land sold by the tract, and described in the deed as so many acres, "more or less," can have the price which the purchaser agreed to pay for the land apportioned because of a deficiency in the number of acres actually conveyed to the purchaser. Hancock v. Nashville Inv. Co., 128 Ga. App. 58, 195 S.E.2d 674 (1973); Waters v. Groover, 138 Ga. App. 276, 226 S.E.2d 74 (1976); McIntyre v. Varner, 156 Ga. App. 529, 275 S.E.2d 90 (1980).

Legal fraud not sufficient. — Sale is by the tract and not by the acre when the specification of the number of acres is only words of description, and to authorize an apportionment for a shortage of acreage, actual fraud must be shown; legal fraud is not sufficient. Kytle v. Collins, 67 Ga. App. 98, 19 S.E.2d 754 (1942).

Constructive fraud insufficient. — In a sale in gross, former Civil Code 1910, § 4622 (see O.C.G.A. § 23-2-51), which defined constructive fraud, was inapplicable, and, standing alone, would not be proper to be given in a charge to the jury. Kirkland v. Brewton, 32 Ga. App. 128, 122 S.E. 814 (1924).

An allegation that the defendant knew that the acreage was short, "or by the exercise of ordinary diligence should have known of such shortage," is a charge of constructive knowledge only, and it requires more than this to make a case of actual fraud. Bivins v. Tucker, 41 Ga. App. 771, 154 S.E. 820 (1930).

Right to apportionment is not assignable by the vendee transferring to the purchaser of the land from the vendee bond for title given by the vendor. Morehead v. Ayers, 136 Ga. 488, 71 S.E. 798 (1911).

Burden is upon the vendee to show that the vendor perpetrated actual fraud upon the vendee, though the amount of the deficiency in acreage is a circumstance to which the jury may look, together with all the other evidence, in determining whether there was actual fraud or not. Milner v. Tyler, 9 Ga. App. 659, 71 S.E. 1123 (1911).

Material representation, falsely made to induce sale, with knowledge of the representation's falsity, is actual fraud. Cates v. Owens, 87 Ga. App. 270, 73 S.E.2d 345 (1952).

Material representation amounting to fraud. — Actual fraud must be alleged and proved, and a material representation falsely made by the vendor to a vendee to induce a sale, and made with the knowledge of the representation's falsity, amounts to actual fraud. Stockburger v. Brooker, 33 Ga. App. 676, 127 S.E. 663 (1925).

An allegation that the vendor's representation at the time of the sale as to the width of the lot was false within the vendor's knowledge, and was acted on by the vendee to the vendee's injury, is a charge of actual fraud. If the vendee was fraudulently induced to buy a lot of width less than the vendor represented it to be, the vendee was

Deception or Fraud (Cont'd)
1. Actual Fraud (Cont'd)

entitled to a reduction of the purchase money in the proportion that the deficiency in frontage bore to the frontage bargained for. Halliburton v. Collier, 75 Ga. App. 316, 43 S.E.2d 339 (1947).

Representation made recklessly, without regard to truth, for purpose of effecting sale. — An allegation that representations were made recklessly and negligently and without regard to the truth and for the purpose of effecting the sale and obtaining the petitioner's money shows a sufficient ground of recovery. Bivins v. Tucker, 41 Ga. App. 771, 154 S.E. 820 (1930).

2. Suspicion of Fraud

Suspicion arises out of comparison of quantities and magnitude of deficiency. — Plaintiff must show both such deficiency in the acreage as will justify a suspicion of fraud and actual fraud. The suspicion must arise out of a comparison of quantities and out of the magnitude of the resulting deficiency. The same facts which justify the suspicion may prove the fraud, prima facie. Estes v. Odom, 91 Ga. 600, 18 S.E. 355 (1893); Kendall v. Wells, 126 Ga. 343, 55 S.E. 41 (1906).

By showing a deficiency, a prima facie case of fraud is made to the extent of raising a suspicion. The same facts which justify the suspicion may prove the fraud, prima facie. The suspicion must arise out of a comparison of quantities and out of the magnitude of the resulting deficiency. Marchman v. Security Loan & Abstract Co., 45 Ga. App. 625, 165 S.E. 884 (1932).

Suspicion arises more quickly when farming land purchased. — When the land is purchased with the view of cultivating the land for farming purposes, the suspicion of mistake amounting to fraud as to the acreage would arise more quickly. Marchman v. Security Loan & Abstract Co., 45 Ga. App. 625, 165 S.E. 884 (1932).

3. Previous Knowledge of Land

Knowledge of boundaries not, in itself, notice of acreage contained. — Knowledge of boundaries need not involve knowledge of acreage or superficial area, and was not, in itself, notice of what the tract contained. Marchman v. Security Loan & Abstract Co., 45 Ga. App. 625, 165 S.E. 884 (1932).

When deficiency great, recovery not precluded by previous knowledge. — When the deficiency was more than could be fairly covered by the use of the words ''more or less,'' previous knowledge of the land or of the land's boundaries, would not preclude the vendee from a recovery for fraudulent misrepresentations of quantity. Stockburger v. Brooker, 33 Ga. App. 676, 127 S.E. 663 (1925).

Recovery for actual fraudulent misrepresentation not precluded by previous knowledge. — Previous knowledge of the land or of the land's boundaries would not preclude the vendee from recovering from a fraudulent misrepresentation of quantity, if, without fault on the vendee's part, the vendee was actually deceived and defrauded by the misrepresentation. Marchman v. Security Loan & Abstract Co., 45 Ga. App. 625, 165 S.E. 884 (1932).

Previous knowledge of the land or of the land's boundaries would not preclude the vendee from recovering from fraudulent misrepresentation of quantity, if, without fault on the vendee's part, the vendee was actually deceived and defrauded by the misrepresentation, provided the deficiency was more than could be fairly covered in the given instance by the phrase ''more or less.'' Cates v. Owens, 87 Ga. App. 270, 73 S.E.2d 345 (1952).

No fraud when equal opportunity to ascertain acreage, and no trick or artifice. — Representation made by a landlord to a tenant as to the number of acres in a tract does not constitute fraud if the tenant had equal opportunity with the landlord of ascertaining the number of acres in the tract, and if the landlord did not by trick or artifice prevent the tenant from ascertaining the size of the tract. The fact that the tenant had no way of measuring the tract or no opportunity of measuring the tract does not show that the tenant did not have an equal opportunity with the landlord of ascertaining the tract's size. Bailey v. Tifton Buick Co., 44 Ga. App. 652, 162 S.E. 646 (1932).

4. Jury Questions

Question of whether sale by tract or by acre left to jury. — When the deed in

question is subject to two possible interpretations, i.e., (1) the sale was a sale by the tract; or (2) the sale was a sale by the acre, and a jury could have found either, this question should have been left to the jury, and the trial court was not authorized to decide the question as to whether or not the deficiency was not so gross as to justify the suspicion of willful deception, or mistake amounting to fraud. Pennington v. Wynne, 149 Ga. App. 151, 253 S.E.2d 830 (1979).

Whether property is sold by the tract, or is sold by the acre so as to entitle the purchaser to an apportionment of the price for deficiency of acreage, is usually a jury question. Boswell v. Bryans, 159 Ga. App. 724, 285 S.E.2d 74 (1981).

Question whether deficiency so gross as to raise suspicion of fraud is for jury. — It is a question for the jury whether, under all the circumstances of the particular case, the deficiency is so gross as to justify the suspicion of fraud, in which event the vendee would be entitled to an apportionment of the price according to relative value. James v. Elliott, 44 Ga. 237 (1871); Bryan v. Yates, 7 Ga. App. 712, 67 S.E. 1048 (1910); Mayo v. Bowen, 26 Ga. App. 539, 106 S.E. 596 (1921).

It is a question of fact to be decided by a jury, on all the circumstances of the particular case, whether the deficiency in a given instance is so gross as to raise a suspicion of mistake amounting to fraud. Marchman v. Security Loan & Abstract Co., 45 Ga. App. 625, 165 S.E. 884 (1932).

Exception may arise in extraordinary cases which afford no room for difference of opinion. Perkins Mfg. Co. v. Williams, 98 Ga. 388, 25 S.E. 556 (1896).

5. Remedies

Vendee may demand either rescission or apportionment of price. If the vendee preferred to keep the land and have compensation for the deficiency by reducing the purchase price by the amount sustained in consequence of the vendor's fraud, the vendee was entitled, upon a tender of the balance of the purchase money, to go into a court of equity and insist upon specific performance. Seegar v. Smith, 78 Ga. 616, 3 S.E. 613 (1887).

Damage remedy generally pro rata part of purchase money paid with interest. — In actions for recovery for deficiency in land, the measure of damages generally is the pro rata part of the purchase money paid or to be paid for deficiency with interest. It is not less than this. However, if a part of such property may be of greater value than other portions, this is not necessarily a fixed rule. Halliburton v. Collier, 75 Ga. App. 316, 43 S.E.2d 339 (1947).

Right to rescind waived. — When the vendee continued in unqualified possession and use of the property until and including the date of the trial, approximately two years from the time of discovery of the fraud, there is no error in holding that the right of rescission was waived, and directing a verdict in favor of the plaintiff and against the plea. Carson v. Blair, 31 Ga. App. 60, 121 S.E. 517 (1923), cert. denied, 31 Ga. App. 811, (1924).

6. Illustrative Cases

Allegation sufficient to charge actual fraud, and to submit question of deficiency to jury. — When it was alleged that the defendant, with the intent to defraud the plaintiffs, represented to the plaintiffs that a certain tract of land which the defendant offered to sell to the plaintiffs, and which the defendant did sell to the plaintiffs, contained 109 acres, when the defendant knew the defendant did not own more than half of the acreage represented, and when it was alleged that the plaintiffs, believing and relying on the defendant's false representations as to the acreage of the tract, purchased the land from the defendant, which was described as containing 109 acres, more or less, but which in fact contained only 49.9 acres, these allegations were sufficient to charge the defendant with actual fraud, and the deficiency in quantity was so gross as to authorize submission of the question of fraud to a jury. Cates v. Owens, 87 Ga. App. 270, 73 S.E.2d 345 (1952).

Sufficient deficiency to prove mistake amounting to fraud. — When a deed recited that the number of acres conveyed was 102 ½, ''more or less,'' and there was a proved deficiency of approximately 41 acres, this deficiency was so gross as to warrant the jury in believing that there was a mistake amounting to fraud. Owens v. Durham, 9 Ga. App. 179, 70 S.E. 989 (1911).

When the owner of improved farm land

Deception or Fraud (Cont'd)
6. Illustrative Cases (Cont'd)

shows the land to one who desires to purchase the land for farming purposes, and the owner represents that the land contains 75 acres, points out two of the boundary lines, which are exceedingly long, and leads the prospective purchaser to believe that the other boundary lines are correspondingly long, when in fact the owner knows that the land does not contain 75 acres, and makes such representations and points out such boundaries for the purpose of willfully and knowingly deceiving the prospective purchaser, and does so deceive the purchaser, and the latter, relying upon such representations, purchases the land, when the tract in fact contains only about 44 acres, the purchaser may obtain an apportionment of the purchase price on account of fraud. Black v. Chapman, 33 Ga. App. 509, 126 S.E. 877 (1925).

RESEARCH REFERENCES

ALR. — Recovery by vendee of money paid under mistake of fact as to vendor's title, 36 ALR 482.

Implied covenant in conveyance with reference to map, plat, or blueprint as to size of remaining lots or against further subdivision thereof, 57 ALR 764.

Legal significance and effect of phrase "more or less" in a deed of real property, 70 ALR 368.

Statute of frauds as affecting right to reformation of deed or mortgage so as to enlarge or restrict the land or interest covered, 86 ALR 448.

Effect of action as an election of remedy or choice of substantive rights in case of fraud in sale of property, 123 ALR 378.

Validity and effect of deed which identifies tract conveyed only by reference to its area and a specified corner or other part of a larger tract from which it is to be taken, 139 ALR 1180.

Rules as to interpretation of description of real property as applicable to description in judgment, 150 ALR 773.

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 ALR 4.

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 ALR2d 9.

Specific performance at instance of purchaser with abatement for vendor's misrepresentation as to matters other than quantity or title, 7 ALR2d 1331.

Sufficiency of description in standing timber deed or contract, 35 ALR2d 1422.

Broker's liability to prospective purchaser for refund of deposit or earnest money where contract fails because of defects in vendor's title, 38 ALR2d 1382.

Measure and element of damages recoverable from vendor where there has been a mistake as to amount of land conveyed, 94 ALR3d 1091.

44-5-36. Purchaser's remedies for loss of land due to title defect.

If the purchaser loses part of his land from a defect of title, he may claim according to the relative value of the land so lost either a rescission of the purchase contract or a reduction of the price. (Orig. Code 1863, § 2599; Code 1868, § 2601; Code 1873, § 2643; Code 1882, § 2643; Civil Code 1895, § 3544; Civil Code 1910, § 4124; Code 1933, § 29-202.)

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

Analysis

General Consideration
Applicability
Remedies

General Consideration

Cited in Ruff v. Copeland, 137 Ga. 56, 72 S.E. 506 (1911); Roberts v. Groover, 156 Ga. 386, 119 S.E. 696 (1923); Riehle v. Bank of Bullochville, 158 Ga. 171, 123 S.E. 124 (1924); Holliday v. Ashford, 163 Ga. 505, 136 S.E. 524 (1927); Ashford v. Holliday, 169 Ga. 237, 149 S.E. 790 (1929); Dorsett v. Roberds, 172 Ga. 545, 158 S.E. 236 (1931); Washington Mfg. Co. v. Wickersham, 201 Ga. 635, 40 S.E.2d 206 (1946); Norris v. Coffee, 206 Ga. 759, 58 S.E.2d 812 (1950); Farrar v. Vanpelt, 96 Ga. App. 244, 99 S.E.2d 738 (1957); Pennington v. Wynne, 149 Ga. App. 151, 253 S.E.2d 830 (1979); Ware v. Durham, 246 Ga. 84, 268 S.E.2d 668 (1980); McClure v. Turner, 165 Ga. App. 380, 301 S.E.2d 304 (1983); Safeco Title Ins. Co. v. Citizens & S. Nat'l Bank, 190 Ga. App. 809, 380 S.E.2d 477 (1989).

Applicability

No application to purchaser's attorney. — Statute clearly deals with the rights of a purchaser against the vendor, not purchaser's attorney. Durham v. Ware, 153 Ga. App. 701, 266 S.E.2d 342, aff'd, 246 Ga. 84, 268 S.E.2d 668 (1980) (see O.C.G.A. § 44-5-36).

Negligent attorney liable for actual damages. — An attorney at law employed to examine title to real estate who negligently fails to report an existing title imperfection is liable to the client for the actual damages sustained as a result of the attorney's negligence. Durham v. Ware, 153 Ga. App. 701, 266 S.E.2d 342, aff'd, 246 Ga. 84, 268 S.E.2d 668 (1980).

When vendor lacks title, title defect exists rather than deficiency. — When a certain tract of land is described in a contract of sale by definite boundaries, and it later appears that the vendor has no title to a portion of the tract contained within the described boundaries, this is a defect in the vendor's title rather than a deficiency in quantity. Lawton v. Byck, 217 Ga. 676, 124 S.E.2d 369 (1962), later appeal, 218 Ga. 858, 131 S.E.2d 176 (1963).

When a certain tract of land was described in a contract of sale by definite boundaries, and it later appeared that the vendor had no title to a portion of the tract contained within the described boundaries, this was a defect in the vendor's title, as contemplated by former Code 1933, § 29-202 (see O.C.G.A. § 44-5-36), rather than a deficiency in quantity, as contemplated by former Code 1933, § 29-201 (see O.C.G.A. § 44-5-35). Lunsford v. King, 132 Ga. App. 749, 209 S.E.2d 27 (1974); Etheridge v. Fried, 183 Ga. App. 842, 360 S.E.2d 409 (1987).

Section applicable when purchaser seeks to mark notes "satisfied" on ground title has failed. — When a purchaser of land sought to have delivered up and marked as ''satisfied'' certain notes given by the purchaser for deferred payments, on the ground that title to certain of the land so purchased had failed, the issue as to whether or not it was a sale by the tract or by the acre was not involved; in such a case the applicable law was that contained in former Code 1933, § 29-202 (see O.C.G.A. § 44-5-36), and not the provision of former Code 1933, § 29-201 (see O.C.G.A. § 44-5-35). Miller v. Minhinnette, 185 Ga. 490, 195 S.E. 425 (1938).

Applicable when sued purchaser sets up defense that vendor cannot make title. — When a purchaser under a bond for title did not hold possession of all the land described in the bond, and was sued on notes representing the unpaid purchase price, the purchaser was permitted to set up as a defense the fact that the purchaser held possession of only a part and that the vendor cannot make title to the other part, and that, as a consequence of the defect in the title, the purchaser was entitled to a reduction in the purchase price, former Code 1933, § 29-201 (see O.C.G.A. § 44-5-35) having no application. Pope v. Williams, 70 Ga. App. 834, 29 S.E.2d 808 (1944).

Provision on breach of bond for title inapplicable unless all land lost. — When a

Applicability (Cont'd)

purchaser lost only a part of the land from a defect in title, the purchaser's remedy was fixed by this section; it would seem that § 44-5-67 did not apply unless all the land was lost. McConnell v. White, 91 Ga. App. 92, 85 S.E.2d 75 (1954).

Remedies

Breach of contract as to title to portion of land entitles purchaser to rescission. — Contract of sale of a tract of land described therein as measuring a certain number of feet in width and in depth binds the obligor to make title to the entire tract so described, and if the obligor has no title to a portion of the land, this is a material breach of the contract, entitling the purchaser to a rescission of the contract of sale at the purchaser's election. Coppage v. King, 96 Ga. App. 192, 99 S.E.2d 541 (1957).

"Relative value" defined. — Expression ''relative value'' means relative value with the purchase price as a base value of the whole, for the reason that, when rescission is not sought, the only remedy is a reduction in purchase price. Any other interpretation might result in the recovery by a purchaser of more than the purchase price, if the land lost was worth more at the time of the breach of contract or bond than the whole land originally bargained for. McConnell v. White, 91 Ga. App. 92, 85 S.E.2d 75 (1954).

Deduction from agreed price in proportion to tract's value as represented, and true value. — When a lot of land is sold by number tract, and one of the boundaries is misrepresented, whereby the purchaser fails to get some of the land the purchaser bought, the deduction to be made from the agreed price, in an action for the purchase money, is generally in proportion to the value of the tract with the boundaries as represented, and its value with the true boundaries, computing value as at the time when the sale was made. Woodstock Village v. Fowler, 154 Ga. App. 82, 267 S.E.2d 558 (1980).

Damage remedy in deficiency actions generally pro rata part of purchase money paid with interest. — In actions for recovery for deficiency in land, the measure of damages generally is the pro rata part of the purchase money paid or to be paid for deficiency with interest. It is not less than this. However, if a part of such property may be of greater value than other portions, this is not necessarily a fixed rule. Halliburton v. Collier, 75 Ga. App. 316, 43 S.E.2d 339 (1947).

Measure of damage for breach by insurer under policy insuring title against encumbrances or encroachments is the difference between the value of the property when purchased with the encumbrance or encroachment thereon, and the value of the property as the value would have been if there had been no such encumbrance or encroachment. Beaullieu v. Atlanta Title & Trust Co., 60 Ga. App. 400, 4 S.E.2d 78 (1939).

Effect of constructive knowledge of prior recorded deed. — Purchaser's right to recover damages is not defeated by constructive knowledge of prior recorded deed. Lunsford v. King, 132 Ga. App. 749, 209 S.E.2d 27 (1974); Mansell v. Pappas, 156 Ga. App. 272, 274 S.E.2d 588 (1980), aff'd, 165 Ga. App. 568, 302 S.E.2d 114 (1983).

In action for purchase price, vendees can set off value of land lost. — When a vendor agrees to sell a designated tract of land to another and points out to the latter its boundaries, and the purchaser relies upon the representations of the vendor as to the boundaries, and where such boundaries include lands to which the vendor has no title, in consequence of which the purchaser loses the land, the purchaser, when sued on the notes given for the purchase money, can set off at law the value of the portion of the land so lost against the purchase money. This would be true whether the misrepresentations were designedly made by the vendor to deceive the purchaser, or were innocently made, if the vendee relied upon such misrepresentations in making the purchase and was thereby damaged. Halliburton v. Collier, 75 Ga. App. 316, 43 S.E.2d 339 (1947).

If the vendors are unable to put the title to any portion of the lands described by metes and bounds in the vendees and put the vendees in undisturbed possession thereof, the vendees in an action by the vendors for the purchase price may set off the value of that portion to which title and possession cannot be given by the vendors. McConnell v. White, 91 Ga. App. 92, 85 S.E.2d 75 (1954).

Defect in title found. — There was a defect in title of a lot conveyed to an insured

as the builder that conveyed the lot did not have superior title to a portion of the lot. Wilkinson Homes, Inc. v. Stewart Title Guar. Co., 271 Ga. App. 577, 610 S.E.2d 187 (2005).

RESEARCH REFERENCES

Am. Jur. 2d. — 23 Am. Jur. 2d, Deeds, § 184 et seq.

ALR. — Doctrine of after-acquired title as between one who took before and one who took after common grantor or mortgagor acquired title, 25 ALR 83.

Recovery by vendee of money paid under mistake of fact as to vendor's title, 36 ALR 482.

Remedy of grantee in possession under deed with covenants of title, independently of those covenants, where the grantor's title is defective, 50 ALR 180; 65 ALR 1142.

Outstanding right of dower as breach of covenant of title or against encumbrances in deed or mortgage of real estate, 141 ALR 482.

Marketability of title as affected by fact that grantor or mortgagor in chain of title acquired complete or perfect title after conveyance, 163 ALR 437.

Specific performance at instance of purchaser with abatement for vendor's misrepresentation as to matters other than quantity or title, 7 ALR2d 1331.

Broker's liability to prospective purchaser for refund of deposit or earnest money where contract fails because of defects in vendor's title, 38 ALR2d 1382.

Measure and element of damages recoverable from vendor where there has been a mistake as to amount of land conveyed, 94 ALR3d 1091.

Application of provision in land purchase agreement that it shall be null unless marketable title is delivered, where defect in title is created or permitted by vendor subsequent to execution of agreement, 13 ALR4th 927.

44-5-37. Applicability of Code Sections 53-2-112 through 53-2-114 to elections under or against deed.

The principles of Code Sections 53-2-112 through 53-2-114 relating to elections shall also apply to deeds. (Orig. Code 1863, § 3096; Code 1868, § 3108; Code 1873, § 3165; Code 1882, § 3165; Civil Code 1895, § 4016; Civil Code 1910, § 4613; Code 1933, § 37-505.)

Cross references. — Equitable principles governing elections between benefits, § 23-1-24.

44-5-38. Effect of recital in deed of receipt of purchase money.

Recital in a deed that the purchase money has been received does not estop the maker from denying the fact and proving the contrary. (Orig. Code 1863, § 2657; Code 1868, § 2656; Code 1873, § 2698; Code 1882, § 2698; Civil Code 1895, § 3608; Civil Code 1910, § 4188; Code 1933, § 29-110.)

JUDICIAL DECISIONS

Recital of payment of purchase money in deed or other contract does not estop maker from denying the fact and proving the contrary. McCann v. Glynn Lumber Co., 199 Ga. 669, 34 S.E.2d 839 (1945).

Failure to pay creates liability. — Fact that

the consideration is not actually paid does not render void the conveyance but creates a liability upon the purchaser which may be enforced in an action at law. Morris v. Johnson, 219 Ga. 81, 132 S.E.2d 45 (1963).

Recital that amount paid subject to inquiry to show amount charged to purchaser's account. — Recital in a written contract of sale of personalty that a specified amount of the purchase money was paid in cash on or before delivery of the property, leaving a stated balance to be covered by notes for installments of so much per month, is subject to inquiry and explanation to the extent of showing that what is described as the initial payment was not in fact received, but was charged to the account of the purchaser as a subsisting and unconditional liability. Newsom v. Reynolds Chevrolet Co., 43 Ga. App. 376, 158 S.E. 763 (1931).

When statement on consideration is by way of recital, actual consideration is subject to explanation; but if the consideration is referred to in the deed in such way as to make the consideration one of the terms or conditions of the contract, the consideration cannot be varied by parol. Shapiro v. Steinberg, 179 Ga. 18, 175 S.E. 1 (1934).

Parole evidence not permissible to modify terms and conditions of contract. — If an instrument states the consideration, not merely by way of recital, but in such a way as to constitute the consideration a part of the terms and conditions of the agreement itself, then and in such event it is not permissible, even under the guise of inquiring into the consideration, to set up a new and different consideration, and in this way to incidentally modify the terms and conditions of the written contract. This rule does not apply where a total lack or a total failure of consideration is shown, in which event the instrument can be attacked irrespective of how or in what manner the consideration may be expressed. Pittman v. Pittman, 196 Ga. 397, 26 S.E.2d 764 (1943).

When consideration not ambiguous, error to admit parol evidence to show parties' intention. — Timber lease, as properly construed, granted the right to cut and remove all the timber of stated kinds and dimensions on the described tract of land, at and for a stipulated price per 1,000 feet, subject only to the expiration of the lease on a date therein fixed, and did not limit the amount of timber that might be so cut by recital of a certain consideration, and the judge erred in holding that the contract was ambiguous on the point at issue, and in admitting over appropriate objection parol evidence offered to show an intention of the parties that only a certain quantity of timber could be so cut and removed under the right granted. McCann v. Glynn Lumber Co., 199 Ga. 669, 34 S.E.2d 839 (1945).

Cited in Bonner v. Metcalf, 58 Ga. 236 (1877); Parrott v. Baker, 82 Ga. 364, 9 S.E. 1068 (1889); Coldwell Co. v. Cowart, 138 Ga. 233, 75 S.E. 425 (1912); Gammage v. Perry, 29 Ga. App. 427, 116 S.E. 126 (1923); Carder v. Arundel Mtg. Co., 47 Ga. App. 309, 170 S.E. 312 (1933).

RESEARCH REFERENCES

Am. Jur. 2d. — 23 Am. Jur. 2d, Deeds, § 86. 28 Am. Jur. 2d, Estoppel and Waiver, § 11 et seq.

ALR. — Estoppel of grantee or mortgagee as to amount of prior mortgage recited, 141 ALR 1184.

Estoppel of oil and gas lessee to deny lessor's title, 87 ALR2d 602.

44-5-39. Binding effect of covenants on grantee who accepts deed.

When a grantee accepts a deed, he is bound by the covenants contained therein even though the deed has not been signed by him. (Civil Code 1895, § 3600; Civil Code 1910, § 4180; Code 1933, § 29-102; Ga. L. 1967, p. 592, § 1.)

History of Code section. — This Code section is derived from the decision in Georgia S.R.R. v. Reeves, 64 Ga. 492 (1879).

Law reviews. — For article, ''Condominium and Home Owner Associations: Formation and Development,'' see 24 Emory L.J. 977 (1975). For article surveying recent legislative and judicial developments in Georgia's real property laws, see 31 Mercer L. Rev. 187 (1979).

For comment on Phillips v. Naff, 332 Mich. 389, 52 N.W.2d 158 (1952), see 15 Ga. B.J. 71 (1952).

JUDICIAL DECISIONS

Owner may sell land subject to reservations or restrictions for benefit of adjoining owned property. — Owner of a fee has the right to sell the owner's land subject to such reservations or restrictions as the owner may see fit to impose, provided the reservations are not contrary to public policy, and such reservations or restrictions create an easement, or servitude in the nature of an easement, upon the land conveyed for the benefit of the adjoining property of which the grantor remains the owner, and a grantee from the former owner who imposes the restriction is entitled to the same remedy for its enforcement as was the grantor. Cawthon v. Anderson, 211 Ga. 77, 84 S.E.2d 66 (1954).

Parties may contract away or extend property rights. — Two parties may contract away their rights or extend their rights as the parties please regarding the use of real property so long as public policy is not violated. Winslette v. Keeler, 220 Ga. 100, 137 S.E.2d 288 (1964).

Covenant must concern land and grantee must have notice. — It is only necessary that covenant concern land or use, and that grantee has notice of it for the covenant to be enforceable against the grantee. Reeves v. Comfort, 172 Ga. 331, 157 S.E. 629 (1931).

Obligation must be clearly expressed or clearly implied. Yaughn v. Harper, 151 Ga. 187, 106 S.E. 100 (1921).

When it is plainly stated in the defendant's deed the purposes for which the property could be used, the parties excluded the property from use for any other purpose. Taylor v. Smith, 221 Ga. 55, 142 S.E.2d 918 (1965).

Covenant to maintain subdivision's quality not void. — Covenant to maintain the high quality of a subdivision is not harmful to the public welfare, nor so vague and indefinite as to be void. Winslette v. Keeler, 220 Ga. 100, 137 S.E.2d 288 (1964).

Purchaser of land is conclusively charged with notice of restrictive agreements or covenants contained in a deed which constitutes one of the muniments of the purchaser's own title, and generally this is true, whether the deed containing such covenants is recorded or not. Reeves v. Comfort, 172 Ga. 331, 157 S.E. 629 (1931).

Compliance with restrictive covenants required. — Trial court properly entered an injunction against a husband and wife requiring them, as homeowners and members of a neighborhood property owners association, to remove a chain link fence that was not allowed pursuant to the association's covenants, and the association did not waive enforcement, nor did estoppel apply to grant the husband and wife exception from the association's rules. Wright v. Piedmont Prop. Owners Ass'n, 288 Ga. App. 261, 653 S.E.2d 846 (2007).

Purchaser with benefit of covenant shall bear burden. — When a covenant is entered into and the covenant is for the benefit of the purchaser, the seller gets an enhanced price for the seller's land, and if seller reserves or requires a benefit for the seller and the seller's assigns, the seller gets present value therefor. In either case, the covenant becomes in effect a part of the estate itself, and whoever takes the estate in one case should have the benefit and in the other should bear the burden. Reeves v. Comfort, 172 Ga. 331, 157 S.E. 629 (1931).

Presumption of full use of easement right-of-way. — Recorded subdivision plats and deeds to subdivision lots created a legal rebuttable presumption that ''reasonably necessary use,'' ''fair,'' or ''reasonable enjoyment'' of the easement required the full use of the right-of-way or street as platted and dedicated, and plaintiff-grantee failed to rebut the presumption in an action to enjoin clear-cutting of the right-of-way. Montana v. Blount, 232 Ga. App. 782, 504 S.E.2d 447 (1998).

Grantee succeeds to all of grantor's rights and liabilities. — When the grantee accepts

a warranty deed from the grantor and enters thereunder, the grantee succeeds to all the rights and liabilities of the grantor in regard to the latter's equity in the property. Williams v. Joel, 89 Ga. App. 329, 79 S.E.2d 401 (1953).

When 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 to the deed itself, the power of sale therein contained was one which might properly be exercised by the second grantee in the foreclosure proceedings. Williams v. Joel, 89 Ga. App. 329, 79 S.E.2d 401 (1953).

Effect of accord and satisfaction on obligation. — Accord and satisfaction evidenced by warranty deed wipes out an antecedent pecuniary obligation. Waters v. Lanier, 116 Ga. App. 471, 157 S.E.2d 796 (1967).

Grantee taking property by deed containing agreement to pay debt personally liable. — Remote grantee of mortgaged property, who takes by a deed in which the grantee agrees to pay a debt, is personally liable to the mortgagee if the intermediate grantor took only subject to the debt and was not personally liable for the debt. Somers v. Avant, 244 Ga. 460, 261 S.E.2d 334 (1979); Carr v. Nodvin, 178 Ga. App. 228, 342 S.E.2d 698 (1986).

Lessee and assigns bound by covenant for payment of rent. — When a lease for a period of years is duly executed by the lessor with the statutory formalities required for a deed, and the lessee accepts the lease, has it recorded, and enters into possession thereunder, the lessee and the lessee's assigns will be bound by a covenant therein for the payment of a specified sum as monthly rental, even though the lessee did not sign the instrument. Such a lease is not unilateral and void for the reason contended, that the provision for the payment of rent is not binding on the lessee. Shell Petro. Corp. v. Stallings, 51 Ga. App. 351, 180 S.E. 654 (1935).

Subtenant not liable to lessor's assignee for original lessee's nonpayment. — Subtenant in possession of premises is not liable in an action ex delicto to one to whom the original lessor subsequently sold the property and assigned the original lease, on account of nonpayment of rents, under an alleged ''conspiracy'' between the subtenant and the original lessee to remain in possession without payment of rents or other compensation. Shell Petro. Corp. v. Stallings, 51 Ga. App. 351, 180 S.E. 654 (1935).

Covenants not destroyed merely because land more valuable under changed conditions. — Court of equity will not strike down and destroy covenants merely because under the changed condition of a particular subdivision or adjoining subdivisions the lots of land would be more valuable and would yield more taxes to the government if the present owners of the lots in this subdivision could use their land for other than residential purposes. Cawthon v. Anderson, 211 Ga. 77, 84 S.E.2d 66 (1954).

Intention to make covenant severable. — When intention to make special covenant severable is denoted, such intention renders covenant separate. Davies v. Blasingame, 181 Ga. 128, 181 S.E. 763 (1935).

Breach of covenant which is sole consideration of absolute deed, with covenantor's insolvency authorizes cancellation, although the deed contains no condition on the happening of which the estate is to determine; on principle, the relief would also extend to recovery of possession of the land. Arrington v. Arrington, 189 Ga. 725, 7 S.E.2d 665 (1940).

Condition subsequent, breach of which causes title's forfeiture, not created. — When a deed did not expressly state a condition that the breach thereof should cause forfeiture of the estate granted, a clause as to providing a home and necessaries of life for the grantor might, by acceptance of the deed and entry of possession thereunder, become binding upon the grantee as a covenant, but the deed did not create a condition subsequent, the breach of which would cause a forfeiture or termination of title conveyed by the deed. Arrington v. Arrington, 189 Ga. 725, 7 S.E.2d 665 (1940).

Period of limitation in breach of covenant action is 20 years. — When, as under the common law, a grantee accepts a deed and thereby, without the necessity of an entry, becomes bound by the covenants therein, and the instrument is under seal, the period of limitation in an action for a breach of the covenant is 20 years. Motz v. Alropa Corp., 192 Ga. 176, 15 S.E.2d 237 (1941).

Cited in Wadley Lumber Co. v. Lott, 130 Ga. 135, 60 S.E. 836 (1908); Stanley v.

Reeves, 149 Ga. 151, 99 S.E. 376 (1919); Renfroe v. Alden, 164 Ga. 77, 137 S.E. 831 (1927); Phillips v. Blackwell, 164 Ga. 856, 139 S.E. 547 (1927); Peebles v. Perkins, 165 Ga. 159, 140 S.E. 360 (1927); Field v. Hargis, 169 Ga. 670, 151 S.E. 379 (1930); Dye v. Dye, 176 Ga. 72, 166 S.E. 861 (1932); Interstate Inv. Co. v. McCullough, 188 Ga. 206, 3 S.E.2d 733 (1939); Austell Bank v. National Bondholders Corp., 188 Ga. 757, 4 S.E.2d 913 (1939); Ramsey v. Kitchen, 192 Ga. 535, 15 S.E.2d 877 (1941); Peppers v. Peppers, 194 Ga. 10, 20 S.E.2d 409 (1942); Grice v. Grice, 197 Ga. 686, 30 S.E.2d 183 (1944); Lawson v. Lewis, 205 Ga. 227, 52 S.E.2d 859 (1949); Moore v. Wells, 212 Ga. 446, 93 S.E.2d 731 (1956); Howard v. Perkins, 229 Ga. 279, 191 S.E.2d 46 (1972); Boxwood Corp. v. Berry, 144 Ga. App. 351, 241 S.E.2d 297 (1977); Antill v. Sigman, 240 Ga. 511, 241 S.E.2d 254 (1978); Flake v. Fulton Nat'l Bank, 146 Ga. App. 40, 245 S.E.2d 330 (1978); Sellers v. Citizens & S. Nat'l Bank, 177 Ga. App. 85, 338 S.E.2d 480 (1985); Argyle Realty Co. v. Cobb County School Dist., 259 Ga. 654, 386 S.E.2d 161 (1989); Southeast Toyota Distribs., Inc. v. Fellton, 212 Ga. App. 23, 440 S.E.2d 708 (1994); Lanier v. Burnette, 245 Ga. App. 566, 538 S.E.2d 476 (2000); Casey v. Wachovia Bank, N.A., 273 Ga. 140, 539 S.E.2d 503 (2000).

RESEARCH REFERENCES

Am. Jur. 2d. — 23 Am. Jur. 2d, Deeds, § 157 et seq.

C.J.S. — 26A C.J.S., Deeds, § 198 et seq.

ALR. — Outstanding title or claim in grantee as breach of covenant in deed, 10 ALR 441.

Effect on validity and character of instrument in form of deed, of provisions therein indicating an intention to postpone or limit the rights of grantee until after the death of grantor, 11 ALR 23; 31 ALR2d 532.

Severance of title or rights to oil and gas in place from title to surface, 29 ALR 586; 146 ALR 880.

Reservation of vendor's lien as preventing severance of estate in mineral from estate in surface by deed otherwise having that effect, 29 ALR 618.

Reservation in grant of land of right to hunt and fish with like right to the grantee, as limiting the right of the grantee actual owners of the land, 32 ALR 1533.

Acquiescence by purchaser of lot in restricted district in violations of restrictions as to some lots as waiver of right to insist upon it as to others, 46 ALR 372; 85 ALR 936.

Quantum of estate granted by a deed as affected by covenant, 47 ALR 869.

Continued use of property for burial purposes as a condition subsequent of a conveyance of dedication of land for that purpose, 47 ALR 1174.

Reservation by grantor of the right to require payment for existing party wall when used, 52 ALR 494.

Structure intended as an outbuilding, but temporarily used as a residence, as breach of restrictive covenant respecting character or cost of residence, 60 ALR 253.

Measure of damages for breach of covenants of title in conveyances or mortgages of real property, 61 ALR 10; 100 ALR 1194.

What is a "manufacturing" business or enterprise within covenant restricting the use of real property, 81 ALR 1047.

Deed as superseding, or merging, provisions of antecedent contract imposing obligations upon the vendor, 84 ALR 1008; 38 ALR2d 1310.

Period of duration of covenant restricting use of real property when not expressly stated, 95 ALR 458.

Fee simple conditional, 114 ALR 602.

Character as a conditional limitation or condition subsequent, or as a covenant, of provision or recital in deed a purchase for which land is to be used, as affected by fact that deed was voluntary or for a merely nominal consideration, 116 ALR 76.

Construction and application of restrictive covenants relating specifically to schools, 124 ALR 448.

"Tourist home" or tourist camp as violation of restrictive covenant as to use of real property, 127 ALR 853.

Character as condition, limitation, covenant, or trust of provision in deed as to purpose for which property is to be used as affected by introduction with word "provided" or its derivatives, 135 ALR 1135.

Delivery of deed as conditioned on obtaining signature of another as grantor, 140 ALR 265.

Building restrictions, by covenant or condition in deed or by zoning regulation, as applied to religious groups, 148 ALR 367.

Benefit of provision in deed which limits or qualifies grant or reservation of mineral rights, as passing to subsequent grant or encumbrancer of land, upon the theory that it is a covenant running with the land, or upon the ground that it creates an interest in the land and passes as such, 151 ALR 818.

Validity of reservation of oil and gas or other mineral rights in deed of land, as against objection of repugnancy to the grant, 157 ALR 485.

Provision of building restriction which permits garage or other outbuilding as applicable to lot on which there is no other building, 162 ALR 1098.

Easement or servitude or restrictive covenant as affected by sale for taxes, 168 ALR 529.

Computation of number or percentage of owners signing restrictive agreement affecting real property, 173 ALR 316.

Construction and application of covenant restricting use of property to ''residence'' or ''residential purposes,'' 175 ALR 1191.

Validity and effect of deed executed in blank as to name of grantee, 175 ALR 1294.

Change of neighborhood in restricted district as affecting restrictive covenant; decisions since 1927, 4 ALR2d 1111.

Omission from deed of restrictive covenant imposed by general plan of subdivision, 4 ALR2d 1364.

Oral agreement restricting use of real property as within statute of frauds, 5 ALR2d 1316.

Use of property by college fraternity or sorority as violation of restrictive covenant, 7 ALR2d 436.

Effectiveness of reservation of vendor's crop rights in land contract in absence of such reservation in deed later executed, 8 ALR2d 565.

Estoppel of mortgagee to contest the mortgagor's title, 11 ALR2d 1397.

Church as violation of covenant restricting use of property, 13 ALR2d 1239.

Personal covenant in recorded deed as enforceable against grantee's lessee or successor, 23 ALR2d 520.

Maintenance, use, or grant of right of way over restricted property as violation of restrictive covenant, 25 ALR2d 904.

''Fronting'' of corner lot on both streets or on only one, within restrictive covenant, 30 ALR2d 559.

Covenant in conveyance requiring erection of dwelling as prohibiting use of property for business or other nonresidential purpose, 32 ALR2d 1207.

Building side line restrictive covenants, 36 ALR2d 861.

Validity of provision of will or conveyance limiting alienation to certain individuals or those of a limited class, 36 ALR2d 1437.

Deed as superseding or merging provisions of antecedent contract imposing obligations upon the vendor, 38 ALR2d 1310.

Validity of provisions of will or deed prohibiting, penalizing, or requiring marriage to one of a particular religious faith, 50 ALR2d 740.

Deed as imposing upon vendee obligations additional to, or as superseding or merging obligations imposed by, antecedent contract, 52 ALR2d 647.

What constitutes acceptance of deed by grantee, 74 ALR2d 992.

Use of premises for parking place as violation of restrictive covenant, 80 ALR2d 1258.

Construction and effect of restrictive covenant in deed or conveyance specifically prohibiting or limiting the keeping of animals, such as livestock, fowl, etc., on the premises, 89 ALR2d 990.

Validity, construction, and effect of contractual provision regarding future revocation or modification of covenant restricting use of real property, 4 ALR3d 570.

Covenant restricting use of land, made for purpose of guarding against competition, as running with land, 25 ALR3d 897.

Zoning or other public restrictions on the use of property as affecting rights and remedies of parties to contract for the sale thereof, 39 ALR3d 362.

Covenant in deed restricting material to be used in building construction, 41 ALR3d 1290.

Meaning of terms ''city,'' ''town,'' or the like as employed in restrictive covenants not to compete, 45 ALR3d 1339.

Validity and effect of provision in deed attempting to make reservation or exception in favor of grantor's spouse, 52 ALR3d 753.

Use of property for multiple dwellings as violating restrictive covenant permitting

property to be used for residential purposes only, 99 ALR3d 985.

Restrictive covenants as to height of structures or buildings, 1 ALR4th 1021.

Validity, construction, and effect of restrictive covenants as to trees and shrubbery, 13 ALR4th 1346.

Validity of zoning or building regulations restricting mobile homes or trailers to established mobile home or trailer parks, 17 ALR4th 106.

Validity and construction of restrictive covenant prohibiting or governing outside storage or parking of housetrailers, motor homes, campers, vans, and the like, in residential neighborhoods, 32 ALR4th 651.

Radio or television aerials, antennas, towers, or satellite dishes or discs as within terms of covenant restricting use, erection, or maintenance of such structures upon residential property, 76 ALR4th 498.

Easement, servitude, or covenant as affected by sale for taxes, 7 ALR5th 187.

44-5-40. Conveyance of future interests or estates.

Future interests or estates are descendible, devisable, and alienable in the same manner as estates in possession. Vested interests in property stemming from the approval of land disturbance, building, construction, or other development plans, permits, or entitlements in accordance with a schedule or time frame approved or adopted by the local government shall be descendible, devisable, and alienable in the same manner as estates in possession. (Orig. Code 1863, § 2650; Code 1868, § 2649; Code 1873, § 2691; Code 1882, § 2691; Civil Code 1895, § 3601; Civil Code 1910, § 4181; Code 1933, § 29-103; Ga. L. 1994, p. 364, § 1; Ga. L. 2008, p. 210, § 3/HB 1283; Ga. L. 2009, p. 8, § 44/SB 46.)

The 2008 amendment, effective July 1, 2008, added the last sentence.

The 2009 amendment, effective April 14, 2009, part of an Act to revise, modernize, and correct the Code, revised punctuation in the last sentence of this Code section.

Editor's notes. — Ga. L. 1994, p. 364, § 3, not codified by the General Assembly, provides: ''This Act is intended to clarify and codify the law regarding the alienability of future interests.''

Ga. L. 2008, p. 210, § 1, not codified by the General Assembly, provides: ''(a) The General Assembly finds that the railroads and their rights of way in Georgia:

''(1) Are essential to the continued viability of this state;

''(2) Are valuable resources which must be preserved and protected;

''(3) Are essential for the economic growth and development of this state;

''(4) Provide a necessary means of transporting raw materials, agricultural products, other finished products, and consumer goods and are also essential for the safe passage of hazardous materials;

''(5) Relieve congestion on the highways and keep dangerous products and materials off our highways;

''(6) Are vital for national defense and national security; and

''(7) Provide the most energy efficient means of transportation through this state, thus minimizing air pollution and fuel consumption.

''(b) The purpose of this Act is to protect the rights of way of railroads from loss by claims of adverse possession or other claims by prescription and to recognize the dimensions of these rights of way as they were identified and defined nearly 100 years ago.''

Law reviews. — For article discussing problems in construction of instrument conveying gift to a group or class, see 6 Ga. St. B.J. 169 (1969). For survey article on zoning and land use law, see 60 Mercer L. Rev. 457 (2008).

For note on the 1994 amendment of this Code section, see 11 Ga. St. U.L. Rev. 243 (1994).

For comment criticizing Franks v. Sparks, 217 Ga. 117, 121 S.E.2d 27 (1961), holding

right of entry not alignable or assignable, see 24 Ga. B.J. 363 (1962).

JUDICIAL DECISIONS

Grantor may convey present estate by deed, although possession postponed. — If the intention by the grantor is to convey a present estate, although possession is postponed until the death of the grantor, the instrument is a deed. Martin v. Smith, 211 Ga. 600, 87 S.E.2d 406 (1955).

When grantor retains exclusive life control over lands. — Deed containing this reservation: ''This conveyance is made with the distinct reservation by the grantor that she retains for herself an exclusive control of all of said lands as long as she may live, and to have the right to use them as her own and as she sees fit, including the working and selling of timber during the remainder of her natural life,'' is a warranty deed, and not a will. Martin v. Smith, 211 Ga. 600, 87 S.E.2d 406 (1955).

Title to bare possibility of future interest cannot be transferred immediately. — Bare possibility of future inheritance from a living person is not a ''future interest or estate,'' the title to which can be transferred immediately. Harper v. Harper, 241 Ga. 19, 243 S.E.2d 74 (1978).

Contingency or possibility cannot be sold, unless present right to future benefit. — Future interest may be conveyed by deed. However, a bare contingency or possibility may not be the subject of sale, unless there shall exist a present right in the person selling to a future benefit. Shockley v. Storey, 185 Ga. 790, 196 S.E. 702 (1938).

Possibility of reverter assignable. — Under a will which gave lands to a certain devisee but contained a provision that, if the devisee died without issue, the land should revert to the testator's estate, the heirs at law of the testator took such a contingent estate therein as was assignable during the lifetime of the devisee. Shockley v. Storey, 185 Ga. 790, 196 S.E. 702 (1938).

Remainder may be assigned or conveyed. — Remainder is an estate in land, and whether vested or contingent, may be freely assigned and conveyed. Darnell v. Holtzclaw, 260 Ga. 891, 401 S.E.2d 521 (1991).

Vested remainder is a present estate; only the possession is postponed. Darnell v. Holtzclaw, 260 Ga. 891, 401 S.E.2d 521 (1991).

Contingent remainder to certain person transmissible. — Descendible interest is created in a contingent remainder when the person or persons to take are certain, but the gift is contingent upon the happening of a certain event, and an interest that is descendible is usually otherwise transmissible. Raney v. Smith, 242 Ga. 809, 251 S.E.2d 554 (1979).

Power to appoint remainderman by will cannot be exercised by deed. — When a deed granted a life estate and at the same time conferred upon the grantee power to appoint by will the person or persons to take in the remainder, the appointment could be made by will only, and an attempt to exercise the power by a deed was ineffectual, and a grantee under the deed had no interest which the grantee could convey to another in virtue of the appointment attempted in the deed. Newton v. Bullard, 181 Ga. 448, 182 S.E. 614 (1935).

Deed to person not in esse. — Deed to immediate estate in land to a person not in esse is absolutely void. Bank of Graymont v. Kingery, 170 Ga. 771, 154 S.E. 355 (1930).

Cited in Lufburrow v. Koch, 75 Ga. 448 (1885); West v. Anderson, 187 Ga. 587, 1 S.E.2d 671 (1939); Yancey v. Grafton, 197 Ga. 117, 27 S.E.2d 857 (1943); Chance v. Buxton, 177 F.2d 297 (5th Cir. 1949); Seymour v. Presley, 239 Ga. 572, 238 S.E.2d 347 (1977); Chattahoochee Holdings, Inc. v. Marshall, 146 Ga. App. 658, 247 S.E.2d 167 (1978); Henderson v. Collins, 245 Ga. 776, 267 S.E.2d 202 (1980).

RESEARCH REFERENCES

Am. Jur. 2d. — 23 Am. Jur. 2d, Deeds, § 211 et seq.

C.J.S. — 26A C.J.S., Deeds, §§ 25, 26.

ALR. — Quantum of estate passing to grantee as affected by language in deed purporting to express his intention that

property is to third person upon his death, 52 ALR 540.

Delivery of deed to third person to be delivered to grantee after grantor's death, 52 ALR 1222.

Fee simple conditional, 114 ALR 602.

Effect on validity and character of instrument in form of deed of provisions therein indicating an intention to postpone or limit the rights of grantee until after the death of grantor, 31 ALR2d 532.

Implication of right of life tenant to entrench upon or dispose of corpus from language contemplating possible diminution or elimination of gift over, 31 ALR3d 6.

Validity and effect of provision in deed attempting to make reservation or exception in favor of grantor's spouse, 52 ALR3d 753.

44-5-41. Voidance and ratification of conveyance to or by a minor.

A deed, security deed, bill of sale to secure debt, or any other conveyance of property or interest in property to or by a minor is voidable unless such minor has become emancipated by operation of law or pursuant to Article 6 of Chapter 11 of Title 15. If a minor has conveyed property or an interest in property, the minor may void the conveyance upon arrival at the age of 18; and, if the minor makes another conveyance at that time, it will void the first conveyance without reentry or repossession. If property or an interest in property has been conveyed to a minor and, after arrival at the age of 18, the minor retains the possession or benefit of the property or interest in property, the minor shall have thereby ratified or affirmed the conveyance. (Orig. Code 1863, § 2653; Code 1868, § 2652; Code 1873, § 2694; Code 1882, § 2694; Civil Code 1895, § 3604; Civil Code 1910, § 4184; Code 1933, § 29-106; Ga. L. 1966, p. 291, § 2; Ga. L. 1969, p. 640, § 2; Ga. L. 1972, p. 193, § 3; Ga. L. 2006, p. 141, § 7/HB 847.)

Cross references. — Capacity of minors to enter into contracts, § 13-3-20 et seq.

Editor's notes. — Georgia Laws 1972, p. 193, § 10, effective July 1, 1972, provided that the purpose of the Act was to reduce the age of legal majority from 21 years of age to 18 years of age so that all persons, upon reaching the age of 18, would have the rights, privileges, powers, duties, responsibilities, and liabilities previously applicable to persons 21 years of age or over. The section further provided that the Act was not to be construed to have the effect of changing the age from 21 to 18 with respect to any legal instrument or court decree in existence prior to the effective date of the Act when the instrument referred only to ''the age of majority'' or words of similar import, except that any guardianship of the person or property of a minor under the provisions of Code 1933, T. 49, whether such guardianship was created by court order or decree entered before or after the effective date of the Act or under the will of a testator which was executed after the effective date of the Act, would terminate when the ward for whom such guardianship was created reached 18 years of age.

Law reviews. — For article recommending more consistency in age requirements of laws pertaining to the welfare of minors, see 6 Ga. St. B.J. 189 (1969). For article on 2006 amendment of this Code section, see 23 Ga. St. U.L. Rev. 79 (2006).

For comment on Ware v. Mobley, 190 Ga. 249, 9 S.E.2d 67 (1940), see 3 Ga. B.J. 65 (1940).

JUDICIAL DECISIONS

Effect of use of "void" in this section. — Prior law was unaffected by fact that 1933 codifiers used word ''voidable'' instead of ''void.'' Ware v. Mobley, 190 Ga. 249, 9

S.E.2d 67 (1940) commented on in 3 Ga. B.J. 65 (1940).

Provisions on voidance of contract and deed construed in pari materia. — Former Code 1933, § 20-201 (see O.C.G.A. § 13-3-20), which declared that generally the contract of an infant was voidable, and former Code 1933, § 29-106 (see O.C.G.A. § 44-5-41), which contained the declaration that the deed of an infant was voidable at the infant's pleasure on majority, should be construed in pari materia. Ware v. Mobley, 190 Ga. 249, 9 S.E.2d 67 (1940) commented on in 3 Ga. B.J. 65 (1940).

Right of disaffirmance applies to executed as well as to executory contracts. Gonackey v. General Accident, Fire & Life Assurance Corp., 6 Ga. App. 381, 65 S.E. 53 (1909).

Deed of an infant is voidable upon infant's disaffirmance during minority or within a reasonable time after attaining majority. Merritt v. Jowers, 184 Ga. 762, 193 S.E. 238 (1937).

Infant may act against immediate grantee and subsequent purchaser. — One who, while an infant, executes a deed to real property may in a proper case, upon reaching majority, disapprove the act, not only as against the immediate grantee, but also as against a subsequent bona fide purchaser. Ware v. Mobley, 190 Ga. 249, 9 S.E.2d 67 (1940) commented on in 3 Ga. B.J. 65 (1940).

Infant's duty to disaffirm is not dependent upon other party's doing anything under the deed. Bentley v. Greer, 100 Ga. 35, 27 S.E. 974 (1896).

"Reasonable time" to disaffirm depends on facts of case. — Infant may disaffirm the deed within a reasonable time after attaining majority, and if the infant fails to do so, the right of avoidance on the ground of infancy will be lost. What is a "reasonable time" will depend upon the facts of each case, but will not be longer than seven years after the disability is removed. Nathans v. Arkwright, 66 Ga. 179 (1880); McGarrity v. Cook, 154 Ga. 311, 114 S.E. 213 (1922).

"Reasonable time" is jury question. — What is a reasonable time within which to disaffirm a deed made during minority after attainment of majority is a question for the jury upon the facts of each particular case, but will not be longer than seven years after the attainment of majority. Merritt v. Jowers, 184 Ga. 762, 193 S.E. 238 (1937).

Surrender of consideration required. — No attempted repudiation under deed can be effective unless accompanied by surrender of consideration acquired by the minor thereunder as may still remain in the minor's hands. Merritt v. Jowers, 184 Ga. 762, 193 S.E. 238 (1937).

Grantor's statement that deed would stand upon receipt of consideration amounts to ratification. — Statement by grantor, after reaching majority, that if the promised consideration which the grantor never received was paid the grantor would let the deed stand amounted to ratification, in the absence of proof that the consideration was paid. Ware v. Mobley, 190 Ga. 249, 9 S.E.2d 67 (1940) commented on in 3 Ga. B.J. 65 (1940).

After affirmance, an infant will be estopped from avoiding a deed on the ground of infancy at the date of the deed's execution. McGarrity v. Cook, 154 Ga. 311, 114 S.E. 213 (1922).

Estoppel by conduct or admission imputable to infant reaching age of discretion. — Waivers or estoppels are not ordinarily imputable against infants, but an estoppel by conduct or admission can be imputed to an infant who has reached an age of discretion when fraud can be imputed against the infant. Nichols v. English, 223 Ga. 227, 154 S.E.2d 239 (1967).

Cited in Beckworth v. Beckworth, 255 Ga. 241, 336 S.E.2d 782 (1985); Harris v. Burrell, 159 Bankr. 365 (Bankr. M.D. Ga. 1993).

RESEARCH REFERENCES

Am. Jur. 2d. — 23 Am. Jur. 2d, Deeds, § 162. 42 Am. Jur. 2d, Infants, § 45 et seq.

C.J.S. — 26A C.J.S., Deeds, § 145 et seq.

ALR. — Fraud or undue influence in conveyance from child to parent, 11 ALR 735.

Rights of mortgagee or conditional vendor under a mortgage or conditional sale contract executed by an infant, against the property covered, in the hands of a third person to whom it has been conveyed or transferred by the infant, 69 ALR 1371.

44-5-42. Delivery of deed to third party as escrow; possession as proof of delivery.

A deed delivered to a third party, to be delivered on certain conditions to the grantee, is an escrow. Possession of that deed by the grantee is presumptive proof of a delivery, but that presumption may be rebutted. (Orig. Code 1863, § 2652; Code 1868, § 2651; Code 1873, § 2693; Code 1882, § 2693; Civil Code 1895, § 3603; Civil Code 1910, § 4183; Code 1933, § 29-105.)

Law reviews. — For article surveying recent legislative and judicial developments in Georgia's real property laws, see 31 Mercer L. Rev. 187 (1979).

For note discussing problems with profits generated by escrow account, and proposing federal legislative reform, see 10 Ga. St. B.J. 618 (1974).

JUDICIAL DECISIONS

Section must be construed with other sections on delivery. — While this statute provides that possession of the deeds by the grantee is presumptive proof of the deed's delivery, which may be rebutted, it is silent both as to character of the evidence by which this is to be done, and circumstances which will overcome the presumption. This statute, therefore, must be construed with other portions of the Code having relation to the subject. Lewis v. Board of Comm'rs, 70 Ga. 486 (1883); Mays v. Shields, 117 Ga. 814, 45 S.E. 68 (1903) (see O.C.G.A. § 44-5-42).

Delivery of deed is essential to validity and is complete only when deed is accepted. The delivery may be actual or constructive. The record of a properly attested deed purporting on the deed's face to have been delivered is prima facie or presumptive evidence of delivery which, of course, is rebuttable. Domestic Loans of Wash., Inc. v. Wilder, 113 Ga. App. 803, 149 S.E.2d 717 (1966).

Deed delivered to third person to be delivered to grantee constitutes escrow. — An escrow, ex vi termini, is a deed delivered to some third person, to be delivered by the third person to the grantee upon performance of some precedent condition by the grantee or another, or the happening of some event. If delivered to the grantee or the grantee's agent, the delivery is complete, and the paper is not an escrow. Duncan v. Pope, 47 Ga. 445 (1872); Moore v. Farmers' Mut. Ins. Ass'n, 107 Ga. 199, 33 S.E. 65 (1899); Heitmann v. Commercial Bank, 6 Ga. App. 584, 65 S.E. 590 (1909); Adams v. Hatfield, 17 Ga. App. 680, 87 S.E. 1099 (1916).

Rule has no application to ordinary contracts in writing. Adams v. Hatfield, 17 Ga. App. 680, 87 S.E. 1099 (1916).

If deed remains in control of maker, it is not strictly an escrow. Anderson v. Goodwin, 125 Ga. 663, 54 S.E. 679 (1906).

Person to whom deed delivered must be agent of both parties. — In every case of an escrow, the person to whom the deed is delivered must, by mutual consent, be constituted the agent of both parties. If one is made merely the agent or attorney of the grantor, there would be no escrow, and the instrument would be recoverable by the grantor, since possession of the depository would remain merely that of the principal. It is equally true that if one is made merely the agent or attorney of the grantee, there would be no escrow since, if such attorneyship or agency is not such as to include the very subject matter of obtaining the conveyance for the grantee, delivery to such an agent or attorney would be altogether futile, while if the attorneyship or agency is such as to include the very matter of obtaining the conveyance for the grantee, the delivery to such a person would operate instantly to pass title into the principal, the same as if there were a delivery to the principal personally. Brown v. Brown, 192 Ga. 852, 16 S.E.2d 853 (1941).

Grantee's possession not conclusive of fact of delivery. — Even if the deed comes into possession of the grantee, that posses-

sion is by no means conclusive of the fact of delivery. Pooser v. Norwich Union Fire Ins. Soc'y, Ltd., 51 Ga. App. 962, 182 S.E. 44 (1935).

Presumption of delivery. — Fact that deed was found in possession of grantee only raises presumption of delivery. Grice v. Grice, 197 Ga. 686, 30 S.E.2d 183 (1944).

No constructive delivery. — Delivery of an altered deed to a bank's attorney was not constructive delivery to the buyer as the attorney represented the bank and the buyer had not authorized the attorney to accept and retain the recorded deed on the buyer's behalf. Z & Y Corp. v. Indore C. Stores, Inc., 282 Ga. App. 163, 638 S.E.2d 760 (2006).

Admissibility of deed in grantee's custody. — Deed coming from grantee's custody, coupled with possession of property conveyed, is admissible in evidence. Tippins v. Lane, 184 Ga. 331, 191 S.E. 134 (1937).

Failure of conditions eliminates existence of conveyance. — After a deed was delivered to the city's attorney to hold until certain conditions as to establishment of a park could be met, because the conditions for transfer of title were not met, no conveyance was made. The fact that the city fenced the area and charged an admission fee does not overcome the intentions of the parties as to the conditions on which the city would become the owner of the streets. Cedeno v. Lockwood, Inc., 250 Ga. 799, 301 S.E.2d 265 (1983).

Cited in Equitable Mtg. Co. v. Butler, 105 Ga. 555, 31 S.E. 395 (1898); Foy v. Scott, 197 Ga. 138, 28 S.E.2d 107 (1943); Spence v. Brown, 198 Ga. 566, 32 S.E.2d 297 (1944); Morris v. Johnson, 219 Ga. 81, 132 S.E.2d 45 (1963).

OPINIONS OF THE ATTORNEY GENERAL

Constructive delivery of a warranty deed may be effected by delivery to an escrow agent within 120 days after execution of the sales contract for purposes of statute, provided all of the following elements are present: (1) the escrow agent must be the agent of both the seller and the buyer, not just that of the seller; (2) the seller must release all control over the warranty deed when the seller delivers the deed to the escrow agent; (3) the escrow agent must be instructed to deliver the warranty deed to the buyer on the happening of a specific future event involving monetary consideration; (4) the escrow agent must be able to enforce the covenants and warranties found in former Code 1933, § 29-301 (see O.C.G.A. § 44-5-60) on behalf of the buyer; and (5) the real estate transaction must be properly recorded to put the world on notice of the buyer's equitable interest in realty. 1974 Op. Att'y Gen. No. U74-17.

RESEARCH REFERENCES

Am. Jur. 2d. — 23 Am. Jur. 2d, Deeds, § 116. 28 Am. Jur. 2d, Escrow, § 47.

C.J.S. — 26A C.J.S., Deeds, §§ 389, 390.

ALR. — Garnishment of money in escrow, 10 ALR 741.

Parol evidence rule as applied to escrow agreement, 49 ALR 1529.

Delivery of deed to third person to be delivered to grantee after grantor's death, 52 ALR 1222.

Rights and remedies where depositary fails or refuses to deliver instrument or property placed in escrow, notwithstanding performance of conditions of delivery, 95 ALR 293.

Undelivered deed or escrow, pursuant to oral contract, as satisfying Statute of Frauds, 100 ALR 196.

Duty and liability of escrow holder as affected by time of performance of, or offer to perform, conditions upon which delivery was to be made by him, 107 ALR 948.

Relation back of title or interest embraced in escrow instrument upon final delivery or performance of condition, 117 ALR 69.

Presumption of delivery where deed is given by grantor to third person or comes into possession of grantee through third person, 124 ALR 462.

Delivery of deed as conditioned on obtaining signature of another as grantor, 140 ALR 265.

Conclusiveness of manual delivery of deed to grantee as an effective legal delivery, 141 ALR 305.

Delivery of deed or mortgage by one or more but not all of the grantors or mortgagors, 162 ALR 892.

Who must bear loss resulting from defaults or speculations of escrow holder, 15 ALR2d 870.

Sufficiency of delivery of deed where grantor retains, or recovers, physical possession, 87 ALR2d 787.

Rights in funds representing ''escrow'' payments made by mortgagor in advance to cover taxes or insurance, 50 ALR3d 697.

44-5-43. Effect of adverse possession on making of deed.

A deed to lands which is made while the lands are held adversely to the maker of the deed is not void. (Ga. L. 1859, p. 24, § 1; Code 1863, § 2654; Code 1868, § 2653; Code 1873, § 2695; Code 1882, § 2695; Civil Code 1895, § 3605; Civil Code 1910, § 4185; Code 1933, § 29-107.)

Cross references. — Nature of title by prescription, § 44-5-160 et seq.

JUDICIAL DECISIONS

Section changes the rule of common law and the Statute of Henry VIII. Gresham v. Webb, 29 Ga. 320 (1859); Reed v. Janes, 84 Ga. 380, 11 S.E. 401 (1890); Tucker v. McArthur, 103 Ga. 409, 30 S.E. 283 (1898) (see O.C.G.A. § 44-5-43).

Section applies to sales of all kinds of property. Downing Lumber Co. v. Medlin & Sundy, 136 Ga. 665, 72 S.E. 22 (1911) (see O.C.G.A. § 44-5-43).

Cited in Booth v. Young, 149 Ga. 276, 99 S.E. 886 (1919); Chattanooga Iron & Coal Corp. v. Shaw, 157 Ga. 869, 122 S.E. 597 (1924); Williamson v. Key, 179 Ga. 502, 176 S.E. 373 (1934); Delray, Inc. v. Reddick, 194 Ga. 676, 22 S.E.2d 599 (1942).

RESEARCH REFERENCES

Am. Jur. 2d. — 23 Am. Jur. 2d, Deeds, § 162.

ALR. — Grantor's continued possession of land after execution of deed as notice of his claim adverse to title conveyed, 105 ALR 845.

Possession of mortgagor or successor in interest as adverse to purchaser at foreclosure sale, 38 ALR2d 348.

44-5-44. Estoppel from claiming adversely to own deed.

The maker of a deed cannot subsequently claim adversely to his deed under a title acquired after the making thereof. He is estopped from denying his right to sell and convey the property treated in the deed. (Orig. Code 1863, § 2658; Code 1868, § 2657; Code 1873, § 2699; Code 1882, § 2699; Civil Code 1895, § 3609; Civil Code 1910, § 4189; Code 1933, § 29-111.)

Law reviews. — For comment on Perkins v. Rhodes, 192 Ga. 331, 15 S.E.2d 426 (1941), see 4 Ga. B.J. 41 (1941). For comment criticizing Franks v. Sparks, 217 Ga. 117, 121

S.E.2d 27 (1961), holding right of entry not alignable or assignable, see 24 Ga. B.J. 363 (1962).

JUDICIAL DECISIONS

Analysis

General Consideration
Applicability
Illustrative Cases

General Consideration

Statute recognizes and declares a fundamental rule of the law of estoppel. Fleming & Co. v. Ray, 86 Ga. 533, 12 S.E. 944 (1891); Morrison v. Whiteside, 116 Ga. 459, 42 S.E. 729 (1902) (see O.C.G.A. § 44-5-44).

What one induces another to regard as true is the truth as between them, if the party who acts has been misled by the conduct or statements of the other. American Freehold Land Mtg. Co. of London, Ltd. v. Walker, 119 Ga. 341, 46 S.E. 426 (1904). See also Baker v. Davis, 127 Ga. 649, 57 S.E. 62 (1907); Gammage v. Perry, 29 Ga. App. 427, 116 S.E. 126 (1923); Bradshaw v. Estill, 157 Ga. 171, 121 S.E. 385 (1924).

Absolute deed divests grantor of right of possession, as well as of legal title, and when grantor is found in possession after delivery of the grantor's deed, it is a fact inconsistent with the legal effect of the deed, and is suggestive that the grantor still retains some interest in the premises. Chandler v. Georgia Chem. Works, 182 Ga. 419, 185 S.E. 787 (1936).

Grantee takes after-acquired title. — When the language of a deed purports to convey and warrant the full and absolute title, the fact that only the then owned equity of redemption may have been all the title which at that time could and did pass would not change the legal effect of the language of the conveyance itself. Under such language, the grantee not only immediately takes all title that the grantor then owned, but, under such an instrument, the grantee could await the time and tide of future events so as to thereafter appropriate all additional title that the grantor might subsequently acquire. Federal Land Bank v. Bank of Lenox, 192 Ga. 543, 16 S.E.2d 9 (1941).

If a vendor conveys land by deed to a vendee before the vendor has title personally, and afterwards the vendor acquires title, the vendor's subsequent title inures to the benefit of the vendee, and a complete title is vested in the vendee the moment the vendor acquires title. Guy v. Poss, 212 Ga. 724, 95 S.E.2d 682 (1956).

Cited in McIntosh v. Williams, 45 Ga. App. 801, 165 S.E. 854 (1932); Veazey v. Sinclair Ref. Co., 66 Ga. App. 730, 19 S.E.2d 53 (1942); Darling Stores Corp. v. William Beatus, Inc., 68 Ga. App. 869, 24 S.E.2d 805 (1943); Franks v. Sparks, 217 Ga. 117, 121 S.E.2d 27 (1961); Chastain v. Consolidated Credit Corp., 113 Ga. App. 225, 147 S.E.2d 807 (1966); Scarbor v. Scarbor, 226 Ga. 323, 175 S.E.2d 6 (1970); Darden v. Darden, 227 Ga. 647, 182 S.E.2d 480 (1971); United States v. Williams, 441 F.2d 637 (5th Cir. 1971); Harper v. Harper, 241 Ga. 19, 243 S.E.2d 74 (1978); Chattahoochee Holdings, Inc. v. Marshall, 146 Ga. App. 658, 247 S.E.2d 167 (1978).

Applicability

Estoppel by deed applies to maker of deed. It does not ordinarily apply to the grantee. Hughes v. Cobb, 195 Ga. 213, 23 S.E.2d 701 (1942).

Word "deed" refers to deed to property to which grantor has no title nor estate. Shockley v. Storey, 185 Ga. 790, 196 S.E. 702 (1938).

Section applies to mortgages as well as deeds. Federal Land Bank v. Bank of Lenox, 192 Ga. 543, 16 S.E.2d 9 (1941) (see O.C.G.A. § 44-5-44).

Section does not apply to quitclaim deeds. Morrison v. Whiteside, 116 Ga. 459, 42 S.E. 729 (1902); Taylor v. Wainman, 116 Ga. 795, 43 S.E. 58 (1902); Baxter & Co. v. Camp, 126 Ga. 354, 55 S.E. 1036 (1906); Marchant v. Young, 147 Ga. 37, 92 S.E. 863 (1917) (see O.C.G.A. § 44-5-44).

This statute is not extended so as to also cover quitclaim deeds. Federal Land Bank v. Bank of Lenox, 192 Ga. 543, 16 S.E.2d 9 (1941) (see O.C.G.A. § 44-5-44).

Section not applicable to conveyance not covering full title. — This rule does not apply to a conveyance limited to such right, title, and interest as the grantee has in a designated estate or premises, or a conveyance which on the conveyance's face is only a bare contingency or possibility, or when such a conveyance does not purport to cover the full title. Federal Land Bank v. Bank of Lenox, 192 Ga. 543, 16 S.E.2d 9 (1941) (see O.C.G.A. § 44-5-44).

This statute has no application whatever to year's support for widows provided by the laws of Georgia. Grant v. Sosebee, 169 Ga. 658, 151 S.E. 336 (1929) (see O.C.G.A. § 44-5-44).

Section inapplicable when no representation grantor conveys adversely to representation in earlier deed. — Doctrines of estoppel by deed and after-acquired title are not applicable when later deed makes no representation, express or implied, that the grantor claims and conveys anything adversely to an express or implied representation made in an earlier deed. ITT Rayonier, Inc. v. Hack, 254 Ga. 324, 328 S.E.2d 542 (1985).

Section inapplicable to grantor's lack of capacity. — Doctrine of after-acquired property as codified in O.C.G.A. § 44-5-44 was properly found to be inapplicable in an action seeking to set aside a conveyance by a decedent and the decedent's spouse to their child's spouse on the ground that the decedent lacked capacity to execute the deed because the doctrine could not be used to transfer title or to remedy flaws in the legal requirements for the creation of a property interest; the doctrine did not address or cure the invalidity of the conveyance of the decedent's ownership interest as a result of the decedent's lack of capacity. Smith v. Smith, 281 Ga. 380, 637 S.E.2d 662 (2006).

Illustrative Cases

When deed cannot pass title under power of sale, after-inherited interest passes by estoppel. — If for any reason a deed would not operate to pass title under a power of sale in a will, then if the maker of the deed afterwards inherited an interest in the premises that interest would pass by virtue of the maker's deed, on the principle of estoppel. Parker v. Jones, 57 Ga. 204 (1876); Terry v. Rodahan, 79 Ga. 278, 5 S.E. 38, 11 Am. St. R. 420 (1887).

Seller of lots estopped from asserting claim adverse to purchasers' rights designated on plat. — When an owner of land sells a part of the land in lots for residential purposes, the sales being made with reference to a plat by which another part of the land is designated as a park, and when the purchasers in buying rely upon the plat, the seller is estopped from asserting a claim adverse to the right of the purchasers, or the purchasers' assigns, to have the land restricted to use as a park and to share such use. Caffey v. Parris, 186 Ga. 303, 197 S.E. 898 (1938).

Benefit of after-acquired title inures to grantee of bond for title interest. — Conveyance by which the grantor transfers ''his bond for title interest'' in the land described, together with all of grantor's ''right, title, and interest'' therein, for the purpose of securing a debt owing by the grantor to the grantee, is one under which the benefit of an after-acquired independent title inures to the benefit of the grantee, and the grantor and those holding under the grantor are estopped thereafter to claim the after-acquired title as against the grantee when the debt so secured remains unpaid. This is true although the conveyance contains no express covenant of warranty. Perkins v. Rhodes, 192 Ga. 331, 15 S.E.2d 426 (1941), for comment, see 4 Ga. B.J. 41 (1941).

When grantor in first security deed reacquires property, junior security deed attaches as first claim. — When the grantor in a first security deed reacquired the property by purchasing the property at a sale under a power contained in the deed, a junior security deed made to another by the same grantor immediately attached as a first claim upon the property, and constituted an encumbrance thereon as against a subsequent grantee of the purchaser, notwithstanding the second security deed may show upon the deed's face that it is a junior deed. Bowlin v. Hemphill, 180 Ga. 435, 179 S.E. 341 (1935).

Title under first trust deed reacquired by grantor inures to beneficiary of second deed. — When a property owner gives a

Illustrative Cases (Cont'd)

deed of trust, reciting on its face that it is a second deed of trust, and when the property is purchased by a third person at a foreclosure sale under the first deed of trust, and through mesne conveyance is reacquired by the grantor, the title so reacquired inures to the beneficiary of the second deed of trust. Federal Land Bank v. Bank of Lenox, 192 Ga. 543, 16 S.E.2d 9 (1941).

Mortgagor of individual property cannot later allege property not mortgagor. — In a proceeding to foreclose a mortgage, one cannot be permitted to allege that the property so mortgaged by the mortgagor as the mortgagor's own individual property was not the mortgagor's property, but was trust property which the mortgagor had no right to mortgage. Martin v. Citizens' Bank, 177 Ga. 871, 171 S.E. 711 (1933).

When junior mortgage given priority, mortgagee cannot be divested in sale under first lien. — When a mortgagor creates a lien on property when no title exists in the mortgagor, or where the mortgagor's title is subject to a superior lien, and there is an express or implied representation by the mortgagor whereby the mortgagor asserts the priority of the junior mortgage, the mortgagor would be estopped from buying in the property at a sale under the first lien, so as to divest the junior mortgagee. Federal Land Bank v. Bank of Lenox, 192 Ga. 543, 16 S.E.2d 9 (1941).

RESEARCH REFERENCES

ALR. — Tender of deed as condition precedent to action for purchase price or on note therefor, 35 ALR 108.

Failure to record or delay in recording an instrument affecting real property as basis of estoppel in favor of credit not directly within protection of recording acts, 52 ALR 183.

Rule of estoppel by conveyance or transfer to set up title subsequently acquired by grantor or transferrer as applicable to conveyance or transfer by executor, administrator, or testament trustee, 93 ALR 231.

Grantor's continued possession of land after execution of deed as notice of his claim adverse to title conveyed, 105 ALR 845.

Estoppel of wife (or her privies) who joins in husband's deed or mortgage to assert title or interest, other than dower homestead rights, superior to that of grantee or mortgagee, 107 ALR 309.

Nature of conveyance or covenants which will create estoppel to assert after-acquired title in real property, 144 ALR 554.

Estoppel of oil and gas lessee to deny lessor's title, 87 ALR2d 602.

44-5-45. When ancient deed admissible without proof of execution.

A deed more than 30 years old which, upon inspection, has the appearance of genuineness and which comes from the proper custody is admissible in evidence without proof of execution if possession of the property has been consistent with such deed. (Orig. Code 1863, § 2659; Code 1868, § 2658; Code 1873, § 2700; Code 1882, § 2700; Civil Code 1895, § 3610; Civil Code 1910, § 4190; Code 1933, § 29-112.)

JUDICIAL DECISIONS

Section added exception to general common law rule. McArthur v. Morrison, 107 Ga. 796, 34 S.E. 205 (1899) (see O.C.G.A. § 44-5-45).

Instrument complying fully with provisions of this statute proves itself. Matthews v. Castleberry, 43 Ga. 346 (1871) (see O.C.G.A. § 44-5-45).

Instrument must be right upon the instrument's face, or made so by proof, before the

instrument's age alone will dispense with proof. Hill v. Nisbet, 58 Ga. 586 (1877); Ferrell v. Hurst, 68 Ga. 132 (1881).

There must be preliminary proof of deed coming from proper custody. Harrell v. Culpepper, 47 Ga. 635 (1873); Maddox v. Gray, 75 Ga. 452 (1885); Swicard v. Hooks, 85 Ga. 580, 11 S.E. 863 (1890); Williamson v. Mosley, 110 Ga. 53, 35 S.E. 301 (1900).

Rebuttal of preliminary proof by any competent evidence may be made. Albright v. Jones, 106 Ga. 302, 31 S.E. 761 (1898).

Presumption of delivery rebutted when recording takes place after grantor's death. — Ordinarily the recording of a deed is prima facie evidence of delivery. This presumption is rebutted when the recording takes place after the death of the grantor as delivery must occur during the grantor's lifetime. Corley v. Parson, 236 Ga. 346, 223 S.E.2d 708 (1976).

Jury to pass on genuineness. — When such deed as described in this statute is apparently genuine, has come from the proper custody, and is shown not to be inconsistent with possession, or if other corroboration appears, it should be admitted in evidence as prima facie established. But the jury has the right to finally pass on the deed's genuineness, after hearing all the testimony pro and con. Gaskins v. Guthrie, 162 Ga. 103, 132 S.E. 764 (1926) (see O.C.G.A. § 44-5-45).

Jury may find from face of deed that it is a forgery, without resort to aliunde evidence. Pridgen v. Green, 80 Ga. 737, 7 S.E. 97 (1888); Daugharty v. Drawdy, 134 Ga. 650, 68 S.E. 472 (1910).

Instrument may be properly admitted as having been sufficiently proved pursuant to former Code 1933, § 38-707 (see O.C.G.A. § 24-7-5), irrespective of whether or not there was a sufficient compliance with the rule admitting ancient writings without proof. Rieves v. Smith, 184 Ga. 657, 192 S.E. 372 (1937).

Cited in John Doe v. Roe, 49 Ga. 165 (1873); Weitman v. Thiot, 64 Ga. 11 (1879); Follendore v. Follendore, 110 Ga. 359, 35 S.E. 676 (1900); McConnell Bros. v. Slappey, 134 Ga. 95, 67 S.E. 440 (1910); Rowe v. Henderson Naval Stores Co., 143 Ga. 756, 85 S.E. 917 (1915); Orr v. Dunn, 145 Ga. 137, 88 S.E. 669 (1916); McDay v. Metropolitan Life Ins. Co., 51 Ga. App. 791, 181 S.E. 871 (1935); Gibson v. Causey, 223 Ga. 135, 153 S.E.2d 704 (1967).

RESEARCH REFERENCES

Am. Jur. 2d. — 23 Am. Jur. 2d, Deeds, § 87.

C.J.S. — 26A C.J.S., Deeds, § 73.

ALR. — Recital in ancient deed as evidence of facts recited against stranger to title, 6 ALR 1437.

44-5-46. Establishment of copy of deed upon loss of original; effect of copy.

If an original deed is lost, a copy may be established by the superior court of the county where the land is located; and when the copy is established, it shall have all the effect of the original. (Laws 1785, Cobb's 1851 Digest, p. 166; Laws 1799, Cobb's 1851 Digest, p. 463; Code 1863, § 2660; Code 1868, § 2659; Code 1873, § 2701; Code 1882, § 2701; Civil Code 1895, § 3611; Civil Code 1910, § 4191; Code 1933, § 29-113.)

JUDICIAL DECISIONS

Jurisdiction under prior law. — Prior to statute's codification, matter lay in common jurisdiction of county's superior and inferior courts. Perkins v. Perkins, 21 Ga. 13 (1857) (see O.C.G.A. § 44-5-46).

When action for land predicated upon lost deed, proof of original must be established. — When, in an action for land, the right of the plaintiffs is predicated upon an alleged lost and unrecorded deed, proof of the

existence of a genuine original must be established before secondary evidence relating thereto is admissible. Latham v. Fowler, 199 Ga. 648, 34 S.E.2d 870 (1945), later appeal, 201 Ga. 68, 38 S.E.2d 732 (1946).

Evidence sufficient to prove deed. — Maker may prove the deed, without the necessity of calling the attesting witnesses, and if the record has also been destroyed, subsequent possession of the deed by one who derived title from the grantee under it is sufficient to establish delivery thereof. Fletcher v. Horne, 75 Ga. 134 (1885).

Evidence not sufficient to prove deed. — Evidence of a statement by a defendant that the defendant knew a deed as alleged by the plaintiffs was in existence in which the father and his children were grantees is not sufficient to establish the deed for the reason that such as an admission is too indefinite to properly identify and establish the existence of any particular deed. Latham v. Fowler, 199 Ga. 648, 34 S.E.2d 870 (1945).

When, in an effort to establish a lost and unrecorded deed, a certified copy of a petition, filed by the plaintiffs' father (holder of a life estate under the alleged deed) to sell for reinvestment, with an attached typewritten copy of what purported to be the alleged unrecorded deed, is admitted in evidence, the evidence does not establish that in fact a genuine deed has been executed, nor does the fact that the petition asserted that the plaintiffs' father had a life interest and the children had a remainder interest in the land make the assertion therein a declaration against the interest of the plaintiffs' father. Latham v. Fowler, 199 Ga. 648, 34 S.E.2d 870 (1945), later appeal, 201 Ga. 68, 38 S.E.2d 732 (1946).

Judgment establishing copy admissible in proceedings if original admissible. — Judgment of a superior court establishing a copy of a lost deed is, when properly authenticated, admissible in any proceeding where the original deed would be admissible. Leggett v. Patterson, 114 Ga. 714, 40 S.E. 736 (1902); Drawdy v. Musselwhite, 150 Ga. 723, 105 S.E. 298 (1920).

Copy of copy has same force. — Properly authenticated copy of a copy of a deed, established under the provisions of this statute, has the same force as the copy of which it is made. McLanahan v. Blackwell, 119 Ga. 64, 45 S.E. 785 (1903) (see O.C.G.A. § 44-5-46).

Judgment binding upon parties, and upon grantor's heirs where administrator party. — Judgment establishing a copy of an alleged lost original constitutes a conclusive determination that a genuine original had in fact existed as the act and deed of the alleged grantor, and, as an adjudication to that effect, is binding upon the parties in that proceeding, and upon heirs at law of the alleged deceased grantor when the administrator was a party defendant therein. Milner v. Allgood, 184 Ga. 288, 191 S.E. 132 (1937).

Appellate jurisdiction not in Supreme Court. — Proceeding to establish a copy of a lost deed did not constitute an action respecting title to land; hence appellate jurisdiction was not in the Supreme Court. Loftin v. Carroll County Bd. of Educ., 195 Ga. 689, 25 S.E.2d 293 (1943).

Cited in Loftin v. Carroll County Bd. of Educ., 70 Ga. App. 315, 28 S.E.2d 372 (1943); Fletcher v. Fletcher, 209 Ga. 184, 71 S.E.2d 219 (1952).

RESEARCH REFERENCES

C.J.S. — 76 C.J.S., Records, § 43.

ALR. — Right of action to restore lost deed, 31 ALR 552.

44-5-47. Liability of purchaser for costs of conveyance.

Without an expressed stipulation to the contrary, a purchaser must pay the costs of the conveyance. (Civil Code 1895, § 3528; Civil Code 1910, § 4108; Code 1933, § 29-115.)

History of Code section. — This Code section is derived from the decision in French, Richards & Co. v. Robinson, 78 Ga. 701, 3 S.E. 902 (1887).

JUDICIAL DECISIONS

Express stipulation as to closing costs not found. — Trial court erred in granting summary judgment to the closing attorney on the alleged client's fraud claim as genuine issues of material fact existed about whether the closing attorney made misrepresentations to the alleged client regarding the sale of timber from the estate of the alleged client's father; one example involved the closing attorney's successful effort to get the alleged client to pay the closing costs associated with the conveyance of timber, even though statutory law directed that the purchaser was to pay such costs absent an express stipulation to the contrary and no such express stipulation existed. Mays v. Askin, 262 Ga. App. 417, 585 S.E.2d 735 (2003).

Cited in Lively v. Munday, 201 Ga. 409, 40 S.E.2d 62 (1946).

44-5-48. Deeds conveying interest in real property used as commercial landfill.

(a) All deeds conveying an interest in real property which has been used as a commercial landfill shall include notice of the landfill operations, the date the landfill operations commenced and terminated, if known, a legal description of the actual location of the landfill, and a description of the type of materials which have been deposited in the landfill. As used in this Code section, ''commercial landfill'' means an area where materials have been deposited for a fee.

(b) This Code section applies only to those parties who have knowledge of the landfill operations when conveying real property.

(c) Any seller of real property who willfully violates the provisions of this Code section shall be liable to the purchaser for treble damages for any losses sustained by the purchaser as a result of the sale. (Code 1981, § 44-5-48, enacted by Ga. L. 1988, p. 821, § 2.)

Cross references. — Prohibition on construction activity on abandoned landfills, § 8-6-1 et seq.

ARTICLE 3

COVENANTS AND WARRANTIES

Law reviews. — For article surveying recent legislative and judicial developments in Georgia's real property laws, see 31 Mercer L. Rev. 187 (1979).

RESEARCH REFERENCES

ALR. — Liability of former owner of real estate because of a violation of statute or ordinance relating to condition of premises, 8 ALR 356.

Extent of lessee's obligation under express covenant as to repairs, 20 ALR 782; 45 ALR 12.

Restriction forbidding manufacture or

sale of liquor as breach of covenant of title or against encumbrances, or as negativing marketable title, 51 ALR 1460.

Reservation by grantor of the right to require payment for existing party wall when used, 52 ALR 494.

Tea room or other place of refreshment as violation of restrictive covenant against use of premises for mercantile or business purposes, or limiting its use to residential purposes, 57 ALR 411.

Implied covenant in conveyance with reference to map, plat, or blueprint as to size of remaining lots or against further subdivision thereof, 57 ALR 764.

Measure of damages for breach of covenants of title in conveyances or mortgages of real property, 61 ALR 10; 100 ALR 1194.

Assignment of lease as breach of covenant against subletting, 79 ALR 1379.

Validity of provisions of instrument creating legal estate attempting to exempt it from claims of creditors, 80 ALR 1007.

Deed or mortgage of real estate as affecting right to oil and gas or royalty interest under existing lease, 94 ALR 660; 140 ALR 1280.

School as violation of restrictive covenant relating to use of real property, 98 ALR 390.

Personal liability of covenantor for breach of restrictive covenant by grantee of property, 98 ALR 779.

Garage or filling station as breach of restrictive covenant, 99 ALR 541.

When does statute of limitations commence to run against action for breach of covenant against encumbrances, 99 ALR 1050.

Liability of grantor in deed with covenants, for expense of grantee's successful litigation with third party, 105 ALR 729.

Use of cemetery grounds for purposes other than interment, 130 ALR 130.

Restrictive covenants as applicable to land itself apart from buildings, 155 ALR 528.

Covenant restricting ''erection,'' ''construction,'' etc., as including limitation on use structure, 155 ALR 1007.

Building restrictions specifying minimum cost in dollars as affected by change in gold content or purchasing power of dollar, 161 ALR 1131.

Rights or interests covered by quitclaim deed, 162 ALR 556.

After-acquired title rule as applicable to title acquired by grantor through enforcement of mortgage or lien, 168 ALR 1149.

Decree or judgment subject to direct attack in chain of title as rendering title unmerchantable, 9 ALR2d 710.

Controlling effect, as to building lines in restrictive covenants, as between provisions in deed and conflicting data on plat referred to therein, 21 ALR2d 1262.

Building side line restrictive covenants, 36 ALR2d 861.

Encroachment of structure on or over adjoining property or way as rendering title unmarketable, 47 ALR2d 331.

Validity, construction, and effect of land sale contract providing that title must be satisfactory to purchaser, 47 ALR2d 455.

Binding effect on tenant holding over of covenants in expired lease, 49 ALR2d 480.

Use of premises for parking place as violation of restrictive covenant, 80 ALR2d 1258.

Reservation or exception in deed in favor of stranger, 88 ALR2d 1199.

Construction and effect of restrictive covenant in deed or conveyance specifically prohibiting or limiting the keeping of animals, such as livestock, fowl, etc., on the premises, 89 ALR2d 990.

Incidental use of dwelling for business or professional purposes as violation of covenant restricting use to residential purposes, 21 ALR3d 641.

Liability of builder-vendor or other vendor of new dwelling for loss, injury, or damage occasioned by defective condition thereof, 25 ALR3d 383.

Covenant restricting use of land, made for purpose of guarding against competition, as running with land, 25 ALR3d 897.

Covenant in deed restricting material to be used in building construction, 41 ALR3d 1290.

Vendor and purchaser: marketability of title as affected by lien dischargeable only out of funds to be received from purchaser at closing, 53 ALR3d 678.

Construction and operation of parking-space provision in shopping-center lease, 56 ALR3d 596.

Restrictive covenants as to height of structures or buildings, 1 ALR4th 1021.

Liability of vendor of existing structure for property damage sustained by purchaser after transfer, 18 ALR4th 1168.

Community residence for mentally disabled persons as violation of restrictive covenant, 41 ALR4th 1216.

Construction and application of restrictive covenants to the use of signs, 61 ALR4th 1028.

Construction and effect of provision in contract for sale of realty by which purchaser agrees to take property "as is" or in its existing condition, 8 ALR5th 312.

44-5-60. Covenants running with land; effect of zoning laws; covenants and scenic easements for use of public; renewal of certain covenants; costs.

(a) The purchaser of lands obtains with the title, whether conveyed to him at public or private sale, all the rights which any former owner of the land under whom he claims may have had by virtue of any covenants of warranty of title, of quiet enjoyment, or of freedom from encumbrances contained in the conveyance from any former grantor unless the transmission of such covenants with the land is expressly prohibited in the covenant itself.

(b) Notwithstanding subsection (a) of this Code section, covenants restricting lands to certain uses shall not run for more than 20 years in municipalities which have adopted zoning laws nor in those areas in counties for which zoning laws have been adopted.

(c) The limitation provided in subsection (b) of this Code section shall not apply with respect to any covenant or scenic easement in favor of or for the benefit of the United States or any department, bureau, or agency thereof; this state or any political subdivision thereof; or any corporation, trust, or other organization holding land for the use of the public, but only with respect to such covenants and scenic easements running in favor of or for the benefit of the land so held for the use of the public. Such covenants and scenic easements shall run in perpetuity.

(d)(1) Notwithstanding the limitation provided in subsection (b) of this Code section, covenants restricting lands to certain uses affecting planned subdivisions containing no fewer than 15 individual plots shall automatically be renewed beyond the period provided for in subsection (b) of this Code section unless terminated as provided in this subsection. Each such renewal shall be for an additional 20 year period, and there shall be no limit on the number of times such covenants shall be renewed.

(2) To terminate a covenant as provided in paragraph (1) of this subsection, at least 51 percent of the persons owning plots affected by such covenant shall execute a document containing a legal description of the entire area affected by the covenant, a list of the names of all record owners of plots affected by the covenant, and a description of the covenant to be terminated, which may be incorporated by reference to another recorded document. By signing such document, each such person shall verify that he or she is a record owner of property affected

by the covenant. Such document shall be recorded in the office of the clerk of the superior court of the county where the land is located no sooner than but within two years prior to the expiration of the initial 20 year period or any subsequent 20 year period. The clerk of the superior court shall index the document under the name of each record owner appearing in the document.

(3) No covenant that prohibits the use or ownership of property within the subdivision may discriminate based on race, creed, color, age, sex, or national origin.

(4) Notwithstanding any other provision of this Code section or of any covenants with respect to the land, no change in the covenants which imposes a greater restriction on the use or development of the land will be enforced unless agreed to in writing by the owner of the affected property at the time such change is made.

(e) To the extent provided in the covenants, the obligation for the payment of assessments and fees arising from covenants shall include the costs of collection, including reasonable attorney's fees actually incurred. (Orig. Code 1863, § 2661; Code 1868, § 2660; Code 1873, § 2702; Code 1882, § 2702; Civil Code 1895, § 3612; Civil Code 1910, § 4192; Code 1933, § 29-301; Ga. L. 1935, p. 112, § 1; Ga. L. 1962, p. 540, § 1; Ga. L. 1971, p. 814, § 1; Ga. L. 1990, p. 384, § 1; Ga. L. 1991, p. 334, § 1; Ga. L. 1993, p. 782, § 1; Ga. L. 2008, p. 1135, § 2A/HB 422.)

The 2008 amendment, effective July 1, 2008, added subsection (e).

Cross references. — Time limitations on bringing action for breach of restrictive covenants, § 9-3-29. Right of purchaser at judicial sale to enforce covenants of warranty running with land which are incorporated into previous title deeds, § 9-13-177. Right of action by alienee of property for continuance of nuisance for which alienee of property causing nuisance is responsible, § 41-1-5.

Law reviews. — For article discussing options to purchase realty in Georgia, with respect to restrictive covenants, see 8 Ga. St. B.J. 229 (1971). For annual survey on law of real property, see 42 Mercer L. Rev. 389 (1990). For annual survey article on real property law, see 52 Mercer L. Rev. 383 (2000).

For note, ''Regulation of Artificial Lakes and Recreational Subdivisions in Georgia,'' recommending methods for future regulation, see 8 Ga. St. B.J. 580 (1972). For note, ''Restrictive Covenants: A Need For Reappraisal of the Limitations Period,'' see 17 Ga. St. B.J. 137 (1981). For note on 1993 amendment of this Code section, see 10 Ga. St. U.L. Rev. 198 (1993).

For comment, ''Injunction Remedy for Breach of Restrictive Covenants: An Economic Analysis,'' see 45 Mercer L. Rev. 543 (1993).

JUDICIAL DECISIONS

Analysis

General Consideration
Covenants Running with Land
1. Creation
2. Effect
3. Enlargement

4. Procedure
5. Illustrative Cases
Covenants Not Running with Land
Zoning
1. Constitutionality
2. Scope
3. Retrospective Operation
4. Period of Enforcement

General Consideration

O.C.G.A. § 44-5-60 deals with restrictions and not easements. Hendley v. Overstreet, 253 Ga. 136, 318 S.E.2d 54 (1984).

O.C.G.A. § 44-5-60(b) only applied to land in cities and counties subject to zoning laws, and neither § 44-5-60(b) nor any other law limited the enforceability of covenants to only a single 20-year term or precluded their eventual renewal upon the expiration of that period. When covenants expressly provided for automatic renewal at successive 10-year intervals unless two-thirds of the residents objected, the question of retroactive application did not arise, and since the covenants authorized an association to sanction a resident for covenant violations, a trial court did not err in refusing to grant an interlocutory injunction prohibiting the association from enforcing the sanction. Sweeney v. Landings Ass'n, 277 Ga. 761, 595 S.E.2d 74 (2004).

O.C.G.A. §§ 9-3-29 and 44-5-30 limit the enforceability of restrictive covenants and hence are inapplicable to a cause of action which is based upon the alleged existence of easements. Estate of Seamans v. True, 247 Ga. 721, 279 S.E.2d 447 (1981).

Scope of subsection (b) of O.C.G.A. § 44-5-60 applies to "use restrictions" and, further, to "building restrictions," as those appear in restrictive covenants, because both restrictive covenants and zoning ordinances contain building and use restrictions. Matera Investors, Inc. v. Sunset Lake Fishing & Hunting Club, 696 F. Supp. 1510 (M.D. Ga. 1988).

No mention of particular uses. — Grantor's reserved rights or interest in land were not rendered unenforceable since the deed contained no language stating that the fee owner had to use the land for any particular uses, but rather stated that the fee owner could put the owner's land to any use whatsoever as long as the use did not violate the grantor's rights under the deed. Matera Investors, Inc. v. Sunset Lake Fishing & Hunting Club, 696 F. Supp. 1510 (M.D. Ga. 1988).

The 1993 amendment of subsection (d) of O.C.G.A. § 44-5-60 providing an automatic continuation of covenants could not be applied retrospectively. Appalachee Enters., Inc. v. Walker, 266 Ga. 35, 463 S.E.2d 896 (1995), overruled on other grounds, Bickford v. Yancey Dev. Co., 276 Ga. 814, 585 S.E.2d 78 (2003).

Covenant on the development corporation's property dating from 1977 requiring a minimum lot size of two acres was not renewed by O.C.G.A. § 44-5-60(d)(1), which was enacted in 1993, because § 44-5-60(d)(1) did not apply retroactively; as a result, the covenant expired in 1997. Bickford v. Yancey Dev. Co., 258 Ga. App. 371, 574 S.E.2d 349 (2002), aff'd, 276 Ga. 814, 585 S.E.2d 78 (2003).

The 1993 revision to O.C.G.A. § 44-5-60(d)(1), providing for the automatic 20-year renewal of restrictive covenants affecting subdivisions containing 15 or more plots, applies only to those restrictive covenants that are established under law after July 1, 1993; as for all restrictive covenants established before July 1, 1993, those covenants are governed by O.C.G.A. § 44-5-60(b), and thus are deemed unenforceable after a period of 20 years. Bickford v. Yancey Dev. Co., 276 Ga. 814, 585 S.E.2d 78 (2003).

Application to covenants statute postdates. — There is no abridgment of constitutional rights when statute is applied to covenants it postdates. House v. James, 232 Ga. 443, 207 S.E.2d 201 (1974) (see O.C.G.A. § 44-5-60).

Cited in Rowan v. Newbern, 32 Ga. App. 363, 123 S.E. 148 (1924); Warlick v. Rome Loan & Fin. Co., 194 Ga. 419, 22 S.E.2d 61 (1942); Delray, Inc. v. Reddick, 194 Ga. 676, 22 S.E.2d 599 (1942); Davies v. Curry, 230 Ga. 190, 196 S.E.2d 382 (1973); Home Mart Bldg. Ctrs., Inc. v. Wallace, 144 Ga. App. 19,

General Consideration (Cont'd)

240 S.E.2d 582 (1977); Antill v. Sigman, 240 Ga. 511, 241 S.E.2d 254 (1978); Rolleston v. Sea Island Properties, Inc., 254 Ga. 183, 327 S.E.2d 489 (1985); Moreland v. Henson, 256 Ga. 685, 353 S.E.2d 181 (1987); Benton v. Gaudry, 230 Ga. App. 373, 496 S.E.2d 507 (1998); Arbor Station Homeowners Servs., Inc. v. Dorman, 255 Ga. App. 866, 567 S.E.2d 102 (2002); CPI Phipps, LLC v. 100 Park Ave. Partners, L.P., 288 Ga. App. 614, 654 S.E.2d 690 (2007).

Covenants Running with Land

1. Creation

Owner of land, selling or leasing the land, may insist upon such covenants as the owner pleases, touching the use and mode of enjoyment of the land; the owner has a right to define the injury personally, and the party contracting with the owner must abide by the definition. Smith v. Pindar Real Estate Co., 187 Ga. 229, 200 S.E. 131 (1938).

Owner may impose restrictions on portion of land sold for benefit of land retained. — If the owner of realty sells a portion thereof, imposing on a vendee restrictions relating to the use of the estate conveyed, a restriction is imposed for the benefit of the land retained, and an implied inhibition is created as to the use of the portion of the land conveyed, thus creating a covenant running with the land. O'Neill v. Myers, 148 Ga. App. 749, 252 S.E.2d 638 (1979).

Covenant must relate to and concern interest created to run with land. — To constitute a covenant running with the land, there must first be an interest or estate therein granted, the covenant must relate to the interest or estate granted, and the act to be done must concern the interest created or title conveyed. If the covenant is of a collateral nature to the land, and is incapable in law of attaching to the interest or estate granted, it is a personal obligation, and will not bind or pass to assignees, even if the assignees are expressly named. Johnson v. Myers, 226 Ga. 23, 172 S.E.2d 421 (1970).

2. Effect

Covenant binds subsequent owner with or without notice. — When there is a covenant running with the land, then the covenant binds any subsequent owner thereof with or without notice, for the reason that the subsequent owner takes no greater title than the predecessor had to convey. O'Neill v. Myers, 148 Ga. App. 749, 252 S.E.2d 638 (1979).

On appeal from an order in a declaratory judgment action, the trial court did not err in finding, upon cross-motions for summary judgment, that restrictive covenants which had been made applicable to the subdivision over 20 years earlier remained in effect and prohibited a buyer from re-subdividing certain tracts into residential lots with less than five acres, but did err in ruling that interpretation of the covenants was a legal matter for the court, rather than a factual matter for the jury. Britt v. Albright, 282 Ga. App. 206, 638 S.E.2d 372 (2006), cert. denied, 2007 Ga. LEXIS 199 (Ga. 2007).

Both restrictions in deeds, and restrictions on plat mentioned in deed, binding. — Plaintiffs were entitled to the benefit of the express building line restrictions in the deeds in the defendant's chain of title, as well as the restrictions indicated by a dotted line on the plat mentioned in the deeds, and the defendants were charged with notice and bound by such restrictions. Jones v. Lanier Dev. Co., 190 Ga. 887, 11 S.E.2d 11 (1940).

Enforcement of general warranty by subsequent grantee. — When a general warranty given by grantor and the grantor's cotenant to grantee did not expressly prohibit its transmission to subsequent owners, the subsequent grantee could sue the grantor and the grantor's cotenant for the breach of their general warranty. Northside Title & Abstract Co. v. Simmons, 200 Ga. App. 892, 409 S.E.2d 885, cert. denied, 200 Ga. App. 896, 409 S.E.2d 885 (1991).

3. Enlargement

Restrictions on the use of real property will not be enlarged or extended by construction, and any doubt will be construed in favor of the grantee; when it is sought to restrict one in the use of one's own private property for any lawful purpose, the ground for such interference must be clear and indubitable. England v. Atkinson, 196 Ga. 181, 26 S.E.2d 431 (1943).

Covenant plainly expressed cannot be broadened for the purchaser by parol proof

of such an intention on the part of the covenantor. Miller v. Desverges, 75 Ga. 407 (1885).

Expired covenants not subject to automatic renewal. — Restrictive covenant, established in 1977, expired in 1997, and was no longer enforceable against any property owner in the subdivision; O.C.G.A. § 44-5-60(d)(1), the covenant automatic renewal law, did not apply retroactively to extend the covenant. Bickford v. Yancey Dev. Co., 276 Ga. 814, 585 S.E.2d 78 (2003).

4. Procedure

Subsequent purchaser of property benefited by mutual covenant entitled to enforce restriction. — When property is adjoined by a vacant lot and benefits by a mutual covenant to keep the vacant lot unenclosed and unimproved, subsequent purchasers of the property, who purchase by warranty deed conveying the property ''with all appurtenances thereto,'' have the right to enforce in equity the restriction against enclosing or improving the vacant lot. Godfrey v. Huson, 180 Ga. 483, 179 S.E. 114 (1935).

Subsequent grantee may, under mutual warranty deed, recover taxes paid. — When A and B make mutual warranty deeds to each other to separate pieces of property after the lien for taxes for the year has become fixed, a subsequent grantee from either may, under the warranty so made, recover the amount of any taxes such purchaser may have been forced to pay. An agreement that each should pay the taxes on their respective tracts is but an agreement to do that which they are already bound to do. McRae v. Sewell, 47 Ga. App. 290, 170 S.E. 315 (1933).

Purchaser's action for breach maintainable against any grantor, if privy in estate. — Purchaser may maintain an action for breach of warranty against any grantor of the premises who is the purchaser's privy in estate, and the action may be maintained as well when a paramount outstanding title prevents one from obtaining possession, as when an ouster results from the necessity of yielding possession in response to such a paramount title. Quitman Furn. & Hdwe. Co. v. Rountree, 14 Ga. App. 382, 80 S.E. 904 (1914). See also Smith v. Williams, 117 Ga. 782, 45 S.E. 394, 97 Am. St. R. 220 (1903); Croom v. Allen, 145 Ga. 347, 89 S.E. 199 (1916).

An unrestricted express warranty of title being a covenant running with the land, a purchaser may maintain an action thereon against any prior grantor making such a warranty, if one is a privy in estate. McEntyre v. Merritt, 49 Ga. App. 416, 175 S.E. 661 (1934).

Last grantee may sue any or all warrantors. — In an action for damages on account of a deficiency in acreage brought against a defendant who, on the date the property was conveyed to the plaintiff, had conveyed the property by warranty deed to the person conveying to the plaintiff, the general warranty of title in the deed executed by the defendant was a covenant running with the land, the benefit of which accrued to the plaintiff, even though the legal title had been taken by the defendant merely as an accommodation to the plaintiff's grantor, since the evidence failed to show that there was any agreement or understanding between the plaintiff and the defendant that the plaintiff was to occupy the status of grantor by taking over the contract made between the plaintiff and the defendant. Long v. Sullivan, 52 Ga. App. 318, 183 S.E. 71 (1935).

When there has been a breach of the warranty of title to land, the last grantee has a right of action against, and may sue the grantee's immediate warrantor, the remote or original warrantor, or any intermediate warrantor, or any or all of them in one action. Smith v. Smith, 129 Ga. App. 618, 200 S.E.2d 504 (1973).

Right to recover cannot exist in intermediate warrantor and last warrantee at same time. — In bringing an action for breach of the warranty of title, the last grantee has the right to select whom the grantee will name as the defendants, in much the same manner as a plaintiff may select which of the joint tortfeasors the plaintiff will sue, but the right to recover for a breach of warranty cannot exist in an intermediate warrantor and the last warrantee at the same time. Smith v. Smith, 129 Ga. App. 618, 200 S.E.2d 504 (1973).

Suit for breach maintainable against vendor's vendor. — Suit for breach of warranty of title to land may be maintained not only against the plaintiff's vendor, but also

Covenants Running with Land (Cont'd)
4. Procedure (Cont'd)

against the vendor of the latter. Reese v. Manget, 53 Ga. App. 637, 186 S.E. 880 (1936).

Intermediate covenantor mending breach entitled to recover from prior grantors. — While the right of action passes out of an intermediate warrantor when the warrantor relinquishes title to the land, and into the assignee, nevertheless, if it should occur that the intermediate covenantor is placed under the legal necessity of paying the lien, or mending the breach, and the intermediate covenantor actually does so, the right to recover for the amount paid out is thereby restored to the intermediate covenantor, and to that extent alone the intermediate covenantor is remitted to the intermediary's rights under the intermediary's own warranties from prior grantors, and the intermediate covenantor in turn may recover from them the amounts so paid. Robertson v. Webster, 79 Ga. App. 30, 52 S.E.2d 511 (1949).

Restrictions based upon extraneous agreement must be established by clear evidence beyond reasonable doubt. — As a general rule, the owner of land in fee has the right to use the land for any lawful purpose. When neither the owner's deed nor any deed in the owner's chain of title contains any restrictions, but restrictions as to the land's use and alienation are sought to be placed thereon, based upon an extraneous agreement by a predecessor in title and by notice to the owner, the restrictions must be established by evidence that is clear and beyond a reasonable doubt. England v. Atkinson, 196 Ga. 181, 26 S.E.2d 431 (1943).

Parol evidence generally inadmissible to vary effect of unrestricted covenant. — In the absence of fraud or mistake, parol evidence is generally inadmissible to contradict or vary the effect of an unlimited and unrestricted covenant in a deed generally warranting the title to the conveyed land. Long v. Sullivan, 52 Ga. App. 318, 183 S.E. 71 (1935).

Equity may interpose injunction if clear breach, regardless of damages. — To warrant relief by an injunction in the case of a covenant restricting erections upon the premises conveyed, it is not essential that the plaintiff should show any actual damage resulting from the breach of covenant of which plaintiff complains, and if a clear breach is shown, equity may interpose its preventive aid regardless of the question of damages, since the covenantee is entitled to the benefit of the covenant. Smith v. Pindar Real Estate Co., 187 Ga. 229, 200 S.E. 131 (1938).

Equity will interfere by injunction to prevent the breach of an express, negative covenant, even though no substantial injury is caused by such a breach, and will also interfere even though the damages, if any, may be recoverable at law. Smith v. Pindar Real Estate Co., 187 Ga. 229, 200 S.E. 131 (1938).

Expiration of covenants. — Covenants that were adopted in 1975 expired in June 1995 after 20 years pursuant to subsection (b) of O.C.G.A. § 44-5-60, and were not automatically renewed under subsection (d) of § 44-5-60. Canterbury Forest Ass'n v. Collins, 243 Ga. App. 425, 532 S.E.2d 736 (2000).

5. Illustrative Cases

Covenant to build a party wall between two adjacent lots runs with each lot. Reidsville & S.E.R.R. v. Baxter, 13 Ga. App. 357, 79 S.E. 187 (1913); Horne v. Macon Tel. Publishing Co., 142 Ga. 489, 83 S.E. 204, 1916B Ann. Cas. 1212 (1914).

Evidence failed to show implied general restriction. — On the issue whether there was an implied restriction, limiting the lots of the defendants to residential purposes, and precluding their building of a theater, there was no error in directing the verdict in their favor since the evidence failed to show such an implied general restriction. Jones v. Lanier Dev. Co., 190 Ga. 887, 11 S.E.2d 11 (1940).

For a discussion of covenants which will run with the land, see Goldberg v. Varner, 72 Ga. App. 673, 34 S.E.2d 722 (1945).

Compliance with expired covenants. — When landowners, unaware that restrictive covenants had expired, relied on an agreement to extend the covenants and took no action to enact new covenants or otherwise protect their property interests, such forbearance, combined with their continued compliance with and enforcement of the covenants, bound defendant and other land-

owners personally to comply with the covenants. Canterbury Forest Ass'n v. Collins, 243 Ga. App. 425, 532 S.E.2d 736 (2000).

Homeowners association's amendment to declaration of protective covenants imposed new restrictions and thus was inapplicable to property owner. — Trial court did not err in granting an owner summary judgment on a home owners association's counterclaims seeking an order requiring the owner to evict tenants and to pay fines for violating its declaration of protective covenants because O.C.G.A. § 44-5-60(d)(4) rendered an amendment to the declaration inapplicable to the owner since it imposed a greater restriction on the owner's use of the land to which the owner did not consent; the amendment, which prohibited the leasing of residences, went beyond a mere restriction on occupancy because it prohibited a specific use of the property, residential leasing, to anyone chosen by the owner, which was specifically within the owner's ownership rights when the property was purchased. Charter Club on the River Home Owners Assoc. v. Walker, 301 Ga. App. 898, 689 S.E.2d 344 (2009).

Covenants Not Running with Land

Statute provides the only means for preventing the rights prescribed from running with the land. Tucker v. McArthur, 103 Ga. 409, 30 S.E. 283 (1898) (see O.C.G.A. § 44-5-60).

If covenant is personal, the covenant binds only original parties and those who assume the covenant's obligation, and upon a conveyance of the land, or a transfer of the lease, as the case may be, the transferee takes free of the obligation of any personal covenant appearing in the deed or lease. Talcott, Inc. v. Roy D. Warren Com., Inc., 120 Ga. App. 544, 171 S.E.2d 907 (1969).

Warranty does not run with an article of personal property sold. Smith v. Williams, 117 Ga. 782, 45 S.E. 394, 97 Am. St. R. 220 (1903).

Zoning

1. Constitutionality

Impairment of contracts. — Statute is not violative of the federal and Georgia Constitutions for the impairment of contracts. Rowland v. Kellos, 236 Ga. 799, 225 S.E.2d 302 (1976) (see O.C.G.A. § 44-5-60).

Broad zoning powers given to counties and municipalities override the state and federal constitutional provisions against the passage of laws impairing the obligation of contracts. Payne v. Borkat, 244 Ga. 615, 261 S.E.2d 393 (1979).

Application of this statute to restrictive covenants in deeds created before the underlying statute was passed, so as to render those covenants unenforceable 20 years after the statute took effect, does not unconstitutionally impair the parties' right to contract. Payne v. Borkat, 244 Ga. 615, 261 S.E.2d 393 (1979) (see O.C.G.A. § 44-5-60).

2. Scope

Statute should apply to both building and use restrictions, illustrated by the fact that both restrictive covenants and zoning ordinances contain building and use restrictions. Payne v. Borkat, 244 Ga. 615, 261 S.E.2d 393 (1979) (see O.C.G.A. § 44-5-60).

Necessity of determining whether particular covenant prohibits building or use. — It is necessary in a given case to determine whether a particular restrictive covenant merely prohibits the erection of a building other than a residence (building restriction), or whether the covenant also prohibits the use of that structure for a nonresidential purpose (use restriction). Payne v. Borkat, 244 Ga. 615, 261 S.E.2d 393 (1979).

Municipalities required to provide reasonable and adequate substitute for covenants. — This statute, which provides that restrictive covenants are void after the passage of 20 years in municipalities where zoning ordinances are in effect, requires municipalities to provide a reasonable and adequate substitute for covenants to protect the property interests of residents. City of Smyrna v. Parks, 240 Ga. 699, 242 S.E.2d 73 (1978) (see O.C.G.A. § 44-5-60).

3. Retrospective Operation

Section not given retrospective operation. — Statute does not purport to have effect retrospectively, and the settled rule for the construction of statutes is not to give them a retrospective operation, unless the language so imperatively requires. Smith v. Pindar Real Estate Co., 187 Ga. 229, 200 S.E. 131

Zoning (Cont'd)
3. Retrospective Operation (Cont'd)

(1938) (see O.C.G.A. § 44-5-60).

Existing covenant not terminated. — Statute, properly construed, was not intended to operate retrospectively, and would not have the effect of terminating a covenant that was already in existence as a valid and binding contract between the parties. Dooley v. Savannah Bank & Trust Co., 199 Ga. 353, 34 S.E.2d 522 (1945) (see O.C.G.A. § 44-5-60).

Automatic covenant renewals valid. — Trial court erred in finding subdivision covenants did not renew because, while the original term of the covenants was restricted by the later passage of local zoning laws and O.C.G.A. § 44-5-60, the automatic renewal provision in subsection (d) did not apply to the covenants; furthermore, the covenant provision for automatic renewal for 15-year terms, unless two-thirds of the property owners agreed to terminate or modify the covenants, was not contrary to law or public policy. Turtle Cove Prop. Owner's Ass'n v. Jasper County, 255 Ga. App. 560, 566 S.E.2d 368 (2002).

4. Period of Enforcement

Section limits period of enforcing covenants to 20 years. — This statute does not declare restrictive covenants running for more than 20 years to be void, but limits the period in which the covenants can be enforced to 20 years. McKinnon v. Neugent, 225 Ga. 215, 167 S.E.2d 593 (1969) (see O.C.G.A. § 44-5-60).

When zoning laws in effect for 20 years. — Restrictive covenants which have run more than 20 years within a municipality or county in which zoning laws have been in effect for more than 20 years are rendered unenforceable. House v. James, 232 Ga. 443, 207 S.E.2d 201 (1974).

Existing covenants rendered unenforceable 20 years after 1962 amendment. — Restrictive covenants in existence prior to the 1962 amendment to this statute in those areas of counties for which zoning laws have been adopted are rendered unenforceable beginning 20 years after the enactment of the amendment. Rowland v. Kellos, 236 Ga. 799, 225 S.E.2d 302 (1976) (see O.C.G.A. § 44-5-60).

OPINIONS OF THE ATTORNEY GENERAL

Constructive delivery of a warranty deed may be effected by delivery to an escrow agent within 120 days after the execution of the sales contract, provided all of the following elements are present: (1) the escrow agent must be the agent of both the seller and the buyer, not just that of the seller; (2) the seller must release all control over the warranty deed when the seller delivers the deed to the escrow agent; (3) the escrow agent must be instructed to deliver the warranty deed to the buyer on the happening of a specific future event involving monetary consideration; (4) the escrow agent must be able to enforce the covenants and warranties found in former Code 1933, § 29-301 (see O.C.G.A. § 44-5-60) on behalf of the buyer; and (5) the real estate transaction must be properly recorded to put the world on notice of the buyer's equitable interest in the realty. 1974 Op. Att'y Gen. No. U74-17.

RESEARCH REFERENCES

Am. Jur. 2d. — 20 Am. Jur. 2d, Covenants, Conditions, and Restrictions, § 28 et seq. 23 Am. Jur. 2d, Deeds, § 237.

C.J.S. — 21 C.J.S., Covenants, § 73 et seq.

ALR. — Unfounded outstanding claims to or against real property as breach of covenants of deed, 5 ALR 1084.

Outstanding title or claim in grantee as breach of covenants in deed, 10 ALR 441.

Validity and effect of condition of dedication that remaining property shall not be subject to assessments for improvements, 16 ALR 499; 37 ALR 1357.

Record of deed or contract for conveyance of one parcel with covenant or easement affecting another parcel owned by grantor constructive notice to subsequent purchaser or encumbrancer of latter parcel, 16 ALR 1013.

Equitable or incipient easement as breach of covenant against encumbrances, 16 ALR 1066.

Reservation in grant of land of right to hunt and fish with like right to the grantee, as limiting the right of the grantee actual owners of the land, 32 ALR 1533.

Affirmative covenants as running with land, 41 ALR 1363; 102 ALR 781; 118 ALR 982; 68 ALR2d 1022.

Encumbrance undischarged and unenforced as affecting rights and damages under a covenant against encumbrances, 44 ALR 410.

Breach of covenant which does not run with the land as affecting right of remote grantee to recover under separate covenant that does, 45 ALR 513.

Acquiescence by purchaser of lot in restricted district in violations of restrictions as to some lots as waiver of right to insist upon it as to others, 46 ALR 372; 85 ALR 936.

Reservation by grantor of the right to require payment for existing party wall when used, 52 ALR 494.

Garage, or filling station, as breach of restrictive covenants, 54 ALR 659; 99 ALR 541.

Change of neighborhood in restricted district as affecting enforcement of restrictive covenant, 54 ALR 812; 4 ALR2d 1111.

Restrictions on use of real property, or remedies in respect of them, as affected by zoning law, 54 ALR 843.

Part of structure that must be beyond line to amount to violation of building-line restriction, 55 ALR 332; 172 ALR 1324.

Nature of conveyance or covenants which will create estoppel to assert after-acquired title or interest in real property, 58 ALR 345; 144 ALR 554.

Encroachment of building upon adjoining property or street as breach of covenant in deed of property on which building is located, 60 ALR 234.

Structure intended as an outbuilding, but temporarily used as a residence, as breach of restrictive covenant respecting character or cost of residence, 60 ALR 253.

Express covenant restricting property conveyed as raising a corresponding implied covenant as to property retained by the grantor, 60 ALR 1216; 144 ALR 916.

Easement as breach of covenant against encumbrances, 64 ALR 1479.

Right of one not otherwise damaged by violation of restrictive covenant to relief in equity or at law upon theory restriction reduced price received for property affected, 66 ALR 1324.

Rights in ditch company as appurtenance of land irrigated, 70 ALR 1008.

Change of conditions subsequent to judgment enforcing restrictive covenant, 76 ALR 1358.

Covenants in oil and gas lease as running with the land, 79 ALR 496.

What is a ''manufacturing'' business or enterprise within covenant restricting the use of real property, 81 ALR 1047.

Use of premises for physical treatment or other personal service as violation of covenant against use of property for ''business'' purposes, 97 ALR 624.

Personal liability of covenantor for breach of restrictive covenant by grantee of property, 98 ALR 779.

Measure of damages for breach of covenant of title in conveyance or mortgage of real property, 100 ALR 1194.

Character as a conditional limitation or condition subsequent, or as a covenant, of provision or recital in deed a purpose for which land is to be used, as affected by fact that was voluntary or for a merely nominal consideration, 116 ALR 76.

Restrictions on use of real property imposed by deed or plat as affected by antecedent mortgage or other lien upon the property or release from or enforcement thereof, 119 ALR 1117.

Validity and effect of reservation in deed of the right to proceeds, or part of the proceeds, of a future sale or condemnation of the property or part thereof, 123 ALR 1474.

Construction and application of restrictive covenants relating specifically to schools, 124 ALR 448.

Lodging or boardinghouse conducted as a business, or taking roomers or boarders as incidental to principal use of premises a home, as within prohibition of zoning statute or ordinance or restrictive covenant, 124 ALR 1011.

''Tourist home'' or tourist camp as violation of restrictive covenant as to use of real property, 127 ALR 853.

Use of cemetery grounds for purposes other than interment, 130 ALR 130.

Outstanding right of dower as breach of covenant of title or against encumbrances in deed or mortgage of real estate, 141 ALR 482.

Provisions of deed restricting type of buildings or other use of property, as covenant or condition, 142 ALR 197.

Building restrictions, by covenant or condition in deed or by zoning regulation, as applied to religious groups, 148 ALR 367.

Benefit of provision in deed which limits or qualifies grant or reservation of mineral rights, as passing to subsequent grant or encumbrancer of land, upon the theory that it is a covenant running with the land, or upon the ground that it creates an interest in the land and passes as such, 151 ALR 818.

Restrictive covenants as applicable to land itself apart from buildings, 155 ALR 528.

Covenant restricting ''erection,'' ''construction,'' etc., as including limitation on use structure, 155 ALR 1007.

Provision of building restriction which permits garage or other outbuilding as applicable to lot on which there is no other building, 162 ALR 1098.

What amounts to constructive eviction which will support action for breach of covenant of warranty or for quiet enjoyment, 172 ALR 18.

Computation of number or percentage of owners signing restrictive agreement affecting real property, 173 ALR 316.

Construction and application of covenant restricting use of property to ''residence'' or ''residential purposes'', 175 ALR 1191.

Change of neighborhood in restricted district as affecting restrictive covenant; decisions since 1927, 4 ALR2d 1111.

Continued value of restrictive covenant to the dominant owner in protection of his property from competition as basis for its enforcement notwithstanding changes of neighborhood conditions, 2 ALR2d 601.

Restrictive covenants, conditions, or agreements in respect of real property discriminating against persons on account of race, color, or religion, 3 ALR2d 466.

Omission from deed of restrictive covenant imposed by general plan of subdivision, 4 ALR2d 1364.

Oral agreement restricting use of real property as within statute of frauds, 5 ALR2d 1316.

Use of property by college fraternity or sorority as violation of restrictive covenant, 7 ALR2d 436.

Garage as part of house with which it is physically connected within zoning regulations or restrictive covenant, 7 ALR2d 593.

Time when statute of limitation starts to run against breach of covenant running with land and requiring affirmative acts by covenantor, 17 ALR2d 1251.

Covenant of lessee to insure as running with the land, 18 ALR2d 1051.

Covenant in conveyance requiring erection of dwelling as prohibiting use of property for business or other nonresidential purpose, 32 ALR2d 1207.

Use of premises for parking place as violation of restrictive covenant, 80 ALR2d 1258.

Covenant in lease to arbitrate, or to submit to appraisal, as running with the leasehold so as to bind assignee, 81 ALR2d 804.

Conveyance ''subject to'' restrictions set forth in a recorded or other indicated instrument as imposing the restrictions on the land conveyed, 84 ALR2d 780.

Reservation or exception in deed in favor of stranger, 88 ALR2d 1199.

Hospital, sanitarium, home for aged, nursing home, or the like, as violation of restrictive covenant, 94 ALR2d 726.

When statute of limitations starts to run against action for breach of covenant of warranty or of seisin, 95 ALR2d 913.

Validity, construction, and effect of contractual provision regarding future revocation or modification of covenant restricting use of real property, 4 ALR3d 570.

Construction of covenant or condition in conveyance of land relating to ''permanent'' maintenance of location of building or other structure, 7 ALR3d 650.

Right of owners of parcels into which dominant tenement is or will be divided to use right of way, 10 ALR3d 960.

Validity of provisions for amortization of nonconforming uses, 22 ALR3d 1134.

Covenant restricting use of land, made for purpose of guarding against competition, as running with land, 25 ALR3d 897.

Zoning or other public restrictions on the use of property as affecting rights and remedies of parties to contract for the sale thereof, 39 ALR3d 362.

Validity and construction of restrictive covenant requiring consent to construction on lot, 40 ALR3d 864.

Meaning of terms ''city,'' ''town,'' or the like as employed in restrictive covenants not to compete, 45 ALR3d 1339.

Who may enforce restrictive covenant or agreement as to use of real property, 51 ALR3d 556.

Change of neighborhood as affecting restrictive covenants precluding use of land for multiple dwelling, 53 ALR3d 492.

Erection of condominium as violation of restrictive covenant forbidding erection of apartment houses, 65 ALR3d 1212.

What constitutes a ''structure'' within restrictive covenant, 75 ALR3d 1095.

Use of property for multiple dwellings as violating restrictive covenant permitting property to be used for residential purposes only, 99 ALR3d 985.

Restrictive covenants as to height of structures or buildings, 1 ALR4th 1021.

Validity, construction, and effect of restrictive covenants as to trees and shrubbery, 13 ALR4th 1346.

Validity of zoning and building regulations restricting mobile homes or trailers to established mobile home or trailer parks, 17 ALR4th 106.

Validity and construction of restrictive covenant prohibiting or governing outside storage or parking of housetrailers, motor homes, campers, vans, and the like, in residential neighborhoods, 32 ALR4th 651.

Zoning: occupation of less than all dwelling units as discontinuance or abandonment of multifamily dwelling nonconforming use, 40 ALR4th 1012.

Restrictive covenant limiting land use to ''private residence'' or ''private residential purposes'': interpretation and application, 43 ALR4th 71.

Validity of provisions for amortization of nonconforming uses, 8 ALR5th 391.

Waiver of right to enforce restrictive covenant by failure to object to other violations, 25 ALR5th 123.

Laches or delay in bringing suit as affecting right to enforce restrictive building covenant, 25 ALR5th 233.

44-5-61. Implied warranty of title.

In a sale of land there is no implied warranty of title. (Civil Code 1895, § 3613; Civil Code 1910, § 4193; Code 1933, § 29-302.)

History of Code section. — This Code section is derived from the decisions in McDonald v. Beall, 55 Ga. 289 (1875) and McDonough & Co. v. Martin, 88 Ga. 675, 16 S.E. 59 (1892).

Law reviews. — For article surveying contracts — Caveat Emptor and Merger by Deed, see 34 Mercer L. Rev. 76 (1982).

For note discussing application of caveat emptor to home sales in Georgia, and nationwide trend toward recognition of implied warranties of workmanlike construction and habitability, see 29 Mercer L. Rev. 323 (1977).

JUDICIAL DECISIONS

There is no presumption that grantor has made express warranty in a sale of land. McEntyre v. Merritt, 44 Ga. App. 583, 162 S.E. 424 (1932).

Doctrine of caveat emptor applies for any sale of land and there is no implied warranty as to the property. Reynolds v. Wilson, 121 Ga. App. 153, 173 S.E.2d 256 (1970), overruled on other grounds, Holmes v. Worthey, 159 Ga. App. 262, 282 S.E.2d 919 (1981).

Caveat emptor does not apply to subcontractors. — Subcontractors who construct the dwelling bear the relationship of independent contractors; therefore, subcontractors are not seller-builders, and caveat emptor does not apply. Welding Prods. v. S.D. Mullins Co., 127 Ga. App. 474, 193 S.E.2d 881 (1972).

Negligent party in real estate sale not protected if no confidential relations. — 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).

Benefit of after-acquired title inures to grantee of bond for title interest. — Conveyance by which the grantor transfers ''his

bond for title interest'' in the land described, together with all of the grantor's ''right, title, and interest'' therein, for the purpose of securing a debt owing by the grantor to the grantee, is one under which the benefit of an after-acquired independent title inures to the benefit of the grantee, and the grantor and those holding under the grantor are estopped thereafter to claim the after-acquired title as against the grantee when the debt so secured remains unpaid. This is true although the conveyance contains no express covenant of warranty. Perkins v. Rhodes, 192 Ga. 331, 15 S.E.2d 426 (1941).

Quality or condition of new house. — Law implies no warranties as to quality or condition of existing new house in favor of purchaser by the seller-builder. P.B.R. Enters., Inc. v. Perren, 158 Ga. App. 24, 279 S.E.2d 292 (1981).

Duty to disclose defects when seller has special knowledge not apparent to purchaser. — Cause of action for fraud resulting from passive concealment of a defect in realty places upon the seller a duty to disclose defects in realty in situations since the seller has special knowledge not apparent to the purchaser; the seller must be aware that purchaser is acting under a misapprehension as to facts which would be important and would probably affect the purchaser's decision. P.B.R. Enters., Inc. v. Perren, 158 Ga. App. 24, 279 S.E.2d 292 (1981).

Cited in Crawford v. State, 117 Ga. 247, 43 S.E. 762 (1903); McLendon Bros. v. Finch, 2 Ga. App. 421, 58 S.E. 690 (1907); Toomey v. Read & Gresham, 133 Ga. 855, 67 S.E. 100 (1910); Lang v. Hall, 25 Ga. App. 118, 102 S.E. 877 (1920); Martin v. Hight, 30 Ga. App. 603, 118 S.E. 595 (1923); Thomas v. Hudson, 190 Ga. 622, 10 S.E.2d 396 (1940); Monroe v. Goldberg, 80 Ga. App. 770, 57 S.E.2d 448 (1950); Holmes v. Worthey, 159 Ga. App. 262, 282 S.E.2d 919 (1981).

RESEARCH REFERENCES

Am. Jur. 2d. — 23 Am. Jur. 2d, Deeds, § 237.

Am. Jur. Proof of Facts. — Builder-Vendor's Liability to Purchaser of New Dwelling for Breach of Implied Warranty of Fitness or Habitability, 50 POF3d 543.

C.J.S. — 33 C.J.S., Exchange of Property, § 9 et seq.

ALR. — Duty of vendor as to abstract of title, 52 ALR 1460.

Marketable title, 57 ALR 1253; 81 ALR2d 1020.

Doctrine of caveat emptor as applied to purchaser at judicial or executor's sale, 68 ALR 659.

Condemnation, proceeding therefor, or prospect thereof, as affecting marketability of title, 21 ALR2d 792.

Validity, construction, and effect of land sale contract providing that title must be satisfactory to purchaser, 47 ALR2d 455.

44-5-62. General warranty — Scope.

A general warranty of title against the claims of all persons includes covenants of a right to sell, of quiet enjoyment, and of freedom from encumbrances. (Orig. Code 1863, § 2662; Code 1868, § 2661; Code 1873, § 2703; Code 1882, § 2703; Civil Code 1895, § 3614; Civil Code 1910, § 4194; Code 1933, § 29-303.)

JUDICIAL DECISIONS

Analysis

General Consideration
Right to Sell
Quiet Possession
Freedom from Encumbrances

General Consideration

This statute modifies the common law, in that the statute embraces in the term general warranty, by implication, certain specific warranties which the common law required to be express. Cheatham v. Palmer, 176 Ga. 227, 167 S.E. 522 (1933) (see O.C.G.A. § 44-5-62).

This statute abolishes the technical rule of the common law which limited the assignee to real covenants. Tucker v. McArthur, 103 Ga. 409, 30 S.E. 283 (1898) (see O.C.G.A. § 44-5-62).

General warranty of title is only a covenant against valid claims of all persons. — Although the general warranty of title covenants the right of quiet enjoyment and of freedom from encumbrances, it is only a covenant against the valid claims of all persons. Pease & Elliman Realty Trust v. Gaines, 160 Ga. App. 125, 286 S.E.2d 448 (1981).

Covenant runs with the land. — Unless the covenant expressly negatives such transmission, a covenant of warranty of title of quiet enjoyment, and of freedom from encumbrances, made by any grantor, passes with the land to subsequent purchasers. McRae v. Sewell, 47 Ga. App. 290, 170 S.E. 315 (1933).

An unrestricted express warranty of title being a covenant running with the land, a purchaser may maintain an action thereon against any prior grantor making such a warranty, if one is a privy in estate. McEntyre v. Merritt, 49 Ga. App. 416, 175 S.E. 661 (1934).

While the right of action passes out of an intermediate warrantor when the warrantor relinquishes title to the land, and into the assignee, nevertheless, if it should occur that the intermediate covenantor is placed under the legal necessity of praying the lien, or mending the breach, and the intermediate covenantor actually does so, the right to recover for the amount paid out is thereby restored to the intermediate covenantor, and to that extent alone the intermediate covenantor remitted to the intermediary's rights under the intermediary's own warranties from prior grantees, and may in turn recover from the prior grantees the amounts so paid. Robertson v. Webster, 79 Ga. App. 30, 52 S.E.2d 511 (1949).

Covenant relates only to title at time of execution. — Covenant of general warranty relates only to the title, and, as a general rule, only to the title as the title existed at the time the covenant was executed. Lifsey v. Finn, 40 Ga. App. 735, 151 S.E. 392 (1930); Rabun Mineral & Dev. Co. v. Heyward, 171 Ga. 322, 155 S.E. 324 (1930).

Transfer of rights by deed. — Mode of transfer of the covenantee's rights in regard to covenants is by deed. Tucker v. McArthur, 103 Ga. 409, 30 S.E. 283 (1898).

Warrantors who may be sued. — When there has been a breach of the warranty of title to land the last grantee has a right of action against and may sue one's immediate warrantor, the remote or original warrantor, or any intermediate warrantor, or any or all of them in one action. Smith v. Smith, 129 Ga. App. 618, 200 S.E.2d 504 (1973).

Right of action not affected by previous conveyance by grantor. — In an action by the grantee against the grantor in a warranty deed conveying the fee simple title to described land, for a breach of such warranty, the grantee's right of action is not affected because of the grantee's prior knowledge that such grantor did not own the entire tract conveyed, or that the grantor had conveyed a part thereof to another. Currin v. Milhollin, 53 Ga. App. 270, 185 S.E. 380 (1936).

Warranty of seizin. — In order to recover on a warranty of seizin, the loss of seizin (that is, eviction) has to be proved. Cheatham v. Palmer, 176 Ga. 227, 167 S.E. 522 (1933).

Zoning matters. — Traditional scope of a general warranty of title does not extend to include zoning matters. Barnett v. Decatur, 261 Ga. 205, 403 S.E.2d 46 (1991).

Mere outstanding title not breach of warranty. — To constitute a breach of the covenant of warranty, or for quiet employment, an eviction or equivalent disturbance by title paramount must occur, and the mere existence of an outstanding paramount title will not constitute a breach. Hitchcock v. Tollison, 213 Ga. App. 477, 444 S.E.2d 844 (1994).

Builder liable to title insurer for breach of warranty. — Doctrine of equitable subrogation applied, a title insurer had standing to sue a builder, and the builder was liable to the insurer for breach of warranty of title as the builder conveyed property to an insured by a general warranty deed that the builder did not own, there was a

General Consideration (Cont'd)

defect in the title, the insurer settled a dispute over title to the lot, and the dispute was not a boundary line dispute but concerned the failure of title to vest in the insured. Wilkinson Homes, Inc. v. Stewart Title Guar. Co., 271 Ga. App. 577, 610 S.E.2d 187 (2005).

Builder's president not liable to title insurer for breach. — Builder's president was not liable, individually, to a title insurer for a breach of warranty of title deed as the builder was the sole grantor of the property and the president never, individually, owned the property or warranted the title. Wilkinson Homes, Inc. v. Stewart Title Guar. Co., 271 Ga. App. 577, 610 S.E.2d 187 (2005).

Cited in Miller v. Desverges, 75 Ga. 407 (1885); Thrower v. Baker, 144 Ga. 372, 87 S.E. 301 (1915); Croom v. Allen, 145 Ga. 347, 89 S.E. 199 (1916); Sawyer Coal & Ice Co. v. Kinnett-Odom Co., 192 Ga. 166, 14 S.E.2d 879 (1941); Echols v. Thompson, 211 Ga. 299, 85 S.E.2d 423 (1955); Wright v. Piedmont Eng'r & Constr. Corp., 106 Ga. App. 401, 126 S.E.2d 865 (1962); Walter L. Tally, Inc. v. Council, 109 Ga. App. 100, 135 S.E.2d 515 (1964); Northside Title & Abstract Co. v. Simmons, 200 Ga. App. 892, 409 S.E.2d 885 (1991); Benton v. Gaudry, 230 Ga. App. 373, 496 S.E.2d 507 (1998).

Right to Sell

Statute enlarges the common law general warranty so as to include the covenant of right to convey. Allen v. Taylor, 121 Ga. 841, 49 S.E. 799 (1905); White & Corbitt v. Stewart & Co., 131 Ga. 460, 62 S.E. 590, 15 Ann. Cas. 1198 (1908) (see O.C.G.A. § 44-5-62).

Quiet Possession

Loss of possession must be shown. — On a covenant for quiet possession, loss of possession has to be shown. Cheatham v. Palmer, 176 Ga. 227, 167 S.E. 522 (1933).

Freedom from Encumbrances

All encumbrances at time of conveyance. — General warranty includes all encumbrances existing at the time of the conveyance of the property to which the property conveyed is subject. Cheatham v. Palmer, 176 Ga. 227, 167 S.E. 522 (1933).

Conditions precedent. — On a covenant against encumbrances, the only conditions precedent to a right of action are the outstanding of a valid encumbrance at the date of the covenant affecting the property conveyed, and its discharge by the covenantee. Cheatham v. Palmer, 176 Ga. 227, 167 S.E. 522 (1933).

When an alleged breach of warranty is based upon the existence of an outstanding encumbrance which it is the duty of the grantor to discharge, it is not necessary to allege or prove that the grantee in the deed has been evicted, or has lost possession of the property, nor is it necessary that the grantor be vouched into court to defend the title. Cheatham v. Palmer, 176 Ga. 227, 167 S.E. 522 (1933).

Knowledge. — Because the purchaser knew about a road and knew that the road was being used before the purchaser closed on the property, this knowledge defeated the purchaser's claim for breach of warranty of title. Richitt v. Southern Pine Plantations, Inc., 228 Ga. App. 333, 491 S.E.2d 528 (1997).

Floodwater detention easement breached general warranty of title. — In an action arising from the sale of property, the trial court erred in granting summary judgment to the sellers, contrary to both O.C.G.A. §§ 44-5-62 and 44-5-63, as a floodwater detention easement burdened the property by permitting the impoundment of water on it to prevent flooding or increased water runoff on other property located downstream, and, even though the lake was certainly open and obvious, the same could not necessarily be said of the easement; moreover, a factual issue remained as damages, and although the buyers' constructive notice of the easement by reason of its recordation within the chains of title would provide a compelling reason for exempting the easement from operation of the warranty deed, O.C.G.A. § 44-5-63 provided otherwise. McMurray v. Housworth, 282 Ga. App. 280, 638 S.E.2d 421 (2006).

RESEARCH REFERENCES

Am. Jur. 2d. — 23 Am. Jur. 2d, Deeds, § 237.

C.J.S. — 33 C.J.S., Exchange of Property, § 9 et seq.

ALR. — Unfounded outstanding claims to or against real property as breach of covenants of deed, 5 ALR 1084.

Equitable or incipient easement as breach of covenant against encumbrances, 16 ALR 1066.

Affirmative covenants as running with land, 41 ALR 1363; 102 ALR 781; 118 ALR 982.

Encumbrance undischarged and unenforced as affecting rights and damages under a covenant against encumbrances, 44 ALR 410.

Duty of purchaser of real property to disclose to the vendor facts or prospects affecting the value of the property, 56 ALR 429.

Encroachment of building upon adjoining property or street as breach of covenant in deed of property on which building is located, 60 ALR 234.

Easement as breach of covenant against encumbrances, 64 ALR 1479.

Unpaid public improvement as constituting breach of covenant or a defect in the vendor's title, 72 ALR 302.

Garage or filling station as breach of restrictive covenant, 99 ALR 541.

Measure of damages for breach of covenant of title in conveyance or mortgage of real property, 100 ALR 1194.

Grantor's continued possession of land after execution of deed as notice of his claim adverse to title conveyed, 105 ALR 845.

Outstanding right of dower as breach of covenant of title or against encumbrances in deed or mortgage of real estate, 141 ALR 482.

What amounts to constructive eviction which will support action for breach of covenant of warranty or for quiet enjoyment, 172 ALR 18.

Use of property by college fraternity or sorority as violation of restrictive covenant, 7 ALR2d 436.

Condemnation, proceeding therefor, or prospect thereof, as affecting marketability of title, 21 ALR2d 792.

Validity, construction, and effect of land sale contract providing that title must be satisfactory to purchaser, 47 ALR2d 455.

Party walls and party-wall agreements as affecting marketability of title, 81 ALR2d 1020.

When statute of limitations starts to run against action for breach of covenant of warranty or of seizin, 95 ALR2d 913.

44-5-63. General warranty — Defects known to purchaser.

In a deed, a general warranty of title against the claims of all persons covers defects in the title even if they are known to the purchaser at the time he takes the deed. (Civil Code 1895, § 3615; Civil Code 1910, § 4195; Code 1933, § 29-304.)

History of Code section. — This Code section is derived from the decision in Miller v. Desverges, 75 Ga. 407 (1886).

Law reviews. — For article surveying developments in Georgia real property law from mid-1980 through mid-1981, see 33 Mercer L. Rev. 219 (1981). For survey article on real property law, see 59 Mercer L. Rev. 371 (2007).

JUDICIAL DECISIONS

This statute modifies the common law, in that the statute embraces in the term general warranty, by implication, certain specific warranties which the common law required to be express. Cheatham v. Palmer, 176 Ga. 227, 167 S.E. 522 (1933) (see O.C.G.A. § 44-5-63).

Purchaser has right to rely on vendor's warranty. — When the purchaser had knowledge of the defect in the vendor's title, or of

the fact that the vendor had formerly sold a portion of the land to another, purchaser although having such knowledge has a right to rely on the vendor's warranty. Currin v. Milhollin, 53 Ga. App. 270, 185 S.E. 380 (1936).

Defects in title include liens and encumbrances. Osburn v. Pritchard, 104 Ga. 145, 30 S.E. 656 (1898).

Outstanding title included. — "Defects in title" include an outstanding paramount title. McCall v. Wilkes, 121 Ga. 722, 49 S.E. 722 (1905); Cummings v. Fleming & Hines, 30 Ga. App. 601, 118 S.E. 593 (1923).

Allegations as to an outstanding paramount title in a third person are sufficient to set forth a cause of action to recover damages by reason of the breach of a covenant of warranty of title. Lee v. Austin, 209 Ga. 715, 75 S.E.2d 426 (1953).

Taxes assessed after contract of sale not included. — Taxes assessed after a contract of sale of land, which the purchaser has covenanted to pay, and which the purchaser permits to remain unpaid, thus causing a sale of the land under a tax execution, do not constitute a defect in the title caused by the vendor under the covenant, and such defect in title is attributable to the purchaser's own fault, for which the vendor is not liable under the vendor's warranty. Lifsey v. Finn, 40 Ga. App. 735, 151 S.E. 392 (1930).

Parol evidence inadmissible to contradict warranty. — Parol evidence to show an intention contradictory to that expressed by the warranty is not admissible. McCall v. Wilkes, 121 Ga. 722, 49 S.E. 722 (1905).

Floodwater detention easement breached general warranty of title. — In an action arising from the sale of property, the trial court erred in granting summary judgment to the sellers, contrary to both O.C.G.A. §§ 44-5-62 and 44-5-63, as a floodwater detention easement burdened the property by permitting the impoundment of water on it to prevent flooding or increased water runoff on other property located downstream, and, even though the lake was certainly open and obvious, the same could not necessarily be said of the easement; moreover, a factual issue remained as damages, and although the buyers' constructive notice of the easement by reason of its recordation within the chains of title would provide a compelling reason for exempting the easement from operation of the warranty deed, O.C.G.A. § 44-5-63 provided otherwise. McMurray v. Housworth, 282 Ga. App. 280, 638 S.E.2d 421 (2006).

Cited in Godwin v. Maxwell, 106 Ga. 194, 32 S.E. 114 (1898); Foute v. Elder, 109 Ga. 713, 35 S.E. 118 (1900); Lowery v. Yawn, 111 Ga. 61, 36 S.E. 294 (1900); Allen v. Taylor, 121 Ga. 841, 49 S.E. 799 (1905); Taylor v. Allen, 131 Ga. 416, 62 S.E. 291 (1908); Thrower v. Baker, 144 Ga. 372, 87 S.E. 301 (1915); Peters v. Miller, 154 Ga. 500, 114 S.E. 640 (1922); Finn v. Lifsey, 169 Ga. 599, 150 S.E. 908 (1929); Federal Land Bank v. Bank of Lenox, 192 Ga. 543, 16 S.E.2d 9 (1941); Hood v. Connell, 204 Ga. 782, 51 S.E.2d 853 (1949); Lunsford v. King, 132 Ga. App. 749, 209 S.E.2d 27 (1974); Mansell v. Pappas, 156 Ga. App. 272, 274 S.E.2d 588 (1980).

RESEARCH REFERENCES

Am. Jur. 2d. — 23 Am. Jur. 2d, Deeds, § 237.

C.J.S. — 33 C.J.S., Exchange of Property, § 9 et seq.

ALR. — Remedy of grantee in possession under deed with covenants of title, independently of an action on those covenants, where the grantor's title is defective, 65 ALR 1142.

Unpaid public improvement as constituting breach of covenant or a defect in the vendor's title, 72 ALR 302.

Remedies of grantor who has conveyed with covenants against third person asserting title or interest hostile to covenants, 97 ALR 711.

Validity, construction, and effect of land sale contract providing that title must be satisfactory to purchaser, 47 ALR2d 455.

44-5-64. Action for breach of warranty — Burden of proof.

In actions for breach of warranty of title, the burden of proof is on the plaintiff except in cases where outstanding encumbrances have been paid off or possession has been yielded as a consequence of legal proceedings of which the warrantor had notice and an opportunity to defend. (Civil Code 1895, § 3617; Civil Code 1910, § 4197; Code 1933, § 29-306.)

History of Code section. — This Code section is derived from the decisions in Leary v. Durham, 4 Ga. 593 (1848), and Amos v. Cosby, 77 Ga. 793 (1885).

Cross references. — Form to be used in action for breach of warranty in deed, § 9-10-203.

JUDICIAL DECISIONS

Plaintiff's burden. — Statement in this statute that the burden of proof is on the plaintiff, except in the two instances mentioned, plainly indicates that they are not the only cases in which suit may be brought for a breach of warranty. When the warrantor has not been vouched or notified, so as to have an opportunity to defend, the bringing of suit by the holder of the outstanding title against the warrantee and obtaining judgment thereon would be of little advantage to the warrantor. In cases other than those specified, the plaintiff would carry the burden of showing that the adverse title was paramount, and that the plaintiff's eviction, or what was equivalent to eviction under it, was legal. Joyner v. Smith, 132 Ga. 779, 65 S.E. 68 (1909) (see O.C.G.A. § 44-5-64).

In a suit for a breach of warranty, the burden is on the plaintiff to show eviction under an outstanding paramount title, or a superior lien upon the land. Roberts v. Hill, 78 Ga. App. 264, 50 S.E.2d 706 (1948).

Yielding possession as consequence of legal proceedings. — Yielding possession of land by a vendee, as a result of a suit for trespass to the land and an injunction brought against the vendee by another which is predicated on a title paramount to the title under which the vendee claims, and the title was adjudicated in that plaintiff, constitutes such yielding of possession in consequence of legal proceedings, and when the warrantor had notice and an opportunity to defend, as affords the vendee a right of action against the vendee's warrantor for a breach of the warranty of title. Reese v. Manget, 53 Ga. App. 637, 186 S.E. 880 (1936).

Showing of competing claim of title. — Trial court erred in granting summary judgment to the buyer in the buyer's suit against the sellers for breach of warranty of title to real property as the evidence, a letter to the buyer after the sale, showed only a competing claim of title to the property and not that the buyer was compelled to yield to an outstanding paramount title to the property. Whited v. Issenberg, 261 Ga. App. 787, 584 S.E.2d 59 (2003).

Cited in Haines v. Fort, 93 Ga. 24, 18 S.E. 994 (1893); McMullen v. Butler & Co., 117 Ga. 845, 45 S.E. 258 (1903); Brooks v. Winkles, 139 Ga. 732, 78 S.E. 129 (1913); Turner v. Tidwell, 141 Ga. 123, 80 S.E. 901 (1913); Rowan v. Newbern, 32 Ga. App. 363, 123 S.E. 148 (1924); Lee v. Austin, 209 Ga. 715, 75 S.E.2d 426 (1953).

RESEARCH REFERENCES

Am. Jur. 2d. — 23 Am. Jur. 2d, Deeds, § 237.

ALR. — Affirmative covenants as running with land, 41 ALR 1363; 102 ALR 781; 118 ALR 982.

What amounts to constructive eviction which will support action for breach of covenant of warranty or for quiet enjoyment, 172 ALR 18.

44-5-65. Action for breach of warranty — Necessity for offer to rescind; mitigation of damages.

To recover upon a breach of a covenant of warranty of title, the warrantee need not offer to rescind the deed. However, an offer by the warrantor to rescind the deed and a refusal by the warrantee should be considered in estimating damages. (Orig. Code 1863, § 2666; Code 1868, § 2662; Code 1873, § 2704; Code 1882, § 3616; Civil Code 1895, § 3616; Civil Code 1910, § 4196; Code 1933, § 29-305.)

JUDICIAL DECISIONS

Cited in Mansell v. Pappas, 156 Ga. App. 272, 274 S.E.2d 588 (1980).

RESEARCH REFERENCES

Am. Jur. 2d. — 23 Am. Jur. 2d, Deeds, § 237.

44-5-66. Action for breach of warranty — Measure of damages.

Upon a breach of a covenant of warranty of title to land, the damages awarded should be the purchase money with interest thereon from the time of sale unless the jury determines, under the circumstances of the case, that the use of the premises was equal to the interest on the money and determines that an equitable setoff should be allowed. However, if valuable improvements have been made on the premises, the interest should be allowed. (Orig. Code 1863, § 2889; Code 1868, § 2897; Code 1873, § 2948; Code 1882, § 2948; Civil Code 1895, § 3804; Civil Code 1910, § 4400; Code 1933, § 20-1412.)

Law reviews. — For article surveying recent legislative and judicial developments in Georgia's real property laws, see 31 Mercer L. Rev. 187 (1979).

JUDICIAL DECISIONS

Damages assessed at time of breach. — Covenant of warranty, if breached at all, is at least technically breached when the covenant is entered into and the damages are therefore to be assessed in accordance with the conditions as the conditions existed at that time. Teems v. City of Forest Park, 137 Ga. App. 733, 225 S.E.2d 87 (1976).

General measure of damages on warranties of title to land is the same as on warranties of title to chattels in basing the recovery on the original consideration with interest, except that the jury is permitted to allow an equitable setoff of the value of the use of the premises against the interest on the purchase price, if they think, under all the circumstances, that the value of the use equals the interest. Cook v. Pollard, 50 Ga. App. 752, 179 S.E. 264 (1935).

When the purchaser lost all title the purchaser received from the intermediate and immediate grantors (the warrantors), and purchased the outstanding title from the true owner, the measure of damages would be the purchase price paid to the warrantors sued with interest, and not the amount paid

for the outstanding title by the purchaser, as in cases of the removal of an encumbrance. West v. Lee, 57 Ga. App. 873, 197 S.E. 75 (1938).

On a breach of warranty of title to land, the measure of damages is the purchase money, with interest. Teems v. City of Forest Park, 137 Ga. App. 733, 225 S.E.2d 87 (1976).

Grantor liable only to immediate grantee for expenses of defense of title. — Grantor of land is liable to the grantor's immediate grantee, who has been evicted, for the purchase money, with interest, and expenses incurred by the grantee in defending the title; but not for expenses incurred in a series of suits for breach of warranty by remote grantees, holding under, but not immediately from, the original grantee. Smith v. Williams, 117 Ga. 782, 45 S.E. 394, 97 Am. St. R. 220 (1903).

Limitation on amount recoverable from remote warrantor. — After a warrantee sued a remote warrantor, the warrantee could not recover more than the consideration the warrantee had paid, with interest. Smith v. Smith, 243 Ga. 56, 252 S.E.2d 484 (1979).

Attorney fees are not allowed in a suit to recover damages if there is no allegation of deceit or fraud in the sale. Smith v. Williams, 117 Ga. 782, 45 S.E. 394, 97 Am. St. R. 220 (1903).

There is no authorization for an award of attorney fees under O.C.G.A. § 44-5-66. Cary v. Guiragossian, 270 Ga. 192, 508 S.E.2d 403 (1998).

Trial court did not err when the court granted summary judgment to a title insurer as to liability on the insurer's breach of warranty of title claim against a builder, but denied summary judgment as to attorney fees and litigation expenses, as neither O.C.G.A. § 44-5-66 nor the warranty deed authorized attorney fees; since the insurer did not allege fraud or deceit, in order to prevail on the insurer's bad faith claim for attorney fees under O.C.G.A. § 13-6-11, the insurer had to prove that the builder acted in bad faith when it sold the property to the insureds. Wilkinson Homes, Inc. v. Stewart Title Guar. Co., 271 Ga. App. 577, 610 S.E.2d 187 (2005).

Partial failure of title. — When a partial failure of title occurs, damages are fixed by a pro rata valuation. Rowan v. Newbern, 32 Ga. App. 363, 123 S.E. 148 (1924).

Who has right to recover. — Right to recover for a breach of warranty cannot exist in an intermediate warrantor and the last warrantee at the same time. Smith v. Smith, 129 Ga. App. 618, 200 S.E.2d 504 (1973).

Statute does not apply to an ousted donee of realty. Smith v. Smith, 243 Ga. 56, 252 S.E.2d 484 (1979) (see O.C.G.A. § 44-5-66).

This statute was not intended to, and does not, cover situations where the property is received as a gift by deed or otherwise. The donee of realty takes with such gift the warranty which the donee's donor had and stands in the shoes of the donee's donor as to such warranty. To hold otherwise would give no recourse to an ousted donee against a remote grantor simply because the donee received the property as a gift by deed or devise without a monetary consideration. Smith v. Smith, 243 Ga. 56, 252 S.E.2d 484 (1979) (see O.C.G.A. § 44-5-66).

Value if deed is of gift with covenants of warranty. — If the deed is one of gift, but the deed contains covenants of warranty, the value of the land at the time of the gift, with interest thereon, is the criterion of damages for breach of the warranty. Smith v. Smith, 243 Ga. 56, 252 S.E.2d 484 (1979).

Cited in Lowery v. Yawn, 111 Ga. 61, 36 S.E. 294 (1900); Whitlock v. Mozley & Co., 142 Ga. 305, 82 S.E. 886 (1914); Neal v. Medlin, 36 Ga. App. 796, 138 S.E. 254 (1927); Jackson v. Franklin, 179 Ga. 840, 177 S.E. 731 (1934); Chance v. Buxton, 163 F.2d 989 (5th Cir. 1947); Lee v. Austin, 209 Ga. 715, 75 S.E.2d 426 (1953); Echols v. Thompson, 211 Ga. 299, 85 S.E.2d 423 (1955); Claxton v. Claxton, 214 Ga. 715, 107 S.E.2d 320 (1959); Smith v. Smith, 129 Ga. App. 618, 200 S.E.2d 504 (1973); Sachs v. Swartz, 233 Ga. 99, 209 S.E.2d 642 (1974); Moss v. Twiggs, 260 Ga. 561, 397 S.E.2d 707 (1990).

RESEARCH REFERENCES

Am. Jur. 2d. — 20 Am. Jur. 2d, Covenants, Conditions, and Restrictions, §§ 52, 65 et seq., 134 et seq.

C.J.S. — 17A C.J.S., Contracts, §§ 561, 562, 600 et seq, 610 et seq., 652, 665.

ALR. — Reduction of claim under con-

tract as affecting right to interest, 89 ALR 678.

Compensation as alternative relief upon denial of rescission to purchaser of land, 175 ALR 686.

Right to recover, in action for breach of contract, expenditures incurred in preparation for performance, 17 ALR2d 1300.

Vendor and purchaser: marketability of title as affected by lien dischargeable only out of funds to be received from purchaser at closing, 53 ALR3d 678.

Effect of doubtful construction of will devising property upon marketability of title, 65 ALR3d 450.

Measure and element of damages recoverable from vendor where there has been a mistake as to amount of land conveyed, 94 ALR3d 1091.

44-5-67. Breach of bond for title to land; measure of damages.

Upon the breach of a bond for title to land, the value of the premises at the time of the breach with interest thereon should be the measure of damages. However, if the vendee has bought up the outstanding title, only the actual damage sustained by him may be recovered. (Orig. Code 1863, § 2890; Code 1868, § 2898; Code 1873, § 2949; Code 1882, § 2949; Civil Code 1895, § 3805; Civil Code 1910, § 4401; Code 1933, § 20-1413.)

Law reviews. — For comment, ''Georgia Installment Sale Contracts—A Time for Reform,'' see 39 Mercer L. Rev. 651 (1988).

JUDICIAL DECISIONS

Statute does not apply unless all the land is lost. McConnell v. White, 91 Ga. App. 92, 85 S.E.2d 75 (1954) (see O.C.G.A. § 44-5-67).

Right of assignee on a bond are those held by the assignor. Peterson v. Harper, 13 Ga. App. 112, 78 S.E. 942 (1913).

Vendee's option of treating vendor's resale as rescission or breach of bond. — Vendee has the option of treating a resale of property to a third person, before the vendor has fully rescinded the contract because of a default in payment by the vendee, either as a rescission of the sale or as a breach of the bond. Buck v. Duvall, 9 Ga. App. 656, 72 S.E. 44 (1911).

Measure of damages. — Jury shall ascertain the value of the land at the time of the breach, and add interest thereon, and return the total amount in solido. Gibson v. Carreker, 82 Ga. 46, 9 S.E. 124 (1889).

Setoff of the actual cost of purchasing a title is permitted in an action by the warrantor on a note. Hull v. Harris, 64 Ga. 309 (1879).

Bond for title is evidence, in a suit for breach of warranty in the deed, to show that the defendants were bound to make plaintiff a good warranty title. Clark v. Whitehead, 47 Ga. 516 (1873).

Cited in McLaren v. Irvin, 63 Ga. 275 (1879); Hull v. Harris, 64 Ga. 309 (1879).

RESEARCH REFERENCES

C.J.S. — 21 C.J.S., Covenants, § 80 et seq.

ALR. — Reduction of claim under contract as affecting right to interest, 89 ALR 678.

Measure and amount of damages recoverable under supersedeas bond in action involving recovery or possession of real estate, 9 ALR3d 330.

Vendor and purchaser: marketability of title as affected by lien dischargeable only out of funds to be received from purchaser at closing, 53 ALR3d 678.

Measure and element of damages recoverable from vendor where there has been a mistake as to amount of land conveyed, 94 ALR3d 1091.

ARTICLE 4

GIFTS GENERALLY

RESEARCH REFERENCES

Am. Jur. Proof of Facts. — Proof of Decedent's Intent That Inter Vivos Gift to Heir Constitutes Advancement, 83 POF3d 295.

ALR. — Validity and construction of statutes discountenancing donations, testamentary or otherwise, between persons living in concubinage or otherwise sustaining immoral relations, 62 ALR 286.

Gift or grant in terms sufficient to carry the whole property absolutely as so operating where followed by a purported limitation over of property not disposed of by the first taker, 17 ALR2d 7.

Validity and effect of provision in will or trust instrument, conditioning gift on beneficiary's assumption or retention of family name, 38 ALR2d 1343.

Validity and effect of provision or condition against alienation in gift for charitable trust or to charitable corporation, 100 ALR2d 1208.

Issuance of stock certificate to joint tenants as creating gift inter vivos, 5 ALR4th 373.

PART 1

INTER VIVOS GIFTS

RESEARCH REFERENCES

ALR. — Gift of debts of third person not evidenced by commercial instrument, 3 ALR 933; 14 ALR 707.

Revocability of gift by one engaged person to the other on ground of undue influence, 33 ALR 590.

Gift of savings deposit by delivery of passbook, 40 ALR 1249; 84 ALR 558.

Gift of interest in estate after decedent's death, 48 ALR 223.

When may gift by will or deed of trust be considered as one to a class, 75 ALR 773; 61 ALR2d 212.

Declarations or admissions by decedent while in possession of personal property that it belonged to another as sufficient evidence of latter's title in absence of sufficient evidence of gift or other transfer by decedent, 98 ALR 755.

Gift or trust by deposit of funds belonging to depositor in bank account in name of himself and another, 135 ALR 993; 149 ALR 879.

Improvidence of donor as affecting validity of gift, 160 ALR 1133.

Nontransferable obligation as subject of gift by delivery, 161 ALR 170.

Rights of party to void marriage in respect of transfers or gifts to other in mistaken belief marriage was valid, 14 ALR2d 918.

Who are within gift or grant to ''offspring,'' 23 ALR2d 842.

Gift or grant to one upon marriage, if married, payable at marriage, or the like, as vested or contingent, 30 ALR2d 127.

Gift of life insurance policy, 33 ALR2d 273.

Donor's own check as subject of gift, 38 ALR2d 594.

Rights and incidents where title to real property purchased with wife's funds is taken in spouses' joint names, 43 ALR2d 917.

Gift of debt to debtor, 63 ALR2d 259.

Person entitled to inter vivos grant or gift to ''husband,'' ''wife,'' or ''widow,'' 71 ALR2d 1273.

Gift over by implication after estate during life or until marriage, where property is expressly given over at death and first taker marries, or vice versa, 73 ALR2d 484.

Right of life tenant with power to anticipate or consume principal to dispose of it by inter vivos gift, 83 ALR3d 135.

Establishment of ''family'' relationship to raise presumption that services were ren-

dered gratuitously, as between persons living in same household but not related by blood or affinity, 92 ALR3d 726.

Wills: gift to persons individually named but also described in terms of relationship to testator or another as class gift, 13 ALR4th 978.

Rights in respect of engagement and courtship presents when marriage does not ensue, 44 ALR5th 1.

44-5-80. Criteria for making valid inter vivos gift.

To constitute a valid inter vivos gift, the following criteria must be met:

(1) The donor must intend to give the gift;

(2) The donee must accept the gift; and

(3) The gift must be delivered or some act which under law is accepted as a substitute for delivery must be done. (Orig. Code 1863, § 2614; Code 1868, § 2615; Code 1873, § 2657; Code 1882, § 2657; Civil Code 1895, § 3564; Civil Code 1910, § 4144; Code 1933, § 48-101.)

Law reviews. — For article, ''Multiple Party Accounts: Georgia Law Compared with the Uniform Probate Code,'' see 8 Ga. L. Rev. 739 (1974). For article, ''Are We Witnessing the Erosion of Georgia's Separate Property Distinction?,'' see 13 Ga. St. B.J. 14 (2007).

For note discussing the treatment of joint bank accounts in Georgia, with regard to survivorship and testamentary effect, prior to the enactment of the Financial Institutions Code of Georgia, see 7 Ga. St. B.J. 370 (1971).

For comment on Felder v. Felder, 71 Ga. App. 860, 32 S.E.2d 550 (1944), see 7 Ga. B.J. 478 (1945).

JUDICIAL DECISIONS

Analysis

General Consideration
Intent
Acceptance
Delivery

General Consideration

Statute is merely a codification of the common law on the subject of gifts. Felder v. Felder, 71 Ga. App. 860, 32 S.E.2d 550 (1944) (see O.C.G.A. § 44-5-80).

Requirements for validity of gift. — To make a valid gift there need be only a present intention to give and a complete renunciation of right by the giver over the thing given, and full delivery of possession as a gift. Mims v. Ross, 42 Ga. 121 (1871); Culpepper v. Culpepper, 18 Ga. App. 182, 89 S.E. 161 (1916); Helmer v. Helmer, 159 Ga. 376, 125 S.E. 849, 37 A.L.R. 1137 (1924); Clark v. Bridges, 163 Ga. 542, 136 S.E. 444 (1927).

Manifestation of an intention to make a present gift to another, and, in consummation of this intention, delivery of the property to or for the use of the intended donee, or some act indicating a renunciation of dominion in favor of the intended donee, are essentials of a gift, whether inter vivos or causa mortis. Moore v. Tiller, 61 F.2d 478 (5th Cir. 1932).

To make a valid gift there must be a present intention to give, and a complete renunciation of right, by the giver, over the thing given, without power of revocation, and a full delivery of possession as a gift inter vivos. Drake v. Wayne, 52 Ga. App. 654, 184 S.E. 339 (1936); Bowen v. Holland, 182 Ga. 430, 185 S.E. 720 (1936); McLendon v. Johnson, 69 Ga. App. 214, 25 S.E.2d 53 (1943); Upchurch v. Upchurch, 76 Ga. App. 215, 45 S.E.2d 855 (1947); Guest v. Stone,

206 Ga. 239, 56 S.E.2d 247 (1949); Stewart v. Stewart, 228 Ga. 517, 186 S.E.2d 746 (1972); Scott v. Stroud, 186 Ga. App. 869, 369 S.E.2d 51 (1988); NeSmith v. Ellerbee, 203 Ga. App. 65, 416 S.E.2d 364 (1992).

It is generally settled that there must be a present intention to give, full completion and execution of the gift by the donor, and acceptance of the gift by the donee, and furthermore that the donor must have renounced all dominion over the subject-matter of the gift in order to make the transaction binding. Mashburn v. Wright, 204 Ga. App. 718, 420 S.E.2d 379 (1992).

In a divorce, a husband's claim that a sum the husband received from the father's corporation was a gift, he did not satisfy the burden of proving this assertion because: (1) while the father testified it was a gift, both the father and the corporation's accountant admitted it was paid to the husband as compensation; (2) the corporation prepared a tax form identifying the payment as compensation; (3) the father signed the appropriate tax return taking the payment as a tax deduction for monies paid to the husband; (4) no gift tax was paid on the payment, nor was a gift tax form reflecting the payment prepared or filed; and (5) the husband accepted the payment as compensation and so listed it on the husband's tax returns. Brock v. Brock, 279 Ga. 119, 610 S.E.2d 29 (2005).

Possession remaining with donor. — When it appears that the donor has relinquished all dominion and control over property as owner and parted absolutely with title, the mere fact that the donee allows possession to remain with the donor will not necessarily defeat the gift. Mashburn v. Wright, 204 Ga. App. 718, 420 S.E.2d 379 (1992).

Unconditional delivery evidenced. — Jury was authorized to believe plaintiff's testimony that the certificate of deposit was in decedent's home only because plaintiff left the certificate with decedent for safekeeping. The jury concluded from this and other evidence that the decedent had unconditionally surrendered dominion over the certificate of deposit during the decedent's life. Mashburn v. Wright, 204 Ga. App. 718, 420 S.E.2d 379 (1992).

Gift operates immediately. — Gift inter vivos operates, if at all, in the donor's lifetime, immediately and irrevocably. It is a gift executed, and no further act of parties, no contingency of death or otherwise, is needed to give the gift effect. Drake v. Wayne, 52 Ga. App. 654, 184 S.E. 339 (1936); Guest v. Stone, 206 Ga. 239, 56 S.E.2d 247 (1949).

Delivery of property subject to be reclaimed by the donor at any time prior to the donor's death, or if full control or power over the property or fund vests in the donee only after the death of the donor, this does not constitute a valid gift inter vivos. Drake v. Wayne, 52 Ga. App. 654, 184 S.E. 339 (1936); Guest v. Stone, 206 Ga. 239, 56 S.E.2d 247 (1949); NeSmith v. Ellerbee, 203 Ga. App. 65, 416 S.E.2d 364 (1992).

Burden of proof. — Burden is on the person claiming a gift to prove all the essential elements of a gift by clear and convincing evidence. Upchurch v. Upchurch, 76 Ga. App. 215, 45 S.E.2d 855 (1947); Hise v. Morgan, 91 Ga. App. 555, 86 S.E.2d 374 (1955); McGrew v. Cooper, 110 Ga. App. 347, 138 S.E.2d 453 (1964); Parker v. Peavey, 198 Ga. App. 694, 403 S.E.2d 213 (1991).

Burden is upon person alleging title by reason of gift to prove all essential elements of gift (intention of the donor, acceptance, and delivery) by clear and convincing evidence. Freeman v. Freeman, 162 Ga. App. 433, 291 S.E.2d 770 (1982); Smith v. Fleming, 183 Ga. App. 342, 358 S.E.2d 900 (1987).

Party seeking to prove title by gift must do so by clear and convincing evidence. Mashburn v. Wright, 204 Ga. App. 718, 420 S.E.2d 379 (1992).

Presumption of gift not rebutted. — Check from parents, who formed a limited partnership, given to their child for a large sum was properly determined to have been a gift from the parents pursuant to O.C.G.A. §§ 44-5-80 and 44-5-84, rather than a loan; the presumption under O.C.G.A. § 44-5-84, together with other supportive circumstantial evidence, including that there was no contract or lending and no repayment had been required, provided support for that factual finding. Baker v. Baker, 280 Ga. 299, 627 S.E.2d 26 (2006).

Presumption of undue influence applies to gifts. — When a relationship of dominance of one party exists, as is ordinarily the case when there is a fiduciary or confidential

General Consideration (Cont'd)

relation between the parties, the courts of equity hold that it raises a presumption of undue influence and throws upon the dominant party the burden of establishing the fairness of the transaction and that it was the free act of the other party. This principle has been generally applied to cases of settlements of property, especially gifts. Spikes v. Spikes, 89 Ga. App. 139, 79 S.E.2d 21 (1953).

Assignment of insurance policy as gift. — When a brother then single took out insurance and made his sister the beneficiary and gave her the policy, but later married and desired to make his wife beneficiary, the gift to the sister was not perfected so as to be absolute and irrevocable and the insured had the right to change the beneficiary. Nally v. Nally, 74 Ga. 669, 58 Am. R. 458 (1885).

Verbal assignment of a policy of life insurance by the insured, accompanied by words indicating an intention to give, and by a delivery of the policy, does not constitute a complete gift. Steele v. Gatlin, 115 Ga. 929, 42 S.E. 253, 59 L.R.A. 129 (1902).

Donor taking title in trust as gift. — When a parent purchases lands with the parent's own funds, and causes title to be made by the vendor to the parent as trustee for a minor daughter, this, in the absence of any valuable consideration as between these two, is equivalent to a gift of the land by the parent to the daughter. Cohen v. Parish, 105 Ga. 339, 31 S.E. 205 (1898).

Parol gift of land. — Parol gift of land without more is ineffectual to pass title to the donee. Thaggard v. Crawford, 112 Ga. 326, 37 S.E. 367 (1900).

To constitute a valid parol gift of land, it is necessary that the donee take possession under the gift, and that the donee make valuable improvements thereon upon the faith of the donor's promise, or declared intention, to make the gift. Frady v. Irvin, 245 Ga. 307, 264 S.E.2d 866 (1980); Whitmire v. Watkins, 245 Ga. 713, 267 S.E.2d 6 (1980).

Failure to allege improvements invalidates gift of land. — When a petition alleging that the plaintiff claimed title to certain lands under a parol gift from the plaintiff's father, construed most strongly against the petitioner, failed to allege that certain valuable improvements made by the plaintiff were made in pursuance of the terms of the gift during the lifetime of the alleged donor, it consequently failed to allege a completed gift. Kerr v. Kerr, 183 Ga. 573, 189 S.E. 20 (1936).

Cited in Porter v. Allen, 54 Ga. 623 (1875); Jones v. Robinson, 172 Ga. 746, 158 S.E. 752 (1931); Aultman v. Gibson, 172 Ga. 877, 159 S.E. 285 (1931); Trustees of Jesse Parker Williams Hosp. v. Nisbet, 189 Ga. 807, 7 S.E.2d 737 (1940); Knight v. Wingate, 205 Ga. 133, 52 S.E.2d 604 (1949); Jackson v. Jackson, 206 Ga. 470, 57 S.E.2d 602 (1950); Berry v. Berry, 208 Ga. 285, 66 S.E.2d 336 (1951); State v. Hiers, 210 Ga. 348, 80 S.E.2d 308 (1954); Swann v. Morris, 212 Ga. 460, 93 S.E.2d 673 (1956); Abney v. West, 101 Ga. App. 450, 114 S.E.2d 149 (1960); Wallace v. Moore, 219 Ga. 137, 132 S.E.2d 37 (1963); Law v. State, 121 Ga. App. 106, 173 S.E.2d 98 (1970); Leachmon v. Leachmon, 239 Ga. 780, 238 S.E.2d 863 (1977); Crymes v. Crymes, 240 Ga. 721, 242 S.E.2d 30 (1978); Talmadge v. Talmadge, 241 Ga. 609, 247 S.E.2d 61 (1978); Gregory v. Gregory, 252 Ga. 154, 312 S.E.2d 313 (1984); Scarbrough v. Honea, 174 Ga. App. 736, 331 S.E.2d 80 (1985); Ansley v. Sunbelt Invs. Realty, Inc., 176 Ga. App. 693, 337 S.E.2d 448 (1985); Hawes v. Emory Univ., 188 Ga. App. 803, 374 S.E.2d 328 (1988); Avera v. Avera, 268 Ga. 4, 485 S.E.2d 731 (1997).

Intent

Intention to make present gift required. — Necessary intention to give by the donor is the intention to make a present gift of the property, that is to transfer some present immediate interest, as distinguished from a mere intention to give in the future, or from a gift testamentary in character. Cannon v. Williams, 194 Ga. 808, 22 S.E.2d 838 (1942); Tucker v. Addison, 265 Ga. 642, 458 S.E.2d 653 (1995).

No intent to make present gift. — Decedent did not have the requisite intent to make an inter vivos gift of the decedent's certificates of deposit since the decedent had no intention to make a present gift of the certificates. NeSmith v. Ellerbee, 203 Ga. App. 65, 416 S.E.2d 364 (1992).

Lack of intent negates gift. — Although there was delivery by the plaintiff and acceptance by the defendant, the transaction fell

short of the elements of gift since there was no present intention to give. Gostin v. Scott, 80 Ga. App. 630, 56 S.E.2d 778 (1949).

Intention alone insufficient. — To make the gift a valid one, it is not sufficient to show an intention to give; this intention must in all cases be followed either by manual delivery or some act indicating delivery. Burt v. Andrews, 112 Ga. 465, 37 S.E. 726 (1900).

No particular form of words is necessary in making a gift as any language indicating an intention to give is sufficient. Ball v. Wallace, 32 Ga. 170 (1861).

Intention to give must be expressed. Culpepper v. Culpepper, 18 Ga. App. 182, 89 S.E. 161 (1916).

Verbal expression is not necessary to prove an intention to give. Barfield v. Hilton, 238 Ga. 150, 231 S.E.2d 755 (1977).

Intention may be ascertained other than by words. — Intention to give may be ascertained or may be made apparent or conveyed to the donee in other ways than by the use of verbal or written language. In some circumstances even the silence of a party may be evidence. Barfield v. Hilton, 238 Ga. 150, 231 S.E.2d 755 (1977).

Subsequent acts and conduct admissible to show intention. — While intention at the time of the conveyances of the property controls and subsequent events cannot cut down an absolute gift to a trust, subsequent acts and conduct are admissible to show intention at the time of the transaction. Ashbaugh v. Ashbaugh, 222 Ga. 811, 152 S.E.2d 888 (1966).

Proof of intention may be based on prior statement. — There may be a gift although proof of the existence of the intention at the time the gift is consummated may depend upon an utterance antedating the actual consummation of the gift by delivery. Mims v. Ross, 42 Ga. 121 (1871); Culpepper v. Culpepper, 18 Ga. App. 182, 89 S.E. 161 (1916); Helmer v. Helmer, 159 Ga. 376, 125 S.E. 849, 37 A.L.R. 1137 (1924); Clark v. Bridges, 163 Ga. 542, 136 S.E. 444 (1927).

Declarations of donor. — When the circumstances are not such as to negative delivery of a gift, declarations of the donor that the donor has given personal property to another living on the premises with the donor are sufficient to authorize a recovery by the donee. Banks v. Harvey, 98 Ga. App. 196, 105 S.E.2d 341 (1958).

Deposit in account without delivery of passbook may lack intent. — Mere fact of the deposit of money in the name of a third person without the delivery of the passbook, or other evidence of intention to make a gift will not constitute a valid gift inter vivos, since this may have been done for any one of a number of reasons, each without donative purpose. Ward v. Sebren, 242 Ga. 782, 251 S.E.2d 524 (1979).

Question of intention is for the jury. — See Roberts v. Griffith, 112 Ga. 146, 37 S.E. 179 (1900).

Acceptance

Gift is incomplete until acceptance, and until acceptance, the gift is revocable and passes no title. Pooser v. Norwich Union Fire Ins. Soc'y, Ltd., 51 Ga. App. 962, 182 S.E. 44 (1935).

Acceptance by the donee imports an actual acquiescence on the donee's part, except as provided in § 44-5-81. Cannon v. Williams, 194 Ga. 808, 22 S.E.2d 838 (1942).

Delivery

For real property, delivery of valid deed accomplishes delivery. — For real property, delivery is accomplished by delivery of an otherwise valid deed; delivery of the property itself is not required. McLemore v. Wilborn, 259 Ga. 451, 383 S.E.2d 892 (1989).

Failure of delivery invalidates gift. — When a client directed the client's attorney to hold all moneys which the attorney might collect on a judgment, and to deliver this money to the client's nephew or the nephew's guardian as soon as one should qualify, and when the client died before the attorney had paid over these funds to the nephew or to the nephew's guardian, there was no valid gift of this money by the client to the nephew for lack of delivery of the subject matter of the gift to the donee. Rogers v. Carter, 177 Ga. 605, 170 S.E. 868 (1933).

Decedent's acts of signing the signature cards and transferring the documents evidencing the certificates of deposit to the donee did not constitute a valid inter vivos gift because ownership of the certificates could not be transferred in that manner. NeSmith v. Ellerbee, 203 Ga. App. 65, 416 S.E.2d 364 (1992).

Delivery (Cont'd)

Gift evidenced by writing dispenses with delivery. — Gift of personalty by parol must be accompanied by delivery and acceptance of the article given, and while a gift evidenced by an ordinary writing (as distinguished from a specialty) dispenses with the necessity for a delivery of the article, such a writing does not ordinarily, in the absence of actual or constructive delivery, dispense with the necessity for a "good consideration." Trustees of Jesse Parker Williams Hosp. v. Nisbet, 189 Ga. 807, 7 S.E.2d 737 (1940).

Delivery of keys is constructive delivery of object. — Delivery of keys to personal property accompanied by a declaration that the donor is giving the property to the donee is sufficient evidence to sustain a finding that there has been a constructive delivery of the object. Banks v. Harvey, 98 Ga. App. 196, 105 S.E.2d 341 (1958).

Deposit in joint account insufficient delivery. — Deposit of money in a bank in a joint checking account subject to demand of another when the depositor also retains the right to jointly or severally demand and receive the funds so deposited, nothing else appearing, is not such a surrender of dominion over the funds thus deposited as to satisfy the requirements of delivery for the making of a gift. Stewart v. Stewart, 228 Ga. 517, 186 S.E.2d 746 (1972).

Deposit in safe deposit box insufficient delivery. — Deposit by the decedent of bearer bonds in a safe deposit box to which the decedent, the decedent's spouse, and child had access did not make an inter vivos gift to either the decedent's wife or child since there was no delivery as the decedent retained access to the box and could have removed the bonds at any time. Dismuke v. Abbott, 233 Ga. App. 844, 505 S.E.2d 58 (1998).

Delivery of chattels in sale of realty. — When chattels are delivered to the vendee of realty subsequent to the sale thereof, upon the vendee's representation that the chatels were included in the sale, when in fact the chatels were not so included, such delivery does not constitute a gift of the chattels. Gostin v. Scott, 80 Ga. App. 630, 56 S.E.2d 778 (1949).

Transfer of stock without delivery of certificates insufficient. — Transfer of stock to an educational institution, without delivery of the certificates, does not constitute a gift; transfer is only a prima facie evidence of delivery. Southern Indus. Inst. v. Marsh, 15 F.2d 347 (5th Cir. 1926), cert. denied, 273 U.S. 747, 71 L. Ed. 872, 47 S. Ct. 449 (1927).

Delivery of commercial paper without endorsement or assignment. — All kinds of personal property which are capable of manual delivery and of which the title either legal or equitable can be transferred by delivery may be the subject matter of a valid gift; accordingly, as to promissory notes, bills of exchange, checks, bonds, and other like choses in action, the equitable title to which may be transferred in the manner indicated, the gift may be sustained, even though the instruments are delivered without endorsement or assignment. Underwood v. Underwood, 43 Ga. App. 643, 159 S.E. 725 (1931).

Delivery of forgiveness of debt. — Debt may be the subject of a gift by the creditor to the creditor's debtor, and is generally referred to as a forgiveness of the debt. The delivery may be accomplished by giving a receipt, even though not under seal and the debt is evidenced by a specialty, by surrendering the instrument evidencing the debt, or even by destroying it, if this is done with intent to cancel the debt; the fact that the creditor reserves the right to interest on the debt does not affect the validity of the gift. Croxton v. Barrow, 57 Ga. App. 1, 194 S.E. 24 (1937).

Receipt issued by the creditor may constitute a gift of the debt. This is particularly true if the subject matter is not a physical thing, but is intangible because, being intangible, it is not susceptible of actual delivery. Croxton v. Barrow, 57 Ga. App. 1, 194 S.E. 24 (1937).

Oral statement releasing debt insufficient. — An oral statement made by the payee to the maker of a note, that the payee releases the maker from the debt evidenced by the note was insufficient as a contract canceling the obligation or as a gift to the maker of the note, where the payee received no consideration for the promise to release the maker and there was no actual delivery or surrender of the note to the maker, or anything done which the law accepts in lieu of actual delivery. Taylor v. Taylor, 45 Ga. App. 735, 165 S.E. 858 (1932).

RESEARCH REFERENCES

Am. Jur. 2d. — 38 Am. Jur. 2d, Gifts, §§ 13, 16, 30.

C.J.S. — 38 C.J.S., Gifts, § 11.

ALR. — Rights in respect of payments made on a note or check which is the subject of a gift, 49 ALR 684.

Gift or trust by deposit of funds belonging to depositor in a bank account in the name of himself and another, 66 ALR 881.

Gift of savings deposit by delivery of passbook, 84 ALR 558.

May unconsummated intention to make a gift of personal property be made effective as a voluntary trust, 96 ALR 383; 123 ALR 1335.

Necessity of delivery of stock certificate to complete valid gift of stock, 99 ALR 1077; 23 ALR 1171.

Admissibility of declarations by donor subsequent to alleged gift, on issue as to gift, 105 ALR 398.

May proof of delivery essential to gift rest upon subsequent declarations of donor, 124 ALR 1391.

Rights of beneficiary under obligation or deposit payable to him at death of holder or depositor if not previously paid to latter, 131 ALR 967; 155 ALR 174; 161 ALR 304.

Surrender, by holder, of certificate of corporate stock, and issuance of a new certificate to him and another, as effective create a gift or a trust, 153 ALR 934.

Improvidence of donor as affecting validity of gift, 160 ALR 1133.

Judicial decisions involving United States war savings bonds, 168 ALR 245.

Implication of gift in inter vivos trust instrument, 11 ALR2d 681.

Transfer by inter vivos trust of insurance policies upon settlor's life as in contemplation of death for tax purposes, 17 ALR2d 787.

Donor's own check as subject of gift, 38 ALR2d 594.

Nature and validity of gift made in contemplation of suicide, 60 ALR2d 575.

Power to make charitable gifts from estate of incompetent, 99 ALR2d 946.

Gift of automobile, 100 ALR2d 1219.

Joint lease of safe-deposit box as evidence in support or denial of gift inter vivos of contents thereof, 40 ALR3d 462.

Creation of joint savings account or savings certificate as gift to survivor, 43 ALR3d 971.

Delivery of personalty to third person with directions to deliver to donee after donor's death as valid gift, 57 ALR3d 1083.

Issuance of stock certificate to joint tenants as creating gift inter vivos, 5 ALR4th 373.

Wills: gift to persons individually named but also described in terms of relationship to testator or another as class gift, 13 ALR4th 978.

Inter vivos gift of remainder in chattel, 83 ALR4th 966.

Validity of charitable gift or trust containing gender restrictions on beneficiaries, 90 ALR4th 836.

Rights in respect of engagement and courtship presents when marriage does not ensue, 44 ALR5th 1.

44-5-81. When acceptance presumed; acceptance for minors and corporations.

If a gift is of substantial benefit, the law will presume its acceptance unless the contrary is shown. A parent, guardian, or friend may accept a gift for a minor. The officers of a corporation may accept a gift for the corporation. (Orig. Code 1863, § 2615; Code 1868, § 2616; Code 1873, § 2658; Code 1882, § 2658; Civil Code 1895, § 3565; Civil Code 1910, § 4145; Code 1933, § 48-102.)

Cross references. — Provisions governing certain gifts to minors, § 44-5-110 et seq.

Law reviews. — For article, "Multiple Party Accounts: Georgia Law Compared with the Uniform Probate Code," see 8 Ga. L. Rev. 739 (1974).

For note discussing the treatment of joint bank accounts in Georgia, with regard to

survivorship and testamentary effect, prior to the enactment of the Financial Institutions Code of Georgia, see 7 Ga. St. B.J. 370 (1971).

JUDICIAL DECISIONS

Acceptance may be implied. — Acceptance by the donee being generally presumed may be implied. Culpepper v. Culpepper, 18 Ga. App. 182, 89 S.E. 161 (1916).

Nondelivery shall not be raised against minors. Whitworth v. Whitworth, 233 Ga. 53, 210 S.E.2d 9 (1974).

Delivery to parent sufficient. — When a grandparent has made a parol gift of land to a grandchild who is a minor at the time, and the parent enters into possession of the land for the parent's child, such possession will inure to the benefit of the child, and can be made the basis of a recovery in an action against one holding adversely. Dasher v. Ellis, 102 Ga. 830, 30 S.E. 544 (1898).

When a parent retained possession of property after delivery to minor child, this was possession by the minor. Hargrove v. Turner, 112 Ga. 134, 37 S.E. 89, 81 Am. St. R. 24 (1900).

Delivery to, and possession of, a deed by the parent is evidence of delivery to the infant. Whitworth v. Whitworth, 233 Ga. 53, 210 S.E.2d 9 (1974).

Acceptance of flowers left upon graves. — When friends and relatives of deceased persons donate flowers to be left upon the graves, the title to such flowers vests in the heirs at law of such deceased persons, provided that they accept the gifts, and there is no express agreement to the contrary. When part of the heirs at law are present and in position to accept the flowers, they hold the same during the period of their usefulness as trustees for those heirs at law who are not present. Turner v. Joiner, 77 Ga. App. 603, 48 S.E.2d 907 (1948).

Cited in Daniel v. Frost, 62 Ga. 697 (1879); Underwood v. Underwood, 43 Ga. App. 643, 159 S.E. 725 (1931); Cozart v. Mobley, 43 Ga. App. 630, 159 S.E. 749 (1931); Rogers v. Carter, 177 Ga. 605, 170 S.E. 868 (1933); Croxton v. Barrow, 57 Ga. App. 1, 194 S.E. 24 (1937); Cannon v. Williams, 194 Ga. 808, 22 S.E.2d 838 (1942); Knight v. Wingate, 205 Ga. 133, 52 S.E.2d 604 (1949); Jackson v. Jackson, 206 Ga. 470, 57 S.E.2d 602 (1950); Berry v. Berry, 208 Ga. 285, 66 S.E.2d 336 (1951); Wallace v. Moore, 219 Ga. 137, 132 S.E.2d 37 (1963); Smith v. Fleming, 183 Ga. App. 342, 358 S.E.2d 900 (1987).

RESEARCH REFERENCES

Am. Jur. 2d. — 38 Am. Jur. 2d, Gifts, §§ 4, 30.

C.J.S. — 38 C.J.S., Gifts, §§ 26, 91.

ALR. — Delivery of bill or note of third person by way of gift, 25 ALR 642.

Rights in respect of payments made on a note or check which is the subject of a gift, 49 ALR 684.

Right of child en ventre sa mere to take under a conveyance or devise of present interest to parent and children, 50 ALR 619.

Presumption of gift, advancement, or settlement where husband takes title from third person to property paid for by or with funds of wife, 113 ALR 339.

Gift of automobile, 100 ALR2d 1219.

Joint lease of safe-deposit box as evidence in support or denial of gift inter vivos of contents thereof, 40 ALR3d 462.

Issuance of stock certificate to joint tenants as creating gift inter vivos, 5 ALR4th 373.

44-5-82. Delivery; constructive delivery.

Actual manual delivery is not essential to the validity of a gift. Any act which indicates a renunciation of dominion by the donor and the transfer of dominion to the donee shall constitute a constructive delivery. (Orig. Code 1863, § 2617; Code 1868, § 2618; Code 1873, § 2660; Code 1882,

§ 2660; Civil Code 1895, § 3567; Civil Code 1910, § 4147; Code 1933, § 48-103.)

Law reviews. — For note discussing the treatment of joint bank accounts in Georgia, with regard to survivorship and testamentary effect, prior to the enactment of the Financial Institutions Code of Georgia, see 7 Ga. St. B.J. 370 (1971).

For comment on Felder v. Felder, 71 Ga. App. 860, 32 S.E.2d 550 (1944), see 7 Ga. B.J. 478 (1945).

JUDICIAL DECISIONS

This statute is merely a codification of the common law on the subject of delivery as a requirement for a gift. Felder v. Felder, 71 Ga. App. 860, 32 S.E.2d 550 (1944) (see O.C.G.A. § 44-5-82).

Delivery is essential for a gift. — Presumption of gift arises only when there is an actual delivery, or when the donee is in exclusive possession. Burt v. Andrews, 112 Ga. 465, 37 S.E. 726 (1900); Cowdrey v. Barksdale, 16 Ga. App. 387, 85 S.E. 617 (1915); Bond v. Bond, 22 Ga. App. 366, 95 S.E. 1005 (1918); Helmer v. Helmer, 159 Ga. 376, 125 S.E. 849, 37 A.L.R. 1137 (1924).

Manifestation of an intention to make a present gift to another and, in consummation of this intention, delivery of the property to or for the use of the intended donee, or some act indicating a renunciation of dominion in favor of the intended donee, are essentials of a gift, whether inter vivos or causa mortis. Moore v. Tiller, 61 F.2d 478 (5th Cir. 1932).

To make a valid gift, there must be a present intention to give, and a complete renunciation of right, by the giver, over the thing given, without power of revocation, and a full delivery of possession as a gift, inter vivos. McLendon v. Johnson, 69 Ga. App. 214, 25 S.E.2d 53 (1943), overruled on other grounds, Barfield v. Hilton, 238 Ga. 150, 231 S.E.2d 755 (1977).

Conduct of parties as showing change of ownership. — Gift inter vivos, as distinguished from a gift mortis causa, does not require actual delivery, and it is sufficient to complete a gift inter vivos that the conduct of the parties should show that the ownership of the chattels has been changed. Poullain v. Poullain, 79 Ga. 11, 4 S.E. 81 (1887).

Actual manual delivery is not essential to validity of a gift but any act which indicates renunciation of dominion by donor (e.g. a forbearance to collect), and transfer of dominion to donee (e.g. telling the donee that the donee need not make payments owed) shall constitute a constructive delivery. Bates v. Bates, 163 Ga. App. 268, 293 S.E.2d 515 (1982).

Burden of proof. — Burden is upon the party asserting a gift to prove it as pleaded. Porter v. Allen, 54 Ga. 623 (1875).

Relinquishing control is jury question. — It is a question of fact for the jury to determine whether the donor has in fact relinquished control by the gift. Williams v. McElroy, 35 Ga. App. 420, 133 S.E. 297 (1926).

Delivery and intention need not be synchronous. — While, as a general rule, there must be an actual delivery of the chattel at the time of the gift, it is not in every case essential that the expression of the intention to give be synchronous with delivery of the chattel; for if it be plain that there could have been no other purpose in the delivery than to effectuate a definite intention expressed in the past in anticipation of a future delivery, the delivery would complete the gift. Culpepper v. Culpepper, 18 Ga. App. 182, 89 S.E. 161 (1916).

Failure of third party to deliver defeats gift. — When a client directed the client's attorney to pay over moneys which the attorney might collect on a judgment to the client's nephew, and when, after client directed the attorney to hold the same for the client's nephew and to deliver this money to the nephew or the nephew's guardian as soon as one should qualify, stating that the client had already given this money to the nephew, and when the client died before the attorney had paid over these funds to the nephew or to the nephew's guardian, there

was no valid gift of this money by the client to the nephew, for lack of delivery of the subject matter of the gift to the donee. Knight v. Jackson, 156 Ga. 165, 118 S.E. 661 (1923); Helmer v. Helmer, 159 Ga. 376, 125 S.E. 849, 37 A.L.R. 1137 (1924).

Holding money as agent is valid gift. — When a mother worked for her brother, and made an agreement with him to hold her wages for her child, to accumulate an estate for it, and that he reported to her that he had done so, and had deposited the money in a named bank in his name as agent for the child; this together with evidence that the uncle did in fact deposit money in the bank to the credit of himself as agent of the child made a prima facie case of a complete gift inter vivos from the mother to the child. Jackson v. Gallagher, 128 Ga. 321, 57 S.E. 750 (1907).

Gift from parent to child. — While in a gift from a father to a minor child the law will dispense with some of the formalities of delivery, a mere promise to give is not the equivalent of a gift itself. Donaldson v. Everett, 122 Ga. 318, 50 S.E. 94 (1905).

Delivery between members of same family. — Rule as to delivery is not so strictly applied to transactions between members of a family living in the same house, the law in such cases accepting as delivery acts which would not be so regarded if the transaction were between strangers living in different places. Harrell v. Nicholson, 119 Ga. 458, 46 S.E. 623 (1904); Williams v. McElroy, 35 Ga. App. 420, 133 S.E. 297 (1926).

Delivery of keys to personal property accompanied by a declaration that the donor is giving the property to the donee is sufficient evidence to sustain a finding that there has been a constructive delivery of the object. Banks v. Harvey, 98 Ga. App. 196, 105 S.E.2d 341 (1958).

Delivery of debt by giving receipt. — Debt may be the subject of a gift by the creditor to the creditor's debtor, and is generally referred to as a forgiveness of the debt. The delivery may be accomplished by giving a receipt, even though not under seal and the debt is evidenced by a specialty, by surrendering the instrument evidencing the debt, or even by destroying the instrument, if this is done with intent to cancel the debt; and the fact that the creditor reserves the right to interest on the debt does not affect the validity of the gift. Croxton v. Barrow, 57 Ga. App. 1, 194 S.E. 24 (1937).

Gift in writing without consideration requires actual delivery. — If a gift in writing is not based upon a good consideration, it is a nudum pactum and, in the absence of actual delivery of the property itself, remains ineffective. Cannon v. Williams, 194 Ga. 808, 22 S.E.2d 838 (1942).

Failure to reduce evidence to writing due to mistake. — Gift of money represented by a time certificate will not be defeated, if the circumstances indicate that the omission to reduce to writing the evidence of the transfer of the legal title was due to ignorance, accident, or mistake. Culpepper v. Culpepper, 18 Ga. App. 182, 89 S.E. 161 (1916). See also Philpot v. Temple Banking Co., 3 Ga. App. 742, 60 S.E. 480 (1908).

Delivery of nonnegotiable written instrument, without more, is not sufficient to prove a gift. Hill v. Sheibley, 64 Ga. 529 (1880).

Gift unknown until after death of donor is invalid. — When an uncle wrote out and signed a promissory note payable to a niece and the note was written in a memorandum book and left in a drawer where both the uncle and niece kept their papers, and the niece did not know of its existence until after the uncle's death, this did not constitute a gift. Helmer v. Helmer, 159 Ga. 376, 125 S.E. 849, 37 A.L.R. 1137 (1924).

Delivery of deposit book. — When a deposit book issued by a savings bank is delivered with appropriate words of gift by the depositor, with the intention to give to the person to whom it is delivered the deposits entered in the book, this is sufficient to constitute a valid gift of the deposits, without assignment or transfer in writing. Wade v. Edwards, 23 Ga. App. 677, 99 S.E. 160 (1919).

Deposit without delivery of passbook. — Mere fact of the deposit of money in the name of a third person without the delivery of the passbook, or other evidence of intention to make a gift, however, will not constitute a valid gift inter vivos, since this may have been done for any one of a number of reasons, each without donative purpose. Ward v. Sebren, 242 Ga. 782, 251 S.E.2d 524 (1979).

Deposit subject to being withdrawn not gift. — Deposit made in a bank by a parent

for the benefit of a child but subject to be drawn out at any time by either is not a gift. Clark v. Bridges, 163 Ga. 542, 136 S.E. 444 (1927).

Language insufficient to prove constructive delivery. — See Lanier v. Holt, 18 Ga. App. 185, 89 S.E. 182 (1916).

Cited in Underwood v. Underwood, 43 Ga. App. 643, 159 S.E. 725 (1931); Knight v. Wingate, 205 Ga. 133, 52 S.E.2d 604 (1949); Jackson v. Jackson, 206 Ga. 470, 57 S.E.2d 602 (1950); Berry v. Berry, 208 Ga. 285, 66 S.E.2d 336 (1951); Barfield v. Hilton, 238 Ga. 150, 231 S.E.2d 755 (1977).

RESEARCH REFERENCES

Am. Jur. 2d. — 38 Am. Jur. 2d, Gifts, § 16 et seq.

C.J.S. — 38 C.J.S., Gifts, § 13 et seq.

ALR. — Necessity of delivery of stock certificate to complete valid gift of stock, 23 ALR 1171; 99 ALR 1077.

Delivery of bill or note of third person by way of gift, 25 ALR 642.

Gift of savings deposit by delivery of passbook, 40 ALR 1249; 84 ALR 558.

Rights in respect of payments made on a note or check which is the subject of a gift, 49 ALR 684.

Declarations or admissions by decedent while in possession of personal property that it belonged to another as sufficient evidence of latter's title in absence of sufficient evidence of gift or other transfer by decedent, 98 ALR 755.

Necessity of delivery where subject of gift is already in possession of donee at time of declaration of gift, 103 ALR 1110.

May proof of delivery essential to gift rest upon subsequent declarations of donor, 124 ALR 1391.

May delivery which will support gift be predicated upon deposit in mail, filing of telegram, or delivery to carrier, 126 ALR 924.

Delivery of key to safe-deposit box or other receptacle as sufficient to consummate gift of contents, 127 ALR 780.

Rights of beneficiary under obligation or deposit payable to him at death of holder or depositor if not previously paid to latter, 131 ALR 967; 155 ALR 174; 161 ALR 304.

Delivery which will support gift of an undivided interest in a chattel or chose in action, 145 ALR 1386.

Opening savings account in sole name of another, without complete surrender of passbook, as a gift, 1 ALR2d 538.

Necessity of delivery of stock certificate to complete valid gift of stock, 23 ALR2d 1171.

Delivery as essential to gift of tangible chattels or securities by written instrument, 48 ALR2d 1405.

Nature and validity of gift made in contemplation of suicide, 60 ALR2d 575.

Gift of automobile, 100 ALR2d 1219.

Joint lease of safe-deposit box as evidence in support or denial of gift inter vivos of contents thereof, 40 ALR3d 462.

Creation of joint savings account or savings certificate as gift to survivor, 43 ALR3d 971.

Delivery of personalty to third person with directions to deliver to donee after donor's death as valid gift, 57 ALR3d 1083.

44-5-83. Written gift.

A gift in writing, without good consideration and without delivery, is void. However, when, in order for a gift to be valid, a written conveyance for good consideration is required by law, or when in any case a written conveyance is made for a good consideration, the execution and delivery of such conveyance shall dispense with the necessity of delivering the article given. (Orig. Code 1863, § 2616; Code 1868, § 2617; Code 1873, § 2659; Code 1882, § 2659; Civil Code 1895, § 3566; Civil Code 1910, § 4146; Code 1933, § 48-104.)

Code Commission notes. — Pursuant to § 28-9-5, in 1991, ''dispense'' was substituted for ''disperse'' near the end of the second sentence.

JUDICIAL DECISIONS

Actual delivery required. — No effect can be given to deed of gift in writing where the maker retains the deed in the maker's own custody, in the absence of satisfactory proof that it was the maker's intention that such instrument should operate to immediately convey to the infant grantee the legal title to the premises therein described. Jenkins v. Southern Ry., 109 Ga. 35, 34 S.E. 355 (1899).

Gift of personalty by parol must be accompanied by delivery and acceptance of the article given, and while a gift evidenced by an ordinary writing (as distinguished from a specialty) dispenses with the necessity for a delivery of the article, such a writing does not ordinarily, in the absence of actual or constructive delivery, dispense with the necessity for a ''good consideration.'' Trustees of Jesse Parker Williams Hosp. v. Nisbet, 189 Ga. 807, 7 S.E.2d 737 (1940).

If a gift in writing be not based upon a good consideration, it is a nudum pactum, and, in the absence of actual delivery of the property itself, remains ineffective. Cannon v. Williams, 194 Ga. 808, 22 S.E.2d 838 (1942).

Deed from mother to daughter based on good consideration. — Deed of gift from a mother to her daughter would be based upon a good consideration, and the deed would be good whether there was any money consideration or not. Dunn v. Evans, 139 Ga. 741, 78 S.E. 122 (1913).

Presumption of gift by a father to a child is not confined to a gift in writing. Johnson v. Griffin, 80 Ga. 551, 7 S.E. 94 (1888).

Cited in Owen v. Smith, 91 Ga. 564, 18 S.E. 527 (1893); King v. McDuffie, 144 Ga. 318, 87 S.E. 22 (1915); Marchant v. Young, 147 Ga. 37, 92 S.E. 863 (1917); Brown v. Nichols, 23 Ga. App. 569, 99 S.E. 57 (1919); Cook v. Flanders, 164 Ga. 279, 138 S.E. 212 (1927); Jones v. Robinson, 172 Ga. 746, 158 S.E. 752 (1931); Waters v. Waters, 195 Ga. 281, 24 S.E.2d 20 (1943).

RESEARCH REFERENCES

Am. Jur. 2d. — 38 Am. Jur. 2d, Gifts, §§ 21, 28 et seq., 96.

C.J.S. — 38 C.J.S., Gifts, §§ 11, 81.

ALR. — Delivery of bill or note of third person by way of gift, 25 ALR 642.

Necessity of delivery where subject of gift is already in possession of donee at time of declaration of gift, 103 ALR 1110.

Grantor's continued possession of land after execution of deed as notice of his claim adverse to title conveyed, 105 ALR 845.

Consideration for subscription agreements, 115 ALR 589; 151 ALR 1238.

Delivery of personalty to third person with directions to deliver to donee after donor's death as valid gift, 57 ALR3d 1083.

44-5-84. Presumption of gift arising from delivery of personalty by parent to child living separate from parent.

The delivery of personal property by a parent into the exclusive possession of a child living separate from the parent creates a presumption of a gift to the child. This presumption may be rebutted by evidence of an actual contract of lending or by circumstances from which such a contract may be inferred. (Orig. Code 1863, § 2621; Code 1868, § 2621; Code 1873, § 2663; Code 1882, § 2663; Civil Code 1895, § 3570; Civil Code 1910, § 4150; Code 1933, § 48-105.)

JUDICIAL DECISIONS

Statute applies only if there is a delivery, or if the donee is in actual possession. Lanier v. Holt, 18 Ga. App. 185, 89 S.E. 182 (1916). See also Hawkins v. Davie, 136 Ga. 550, 71 S.E. 873 (1911) (see O.C.G.A. § 44-5-84).

Presumption of gift applied. — When a father permits property to go home with his daughter, immediately upon her marriage or at any subsequent period, if he suffer it to remain there for a number of years, the presumption of law is that he intended it as a gift. Butler v. Hughes, 35 Ga. 200 (1866).

Presumption rebutted by proof that chattel held as loan. — Presumption that the law raises in favor of a gift, when made by a parent to a child, when the recipient is allowed to retain in the recipient's possession a chattel, is completely overcome and destroyed in the absence of other proof, by the declarations of such recipient, that the recipient held the chattel as a loan, and not as a gift — that the title to the property was in the parent. Culbreath v. Patton, 73 Ga. App. 667, 37 S.E.2d 719 (1946).

Presumption of gift not rebutted by evidence. — Check from parents, who formed a limited partnership, given to their child for a large sum, was properly determined to have been a gift from the parents pursuant to O.C.G.A. §§ 44-5-80 and 44-5-84, rather than a loan; the presumption under O.C.G.A. § 44-5-84, together with other supportive circumstantial evidence, including that there was no contract or lending and no repayment had been required, provided support for that factual finding. Baker v. Baker, 280 Ga. 299, 627 S.E.2d 26 (2006).

Question for jury. — Question whether money left with son-in-law was a loan to him or a gift to the daughter is a question of fact for the jury. Crawford v. Manson, 82 Ga. 118, 8 S.E. 54 (1888); Gross v. Higginbotham, 34 Ga. App. 549, 130 S.E. 371 (1925).

Presumption of advancement. — Gift of property by a parent to a child after marriage, when the child is living alone, is prima facie an advancement. Holliday v. Wingfield, 59 Ga. 206 (1877).

Cited in Webb v. Blake, 31 Ga. App. 101, 119 S.E. 447 (1923); Jackson v. Moultrie Prod. Credit Ass'n, 76 Ga. App. 768, 47 S.E.2d 127 (1948); Paris v. Paris, 207 Ga. 341, 61 S.E.2d 491 (1950).

RESEARCH REFERENCES

Am. Jur. 2d. — 38 Am. Jur. 2d, Gifts, § 62.

C.J.S. — 38 C.J.S., Gifts, § 91.

ALR. — Right of child en ventre sa mere to take under a conveyance or devise of present interest to parent and children, 50 ALR 619.

Gift of automobile, 100 ALR2d 1219.

Unexplained gratuitous transfer of property from one relative to another as raising presumption of gift, 94 ALR3d 608.

Issuance of stock certificate to joint tenants as creating gift inter vivos, 5 ALR4th 373.

44-5-85. Rebuttable presumption of gift of lands belonging to parent but in possession of child for seven years.

The exclusive possession by a child of lands which originally belonged to the parent or parents, without payment of rent, for the space of seven years, creates a rebuttable presumption of a gift and conveys title to the child. The presumption may be rebutted by evidence of a loan, of a claim of dominion by the parent or parents acknowledged by the child, of a disclaimer of title by the child, or similar evidence. (Orig. Code 1863, § 2622; Code 1868, § 2622; Code 1873, § 2664; Code 1882, § 2664; Civil Code 1895, § 3571; Civil Code 1910, § 4151; Code 1933, § 48-106; Ga. L. 1998, p. 1304, § 1.)

Law reviews. — For comment on Harper v. Hudson, 210 Ga. 751, 82 S.E.2d 854 (1954), see 17 Ga. B.J. 391 (1955).

JUDICIAL DECISIONS

Section formerly referred only to lands of father. — Former statute distinctly said, and dealt with, lands belonging to the father, and may not be extended to include lands belonging originally to the mother. Holton v. Mercer, 65 Ga. App. 53, 15 S.E.2d 253 (1941); Owens v. White, 218 Ga. 1, 126 S.E.2d 425 (1962) (see O.C.G.A. § 44-5-85).

Statute is not a part of the law of prescription. It is explicit in its terms, and is restricted to cases where possession for seven years raises a presumption, as between parent and child, that the title passed originally by gift. Mitchell v. Gunter, 170 Ga. 135, 152 S.E. 466 (1930) (see O.C.G.A. § 44-5-85).

Intent to make present transfer necessary for gift. — To constitute a valid gift, there must be an intention by the donor to transfer to the donee an immediate present interest, and not a mere future interest, or to make a testamentary gift. May v. May, 165 Ga. App. 461, 300 S.E.2d 215 (1983).

Gender bias was eliminated when law passed and not when amendment codified. — When the trial court granted summary judgment to mother against her six children who sought declaration of title to the house, because the words ''parent or parents'' did not replace the word ''father'' in the statute until the Official Code of Georgia was adopted in 1982, the trial court incorrectly reasoned that seven years had not run against the mother's interest in the property to invoke the statute; this section was amended sub silentio in 1979 after Orr v. Orr, 440 U.S. 268, 99 S. Ct. 1102, 59 L. Ed. 2d 306 (1979), when the legislature passed 1979 Ga. L. 466, and not in 1982 when the amendment was officially codified in the new code; thus, the omission of a presumptive right against the mother was not fatal to the children's cause of action. Sims v. Holtzclaw, 259 Ga. 537, 384 S.E.2d 656 (1989).

This statute applies only if there is a delivery, or if the donee is in actual possession for the seven-year period. Burch v. Burch, 96 Ga. 133, 22 S.E. 718 (1895); Cowdrey v. Barksdale, 16 Ga. App. 387, 85 S.E. 617 (1915); Lanier v. Holt, 18 Ga. App. 185, 89 S.E. 182 (1916) (see O.C.G.A. § 44-5-85).

No presumption arises from an expressed intention to give. Such a presumption arises only if there is an actual delivery, or if the donee is in exclusive possession. Cowdrey v. Barksdale, 16 Ga. App. 387, 85 S.E. 617 (1915).

Gift conclusively presumed. — In a proper case when this statute applies, the gift is conclusively presumed under its very terms, and no proof touching such gift is required. Harden v. Morton, 195 Ga. 471, 24 S.E.2d 685 (1943) (see O.C.G.A. § 44-5-85).

Presumption not confined to written gift. — Presumption is not confined to a gift by writing. The presumption may arise though it be certain that the father retained the paper title, and though that fact be admitted by the son. The assertion of dominion by the father which the statute contemplates is over the property not merely over the paper title. Johnson v. Griffin, 80 Ga. 551, 7 S.E. 94 (1888).

Mere promise not equivalent of a gift. — While in a gift from a father to a son the law will dispense with some of the formalities of delivery, a mere promise to give is not the equivalent of a gift itself. Donaldson v. Everett, 122 Ga. 318, 50 S.E. 94 (1905).

"Child" construed. — Term ''child'' in this section does not include a bastard. Floyd v. Floyd, 97 Ga. 124, 24 S.E. 451 (1895); Johnstone v. Taliaferro, 107 Ga. 6, 32 S.E. 931, 45 L.R.A. 95 (1899).

Possession may begin during minority. Whitton v. Whitton, 218 Ga. 845, 131 S.E.2d 189 (1963).

Possession during minority. — Presumption of a gift may arise in favor of a child whose possession began during minority if, at or before the time when the child went into possession, the child had been manumitted by the parent. In case a parent and minor child reside together upon land, the possession during the child's minority is presumptively that of the parent; but this presumption may be overcome by clear and

unequivocal proof showing that the parent had actually surrendered to the child the exclusive control of and dominion over the property. Holt v. Anderson, 98 Ga. 220, 25 S.E. 496 (1896).

Death of father before expiration of seven years. — If the father dies before the seven years is complete, the presumption provided in this statute does not exist. Roe v. Doe, 48 Ga. 332 (1873) (see O.C.G.A. § 44-5-85).

Reentry by parent. — When a possession of this kind has begun, and title under it is ripening, it would undoubtedly be the right of the father, at any time before the expiration of the seven years, to reenter; and in this event the prior possession of the son would count for nothing. In other words, he would acquire no conclusive right as against the father, nor have title at all, until the full completion of the seven years. Harden v. Morton, 195 Ga. 471, 24 S.E.2d 685 (1943).

If the possession of the child is exclusive the statute is satisfied even though the father returned and stayed in the house for a few weeks during the seven-year period. Whitton v. Whitton, 218 Ga. 845, 131 S.E.2d 189 (1963).

Judgment against father bars gift. — Until a gift of land by a father to his son was completed a judgment against the donor would bind the land and prevent the subsequent completion of the gift. Jones v. Clark, 59 Ga. 136 (1877); Hughes v. Berrien, 70 Ga. 273 (1883).

Creditor of donee. — Land held by a son for less than seven years under a parol gift from his father is not subject to execution in favor of the son's creditor, against the claim of the father, though the son may have erected valuable improvements on the faith of the gift. The legal title remaining in the father, and the son's remedy being by a suit for specific performance of the voluntary agreement, his creditor must resort to a like remedy. Harvey v. West, 87 Ga. 553, 13 S.E. 693 (1891).

Loan of property and acknowledgment by child of claim. — When the only defense was that the child went into possession under agreement that the land was loaned to the child, it was error to charge the jury that the jury could not find for the father unless the jury believed from the evidence that the child not only took possession as a loan, but also acknowledged a claim of dominion by the father, or disclaimed title. Hardman v. Nowell, 84 Ga. 46, 10 S.E. 370 (1889).

Purchase of part of land not disclaimer of title. — Consent of the wife, before the expiration of the period of seven years after she went into possession of the land in controversy under an alleged parol gift, to the purchase of a small part of the land by her husband from her father, the alleged donor, while a circumstance to be considered by the jury together with other evidence in the case, is not, as a matter of law, inconsistent with the claim of the wife that there was a gift by the father, that she had not disclaimed title, and that there had not been a claim of dominion by the father acknowledged by the donee. Holloway v. Hoard, 140 Ga. 380, 78 S.E. 928 (1913).

Section inapplicable when son purchases property upon contingency. — When a son purchased land from his father and took a contract in the nature of a bond for title, providing for the making of a conveyance upon the happening of a named contingency, and entered into and held possession thereunder, this statute has no application. Graham v. Peacock, 131 Ga. 785, 63 S.E. 348 (1909) (see O.C.G.A. § 44-5-85).

Proof of possession. — When it is claimed by the alleged donee, under the provisions of this statute, that possession has been had by the donee for the statutory period, this allegation is supported by proof of possession by the donee for a part of that period and by the donee's tenants for the remainder of the period, even though one of the tenants was the father of the donee, when it appears that the father actually paid rents to the donee during the period of the father's occupancy and recognized the donee as the father's landlord. Holloway v. Hoard, 140 Ga. 380, 78 S.E. 928 (1913).

Gift subject to deed to secure debt. — Fact that a deed to secure debt exists means that the grantor does not hold complete title, but it does not prevent the grantor from conveying that which the grantor owns and the effect of O.C.G.A. § 44-5-85 in a situation such as this is a gift by operation of the statute, subject to the deed to secure debt. Ivey v. Stanley, 272 Ga. 180, 526 S.E.2d 331 (2000).

Question for jury. — It is for the jury to say whether the evidence is sufficient to show exclusive possession, without disclaimer or

loan or dominion, each point to be settled by the weight of the evidence thereon. Hughes v. Hughes, 72 Ga. 173 (1883).

Conveyance by parent before expiration of seven years. — When, before child had been in possession of property for seven years, the child's parent conveyed legal title to another and legal title never returned to the parent, the child did not receive title through a presumptive gift from the child's parent. Tucker v. Addison, 265 Ga. 642, 458 S.E.2d 653 (1995).

Possession was not exclusive. — Child could not show child was in exclusive possession of a farm because, within a few years after the parent purchased the farm, the parent moved houses onto the farm and rented the houses for the parent's own benefit. Chapman v. Quinn, 267 Ga. 829, 483 S.E.2d 580 (1997).

Cited in Daniel v. Frost, 62 Ga. 697 (1879); Thaggard v. Crawford, 112 Ga. 326, 37 S.E. 367 (1900); Coffey v. Cobb, 143 Ga. 539, 85 S.E. 693 (1915); Doe v. Newton, 171 Ga. 418, 156 S.E. 25 (1930); Kerr v. Kerr, 183 Ga. 573, 189 S.E. 20 (1936); Mitchell v. Hunt, 185 Ga. 835, 196 S.E. 711 (1938); Moore v. Segars, 192 Ga. 190, 14 S.E.2d 752 (1941); Holton v. Mercer, 195 Ga. 47, 23 S.E.2d 166 (1942); Davis v. Davis, 199 Ga. 149, 33 S.E.2d 429 (1945); Matthews v. Grace, 199 Ga. 400, 34 S.E.2d 454 (1945); North v. Tolbert, 80 Ga. App. 110, 55 S.E.2d 661 (1949); Harper v. Hudson, 210 Ga. 751, 82 S.E.2d 854 (1954); Davis v. Newton, 215 Ga. 58, 108 S.E.2d 809 (1959).

RESEARCH REFERENCES

Am. Jur. 2d. — 38 Am. Jur. 2d, Gifts, § 62.

C.J.S. — 38 C.J.S., Gifts, § 91.

ALR. — Right of child en ventre sa mere to take under a conveyance or devise of present interest to parent and children, 50 ALR 619.

Adverse possession under parol gift of land, 43 ALR2d 6.

Unexplained gratuitous transfer of property from one relative to another as raising presumption of gift, 94 ALR3d 608.

44-5-86. Gifts by person subject to undue influence; avoidance.

A gift by a person who is just over the age of majority or who is particularly susceptible to be unduly influenced by his parent, guardian, trustee, attorney, or other person standing in a similar confidential relationship to one of such persons shall be closely scrutinized. Upon the slightest evidence of persuasion or influence, such gift shall be declared void at the instance of the donor or his legal representative and at any time within five years after the making of such gift. (Orig. Code 1863, § 2624; Code 1868, § 2624; Code 1873, § 2666; Code 1882, § 2666; Civil Code 1895, § 3572; Civil Code 1910, § 4152; Code 1933, § 48-107; Ga. L. 1982, p. 3, § 44.)

Law reviews. — For article, "Georgia's Law of Undue Influence in Gift-Making," see 5 Ga. St. B.J. 12 (2000). For annual survey of law of wills, trusts, guardianships, and fiduciary administration, see 56 Mercer L. Rev. 457 (2004).

JUDICIAL DECISIONS

Purpose. — It is for the common security of mankind that gifts procured by agents, and purchases made by the agents, from their principal, should be scrutinized with a close and vigilant suspicion. Harrison v. Harrison, 214 Ga. 393, 105 S.E.2d 214 (1958).

Presumption of undue influence. — Georgia law raises a presumption of undue influence when the beneficiary stands in a confi-

dential or fiduciary relationship with the donor, the donor is of weak mentality, and the beneficiary occupies a dominant position. Wheeless v. Gelzer, 780 F. Supp. 1373 (N.D. Ga. 1991).

To prove undue influence it is not sufficient to show merely that a person receiving substantial benefits occupied a confidential relationship to a donor and had an opportunity to exert undue influence. Rather, it must also be shown that the person receiving the gift occupied a dominant position over the donor, so that the donor's free will was destroyed and the donor in making the gift did something that the donor would not otherwise have done. Wheeless v. Gelzer, 780 F. Supp. 1373 (N.D. Ga. 1991).

Deed made in favor of guardian. — This statute does not apply to the case of a deed or will in favor of a guardian made by a person some years after arriving at majority; but even if it did apply, such a deed would be good if made with a full knowledge of the facts, and without any misrepresentation or suppression of material facts by the guardian. Ralston v. Turpin, 129 U.S. 663, 9 S. Ct. 420, 32 L. Ed. 747 (1889) (see O.C.G.A. § 44-5-86).

Deeds of gift by a married woman conveying her separate estate to her husband will be scrutinized with great jealousy. Ball v. Moore, 181 Ga. 146, 182 S.E. 28 (1935).

Limitation of action when transfer is from wife to husband. — Limitation expressed in this statute is not applicable if a wife, under the influence of her husband, transferred stock to him and he in turn transferred it to a bank. Hill v. Fourth Nat'l Bank, 156 Ga. 704, 120 S.E. 1 (1923) (see O.C.G.A. § 44-5-86).

If a deed by a wife to her husband was really intended as a gift, the statute of limitations will apply; but if the deed was executed merely as part of a general scheme and device, inaugurated by the husband's creditor, to pledge the property to the creditor for the husband's debt, the deed to the husband would be a mere form, and not a gift, within the meaning of the statute. Barron v. First Nat'l Bank & Trust Co., 182 Ga. 796, 186 S.E. 847 (1936) (see O.C.G.A. § 44-5-86).

Section applied in gift from wife to husband. — See Cain v. Ligon, 71 Ga. 692, 51 Am. R. 281 (1883); Sasser v. Sasser, 73 Ga. 275 (1884).

Burden of proof not met. — Plaintiffs failed to meet plaintiff's burden of proof with regard to either the husband/father's alleged mental incompetence, or the wife's alleged exercise of fraud and/or undue influence over him at the time of the transactions in question. Wheeless v. Gelzer, 780 F. Supp. 1373 (N.D. Ga. 1991).

Cited in Simmons Hdwe. Co. v. Timmons, 180 Ga. 531, 179 S.E. 726 (1935); Davis v. Liberty Co., 183 Ga. 286, 188 S.E. 344 (1936); Hadaway v. Hadaway, 192 Ga. 265, 14 S.E.2d 874 (1941); Armour v. Lunsford, 192 Ga. 598, 15 S.E.2d 886 (1941); Jones v. Hogans, 197 Ga. 404, 29 S.E.2d 568 (1944); Vinson v. Citizens & S. Nat'l Bank, 208 Ga. 813, 69 S.E.2d 866 (1952); Johnson v. Hutchinson, 217 Ga. 489, 123 S.E.2d 551 (1962).

RESEARCH REFERENCES

Am. Jur. 2d. — 38 Am. Jur. 2d, Gifts, §§ 5, 12, 39.

C.J.S. — 38 C.J.S., Gifts, § 91.

ALR. — Undue influence by third person in which immediate beneficiary did not participate, 96 ALR 613.

Undue influence in nontestamentary gift to clergyman, spiritual adviser, or church, 14 ALR2d 649.

Undue influence in nontestamentary gift from client to attorney, 24 ALR2d 1288.

Undue influence in nontestamentary gift from patient to physician, nurse, or other medical practitioner, 70 ALR2d 591.

Unexplained gratuitous transfer of property from one relative to another as raising presumption of gift, 94 ALR3d 608.

Validity of inter vivos gift by ward to guardian or conservator, 70 ALR4th 499.

44-5-87. Implied trust on failure of specific purpose for which gift made.

If a gift is made for a specific purpose which is either expressed or is secretly understood and the purpose is illegal or from some other cause fails or cannot be accomplished, the donee shall hold the object of the gift as trustee for the donor or his next of kin. (Orig. Code 1863, § 2625; Code 1868, § 2625; Code 1873, § 2667; Code 1882, § 2667; Civil Code 1895, § 3573; Civil Code 1910, § 4153; Code 1933, § 48-108.)

JUDICIAL DECISIONS

Deed in consideration of immoral or illegal thing constitutes contract. — Deed executed and delivered in consideration to do an immoral or illegal thing is not a gift, but an executed contract founded upon a consideration. Watkins v. Nugen, 118 Ga. 372, 45 S.E. 262 (1903).

No failure to use for designated purpose. — When designated gifts were to be made from the proceeds of a sale of property donated to a charitable remainder unitrust, there was no failure to use the sale proceeds for specific charities when no sale had occurred. Powell v. Emory Univ., 268 Ga. 658, 492 S.E.2d 874 (1997).

Unclean hands. — Equity will not declare an implied trust in a case of unclean hands. Morgan v. Wright, 219 Ga. 385, 133 S.E.2d 341 (1963).

Gifts made in contemplation of marriage are subject to an implied condition that the gifts are to be returned if the donee breaks the engagement, which rule applies to real estate as well as personalty; in a proper case equity will take jurisdiction to enforce a reconveyance. Guffin v. Kelly, 191 Ga. 880, 14 S.E.2d 50 (1941).

Cited in Hollomon v. Board of Educ., 168 Ga. 359, 147 S.E. 882 (1929); Morgan v. Hutcheson, 195 Ga. 123, 23 S.E.2d 406 (1942).

RESEARCH REFERENCES

ALR. — Right of parent as against creditor or lienor to make gift to minor child of latter's own services, 44 ALR 876.

Validity and construction of statutes discountenancing donations, testamentary or otherwise, between persons living in concubinage or otherwise sustaining immoral relations, 62 ALR 286.

Gift by husband as fraud on wife, 64 ALR 466; 49 ALR2d 521.

44-5-88. Gifts void against creditors and bona fide purchasers.

(a) An insolvent person may not make a valid gift to the injury of his existing creditors.

(b) When partial or complete possession of property remains with the donor, every parol gift thereof shall be void against bona fide creditors and bona fide purchasers without notice. (Orig. Code 1863, § 2619; Code 1868, § 2620; Code 1873, § 2662; Code 1882, § 2662; Civil Code 1895, § 3569; Civil Code 1910, § 4149; Code 1933, § 48-110.)

JUDICIAL DECISIONS

Transaction may be set aside. — Every voluntary deed or conveyance, made by a debtor insolvent at the time of execution, being thus invalid, and an insolvent person

being precluded from making a valid gift to the injury of the person's existing creditors, such a transaction may be set aside, and the assets thus transferred subjected to debts existing at the time of the transfer, or to subsequent debts if there was an intent to defraud as to the creditors. Edwards v. United Food Brokers, Inc., 195 Ga. 1, 22 S.E.2d 812 (1942).

Conveyance is void when the donor thereby renders oneself insolvent. United States v. Phillips, 59 F. Supp. 1006 (S.D. Ga. 1945).

Conveyance leaving debtor without resources to pay debts. — Debtor is insolvent and debtor's voluntary deed is void when, after such conveyance, property left or retained by the debtor is not ample to pay debtor's existing debts. Federal Land Bank v. Bush, 179 Ga. 627, 176 S.E. 639 (1934).

Existing and subsequent creditors. — Gift by a debtor insolvent at the time is void as to the debtor's then existing creditors whether made for the purpose of defrauding the creditors or not; but such a gift is not void against subsequent creditors, unless at the time of making it there was an intention to defraud. Lane v. Newton, 140 Ga. 415, 78 S.E. 1082 (1913); Beasley v. Smith, 144 Ga. 377, 87 S.E. 293 (1915); Roach v. Roach, 212 Ga. 40, 90 S.E.2d 423 (1955).

Conveyance by solvent person binding. — Voluntary conveyance made by a husband, solvent at the time, to his wife and children, is binding against creditors. Brown v. Spivey, 53 Ga. 155 (1874); Trounstine & Co. v. Irving, 91 Ga. 92, 16 S.E. 310 (1892).

Donee's knowledge is irrelevant. — If a husband, insolvent at the time and having no property subject to the demands of judgment creditors, makes a gift of property to his wife, such a gift would be void as against creditors, whether or not the wife had knowledge or notice of the husband's fraudulent intent. Garner v. State Banking Co., 150 Ga. 6, 102 S.E. 442 (1920).

Standing to set aside conveyance. — Assignee in bankruptcy has no standing to impeach a voluntary conveyance made by the bankrupt to the bankrupt's children prior to the adjudication in bankruptcy, unless such conveyance was void because of fraud. Only existing creditors have a right to assail such a conveyance. Adams v. Collier, 122 U.S. 382, 7 S. Ct. 1208, 30 L. Ed. 1207 (1887).

Possession by donor after gift as fraud. — Father being the proper custodian of property belonging to his minor child, possession of such by him is not indicative of fraud. Hargrove v. Turner, 112 Ga. 134, 37 S.E. 89, 81 Am. St. R. 24 (1900); Ross v. Cooley, 113 Ga. 1047, 39 S.E. 471 (1901).

As a general rule, possession of personalty by an alleged donor, after the donor has executed an instrument purporting to evidence a gift of the property, is a badge of fraud which, in proceedings instituted by a judgment creditor of the former to subject the property to the donor's debt, must be satisfactorily explained in order to uphold the validity of the gift. Ross v. Cooley, 113 Ga. 1047, 39 S.E. 471 (1901).

Debtor may make gift. — Person, though in debt, may in good faith make a voluntary conveyance of a part of the person's property, if the part which the person retains is amply sufficient to pay that person's debts. Cohen v. Parish, 105 Ga. 339, 31 S.E. 205 (1898).

Services may be given away. — Person, though insolvent, can legally give away the person's services, and so doing is not a fraud upon the person's creditors. Brand v. Bagwell, 133 Ga. 750, 66 S.E. 935 (1910).

Question of solvency for jury. — Whether a debtor is insolvent or not is a question for the jury. Primrose v. Browning, 56 Ga. 369 (1876).

Cited in Sims v. Albea, 72 Ga. 751 (1884); Garner v. State Banking Co., 150 Ga. 6, 102 S.E. 442 (1920); Davenport & Broadhurst v. Wood, 166 Ga. 365, 143 S.E. 398 (1928); Harper v. Atlanta Milling Co., 203 Ga. 608, 48 S.E.2d 89 (1948).

RESEARCH REFERENCES

Am. Jur. 2d. — 38 Am. Jur. 2d, Gifts, §§ 1, 8.

C.J.S. — 38 C.J.S., Gifts, § 7.

ALR. — Right of creditor or one representing him to recover money paid or property transferred by debtor on illegal consideration, 34 ALR 1297.

Right of parent as against creditor or lienor to make gift to minor child of latter's own services, 44 ALR 876.

44-5-89. Donation of blood by persons over 17 years of age.

Any person who is a resident of this state and who is 17 years of age or over may donate his blood to any person, firm, association, organization, public or private agency, or corporation without the consent of his parent or parents or guardian. Any person who is not a resident of this state and who is 17 years of age or over may donate his blood to any person, firm, association, organization, public or private agency, or corporation in this state without the consent of his parent or parents or guardian when the laws of the state wherein such person resides permit the donation of blood at such age. (Ga. L. 1970, p. 150, § 1; Ga. L. 1975, p. 1071, § 1.)

Cross references. — Consent to surgical or medical treatment generally, Ch. 9, T. 31. Labeling of blood withdrawn from person for transfusion purposes or for purposes of industrial use, Ch. 24, T. 31.

Part 2

Gifts Causa Mortis

RESEARCH REFERENCES

ALR. — Gift of savings deposit by delivery of passbook, 40 ALR 1249; 84 ALR 558.

Birth of child as affecting gift causa mortis, 49 ALR 1445.

Gift or grant to one upon marriage, if married, payable at marriage, or the like, as vested or contingent, 30 ALR2d 127.

44-5-100. Criteria for making valid gift causa mortis.

(a) To constitute a valid gift in contemplation of death, the following criteria must be met:

(1) The object of the gift must be personal property;

(2) The donor must be in his last illness or in peril of death;

(3) The gift must be intended to be absolute only in the event of death;

(4) The gift must be perfected by either actual or symbolic delivery; and

(5) The gift must be proved by one or more witnesses.

(b) A gift in contemplation of death may be made by parol. (Orig. Code 1863, § 2626; Code 1868, § 2626; Code 1873, § 2668; Code 1882, § 2668; Civil Code 1895, § 3574; Civil Code 1910, § 4154; Code 1933, § 48-201.)

JUDICIAL DECISIONS

Distinguished from gift inter vivos. — Gifts inter vivos and gifts causa mortis differ in nothing except that the latter are made in the expectation of death, become effectual only on the death of the donor, and may be revoked. Philpot v. Temple Banking Co., 3 Ga. App. 742, 60 S.E. 480 (1908).

Chief distinction between a gift inter vivos and a gift causa mortis is that a gift causa mortis while immediately passing a revocable, contingent interest, must be intended to pass the absolute title only in the event of death. As a consequence, it is the general rule that a gift causa mortis may be revoked at any time during life at the option of the donor; and the donor's recovery from the particular illness or escape from the peril, in contemplation of which the gift was made, will of itself operate as a revocation. Cannon v. Williams, 194 Ga. 808, 22 S.E.2d 838 (1942).

Revocable contingent interest in property. — Gift causa mortis carries an immediate though revocable contingent interest in the property, as distinguished from absolute title. The full title is intended to pass only in case of death. Higgs v. Willis, 205 Ga. 857, 55 S.E.2d 372 (1949).

Donor must be in last illness. — If personal property be delivered by the owner to another for a third person with the intention of making a gift causa mortis at a time when the donor is not in the donor's last illness, this, without more, would not be sufficient to effectuate the gift; but if the donor, while in the donor's last illness and conscious of the approach of death, reaffirms the gift, and requests the person receiving the property to retain possession and deliver to the intended donee after the donor's death, this would be the equivalent of a new delivery, taking effect from the time such request was made. Sorrells v. Collins, 110 Ga. 518, 36 S.E. 74 (1900).

Transaction which did not occur during the last illness or while the deceased was in peril of death does not meet the requirements of a gift causa mortis. Guest v. Stone, 206 Ga. 239, 56 S.E.2d 247 (1949).

Gifts must be absolute only in event of death. — Gift causa mortis must be intended to be absolute only in the event of death. Southern Indus. Inst. v. Marsh, 15 F.2d 347 (5th Cir. 1926), cert. denied, 273 U.S. 747, 71 L. Ed. 872, 47 S. Ct. 449 (1927).

Alleged debt forgiveness was not a gift in contemplation of death if the gift was intended to be immediate. Harrison v. Martin, 213 Ga. App. 337, 444 S.E.2d 618 (1994).

Delivery provable by circumstantial evidence. — Though the delivery of the article allegedly given must be proved, it may be proved by circumstantial as well as by direct evidence. Salmon v. McCrary, 71 Ga. App. 262, 30 S.E.2d 444 (1944).

Delivery to third person valid. — In order to constitute a valid gift of personalty made by one in view of impending dissolution, it is not necessary that there should be a delivery of the property to the donee personally; but such a delivery may be effected and the gift rendered valid by a delivery to a third person in trust and for the benefit of the donee. Sorrells v. Collins, 110 Ga. 518, 36 S.E. 74 (1900).

Gift in writing not testamentary in character. — Expression in writing transferring title to the trustee of the donee, which made the gift conditional on the donor's death, and which is but an expressed statement of this essential element of a gift causa mortis as distinguished from a gift inter vivos, did not render the writing testamentary in character. Whether express or not, such a condition is always implied under the very definition of a gift causa mortis, as generally recognized and as expressed in this statute. Cannon v. Williams, 194 Ga. 808, 22 S.E.2d 838 (1942) (see O.C.G.A. § 44-5-100).

Delivery of a certificate of deposit constituted a valid gift causa mortis. Philpot v. Temple Banking Co., 3 Ga. App. 742, 60 S.E. 480 (1908).

Purported transfer of certificates of deposit not valid gift causa mortis. — Trial court did not err by holding that the purported transfer of certificates of deposit did not constitute a valid gift causa mortis since the only evidence submitted by defendants that the decedent intended to transfer the certificates to the defendant were the signature cards and the defendant's testimony. NeSmith v. Ellerbee, 203 Ga. App. 65, 416 S.E.2d 364 (1992).

Check as gift causa mortis. — Check payable to the donor or bearer is capable of

being made a gift inter vivos or causa mortis, and that in such gifts a mere delivery of the check, accompanied by proper words of gift, is sufficient; and it is not necessary, in order that the gift may be complete, that the check shall be presented for payment before the death of the donor. Philpot v. Temple Banking Co., 3 Ga. App. 742, 60 S.E. 480 (1908).

Life insurance policy. — General rule is that a policy of insurance on the life of a donor may be made the subject of a gift in the same manner as any other chose in action. Higgs v. Willis, 205 Ga. 857, 55 S.E.2d 372 (1949).

Realty cannot be the subject of a gift causa mortis. Salmon v. McCrary, 71 Ga. App. 262, 30 S.E.2d 444 (1944).

Conveyance not a gift causa mortis. — Conveyance was not a gift causa mortis under O.C.G.A. § 44-5-100(a) when a promissory note executed by grantees in favor of a decedent indicated that the debt was to be forgiven upon the decedent's death. The consideration was bargained for and paid to the decedent until the decedent's death; neither a security deed nor the note made any mention of a gift; and the grantees would have been obligated to continue paying on the note had the decedent not died. Mize v. Woodall, 291 Ga. App. 349, 662 S.E.2d 178 (2008).

Cited in Poullain v. Poullain, 79 Ga. 11, 4 S.E. 81 (1887); Cowdrey v. Barksdale, 16 Ga. App. 387, 85 S.E. 617 (1915); Bank of Adel v. Hutchinson, 18 Ga. App. 418, 89 S.E. 492 (1916); Moore v. Tiller, 61 F.2d 478 (5th Cir. 1932); Drake v. Wayne, 52 Ga. App. 654, 184 S.E. 339 (1936); Thomas v. Lockwood, 198 Ga. 437, 31 S.E.2d 791 (1944); Swann v. Morris, 212 Ga. 460, 93 S.E.2d 673 (1956); Abney v. West, 101 Ga. App. 450, 114 S.E.2d 149 (1960).

RESEARCH REFERENCES

Am. Jur. 2d. — 38 Am. Jur. 2d, Gifts, §§ 5, 9, 12, 39.

C.J.S. — 38 C.J.S., Gifts, §§ 45, 47.

ALR. — Gift of debt of third person not evidenced by commercial instrument, 14 ALR 707.

When transfer deemed to be one in contemplation of death, within the meaning of the inheritance tax laws, 21 ALR 1335; 41 ALR 989; 75 ALR 544; 120 ALR 170; 148 ALR 1051.

Delivery of bill or note of third person by way of gift, 25 ALR 642.

Validity of gift causa mortis as affected by donor's intention to transfer all his property, 90 ALR 366.

Necessity of delivery where subject of gift is already in possession of donee at time of declaration of gift, 103 ALR 1110.

What institutions or gifts are within statutes declaring invalid bequests for charitable, benevolent, religious, or similar purposes, if made within a specified period before testator's death, or prohibiting, or limiting the amount of, such bequests, 111 ALR 525.

May proof of delivery essential to gift rest upon subsequent declarations of donor, 124 ALR 1391.

Delivery of key to safe-deposit box or other receptacle as sufficient to consummate gift of contents, 127 ALR 780.

Time as of which rate of tax applicable to transfer in contemplation of death, or to take effect on death, is determined, 5 ALR2d 1065.

Transfer by inter vivos trust of insurance policies upon settlor's life as in contemplation of death for tax purposes, 17 ALR2d 787.

Nature and validity of gift made in contemplation of suicide, 60 ALR2d 575.

Creation of joint savings account or savings certificate as gift to survivor, 43 ALR3d 971.

Delivery of personalty to third person with directions to deliver to donee after donor's death as valid gift, 57 ALR3d 1083.

Unexplained gratuitous transfer of property from one relative to another as raising presumption of gift, 94 ALR3d 608.

ARTICLE 5

THE GEORGIA TRANSFERS TO MINORS ACT

Editor's notes. — Section 10 of Ga. L. 1972, p. 193, effective July 1, 1972, provided that it was the purpose of the Act to reduce the age of legal majority from 21 years of age to 18 years of age so that all persons, upon reaching the age of 18, would have the rights, privileges, powers, duties, responsibilities, and liabilities previously applicable to persons 21 years of age or over. The section further provided that the Act was not to be construed as having the effect of changing the definition of a minor or of an adult as defined in the former ''The Georgia Gift to Minors Act'' for the purposes of that Act.

Ga. L. 1990, p. 667, § 1, effective July 1, 1990, repealed the Code sections formerly codified at this article and enacted the current article. The former article, concerning the Georgia Gift to Minors Act, consisted of §§ 44-5-110 through 44-5-124 and was based on Ga. L. 1955, p. 592, §§ 1-13; Ga. L. 1957, p. 98, § 1; Ga. L. 1960, p. 232, § 1; Ga. L. 1969, p. 24, §§ 1-8; Ga. L. 1981, Ex. Sess., p. 8; Ga. L. 1983, p. 3, § 33, Ga. L. 1984, p. 22, § 44, and Ga. L. 1985, p. 819, §§ 1-3.

Law reviews. — For article surveying trust and estate law in 1984-1985, see 37 Mercer L. Rev. 443 (1985). For article discussing the custodian as a fiduciary under this article, see 7 Ga. St. B.J. 175 (1970).

RESEARCH REFERENCES

ALR. — Gift of savings deposit by delivery of passbook, 40 ALR 1249; 84 ALR 558.

Right of parent as against creditor or lienor to make gift to minor child of latter's own services, 44 ALR 876.

''Business situs'' for purposes of property taxation of intangibles in state other than domicile of owner, 143 ALR 361.

Construction and effect of Uniform Gifts to Minors Act, 50 ALR3d 528.

44-5-110. Short title.

This article shall be known and may be cited as ''The Georgia Transfers to Minors Act.'' (Code 1981, § 44-5-110, enacted by Ga. L. 1990, p. 667, § 1.)

Law reviews. — For annual survey of wills, trusts, and administration of estates, see 42 Mercer L. Rev. 491 (1990).

JUDICIAL DECISIONS

Cited in Baird v. Baird, 258 Ga. 186, 367 S.E.2d 37 (1988); Brandenburg v. Brandenburg, 274 Ga. 183, 551 S.E.2d 721 (2001).

44-5-111. Definitions.

As used in this article, the term:

(1) ''Adult'' means an individual who has attained the age of 21 years.

(2) ''Benefit plan'' means an employer's plan for the benefit of an employee or partner or an individual retirement account.

(3) ''Broker'' means a person lawfully engaged in the business of effecting transactions in securities or commodities for the person's own account or for the account of others.

(4) ''Court'' means the probate court in the county where the minor resides, or, if the minor is not a resident of this state, the probate court in the county where the custodian resides or has his principal place of business or where the custodial property is located.

(5) ''Custodial property'' means any interest in property transferred to a custodian under the authority of this article and the income from and proceeds of that interest in property.

(6) ''Custodian'' means a person so designated under Code Section 44-5-119 or a successor or substitute custodian designated under Code Section 44-5-128.

(7) ''Financial institution'' means a bank, trust company, national banking association, industrial bank, savings institution, or credit union chartered and supervised under state or federal law.

(8) ''Guardian'' means a person appointed or qualified by a court to act as general, limited, or temporary guardian of a minor's property or a person legally authorized to perform substantially the same functions.

(9) ''Legal representative'' means an individual's personal representative or guardian.

(10) ''Member of the minor's family'' means the minor's parent, stepparent, spouse, grandparent, brother, sister, uncle, or aunt, whether of the whole or half blood or by adoption.

(11) ''Minor'' means an individual who has not attained the age of 21 years.

(12) ''Person'' means an individual, corporation, organization, or other legal entity.

(13) ''Personal representative'' means an executor, administrator, successor personal representative, or special administrator of a decedent's estate or a person legally authorized to perform substantially the same functions.

(14) ''State'' includes any state of the United States, the District of Columbia, the Commonwealth of Puerto Rico, and any territory or possession subject to the legislative authority of the United States.

(15) ''Transfer'' means a transaction that creates custodial property under Code Section 44-5-119.

(16) ''Transferor'' means a person who makes a transfer under the authority of this article.

(17) ''Trust company'' means a financial institution, corporation, or other legal entity authorized to exercise general trust powers in this state. (Code 1981, § 44-5-111, enacted by Ga. L. 1990, p. 667, § 1.)

JUDICIAL DECISIONS

Cited in Honeycutt v. Edwards, 136 Ga. App. 486, 221 S.E.2d 678 (1975); Penny v. McBride, 282 Ga. App. 590, 639 S.E.2d 561 (2006).

RESEARCH REFERENCES

Am. Jur. 2d. — 38 Am. Jur. 2d, Gifts, § 1.
U.L.A. — Uniform Transfers to Minors Act (U.L.A.) § 1.

44-5-112. Applicability of article.

(a) This article applies to a transfer that refers to ''The Georgia Transfers to Minors Act'' in the designation under subsection (a) of Code Section 44-5-119 by which the transfer is made if at the time of the transfer the transferor, the minor, or the custodian is a resident of this state or the custodial property is located in this state. The custodianship so created remains subject to this article despite a subsequent change in residence of a transferor, the minor, or the custodian or the removal of custodial property from this state.

(b) A person designated as custodian under the authority of this article is subject to personal jurisdiction in this state with respect to any matter relating to the custodianship.

(c) A transfer that purports to be made and which is valid under the Uniform Transfers to Minors Act, the Uniform Gifts to Minors Act, or a substantially similar act of another state is governed by the law of the designated state and may be executed and is enforceable in this state if, at the time of the transfer, the transferor, the minor, or the custodian is a resident of the designated state or the custodial property is located in the designated state. (Code 1981, § 44-5-112, enacted by Ga. L. 1990, p. 667, § 1.)

RESEARCH REFERENCES

U.L.A. — Uniform Transfers to Minors Act (U.L.A.) § 2.
ALR. — Gift of savings deposit by delivery of passbook, 40 ALR 1249; 84 ALR 558.
Delivery as essential to gift of tangible chattels or securities by written instrument, 63 ALR 537; 48 ALR2d 1405.
Delivery which will support gift of an undivided interest in a chattel or chose in action, 145 ALR 1386.
Opening savings account in sole name of another, without complete surrender of passbook, as a gift, 1 ALR2d 538.

44-5-113. Nomination of custodian.

(a) A person having the right to designate the recipient of property transferable upon the occurrence of a future event may revocably nominate a custodian to receive the property for a minor recipient upon the occurrence of the event by naming the custodian, followed in substance by the words: ''as custodian for _____ (name of minor) under 'The Georgia Transfers to Minors Act.' '' The nomination may name one or more persons as substitute custodians to whom the property must be transferred, in the order named, if the first nominated custodian dies before the transfer or is unable, declines, or is ineligible to serve. The nomination may be made in a will, a trust, a deed, an instrument exercising a power of appointment, or in a writing designating a beneficiary of contractual rights which is delivered to the payor, issuer, or other obligor of the contractual rights.

(b) A custodian nominated under this Code section must be a person to whom a transfer of property of that kind may be made under subsection (a) of Code Section 44-5-119.

(c) The nomination of a custodian under this Code section does not create custodial property until the nominating instrument becomes irrevocable or a transfer to the nominated custodian is completed under Code Section 44-5-119. Unless the nomination of a custodian has been revoked, upon the occurrence of the future event the custodianship becomes effective and the custodian shall enforce a transfer of the custodial property pursuant to Code Section 44-5-119. (Code 1981, § 44-5-113, enacted by Ga. L. 1990, p. 667, § 1.)

JUDICIAL DECISIONS

Cited in Honeycutt v. Edwards, 136 Ga. App. 486, 221 S.E.2d 678 (1975).

RESEARCH REFERENCES

Am. Jur. 2d. — 38 Am. Jur. 2d, Gifts, §§ 2 et seq., 36, 81, 91.

C.J.S. — 38 C.J.S., Gifts, §§ 11, 76, 77, 79 et seq.

U.L.A. — Uniform Transfers to Minors Act (U.L.A.) § 3.

ALR. — When may gift by will or deed of trust be considered as one to a class, 75 ALR 773; 61 ALR2d 212.

Opening savings account in sole name of another, without complete surrender of passbook, as a gift, 1 ALR2d 538.

Wills: gift to persons individually named but also described in terms of relationship to testator or another as class gift, 13 ALR4th 978.

44-5-114. Irrevocable gift or exercise of power of appointment made under Code Section 44-5-119.

A person may make a transfer by irrevocable gift to, or by the irrevocable exercise of a power of appointment in favor of, a custodian for the benefit of a minor pursuant to Code Section 44-5-119. (Code 1981, § 44-5-114, enacted by Ga. L. 1990, p. 667, § 1.)

JUDICIAL DECISIONS

Cited in Honeycutt v. Edwards, 136 Ga. App. 486, 221 S.E.2d 678 (1975).

RESEARCH REFERENCES

Am. Jur. 2d. — 38 Am. Jur. 2d, Gifts, §§ 3, 4.

C.J.S. — 38 C.J.S., Gifts, § 34. 39 C.J.S., Guardian and Ward, § 70 et seq.

U.L.A. — Uniform Transfers to Minors Act (U.L.A.) § 4.

44-5-115. Irrevocable transfer by personal representative or trustee to custodian for minor's benefit.

(a) A personal representative or trustee may make an irrevocable transfer pursuant to Code Section 44-5-119 to a custodian for the benefit of a minor as authorized in the governing will or trust.

(b) If the testator or settlor has nominated a custodian under Code Section 44-5-113 to receive the custodial property, the transfer must be made to that person.

(c) If the testator or settlor has not nominated a custodian under Code Section 44-5-113, or all persons so nominated as custodian die before the transfer or are unable, decline, or are ineligible to serve, the personal representative or the trustee, as the case may be, shall designate the custodian from among those eligible to serve as custodian for property of that kind under subsection (a) of Code Section 44-5-119, which designation may include the personal representative or the trustee. (Code 1981, § 44-5-115, enacted by Ga. L. 1990, p. 667, § 1.)

JUDICIAL DECISIONS

Use of funds by custodian. — Custodian may show that the custodian has used a part or all of the funds in the custodian's absolute discretion for the support, maintenance, education, or general use of the minor and, although title was in the beneficiary, the beneficiary is entitled only to so much of the fund or property as may remain after proper disbursement. Honeycutt v. Edwards, 136 Ga. App. 486, 221 S.E.2d 678 (1975).

Cited in Harris, Upham & Co. v. Harris, 142 Ga. App. 696, 236 S.E.2d 773 (1977).

RESEARCH REFERENCES

Am. Jur. 2d. — 38 Am. Jur. 2d, Gifts, § 7. **C.J.S.** — 39 C.J.S., Guardian and Ward, § 70 et seq. **U.L.A.** — Uniform Transfers to Minors Act (U.L.A.) § 5.

44-5-116. Irrevocable transfer by personal representative, trustee, or guardian to custodian.

(a) Subject to subsection (c) of this Code section, a personal representative or trustee may make an irrevocable transfer to an adult or trust company as custodian (which custodian may be the personal representative or the trustee) for the benefit of a minor pursuant to Code Section 44-5-119, in the absence of a will or under a will or trust that does not contain an authorization to do so.

(b) Subject to subsection (c) of this Code section, a guardian may make an irrevocable transfer to an adult or trust company as custodian (which custodian may be the guardian) for the benefit of the minor pursuant to Code Section 44-5-119.

(c) A transfer under subsection (a) or (b) of this Code section may be made only if:

(1) The personal representative, trustee, or guardian considers the transfer to be in the best interest of the minor;

(2) The transfer is not prohibited by or inconsistent with provisions of the applicable will, trust agreement, or other governing instrument; and

(3) The transfer is authorized by the court as in the best interest of the minor if such transfer, combined with all prior transfers to the minor under this Code section, in the aggregate exceeds $10,000.00 in value. (Code 1981, § 44-5-116, enacted by Ga. L. 1990, p. 667, § 1.)

RESEARCH REFERENCES

Am. Jur. 2d. — 39 Am. Jur. 2d, Gifts, § 4. **C.J.S.** — 39 C.J.S., Guardian and Ward, § 218 et seq. **U.L.A.** — Uniform Transfers to Minors Act (U.L.A.) § 6.

44-5-117. Transfers by other persons to custodian.

(a) Subject to subsections (b) and (c) of this Code section, a person not subject to Code Section 44-5-115 or 44-5-116 who holds property of or owes a liquidated debt to a minor may make an irrevocable transfer to a custodian for the benefit of the minor pursuant to Code Section 44-5-119.

(b) If a person having the right to do so under Code Section 44-5-113 has nominated a custodian under that Code section to receive the custodial property, the transfer must be made to the custodian so designated.

(c) If no custodian has been nominated under Code Section 44-5-113, or all persons so nominated as custodian die before the transfer or are unable, decline, or are ineligible to serve, a transfer under this Code section may be made to an adult member of the minor's family or to a trust company as custodian for the benefit of the minor if a guardian appointed for such minor considers the transfer to be in the best interest of the minor and, on petition brought by the minor's guardian, the transfer is authorized by the court as in the best interest of the minor. (Code 1981, § 44-5-117, enacted by Ga. L. 1990, p. 667, § 1.)

RESEARCH REFERENCES

Am. Jur. 2d. — 39 Am. Jur. 2d, Gifts, § 4. **C.J.S.** — 39 C.J.S., Guardian and Ward, §§ 10 et seq., 199, 200, 221. **U.L.A.** — Uniform Transfers to Minors Act (U.L.A.) § 7.

44-5-118. Effect of custodian's written acknowledgment of delivery.

A written acknowledgment of delivery by a custodian constitutes a sufficient receipt and discharge for custodial property transferred to the custodian pursuant to this article. (Code 1981, § 44-5-118, enacted by Ga. L. 1990, p. 667, § 1.)

RESEARCH REFERENCES

Am. Jur. 2d. — 38 Am. Jur. 2d, Gifts, § 4. **C.J.S.** — 39 C.J.S., Guardian and Ward, § 41 et seq. **U.L.A.** — Uniform Transfers to Minors Act (U.L.A.) § 8.

44-5-119. Creation and transfer of custodial property.

(a) Custodial property is created and a transfer is made whenever:

(1) An uncertificated security or a certificated security in registered form is either:

(A) Registered in the name of the transferor, an adult other than the transferor, or a trust company, followed in substance by the words: ''as custodian for _____ (name of minor) under 'The Georgia Transfers to Minors Act' ''; or

(B) Delivered if in certificated form, or any document necessary for the transfer of an uncertificated security is delivered, together with any necessary endorsement to an adult other than the transferor or to a trust company as custodian, accompanied by an instrument in substantially the form set forth in subsection (b) of this Code section;

(2) Money is paid or delivered to a broker or financial institution for credit to an account in the name of the transferor, an adult other than the transferor, or a trust company, followed in substance by the words: ''as

custodian for _____ (name of minor) under 'The Georgia Transfers to Minors Act' ";

(3) The ownership of a life or endowment insurance policy or annuity contract is either:

(A) Registered with the issuer in the name of the transferor, an adult other than the transferor, or a trust company, followed in substance by the words: "as custodian for _____ (name of minor) under 'The Georgia Transfers to Minors Act' "; or

(B) Assigned in a writing delivered to an adult other than the transferor or to a trust company whose name in the assignment is followed in substance by the words: "as custodian for _____ (name of minor) under 'The Georgia Transfers to Minors Act' ";

(4) An irrevocable exercise of a power of appointment or an irrevocable present right to future payment under a contract is the subject of a written notification delivered to the payor, issuer, or other obligor that the right is transferred to the transferor, an adult other than the transferor, or a trust company, whose name in the notification is followed in substance by the words: "as custodian for _____ (name of minor) under 'The Georgia Transfers to Minors Act' ";

(5) An interest in real property is recorded in the name of the transferor, an adult other than the transferor, or a trust company, followed in substance by the words: "as custodian for _____ (name of minor) under 'The Georgia Transfers to Minors Act' ";

(6) A certificate of title issued by a department or agency of a state or of the United States which evidences title to tangible personal property is either:

(A) Issued in the name of the transferor, an adult other than the transferor, or a trust company, followed in substance by the words: "as custodian for _____ (name of minor) under 'The Georgia Transfers to Minors Act' "; or

(B) Delivered to an adult other than the transferor or to a trust company, endorsed to that person, followed in substance by the words: "as custodian for _____ (name of minor) under 'The Georgia Transfers to Minors Act' ";

(7) An interest in any property not described in paragraphs (1) through (6) of this subsection is transferred to an adult other than the transferor or to a trust company by a written instrument in substantially the form set forth in subsection (b) of this Code section.

(b) An instrument in the following form satisfies the requirements of subparagraph (B) of paragraph (1) and paragraph (7) of subsection (a) of this Code section:

"TRANSFER UNDER THE GEORGIA

TRANSFERS TO MINORS ACT

I, _____ (name of transferor or name and representative capacity if a fiduciary) transfer to _____ (name of custodian), as custodian for _____ (name of minor) under 'The Georgia Transfers to Minors Act,' the following: (insert a description of the custodial property sufficient to identify it).

Dated: _____

_____

(Signature)

_____ (name of custodian) acknowledges receipt of the property described above as custodian for the minor named above under 'The Georgia Transfers to Minors Act.'

Dated: _____

_____

(Signature of Custodian)"

(c) A transferor shall place the custodian in control of the custodial property as soon as practicable. (Code 1981, § 44-5-119, enacted by Ga. L. 1990, p. 667, § 1.)

Cross references. — Relief of garnishee from liability, § 18-4-92.1.

RESEARCH REFERENCES

Am. Jur. 2d. — 38 Am. Jur. 2d, Gifts, § 7.
C.J.S. — 39 C.J.S., Guardian and Ward, § 43.
U.L.A. — Uniform Transfers to Minors Act (U.L.A.) § 9.

44-5-120. Single custodianship.

A transfer may be made only for one minor, and only one person may be custodian. All custodial property held under the authority of this article by the same custodian for the benefit of the same minor constitutes a single custodianship. (Code 1981, § 44-5-120, enacted by Ga. L. 1990, p. 667, § 1.)

RESEARCH REFERENCES

Am. Jur. 2d. — 38 Am. Jur. 2d, Gifts, § 7.

C.J.S. — 39 C.J.S., Guardian and Ward, § 20 et seq.

U.L.A. — Uniform Transfers to Minors Act (U.L.A.) § 10.

44-5-121. Validity of transfer.

(a) The validity of a transfer made in a manner prescribed in this article is not affected by:

(1) Failure of the transferor to comply with subsection (c) of Code Section 44-5-119 concerning possession and control;

(2) Designation of an ineligible custodian, except designation of the transferor in the case of property for which the transferor is ineligible to serve as custodian under subsection (a) of Code Section 44-5-119; or

(3) Death or incapacity of a person nominated under Code Section 44-5-113 or designated under Code Section 44-5-119 as custodian or the disclaimer of the office by that person.

(b) A transfer made pursuant to Code Section 44-5-119 is irrevocable, and the custodial property is indefeasibly vested in the minor, but the custodian has all the rights, powers, duties, and authority provided in this article, and neither that minor nor the minor's legal representative has any right, power, duty, or authority with respect to the custodial property except as provided in this article.

(c) By making a transfer, the transferor incorporates in the disposition all the provisions of this article and grants to the custodian, and to any third person dealing with a person designated as custodian, the respective powers, rights, and immunities provided in this article. (Code 1981, § 44-5-121, enacted by Ga. L. 1990, p. 667, § 1.)

RESEARCH REFERENCES

Am. Jur. 2d. — 38 Am. Jur. 2d, Gifts, § 7.
U.L.A. — Uniform Transfers to Minors Act (U.L.A.) § 11.

44-5-122. Powers and duties of custodian; name in which registered securities to be held; commingling with personal assets.

(a) A custodian shall:

(1) Take control of custodial property;

(2) Register or record title to custodial property if appropriate; and

(3) Collect, hold, manage, invest, and reinvest custodial property.

(b) In dealing with custodial property, a custodian shall invest and reinvest the custodial property as would prudent men of discretion and intelligence who are seeking a reasonable income and the preservation of

their capital, without reference to the laws relating to permissible investments by fiduciaries. If a custodian has a special skill or expertise or is named custodian on the basis of representations of a special skill or expertise, the custodian shall use that skill or expertise. However, a custodian, in the custodian's discretion and without liability to the minor or the minor's estate, may retain any custodial property received from a transferor without reference to the laws relating to permissible investments by fiduciaries.

(c) A custodian may invest in or pay premiums on life insurance or endowment policies on:

(1) The life of the minor only if the minor or the minor's estate is the sole beneficiary; or

(2) The life of another person in whom the minor has an insurable interest only to the extent that the minor, the minor's estate, or the custodian in the capacity of custodian is the irrevocable beneficiary.

(d) A custodian at all times shall keep custodial property separate and distinct from all other property in a manner sufficient to identify it clearly as custodial property of the minor. Custodial property consisting of an undivided interest is so identified if the minor's interest is held as a tenant in common and is fixed. Custodial property subject to recordation is so identified if it is recorded, and custodial property subject to registration is so identified if it is either registered, or held in an account designated, in the name of the custodian, followed in substance by the words: ''as a custodian for _____ (name of minor) under 'The Georgia Transfers to Minors Act.' ''

(e) A custodian shall keep records of all transactions with respect to custodial property, including information necessary for the preparation of the minor's tax returns, and shall make them available for inspection at reasonable intervals by a parent or legal representative of the minor or by the minor if the minor has attained the age of 14 years. (Code 1981, § 44-5-122, enacted by Ga. L. 1990, p. 667, § 1.)

JUDICIAL DECISIONS

Probate court has sole power to compel accounting. — Act vests in the probate court the sole power to compel the custodian to account for the funds. Honeycutt v. Edwards, 136 Ga. App. 486, 221 S.E.2d 678 (1975).

RESEARCH REFERENCES

Am. Jur. 2d. — 38 Am. Jur. 2d, Gifts, § 7.
C.J.S. — 39 C.J.S., Guardian and Ward, § 207 et seq.
U.L.A. — Uniform Transfers to Minors Act (U.L.A.) § 12.

44-5-123. Custodian's rights, powers, and authority over custodial property; liability for breach of Code Section 44-5-122.

(a) A custodian, acting in a custodial capacity, has all the rights, powers, and authority over custodial property that adult owners have over their own property, but a custodian may exercise those rights, powers, and authority in that capacity only.

(b) This Code section does not relieve a custodian from liability for breach of Code Section 44-5-122. (Code 1981, § 44-5-123, enacted by Ga. L. 1990, p. 667, § 1.)

RESEARCH REFERENCES

U.L.A. — Uniform Transfers to Minors Act (U.L.A.) § 13.

44-5-124. Custodial discretion in transfers of custodial property for support, maintenance, education, and general use and benefit of minor.

(a) A custodian may deliver or pay to the minor or expend for or apply to the minor's benefit so much or the whole of the custodial property as the custodian considers advisable for the support, maintenance, education, and general use and benefit of the minor in such manner, at such time or times, and to such extent as the custodian may deem suitable and proper, without court order and without regard to:

(1) The duty or ability of the custodian personally or of any other person to support the minor; or

(2) Any other income or property of the minor which may be applicable or available for that purpose.

(b) On petition of an interested person or the minor if the minor has attained the age of 14 years, the court may order the custodian to deliver or pay to the minor or expend for the minor's benefit so much of the custodial property as the court considers advisable for the use and benefit of the minor.

(c) A delivery, payment, or expenditure under this Code section is in addition to, not in substitution for, and does not affect any obligation of a person to support the minor. (Code 1981, § 44-5-124, enacted by Ga. L. 1990, p. 667, § 1.)

JUDICIAL DECISIONS

Cited in Brandenburg v. Brandenburg, 274 Ga. 183, 551 S.E.2d 721 (2001).

RESEARCH REFERENCES

U.L.A. — Uniform Transfers to Minors Act (U.L.A.) § 14.

ALR. — Unexplained gratuitous transfer of property from one relative to another as raising presumption of gift, 94 ALR3d 608.

44-5-125. Compensation; expenses of custodian; bond.

(a) A custodian is entitled to reimbursement from custodial property for reasonable expenses incurred in the performance of the custodian's duties.

(b) Except for one who is a transferor under Code Section 44-5-114, a custodian has a noncumulative election during each calendar year to charge reasonable compensation for services performed during that year.

(c) Except as provided in subsection (f) of Code Section 44-5-128, a custodian need not give a bond. (Code 1981, § 44-5-125, enacted by Ga. L. 1990, p. 667, § 1.)

RESEARCH REFERENCES

U.L.A. — Uniform Transfers to Minors Act (U.L.A.) § 15.

44-5-126. Liability of third person for dealings with person purporting to act in capacity of custodian.

A third person in good faith and without court order may act on the instructions of or otherwise deal with any person purporting to make a transfer or purporting to act in the capacity of a custodian and, in the absence of knowledge, is not responsible for determining:

(1) The validity of the purported custodian's designation;

(2) The propriety of, or the authority under this article for, any act of the purported custodian;

(3) The validity or propriety under this article of any instrument or instructions executed or given either by the person purporting to make a transfer or by the purported custodian; or

(4) The propriety of the application of any property of the minor delivered to the purported custodian. (Code 1981, § 44-5-126, enacted by Ga. L. 1990, p. 667, § 1.)

RESEARCH REFERENCES

U.L.A. — Uniform Transfers to Minors Act (U.L.A.) § 16.

44-5-127. Assertion of claim arising out of custodial relationship.

(a) A claim based on:

(1) A contract entered into by a custodian acting in a custodial capacity;

(2) An obligation arising from the ownership or control of custodial property; or

(3) A tort committed during the custodianship

may be asserted against the custodial property by proceeding against the custodian in the custodial capacity, whether or not the custodian or the minor is personally liable therefor.

(b) A custodian is not personally liable:

(1) On a contract properly entered into in the custodial capacity unless the custodian fails to reveal that capacity and to identify the custodianship in the contract; or

(2) For an obligation arising from control of custodial property or for a tort committed during the custodianship unless the custodian is personally at fault.

(c) A minor is not personally liable for an obligation arising from ownership of custodial property or for a tort committed during the custodianship unless the minor is personally at fault. (Code 1981, § 44-5-127, enacted by Ga. L. 1990, p. 667, § 1.)

RESEARCH REFERENCES

U.L.A. — Uniform Transfers to Minors Act (U.L.A.) § 17.

44-5-128. Appointment of successor custodian.

(a) A person nominated under Code Section 44-5-113 or designated under Code Section 44-5-119 as custodian may decline to serve by delivering a valid disclaimer under Code Section 53-2-115 to the person who made the nomination or to the transferor or the transferor's legal representative. If the event giving rise to a transfer has not occurred and no substitute custodian able, willing, and eligible to serve was nominated under Code Section 44-5-113, the person who made the nomination may nominate a substitute custodian under Code Section 44-5-113; otherwise, the transferor or the transferor's legal representative shall designate a substitute custodian at the time of the transfer, in either case from among the persons eligible to serve as custodian for that kind of property under subsection (a) of Code Section 44-5-119. The custodian so designated has the rights of a successor custodian.

(b) A custodian at any time may designate a trust company or an adult other than a transferor under Code Section 44-5-114 as successor custodian by executing and dating an instrument of designation before a subscribing witness other than the successor. If the instrument of designation does not contain or is not accompanied by the resignation of the custodian, the designation of the successor does not take effect until the custodian resigns, dies, becomes incapacitated, or is removed.

(c) A custodian may resign at any time by delivering written notice to the minor if the minor has attained the age of 14 years and to the successor custodian and by delivering the custodial property to the successor custodian.

(d) If a custodian is ineligible, dies, or becomes incapacitated without having effectively designated a successor and the minor has attained the age of 14 years, the minor may designate as successor custodian, in the manner prescribed in subsection (b) of this Code section, an adult member of the minor's family, a guardian of the minor, or a trust company. If the minor has not attained the age of 14 years or fails to act within 60 days after the ineligibility, death, or incapacity, the guardian of the minor becomes successor custodian. If the minor has no guardian or the guardian declines to act, the transferor, the legal representative of the transferor or of the custodian, an adult member of the minor's family, or any other interested person may petition the court to designate a successor custodian.

(e) A custodian who declines to serve under subsection (a) of this Code section or resigns under subsection (c) of this Code section, or the legal representative of a deceased or incapacitated custodian, as soon as practicable, shall put the custodial property and records in the possession and control of the successor custodian. The successor custodian by action may enforce the obligation to deliver custodial property and records and becomes responsible for each item as received.

(f) A transferor, the legal representative of a transferor, an adult member of the minor's family, a guardian of the person of the minor, the guardian of the minor, or the minor if the minor has attained the age of 14 years may petition the court to remove the custodian for cause and to designate a successor custodian other than a transferor under Code Section 44-5-114 or to require the custodian to give appropriate bond. (Code 1981, § 44-5-128, enacted by Ga. L. 1990, p. 667, § 1.)

RESEARCH REFERENCES

U.L.A. — Uniform Transfers to Minors Act (U.L.A.) § 18.

44-5-129. Accounting by custodian; petition for accounting.

(a) A minor who has attained the age of 14 years, the minor's guardian of the person or legal representative, an adult member of the minor's family, a transferor, or a transferor's legal representative may petition the court:

(1) For an accounting by the custodian or the custodian's legal representative; or

(2) For a determination of responsibility, as between the custodial property and the custodian personally, for claims against the custodial property unless the responsibility has been adjudicated in an action under Code Section 44-5-127 to which the minor or the minor's legal representative was a party.

(b) A successor custodian may petition the court for an accounting by the predecessor custodian.

(c) The court, in a proceeding under this article or in any other proceeding, may require or permit the custodian or the custodian's legal representative to account.

(d) If a custodian is removed under subsection (f) of Code Section 44-5-128, the court shall require an accounting and order delivery of the custodial property and records to the successor custodian and the execution of all instruments required for transfer of the custodial property. (Code 1981, § 44-5-129, enacted by Ga. L. 1990, p. 667, § 1.)

RESEARCH REFERENCES

U.L.A. — Uniform Transfers to Minors Act (U.L.A) § 19.

44-5-130. Transfer of custodial property by custodian to minor or minor's estate.

The custodian shall transfer in an appropriate manner the custodial property to the minor or to the minor's estate upon the earliest of:

(1) The minor's attainment of 21 years of age with respect to custodial property transferred under Code Section 44-5-114 or 44-5-115;

(2) The minor's attainment of majority under the laws of this state other than this article with respect to custodial property transferred under Code Section 44-5-116 or 44-5-117; or

(3) The minor's death. (Code 1981, § 44-5-130, enacted by Ga. L. 1990, p. 667, § 1.)

RESEARCH REFERENCES

U.L.A. — Uniform Transfers to Minors Act (U.L.A.) § 20.

44-5-131. Applicability to transfers made after July 1, 1990.

This article applies to a transfer within the scope of Code Section 44-5-112 made after July 1, 1990, if:

(1) The transfer purports to have been made under former Article 5 of this chapter, known as ''The Georgia Gifts to Minors Act''; or

(2) The instrument by which the transfer purports to have been made uses in substance the designation ''as custodian under the Uniform Gifts to Minors Act'' or ''as custodian under the Uniform Transfers to Minors Act'' of any other state, and the application of this article is necessary to validate the transfer. (Code 1981, § 44-5-131, enacted by Ga. L. 1990, p. 667, § 1.)

RESEARCH REFERENCES

U.L.A. — Uniform Transfers to Minors Act (U.L.A.) § 21.

44-5-132. Applicability to transfers made prior to July 1, 1990.

(a) Any transfer of custodial property as now defined in this article made before July 1, 1990, is validated notwithstanding that there was no specific authority in former Article 5 of this chapter, known as ''The Georgia Gifts to Minors Act,'' for the coverage of custodial property of that kind or for a transfer from that source at the time the transfer was made.

(b) This article applies to all transfers made before July 1, 1990, in a manner and form prescribed in former Article 5 of this chapter, known as ''The Georgia Gifts to Minors Act,'' except insofar as the application impairs constitutionally vested rights or extends the duration of custodianships in existence on July 1, 1990. (Code 1981, § 44-5-132, enacted by Ga. L. 1990, p. 667, § 1.)

RESEARCH REFERENCES

U.L.A. — Uniform Transfers to Minors Act (U.L.A.) § 22.

44-5-133. Uniform applicability of article.

This article shall be applied and construed to effectuate its general purpose to make uniform the law with respect to the subject of this article

among states enacting it. (Code 1981, § 44-5-133, enacted by Ga. L. 1990, p. 667, § 1.)

RESEARCH REFERENCES

U.L.A. — Uniform Transfers Minors Act (U.L.A.) § 23.

44-5-134. Exceptions to article.

The former Article 5 of this chapter, known as ''The Georgia Gifts to Minors Act,'' is repealed. To the extent that this new article, by virtue of subsection (b) of Code Section 44-5-132, does not apply to transfers made in a manner prescribed in ''The Georgia Gifts to Minors Act'' or to the powers, duties, and immunities conferred by transfers in that manner upon custodians and persons dealing with custodians, the repeal of ''The Georgia Gifts to Minors Act'' does not affect those transfers or those powers, duties, and immunities. (Code 1981, § 44-5-134, enacted by Ga. L. 1990, p. 667, § 1.)

RESEARCH REFERENCES

U.L.A. — Uniform Transfers to Minors Act (U.L.A.) § 27.

ARTICLE 6

REVISED UNIFORM ANATOMICAL GIFTS

Cross references. — Human body trafficking, Art. 6, Ch. 12, T. 16. Dead bodies, Ch. 21, T. 31. Eye banks, Ch. 23, T. 31. Advanced directives for health care, Ch. 32, T. 31. Forms for making anatomical gifts upon issuance of driver's license, § 40-5-6.

Editor's notes. — Ga. L. 2008, p. 503, § 1, effective July 1, 2008, repealed the Code sections formerly codified at this article and enacted the current article. The former article consisted of Code Sections 44-5-140 through 44-5-151, relating to anatomical gifts, and was based on Ga. L. 1969, p. 59, § 9 and Ga. L. 1984, p. 1036, § 1; Ga. L. 1986, p. 645, § 1, 2; Ga. L. 1987, p. 1101, §§ 1-3; Ga. L. 1992, p. 2946, § 2; Ga. L. 2002, p. 415, § 44; Ga. L. 2007, p. 133, § 17/HB 24.

44-5-140. Short title.

This article shall be known and may be cited as the ''Georgia Revised Uniform Anatomical Gift Act.'' (Code 1981, § 44-5-140, enacted by Ga. L. 2008, p. 503, § 1/SB 405.)

Administrative rules and regulations. — Anatomical Gifts, Official Compilation of the Rules and Regulations of the State of Georgia, Department of Human Resources, Public Health, Chapter 290-5-50.

Law reviews. — For survey article on wills, trusts, guardianships, and fiduciary administration, see 60 Mercer L. Rev. 417 (2008).

44-5-141. Definitions.

As used in this article, the term:

(1) ''Adult'' means an individual who is at least 18 years of age.

(2) ''Agent'' means an individual:

(A) Authorized to make health care decisions on the principal's behalf by an advance directive for health care or a durable power of attorney for health care; or

(B) Expressly authorized to make an anatomical gift on the principal's behalf by any other record signed by the principal.

(3) ''Anatomical gift'' means a donation of all or part of a human body to take effect after the donor's death for the purpose of transplantation, therapy, research, or education.

(4) ''Decedent'' means a deceased individual whose body or part is or may be the source of an anatomical gift. The term includes a stillborn infant and a fetus.

(5) ''Disinterested witness'' means a witness other than the spouse, child, parent, sibling, grandchild, grandparent, or guardian of the individual who makes, amends, revokes, or refuses to make an anatomical gift. The term does not include a person to which an anatomical gift could pass under Code Section 44-5-149.

(6) ''Document of gift'' means a donor card or other record used to make an anatomical gift. The term includes a statement or symbol on a driver's license, identification card, or donor registry.

(7) ''Donor'' means an individual whose body or part is the subject of an anatomical gift.

(8) ''Donor registry'' means a data base that contains records of anatomical gifts and amendments to or revocations of anatomical gifts.

(9) ''Driver's license'' means a license or permit issued by the Department of Driver Services to operate a vehicle, whether or not conditions are attached to the license or permit.

(10) ''Eye bank'' means a person that is licensed, accredited, or regulated under federal or state law to engage in the recovery, screening, testing, processing, storage, or distribution of human eyes or portions of human eyes.

(11) ''Guardian'' means a person appointed by a court to make decisions regarding the support, care, education, health, or welfare of an individual. The term does not include a guardian ad litem.

(12) ''Hospital'' means a facility licensed as a hospital under the law of any state or a facility operated as a hospital by the United States, a state, or a subdivision of a state.

(13) ''Identification card'' means an identification card for persons without drivers' licenses issued pursuant to Code Sections 40-5-100 through 40-5-104 by the Department of Driver Services.

(14) ''Know'' means to have actual knowledge.

(15) ''Minor'' means an individual who is under 18 years of age.

(16) ''Organ procurement organization'' means a person designated by the Secretary of the United States Department of Health and Human Services as an organ procurement organization.

(17) ''Parent'' means a parent whose parental rights have not been terminated.

(18) ''Part'' means an organ, an eye, or tissue of a human being. The term does not include the whole body.

(19) ''Person'' means an individual, corporation, business trust, estate, trust, partnership, limited liability company, association, joint venture, public corporation, government or governmental subdivision, agency, or instrumentality, or any other legal or commercial entity.

(20) ''Physician'' means an individual authorized to practice medicine or osteopathy under the law of any state.

(21) ''Procurement organization'' means an eye bank, organ procurement organization, or tissue bank.

(22) ''Prospective donor'' means an individual who is dead or near death and has been determined by a procurement organization to have a part that could be medically suitable for transplantation, therapy, research, or education. The term does not include an individual who has made a refusal.

(23) ''Reasonably available'' means able to be contacted by a procurement organization without undue effort and willing and able to act in a timely manner consistent with existing medical criteria necessary for the making of an anatomical gift.

(24) ''Recipient'' means an individual into whose body a decedent's part has been or is intended to be transplanted.

(25) ''Record'' means information that is inscribed on a tangible medium or that is stored in an electronic or other medium and is retrievable in perceivable form.

(26) ''Refusal'' means a record created under Code Section 44-5-145 that expressly states an intent to bar other persons from making an anatomical gift of an individual's body or part.

(27) ''Sign'' means, with the present intent to authenticate or adopt a record:

(A) To execute or adopt a tangible symbol; or

(B) To attach to or logically associate with the record an electronic symbol, sound, or process.

(28) ''State'' means a state of the United States, the District of Columbia, Puerto Rico, the United States Virgin Islands, or any territory or insular possession subject to the jurisdiction of the United States.

(29) ''Technician'' means an individual determined to be qualified to remove or process parts by an appropriate organization that is licensed, accredited, or regulated under federal or state law. The term includes an individual who is authorized to remove eyes, known as an enucleator.

(30) ''Tissue'' means a portion of the human body other than an organ or an eye. The term does not include blood unless the blood is donated for the purpose of research or education.

(31) ''Tissue bank'' means a person that is licensed, accredited, or regulated under federal or state law to engage in the recovery, screening, testing, processing, storage, or distribution of tissue.

(32) ''Transplant hospital'' means a hospital that furnishes organ transplants and other medical and surgical specialty services required for the care of transplant patients. (Code 1981, § 44-5-141, enacted by Ga. L. 2008, p. 503, § 1/SB 405.)

44-5-142. Anatomical gifts during life of donor.

Subject to Code Section 44-5-146, an anatomical gift of a donor's body or part may be made during the life of the donor for the purpose of transplantation, therapy, research, or education in the manner provided in Code Section 44-5-143 by:

(1) The donor, if the donor is an adult or if the donor is a minor and is:

(A) Emancipated; or

(B) Authorized under state law to apply for a driver's license because the donor is at least 16 years of age;

(2) An agent of the donor, unless the advance directive for health care or durable power of attorney for health care prohibits the agent from making an anatomical gift;

(3) A parent of the donor, if the donor is an unemancipated minor; or

(4) The donor's guardian. (Code 1981, § 44-5-142, enacted by Ga. L. 2008, p. 503, § 1/SB 405.)

44-5-143. Method to make an anatomical gift.

(a) A donor may make an anatomical gift:

(1) By authorizing a statement or symbol indicating that the donor has made an anatomical gift to be imprinted on the donor's driver's license or identification card;

(2) In a will;

(3) During a terminal illness or injury of the donor, by any form of communication addressed to at least two adults, at least one of whom is a disinterested witness;

(4) By granting power pursuant to a durable power of attorney for health care or advance directive for health care under Chapter 32 of Title 31; or

(5) As provided in subsection (b) of this Code section.

(b) A donor or other person authorized to make an anatomical gift under Code Section 44-5-142 may make a gift by a donor card or other record signed by the donor or other person making the gift or by authorizing that a statement or symbol indicating that the donor has made an anatomical gift be included on a donor registry. If the donor or other person is physically unable to sign a record, the record may be signed by another individual at the direction of the donor or other person and shall:

(1) Be witnessed by at least two adults, at least one of whom is a disinterested witness, who have signed at the request of the donor or the other person; and

(2) State that it has been signed and witnessed as provided in paragraph (1) of this subsection.

(c) Revocation, suspension, expiration, or cancellation of a driver's license or identification card upon which an anatomical gift is indicated does not invalidate the gift.

(d) An anatomical gift made by will takes effect upon the donor's death whether or not the will is probated. Invalidation of the will after the donor's death does not invalidate the gift. (Code 1981, § 44-5-143, enacted by Ga. L. 2008, p. 503, § 1/SB 405.)

Cross references. — Forms for making of anatomical gifts upon issuance or renewal of driver's license, § 40-5-6. Wills generally, Ch. 2, T. 53.

Code Commission notes. — Pursuant to Code Section 28-9-5, in 2008, in paragraph (a)(3), ''or'' was deleted from the end, and in paragraph (a)(4), ''; or'' was substituted for a period at the end.

RESEARCH REFERENCES

ALR. — Validity and effect of testamentary direction as to disposition of testator's body, 7 ALR3d 747.

Tort liability of physician or hospital in connection with organ or tissue transplant procedures, 76 ALR3d 890.

44-5-144. Amending, or revoking an anatomical gift.

(a) Subject to Code Section 44-5-146, a donor or other person authorized to make an anatomical gift under Code Section 44-5-142 may amend or revoke an anatomical gift by:

(1) A record signed by:

(A) The donor;

(B) The other person; or

(C) Subject to subsection (b) of this Code section, another individual acting at the direction of the donor or the other person if the donor or other person is physically unable to sign; or

(2) A later-executed document of gift that amends or revokes a previous anatomical gift or portion of an anatomical gift, either expressly or by inconsistency.

(b) A record signed pursuant to subparagraph (a)(1)(C) of this Code section shall:

(1) Be witnessed by at least two adults, at least one of whom is a disinterested witness, who have signed at the request of the donor or the other person; and

(2) State that it has been signed and witnessed as provided in paragraph (1) of this subsection.

(c) Subject to Code Section 44-5-146, a donor or other person authorized to make an anatomical gift under Code Section 44-5-142 may revoke an anatomical gift by the destruction or cancellation of the document of gift, or the portion of the document of gift used to make the gift, with the intent to revoke the gift.

(d) A donor may amend or revoke an anatomical gift that was not made in a will by any form of communication during a terminal illness or injury addressed to at least two adults, at least one of whom is a disinterested witness.

(e) A donor who makes an anatomical gift in a will may amend or revoke the gift in the manner provided for amendment or revocation of wills under Chapter 4 of Title 53 or as provided in subsection (a) of this Code section. (Code 1981, § 44-5-144, enacted by Ga. L. 2008, p. 503, § 1/SB 405.)

44-5-145. Refusal to make an anatomical gift.

(a) An individual may refuse to make an anatomical gift of the individual's body or part by:

(1) A record signed by:

(A) The individual; or

(B) Subject to subsection (b) of this Code section, another individual acting at the direction of the individual if the individual is physically unable to sign;

(2) The individual's will, whether or not the will is admitted to probate or invalidated after the individual's death; or

(3) Any form of communication made by the individual during the individual's terminal illness or injury addressed to at least two adults, at least one of whom is a disinterested witness.

(b) A record signed pursuant to subparagraph (a)(1)(B) of this Code section shall:

(1) Be witnessed by at least two adults, at least one of whom is a disinterested witness, who have signed at the request of the individual; and

(2) State that it has been signed and witnessed as provided in paragraph (1) of this subsection.

(c) An individual who has made a refusal may amend or revoke the refusal:

(1) In the manner provided in subsection (a) of this Code section for making a refusal;

(2) By subsequently making an anatomical gift pursuant to Code Section 44-5-143 that is inconsistent with the refusal; or

(3) By destroying or canceling the record evidencing the refusal, or the portion of the record used to make the refusal, with the intent to revoke the refusal.

(d) Except as otherwise provided in subsection (h) of Code Section 44-5-146, in the absence of an express, contrary indication by the individual set forth in the refusal, an individual's unrevoked refusal to make an anatomical gift of the individual's body or part bars all other persons from making an anatomical gift of the individual's body or part. (Code 1981, § 44-5-145, enacted by Ga. L. 2008, p. 503, § 1/SB 405.)

44-5-146. Role and authority of people other than donor.

(a) Except as otherwise provided in subsection (g) of this Code section and subject to subsection (f) of this Code section, in the absence of an

express, contrary indication by the donor, a person other than the donor is barred from making, amending, or revoking an anatomical gift of a donor's body or part if the donor made an anatomical gift of the donor's body or part under Code Section 44-5-143 or an amendment to an anatomical gift of the donor's body or part under Code Section 44-5-144.

(b) A donor's revocation of an anatomical gift of the donor's body or part under Code Section 44-5-144 is not a refusal and does not bar another person specified in Code Sections 44-5-142 and 44-5-147 from making an anatomical gift of the donor's body or part under Code Section 44-5-143 or 44-5-148.

(c) If a person other than the donor makes an unrevoked anatomical gift of the donor's body or part under Code Section 44-5-143 or an amendment to an anatomical gift of the donor's body or part under Code Section 44-5-144, another person may not make, amend, or revoke the gift of the donor's body or part under Code Section 44-5-148.

(d) A revocation of an anatomical gift of a donor's body or part under Code Section 44-5-144 by a person other than the donor does not bar another person from making an anatomical gift of the body or part under Code Section 44-5-143 or 44-5-148.

(e) In the absence of an express, contrary indication by the donor or other person authorized to make an anatomical gift under Code Section 44-5-142, an anatomical gift of a part is neither a refusal to give another part nor a limitation on the making of an anatomical gift of another part at a later time by the donor or another person.

(f) In the absence of an express, contrary indication by the donor or other person authorized to make an anatomical gift under Code Section 44-5-142, an anatomical gift of a part for one or more of the purposes set forth in Code Section 44-5-142 is not a limitation on the making of an anatomical gift of the part for any of the other purposes by the donor or any other person under Code Section 44-5-143 or 44-5-148.

(g) If a donor who is an unemancipated minor dies, a parent of the donor who is reasonably available may revoke or amend an anatomical gift of the donor's body or part.

(h) If an unemancipated minor who signed a refusal dies, a parent of the minor who is reasonably available may revoke the minor's refusal. (Code 1981, § 44-5-146, enacted by Ga. L. 2008, p. 503, § 1/SB 405.)

44-5-147. Classes of persons available to make donations; priority.

(a) Subject to subsections (b) and (c) of this Code section and unless barred by Code Section 44-5-145 or 44-5-146, an anatomical gift of a decedent's body or part for the purpose of transplantation, therapy,

research, or education may be made by any member of the following classes of persons who is reasonably available, in the order of priority listed:

(1) An agent of the decedent at the time of death who could have made an anatomical gift under paragraph (2) of Code Section 44-5-142 immediately before the decedent's death;

(2) The spouse of the decedent;

(3) Adult children of the decedent;

(4) Parents of the decedent;

(5) Adult siblings of the decedent;

(6) Adult grandchildren of the decedent;

(7) Grandparents of the decedent;

(8) The persons who were acting as the guardians of the person of the decedent at the time of death;

(9) Any other person having the authority to dispose of the decedent's body; and

(10) A representative ad litem who shall be appointed by a court of competent jurisdiction forthwith upon a petition heard ex parte filed by any person, which representative ad litem shall ascertain that no person of higher priority exists and is reasonably available who objects to the gift of all or any part of the decedent's body and that no evidence exists of the decedent's having made a communication expressing a desire that his or her body or body parts not be donated upon death.

(b) If there is more than one member of a class listed in paragraph (1), (3), (4), (5), (6), (7), or (8) of subsection (a) of this Code section entitled to make an anatomical gift, an anatomical gift may be made by a member of the class only if the person to which the gift may pass under Code Section 44-5-149 in good faith obtains a representation from the member that the member does not know of an objection by another member of the class. If an objection is known, the gift may be made only by a majority of the members of the class who are reasonably available.

(c) A person may not make an anatomical gift if, at the time of the decedent's death, a person in a prior class under subsection (a) of this Code section is reasonably available to make or to object to the making of an anatomical gift. (Code 1981, § 44-5-147, enacted by Ga. L. 2008, p. 503, § 1/SB 405.)

44-5-148. Signed writing or oral communication required for gift of document.

(a) A person authorized to make an anatomical gift under Code Section 44-5-147 may make an anatomical gift by a document of gift signed by the

person making the gift or by that person's oral communication that is electronically recorded or is contemporaneously reduced to a record and signed by the individual receiving the oral communication.

(b) Subject to subsection (c) of this Code section, an anatomical gift by a person authorized under Code Section 44-5-147 may be amended or revoked orally or in a record by any member of a prior class who is reasonably available. If more than one member of the prior class is reasonably available, the gift made by a person authorized under Code Section 44-5-147 may be:

(1) Amended only if a majority of the reasonably available members agree to the amending of the gift; or

(2) Revoked only if a majority of the reasonably available members agree to the revoking of the gift or if they are equally divided as to whether to revoke the gift.

(c) A revocation under subsection (b) of this Code section is effective only if, before an incision has been made to remove a part from the donor's body or before invasive procedures have begun to prepare the recipient, the procurement organization, transplant hospital, or physician or technician knows of the revocation. (Code 1981, § 44-5-148, enacted by Ga. L. 2008, p. 503, § 1/SB 405.)

44-5-149. Recipients of anatomical gifts of procurement organizations.

(a) An anatomical gift may be made to the following persons named in the document of gift:

(1) A hospital; accredited medical school, dental school, college, or university; organ procurement organization; or other appropriate person, for research or education;

(2) Subject to subsection (b) of this Code section, an individual designated by the person making the anatomical gift if the individual is the recipient of the part; or

(3) An eye bank or tissue bank.

(b) If an anatomical gift to an individual under paragraph (2) of subsection (a) of this Code section cannot be transplanted into the individual, the part passes in accordance with subsection (g) of this Code section in the absence of an express, contrary indication by the person making the anatomical gift.

(c) If an anatomical gift of one or more specific parts or of all parts is made in a document of gift that does not name a person described in subsection (a) of this Code section but identifies the purpose for which an anatomical gift may be used, the following rules apply:

(1) If the part is an eye and the gift is for the purpose of transplantation or therapy, the gift passes to the appropriate eye bank;

(2) If the part is tissue and the gift is for the purpose of transplantation or therapy, the gift passes to the appropriate tissue bank;

(3) If the part is an organ and the gift is for the purpose of transplantation or therapy, the gift passes to the appropriate organ procurement organization as custodian of the organ; and

(4) If the part is an organ, an eye, or tissue and the gift is for the purpose of research or education, the gift passes to the appropriate procurement organization.

(d) For the purpose of subsection (c) of this Code section, if there is more than one purpose of an anatomical gift set forth in the document of gift but the purposes are not set forth in any priority, the gift shall be used for transplantation or therapy, if suitable. If the gift cannot be used for transplantation or therapy, the gift may be used for research or education.

(e) If an anatomical gift of one or more specific parts is made in a document of gift that does not name a person described in subsection (a) of this Code section and does not identify the purpose of the gift, the gift may be used only for transplantation or therapy, and the gift passes in accordance with subsection (g) of this Code section.

(f) If a document of gift specifies only a general intent to make an anatomical gift by words such as ''donor,'' ''organ donor,'' or ''body donor,'' or by a symbol or statement of similar import, the gift may be used only for transplantation or therapy, and the gift passes in accordance with subsection (g) of this Code section.

(g) For purposes of subsections (b), (e), and (f) of this Code section, the following rules apply:

(1) If the part is an eye, the gift passes to the appropriate eye bank;

(2) If the part is tissue, the gift passes to the appropriate tissue bank; and

(3) If the part is an organ, the gift passes to the appropriate organ procurement organization as custodian of the organ.

(h) An anatomical gift of an organ for transplantation or therapy, other than an anatomical gift under paragraph (2) of subsection (a) of this Code section, passes to the organ procurement organization as custodian of the organ.

(i) If an anatomical gift does not pass pursuant to subsections (a) through (h) of this Code section or the decedent's body or part is not used for transplantation, therapy, research, or education, custody of the body or part passes to the person under obligation to dispose of the body or part.

(j) A person may not accept an anatomical gift if the person knows that the gift was not effectively made under Code Sections 44-5-143 and 44-5-148 or if the person knows that the decedent made a refusal under Code Section 44-5-145 that was not revoked. For purposes of this subsection, if a person knows that an anatomical gift was made on a document of gift, the person is deemed to know of any amendment or revocation of the gift or any refusal to make an anatomical gift on the same document of gift.

(k) Except as otherwise provided in paragraph (2) of subsection (a) of this Code section, nothing in this article affects the allocation of organs for transplantation or therapy. (Code 1981, § 44-5-149, enacted by Ga. L. 2008, p. 503, § 1/SB 405.)

Cross references. — Facilities for receipt and storage of human eyes, Ch. 23, T. 31.

RESEARCH REFERENCES

ALR. — Tort liability of physician or hospital in connection with organ or tissue transplant procedures, 76 ALR3d 890.

Physician's use of patient's tissue, cells, or bodily substances for medical research or economic purposes, 16 ALR5th 143.

44-5-150. Search and notification for information identifying donor status.

(a) The following persons shall make a reasonable search of an individual who the person reasonably believes is dead or near death for a document of gift or other information identifying the individual as a donor or as an individual who made a refusal:

(1) A law enforcement officer, firefighter, paramedic, emergency medical technician, or other first responder finding the individual, in accordance with subsection (b.1) of Code Section 17-6-11; and

(2) If no other source of the information is immediately available, a hospital, as soon as practical after the individual's arrival at the hospital.

(b) If a document of gift or a refusal to make an anatomical gift is located by the search required by subsection (a) of this Code section and the individual or deceased individual to whom it relates is taken to a hospital, the person responsible for conducting the search shall send the document of gift or refusal to the hospital.

(c) A person is not subject to criminal or civil liability for failing to discharge the duties imposed by this Code section but may be subject to administrative sanctions. (Code 1981, § 44-5-150, enacted by Ga. L. 2008, p. 503, § 1/SB 405.)

44-5-151. Delivery of document.

(a) A document of gift need not be delivered during the donor's lifetime to be effective.

(b) Upon or after an individual's death, a person in possession of a document of gift or a refusal to make an anatomical gift with respect to the individual shall allow examination and copying of the document of gift or refusal by a person authorized to make or object to the making of an anatomical gift with respect to the individual or by a person to which the gift could pass under Code Section 44-5-149. (Code 1981, § 44-5-151, enacted by Ga. L. 2008, p. 503, § 1/SB 405.)

44-5-152. Rights and duties of procurement organizations.

(a) When a hospital refers an individual at or near death to a procurement organization, the organization shall make a reasonable search of the records of any donor registry that it knows exists for the geographical area in which the individual resides to ascertain whether the individual has made an anatomical gift.

(b) The Department of Driver Services shall make donor information reasonably available to a procurement organization.

(c) When a hospital refers an individual at or near death to a procurement organization, the organization may conduct any reasonable examination necessary to ensure the medical suitability of a part that is or could be the subject of an anatomical gift for transplantation, therapy, research, or education from a donor or a prospective donor. During the examination period, measures necessary to ensure the medical suitability of the part may not be withdrawn unless the hospital or procurement organization knows that the individual expressed a contrary intent.

(d) Unless prohibited by law other than this article, at any time after a donor's death, the person to which a part passes under Code Section 44-5-149 may conduct any reasonable examination necessary to ensure the medical suitability of the body or part for its intended purpose.

(e) Unless prohibited by law other than this article, an examination under subsection (c) or (d) of this Code section may include an examination of all medical and dental records of the donor or prospective donor.

(f) Unless a procurement organization knows the minor is emancipated, the procurement organization shall conduct a reasonable search for the parents of the minor and provide the parents with an opportunity to revoke or amend the anatomical gift or revoke the refusal, if any.

(g) Upon referral by a hospital under subsection (a) of this Code section, a procurement organization shall make a reasonable search for any person listed in Code Section 44-5-147 having priority to make an anatomical gift on behalf of a prospective donor. If a procurement organization receives information that an anatomical gift to any other person was made, amended, or revoked, it shall promptly advise the other person of all relevant information.

(h) Subject to subsection (i) of Code Section 44-5-149 and Code Section 44-5-151, the rights of the person to which a part passes under Code Section 44-5-149 are superior to the rights of all others with respect to the part. The person may accept or reject an anatomical gift in whole or in part. Subject to the terms of the document of gift and this article, a person that accepts an anatomical gift of an entire body may allow embalming, burial, or cremation and use of remains in a funeral service. If the gift is of a part, the person to which the part passes under Code Section 44-5-149, upon the death of the donor and before embalming, burial, or cremation, shall cause the part to be removed without unnecessary mutilation.

(i) Neither the physician who attends the decedent at death nor the physician who determines the time of the decedent's death may participate in the procedures for removing or transplanting a part from the decedent.

(j) A physician or technician may remove a donated part from the body of a donor that the physician or technician is qualified to remove. (Code 1981, § 44-5-152, enacted by Ga. L. 2008, p. 503, § 1/SB 405.)

Cross references. — Facilities for receipt and storage of human eyes, Ch. 23, T. 31.

44-5-153. Coordination of procurement and use.

Each hospital in this state shall enter into agreements or affiliations with procurement organizations for coordination of procurement and use of anatomical gifts. (Code 1981, § 44-5-153, enacted by Ga. L. 2008, p. 503, § 1/SB 405.)

44-5-154. Limited prohibition on sale or purchase of body parts.

(a) Except as otherwise provided in subsection (b) of this Code section, a person that for valuable consideration knowingly purchases or sells a part for transplantation or therapy if removal of a part from an individual is intended to occur after the individual's death commits a felony and upon conviction is subject to a fine not exceeding $50,000.00 or imprisonment not exceeding five years, or both.

(b) A person may charge a reasonable amount for the removal, processing, preservation, quality control, storage, transportation, implantation, or disposal of a part. (Code 1981, § 44-5-154, enacted by Ga. L. 2008, p. 503, § 1/SB 405.)

Cross references. — Buying or selling or offering to buy or sell the human body or parts, § 16-12-160. Sale by contract or will of implanted pacemaker, § 53-1-4.

44-5-155. Penalties.

A person that, in order to obtain a financial gain, intentionally falsifies, forges, conceals, defaces, or obliterates a document of gift, an amendment or revocation of a document of gift, or a refusal commits a felony and upon conviction is subject to a fine not exceeding $50,000.00 or imprisonment not exceeding five years, or both. (Code 1981, § 44-5-155, enacted by Ga. L. 2008, p. 503, § 1/SB 405.)

44-5-156. Immunity.

(a) A person that acts in accordance with this article or with the applicable anatomical gift law of another state, or attempts in good faith to do so, is not liable for the act in a civil action, criminal prosecution, or administrative proceeding.

(b) Neither the person making an anatomical gift nor the donor's estate is liable for any injury or damage that results from the making or use of the gift.

(c) In determining whether an anatomical gift has been made, amended, or revoked under this article, a person may rely upon representations of an individual listed in paragraph (2), (3), (4), (5), (6), or (7) of subsection (a) of Code Section 44-5-147 relating to the individual's relationship to the donor or prospective donor unless the person knows that the representation is untrue. (Code 1981, § 44-5-156, enacted by Ga. L. 2008, p. 503, § 1/SB 405.)

44-5-157. Requirements for validity of document of gift; governing law.

(a) A document of gift is valid if executed in accordance with:

(1) This article;

(2) The laws of the state or country where it was executed; or

(3) The laws of the state or country where the person making the anatomical gift was domiciled, has a place of residence, or was a national at the time the document of gift was executed.

(b) If a document of gift is valid under this Code section, the law of this state governs the interpretation of the document of gift.

(c) A person may presume that a document of gift or amendment of an anatomical gift is valid unless that person knows that it was not validly executed or was revoked. (Code 1981, § 44-5-157, enacted by Ga. L. 2008, p. 503, § 1/SB 405.)

44-5-158. Donor registry.

(a) The Department of Driver Services shall make available to procurement organizations or secure data centers maintained and managed at the

direction of a procurement organization the name, license number, date of birth, gender, and most recent address of any person who obtains an organ donor's license; provided, however, that the gender information shall only be made available to a procurement organization or secure data center if such organization or center has sufficient funds to cover the associated costs with providing such information. Information so obtained by such organizations shall be used for the purpose of establishing a state-wide organ donor registry accessible to organ tissue and eye banks authorized to function as such in this state and shall not be further disseminated.

(b) A donor registry shall:

(1) Allow a donor or other person authorized under Code Section 44-5-142 to include on the donor registry a statement or symbol that the donor has made, amended, or revoked an anatomical gift;

(2) Be accessible to a procurement organization to allow it to obtain relevant information on the donor registry to determine, at or near death of the donor or a prospective donor, whether the donor or prospective donor has made, amended, or revoked an anatomical gift; and

(3) Be accessible for purposes of paragraphs (1) and (2) of this subsection seven days a week on a 24 hour basis.

(c) Personally identifiable information on a donor registry about a donor or prospective donor may not be used or disclosed without the express consent of the donor, prospective donor, or person that made the anatomical gift for any purpose other than to determine, at or near death of the donor or prospective donor, whether the donor or prospective donor has made, amended, or revoked an anatomical gift; provided, however, this shall not preclude the use of aggregated demographic information for the purposes of annual reporting, research, or education.

(d) This Code section does not prohibit any person from creating or maintaining a donor registry that is not established by or under contract with this state. Any such registry shall comply with subsections (b) and (c) of this Code section. (Code 1981, § 44-5-158, enacted by Ga. L. 2008, p. 503, § 1/SB 405.)

Cross references. — Forms for making of anatomical gifts upon issuance or renewal of driver's license, § 40-5-6.

44-5-159. Impact of anatomical gift on an advance directive for health care.

If a prospective donor has an advance directive for health care in accordance with Chapter 32 of Title 31 or a declaration signed by a prospective donor, unless it expressly provides to the contrary, measures necessary to ensure the medical suitability of an organ for transplantation

or therapy may not be withheld or withdrawn from the prospective donor. (Code 1981, § 44-5-159, enacted by Ga. L. 2008, p. 503, § 1/SB 405.)

44-5-159.1. Cooperation between medical examiners and procurement organizations.

(a) A medical examiner and procurement organizations shall cooperate with each other to maximize the opportunity to recover anatomical gifts for the purpose of transplantation, therapy, research, or education.

(b) If a medical examiner receives notice from a procurement organization that an anatomical gift might be available or was made with respect to a decedent whose body is under the jurisdiction of the medical examiner and a postmortem examination is going to be performed, unless the medical examiner denies recovery in accordance with Code Section 44-5-159.2, the medical examiner or designee shall conduct, when practicable, a postmortem examination of the body or the part in a manner and within a period compatible with its preservation for the purposes of the gift. The date and location of such examinations shall occur as specified in the agreement as provided for in subsection (e) of Code Section 44-5-159.2.

(c) A part may not be removed from the body of a decedent under the jurisdiction of a medical examiner for transplantation, therapy, research, or education unless the part is the subject of an anatomical gift. The body of a decedent under the jurisdiction of the medical examiner may not be delivered to a person for research or education unless the body is the subject of an anatomical gift. This subsection shall not preclude a medical examiner from performing the medicolegal autopsy upon the body or parts of a decedent under the jurisdiction of the medical examiner or from using the body or parts of a decedent under the jurisdiction of the medical examiner for the purposes of education, training, and research required by the medical examiner. (Code 1981, § 44-5-159.1, enacted by Ga. L. 2008, p. 503, § 1/SB 405.)

RESEARCH REFERENCES

ALR. — Tests of death for organ transplant purposes, 76 ALR3d 913.

Liability for wrongful autopsy, 18 ALR4th 858.

44-5-159.2. Role of medical examiner.

(a) Upon specific request of a procurement organization, and in accordance with the procedures set forth under the agreement established pursuant to subsection (e) of this Code section, a medical examiner shall release to the procurement organization the name, contact information, and available medical and social history of a decedent whose body is under the jurisdiction of the medical examiner. If the decedent's body or part is medically suitable for transplantation, therapy, research, or education, and

the gift or procurement does occur, the medical examiner shall release postmortem examination results to the procurement organization. The procurement organization may make a subsequent disclosure of the postmortem examination results or other information received from the medical examiner only if relevant to transplantation, therapy, research, or education.

(b) The medical examiner may conduct a medicolegal investigation by reviewing all medical records, laboratory test results, x-rays, other diagnostic results, and other information that any person possesses about a donor or prospective donor whose body is under the jurisdiction of the medical examiner that the medical examiner determines may be relevant to the investigation.

(c) A person that has any information requested by a medical examiner pursuant to subsection (b) of this Code section shall provide that information as expeditiously as possible to allow the medical examiner to conduct the medicolegal investigation within a period compatible with the preservation of parts for the purpose of transplantation, therapy, research, or education.

(d) If an anatomical gift has been or might be made of a part of a decedent whose body is under the jurisdiction of the medical examiner and a postmortem examination is not required, or the medical examiner determines that a postmortem examination is required but that the recovery of the part that is the subject of an anatomical gift will not interfere with the examination, the medical examiner and procurement organization shall cooperate in the timely removal of the part from the decedent for the purpose of transplantation, therapy, research, or education.

(e) The medical examiner and procurement organizations shall enter into an agreement signed by both parties setting forth protocols and procedures to govern relations between the parties when an anatomical gift of a part from a decedent under the jurisdiction of the medical examiner has been or might be made, but the medical examiner believes that the recovery of the part could interfere with the postmortem investigation into the decedent's cause or manner of death. Decisions regarding the recovery of organs, tissue, and eyes from such a decedent, and decisions about approaches to tissue donation cases compared with organ donation cases, shall be made in accordance with the agreement. In the event that a medical examiner denies recovery of an anatomical gift, the procurement organization may request the regional medical examiner serving the county having jurisdiction over the death to reconsider the denial and to permit the recovery to proceed; provided, however, that if a county having jurisdiction over the death does not have a county medical examiner as defined in paragraph (2) of Code Section 45-16-21, and a recovery is denied as provided herein, the procurement organization may request the chief medical examiner appointed pursuant to Code Section 35-3-153 to recon-

sider the denial and to permit the recovery to proceed. The parties shall evaluate the effectiveness of the protocols and procedures at regular intervals but no less frequently than every two years. A medical examiner may limit its involvement and agreements with procurement organizations to one procurement organization, but may work with more than one procurement organization in the discretion of the medical examiner.

(f) If the medical examiner or designee allows recovery of a part under subsection (d) or (e) of this Code section, the procurement organization, upon request, shall cause the physician or technician who removes the part to provide the medical examiner with a record describing the condition of the part, a biopsy, a photograph, and any other information and observations that would assist in the postmortem examination.

(g) If a medical examiner or designee is required to be present at a removal procedure pursuant to an agreement entered into under subsection (e) of this Code section, upon request the procurement organization requesting the recovery of the part shall reimburse the medical examiner or designee for the additional costs incurred in complying with subsection (e) of this Code section. (Code 1981, § 44-5-159.2, enacted by Ga. L. 2008, p. 503, § 1/SB 405.)

RESEARCH REFERENCES

ALR. — Tests of death for organ transplant purposes, 76 ALR3d 913. Liability for wrongful autopsy, 18 ALR4th 858.

44-5-159.3. Application.

This article applies to an anatomical gift or amendment to, revocation of, or refusal to make an anatomical gift, whenever made. (Code 1981, § 44-5-159.3, enacted by Ga. L. 2008, p. 503, § 1/SB 405.)

44-5-159.4. Construction with federal law.

This article modifies, limits, and supersedes the Electronic Signatures in Global and National Commerce Act, 15 U.S.C. Section 7001 et seq., but does not modify, limit or supersede Section 101(a) of that act, 15 U.S.C. Section 7001, or authorize electronic delivery of any of the notices described in Section 103(b) of that act, 15 U.S.C. Section 7003(b). (Code 1981, § 44-5-159.4, enacted by Ga. L. 2008, p. 503, § 1/SB 405.)

ARTICLE 7

PRESCRIPTION

Law reviews. — For article surveying Georgia cases in the area of real property from June 1977 through May 1978, see 30 Mercer L. Rev. 167 (1978).

For note, ''Adverse Possession of Municipal and County Property Held for Proprietary Purposes: The Unique Georgia Development,'' see 7 Ga. St. B.J. 482 (1971).

JUDICIAL DECISIONS

Possession of land remaining with grantor and never surrendered is deemed held under grantee. Such possession is construed as consistent with the grantor's recorded deed, and is not notice to an innocent purchaser from the grantee of any mistake in the deed whereby a larger tract was inadvertently conveyed than the parties to the deed intended. Under these circumstances such possession, although remaining with the grantor and never surrendered, is not deemed adverse to the title of the grantor's grantee, and a prescriptive title in favor of the grantor can never ripen under such possession. Stepp v. Stepp, 195 Ga. 595, 25 S.E.2d 6 (1943).

Cited in Carnes v. Pittman, 209 Ga. 639, 74 S.E.2d 852 (1953); Lightfoot v. Applewhite, 212 Ga. 136, 91 S.E.2d 37 (1956); Mann v. Carter, 213 Ga. 85, 97 S.E.2d 137 (1957).

RESEARCH REFERENCES

ALR. — Loss of easement by adverse possession, or nonuser, 1 ALR 884; 66 ALR 1099; 98 ALR 1291; 25 ALR2d 1265.

Adverse possession as against vendor by one who enters under executory contract, 1 ALR 1329.

Adverse possession of common, 9 ALR 1373.

Necessity of actual possession to give title by adverse possession under invalid tax title, 22 ALR 550.

Act of trespasser as interrupting adverse possession, 22 ALR 1458.

Holder of invalid tax title as within occupying claimant's act, 44 ALR 479.

Adverse possession of railroad right of way, 50 ALR 303.

Adverse possession or prescription as affected by owner's informal consent subsequent to hostile entry, 65 ALR 128.

Possession by widow after extinguishment of dower as adverse to heirs or their privies, 75 ALR 147.

Rule against accumulation of income as applicable to income from personalty, or real property equitably converted into personalty, 75 ALR 196.

Time covered by pendency of suit discontinued without decision on merits as included in computation of period of adverse possession, 80 ALR 439.

Right of cotenant to acquire and assert adverse title or interest as against other cotenant, 85 ALR 1535.

Time during which dominant and servient tracts were in same ownership or under same control as excluded or included in determining easement by prescription, 98 ALR 591.

Sufficiency of compliance, as regards payment of taxes, with limitation statute requiring payment of taxes as a condition of adverse possession, 132 ALR 216.

Adverse possession by religious society, 4 ALR2d 123.

Tacking adverse possession of area not within description of deed or contract, 17 ALR2d 1128.

Adverse possession: sufficiency, as regards continuity, of seasonal possession other than for agricultural or logging purposes, 24 ALR2d 632.

Acquisition of title to ground through adverse possession by cemetery or graveyard authorities, 41 ALR2d 925.

Adverse possession of executor or administrator or his vendee as continuous with that of ancestor and heirs, 43 ALR2d 1061.

Acquisition by user or prescription of right of way over unenclosed land, 46 ALR2d 1140.

Acquisition by adverse possession or use of public property held by municipal corporation or other governmental unit otherwise than for streets, alleys, parks, or common, 55 ALR2d 554.

Easement by prescription in artificial drains, pipes, or sewers, 55 ALR2d 1144.

Acquisition of right of way by prescription as affected by change of location or deviation during prescriptive period, 80 ALR2d 1095.

Adverse possession involving ignorance or

mistake as to boundaries — modern views, 80 ALR2d 1171.

Use of property by public as affecting acquisition of title by adverse possession, 56 ALR3d 1182.

Adverse possession between cotenants who are unaware of cotenancy, 27 ALR4th 420.

Presumptions and evidence respecting identification of land on which property taxes were paid to establish adverse possession, 36 ALR4th 843.

Grazing of livestock, gathering of natural crop, or cutting of timber by record owner as defeating exclusiveness or continuity of possession by one claiming title by adverse possession, 39 ALR4th 1148.

44-5-160. Nature of title by prescription.

Title by prescription is the right to property which a possessor acquires by reason of the continuance of his possession for a period of time fixed by law. (Orig. Code 1863, § 2637; Code 1868, § 2636; Code 1873, § 2678; Code 1882, § 2678; Civil Code 1895, § 3583; Civil Code 1910, § 4163; Code 1933, § 85-401.)

Law reviews. — For article, ''Some Aspects of the Law of Easements,'' see 9 Ga. St. B.J. 287 (1973).

JUDICIAL DECISIONS

Object of doctrine of prescription is to make a bad title good upon compliance with the necessary requisites; of course, if a person purchases land in bad faith, knowing that the title one purchases is fraudulent, it can never ripen into a good title. Latham v. Fowler, 192 Ga. 686, 16 S.E.2d 591 (1941).

Foundation of prescription is possession. Yundt v. Davison, 186 Ga. 179, 197 S.E. 248 (1938).

Prescriptive time interrupted. — Trial court erred in granting summary judgment on prescription and acquiescence grounds to the contestants to a tract of land without determining the validity or sufficiency of the legal descriptions of either deed to the property as there was insufficient evidence of possession and support for prescriptive title, and the construction of a driveway, apparently on the disputed tract, was interrupted by a quiet title action filed within seven years by the heirs of the property. Henson v. Tucker, 278 Ga. App. 859, 630 S.E.2d 64 (2006).

Possession, if held under claim of right, is referred to as title, actual or supposed, under which the right of possession is claimed. Patellis v. Tanner, 199 Ga. 304, 34 S.E.2d 84 (1945).

State may obtain title to property by prescription. Seignious v. Metropolitan Atlanta Rapid Transit Auth., 252 Ga. 69, 311 S.E.2d 808 (1984).

Squatter can never gain prescriptive title to land no matter how long the squatter holds the possession; the squatter's possession is never considered as adverse. Mayor of Forsyth v. Hooks, 182 Ga. 78, 184 S.E. 724 (1936).

Requirement of continuity of possession is one of substance, not of absolute mathematical continuity, provided there is no break so as to make a severance of two possessions. Anneberg v. Kurtz, 197 Ga. 188, 28 S.E.2d 769 (1944).

Good faith is one of main elements when doctrine of prescription is involved in an action of ejectment. Latham v. Fowler, 192 Ga. 686, 16 S.E.2d 591 (1941).

If a person buys land in good faith, believing the person is obtaining a good title, and enters into possession thereof, and remains there continuously, uninterruptedly, peaceably, etc., for seven years, that possession ripens into a good title, whether the title the person purchased originally was good or not. Latham v. Fowler, 192 Ga. 686, 16 S.E.2d 591 (1941).

An outstanding recorded title will not prevent the ripening of a title by prescrip-

tion since the possessor enters in good faith under written evidence of title from another. Hearn v. Leverette, 213 Ga. 286, 99 S.E.2d 147 (1957).

Question of good faith is ordinarily one of fact for jury. Latham v. Fowler, 192 Ga. 686, 16 S.E.2d 591 (1941).

"Appurtenants" construed. — Word ''appurtenants'' in a deed, when none are specified, will not be construed to convey anything except what was legally appurtenant to the lands in the hands of the grantor; it does not convey an easement in the land of another which has not ripened into a legal right and has not become attached to the premises conveyed, unless accompanied by proper words describing it and showing the intention of the grantor to pass it. Olsen v. Noble, 209 Ga. 899, 76 S.E.2d 775 (1953).

Right of prescription is measured by actual user, and not by capacity for more extended use, and the right does not begin to run until an actionable injury has been inflicted. Goble v. Louisville & N.R.R., 187 Ga. 243, 200 S.E. 259 (1938).

Right to maintain private nuisance may be acquired by prescription. Anneberg v. Kurtz, 197 Ga. 188, 28 S.E.2d 769 (1944).

Evidence showed that defendant was in actual adverse possession of land involved when the plaintiffs filed suit against the defendant in 1955, and that the defendant had been in such possession under a claim of right or ownership continuously and exclusively since 1934, under circumstances which would ripen the defendant's possession into a good prescriptive title, since actual possession was delivered to the defendant by defendant's mother by execution and delivery of a warranty deed which purported to convey to the defendant the property in question, the defendant and the defendant's tenants since then continuously occupied and used the property to the exclusion of all others, the defendant improved the property by the construction of two dwelling houses, three garages and a barn, which buildings the defendant has since kept repaired, the defendant paid annual taxes and fire insurance premiums, the defendant had the land regularly cultivated in annual crops, and kept the defendant's livestock, poultry, and farming equipment on the land, and the defendant sold two described portions of the land in 1954 and 1955. Hughes v. Heard, 215 Ga. 156, 109 S.E.2d 510 (1959).

Title by prescription arises if adverse possession held for 20 years. — While a prescriptive title may be extinguished by the ripening of a prescription in favor of a subsequent adverse possession, yet if adverse possession is held for 20 years, a title by prescription arises, good against everyone except the state, or persons laboring under legal disabilities, and that title is not lost or impaired by any subsequent abandonment of the adverse possession. Bridges v. Henson, 216 Ga. 423, 116 S.E.2d 570 (1960).

Acquisition of prescriptive title by recorded deed and seven years of actual possession. — Person claiming under a recorded deed may have constructive possession of lands and may acquire a prescriptive title to all lands which are covered by the deed and are contiguous by having actual possession of a part thereof for a period of seven years. Mincey v. Anderson, 206 Ga. 572, 57 S.E.2d 922 (1950).

Prescriptive right to empty plant refuse into stream acquired. — When a person, in the operation of a canning plant, has from June 1 to November 1 of each year, for more than 20 years, emptied the refuse from the plant into a nonnavigable stream, the person has thereby acquired a prescriptive right so to do. Anneberg v. Kurtz, 197 Ga. 188, 28 S.E.2d 769 (1944).

Adverse possession of church will support prescriptive title. — Possession of property for the use of a church by the constituent membership is possession of the church, and if continued adversely for the prescriptive period, will support prescriptive title. Bridges v. Henson, 216 Ga. 423, 116 S.E.2d 570 (1960).

Trial court properly found that a church acquired prescriptive title to a portion of the disputed land bordering that of the adjacent landowners, setting a boundary line between the two parcels, upon sufficient evidence of the church's adverse possession, the paper trail recognizing the church's use and possession of the disputed property for the requisite time frame, and the setting of the boundary line almost 30 years earlier imputing personal knowledge to one of the owners of the adjacent land. Mobley v. Jackson Chapel Church, 281 Ga. 122, 636 S.E.2d 535 (2006).

Stringing wire consistently with customary location permissible as within easement. — When poles and wires were used in the operation of a telephone line or lines over the lands of another, those poles and wires should be considered as having marked or outlined a general area in use according to the usual and ordinary manner; and if the outer limits of this space remains the same for the prescriptive period of 20 years, the resulting easement will apply at least to such general area, so that the stringing of additional wires anywhere therein consistently with customary location is permissible as territorially within the easement, whether or not the identical space to be physically occupied by such wires had ever before been so occupied by other wires. Kerlin v. Southern Bell Tel. & Tel. Co., 191 Ga. 663, 13 S.E.2d 790 (1941).

Easement to flood lands not acquired by maintenance of trestle. — Railroad company which has for 25 years maintained a trestle and abutments, under which a stream flows, does not thereby acquire a prescriptive easement to flood lands, unless such flooding has been continuous and uninterrupted for a period sufficient to ripen prescription. Goble v. Louisville & N.R.R., 187 Ga. 243, 200 S.E. 259 (1938).

Neither laches nor statute of limitations will run against one in peaceable possession of property under a claim of ownership for delay in resorting to a court of equity to establish one's rights. Reid v. Wilkerson, 222 Ga. 282, 149 S.E.2d 700 (1966).

Title by prescription is substituted for statute of limitations in actions to recover land. Latham v. Fowler, 192 Ga. 686, 16 S.E.2d 591 (1941), later appeal, 206 Ga. 245, 56 S.E.2d 272 (1949).

One who relies on prescriptive title has burden of establishing prescription. Patellis v. Tanner, 199 Ga. 304, 34 S.E.2d 84 (1945).

Adverse possession is usually mixed question of law and fact. — Whether the facts exist which constitute adverse possession is for the jury to judge; whether, assuming the facts prove to be true, those facts constitute adverse possession is for the court to decide. Olsen v. Noble, 209 Ga. 899, 76 S.E.2d 775 (1953).

Court may decide question of title by prescription as matter of law without submitting the question to the jury. Verdery v. Savannah, F. & W. Ry., 82 Ga. 675, 9 S.E. 1133 (1889).

Cited in Walker v. Steffes, 139 Ga. 520, 77 S.E. 580 (1913); Bagley v. Forrester, 53 F.2d 831 (5th Cir. 1931); Beeland v. Butler Payne Lumber Co., 48 Ga. App. 619, 173 S.E. 436 (1934); Ewing v. Tanner, 184 Ga. 773, 193 S.E. 243 (1937); Fitzpatrick v. Massee-Felton Lumber Co., 188 Ga. 80, 3 S.E.2d 91 (1939); Dyal v. Sanders, 194 Ga. 228, 21 S.E.2d 596 (1942); Strickland v. Padgett, 197 Ga. 589, 30 S.E.2d 167 (1944); Powell v. Moore, 202 Ga. 62, 42 S.E.2d 110 (1947); Key v. Stringer, 204 Ga. 869, 52 S.E.2d 305 (1949); Rowland v. McLain, 86 Ga. App. 140, 70 S.E.2d 918 (1952); Burgin v. Moye, 212 Ga. 370, 93 S.E.2d 9 (1956); Pridgen v. Coffee County Bd. of Educ., 218 Ga. 326, 127 S.E.2d 808 (1962); Whitton v. Whitton, 218 Ga. 845, 131 S.E.2d 189 (1963); Little v. Weatherby, 220 Ga. 274, 138 S.E.2d 380 (1964); Hasty v. Wilson, 223 Ga. 739, 158 S.E.2d 915 (1967); Pannell v. Continental Can Co., 554 F.2d 216 (5th Cir. 1977); Larkin v. Laster, 254 Ga. 716, 334 S.E.2d 158 (1985); Fort Mt. Container Corp. v. Keith, 275 Ga. 210, 563 S.E.2d 860 (2002).

RESEARCH REFERENCES

Am. Jur. 2d. — 3 Am. Jur. 2d, Adverse Possession, §§ 1 et seq., 8, 11, 248, 249, 310.

Am. Jur. Proof of Facts. — Mistaken Occupant's Right to Recover for Improvements, 2 POF2d 467.

Permissive Possession or Use of Land, 28 POF2d 703.

Acquisition of Title to Property by Adverse Possession, 39 POF2d 261.

Permissive Possession or Use of Land as Defeating Claim of Adverse Possession or Prescriptive Easement, 68 POF3d 239.

C.J.S. — 2 C.J.S., Adverse Possession, §§ 1, 2, 7. 73 C.J.S., Property, § 55 et seq.

ALR. — Adverse possession by third party or stranger of property held in trust, 2 ALR 41.

Writing as essential to color of title in adverse occupant of land, 2 ALR 1457.

What will disprove acquiescence by owner

essential to easement by prescription in case of known use, 5 ALR 1325.

Adverse possession of railroad right of way, 50 ALR 303.

Adverse possession or prescription in respect of burial lot, 107 ALR 1294.

Tacking adverse possession of area not within description of deed or contract, 17 ALR2d 1128.

Rights derived from use by adjoining owners for driveway, or other common purpose, of strip of land lying over and along their boundary, 27 ALR2d 332.

Acquisition of title to mines or minerals by adverse possession, 35 ALR2d 124.

Right of owner of title to or interest in minerals under one tract to use surface, or underground passages, in connection with mining other tract, 83 ALR2d 665.

Acquisition of title to land by adverse possession by state or other governmental unit or agency, 18 ALR3d 678.

Tacking as applied to prescriptive easements, 72 ALR3d 648.

Scope of prescriptive easement for access (easement of way), 79 ALR4th 604.

44-5-161. Adverse possession; effect of permissive possession.

(a) In order for possession to be the foundation of prescriptive title, it:

(1) Must be in the right of the possessor and not of another;

(2) Must not have originated in fraud except as provided in Code Section 44-5-162;

(3) Must be public, continuous, exclusive, uninterrupted, and peaceable; and

(4) Must be accompanied by a claim of right.

(b) Permissive possession cannot be the foundation of a prescription until an adverse claim and actual notice to the other party. (Ga. L. 1851-52, p. 238, § 2; Code 1863, § 2638; Code 1868, § 2637; Code 1873, § 2679; Code 1882, § 2679; Civil Code 1895, § 3584; Civil Code 1910, § 4164; Code 1933, § 85-402.)

Cross references. — Adverse possession against cotenant, § 44-6-123. Obtaining private ways through adverse possession, §§ 44-9-1, 44-9-54, 44-9-55.

Law reviews. — For annual survey of real property law, see 35 Mercer L. Rev. 257 (1983). For annual survey of zoning and land use law, see 57 Mercer L. Rev. 447 (2005). For survey article on local government law, see 59 Mercer L. Rev. 285 (2007).

For note, ''For Sale — One Level 5 Barbarian for 94,800 Won: The International Effects of Virtual Property and the Legality of Its Ownership,'' see 37 Ga. J. Int'l & Comp. L. 381 (2009).

JUDICIAL DECISIONS

Analysis

General Consideration
Requirements
Right of Possessor
Fraud
Public, Continuous, Exclusive, Uninterrupted, and Peaceable
Claim of Right
Permissive Possession

General Consideration

Purpose. — Object of statutory provisions on prescription is to make a bad title good by compliance with the requisites; therefore, if a person buys land in good faith, believing the person is obtaining a good title, enters into possession thereof, and remains there continuously, uninterruptedly, peaceably, etc., for seven years, that possession ripens into a good title, whether the title the person purchased originally was good or not. Chandler v. Douglas, 178 Ga. 11, 172 S.E. 54 (1933); Fraser v. Dolvin, 199 Ga. 638, 34 S.E.2d 875 (1945).

Statute incorporates common-law rule to quiet men's estates that have been long in possession. Shiels v. Roberts, 64 Ga. 370 (1879) (see O.C.G.A. § 44-5-161).

Prescriptive title generally. — Prescriptive title involves a failure on the part of the holder of the superior title to properly assert it within the time limited. Walker v. Steffes, 139 Ga. 520, 77 S.E. 580 (1913).

In a dispute over two subdivision lots, the trial court did not err in admitting evidence that was cumulative to properly admitted evidence showing a legal property owner's record title, and the evidence was not hearsay, as alleged by a claimant who sought title to the property by prescription; further, the evidence was relevant to the issue of whether a claimant's adverse possession ripened into title by prescription. Smith v. Stacey, 281 Ga. 601, 642 S.E.2d 28 (2007).

Applicability. — Section refers to title by prescription and has no bearing on establishing dividing lines by agreement and possession or acquiescence by acts or declarations for seven years. Bennett v. Perry, 207 Ga. 331, 61 S.E.2d 501 (1950).

Statute applies equally to seven years with color of title or 20 years without. Woods v. Brannen, 208 Ga. 495, 67 S.E.2d 702 (1951) (see O.C.G.A. § 44-5-161).

Applicability to right-of-way. — Record supported conclusion defendant had at all relevant times inspected, cleared, and marked defendant's right-of-way, and in 1978 had installed a second pipeline in the right-of-way; therefore, defendant had acquired title by adverse possession. Simpson v. Colonial Pipeline Co., 269 Ga. 520, 499 S.E.2d 634 (1998).

Elements of adverse possession are set out in this statute. Rowland v. McLain, 86 Ga. App. 140, 70 S.E.2d 918 (1952) (see O.C.G.A. § 44-5-161).

Possession must meet requirements of this statute. — In defining the adverse possession which may be the foundation of a prescriptive title, it is best to state the necessary elements of such possession as those elements are stated in this statute. Smith v. Board of Educ., 168 Ga. 755, 149 S.E. 136 (1929) (see O.C.G.A. § 44-5-161).

Whether title was claimed under former Civil Code 1910, § 4168 (see O.C.G.A. § 44-5-163) by virtue of adverse possession for 20 years without written evidence of title, or under former Civil Code 1910, § 4169 (see O.C.G.A. § 44-5-164) by virtue of adverse possession for seven years under color of title, the possession relied upon must meet the requirements of former Code 1910, § 4169 (see O.C.G.A. § 44-5-161). Smith v. Board of Educ., 168 Ga. 755, 149 S.E. 136 (1929); Martin v. Clark, 190 Ga. 270, 9 S.E.2d 54 (1940); Moore v. Stephens, 199 Ga. 500, 34 S.E.2d 716 (1945); Flynt v. Dumas, 205 Ga. 702, 54 S.E.2d 429 (1949).

Because the trial court found that there was evidence to support the special master's determination that the contestant failed to establish prescriptive title to the disputed parcel, either under O.C.G.A. § 44-5-161(a) or O.C.G.A. § 44-5-164, and that the disputed parcel showed no signs of having been disturbed by any of the contestant's alleged activities thereon, the trial court properly adopted the special master's recommendations that title vested in a railroad free of any claims by the contestant, and that the contestant's affidavits should be stricken from the deed records. Thompson v. Cent. of Ga. R.R., 282 Ga. 264, 646 S.E.2d 669 (2007).

Mere use is not notice of adverse claim. — In a dispute over a landowners' patio built on a neighbor's land and use of a roadway over the neighbor's land, the patio did not create a prescriptive right of way as the patio was not a road or path and the bottom part of the road was not taken by adverse possession as mere use was not notice of an adverse claim; however, as the landowner might have met the time and notice requirements to obtain a right of way by prescription for the top part of the road, summary judgment was not proper on that point. Moody v. Degges, 258 Ga. App. 135, 573 S.E.2d 93 (2002).

Right of prescription is measured by actual user, and not by capacity for more

extended use, and the right does not begin to run until an actionable injury has been inflicted. Goble v. Louisville & N.R.R., 187 Ga. 243, 200 S.E. 259 (1938).

Person claiming prescriptive title against cotenant has burden of showing not only the usual elements of prescription under O.C.G.A. § 44-5-161, but in addition thereto at least one of the conditions stated in O.C.G.A. § 44-6-123. Lindsey v. Lindsey, 249 Ga. 832, 294 S.E.2d 512 (1982); Wright v. Wright, 270 Ga. 530, 512 S.E.2d 618 (1999).

In order for one cotenant to prescribe against another, O.C.G.A. § 44-6-123 requires actual ouster, exclusive possession after demand, or express notice of adverse possession, in addition to the usual elements of adverse possession. Carter v. Becton, 250 Ga. 617, 300 S.E.2d 152 (1983).

Because a trust's predecessors in interest to a disputed parcel of land maintained public, exclusive, and continuous possession of that tract for the required time frames under both O.C.G.A. §§ 44-5-163 and 44-5-164, and the original grantee's hostile possession of the property was done in good faith that a claim of right existed, the trial court did not err in adopting a special master's award and findings that the trust owned the disputed property against the rights of a contesting neighbor. Crawford v. Simpson, 279 Ga. 280, 612 S.E.2d 783 (2005).

Adverse possession is usually mixed question of law and fact. — Whether the facts exist which constitute adverse possession is for the jury to judge; whether, assuming the facts prove to be true, those facts constitute adverse possession is for the court to decide. Olsen v. Noble, 209 Ga. 899, 76 S.E.2d 775 (1953); Barnett v. Holliday, 228 Ga. 361, 185 S.E.2d 397 (1971).

Questions of fact as to whether the state acquired land by adverse possession arise when the state's claim of acquisition by adverse possession are disputed by parties producing evidence that those parties have record title to the land, that the state's possession of the land was permissible, and that the state did not purport to have a valid claim of right to the land or give notice that the state did have a valid claim to the land. Tanner v. Brasher, 254 Ga. 41, 326 S.E.2d 218 (1985).

Insufficient evidence of ouster. — By affidavit, heirs who had an ownership interest in property showed that a cotenant did not meet the requirements of O.C.G.A. § 44-6-123 by averring that the cotenant took no action to oust the heirs from the property in question, to demand and retain exclusive possession, or to give actual notice of adverse possession; the burden shifted to the cotenant to point to a conflict on this issue, but in an affidavit, the cotenant only showed that the cotenant paid the property taxes and that the heirs did not use the property or question the cotenants right to be on the property, which did not establish an ouster or to satisfy an ''express notice'' or a ''hostile claim'' criterion, and summary judgment in favor of the heirs was proper. Ward v. Morgan, 280 Ga. 569, 629 S.E.2d 230 (2006).

When state's claim not established, opposing party's case not barred by sovereign immunity. — When the state's claim to land by adverse possession has not been established as a matter of law, the scope of state officials' authority with respect to the land may not yet be determined, and the officials, therefore, may not bar the opposing party's case on the ground of sovereign immunity for acts undertaken within the scope of the officials' authority. Tanner v. Brasher, 254 Ga. 41, 326 S.E.2d 218 (1985).

Ripening of prescriptive title not prevented by suspension of statute of limitations. — Suspension of the statute of limitations in war time when it creates no disability to sue does not prevent the ripening of a prescriptive title founded upon possession begun during the period of suspension. Roe v. Doe, 38 Ga. 439 (1868).

Mandamus to require county to maintain road. — Group of landowners were properly granted mandamus relief requiring a county to maintain an adjacent road as the county had acquired title to the road by prescriptive acquisition, abandonment was not an issue, and compliance with O.C.G.A. § 32-3-3(c) did not need to be shown when a roadway was otherwise acquired by prescription; moreover, urging that a county's failure to meet the county's obligation to maintain public roads was an acceptable method of abandoning a roadway would encourage counties to disregard their public duty. Shearin v. Wayne Davis & Co., P.C., 281 Ga. 385, 637 S.E.2d 679 (2006).

Cited in Hill v. Waldrop, 57 Ga. 134 (1876); Western Union Tel. Co. v. Georgia

General Consideration (Cont'd)

R.R. & Banking Co., 227 F. 276 (S.D. Ga. 1915); Lancaster v. Treadwell, 146 Ga. 81, 90 S.E. 710 (1916); Frazier v. Swain, 147 Ga. 654, 95 S.E. 211 (1918); Johnson v. Mary-Leila Cotton Mills, 155 Ga. 344, 116 S.E. 609 (1923); Bagley v. Forrester, 53 F.2d 831 (5th Cir. 1931); McNeill v. Daniel, 174 Ga. 820, 164 S.E. 187 (1932); Chandler v. Douglas, 178 Ga. 11, 172 S.E. 54 (1933); Beeland v. Butler Payne Lumber Co., 48 Ga. App. 619, 173 S.E. 436 (1934); Vick v. Georgia Power Co., 178 Ga. 869, 174 S.E. 713 (1934); Hardin v. Pie, 179 Ga. 446, 176 S.E. 14 (1934); Kelley v. Spivey, 182 Ga. 507, 185 S.E. 783 (1936); Sewell v. Sprayberry, 186 Ga. 1, 196 S.E. 796 (1938); Reynolds v. Smith, 186 Ga. 838, 199 S.E. 137 (1938); Waters v. Baker, 190 Ga. 186, 8 S.E.2d 637 (1940); Metropolitan Life Ins. Co. v. Hall, 191 Ga. 294, 12 S.E.2d 53 (1940); Lockwood v. Daniel, 194 Ga. 544, 22 S.E.2d 85 (1942); Holloway v. Woods, 195 Ga. 55, 23 S.E.2d 254 (1942); Gooch v. Citizens & S. Nat'l Bank, 196 Ga. 322, 26 S.E.2d 727 (1943); Strickland v. Padgett, 197 Ga. 589, 30 S.E.2d 167 (1944); Elliott v. Robinson, 198 Ga. 811, 33 S.E.2d 95 (1945); Barfield v. Vickers, 200 Ga. 279, 36 S.E.2d 766 (1946); Thompson v. Fouts, 203 Ga. 522, 47 S.E.2d 571 (1948); Davis v. Newton, 215 Ga. 58, 108 S.E.2d 809 (1959); Pridgen v. Coffee County Bd. of Educ., 218 Ga. 326, 127 S.E.2d 808 (1962); Whitton v. Whitton, 218 Ga. 845, 131 S.E.2d 189 (1963); Durand v. Reeves, 219 Ga. 182, 132 S.E.2d 71 (1963); Little v. Weatherby, 220 Ga. 274, 138 S.E.2d 380 (1964); Hiwassee Land Co. v. Biddy, 222 Ga. 784, 152 S.E.2d 395 (1966); Hughes v. Heard, 215 Ga. 156, 109 S.E.2d 510 (1972); Jordan v. Robinson, 229 Ga. 761, 194 S.E.2d 452 (1972); Jordan v. Way, 235 Ga. 496, 220 S.E.2d 258 (1975); Drew v. DeKalb County, 239 Ga. 35, 235 S.E.2d 528 (1977); Arrington v. Watkins, 239 Ga. 793, 239 S.E.2d 10 (1977); Pannell v. Continental Can Co., 554 F.2d 216 (5th Cir. 1977); Swicord v. Hester, 240 Ga. 484, 241 S.E.2d 242 (1978); Edingburg v. Citizens & S. Bank of Macon, Inc., 244 Ga. 667, 261 S.E.2d 617 (1979); Waters v. Pervis, 153 Ga. App. 71, 264 S.E.2d 551 (1980); Fuller v. Smith, 245 Ga. 751, 267 S.E.2d 23 (1980); Cheek v. Wainwright, 246 Ga. 171, 269 S.E.2d 443 (1980); Estate of Seamans v. True, 247 Ga. 721, 279 S.E.2d 447 (1981); Ross v. Lowery, 249 Ga. 307, 290 S.E.2d 61 (1982); Larkin v. Laster, 254 Ga. 716, 334 S.E.2d 158 (1985); Simms v. Candler, 256 Ga. 163, 345 S.E.2d 37 (1986); Nebb v. Butler, 257 Ga. 145, 357 S.E.2d 257 (1987); Love v. Love, 259 Ga. 423, 383 S.E.2d 329 (1989); Addison v. Reece, 263 Ga. 631, 436 S.E.2d 663 (1993); Davis v. Merritt, 265 Ga. 160, 454 S.E.2d 515 (1995); Young v. Faulkner, 217 Ga. App. 321, 457 S.E.2d 584 (1995); Resseau v. Bland, 268 Ga. 634, 491 S.E.2d 809 (1997); Strozzo v. Coffee Bluff Marina Property, 250 Ga. App. 212, 550 S.E.2d 122 (2001); Wilbanks v. Arthur, 257 Ga. App. 226, 570 S.E.2d 664 (2002); Gigger v. White, 277 Ga. 68, 586 S.E.2d 242 (2003).

Requirements

Notice required. — To establish title by adverse possession, the claimant must show actual notice of the adverse claim. Coleman v. Coleman, 265 Ga. 568, 459 S.E.2d 166 (1995).

Couple's use of a dock, which was based on a common belief that the couple had the right to do so per their deed language, was permissive in nature; thus, a showing of notice of an adverse claim was required to establish a prescriptive easement under O.C.G.A. § 44-5-161. Waters v. Ellzey, 290 Ga. App. 693, 660 S.E.2d 392 (2008).

Requirement of actual notice applies only to adverse claims based on the claimant's possession by permission. Proctor v. Heirs of Jernigan, 273 Ga. 29, 538 S.E.2d 36 (2000).

Requirements satisfied. — Because: (1) a landowner continuously and exclusively maintained and used the land in question for more than 20 years accompanied by a claim of right; and (2) a claim that the Dead Man's Statute was violated lacked merit, the landowner established prescriptive title by adverse possession. Murray v. Stone, 283 Ga. 6, 655 S.E.2d 821 (2008).

Requirements not satisfied. — Although the quia timet provision under which the property purchaser sought to quiet title permitted the property claimant to seek a jury trial, the special master's error in concluding that the claimant was not entitled to a jury trial was harmless because the property claimant did not show that the case presented a question of fact requiring the intervention of a jury; the property claimant did

not show the existence of a claim to the property by virtue of adverse possession since the claimant did not show that there had been uninterrupted and continuous possession for 20 years. Gurley v. E. Atlanta Land Co., 276 Ga. 749, 583 S.E.2d 866 (2003).

Surveying of a disputed tract of land and marking of drill rods and pins found thereon did not amount to an adverse possession; additionally, these acts did not become an adverse possession merely because the acts were done in the presence of the true owner and consistent with the owner's indications of the property boundaries. Henson v. Tucker, 278 Ga. App. 859, 630 S.E.2d 64 (2006).

Transferee's payment of taxes on the property at issue in an adverse possession claim was not evidence of title and ownership and was properly excluded; the trial court's order excluding evidence which was insufficient to show the transferee's ''possession'' as probative of adverse possession, but allowing it insofar as it showed that the transferee had not been dispossessed of the property, was proper. Byrd v. Shelley, 279 Ga. App. 886, 633 S.E.2d 56 (2006).

Recordation over the course of years of no consequence. — Claim of adverse possession, based on recordation of the various deeds over the course of eight years, in and of itself, had to fail in light of O.C.G.A. § 44-5-166(b). Double 'D' bar 'C' Ranch v. Bell, 283 Ga. 386, 658 S.E.2d 635 (2008).

Payment of taxes and running people off land insufficient for prescriptive title. — In a quiet title action, because a ranch, that was seeking title to the disputed parcel of land, adduced no evidence that the ranch cultivated or built upon the land or enclosed or excluded others from the entire property, the special master correctly concluded that the act of posting of a few signs forbidding trespassing and driving off an occasional trespasser was insufficient to show adverse possession. Moreover, the payment of property taxes on the parcel since 1997, in and of itself, was insufficient to establish prescriptive title. Double 'D' bar 'C' Ranch v. Bell, 283 Ga. 386, 658 S.E.2d 635 (2008).

Right of Possessor

True owner deemed to be in possession unless dispossessed. — When two persons enter onto property each claiming an interest therein, one who is the true owner or has the better title is deemed to be in possession thereof unless that one is dispossessed by the other person. Carter v. Becton, 250 Ga. 617, 300 S.E.2d 152 (1983).

Scope of prescription by mere possession. — Prescription by mere possession does not extend beyond the actual possessio pedis of the prescriber. Arnold v. Shackelford, 219 Ga. 839, 136 S.E.2d 384 (1964).

Actual possession of land is notice to world of claim thereto, and one who, knowing land to be held by one person, buys the land from another, will be charged with notice of an unrecorded deed held by the party in possession. Scarbor v. Scarbor, 226 Ga. 323, 175 S.E.2d 6 (1970).

Possession is presumed to be adverse and in good faith, until the contrary is shown. Tarbutton v. All That Tract or Parcel of Land Known as Carter Place, 641 F. Supp. 521 (M.D. Ga. 1986).

Law will never construe possession as tortious, unless from necessity; it will consider every possession lawful, the commencement and continuance of which is not proved to be wrongful. Ewing v. Tanner, 184 Ga. 773, 193 S.E. 243 (1937).

Possession need not be held in person by one claiming prescriptive rights. Swygert v. Roberts, 136 Ga. App. 700, 222 S.E.2d 75 (1975).

Tenant's possession is that of the tenant's landlord; and the landlord is the true possessor within the meaning of this statute. Swygert v. Roberts, 136 Ga. App. 700, 222 S.E.2d 75 (1975) (see O.C.G.A. § 44-5-161).

Tenant's knowledge. — When the landlord never had possession of the land or claimed title to the land, and did not include the land in the lease, the possession of the tenant, beyond the boundaries of the land contained in the lease, is not the possession of the landlord, even though the tenant believes the tenant is occupying only the land demised. Olsen v. Noble, 209 Ga. 899, 76 S.E.2d 775 (1953).

Use by tenant inures to landlord's benefit if it expressly or impliedly includes easement; a tenant cannot originate adverse user in the landlord's favor if the lease does not expressly or impliedly include the easement. Olsen v. Noble, 209 Ga. 899, 76 S.E.2d 775 (1953).

Right of Possessor (Cont'd)

Except if tenant's adverse occupation not covered by lease. — An independent adverse occupation by a tenant of another's land, not purporting to be covered by the terms of the lease, and not based upon any authorization purporting to be conferred therein by the lessor, does not inure to the benefit of the landlord. Olsen v. Noble, 209 Ga. 899, 76 S.E.2d 775 (1953).

Bald trespass is entry upon lands without any right to do so and without a bona fide claim of any right to do; one so entering may receive a form of property in one's bare possession sufficient to enable one to hold the land as against subsequent intruders, but which can never ripen into prescriptive title. Mayor of Forsyth v. Hooks, 182 Ga. 78, 184 S.E. 724 (1936); Hannah v. Kenny, 210 Ga. 824, 83 S.E.2d 1 (1954).

Squatter can never gain prescriptive title to land, no matter how long the squatter holds the possession; the squatter's possession is never considered as adverse. Mayor of Forsyth v. Hooks, 182 Ga. 78, 184 S.E. 724 (1936); Hannah v. Kenny, 210 Ga. 824, 83 S.E.2d 1 (1954).

Mere squatter on a lot of land, without color of title or claim of right, cannot defeat the title of the true owner by conveying the land to other purchasers who had full knowledge of the nature and character of the title when the purchaser's purchased the land, although the purchaser's may have been in possession of the land for seven years under such title. Hannah v. Kenny, 210 Ga. 824, 83 S.E.2d 1 (1954).

Adverse possession of church will support prescriptive title. — Possession of property for the use of a church by the constituent membership is possession of the church, and if continued adversely for the prescriptive period, will support prescriptive title. Bridges v. Henson, 216 Ga. 423, 116 S.E.2d 570 (1960).

Adverse possession of adjoining strip held insufficient to establish title. — Adverse possession of an adjoining strip by successive tenants, not expressly or impliedly authorized by the landlord, who was never in possession, is not sufficient to give the landlord title to the adjoining strip. Olsen v. Noble, 209 Ga. 899, 76 S.E.2d 775 (1953).

Purchaser not entitled to possession during owner's redemption period. — Purchaser at a tax sale is not entitled to possession during the period in which the law allows the owner to redeem; possession during that period by the purchaser cannot be as a matter of right or law. McDonald v. Wimpy, 206 Ga. 270, 56 S.E.2d 524 (1949).

Act of possession not amounting to adverse possession. — Evidence that, without actual notice of the grantor's deed to secure debt, the claimant for more than seven years had paid taxes, that on one occasion the claimant drove across the land and gathered certain botanical specimens, but that the claimant never fenced the land or any part of the land, never cultivated any of the land through a tenant or otherwise, or did any other act to indicate actual possession, disclosed no such actual possession as was necessary to show a prescriptive title as against plaintiffs in fi. fa. Yundt v. Davison, 186 Ga. 179, 197 S.E. 248 (1938).

When defendant and defendant's grantor plowed and burned fire breaks to keep fire off the land, planted trees for two or three years, not many of which lived, had the land surveyed, the corners and land lines marked, kept trespassers from getting wood off the land and kept named persons from working turpentine trees thereon, and paid taxes thereon for 12 or 14 years, but there was no dwelling or outhouse of any kind on the land, the land was not fenced, and no part of the land was in cultivation, the acts relied upon by the defendant and the defendant's grantor did not amount to actual, open, visible, exclusive, and unambiguous possession. Memory v. Walker, 209 Ga. 916, 76 S.E.2d 698 (1953).

Claimant's possession was not adverse since claimant was incarcerated for six months during the time period claimant claims claimant adversely possessed the property and the owner averred that claimant was the caretaker of the property. Wolf v. McCollum, 240 Ga. App. 412, 522 S.E.2d 547 (1999).

Beaver dams. — Landowner enjoys no prescriptive right to the continued existence of beaver dams in a creek which form a border of the landowner's property because the dams are not erected through human

agency. Dawson v. Wade, 257 Ga. 552, 361 S.E.2d 181 (1987).

Fraud

Statute only contemplates fraud against true landowner. Moore v. Mobley, 123 Ga. 424, 51 S.E. 351 (1905) (see O.C.G.A. § 44-5-161).

Statute includes not only mere legal fraud but also moral fraud. — This fraud is not mere legal fraud but is moral fraud, that is, something in the transaction which charges the conscience of the prescriber; an honest mistake of law cannot amount to such a fraud. Wright v. Smith, 43 Ga. 291 (1871); Brown v. Wells, 44 Ga. 573 (1872); McCamy v. Higdon, 50 Ga. 629 (1874); Virgin v. Wingfield, 54 Ga. 451 (1875); Ware v. Barlow, 81 Ga. 1, 6 S.E. 465 (1875); Ellis v. Dasher, 101 Ga. 5, 29 S.E. 268 (1897); Street v. Collier, 118 Ga. 470, 45 S.E. 294 (1903); Bower v. Cohen, 126 Ga. 35, 54 S.E. 918 (1906).

In order to defeat title by prescription on the ground of fraud, it must appear that the fraud of the prescriber was such as to "charge his conscience," and thus amount to actual moral fraud. Tarbutton v. All That Tract or Parcel of Land Known as Carter Place, 641 F. Supp. 521 (M.D. Ga. 1986).

Possession originating in fraud will not be presumed. Chancey v. Georgia Power Co., 238 Ga. 397, 233 S.E.2d 365 (1977).

Fraud precludes adverse possession. — When, at the time of the intestate decedent's death, the wife and children falsely informed the probate court that they were the decedent's only heirs at law when the son was also an heir at law, an issue of fact remained as to whether the wife and children's possession of the decedent's property originated in fraud, which would have precluded adverse possession under O.C.G.A. § 44-5-161(a)(2). Ponder v. Ponder, 275 Ga. 616, 571 S.E.2d 343 (2002).

It is enough if nothing appears indicative of fraud. McMullin v. Erwin, 58 Ga. 427 (1877).

Presumption of good faith in origin of possession exists when actual possession has been shown; this would not be true if actual possession had been only alleged. Latham v. Fowler, 192 Ga. 686, 16 S.E.2d 591 (1941); Fraser v. Dolvin, 199 Ga. 638, 34 S.E.2d 875 (1945).

Good faith has relation to actual existing state of mind, whether so from ignorance, skepticism, sophistry, delusion, or imbecility, and without regard to what it should be from given legal standards of law or reason. Fraser v. Dolvin, 199 Ga. 638, 34 S.E.2d 875 (1945); McDonald v. Wimpy, 206 Ga. 270, 56 S.E.2d 524 (1949).

No prescription can be based upon fraud. — If the color of title is fraudulent and notice thereof is brought home to the claimant before or at the time of the commencement of one's possession, no prescription can be based upon the fraud. Johnson v. Key, 173 Ga. 586, 160 S.E. 794 (1931).

Burden of proof. — Claimant must establish fraud in defendant or else defendant's knowledge of fraud by someone upon whose possession one relies for one's prescriptive title. Ross v. Central R.R. & Banking Co., 53 Ga. 371 (1874); Fraser v. Dolvin, 199 Ga. 638, 34 S.E.2d 875 (1945).

Notice insufficient to constitute fraud. — When the plaintiff purchased land from the county which in turn made a bid in the land at a tax sale, it will not be adjudged that under such circumstances one who enters otherwise in good faith will be held to have been guilty of such notice of the claim of the original owner as would render one's entry fraudulent. Dyal v. Sanders, 194 Ga. 228, 21 S.E.2d 596 (1942).

Alleged fraud did not defeat adverse possession. — Upon finding that the trial court had exclusive subject matter jurisdiction, the court also properly ruled that a sibling had prescriptive title to certain property under O.C.G.A. § 44-5-164 by possessing the property under color of title for a period greater than seven years, satisfying the requirements of O.C.G.A. § 44-5-161; the fraud alleged by the other siblings did not defeat the title, as they were unaware of the fraud from 1989 to 2002. Goodrum v. Goodrum, 283 Ga. 163, 657 S.E.2d 192 (2008).

Public, Continuous, Exclusive, Uninterrupted, and Peaceable

"Continuous" means that the user shall exercise the right of possession more or less frequently according to the nature of the use to which its enjoyment may be applied. Anneberg v. Kurtz, 197 Ga. 188, 28 S.E.2d 769 (1944).

Public, Continuous, Exclusive, Uninterrupted, and Peaceable (Cont'd)

"Peaceable possession" means possession unbroken by an ouster and is contradistinguished from disputed or hostile possession. Tarbutton v. All That Tract or Parcel of Land Known as Carter Place, 641 F. Supp. 521 (M.D. Ga. 1986).

Omission to use when not needed does not disprove continuity of use, shown by using it when needed; it is not required that a person shall use the easement everyday for the prescriptive period. Anneberg v. Kurtz, 197 Ga. 188, 28 S.E.2d 769 (1944).

Applicability of continuity requirement. — Requirement of continuity of possession for a period of 20 years is applicable to any practice relied upon to vest in the prescriber the right to subject the lands of another to a particular burden or use. 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).

Continuity as consisting of successive possessions of several persons in privity. — To constitute element of continuity which is essential to adverse possession as the foundation of a good prescriptive title, it is not necessary that adverse possession be maintained for the statutory period by the same person, since continuity may as effectively be shown by the successive bona fide possessions of several persons, provided the requisite privity exists between them, so as to permit attacking of their unbroken successive possessions. Blalock v. Redwine, 191 Ga. 169, 12 S.E.2d 639 (1940); Tarbutton v. All That Tract or Parcel of Land Known as Carter Place, 641 F. Supp. 521 (M.D. Ga. 1986).

In order to show privity between successive occupants, all that is necessary is that one shall have received one's possession from the other by some act of another or by operation of law. This may be accomplished by a parol agreement or understanding, under which the actual possession of the premises is delivered, as well as by a written conveyance. Blalock v. Redwine, 191 Ga. 169, 12 S.E.2d 639 (1940); Cliett v. Metropolitan Life Ins. Co., 195 Ga. 257, 24 S.E.2d 59 (1943).

Requirement of continuity of possession is one of substance and not of absolute mathematical continuity, provided that there is no break so as to make a severance of two possessions. Clark v. White, 120 Ga. 957, 48 S.E. 357 (1904); Walker v. Steffes, 139 Ga. 520, 77 S.E. 580 (1913); Anneberg v. Kurtz, 197 Ga. 188, 28 S.E.2d 769 (1944).

There may be slight intervals in which the prescriber or the prescriber's agent or tenant is not actually upon the land, as in cases of changing tenants, or if the nature or character of the business does not require one's presence every day, or there may be short intervals of temporary absence of such person. Clark v. White, 120 Ga. 957, 48 S.E. 357 (1904); Walker v. Steffes, 139 Ga. 520, 77 S.E. 580 (1913).

Mere bringing of an action which is dismissed and not prosecuted to a successful termination is no disturbance of possession so as to prevent a prescriptive title from ripening. Kile v. Fleming, 78 Ga. 1 (1886).

Suit to which the true owner is not a party does not stop or break the continuity of adverse possession, even though the land is sold under a decree in such suit. Verdery v. Savannah, F. & W. Ry., 82 Ga. 675, 9 S.E. 1133 (1889).

Joint adverse possession may create jointly acquired prescriptive title. — When two or more persons are in joint possession of real estate, and when they are jointly claiming adverse possession as against the rest of the world, they can jointly acquire prescriptive title through adverse possession. Carter v. Becton, 250 Ga. 617, 300 S.E.2d 152 (1983).

Effect of joint and mutually adverse possession. — When two or more persons without title or color of title are in joint possession of real estate, and when they are making claims to the same property adverse to each other, none has the exclusive possession necessary to establish prescriptive title through adverse possession. Carter v. Becton, 250 Ga. 617, 300 S.E.2d 152 (1983).

Tacking. — Adverse possession of land by promoters or officers of a corporation may be tacked to the adverse possession of the corporation after the corporation's organization and incorporation. Blalock v. Redwine, 191 Ga. 169, 12 S.E.2d 639 (1940).

Link in chain of prescriptive title can be formed if executor had possession in the executor's own name before turning over the land to a devisee. Caraker v. Brown, 152 Ga. 677, 111 S.E. 51 (1922).

One may hold the possession in person or by a tenant. McMullin v. Erwin, 58 Ga. 427 (1877).

Possession by a tenant or agent, under a parol understanding with the owner, will suffice to support the owner's claim of a prescriptive title. Cliett v. Metropolitan Life Ins. Co., 195 Ga. 257, 24 S.E.2d 59 (1943).

When the uncontradicted evidence shows that the plaintiff and the plaintiff's immediate grantor, in whom demises were properly laid, entered in good faith and were successively in continuous adverse possession of certain property, under color of title, of the land so described, for more than seven years before the alleged ouster, the evidence demanded a finding for the plaintiff on the basis of title by prescription. Elliott v. Robinson, 192 Ga. 682, 16 S.E.2d 433 (1941).

Vendee placed in possession by the vendor under a bond or contract to convey does not hold adversely to the vendor. Hines v. Rutherford, 67 Ga. 606 (1881); Allen v. Napier, 75 Ga. 275 (1885); Parrott v. Baker, 82 Ga. 364, 9 S.E. 1068 (1889); Brown v. Huey, 103 Ga. 448, 30 S.E. 429 (1898).

Burden of proof for owners tacking on tenant's prior possession time. — For owners to tack onto the period of their possession the time that the property was used by a tenant of the owner, the burden is upon the owners to show by a preponderance of the evidence that this prior possession is of such character as to be the foundation of prescription, and be adverse, and the foundation must meet all the requirements of law, including the requirement that the possession must be accompanied by a claim of right. Olsen v. Noble, 209 Ga. 899, 76 S.E.2d 775 (1953).

Title acquired by continuously emptying refuse into stream. — When a person in the operation of a canning plant, has from June 1 to November 1 of each year for more than 20 years, emptied the refuse from the plant into a nonnavigable stream, the person has thereby acquired a prescriptive right so to do. Anneberg v. Kurtz, 197 Ga. 188, 28 S.E.2d 769 (1944).

Easement to flood lands denied. — Railroad company which has for 25 years maintained a trestle and abutments, under which a stream flows, does not thereby acquire a prescriptive easement to flood lands, unless such flooding has been continuous and uninterrupted for a period sufficient to ripen prescription. Goble v. Louisville & N.R.R., 187 Ga. 243, 200 S.E. 259 (1938).

Long intervals between possessory periods defeats adverse possession. — When the plaintiff went into possession of a part of the land, remaining in possession only for short periods with long intervals between periods of possession, this will not meet the requirements for adverse possession. McDonald v. Wimpy, 206 Ga. 270, 56 S.E.2d 524 (1949).

Possession of property under a duly recorded warranty deed is notice to the world of the possessor's claim of title. Tarbutton v. All That Tract or Parcel of Land Known as Carter Place, 641 F. Supp. 521 (M.D. Ga. 1986).

Title insufficient absent evidence of continuous physical possession of land. — Evidence was insufficient to show that the defendant had acquired title to the strip of land in dispute by actual adverse possession for a period of 20 years since it did not show that the defendant and the defendant's predecessors in title had been in physical or corporeal possession of such strip continuously for the period stated. Bradley v. Shelton, 189 Ga. 696, 7 S.E.2d 261 (1940).

Evidence of successive occupation need not be in writing; the transfer may be accomplished by a parol agreement or understanding under which the actual possession of the premises is delivered, as well as by a written conveyance. Blalock v. Redwine, 191 Ga. 169, 12 S.E.2d 639 (1940).

Complete enclosure of land indicates complete and notorious dominion over land. McCrea v. Georgia Power Co., 179 Ga. 1, 174 S.E. 798 (1934), later appeal, 187 Ga. 708, 1 S.E.2d 664 (1939).

To constitute actual possession by enclosure, the land must be completely enclosed, but it is not necessary that the land should be completely enclosed on every side by artificial means, such as fences. McCrea v. Georgia Power Co., 179 Ga. 1, 174 S.E. 798 (1934), later appeal, 187 Ga. 708, 1 S.E.2d 664 (1939).

Actual possession of land may consist of an enclosure of land in part by fences, high banks of a creek and by a rocky shoal, if all together they make a complete enclosure. McCrea v. Georgia Power Co., 179 Ga. 1, 174 S.E. 798 (1934), later appeal, 187 Ga. 708, 1 S.E.2d 664 (1939).

Public, Continuous, Exclusive, Uninterrupted, and Peaceable (Cont'd)

Hog wire fence. — Trial court erred by concluding, as a matter of law, that defendant's ''hog wire fence'' satisfied the notoriety and exclusivity requirements of O.C.G.A. § 44-5-161. Guagliardo v. Jones, 238 Ga. App. 668, 518 S.E.2d 925 (1999).

Telephone poles and wires outline general area in use. — When poles and wires were used in the operation of a telephone line or lines over the lands of another, the poles and wires should be considered as having marked or outlined a general area in use according to the usual and ordinary manner; and if the outer limits of this space remained the same for the prescriptive period of 20 years, the resulting easement would apply at least to such general area, so that the stringing of additional wires anywhere therein consistently with customary location would be permissible as territorially within the easement, whether or not the identical space to be physically occupied by such wires had ever before been so occupied by other wires. Kerlin v. Southern Bell Tel. & Tel. Co., 191 Ga. 663, 13 S.E.2d 790 (1941).

Utility company's use of land. — Even though continuous and open possession of property for almost an entire century was subject to a power company's limited use and was therefore not ''absolutely exclusive,'' it was consistent with ownership, and was sufficiently exclusive to satisfy O.C.G.A. § 44-5-161. Georgia Power Co. v. Irvin, 267 Ga. 760, 482 S.E.2d 362 (1997).

Quitclaim deed held not impediment to adverse possession. — Quitclaim deed to the disputed property, executed 40 years earlier by plaintiff's decedent in favor of plaintiff's predecessor in title, was no impediment to decedent's adverse possession of the property, since there was no evidence of mistake or that the decedent remained in possession after executing the deed, but there was evidence that the decedent was in possession for 30 years preceding the litigation. Brown v. Williams, 259 Ga. 6, 375 S.E.2d 835 (1989).

Evidence supporting claim of adverse possession. — Indicia of ownership, including cultivating garden plots, harvesting trees, creating and maintaining roads, hunting, and excluding members of another family from use of the property were sufficient to provide notice of the occupier's adverse claim. Armour v. Peek, 271 Ga. 202, 517 S.E.2d 527 (1999).

Evidence that the possessors and their predecessors in interest were in continued possession of the property since 1906 and that they fenced, maintained, landscaped and put the property to various exclusive uses authorized the special master's finding that the possessors acquired prescriptive title. Childs v. Sammons, 272 Ga. 737, 534 S.E.2d 409 (2000).

Trial court properly found that a church acquired prescriptive title to a portion of the disputed land bordering that of the adjacent landowners, setting a boundary line between the two parcels, upon sufficient evidence of the church's adverse possession, the paper trail recognizing the church's use and possession of the disputed property for the requisite time frame, and the setting of the boundary line almost 30 years earlier imputing personal knowledge to one of the owners of the adjacent land. Mobley v. Jackson Chapel Church, 281 Ga. 122, 636 S.E.2d 535 (2006).

Evidence insufficient to support claim of adverse title. — Neighbor's claims of ownership as to a tract of land was denied because the evidence did not support the neighbor's alleged use of the tract as being continuous, exclusive, nor uninterrupted for the requisite 20-year period, and the jury could have reasonably decided that this evidence demonstrated interruption of possession or lack of continuity and exclusivity. Jackson v. Tolliver, 277 Ga. 58, 586 S.E.2d 321 (2003).

Trial court did not err when the court concluded that a buyer's tax deed did not ripen by prescription into a fee simple title because neither the buyer's payments of taxes nor occasional cleanup and mowing areas were sufficiently notorious or exclusive as to constitute actual possession. Washington v. McKibbon Hotel Group, Inc., 284 Ga. 262, 664 S.E.2d 201 (2008).

Trial court properly granted a renter summary judgment and removed an affidavit asserting adverse possession filed by the owner of the first floor of a building with regard to a 1,350 square foot space on the second floor of the building as the renter established that title was acquired via a quit claim deed, that the renter changed the

door at the base of the stairwell and had sole access to the second floor space, as well as posted no trespassing signs. The owner of the first floor failed to establish a continuous, exclusive, and uninterrupted possession of the space based on sporadic repairs made to the roof of the entire building. MEA Family Invs., LP v. Adams, 284 Ga. 407, 667 S.E.2d 609 (2008).

Petition to quiet title based on adverse possession claim properly granted. — Trial court properly granted executor's petition to quiet title based on the claim that the executor's grandfather acquired the property through adverse possession, because the grandfather and his lineal descendants continuously occupied the property and openly declared to others that they owned the property; thus, possession of the property by the executor's family was public, continuous, exclusive, uninterrupted and peaceable, and under a claim of right as required under O.C.G.A. § 44-5-161(a). Cooley v. McRae, 275 Ga. 435, 569 S.E.2d 845 (2002).

Claim of Right

Title based on adverse possession must be accompanied by claim of right. Hardison v. McCreary, 304 F.2d 699 (5th Cir. 1962).

"Claim of right" is synonymous with claim of title and claim of ownership; while this does not mean that the possession must be accompanied by a claim of title out of some predecessor, there must be some claim of title in the sense that the possessor claims the property as the possessor's own. Ewing v. Tanner, 184 Ga. 773, 193 S.E. 243 (1937); Allen v. Allen, 196 Ga. 736, 27 S.E.2d 679 (1943).

Hostile possession or possession under claim of right are legal equivalents for all practical purposes. Ewing v. Tanner, 184 Ga. 773, 193 S.E. 243 (1937).

Possession, if held under claim of right, is referred to as title, actual or supposed, under which the right of possession is claimed. Patellis v. Tanner, 199 Ga. 304, 34 S.E.2d 84 (1945).

Color of title is anything in writing, purporting to convey title to land, which defines the extent of the claim. McCrea v. Georgia Power Co., 179 Ga. 1, 174 S.E. 798 (1934), later appeal, 187 Ga. 708, 1 S.E.2d 664 (1939).

Color of title is a writing, upon the writing's face professing to pass title, but which does not do it, either from a want of title in the person making the writing, or from the defective conveyance that is used — a title that is imperfect, but not so obviously so that it would be apparent to one not skilled in the law. Fraser v. Dolvin, 199 Ga. 638, 34 S.E.2d 875 (1945).

Squatter defined. — Person entering upon lands, not claiming in good faith the right to do so by virtue of any title of one's own or by virtue of some agreement with someone else whom one believes to hold the title, is called a squatter. Hannah v. Kenny, 210 Ga. 824, 83 S.E.2d 1 (1954).

Claim must be honestly entertained before prescription can arise under an asserted claim of right. Mayor of Forsyth v. Hooks, 182 Ga. 78, 184 S.E. 724 (1936).

Honesty and good faith required. — Although a given paper may constitute color of title, no prescription can be based thereon unless the claimant entered thereunder honestly and in good faith. Johnson v. Key, 173 Ga. 586, 160 S.E. 794 (1931).

An outstanding recorded title will not prevent the ripening of a title by prescription if the possessor enters in good faith under written evidence of title from another. Hearn v. Leverette, 213 Ga. 286, 99 S.E.2d 147 (1957).

No paper title is necessary; nothing but actual bona fide possession, and the claimant is not required to show that the claimant went into possession bona fide. Evans v. Baird, 44 Ga. 645 (1872); Shiels v. Roberts, 64 Ga. 370 (1879); Hall v. Gay, 68 Ga. 442 (1882).

Deed void for uncertainty of description cannot be foundation of color of title upon which a prescriptive title may rest. Etowah Mining Co. v. Parker, 73 Ga. 51 (1884).

Evidence of claim of right or title. — Claim of right or title may be evidenced by acts or conduct in relation to the property possessed, which are inconsistent with the true owner's title. Ewing v. Tanner, 184 Ga. 773, 193 S.E. 243 (1937); Hasty v. Wilson, 223 Ga. 739, 158 S.E.2d 915 (1967).

Deed, reciting that levy under which a tax sale took place was made by a constable, is not valid as a muniment of title, but is only color of title. McDonald v. Wimpy, 206 Ga. 270, 56 S.E.2d 524 (1949).

Because the heirs produced evidence rais-

Claim of Right (Cont'd)

ing a material question of fact as to whether their ancestors possessed certain property for the requisite period of time under a claim of right pursuant to O.C.G.A. §§ 44-5-161(a), 44-5-163, and 44-5-165, the record owner was not entitled to summary judgment. Walker v. Sapelo Island Heritage Auth., 285 Ga. 194, 674 S.E.2d 925 (2009).

Equitable claim in divorce proceeding. — Wife acquired a prescriptive title to property through adverse possession because her equitable claim to ownership in a divorce proceeding gave sufficient notice of intent to possess property adversely. Walters v. McNeese, 257 Ga. 440, 360 S.E.2d 268 (1987).

Inventory of property in state entity's records. — State's claim of right to property is evidenced by its inclusion in an inventory of the property of the Western and Atlantic Railroad as the state is the owner of the Western and Atlantic Railroad. Seignious v. Metropolitan Atlanta Rapid Transit Auth., 252 Ga. 69, 311 S.E.2d 808 (1984).

Claim of right will be presumed from assertion of dominion, particularly if the assertion of dominion is made by the erection of valuable improvements. Chancey v. Georgia Power Co., 238 Ga. 397, 233 S.E.2d 365 (1977).

Judgment of probate court is color of title. — Judgment of a probate court purporting to vest title to the land of a decedent in a widow for a year's support is generally color of title on which prescription can be based. Johnson v. Key, 173 Ga. 586, 160 S.E. 794 (1931).

Sheriff's deed may be color of title, even though the deed is defective. Martin v. Clark, 190 Ga. 270, 9 S.E.2d 54 (1940).

Claim lacking element of hostility fails to show good title. — Plaintiff did not show a good prescriptive title by seven years adverse possession under color of voluntary deed made to her by husband, intervenors' brother, since the necessary element of hostility inherent in adverse possession was lacking, by reason of the fact that, before the lapse of seven years from the beginning of plaintiff's possession, plaintiff's vendee, defendant, in actual possession, had under the undisputed evidence recognized that his holding of the land was subject to any valid claim of the intervenors, and plaintiff also had partly recognized their claim. Pittman v. Pittman, 196 Ga. 397, 26 S.E.2d 764 (1943).

Title fails for lack of claim of right. — When the tenant of the immediate predecessor in title to the defendants used a portion of plaintiff's adjoining property in such a manner as to be considered an adverse use as against the plaintiffs, but the owners (defendant's predecessors in title) during this period made no claim of a right to the use of plaintiffs' property, and expressly denied any claim of benefit by reason of the use of their tenant, one of the essential elements of prescription is lacking, as the possession through the tenant was not accompanied by any claim of right on its part as the owner and the defendants' own use of the property was for less than seven years. Olsen v. Noble, 209 Ga. 899, 76 S.E.2d 775 (1953).

Permissive Possession

Permissive possession cannot be foundation of prescription until an adverse claim and actual notice to the other party are shown. Johnson v. Key, 173 Ga. 586, 160 S.E. 794 (1931); Tanner v. John Hancock Mut. Life Ins. Co., 73 F.2d 382 (5th Cir. 1934), cert. denied, 295 U.S. 733, 55 S. Ct. 644, 79 L. Ed. 1682 (1935); Harris v. Mandeville, 195 Ga. 251, 24 S.E.2d 23 (1943); Blanton v. Moody, 265 F.2d 533 (5th Cir. 1959); Dickson v. Davis, 237 Ga. 883, 230 S.E.2d 279 (1976).

Possession inceptively permissive cannot become adverse until the possessor notifies the one who placed the possessor in possession that the possessor is holding adversely. Rucker v. Rucker, 136 Ga. 830, 72 S.E. 241 (1911).

It is necessary that, during the whole time required for the ripening of prescription, there should be something to give notice that another is doing such acts or holding out such signs as to indicate the existence of a possession adverse to the true owner. Clark v. White, 120 Ga. 957, 48 S.E. 357 (1904); Walker v. Steffes, 139 Ga. 520, 77 S.E. 580 (1913).

Private way may not be acquired by prescription if use of the private way is with the owner's permission until an adverse claim is made and actual notice is given to the owner or party in possession. Greer v. Piedmont

Realty Invs., Inc., 248 Ga. 821, 286 S.E.2d 712 (1982).

Possession was permissive during period when parties went into possession of their tract under an oral agreement to purchase the land from the owner, and did not receive a deed to the property until the purchase price was paid; they could not prescribe against the vendor until the purchase money was paid in full. Burk v. Tyrrell, 212 Ga. 239, 91 S.E.2d 744 (1956).

Permissive possession prevents prevailing under theory of adverse possession. Foster v. Adcock, 207 Ga. 201, 60 S.E.2d 334 (1950).

Permissive possession is presumed to be for another, the rightful owner. Ewing v. Tanner, 184 Ga. 773, 193 S.E. 243 (1937).

If personalty of tenant is left behind by the tenant, possession by the landlord is permissive, and cannot be the foundation of a prescription until an adverse claim and actual notice to the other party. Cozart v. Johnson, 181 Ga. 337, 182 S.E. 502 (1935).

Possession by heirs. — Possession by heirs is permissive, not adverse, and no prescription can be based on such possession as against the grantees in security deeds. Boswell v. Underwood, 106 Ga. App. 675, 127 S.E.2d 870 (1962).

When an heir, in possession, held under a deed from the other heirs of the grantor, who had executed a security deed to the plaintiff and, as an heir personally, still owned and claimed in part only by descent from the grantor in plaintiff's security deed, that heir ''stood in the shoes'' of such grantor, and could not set up an adverse prescriptive title against the plaintiff grantee in the security deed. Sweat v. Arline, 186 Ga. 460, 197 S.E. 893 (1938).

Possession and valuable improvements alone are not sufficient bases for prescriptive claim in favor of a grantor against a grantee because the possession is permissive, and any improvements put on the land by the grantor accrue to the benefit of the grantee in the absence of a bona fide adverse claim of title and notice to the grantee. Fuller v. Calhoun Nat'l Bank, 59 Ga. App. 419, 1 S.E.2d 86 (1939).

No prescriptive right acquired by permissive encroachment. — When the plaintiff and her husband had encroached upon lands now owned by the defendant with the permission of the previous owner, the plaintiff did not acquire any prescriptive right by the permissive encroachment made upon such lands since neither the plaintiff nor her husband gave notice at any time that they were claiming adversely to the rights of the defendant. McClung v. Schulte, 214 Ga. 426, 105 S.E.2d 225 (1958).

Grantor who never surrenders possession to grantee does not hold adversely to grantee. Jay v. Welchel, 78 Ga. 786, 3 S.E. 906 (1887); Melson v. Leigh, 159 Ga. 683, 126 S.E. 718 (1925).

Vendor does not hold adversely to vendee if the vendor sold property to his wife and continued in possession without making her a deed thereto as he promised. McArthur v. Ryals, 162 Ga. 413, 134 S.E. 76 (1926).

Adverse possession not sustained against security deed holder. — One in possession of property who makes payments to the holder of a security deed on the property, such payments being either rent or payments on an indebtedness that the property itself secured, cannot sustain a claim of adverse possession against the security deed holder as a matter of law. Dickson v. Davis, 237 Ga. 883, 230 S.E.2d 279 (1976).

No adverse possession if possessor of property admits making payments of rent to record title holder. Dickson v. Davis, 237 Ga. 883, 230 S.E.2d 279 (1976).

Acquiescence to division line between land of coterminous proprietors not mere permissive possession. — If location of the line between two coterminous proprietors is uncertain, and the proprietors, conceding the title of each to each one's separate lot, erect at joint expense a fence intended as marking the line of division, and both acquiesce therein by exercise of actual possession up to the fence, such possession of each is in right of the possessor and, being so, is not mere permissive possession within the meaning of this statute. Lockwood v. Daniel, 193 Ga. 122, 17 S.E.2d 542 (1941) (see O.C.G.A. § 44-5-161).

Possession is not permissive if the evidence shows a claim of right under an equitable title based upon an oral contract of sale, the payment of a valuable consideration, and the erection of valuable improvements. Serritt v. Johnson, 223 Ga. 620, 157 S.E.2d 484 (1967).

Tenant at sufferance is not in possession by permission of the landlord, but as a result

Permissive Possession (Cont'd)

of the tenant's laches or neglect. Reid v. Wilkerson, 222 Ga. 282, 149 S.E.2d 700 (1966).

RESEARCH REFERENCES

Am. Jur. 2d. — 3 Am. Jur. 2d, Adverse Possession, § 10 et seq.

C.J.S. — 2 C.J.S., Adverse Possession, §§ 1, 29 et seq. 31 C.J.S., Estates, § 79.

ALR. — Adverse possession by third party or stranger of property held in trust, 2 ALR 41.

Writing as essential to color of title in adverse occupant of land, 2 ALR 1457.

Adverse possession of common, 9 ALR 1373.

Act of trespasser as interrupting adverse possession, 22 ALR 1458.

Adverse possession of railroad right of way, 50 ALR 303.

Adverse possession or prescription as affected by owner's informal consent subsequent to hostile entry, 65 ALR 128.

May adverse possession be predicated upon use or occupancy by one spouse of real property of other, 74 ALR 138.

Interval between crops as affecting continuity of adverse possession, 76 ALR 1492.

Adverse possession due to ignorance or mistake as to boundaries, 97 ALR 14.

Tenant's adverse possession or use of third person's land not within the description in the lease as inuring to landlord's benefit so as to support latter's title or right by adverse possession or prescription, 105 ALR 1187.

Adverse possession or prescription in respect of burial lot, 107 ALR 1294.

Use by public as affecting acquisition by individual of right of way by prescription, 111 ALR 221.

Adverse possession as against remainderman during life estate as affected by fact that conveyance by life tenant purported to cover fee, 112 ALR 1042.

Purchase of, or offer to purchase or to settle, outstanding title, interest, or claim as interrupting continuity of adverse possession as regards another title, interest, or claim, 125 ALR 825.

Adverse possession by stranger as against mortgagee, 136 ALR 782.

Cutting of timber as adverse possession, 170 ALR 887.

Title by adverse possession as affected by recording statutes, 9 ALR2d 850.

Tacking adverse possession of area not within description of deed or contract, 17 ALR2d 1128.

Adverse possession: sufficiency, as regards continuity, of seasonal possession other than for agricultural or logging purposes, 24 ALR2d 632.

Possession by stranger claiming under conveyance by cotenant as adverse to other cotenants, 32 ALR2d 1214.

Acquisition of title to mines or minerals by adverse possession, 35 ALR2d 124.

Void tax deed, tax sale certificate, and the like, as constituting color of title, 38 ALR2d 986.

Grantor's possession as adverse possession against grantee, 39 ALR2d 353.

Title by or through adverse possession as marketable, 46 ALR2d 544.

What acts, claims, circumstances, instruments, color of title, judgment, or thing of record will ground adverse possession in a life tenant as against remaindermen or reversioners, 58 ALR2d 299.

Judgment or decree as constituting color of title, 71 ALR2d 404.

Adverse possession of land by personal representative as against deceased owner's heirs or devisees, 73 ALR2d 1097.

Adverse possession involving ignorance or mistake as to boundaries — modern views, 80 ALR2d 1171.

Adverse possession based on encroachment of building or other structure, 2 ALR3d 1005.

Acquisition of title to land by adverse possession by state or other governmental unit or agency, 18 ALR3d 678.

Grazing of livestock or gathering of natural crop as fulfilling traditional elements of adverse possession, 48 ALR3d 818.

Owner's surveying of land as entry thereon tolling running of statute of limitations for purposes of adverse possession, 76 ALR3d 1202.

Fence as factor in fixing location of boundary line — modern cases, 7 ALR4th 53.

44-5-162. Effect of fraud on prescription.

(a) In order for fraud to prevent the possession of property from being the foundation of prescription, such fraud must be actual or positive and not merely constructive or legal.

(b) When actual or positive fraud prevents or deters another party from acting, prescription shall not run until such fraud is discovered. (Civil Code 1895, § 3597; Civil Code 1910, § 4177; Code 1933, § 85-414.)

History of Code section. — This Code section is derived from the decision in Salter v. Salter, 80 Ga. 178, 4 S.E. 391 (1887).

JUDICIAL DECISIONS

Presumption of good faith arises from adverse possession. Baxley v. Baxley, 117 Ga. 60, 43 S.E. 436 (1903).

Moral fraud required to defeat prescriptive title for fraud. — In order to defeat a prescriptive title for fraud, the claimant's written evidence of title, under which the claimant went into possession of the property, must be shown to have been fraudulent within the claimant's own knowledge, or notice thereof brought home to the claimant before or at the time of the commencement of the claimant's possession. Wingfield v. Virgin, 51 Ga. 139 (1874); Street v. Collier, 118 Ga. 470, 45 S.E. 294 (1903); Wood v. Wilson, 145 Ga. 256, 88 S.E. 980 (1916). See also Salter v. Salter, 80 Ga. 178, 4 S.E. 391, 12 Am. St. R. 249 (1887).

To defeat prescription title, the fraud of the party claiming thereunder must be such as to change one's conscience; one must be cognizant of the fraud, not by constructive but by actual notice. Kelley v. Tucker, 175 Ga. 796, 166 S.E. 187 (1932).

Only moral fraud will prevent possession under color of title from ripening into prescriptive title. Wanamaker v. Wanamaker, 215 Ga. 473, 111 S.E.2d 94 (1959).

Actual fraud cannot be founded on presumptive notice, on that sort of notice which is based upon record, or which is presumed from want of diligence. Baxter v. Phillips, 150 Ga. 498, 104 S.E. 196 (1920); Mohr & Sons v. Dubberly, 165 Ga. 309, 140 S.E. 856 (1927).

Direct evidence of bona fide possession is not required. Baxley v. Baxley, 117 Ga. 60, 43 S.E. 436 (1903).

In order to constitute element of continuity which is essential to adverse possession as the foundation of a good prescriptive title, it is not necessary that adverse possession be maintained from the statutory period by the same person, since continuity may as effectively be shown by the successive bona fide possessions of several persons, provided the requisite privity exists between the people, so as to thus permit attacking of their unbroken successive possessions. Blalock v. Redwine, 191 Ga. 169, 12 S.E.2d 639 (1940); Cliett v. Metropolitan Life Ins. Co., 195 Ga. 257, 24 S.E.2d 59 (1943).

In order to show privity between successive occupants, all that is necessary is that one shall have received one's possession from the other by some act of such other or by operation of law; it is not necessary that such a transfer be in writing, since this may be accomplished by a parol agreement or understanding, under which the actual possession of the premises is delivered, as well as by a written conveyance. Blalock v. Redwine, 191 Ga. 169, 12 S.E.2d 639 (1940); Cliett v. Metropolitan Life Ins. Co., 195 Ga. 257, 24 S.E.2d 59 (1943).

Possession by tenant or agent sufficient. — Possession by a tenant or agent, under a parol understanding with the owner, will suffice to support the owner's claim of prescriptive title. Cliett v. Metropolitan Life Ins. Co., 195 Ga. 257, 24 S.E.2d 59 (1943).

Alleged fraud did not defeat adverse possession. — Upon finding that the trial court had exclusive subject matter jurisdiction, the court also properly ruled that a sibling had prescriptive title to certain property under

O.C.G.A. § 44-5-164 by possessing the property under color of title for a period greater than seven years, satisfying the requirements of O.C.G.A. § 44-5-161; the fraud alleged by the other siblings did not defeat the title as the siblings were unaware of the fraud from 1989 to 2002. Goodrum v. Goodrum, 283 Ga. 163, 657 S.E.2d 192 (2008).

Cited in Thomas v. Couch, 171 Ga. 602, 156 S.E. 206 (1930); Bagley v. Forrester, 53 F.2d 831 (5th Cir. 1931); Reynolds v. Smith, 186 Ga. 838, 199 S.E. 137 (1938); Fitzpatrick v. Massee-Felton Lumber Co., 188 Ga. 80, 3 S.E.2d 91 (1939); Metropolitan Life Ins. Co. v. Hall, 191 Ga. 294, 12 S.E.2d 53 (1940).

RESEARCH REFERENCES

Am. Jur. 2d. — 3 Am. Jur. 2d, Adverse Possession, §§ 13 et seq., 111 et seq., 118, 130, 136, 143, 144, 264, 301.

C.J.S. — 2 C.J.S., Adverse Possession, §§ 208, 263.

ALR. — What constitutes sufficient repudiation of express trust by trustee to cause statute of limitations to run, 54 ALR2d 13.

44-5-163. When adverse possession for 20 years confers title.

Possession of real property in conformance with the requirements of Code Section 44-5-161 for a period of 20 years shall confer good title by prescription to the property against everyone except the state and those persons laboring under the disabilities stated in Code Section 44-5-170. (Laws 1767, Cobb's 1851 Digest, p. 560; Code 1863, § 2641; Code 1868, § 2640; Code 1873, § 2682; Code 1882, § 2682; Civil Code 1895, § 3588; Civil Code 1910, § 4168; Code 1933, § 85-406.)

Cross references. — Surveying and marking boundary lines of property possessed under claim of right for more than seven years, § 44-4-7. Presumption of grant from state upon 20 years' possession of land under claim of right, § 44-5-14.

Law reviews. — For article, ''Some Aspects of the Law of Easements,'' see 9 Ga. St. B.J. 287 (1973). For annual survey of real property law, see 57 Mercer L. Rev. 331 (2005). For survey article on local government law, see 59 Mercer L. Rev. 285 (2007).

JUDICIAL DECISIONS

Analysis

General Consideration
Requirements
Actions Supporting Title
Actions Failing to Establish Title
Burden of Proof

General Consideration

"Adverse" construed. — Possession is ''adverse'' within the meaning of this statute only as to one who has an immediate right to bring an action to recover lands the possession of which are wrongfully withheld. Futch v. Jarrard, 203 Ga. 47, 45 S.E.2d 420 (1947) (see O.C.G.A. § 44-5-163).

Applicability of doctrine of prescription. — Doctrine of prescription applies to any incorporeal right which may be lawfully granted. Davis v. State, 9 Ga. App. 430, 71 S.E. 603 (1911); Smith v. Jensen, 156 Ga. 814, 120 S.E. 417 (1923).

Ripened prescriptive title extinguishes all inconsistent titles. — When an adverse possessor has held for the requisite period and one's prescriptive title ripens, it extinguishes all other inconsistent titles and itself becomes the true title. Danielly v. Lowe, 161

Ga. 279, 130 S.E. 687 (1925).

Provision that adverse possession shall not run against state is all-inclusive, and it includes all property held by this state whether used for governmental or for proprietary purposes. Grand Lodge, I.O.O.F. v. City of Thomasville, 226 Ga. 4, 172 S.E.2d 612 (1970).

State not barred by statute of limitations. — No statute of limitations or prescription runs against the state so as to be a bar. Dougherty v. Western & A.R.R., 53 Ga. 304 (1874).

Fraud, to bar prescription, must be actual fraud. Street v. Collier, 118 Ga. 470, 45 S.E. 294 (1903).

Prescription does not run against a county in regard to land held for the benefit of the public. Clark v. McBride, 256 Ga. 308, 348 S.E.2d 634 (1986), overruled on other grounds, Northpark Assocs. No. 2 v. Homard Dev. Co., 262 Ga. 138, 414 S.E.2d 214 (1992).

Prescription may run against wife in favor of husband, though living together, as to property other than home. Bagley v. Forrester, 53 F.2d 831 (5th Cir. 1931).

Mandamus to require county to maintain road. — Group of landowners were properly granted a writ of mandamus requiring a county to maintain an adjacent road as the county had acquired title to the road by prescriptive acquisition, abandonment was not an issue, and compliance with O.C.G.A. § 32-3-3(c) did not need to be shown when a roadway was otherwise acquired by prescription; moreover, urging that a county's failure to meet the county's obligation to maintain public roads was an acceptable method of abandoning a roadway would encourage counties to disregard their public duty. Shearin v. Wayne Davis & Co., P.C., 281 Ga. 385, 637 S.E.2d 679 (2006).

Cited in McLaren v. Irvin, 63 Ga. 275 (1879); Milliken v. Kennedy, 87 Ga. 463, 13 S.E. 635 (1891); Cushman v. Coleman, 92 Ga. 772, 19 S.E. 46 (1894); Sapp v. Cline, 131 Ga. 433, 62 S.E. 529 (1908); Tarver v. Deppen, 132 Ga. 798, 65 S.E. 177, 24 L.R.A. (n.s.) 1161 (1909); Bunger v. Grimm, 142 Ga. 448, 83 S.E. 200, 1916C Ann. Cas. 173 (1914); Stringfield v. Stringfield, 143 Ga. 557, 85 S.E. 754 (1915); Ballenger v. Burton, 147 Ga. 5, 92 S.E. 514 (1917); Brewton v. Brewton, 167 Ga. 633, 146 S.E. 444 (1929); Wright v. Harber, 175 Ga. 696, 165 S.E. 616 (1932); Beeland v. Butler Payne Lumber Co., 48 Ga. App. 619, 173 S.E. 436 (1934); Rocker v. De Loach, 178 Ga. 480, 173 S.E. 709 (1934); Sewell v. Sprayberry, 186 Ga. 1, 196 S.E. 796 (1938); McCrea v. Georgia Power Co., 187 Ga. 708, 1 S.E.2d 664 (1939); Fitzpatrick v. Massee-Felton Lumber Co., 188 Ga. 80, 3 S.E.2d 91 (1939); Stanley v. Laurens County Bd. of Educ., 188 Ga. 581, 4 S.E.2d 164 (1939); Crump v. McEntire, 190 Ga. 684, 10 S.E.2d 186 (1940); Flournoy v. United States, 115 F.2d 220 (5th Cir. 1940); Lockwood v. Daniel, 193 Ga. 122, 17 S.E.2d 542 (1941); Hardy v. Brannen, 194 Ga. 252, 21 S.E.2d 417 (1942); Holton v. Mercer, 195 Ga. 47, 23 S.E.2d 166 (1942); Holloway v. Woods, 195 Ga. 55, 23 S.E.2d 254 (1942); Harden v. Morton, 195 Ga. 471, 24 S.E.2d 685 (1943); Pittman v. Pittman, 196 Ga. 397, 26 S.E.2d 764 (1943); Patellis v. Tanner, 199 Ga. 304, 34 S.E.2d 84 (1945); Fraser v. Dolvin, 199 Ga. 638, 34 S.E.2d 875 (1945); Barfield v. Vickers, 200 Ga. 279, 36 S.E.2d 766 (1946); Powell v. Moore, 202 Ga. 62, 42 S.E.2d 110 (1947); Browne v. Johnson, 204 Ga. 634, 51 S.E.2d 416 (1949); Key v. Stringer, 204 Ga. 869, 52 S.E.2d 305 (1949); Ballenger v. Houston, 207 Ga. 438, 62 S.E.2d 189 (1950); Harrison v. Durham, 210 Ga. 187, 78 S.E.2d 482 (1953); Phillips v. Wheeler, 212 Ga. 603, 94 S.E.2d 732 (1956); Turner v. McKee, 97 Ga. App. 531, 103 S.E.2d 658 (1958); Hughes v. Heard, 215 Ga. 156, 109 S.E.2d 510 (1959); Blanton v. Moody, 265 F.2d 533 (5th Cir. 1959); Pridgen v. Coffee County Bd. of Educ., 218 Ga. 326, 127 S.E.2d 808 (1962); Harrison v. Morris, 108 Ga. App. 566, 133 S.E.2d 899 (1963); Little v. Weatherby, 220 Ga. 274, 138 S.E.2d 380 (1964); Reid v. Wilkerson, 222 Ga. 282, 149 S.E.2d 700 (1966); Barnett v. Holliday, 228 Ga. 361, 185 S.E.2d 397 (1971); United States v. Williams, 441 F.2d 637 (5th Cir. 1971); Seaboard Coast Line R.R. v. Carter, 231 Ga. 5, 200 S.E.2d 113 (1973); Roe v. Doe, 233 Ga. 691, 212 S.E.2d 854 (1975); Jordan v. Way, 235 Ga. 496, 220 S.E.2d 258 (1975); Chancey v. Georgia Power Co., 238 Ga. 397, 233 S.E.2d 365 (1977); Pannell v. Continental Can Co., 554 F.2d 216 (5th Cir. 1977); Swicord v. Hester, 240 Ga. 484, 241 S.E.2d 242 (1978); Crosby v. Jones, 241 Ga. 558, 246 S.E.2d 677 (1978); Killingsworth v. Willis, 244 Ga. 662, 261 S.E.2d 613 (1979); Fuller v.

General Consideration (Cont'd)

Smith, 245 Ga. 751, 267 S.E.2d 23 (1980); Bailey v. Johnson, 245 Ga. 823, 268 S.E.2d 147 (1980); Atlanta Trailer Mart, Inc. v. Ashmore Foods, Inc., 247 Ga. 254, 275 S.E.2d 336 (1981); Ross v. Lowery, 249 Ga. 307, 290 S.E.2d 61 (1982); Simms v. Candler, 256 Ga. 163, 345 S.E.2d 37 (1986); Tarbutton v. All That Tract or Parcel of Land Known as Carter Place, 641 F. Supp. 521 (M.D. Ga. 1986); Georgia Power Co. v. Irvin, 267 Ga. 760, 482 S.E.2d 362 (1997); Strozzo v. Coffee Bluff Marina Property, 250 Ga. App. 212, 550 S.E.2d 122 (2001).

Requirements

Actual adverse possession of land for 20 years, by itself, gives good title by prescription. Hughes v. Heard, 215 Ga. 156, 109 S.E.2d 510 (1959).

Statute provides for a title to land by prescription based upon possession alone for the time prescribed without the aid of any written evidence of title. Futch v. Jarrard, 203 Ga. 47, 45 S.E.2d 420 (1947) (see O.C.G.A. § 44-5-163).

An easement may be acquired by prescription in 20 years unless there is some color of title, in which case only seven years is required. Smith v. Clay, 239 Ga. 220, 236 S.E.2d 346 (1977).

Possession relied upon must meet requirements of O.C.G.A. § 44-5-161. — Whether title was claimed under former Code 1933, § 85-406 (see O.C.G.A. § 44-5-163) by virtue of adverse possession for 20 years without written evidence of title or, under former Code 1933, § 85-407 (see O.C.G.A. § 44-5-164) by virtue of adverse possession for seven years under color of title, the possession relied upon must meet the requirements of former Code 1933, § 85-402 (see O.C.G.A. § 44-5-161). Martin v. Clark, 190 Ga. 270, 9 S.E.2d 54 (1940); Moore v. Stephens, 199 Ga. 500, 34 S.E.2d 716 (1945).

Surveying of a disputed tract of land and marking of drill rods and pins found thereon did not amount to an adverse possession; additionally, these acts did not become an adverse possession merely because the acts were done in the presence of the true owner and consistent with the owner's indications of the property boundaries. Henson v. Tucker, 278 Ga. App. 859, 630 S.E.2d 64 (2006).

Trial court properly found that a church acquired prescriptive title to a portion of the disputed land bordering that of the adjacent landowners, setting a boundary line between the two parcels, upon sufficient evidence of the church's adverse possession, the paper trail recognizing the church's use and possession of the disputed property for the requisite time frame, and the setting of the boundary line almost 30 years earlier imputing personal knowledge to one of the owners of the adjacent land. Mobley v. Jackson Chapel Church, 281 Ga. 122, 636 S.E.2d 535 (2006).

In absence of color of title, possession must be continuous for a period of at least 20 years before such possession can ripen into a prescriptive title. Spillers v. Jordan, 96 Ga. App. 426, 100 S.E.2d 483 (1957).

Period of possession need not be for more than 20 years. Bridges v. Black, 144 Ga. 311, 87 S.E. 20 (1915).

Actual possession required for title by prescription. Brookman v. Rennolds, 148 Ga. 721, 98 S.E. 543 (1919).

Evidence insufficient for title. — Evidence was insufficient to show that the defendant had acquired title to a strip of land by actual adverse possession for a period of 20 years since the evidence did not show that the defendant and defendant's predecessors in title had been in physical or corporeal possession of such strip continuously for the period stated. Bradley v. Shelton, 189 Ga. 696, 7 S.E.2d 261 (1940).

When poles and wires were used in the operation of a telephone line or lines over the lands of another, they should be considered as having marked or outlined a general area in use according to the usual or ordinary manner; and if the outer limits of this space remained the same for the prescriptive period of 20 years, the resulting easement would apply at least to such general area, so that the stringing of additional wires anywhere therein consistently with customary location would be permissible as territorially within the easement, whether or not the identical space to be physically occupied by such wires had ever before been so occupied by other wires. Kerlin v. Southern Bell Tel. & Tel. Co., 191 Ga. 663, 13 S.E.2d 790 (1941).

Land beyond limits of actual possession excluded. — Prescriptive title, arising upon

actual adverse possession alone, will not include any part of a given tract of land beyond the limits of the actual possession. Ford v. Williams, 73 Ga. 106 (1884); Baker v. White, 136 Ga. 541, 71 S.E. 871 (1911); Rock Run Iron Co. v. Heath, 155 Ga. 95, 116 S.E. 590 (1923); Martin v. Clark, 190 Ga. 270, 9 S.E.2d 54 (1940).

When actual possession impossible. — When the character of property is such that it is impossible to be in actual possession thereof, title thereto can pass from one to another only by written evidence of title. Rowland v. McLain, 86 Ga. App. 140, 70 S.E.2d 918 (1952).

Notice required. — To establish title by adverse possession, the claimant must show actual notice of the adverse claim. Coleman v. Coleman, 265 Ga. 568, 459 S.E.2d 166 (1995).

Continuity of possession required for acquisition of prescriptive easement. — To acquire a prescriptive easement over real property, there must be continuity of possession of the right asserted for the entire period fixed by statute. 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).

In order to constitute element of continuity which is essential to adverse possession as the foundation of good prescriptive title, it is not necessary that adverse possession be maintained for the statutory period by the same person, since continuity may just as effectively be shown by the successive bona fide possessions of several persons, provided the requisite privity exists between the people, so as to permit a tacking of their unbroken successive possessions. Blalock v. Redwine, 191 Ga. 169, 12 S.E.2d 639 (1940); Cliett v. Metropolitan Life Ins. Co., 195 Ga. 257, 24 S.E.2d 59 (1943).

In order to show privity between successive occupants, all that is necessary is that one shall have received one's possession from the other by some act of such other person or by operation of law. Blalock v. Redwine, 191 Ga. 169, 12 S.E.2d 639 (1940); Cliett v. Metropolitan Life Ins. Co., 195 Ga. 257, 24 S.E.2d 59 (1943).

Adverse possession of land by promoters or officers of a corporation may be tacked to the adverse possession of the corporation after the corporation's organization and incorporation. Blalock v. Redwine, 191 Ga. 169, 12 S.E.2d 639 (1940).

Privity between successive occupants may be accomplished by a parol agreement or understanding, under which the actual possession of the premises is delivered, as well as by a written conveyance. Cliett v. Metropolitan Life Ins. Co., 195 Ga. 257, 24 S.E.2d 59 (1943).

Prescription may run against wife in favor of husband, though living together, as to property other than home. Bagley v. Forrester, 53 F.2d 831 (5th Cir. 1931).

Permissive possession cannot be foundation of prescription until there is adverse claim and actual notice to other party. Harris v. Mandeville, 195 Ga. 251, 24 S.E.2d 23 (1943).

Actions Supporting Title

Abandonment. — Title once ripened by adverse possession is no longer affected by abandonment. Peeples v. Rudulph, 153 Ga. 17, 111 S.E. 548 (1922).

Possession of church by membership for prescriptive period supports title. — Possession of the property for use of a church by the constituent membership is possession of the church as such an entity, and if continued adversely for the prescriptive period will support prescriptive title. Slaughter v. Land, 194 Ga. 156, 21 S.E.2d 72 (1942).

Possession, use, and upkeep of road by public as highway for 20 years ripens into prescriptive title. Hyde v. Chappell, 194 Ga. 536, 22 S.E.2d 313 (1942).

Possession by tenant or agent will suffice to support owner's claim of prescriptive title under a parol understanding with the owner. Cliett v. Metropolitan Life Ins. Co., 195 Ga. 257, 24 S.E.2d 59 (1943).

Adverse possession properly granted under both O.C.G.A. §§ 44-5-163 and 44-5-164. — Because a trust's predecessors in interest to a disputed parcel of land maintained public, exclusive, and continuous possession of that tract for the required time frames under both O.C.G.A. §§ 44-5-163 and 44-5-164, and the original grantee's hostile possession of the property was done in good faith that a claim of right existed, the trial court did not err in adopting a special master's award and findings that the trust owned the disputed property against the

Actions Supporting Title (Cont'd)

rights of a contesting neighbor. Crawford v. Simpson, 279 Ga. 280, 612 S.E.2d 783 (2005).

When homestead claim does not prevent prescriptive title from ripening. — When the homestead never became legally operative by reason of a deed made prior to the application for homestead, and since the alleged equitable redemption of the property under such deed was never asserted by proper legal or equitable proceedings, and none of the claimants were shown to be laboring under disabilities, a claim of homestead would not prevent title by prescription from ripening. Slade v. Barber, 200 Ga. 405, 37 S.E.2d 143 (1946).

Evidence of claim of right or title sufficiently avoids summary judgment. — Because the heirs produced evidence raising a material question of fact as to whether their ancestors possessed certain property for the requisite period of time under a claim of right pursuant to O.C.G.A. §§ 44-5-161(a), 44-5-163, and 44-5-165, the record owner was not entitled to summary judgment. Walker v. Sapelo Island Heritage Auth., 285 Ga. 194, 674 S.E.2d 925 (2009).

Actions Failing to Establish Title

Payment of taxes on property is insufficient to establish prescriptive title. Adams v. Talmadge, 240 Ga. 193, 240 S.E.2d 9 (1977).

Beneficiaries cannot prescribe against title conveyed by trustee. — Trial court properly granted summary judgment to the property owner on the trust beneficiary's suit to establish certain prescriptive rights to property a trust had sold to the property owner as a sale by a trustee of land held by the trustee in trust for beneficiaries, such as the trust beneficiary, was in effect a sale by the beneficiaries, including the trust beneficiaries, and the beneficiaries could not prescribe against title conveyed by the trustee; accordingly, the trust beneficiary's possession of a portion of the property after the trustee sold the property to the property owner could not be adverse to the property owner. Reasor v. Peoples Fin. Servs., 276 Ga. 534, 579 S.E.2d 742 (2003).

Principle of acquiescence was inapplicable. — Neighbor's claims of ownership as to a tract of land was denied because the principle of acquiescence was inapplicable to the ownership of a tract of land as a deed to the tract of land undisputedly conveyed the tract of land and the property line was neither in dispute, uncertain, or unascertained during the period in question. Jackson v. Tolliver, 277 Ga. 58, 586 S.E.2d 321 (2003).

Sporadic repairs. — Trial court properly granted a renter summary judgment and removed an affidavit asserting adverse possession filed by the owner of the first floor of a building with regard to a 1,350 square foot space on the second floor of the building as the renter established that title was acquired via a quit claim deed, that the renter changed the door at the base of the stairwell and had sole access to the second floor space, as well as posted no trespassing signs. The owner of the first floor failed to establish a continuous, exclusive, and uninterrupted possession of the space based on sporadic repairs made to the roof of the entire building. MEA Family Invs., LP v. Adams, 284 Ga. 407, 667 S.E.2d 609 (2008).

When there has been no cultivation, enclosure, or act of possession thereon except the occasional cutting of timber of a disputed strip of land, there can be no prescriptive title based on possession of the property for 20 years. Robertson v. Abernathy, 192 Ga. 694, 16 S.E.2d 584 (1941), later appeal, 195 Ga. 704, 25 S.E.2d 424 (1943).

Burden of Proof

One who claims prescriptive title has burden of establishing it. Yerbey v. Chandler, 194 Ga. 263, 21 S.E.2d 636 (1942).

Burden of proof satisfied. — Because: (1) a landowner continuously and exclusively maintained and used the land in question for more than 20 years accompanied by a claim of right; and (2) a claim that the Dead Man's Statute was violated lacked merit, the landowner established prescriptive title by adverse possession. Murray v. Stone, 283 Ga. 6, 655 S.E.2d 821 (2008).

RESEARCH REFERENCES

Am. Jur. 2d. — 3 Am. Jur. 2d, Adverse Possession, §§ 1 et seq., 7, 13 et seq., 42, 50.

C.J.S. — 2 C.J.S., Adverse Possession, §§ 66, 200 et seq.

ALR. — Adverse possession of railroad right of way, 50 ALR 303.

May adverse possession be predicated upon use or occupancy by one spouse of real property of other, 74 ALR 138.

Time during which dominant and servient tracts were in same ownership or under same control as excluded or included in determining easement by prescription, 98 ALR 591.

Adoption as period of prescription for easement the period prescribed by statute of limitations with reference to adverse possession as including condition of color of title or right or other conditions imposed by that statute, 112 ALR 545.

Adverse possession as affected by attempt during period thereof to change, or make more specific, the tract claimed, 115 ALR 1299.

Time when statute of limitations or period of adverse possession of real estate commences to run against or in favor purchaser at judicial sale, 118 ALR 946.

Adverse possession: mortgagee's possession before foreclosure as barring right of redemption, 7 ALR2d 1131.

Acquisition of title to mines or minerals by adverse possession, 35 ALR2d 124.

Possession of mortgagor or successor in interest as adverse to purchaser at foreclosure sale, 38 ALR2d 348.

Adverse possession of landlord as affected by tenant's recognition of title of third person, 38 ALR2d 826.

Adverse possession under parol gift of land, 43 ALR2d 6.

Title by or through adverse possession as marketable, 46 ALR2d 544.

Tax sales or forfeitures by or to governmental units as interrupting adverse possession, 50 ALR2d 600.

Acquisition of title to land by adverse possession by state or other governmental unit or agency, 18 ALR3d 678.

Owner's surveying of land as entry thereon tolling running of statute of limitations for purposes of adverse possession, 76 ALR3d 1202.

44-5-164. When adverse possession for seven years confers title.

Possession of real property under written evidence of title in conformance with the requirements of Code Section 44-5-161 for a period of seven years shall confer good title by prescription to the property against everyone except the state and those persons laboring under the disabilities stated in Code Section 44-5-170, provided that, if the written title is forged or fraudulent and if the person claiming adverse possession had actual notice of such forgery or fraud when he commenced his possession, no prescription may be based on such possession. (Laws 1767, Cobb's 1851 Digest, p. 559; Laws 1805, Cobb's 1851 Digest, p. 563; Ga. L. 1851-52, p. 238, § 1; Ga. L. 1855-56, p. 233, § 1; Code 1863, § 2642; Code 1868, § 2641; Code 1873, § 2683; Code 1882, § 2683; Civil Code 1895, § 3589; Civil Code 1910, § 4169; Code 1933, § 85-407; Ga. L. 1982, p. 3, § 44.)

Cross references. — Surveying and marking boundary lines of property possessed under claim of right for more than seven years, § 44-4-7.

Law reviews. — For article, ''Some Aspects of the Law of Easements,'' see 9 Ga. St. B.J. 287 (1973). For article surveying real property law, see 34 Mercer L. Rev. 255 (1982). For annual survey of real property law, see 57 Mercer L. Rev. 331 (2005).

JUDICIAL DECISIONS

Analysis

General Consideration
Adverse Possession
1. Requirements
2. Acts Creating Prescriptive Title
3. Acts Defeating Prescriptive Title
Color of Title
1. In General
2. Forgery or Fraud
3. Sufficient Instruments
4. Insufficient Instruments
5. Statute of Limitations

General Consideration

Easement may be acquired by prescription in 20 years unless there is some color of title, in which case only seven years is required. Smith v. Clay, 239 Ga. 220, 236 S.E.2d 346 (1977).

Possession, where there is no color of title, cannot ripen into prescriptive ownership in less than 20 years. Spillers v. Jordan, 96 Ga. App. 426, 100 S.E.2d 483 (1957).

Applicability. — Statute does not apply against a judgment lien on a decedent's estate in favor of land in the hands of devisees when the action was brought before the debt was barred. Redd v. Davis, 59 Ga. 823 (1877) (see O.C.G.A. § 44-5-164).

Statute applies in favor of a vendee against a vendor holding legal title to property for security. Janes v. Patterson, 62 Ga. 527 (1879) (see O.C.G.A. § 44-5-164).

Statute applies in favor of a claimant against the lien of a judgment against the claimant's vendor when there has been no levy on the property until after the prescriptive title has ripened. Johnston v. Neal, 67 Ga. 528 (1881) (see O.C.G.A. § 44-5-164).

Permissive possession cannot be foundation of prescription until adverse claim and actual notice to other party are shown. Johnson v. Key, 173 Ga. 586, 160 S.E. 794 (1931).

Incorporeal rights. — Incorporeal rights, such as the right to maintain a sign or show case on another's property, may be acquired. Smith v. Jensen, 156 Ga. 814, 120 S.E. 417 (1923).

Ripened prescriptive title extinguishes inconsistent titles. — When an adverse possessor has held for the requisite period and the possessor's prescriptive title ripens, it extinguishes all other inconsistent titles and itself becomes the true title. Fraser v. Dolvin, 199 Ga. 638, 34 S.E.2d 875 (1945).

Jury instruction held not cause for new trial. — When the provision of this statute which relates to forged or fraudulent deeds was not applicable to a particular action, giving this statute in charge to the jury could not harm the plaintiff and is not cause for a new trial. Butler v. Lovelace-Eubanks Lumber Co., 37 Ga. App. 74, 139 S.E. 83 (1927); Rogers v. Manning, 200 Ga. 844, 38 S.E.2d 724 (1946) (see O.C.G.A. § 44-5-164).

Whether or not taking possession under a tax deed before the expiration of the period of redemption is such fraud as would authorize charging this statute, the charge was not harmful to the petitioner, and a new trial was not granted. McDonald v. Wimpy, 206 Ga. 270, 56 S.E.2d 524 (1949) (see O.C.G.A. § 44-5-164).

Cited in Doe v. Roe, 36 Ga. 199 (1867); Wright v. Smith, 43 Ga. 291 (1871); Garrett v. Adrain, 44 Ga. 274 (1871); Wingfield v. Davis, 53 Ga. 655 (1875); Bennett v. Walker, 64 Ga. 326 (1879); Veal v. Robinson, 70 Ga. 809 (1883); Millen v. Stines, 81 Ga. 655, 8 S.E. 315 (1888); Parker v. Waycross & F.R.R., 81 Ga. 387, 8 S.E. 871 (1889); Bussey v. Jackson, 104 Ga. 151, 30 S.E. 646 (1898); Wardlaw v. McNeill, 106 Ga. 29, 31 S.E. 785 (1898); Baxley v. Baxley, 117 Ga. 60, 43 S.E. 436 (1903); Street v. Collier, 118 Ga. 470, 45 S.E. 294 (1903); Peeples v. Wilson, 140 Ga. 610, 79 S.E. 466 (1913); Buchan v. Daniel, 147 Ga. 450, 94 S.E. 578 (1917); Spillar v. Dickson, 148 Ga. 90, 95 S.E. 994 (1918); Cock v. Lipsey, 148 Ga. 322, 96 S.E. 628 (1918); Watts v. Boothe, 148 Ga. 376, 96 S.E.

863 (1918); Baxter v. Phillips, 150 Ga. 498, 104 S.E. 196 (1920); Dodge v. Clark, 268 F. 784 (5th Cir. 1920); Sweat v. Lott, 151 Ga. 66, 105 S.E. 835 (1921); Byrom v. Riley, 154 Ga. 580, 114 S.E. 642 (1922); Ashford v. Holliday, 169 Ga. 237, 149 S.E. 790 (1929); Cattahoochee Fertilizer Co. v. Quinn, 169 Ga. 801, 151 S.E. 496 (1930); Bagley v. Forrester, 53 F.2d 831 (5th Cir. 1931); Beeland v. Butler Payne Lumber Co., 48 Ga. App. 619, 173 S.E. 436 (1934); Rocker v. De Loach, 178 Ga. 480, 173 S.E. 709 (1934); James v. Riley, 181 Ga. 454, 182 S.E. 604 (1935); Kelley v. Spivey, 182 Ga. 507, 185 S.E. 783 (1936); Warsaw Turpentine Co. v. Fort Barrington Club, 185 Ga. 540, 195 S.E. 755 (1937); Sewell v. Sprayberry, 186 Ga. 1, 196 S.E. 796 (1938); Cartledge v. Trust Co., 186 Ga. 718, 198 S.E. 741 (1938); Reynolds v. Smith, 186 Ga. 838, 199 S.E. 137 (1938); Stanley v. Laurens County Bd. of Educ., 188 Ga. 581, 4 S.E.2d 164 (1939); Dorsey v. Dorsey, 189 Ga. 662, 7 S.E.2d 273 (1940); Crump v. McEntire, 190 Ga. 684, 10 S.E.2d 186 (1940); Metropolitan Life Ins. Co. v. Hall, 191 Ga. 294, 12 S.E.2d 53 (1940); Flournoy v. United States, 115 F.2d 220 (5th Cir. 1940); Barnes v. Avery, 192 Ga. 874, 16 S.E.2d 861 (1941); MacNeil v. Bazemore, 194 Ga. 406, 21 S.E.2d 414 (1942); Hardy v. Brannen, 194 Ga. 252, 21 S.E.2d 417 (1942); Dyal v. Sanders, 194 Ga. 228, 21 S.E.2d 596 (1942); Holloway v. Woods, 195 Ga. 55, 23 S.E.2d 254 (1942); Sharpe v. Stewart, 195 Ga. 610, 24 S.E.2d 781 (1943); Hall v. Metropolitan Life Ins. Co., 198 Ga. 858, 33 S.E.2d 1 (1945); Elliott v. Robinson, 198 Ga. 811, 33 S.E.2d 95 (1945); Chalker v. Beasley, 72 Ga. App. 652, 34 S.E.2d 658 (1945); Barfield v. Vickers, 200 Ga. 279, 36 S.E.2d 766 (1946); Knighton v. Hosty, 200 Ga. 507, 37 S.E.2d 382 (1946); Castile v. Burton, 200 Ga. 877, 38 S.E.2d 919 (1946); Allen v. Bone, 202 Ga. 349, 43 S.E.2d 311 (1947); Wright v. Anthony, 205 Ga. 47, 52 S.E.2d 316 (1949); Blue Ridge Apt. Co. v. Telfair Stockton & Co., 205 Ga. 552, 54 S.E.2d 608 (1949); Rogers v. Moore, 207 Ga. 182, 60 S.E.2d 359 (1950); Bell v. Cone, 208 Ga. 467, 67 S.E.2d 558 (1951); Farlow v. Brown, 208 Ga. 646, 68 S.E.2d 903 (1952); Smith v. Powers, 208 Ga. 768, 69 S.E.2d 374 (1952); Harrison v. Durham, 210 Ga. 187, 78 S.E.2d 482 (1953); Floyd v. Carswell, 211 Ga. 36, 83 S.E.2d 586 (1954); Thurston v. City of Forest Park, 211 Ga. 910, 89 S.E.2d 509 (1955); Phillips v. Wheeler, 212 Ga. 603, 94 S.E.2d 732 (1956); Wanamaker v. Wanamaker, 215 Ga. 473, 111 S.E.2d 94 (1959); Blanton v. Moody, 265 F.2d 533 (5th Cir. 1959); Whitton v. Whitton, 218 Ga. 845, 131 S.E.2d 189 (1963); Harrison v. Morris, 108 Ga. App. 566, 133 S.E.2d 899 (1963); Shepherd v. Frasier, 223 Ga. 874, 159 S.E.2d 58 (1968); Herrington v. City of Atlanta, 224 Ga. 465, 162 S.E.2d 420 (1968); Howell v. Baynes, 225 Ga. 164, 166 S.E.2d 359 (1969); Georgia Power Co. v. Gibson, 226 Ga. 165, 173 S.E.2d 217 (1970); Stephens v. Cogdell, 227 Ga. 121, 179 S.E.2d 45 (1971); Adair v. Atlanta Jewish Community, Inc., 228 Ga. 422, 185 S.E.2d 921 (1971); United States v. Williams, 441 F.2d 637 (5th Cir. 1971); Whitworth v. Whitworth, 233 Ga. 53, 210 S.E.2d 9 (1974); Jones v. Spindel, 239 Ga. 68, 235 S.E.2d 486 (1977); Stephens v. Stephens, 239 Ga. 528, 238 S.E.2d 71 (1977); Pannell v. Continental Can Co., 554 F.2d 216 (5th Cir. 1977); Crosby v. Jones, 241 Ga. 558, 246 S.E.2d 677 (1978); Fuller v. Smith, 245 Ga. 751, 267 S.E.2d 23 (1980); Atlanta Trailer Mart, Inc. v. Ashmore Foods, Inc., 247 Ga. 254, 275 S.E.2d 336 (1981); Ross v. Lowery, 249 Ga. 307, 290 S.E.2d 61 (1982); Georgia Power Co. v. Irvin, 267 Ga. 760, 482 S.E.2d 362 (1997); Roach v. Gwinnett County, 273 Ga. 741, 545 S.E.2d 912 (2001); Trammell v. Whetstone, 250 Ga. App. 503, 552 S.E.2d 485 (2001).

Adverse Possession

1. Requirements

Compliance with possession requirements necessary. — In defining the adverse possession which may be the foundation of a prescriptive title, it was best to state the necessary elements of such possession as those elements were stated in former Civil Code 1910, § 4164 (see O.C.G.A. § 44-5-161), relating to adverse possession, as in some cases the omission of any one of those elements may be ground for the grant of a new trial. Smith v. Board of Educ., 168 Ga. 755, 149 S.E. 136 (1929).

Whether title by prescription was claimed under former Code 1933, § 85-406 (see O.C.G.A. § 44-5-163), relating to 20 years' actual adverse possession, or under former Code 1933, § 85-407 (see O.C.G.A. § 44-5-164), relating to adverse possession

Adverse Possession (Cont'd)
1. Requirements (Cont'd)

for seven years under written evidence of title, the possession relied upon must meet the requirements of former Code 1933, § 85-402 (see O.C.G.A. § 44-5-161), relating to the essentials of possession. Martin v. Clark, 190 Ga. 270, 9 S.E.2d 54 (1940); Moore v. Stephens, 199 Ga. 500, 34 S.E.2d 716 (1945).

Wherever the proof is that one in possession holds for oneself to the exclusion of all others, the possession so held is adverse to all others, whatever relation in interest and privity in which one may stand to others. Stallings v. Britt, 204 Ga. 250, 49 S.E.2d 517 (1948).

Purchaser who buys in good faith and gets a paper claim of right acquires, in seven years, a prescriptive title. Lanier v. Graham, 179 Ga. 744, 177 S.E. 574 (1934).

If a person buys land in good faith, believing the person is obtaining a good title, enters into possession thereof and remains there continuously, uninterruptedly, peaceably, etc., for seven years, that possession ripens into a good title, whether the title the person purchased originally was good or not. Latham v. Fowler, 192 Ga. 686, 16 S.E.2d 591 (1941); Fraser v. Dolvin, 199 Ga. 638, 34 S.E.2d 875 (1945).

When all other elements of prescription are present, adverse possession of land under written evidence of title for seven years will give a good title by prescription. Knighton v. Hasty, 200 Ga. 507, 37 S.E.2d 382 (1946); Hardin v. Council, 200 Ga. 822, 38 S.E.2d 549 (1946).

Possession with cotenants insufficient for adverse possession. — Silent and peaceable possession of a tenant in common, with no act which can amount to an ouster of the cotenants, is not enough. There must be actual notice of the adverse claim or unequivocal acts making the possession visible, hostile, exclusive and notorious; otherwise, exclusive possession will be presumed to be in support of the common title. Fuller v. McBurrows, 229 Ga. 422, 192 S.E.2d 144 (1972).

One claiming prescriptive title against a cotenant must not only show the usual elements of prescription as provided by former Code 1933, § 85-407 (see O.C.G.A. § 44-5-164), but must also show that one's claim of title by prescription meets at least one of the conditions stated in former Code 1933, § 85-1005 (see O.C.G.A. § 44-6-123). Fuller v. McBurrows, 229 Ga. 422, 192 S.E.2d 144 (1972).

Easement. — Easement may be acquired by prescription in 20 years unless there is some color of title, in which case only seven years is required. Nodvin v. Plantation Pipe Line Co., 204 Ga. App. 606, 420 S.E.2d 322 (1992).

Whether ouster results from occupation and possession is a question of fact for the jury. Roumillot v. Gardner, 113 Ga. 60, 38 S.E. 362, 53 L.R.A. 729 (1901).

Possession must be adverse. McLaren v. Irvin, 63 Ga. 275 (1879).

Adverse possession by tenant. — There can be adverse possession, whether under color of title, or acquiescence in line, by an owner of adjacent property who is also tenant of an adjacent property owner during such terms as the tenancy is in effect. Everett v. Culberson, 215 Ga. 577, 111 S.E.2d 367 (1959).

Possession may be actual or constructive. Brookman v. Rennolds, 148 Ga. 721, 98 S.E. 543 (1919).

Possession must be continuous. W.A. Greer & Co. v. Rainey, 120 Ga. 290, 47 S.E. 939 (1904).

In order to constitute element of continuity which is essential to adverse possession as the foundation of a good prescriptive title, it is not necessary that adverse possession be maintained for the statutory period by the same person, since continuity may as effectively be shown by the successive bona fide possessions of several persons, provided the requisite privity exists between the people, so as to thus permit attacking of their unbroken successive possessions. Blalock v. Redwine, 191 Ga. 169, 12 S.E.2d 639 (1940); Cliett v. Metropolitan Life Ins. Co., 195 Ga. 257, 24 S.E.2d 59 (1943).

Requirement of continuity of possession is one of substance, and not of absolute mathematical continuity, provided there is no break so as to make a severance of two possessions. Chamblee v. Johnson, 200 Ga. 838, 38 S.E.2d 721 (1946).

Opposing landowner's minority status affects prescription period. — Transferee's claim of adverse possession failed as such

could not be based on a period of time in which the opposing landowner was a minor. Reece v. Smith, 276 Ga. 404, 577 S.E.2d 583 (2003).

In order to show privity between successive occupants, all that is necessary is that one shall have received one's possession from the other by some act of such other person or by operation of law. Blalock v. Redwine, 191 Ga. 169, 12 S.E.2d 639 (1940); Cliett v. Metropolitan Life Ins. Co., 195 Ga. 257, 24 S.E.2d 59 (1943).

Tacking. — Possession by different holders may be tacked together when the character of the prior possession also meets the requirements of this statute. Worthy v. Kinamon, 44 Ga. 297 (1871); Brown v. Caraker, 147 Ga. 498, 94 S.E. 759 (1917) (see O.C.G.A. § 44-5-164).

Adverse possession of land by promoters or officers of a corporation may be tacked to the adverse possession of the corporation after the corporation's organization and incorporation. Blalock v. Redwine, 191 Ga. 169, 12 S.E.2d 639 (1940).

Good faith construed. — Good faith, as contemplated by the adverse possession statutes, has relation to the actual existing state of the mind, whether so from ignorance, skepticism, sophistry, delusion, or imbecility, and without regard to what it should be from given legal standards of law or reason. Fraser v. Dolvin, 199 Ga. 638, 34 S.E.2d 875 (1945).

Presumption of good faith arises from adverse possession; direct evidence of bona fides is not required. Fraser v. Dolvin, 199 Ga. 638, 34 S.E.2d 875 (1945).

Good faith presumed. — When actual possession had been shown, good faith in the origin of such possession, required by former Code 1933, §§ 85-402 and 85-407 (see O.C.G.A. §§ 44-5-161 and 44-5-164), will ordinarily be presumed; this will not be true if actual possession had been only alleged. Latham v. Fowler, 192 Ga. 686, 16 S.E.2d 591 (1941).

Jury determines question of good faith. — Question of what is good faith, in a person claiming under color of title, is one of fact for the jury. Lee v. O'Quin, 103 Ga. 355, 30 S.E. 356 (1898).

Ordinarily, the question of a prescriber's good faith is one of fact to be determined by the jury. Quarterman v. Perry, 190 Ga. 275, 9 S.E.2d 61 (1940).

Motion for directed verdict properly denied. — See Wisenbaker v. Warren, 196 Ga. App. 551, 396 S.E.2d 528 (1990).

2. Acts Creating Prescriptive Title

When prescriptive title ripened. — When the uncontradicted evidence shows that the plaintiff and the plaintiff's immediate grantor, in whom demises were properly laid, entered in good faith and were successively in continuous adverse possession of certain property, under color of title, of the land so described, for more than seven years before the alleged ouster, the evidence demanded a finding for the plaintiff on the basis of title by prescription. Elliott v. Robinson, 192 Ga. 682, 16 S.E.2d 433 (1941).

When the evidence conclusively showed that the defendant and the defendant's predecessors in title acquired color of title to the property in dispute and bona fide entered into possession under their respective paper titles under a claim of right, and that the adverse possession of the defendant together with that of defendant's predecessors in title was for about 13 years (more than seven years), the prescriptive title of the defendant thereby ripened, extinguished all inconsistent titles and became the true title to the property. Fraser v. Dolvin, 199 Ga. 638, 34 S.E.2d 875 (1945).

Possession, use, and upkeep of a road by the public as a highway for 20 years ripens into prescriptive title. Hyde v. Chappell, 194 Ga. 536, 22 S.E.2d 313 (1942).

Possession by tenant or agent under parol understanding with owner will suffice to support the owner's claim of a prescriptive title. Cliett v. Metropolitan Life Ins. Co., 195 Ga. 257, 24 S.E.2d 59 (1943).

Prescription in favor of third persons against trust estate. — When interest of remainderman is equitable, and legal title is vested in trustee who holds such title, not only for the life tenant, but also for the remainderman, prescription will run in favor of third persons holding adversely to the trust estate. Mathis v. Solomon, 188 Ga. 311, 4 S.E.2d 24 (1939).

Because a trust's predecessors in interest to a disputed parcel of land maintained public, exclusive, and continuous possession of a tract for the required time frames under both O.C.G.A. §§ 44-5-163 and 44-5-164,

Adverse Possession (Cont'd)
2. Acts Creating Prescriptive Title (Cont'd)

and the original grantee's hostile possession of the property was done in good faith that a claim of right existed, the trial court did not err in adopting a special master's award and findings that the trust owned the disputed property against the rights of a contesting neighbor. Crawford v. Simpson, 279 Ga. 280, 612 S.E.2d 783 (2005).

3. Acts Defeating Prescriptive Title

Possession adverse to mortgagee denied by purchase of encumbered title. — When the purchaser buys from the mortgagor and the purchaser's title is a deed from the mortgagor, with seven years' possession of the land, and if the mortgage is legal and has been recorded within the time prescribed by law, the purchaser buys the title of the mortgagor encumbered with the lien of the mortgage; the purchaser does not hold adversely to the mortgagee, and no title by prescription is acquired so as to defeat the mortgage lien. Fudge v. Bailey, 182 Ga. 119, 185 S.E. 91 (1936).

Title divested by sheriff's sale. — All title asserted by defendant and any interest or claim that the defendant had because of deed was completely divested and extinguished by sheriff's legally conducted sale on an execution, admitted to be valid; after the sheriff executed and delivered to the bank the sheriff's deed to the land in controversy, defendant had no more interest in, or claim to the land, than one who had never professed to have title and had no written evidence of title on which to base seven years of possession for title by prescription. Gooch v. Citizens & S. Nat'l Bank, 196 Ga. 322, 26 S.E.2d 727 (1943).

Title not prevented by homestead application made subsequent to deed. — When a homestead never became legally operative by reason of a deed made prior to the application for homestead, and if the alleged equitable redemption of the property under such deed was never asserted by proper legal or equitable proceedings, and none of the claimants were shown to be laboring under disabilities, a claim of homestead will not prevent title by prescription from ripening in persons in adverse possession of the property for over 40 years under a claim of right. Slade v. Barber, 200 Ga. 405, 37 S.E.2d 143 (1946).

Prescription not defeated by prior deed. — Prescriptive title which meets the requirements prescribed by statute will not be defeated by the fact that a grant, through whom the claimants of prescription held, had made a deed prior to that under which the claimants claimed, even though it was of record. Hunt v. Pond, 67 Ga. 578 (1881).

Outstanding recorded title will not prevent ripening of title by prescription if the possessor enters in good faith under written evidence of title from another. Hearn v. Leverette, 213 Ga. 286, 99 S.E.2d 147 (1957).

Proposed prescription defeated. — Trial court properly granted a renter summary judgment and removed an affidavit asserting adverse possession filed by the owner of the first floor of a building with regard to a 1,350 square foot space on the second floor of the building as the renter established that title was acquired via a quit claim deed, that the renter changed the door at the base of the stairwell and had sole access to the second floor space, as well as posted no trespassing signs. The owner of the first floor failed to establish a continuous, exclusive, and uninterrupted possession of the space based on sporadic repairs made to the roof of the entire building. MEA Family Invs., LP v. Adams, 284 Ga. 407, 667 S.E.2d 609 (2008).

Color of Title

1. In General

Possession refers to title. — Possession, if held under a claim of right, refers to the title, actual or supposed, under which the right of possession is claimed. Patellis v. Tanner, 199 Ga. 304, 34 S.E.2d 84 (1945).

Written evidence of title is essential in respect to a claim or defense based on adverse possession for seven years. Seaboard Coast Line R.R. v. Carter, 231 Ga. 5, 200 S.E.2d 113 (1973).

To entitle the possessor to the benefit of the possessor's color of title, there must be a writing; it must purport to convey the property to the possessor (to one holding either the corporeal or the legal possession), and not to others whom the possessor does not hold; it must contain such a description of the property as to render it capable of

identification, and the possessor must in good faith claim the land under it. Capers v. Camp, 244 Ga. 7, 257 S.E.2d 517 (1979).

Phrase "written evidence of title" means color of title. Warlick v. Rome Loan & Fin. Co., 194 Ga. 419, 22 S.E.2d 61 (1942); Gooch v. Citizens & S. Nat'l Bank, 196 Ga. 322, 26 S.E.2d 727 (1943); Stallings v. Britt, 204 Ga. 250, 49 S.E.2d 517 (1948); Bracewell v. King, 147 Ga. App. 691, 250 S.E.2d 25 (1978).

"Color of title" defined. — Color of title is anything in writing which serves to define the extent and character of the claim with parties from whom it may come and to whom it may be made. Burdell v. Blain, 66 Ga. 169 (1880).

Color of title is a writing upon its face professing to pass title, but which does not do it, either from want of title in the person making the writing, or from the defective conveyance that is used — a title that is imperfect, but not so obviously so that it would be apparent to one not skilled in the law. Warlick v. Rome Loan & Fin. Co., 194 Ga. 419, 22 S.E.2d 61 (1942); Gooch v. Citizens & S. Nat'l Bank, 196 Ga. 322, 26 S.E.2d 727 (1943); Herrington v. Church of Lord Jesus Christ, 222 Ga. 542, 150 S.E.2d 805 (1966); Capers v. Camp, 244 Ga. 7, 257 S.E.2d 517 (1979).

When deed is not defective in any way, it does not in fact meet the meaning of color of title which is usually a flaw arising from a defect of conveyance or from want of title in the maker. Bracewell v. King, 147 Ga. App. 691, 250 S.E.2d 25 (1978).

Color of title may be only sign or semblance of title. Warlick v. Rome Loan & Fin. Co., 194 Ga. 419, 22 S.E.2d 61 (1942).

''Color of title'' implies that sign or semblance of title is not valid to pass title. Gooch v. Citizens & S. Nat'l Bank, 196 Ga. 322, 26 S.E.2d 727 (1943).

Description of property necessary. — Deed is inadmissible as color of title unless it describes property or furnishes a key for description. McCrea v. Georgia Power Co., 187 Ga. 708, 1 S.E.2d 664 (1939).

Same certainty of description which is requisite to constitute an instrument as a conveyance of title is required in an instrument which is relied upon as color of title. McCrea v. Georgia Power Co., 187 Ga. 708, 1 S.E.2d 664 (1939).

Description not restricted by reference to another deed. — When a reference to another deed is made merely for the purpose of showing from what source title is derived, it will not operate to restrict the description relied upon in the deed from which reference is made. Adams v. Talmadge, 240 Ga. 193, 240 S.E.2d 9 (1977).

Scope of color of title. — Color of title will not extend beyond the description contained in the grant. Bradley v. Shelton, 189 Ga. 696, 7 S.E.2d 261 (1940).

Claimant in actual possession of a part of a tract may rely upon the presumption that the claimant's possession extends to the boundaries of the tract described in the claimant's paper title, although prescription will not run in the claimant's favor as against one having like constructive possession. Martin v. Clark, 190 Ga. 270, 9 S.E.2d 54 (1940).

When land is bounded in a deed by the land of an adjacent owner, and if such boundary of the adjacent owner is undefined, there can be no prescription under the deed as against such owner, farther than the actual possession of the grantee in the deed extends. Quarterman v. Perry, 190 Ga. 275, 9 S.E.2d 61 (1940).

One can acquire by prescription under a deed no greater title than that defined in the deed. Gooch v. Citizens & S. Nat'l Bank, 196 Ga. 322, 26 S.E.2d 727 (1943).

Trial court properly granted summary judgment to the grantor's grandchildren as the grandchildren held the disputed parcel of property under color of title, via a deed to the grantor's child, albeit the fact that it was not effective as a deed conveying a present interest, for the prescription period of seven years, and the grantor's heirs at law did not contest it until suit was filed. Matthews v. Crowder, 281 Ga. 842, 642 S.E.2d 852 (2007).

Possession must meet requirements of statute. — Because the trial court found that there was evidence to support the special master's determination that the contestant failed to establish prescriptive title to the disputed parcel, either under O.C.G.A. § 44-5-161(a) or O.C.G.A. § 44-5-164, and that the disputed parcel showed no signs of having been disturbed by any of the contestant's alleged activities thereon, the trial court properly adopted the special master's recommendations that title vested in a rail-

Color of Title (Cont'd)
1. In General (Cont'd)

road free of any claims by the contestant, and that the contestant's affidavits should be stricken from the deed records. Thompson v. Cent. of Ga. R.R., 282 Ga. 264, 646 S.E.2d 669 (2007).

Honesty and good faith required for prescription. — Although a given paper may constitute color of title, no prescription can be based thereon unless the claimant entered thereunder honestly and in good faith. Lee v. O'Quin, 103 Ga. 355, 30 S.E. 356 (1898); Johnson v. Key, 173 Ga. 586, 160 S.E. 794 (1931).

2. Forgery or Fraud

Exceptions in statute are exhaustive. — Exceptions specified in this statute, by which a prescriptive title will be defeated, are exhaustive, and will not be enlarged by construction. Jones v. Bibins, 56 Ga. 538 (1876) (see O.C.G.A. § 44-5-164).

Nothing but fraud, want of good faith, will vitiate claim of right of adverse possessor. Lanier v. Graham, 179 Ga. 744, 177 S.E. 574 (1934).

Fraud construed. — Fraud contemplated by the law is such as would affect the conscience of the claimant with bad faith and moral turpitude. Brady v. Walters, 55 Ga. 25 (1875); Prater v. Cox, 64 Ga. 706 (1880); Bower v. Cohen, 126 Ga. 35, 54 S.E. 918 (1906); Fraser v. Dolvin, 199 Ga. 638, 34 S.E.2d 875 (1945).

To defeat prescriptive title, the fraud of the party claiming thereunder must be such as to charge one's conscience. Kelley v. Tucker, 175 Ga. 796, 166 S.E. 187 (1932); Lanier v. Graham, 179 Ga. 744, 177 S.E. 574 (1934).

It is not legal, but moral, fraud, a consciousness of doing wrong, which, in the origin of the possession of land prevents a prescription from running in favor of the possessor. Lanier v. Graham, 179 Ga. 744, 177 S.E. 574 (1934).

Actual fraud required to defeat prescriptive title. — Fraud which will prevent possession of property from being the foundation of prescription must be actual or positive fraud. Fraser v. Dolvin, 199 Ga. 638, 34 S.E.2d 875 (1945).

Party must be cognizant of fraud, not by constructive, but by actual notice to defeat a prescriptive title. Kelley v. Tucker, 175 Ga. 796, 166 S.E. 187 (1932); Lanier v. Graham, 179 Ga. 744, 177 S.E. 574 (1934).

Since good faith is a prerequisite to acquiring title by prescription under color as provided in this statute, one holding possession under color of title, which one knows was fraudulently procured, cannot acquire prescriptive title regardless of the period of time such possession is held. Harrison v. Holsenbeck, 208 Ga. 410, 67 S.E.2d 311 (1951) (see O.C.G.A. § 44-5-164).

If a purchaser has actual notice that the purchaser is purchasing a bad title when the purchaser takes possession, the purchaser's purchase is bad, and the purchaser goes into possession in fraud of the rights of the true owner, and the provisions of this statute cannot apply. West v. Rodahan, 46 Ga. 553 (1872); McCamy v. Higdon, 50 Ga. 629 (1874); Hunt v. Dunn, 74 Ga. 120 (1884) (see O.C.G.A. § 44-5-164).

Adverse possession of land, under written evidence of title for seven years in order to ripen into title by prescription, must be in good faith, and knowledge by a purchaser that land possessed under the purchaser's deed did not actually belong to the purchaser's grantor and could not have been conveyed will prevent such possession from ripening into a good title by prescription. Quarterman v. Perry, 190 Ga. 275, 9 S.E.2d 61 (1940).

If the color of title is fraudulent and notice thereof is brought home to the claimant before or at the time of the commencement of the claimant's possession, no prescription can be based thereon. Johnson v. Key, 173 Ga. 586, 160 S.E. 794 (1931).

Fraud cannot be founded on presumptive notice, on that sort of notice which is based upon record, or which is presumed from want of diligence. Lanier v. Graham, 179 Ga. 744, 177 S.E. 574 (1934); Fraser v. Dolvin, 199 Ga. 638, 34 S.E.2d 875 (1945).

Successive possessions presumed acquired in good faith. — When the uncontradicted evidence shows that the prescriber and each of the several persons under whom one claims maintained possession under warranty deeds executed upon a valuable consideration for successive terms less than seven years, but more than seven years in the aggregate, and it does not affirma-

tively appear that either of the several possessions originated in actual fraud upon the true owner, such several possessions will be presumed to be in good faith, and a verdict setting up the prescription will be demanded and may be directed by the judge. Rainey v. Whatley, 169 Ga. 172, 150 S.E. 95 (1929).

Discovery of defect after seven years possession insufficient to show fraud. — When the evidence shows that plaintiff went into possession free from any fraud and under the belief that plaintiff owned the land, the discovery of any defects in the plaintiff's title after seven years of possession and the plaintiff's efforts to quiet the claims of others by purchase did not raise any issue of fact as to fraud or good faith for determination by the jury. Crews v. Stokes, 213 Ga. 397, 99 S.E.2d 159 (1957).

Occupants' knowledge of fraud by relative of deceased owner. — Genuine issue of material fact did not remain as to the occupants' actual knowledge of alleged fraud and forgery committed by the decedent's brother who was the ''owner'' of the property; thus, a financing bank was not limited to claiming title based on the occupants' adverse possession, as the occupants were bona fide purchasers. Bonner v. Norwest Bank Minn., N.A., 275 Ga. 620, 571 S.E.2d 387 (2002).

Burden of proof. — When a party claims adversely, it is not necessary for the party to show that the party went into possession bona fide; the burden of showing fraud is upon the opposite party. Fraser v. Dolvin, 199 Ga. 638, 34 S.E.2d 875 (1945).

Alleged fraud did not defeat adverse possession. — Upon finding that the trial court had exclusive subject matter jurisdiction, the court also properly ruled that a sibling had prescriptive title to certain property under O.C.G.A. § 44-5-164 by possessing the property under color of title for a period greater than seven years, satisfying the requirements of O.C.G.A. § 44-5-161; the fraud alleged by the other siblings did not defeat the title, as the siblings were unaware of the fraud from 1989 to 2002. Goodrum v. Goodrum, 283 Ga. 163, 657 S.E.2d 192 (2008).

3. Sufficient Instruments

Quitclaim deed may be good as color of title. Warlick v. Rome Loan & Fin. Co., 194 Ga. 419, 22 S.E.2d 61 (1942).

Deed which, upon the deed's face, professed to pass title to entire tract but did not do so from a want of title in the grantor, even though it did not invest the grantees with legal title to the property, did bestow upon the grantees the color of title. Adams v. Talmadge, 240 Ga. 193, 240 S.E.2d 9 (1977); Armour v. Peek, 271 Ga. 202, 517 S.E.2d 527 (1999).

Deed executed during existing homestead constitutes color of title. — Deed from the head of a family upon whose application a homestead had been set apart under an earlier Constitution, executed during the existence of the homestead, did not convey title to the grantee, but was sufficient to constitute color of title for one entering into possession of the land thereunder, and in such a case prescription runs in favor of the grantee against both the homestead and the title estate. Dorsey v. Dorsey, 189 Ga. 662, 7 S.E.2d 273 (1940).

Deed executed by decedent's husband. — Quitclaim deed which a decedent's husband gave to a grantee purported to convey fee simple title to real property and gave her color of title, and because the grantee was not aware that there were other heirs who had an interest in the property, she did not commit fraud to obtain title; furthermore, she lived on the property for more than seven years, thus, she acquired title by prescription, pursuant to O.C.G.A. § 44-5-164. Gigger v. White, 277 Ga. 68, 586 S.E.2d 242 (2003).

Deed from wife to her husband for sale of her separate estate is color of title, though the deed itself be void for lack of approval. Stallings v. Britt, 204 Ga. 250, 49 S.E.2d 517 (1948).

Devise of land under duly recorded will is color of title, and adverse possession thereunder for a period of seven years ripens into a prescriptive title that is superior to the title of a grantee in a security deed executed by the testator. Blalock v. Webb, 190 Ga. 769, 10 S.E.2d 747 (1940).

Judgment of probate court purporting to vest title to land of a decedent in the decedents widow for a year's support is generally color of title on which prescription can be based. Johnson v. Key, 173 Ga. 586, 160 S.E. 794 (1931).

Sheriff's deed may be color of title, even though defective. Martin v. Clark, 190 Ga. 270, 9 S.E.2d 54 (1940).

Color of Title (Cont'd)
3. Sufficient Instruments (Cont'd)

Deed properly executed by a sheriff pursuant to a sale under a tax execution, even if void for any reason, is such color of title as will support prescription by seven years' adverse possession. Memory v. Walker, 209 Ga. 916, 76 S.E.2d 698 (1953).

Deed executed by unauthorized county officer. — Even though a deed is executed by a county officer without authority, and is therefore void, the deed may, if accepted in good faith as valid, afford good color of title. Calfee v. Jones, 54 Ga. App. 481, 188 S.E. 307 (1936).

Deed executed by the administrator of decedent's estate, which purported to convey fee simple title, was sufficient as color of title, even though decedent did not own the property at the time of death — a fact unknown to all parties at the time of the transaction. Smart v. Miller, 260 Ga. 88, 389 S.E.2d 757 (1990).

Effect of deeds without defect. — Since there was no defect in the deeds by which the parties acquired title, the deeds did not support a claim of adverse possession under color of title. Gay v. Strain, 261 Ga. App. 708, 583 S.E.2d 529 (2003).

4. Insufficient Instruments

No color of title absent sufficient identification of property. — When a deed relied upon did not give color of title, as when the deed did not in fact describe the land in question, there could be no prescriptive title under former Civil Code 1895, § 3589 (see O.C.G.A. § 44-5-164); reliance in such a case must be had upon former Civil Code 1895, § 3588 (see O.C.G.A. § 44-5-163). Berry v. Clark, 117 Ga. 964, 44 S.E. 824 (1903). See also Bunger v. Grimm, 142 Ga. 448, 83 S.E. 200, 1916C Ann. Cas. 173 (1914); May v. Sorrell, 149 Ga. 610, 101 S.E. 535 (1919).

When the description of the property is so vague and indefinite as to afford no means of identifying any particular tract of land, the instrument is inoperative either as a conveyance or as color of title. Herrington v. Church of Lord Jesus Christ, 222 Ga. 542, 150 S.E.2d 805 (1966).

Deed lacking in a description of the land sufficiently certain to effect a means of identification of description, standing alone, is inoperative as color of title. Donaldson v. Nichols, 223 Ga. 206, 154 S.E.2d 201 (1967).

Quitclaim deed subject to security deed. — Quitclaim deed, reciting that it is subject to a security deed, passed title to the equity only, and is not color of title. Gooch v. Citizens & S. Nat'l Bank, 196 Ga. 322, 26 S.E.2d 727 (1943).

Valid deed conveying title to land is never color of title. Gooch v. Citizens & S. Nat'l Bank, 196 Ga. 322, 26 S.E.2d 727 (1943).

Will which leaves devise to others than claimant cannot be color of title to the claimant. White v. Rowland, 67 Ga. 546, 44 Am. R. 731 (1881).

Payment of taxes is not itself evidence of title, yet it is admissible as a circumstance tending to prove adverse possession. Chamblee v. Johnson, 200 Ga. 838, 38 S.E.2d 721 (1946).

Divorce decree was not written evidence of title because the decree did not award the property to the plaintiff claiming adverse possession under color of title. Coleman v. Coleman, 265 Ga. 568, 459 S.E.2d 166 (1995).

5. Statute of Limitations

Period of limitation applicable to equitable suit for cancellation of deed is seven years from the date of the deed's execution. Stephens v. Walker, 193 Ga. 330, 18 S.E.2d 537 (1942); Paden v. Matthews, 216 Ga. 458, 117 S.E.2d 346 (1960).

Seven years time is permitted only absent special circumstances demanding earlier application; if 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).

Exception. — An exception to the rule that an equitable suit to cancel a deed is covered by a seven-year limitation period is that if suit is brought primarily for recovery of the land under an antecedent deed, against one holding, but with less than seven years' actual possession, under a junior deed. In such a case, cancellation of the subsequent deed under which the defendant claims is a mere incident to the question of title, and the fact that the deed may have been executed for more than seven years will

not operate to prevent the deed's cancellation. Stephens v. Walker, 193 Ga. 330, 18 S.E.2d 537 (1942).

Period of limitation for fraud is seven years from discovery. — 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).

An action seeking cancellation of an alleged fraudulent deed must be brought within seven years from the time the fraud became known. Shirley v. Mulligan, 202 Ga. 746, 44 S.E.2d 796 (1947).

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).

Constructive fraud insufficient to toll statute of limitations. — Seven-year statute of limitations was not tolled by alleged fraud on the part of plaintiff's predecessor in title since the evidence showed only constructive fraud at most, and there were no separate and independent acts of actual fraud involving moral turpitude which would have prevented, debarred, or deterred defendants from bringing their action much more timely. Tarbutton v. All That Tract or Parcel of Land Known as Carter Place, 641 F. Supp. 521 (M.D. Ga. 1986).

Period of seven years begins to run only from date of written color of title regardless of how long the claimants may have actually been in possession. Hobby v. Alford, 73 Ga. 791 (1884); Rock Run Iron Co. v. Heath, 155 Ga. 95, 116 S.E. 590 (1923).

Period running from death of life tenant. — Prescription does not begin to run in favor of a grantee under a deed from a life tenant, against a remainderman who does not join in the deed, until the falling in of the life estate by the death of the life tenant, since until the remainderman has a right of entry and possession, the remainderman has no cause of action against such grantee. Mathis v. Solomon, 188 Ga. 311, 4 S.E.2d 24 (1939).

Earliest time at which the seven-year period of adverse holding can begin against a person with fee simple title subject to a life estate is at the date of the death of the life tenant. Howard v. Henderson, 142 Ga. 1, 82 S.E. 292 (1914); Drake v. Barrs, 225 Ga. 597, 170 S.E.2d 684 (1969).

Action not brought within statutory period barred. — When one claiming land under written evidence of title delays for more than seven years after the knowledge of fraud to institute a suit to cancel such evidence of title upon the ground that the deed is fraudulent, the proceedings to cancel are barred by limitation. Shirley v. Mulligan, 202 Ga. 746, 44 S.E.2d 796 (1947).

Unless an action is brought within the time in which it would ripen into prescriptive title under this statute, the action will be barred. Brown v. Brown, 208 Ga. 404, 67 S.E.2d 128 (1951) (see O.C.G.A. § 44-5-164).

RESEARCH REFERENCES

Am. Jur. 2d. — 3 Am. Jur. 2d, Adverse Possession, §§ 1 et seq., 11, 13, 123 et seq.

C.J.S. — 2 C.J.S., Adverse Possession, §§ 200 et seq., 208.

ALR. — May adverse possession be predicated upon use or occupancy by one spouse of real property of other, 74 ALR 138.

Time during which dominant and servient tracts were in same ownership or under same control as excluded or included in determining easement by prescription, 98 ALR 591.

Adverse possession or prescription in respect to burial lot, 107 ALR 1294.

Adoption as period of prescription for easement the period prescribed by statute of limitations with reference to adverse possession as including condition of color of title or right or other conditions imposed by that statute, 112 ALR 545.

Adverse possession as affected by attempt during period thereof to change, or make more specific, the tract claimed, 115 ALR 1299.

Scope and application of the doctrine that one cannot successfully claim adverse possession under color of title where one has deprived himself or been deprived of the color relied on, 136 ALR 1349.

Adverse possession: mortgagee's possession before foreclosure as barring right of redemption, 7 ALR2d 1131.

Acquisition of title to mines or minerals by adverse possession, 35 ALR2d 124.

Possession of mortgagor or successor in interest as adverse to purchaser at foreclosure sale, 38 ALR2d 348.

Adverse possession of landlord as affected by tenant's recognition of title of third person, 38 ALR2d 826.

Adverse possession of executor or administrator or his vendee as continuous with that of ancestor and heirs, 43 ALR2d 1061.

Title by or through adverse possession was marketable, 46 ALR2d 544.

Judgment or decree as constituting color of title, 71 ALR2d 404.

Procuring signature by fraud as forgery, 11 ALR3d 1074.

Owner's surveying of land as entry thereon tolling running of statute of limitations for purposes of adverse possession, 76 ALR3d 1202.

44-5-165. How actual possession of lands evidenced.

Actual possession of lands may be evidenced by enclosure, cultivation, or any use and occupation of the lands which is so notorious as to attract the attention of every adverse claimant and so exclusive as to prevent actual occupation by another. As to any claim which is not vested under this chapter prior to July 1, 2008, no party shall attempt to establish possession of lands for purposes of this article for any lands depicted within the applicable tract identified on the official map of any railroad filed with the Interstate Commerce Commission pursuant to the Railroad Valuation Act of March 1, 1913, Stat. 701, as amended, unless such party establishes that such occupancy interferes with the operations of such railroad corporation or railroad company; provided, however, that each railroad corporation and railroad company shall file and record such official map of the railroad with the superior court for the county in which such land depicted on such official railroad map is situated. Any court of this state shall take judicial notice of the information set forth in any such official map properly filed and recorded by such railroad corporation or railroad company. This Code section shall not be applied to adverse claims of aboveground utilities which have been initiated but which have not vested prior to July 1, 2008; provided, however, that a railroad corporation or railroad company shall not be precluded from enforcing rights of ownership against any adverse claims which have not vested. (Orig. Code 1863, § 2639; Code 1868, § 2638; Code 1873, § 2680; Code 1882, § 2680; Civil Code 1895, § 3585; Civil Code 1910, § 4165; Code 1933, § 85-403; Ga. L. 2008, p. 210, § 4/HB 1283.)

The 2008 amendment, effective July 1, 2008, added the last three sentences.

Editor's notes. — Ga. L. 2008, p. 210, § 1, not codified by the General Assembly, provides: ''(a) The General Assembly finds that the railroads and their rights of way in Georgia:

''(1) Are essential to the continued viability of this state;

''(2) Are valuable resources which must be preserved and protected;

''(3) Are essential for the economic growth and development of this state;

''(4) Provide a necessary means of trans-

porting raw materials, agricultural products, other finished products, and consumer goods and are also essential for the safe passage of hazardous materials;

''(5) Relieve congestion on the highways and keep dangerous products and materials off our highways;

''(6) Are vital for national defense and national security; and

''(7) Provide the most energy efficient means of transportation through this state, thus minimizing air pollution and fuel consumption.

''(b) The purpose of this Act is to protect the rights of way of railroads from loss by claims of adverse possession or other claims by prescription and to recognize the dimensions of these rights of way as they were identified and defined nearly 100 years ago.''

JUDICIAL DECISIONS

Analysis

General Consideration
Actual Possession
1. In General
2. Enclosure
3. Cultivation

General Consideration

Scope of prescription by mere possession. — Prescription by mere possession does not extend beyond the actual possessio pedis of the prescriber. Kerlin v. Southern Bell Tel. & Tel. Co., 191 Ga. 663, 13 S.E.2d 790 (1941); Robertson v. Abernathy, 192 Ga. 694, 16 S.E.2d 584 (1941), later appeal, 195 Ga. 704, 25 S.E.2d 424 (1943); Arnold v. Shackelford, 219 Ga. 839, 136 S.E.2d 384 (1964).

Requirement of continuity of possession is one of substance, not of absolute mathematical continuity, provided there is no break so as to make a severance of two possessions. Chamblee v. Johnson, 200 Ga. 838, 38 S.E.2d 721 (1946).

Payment of taxes is not itself evidence of title, yet it is admissible as a circumstance tending to prove adverse possession. Chamblee v. Johnson, 200 Ga. 838, 38 S.E.2d 721 (1946).

Outstanding recorded title will not prevent ripening of title by prescription if the possessor enters in good faith under written evidence of title from another. Hearn v. Leverette, 213 Ga. 286, 99 S.E.2d 147 (1957).

Because the heirs produced evidence raising a material question of fact as to whether their ancestors possessed certain property for the requisite period of time under a claim of right pursuant to O.C.G.A. §§ 44-5-161(a), 44-5-163, and 44-5-165, the record owner was not entitled to summary judgment. Walker v. Sapelo Island Heritage Auth., 285 Ga. 194, 674 S.E.2d 925 (2009).

Cited in Hunt v. Pond, 67 Ga. 578 (1881); Burr v. Toomer, 103 Ga. 159, 29 S.E. 692 (1897); Knight v. Isom, 113 Ga. 613, 39 S.E. 103 (1901); Walker v. Steffes, 139 Ga. 520, 77 S.E. 580 (1913); Connasauga River Lumber Co. v. Shippen, 293 F. 579 (5th Cir. 1923); Beeland v. Butler Payne Lumber Co., 48 Ga. App. 619, 173 S.E. 436 (1934); Sewell v. Sprayberry, 186 Ga. 1, 196 S.E. 796 (1938); Poole v. Atlanta Joint Stock Land Bank, 189 Ga. 59, 5 S.E.2d 368 (1939); Bradley v. Shelton, 189 Ga. 696, 7 S.E.2d 261 (1940); Flournoy v. United States, 115 F.2d 220 (5th Cir. 1940); Dyal v. Sanders, 194 Ga. 228, 21 S.E.2d 596 (1942); Holloway v. Woods, 195 Ga. 55, 23 S.E.2d 254 (1942); Strickland v. Padgett, 197 Ga. 589, 30 S.E.2d 167 (1944); Elliott v. Robinson, 198 Ga. 811, 33 S.E.2d 95 (1945); Toms v. Knighton, 199 Ga. 858, 36 S.E.2d 315 (1945); Smith v. Jefferson County, 201 Ga. 674, 40 S.E.2d 773 (1946); Powell v. Moore, 202 Ga. 62, 42 S.E.2d 110 (1947); Rogers v. Moore, 207 Ga. 182, 60 S.E.2d 359 (1950); Phillips v. Wheeler, 212 Ga. 603, 94 S.E.2d 732 (1956); Spillers v. Jordan, 96 Ga. App. 426, 100 S.E.2d 483 (1957); Davis v. Palmer, 213 Ga. 862, 102 S.E.2d 478 (1958);

General Consideration (Cont'd)

Pridgen v. Coffee County Bd. of Educ., 218 Ga. 326, 127 S.E.2d 808 (1962); Durand v. Reeves, 219 Ga. 182, 132 S.E.2d 71 (1963); Harrison v. Morris, 108 Ga. App. 566, 133 S.E.2d 899 (1963); Reid v. Wilkerson, 222 Ga. 282, 149 S.E.2d 700 (1966); Herrington v. City of Atlanta, 224 Ga. 465, 162 S.E.2d 420 (1968); Barnett v. Holliday, 228 Ga. 361, 185 S.E.2d 397 (1971); Guagliardo v. Jones, 238 Ga. App. 668, 518 S.E.2d 925 (1999).

Actual Possession

1. In General

Statute indicates how actual possession is evidenced. Rowland v. McLain, 86 Ga. App. 140, 70 S.E.2d 918 (1952) (see O.C.G.A. § 44-5-165).

Essence of actual possession is use of land to such an extent and in such a manner as to put the world on notice. Cheek v. Wainwright, 246 Ga. 171, 269 S.E.2d 443 (1980).

Evidence of defendant's actual adverse possession. — Evidence of color of title, continuous occupation, use of property to the exclusion of all others, construction of improvements on the land, payment of annual taxes and fire insurance premiums, cultivation of annual crops, and keeping of livestock and penalty shows that the defendant had actual adverse possession. Hughes v. Heard, 215 Ga. 156, 109 S.E.2d 510 (1959) (see O.C.G.A. § 44-5-165).

Prescriptive title generally. — In a dispute over two subdivision lots, the trial court did not err in admitting evidence that was cumulative to properly admitted evidence showing a legal property owner's record title, and the evidence was not hearsay, as alleged by a claimant who sought title to the property by prescription; further, the evidence was relevant to the issue of whether a claimant's adverse possession ripened into title by prescription. Smith v. Stacey, 281 Ga. 601, 642 S.E.2d 28 (2007).

Building a driveway insufficient. — Trial court erred in granting summary judgment on prescription and acquiescence grounds to the contestants to a tract of land without determining the validity or sufficiency of the legal descriptions of either deed to the property as there was insufficient evidence of possession and support for prescriptive title, and the construction of a driveway, apparently on the disputed tract was interrupted by a quiet title action filed within seven years by the heirs of the property. Henson v. Tucker, 278 Ga. App. 859, 630 S.E.2d 64 (2006).

Occasional cleanup and mowing insufficient. — Trial court did not err when the court concluded that a buyer's tax deed did not ripen by prescription into a fee simple title because neither the buyer's payments of taxes nor occasional cleanup and mowing areas were sufficiently notorious or exclusive as to constitute actual possession. Washington v. McKibbon Hotel Group, Inc., 284 Ga. 262, 664 S.E.2d 201 (2008).

Sporadic repairs insufficient. — Trial court properly granted a renter summary judgment and removed an affidavit asserting adverse possession filed by the owner of the first floor of a building with regard to a 1,350 square foot space on the second floor of the building as the renter established that title was acquired via a quit claim deed, that the renter changed the door at the base of the stairwell and had sole access to the second floor space, as well as posted no trespassing signs. The owner of the first floor failed to establish a continuous, exclusive, and uninterrupted possession of the space based on sporadic repairs made to the roof of the entire building. MEA Family Invs., LP v. Adams, 284 Ga. 407, 667 S.E.2d 609 (2008).

When there is no evidence of enclosure or cultivation, notoriety and exclusivity became questions of fact for the jury. Friendship Baptist Church, Inc. v. West, 265 Ga. 745, 462 S.E.2d 618 (1995).

2. Enclosure

Fencing is acceptable evidence of actual possession. Lyons v. Bassford, 242 Ga. 466, 249 S.E.2d 255 (1978).

When land is bounded in a deed by the land of an adjacent owner, and if such boundary of the adjacent owner is undefined, there can be no prescription under the deed, as against such owner, rather than the actual possession of the grantee in the deed extends; on the other hand, if the deed provides that the land is bounded by an adjacent owner, and designated that boundary as the line of an existing fence, and the deed owner actually occupies the land up to the fence, when other requirements are met,

one may obtain title by prescription up to the fence which is the limit of one's possession. Lyons v. Bassford, 242 Ga. 466, 249 S.E.2d 255 (1978).

Fencing not required. Pannell v. Continental Can Co., 554 F.2d 216 (5th Cir. 1977).

Failure to maintain fence prevents required notice. — Even though the adverse possessor may have taken possession of property by fencing the property at the time the possessor purchased the property, if in fact the possessor had not maintained the fence, it did not constitute notice such as is required by the provisions of this statute. Turner v. McKee, 97 Ga. App. 531, 103 S.E.2d 658 (1958) (see O.C.G.A. § 44-5-165).

Planting trees on boundary lines and corners may be sufficient earmarks of possession. Howell v. United States, 519 F. Supp. 298 (N.D. Ga. 1981).

To constitute actual possession by enclosure, the land must be completely enclosed, but it is not necessary that the land should be completely enclosed, on every side, by artificial means, such as fences. Fitzpatrick v. Massee-Felton Lumber Co., 188 Ga. 80, 3 S.E.2d 91 (1939).

Natural barriers. — Natural barriers in part may be utilized in connection with fences provided that the barriers constitute a complete enclosure which indicates complete and notorious dominion over the land. Fitzpatrick v. Massee-Felton Lumber Co., 188 Ga. 80, 3 S.E.2d 91 (1965).

Telephone poles and wires outline general area in use. — When poles and wires were used in the operation of a telephone line or lines over the lands of another, they should be considered as having marked or outlined a general area in use according to the usual and ordinary manner; and if the outer limits of this space remained the same for the prescriptive period of 20 years, the resulting easement would apply at least to such general area, so that the stringing of additional wires anywhere therein consistently with customary location would be permissible as territorially within the easement, whether or not the identical space to be physically occupied by such wires had ever before been so occupied by other wires. Kerlin v. Southern Bell Tel. & Tel. Co., 191 Ga. 663, 13 S.E.2d 790 (1941).

3. Cultivation

Cultivation, tillage of soil, planting, and harvesting crop are superior indicia of possession. May v. Sorrell, 153 Ga. 47, 111 S.E. 810 (1922); Cheek v. Wainwright, 246 Ga. 171, 269 S.E.2d 443 (1980).

Trees planted in rows along a public road give a clear and lasting notice that someone is exercising possession by changing the nature of the real estate. Cheek v. Wainwright, 246 Ga. 171, 269 S.E.2d 443 (1980).

Use of land for timber will not alone amount to actual possession, even though the land is suitable only for such uses. McCook v. Crawford, 114 Ga. 337, 40 S.E. 225 (1901); Robertson v. Abernathy, 192 Ga. 694, 16 S.E.2d 584 (1941), later appeal, 195 Ga. 704, 25 S.E.2d 424 (1943); Rowland v. McLain, 86 Ga. App. 140, 70 S.E.2d 918 (1952); Cheek v. Wainwright, 246 Ga. 171, 269 S.E.2d 443 (1980).

Use as cattle range alone will not amount to actual possession, even though the land is suitable only for such uses. McCook v. Crawford, 114 Ga. 337, 40 S.E. 225 (1901).

Roaming cattle and hogs on a large area of swamp woodland does not amount to actual possession within the meaning of the law. Rowland v. McLain, 86 Ga. App. 140, 70 S.E.2d 918 (1952); Fitzpatrick v. Massee-Felton Lumber Co., 188 Ga. 80, 3 S.E.2d 91 (1965).

Posting signs forbidding trespassing, and driving away hunters from time to time on a large area of swamp woodland does not amount to actual possession. Rowland v. McLain, 86 Ga. App. 140, 70 S.E.2d 918 (1952); Fitzpatrick v. Massee-Felton Lumber Co., 188 Ga. 80, 3 S.E.2d 91 (1965).

Cultivation of annual crops is not required. Pannell v. Continental Can Co., 554 F.2d 216 (5th Cir. 1977).

Cultivation is question of fact depending upon the character of possession, the extent of the visible signs of occupancy and its continuance. Pannell v. Continental Can Co., 554 F.2d 216 (5th Cir. 1977).

RESEARCH REFERENCES

Am. Jur. 2d. — 3 Am. Jur. 2d, Adverse Possession, §§ 10 et seq., 296 et seq.

C.J.S. — 2 C.J.S., Adverse Possession, § 34 et seq.

ALR. — Act of trespasser as interrupting adverse possession, 22 ALR 1458.

Adverse possession of railroad right of way, 50 ALR 303.

Interval between crops as affecting continuity of adverse possession, 76 ALR 1492.

Grantor's continued possession of land after execution of deed as notice of his claim adverse to title conveyed, 105 ALR 845.

Length of period of possession before accrual of rights of person sought to be affected by notice as affecting the rule regarding constructive notice from possession of real property, 105 ALR 892.

Purchase of, or offer to purchase or to settle, outstanding title, interest, or claim as interrupting continuity of adverse possession as regards another title, interest, or claim, 125 ALR 825.

Cutting of timber as adverse possession, 170 ALR 887.

Adverse possession: sufficiency, as regards continuity, of seasonal possession other than for agricultural or logging purposes, 24 ALR2d 632.

Acquisition of title to mines or minerals by adverse possession, 35 ALR2d 124.

Grantor's possession as adverse possession against grantee, 39 ALR2d 353.

Adverse possession based on encroachment of building or other structure, 2 ALR3d 1005.

Acquisition of title to land by adverse possession by state or other governmental unit or agency, 18 ALR3d 678.

Grazing of livestock or gathering of natural crop as fulfilling traditional elements of adverse possession, 48 ALR3d 818.

44-5-166. Constructive possession of lands; effect of constructive possession of same land by adjacent owners.

(a) Constructive possession of lands exists where a person who has paper title to a tract of land is in actual possession of only a part of such tract. In such case, his or her possession shall be construed to extend to the boundary of such tract. With respect to a railroad corporation or railroad company, construction of the road bed and track on the railroad right of way shall constitute actual possession and occupancy of all lands depicted within the applicable tract identified on the official map of the railroad filed with the Interstate Commerce Commission pursuant to the Railroad Valuation Act of March 1, 1913, Stat. 701, as amended; provided, however, that each railroad corporation and railroad company shall file and record such official map of the railroad with the superior court for the county in which such land depicted on such official railroad map is situated. Any court of this state shall take judicial notice of the information set forth in any such official map properly filed and recorded by such railroad corporation or railroad company.

(b) When land is included in the boundaries of more than one tract so that adjacent owners are in constructive possession of the same land, no prescription shall arise in favor of any of such owners. (Orig. Code 1863, § 2640; Code 1868, § 2639; Code 1873, § 2681; Code 1882, § 2681; Civil Code 1895, § 3586; Civil Code 1910, § 4166; Code 1933, § 85-404; Ga. L. 2008, p. 210, § 5/HB 1283.)

The 2008 amendment, effective July 1, 2008, in subsection (a), substituted ''such'' for ''the'' twice, in the second sentence, deleted ''a'' preceding ''case,'', inserted ''or her'', and added the last two sentences.

Editor's notes. — Ga. L. 2008, p. 210, § 1, not codified by the General Assembly, provides: ''(a) The General Assembly finds that the railroads and their rights of way in Georgia:

''(1) Are essential to the continued viability of this state;

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''(5) Relieve congestion on the highways and keep dangerous products and materials off our highways;

''(6) Are vital for national defense and national security; and

''(7) Provide the most energy efficient means of transportation through this state, thus minimizing air pollution and fuel consumption.

''(b) The purpose of this Act is to protect the rights of way of railroads from loss by claims of adverse possession or other claims by prescription and to recognize the dimensions of these rights of way as they were identified and defined nearly 100 years ago.''

JUDICIAL DECISIONS

Analysis

General Consideration
Constructive Possession
Adjacent Owners

General Consideration

Policy of this statute. — It is not the policy of this statute to permit the true owner of land to be disseized by equivocal possession; but, if the occupant's possession be of such a character as to announce to the world and to the true owner that one's assertion of ownership, and that possession is under a duly recorded deed, it will be construed to extend to all the contiguous property embraced therein. G.S. Baxter & Co. v. Wetherington, 128 Ga. 801, 58 S.E. 467 (1907) (see O.C.G.A. § 44-5-166).

Applicability. — When separate lots are conveyed not as a single tract, this statute does not apply. Barber v. Shaffer, 76 Ga. 285 (1886) (see O.C.G.A. § 44-5-166).

Actual adverse possession. — O.C.G.A. § 44-5-166 is inapplicable if one of two claimants to the disputed land had actual adverse possession of the land. Walker v. Hill, 253 Ga. 126, 317 S.E.2d 825 (1984).

Evidence necessary to establish title. — Before one can establish title by reason of possession under color of title, one must show: (1) that the writing which one claims as color of title purports to confer title upon the possessor; (2) actual possession of some portion of the tract; and (3) a claim of ownership over the portion not held in actual possession. Sewell v. Sprayberry, 186 Ga. 1, 196 S.E. 796 (1938).

Actual boundaries are question for jury. — Questions of location of actual boundaries indicated by written agreement are for jury. Shiels v. Lamar, 58 Ga. 590 (1877).

Recordation over the course of years of no consequence. — Claim of adverse possession, based on recordation of the various deeds over the course of eight years, in and of itself, had to fail in light of O.C.G.A. § 44-5-166(b). Double 'D' bar 'C' Ranch v. Bell, 283 Ga. 386, 658 S.E.2d 635 (2008).

Cited in Clark v. Hulsey, 54 Ga. 608 (1875); Anderson v. Dodd, 65 Ga. 402 (1880); Wood v. Crawford, 75 Ga. 733 (1885); Johnson v. Simerly, 90 Ga. 612, 16 S.E. 951 (1892); Furgerson v. Bagley, 95 Ga. 516, 20 S.E. 241 (1894); Ault v. Meager, 112 Ga. 148, 37 S.E. 185 (1900); Crawford v. Verner, 122 Ga. 814, 50 S.E. 958 (1905); Terrell v. McLean, 130 Ga. 633, 61 S.E. 485 (1908); Dodge v. Cowart, 131 Ga. 549, 62 S.E. 987 (1908); Durham Coal & Coke Co. v. Wingfield, 142 Ga. 725, 83 S.E. 683 (1914); Rowe v. Henderson Naval Stores Co., 143 Ga.

General Consideration (Cont'd)

756, 85 S.E. 917 (1915); R.J. & B.F. Camp Lumber Co. v. Strickland, 144 Ga. 445, 87 S.E. 413 (1915); Rowan v. Newbern, 32 Ga. App. 363, 123 S.E. 148 (1924); Dinsmore v. Holcomb, 167 Ga. 20, 144 S.E. 780 (1928); Beeland v. Butler Payne Lumber Co., 48 Ga. App. 619, 173 S.E. 436 (1934); Warsaw Turpentine Co. v. Fort Barrington Club, 185 Ga. 540, 195 S.E. 755 (1937); Fitzpatrick v. Massee-Felton Lumber Co., 188 Ga. 80, 3 S.E.2d 91 (1939); MacNeil v. Bazemore, 194 Ga. 406, 21 S.E.2d 414 (1942); Hardy v. Brannen, 194 Ga. 252, 21 S.E.2d 417 (1942); Holloway v. Woods, 195 Ga. 55, 23 S.E.2d 254 (1942); Pittman v. Pittman, 196 Ga. 397, 26 S.E.2d 764 (1943); Knighton v. Hasty, 200 Ga. 507, 37 S.E.2d 382 (1946); Castile v. Burton, 200 Ga. 877, 38 S.E.2d 919 (1946); Allen v. Bone, 202 Ga. 349, 43 S.E.2d 311 (1947); Wright v. Anthony, 205 Ga. 47, 52 S.E.2d 316 (1949); Harrison v. Durham, 210 Ga. 187, 78 S.E.2d 482 (1953); Floyd v. Carswell, 211 Ga. 36, 83 S.E.2d 586 (1954); Thurston v. City of Forest Park, 211 Ga. 910, 89 S.E.2d 509 (1955); Maxwell v. Hollis, 214 Ga. 358, 104 S.E.2d 893 (1958); Davis v. Newton, 215 Ga. 58, 108 S.E.2d 809 (1959); Gordon v. Georgia Kraft Co., 217 Ga. 500, 123 S.E.2d 540 (1962); Herrington v. City of Atlanta, 224 Ga. 465, 162 S.E.2d 420 (1968); Trammell v. Thomas, 226 Ga. 148, 173 S.E.2d 197 (1970); Pressley v. Jennings, 227 Ga. 366, 180 S.E.2d 896 (1971); Smith v. E.B. Burney Constr. Co., 231 Ga. 772, 204 S.E.2d 93 (1974); Pannell v. Continental Can Co., 554 F.2d 216 (5th Cir. 1977); Department of Transp. v. Howard, 245 Ga. 96, 263 S.E.2d 135 (1980).

Constructive Possession

Prescription by mere possession will not extend beyond actual possessio pedis of prescriber. Hall v. Gay, 68 Ga. 442 (1882).

Ordinarily actual possession under a recorded deed of a portion of several specified tracts or lots of land which are all contiguous and lie in one body (though not expressly designated as one parcel or tract by the terms of the deed) will extend by construction so as to include the entire premises conveyed; if, however, such possession is under an unrecorded deed, constructive possession will not extend beyond the tract or lot on which actual possession is maintained. Campbell v. Gregory, 200 Ga. 684, 38 S.E.2d 295 (1946); Tucker v. Long, 207 Ga. 730, 64 S.E.2d 69 (1951).

When in a dispute over the ownership of a parcel of land between a landowner and a railroad, the railroad showed the railroad had color of title to the disputed property, based on a prior deed, the railroad did not have constructive possession of the land as a matter of law, sufficient to satisfy the requirements of adverse possession, because the deed under which it had color of title was not recorded, so any constructive possession did not extend beyond the land actually possessed, and there was a genuine issue of material fact as to what land the railroad actually possessed. Watkins v. Hartwell R.R. Co., 278 Ga. 42, 597 S.E.2d 377 (2004).

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).

Actual possession with title extends to boundary. — When, in addition to actual possession, there is also a paper title to the rest of the tract, it is the actual possession which extends to the boundary. Robertson v. Downing Co., 120 Ga. 833, 48 S.E. 429, 102 Am. St. R. 128, 1 Ann. Cas. 757 (1904); Downing v. Anderson, 126 Ga. 373, 55 S.E. 184 (1906).

Possession of land by one who has an unrecorded deed from one's vendor, conveying a definitely described tract or lot of land, and who resides upon the land and cultivates a part thereof and bona fide claims the whole, is sufficient to give notice to another, who subsequently lends money to one's vendor and takes a deed to the same land to secure the loan, as to the extent and character of the occupant's title to the whole lot. Atlanta & C.A.L. Ry. v. Colbert, 171 Ga. 196, 154 S.E. 909 (1930), later appeal, 178 Ga. 450, 173 S.E. 378 (1934).

When a deed describing the land conveyed as lot 168, ''containing 157 acres more or less,'' purports to convey the entire lot, actual possession of a portion of the lot under such a deed gives the grantee constructive possession of the entire lot. Shahan v. Watkins, 194 Ga. 164, 21 S.E.2d 58 (1942).

Under former Code 1933, §§ 85-404 and 85-405 (see O.C.G.A. §§ 44-5-166 and 44-5-167), a person claiming under a recorded deed may have constructive possession of lands and may acquire a prescriptive title to all lands which were covered by the deed and were contiguous by having actual possession of a part thereof for a period of seven years. Mincey v. Anderson, 206 Ga. 572, 57 S.E.2d 922 (1950).

If there is actual possession under a deed of only a part of the property, the law construes the possession to extend to the boundary of the tract. Lyons v. Bassford, 242 Ga. 466, 249 S.E.2d 255 (1978).

Color of title will not extend beyond description contained in grant. Bradley v. Shelton, 189 Ga. 696, 7 S.E.2d 261 (1940).

Showing of notoriety. — In cases involving prescription and in other cases respecting adverse possession, the element of notoriety as to an asserted constructive possession is adequately shown whenever the party asserting the adverse constructive possession shows color of title covering the land in dispute and produces proof either: (1) that the party's actual adverse possession has been maintained on a part of the land in dispute; or (2) that, while the party's actual possession may not have been maintained on a part of the land in dispute, yet it has been maintained on a portion of the tract included in the party's color of title, and that the conveyance which constitutes the color of title was duly recorded, or was otherwise brought to the knowledge (actual or constructive) of the person against whose title the adverse possession is asserted. On the other hand, if the possessor has no actual possession of any part of the tract claimed by the person against whom the adverse constructive possession is asserted, and the party's deed (though it includes the land in dispute) is not recorded and notice of the boundaries has not otherwise been given, the possessor cannot assert adverse constructive possession to the tract in dispute. Campbell v. Gregory, 200 Ga. 684, 38 S.E.2d 295 (1946).

Adjacent Owners

If adjacent owners possess constructively same tract, no prescription arises in favor of either. Harriss v. Howard, 126 Ga. 325, 55 S.E. 59 (1906).

Claimant in actual possession of a part of a tract may rely upon the presumption that the claimant's possession extends to the boundaries of the tract described in the claimant's paper title, although prescription will not run in the claimant's favor as against one having like constructive possession. Martin v. Clark, 190 Ga. 270, 9 S.E.2d 54 (1940).

If the strip of land 50 feet broad is included in the deeds of both the defendant and the plaintiff, and the plaintiff is in possession of a part of the land conveyed by the deed to it, the occupancy by the defendant of a part of that strip of land 50 feet broad cannot ripen into a prescriptive title as against the other claimant. Atlanta & C.A.L. Ry. v. Colbert, 171 Ga. 196, 154 S.E. 909 (1930), later appeal, 178 Ga. 450, 173 S.E. 378 (1934).

When the parties to an action of ejectment to recover a strip of land are adjacent owners, the petition cannot seek a recovery on the theory of constructive possession by virtue of seven years' actual possession under color of title since, as between such adjacent owners, no prescription by constructive possession arises in favor of either. Robertson v. Abernathy, 192 Ga. 694, 16 S.E.2d 584 (1941), later appeal, 195 Ga. 704, 25 S.E.2d 424 (1943).

When the petitioner's predecessor in title and the defendant were in possession of a portion of the land described in their respective deeds, each was in constructive possession of the five-acre tract, and no prescriptive title could ripen in favor of the petitioner's predecessor in title. Tucker v. Long, 207 Ga. 730, 64 S.E.2d 69 (1951).

Superiority of title aside from prescription determines rights. — When adjacent owners possess constructively the same tract, no prescription arises in favor of either; superiority of title aside from the prescription determines the matter. Harriss v. Howard, 126 Ga. 325, 55 S.E. 59 (1906).

Prior constructive possession creates superior rights. — If neither party has the true title, and neither party claims prescriptive title by actual adverse possession under color of title, the rights of one who had the prior constructive possession are the superior. Allen v. Johns, 235 Ga. 667, 219 S.E.2d 369 (1975).

Party having oldest title duly recorded should prevail in cases when adjacent own-

Adjacent Owners (Cont'd)

ers are in constructive possession of the same land. Singer v. Shellhouse, 175 Ga. 136, 165 S.E. 73 (1932).

RESEARCH REFERENCES

Am. Jur. 2d. — 3 Am. Jur. 2d, Adverse Possession, §§ 27, 123, 124, 126, 127, 257 et seq.

C.J.S. — 2 C.J.S., Adverse Possession, §§ 85, 225, 228 et seq.

ALR. — Adverse possession of railroad right of way, 50 ALR 303.

Purchase of, or offer to purchase or to settle, outstanding title, interest, or claim as interrupting continuity of adverse possession as regards another title, interest, or claim, 125 ALR 825.

Acquisition of title to mines or minerals by adverse possession, 35 ALR2d 124.

Grantor's possession as adverse possession against grantee, 39 ALR2d 353.

Adverse possession involving ignorance or mistake as to boundaries — modern views, 80 ALR2d 1171.

44-5-167. Extent of constructive possession under deed; judicial notice.

Possession under a duly recorded deed shall be construed to extend to all the contiguous property embraced in such deed. To the extent that any such property is bounded on one or more sides by a railroad, and the description of the property contained in such deed makes reference to the railroad or the railroad right of way as a boundary for such property, such reference shall be construed to mean that the boundary line is located at the edge of the tract depicted on the official map of the railroad filed with the Interstate Commerce Commission pursuant to the Railroad Valuation Act of March 1, 1913, Stat. 701, as amended, and such depictions contained on such official railroad map shall be conclusive as to the location of the boundary line between the property of the railroad and any adjoining property owner as of the date of such railroad map; provided, however, that each railroad corporation and railroad company shall file and record such official map of the railroad with the superior court for the county in which such land depicted on such official railroad map is situated. Any court of this state shall take judicial notice of the information set forth in any such official map properly filed and recorded by such railroad corporation or railroad company. (Civil Code 1895, § 3587; Civil Code 1910, § 4167; Code 1933, § 85-405; Ga. L. 2008, p. 210, § 6/HB 1283.)

The 2008 amendment, effective July 1, 2008, in the first sentence substituted "shall" for "will", substituted "such" for "the", and added the last two sentences.

History of Code section. — This Code section is derived from the decisions in Griffin v. Lee, 90 Ga. 224, 15 S.E. 810 (1892) and Johnson v. Simerly, 90 Ga. 612, 16 S.E. 951 (1892).

Editor's notes. — Ga. L. 2008, p. 210, § 1, not codified by the General Assembly, provides: "(a) The General Assembly finds that the railroads and their rights of way in Georgia:

"(1) Are essential to the continued viability of this state;

"(2) Are valuable resources which must be preserved and protected;

"(3) Are essential for the economic growth and development of this state;

"(4) Provide a necessary means of transporting raw materials, agricultural products,

other finished products, and consumer goods and are also essential for the safe passage of hazardous materials;

''(5) Relieve congestion on the highways and keep dangerous products and materials off our highways;

''(6) Are vital for national defense and national security; and

''(7) Provide the most energy efficient means of transportation through this state, thus minimizing air pollution and fuel consumption.

''(b) The purpose of this Act is to protect the rights of way of railroads from loss by claims of adverse possession or other claims by prescription and to recognize the dimensions of these rights of way as they were identified and defined nearly 100 years ago.''

Law reviews. — For survey article on real property law, see 60 Mercer L. Rev. 345 (2008). For survey article on zoning and land use law, see 60 Mercer L. Rev. 457 (2008).

For comment on Campbell v. Gregory, 200 Ga. 684, 38 S.E.2d 295 (1946), see 9 Ga. B.J. 204 (1946).

JUDICIAL DECISIONS

''Contiguous'' defined. — Word ''contiguous,'' as used in this section, means to touch. Morris v. Gibson, 35 Ga. App. 689, 134 S.E. 796 (1926).

Tracts of land which corner with one another are contiguous. Morris v. Gibson, 35 Ga. App. 689, 134 S.E. 796 (1926).

Applicability. — Statute has no application to partition proceedings. Rowe v. Henderson Naval Stores Co., 143 Ga. 756, 85 S.E. 917 (1915) (see O.C.G.A. § 44-5-167).

Color of title will not extend beyond description contained in grant. Bradley v. Shelton, 189 Ga. 696, 7 S.E.2d 261 (1940).

Claimant in actual possession of a part of a tract may rely upon the presumption that the claimant's possession extends to the boundaries of the tract described in the claimant's paper title, although prescription will not run in the claimant's favor as against one having like constructive possession. Martin v. Clark, 190 Ga. 270, 9 S.E.2d 54 (1940).

Person claiming under a recorded deed may have constructive possession of lands and may acquire a prescriptive title to all lands which are covered by the deed and are contiguous by having actual possession of a part thereof for a period of seven years. Mincey v. Anderson, 206 Ga. 572, 57 S.E.2d 922 (1950).

Conveyance of several noncontiguous tracts by same deed. — If the same deed makes independent conveyances of two or more separate and noncontiguous tracts of land, actual possession of one or more of such distinct entities as thus conveyed will not be extended by construction to include them all; but if the several tracts designated as being included by the terms of the conveyance actually adjoin or corner, so as to in fact constitute a single parcel, actual possession of a portion of the premises thus conveyed will be extended by construction to include the entire premises. Morris v. Gibson, 35 Ga. App. 689, 134 S.E. 796 (1926).

Deed did not embrace public right of way. — When a builder's trucks damaged grass near a curb in front of a landowner's house, and the grass was entirely within a public right of way owned by a county, the landowner did not have standing to sue the builder for trespass based on O.C.G.A. § 44-5-167; possession under § 44-5-167 extended to the contiguous property embraced in a deed, and the landowner's deed did not embrace the right of way. Moses v. Traton Corp., 286 Ga. App. 843, 650 S.E.2d 353 (2007), cert. denied, 2007 Ga. LEXIS 743 (Ga. 2007).

Scope of possession when deed unrecorded. — In the case of an unrecorded deed, possession will not ordinarily extend by construction beyond the possessio pedis, even as to the lot or parcel on which actual possession is maintained of a portion, unless actual possession has been maintained of a portion of the land in dispute. Campbell v. Gregory, 200 Ga. 684, 38 S.E.2d 295 (1946) commented on in 9 Ga. B.J. 204 (1946).

Ordinarily actual possession under a recorded deed of a portion of several specified tracts or lots of land which are all contiguous and lie in one body will extend by construction so as to include the entire premises conveyed; if, however, such possession is

under an unrecorded deed, constructive possession will not extend beyond the tract or lot on which actual possession is maintained. Campbell v. Gregory, 200 Ga. 684, 38 S.E.2d 295 (1946); Tucker v. Long, 207 Ga. 730, 64 S.E.2d 69 (1951).

Before one can establish title by reason of possession under color of title, one must show: (1) that the writing which one claims as color of title purports to confer title upon the possessor; (2) actual possession of some portion of the tract; and (3) a claim of ownership over the portion not held in actual possession. Sewell v. Sprayberry, 186 Ga. 1, 196 S.E. 796 (1938).

What is most material and most certain in description shall prevail over that which is less material and less certain. Sewell v. Sprayberry, 186 Ga. 1, 196 S.E. 796 (1938).

Public recordation provides notoriety. — Public recordation of the deed is such adequate notice to the true owner as to invest the constructive possession with the element of notoriety essential to its being adverse. Gordon v. Georgia Kraft Co., 217 Ga. 500, 123 S.E.2d 540 (1962).

Evidence of notoriety. — In cases involving prescription and in other cases respecting adverse possession, the element of notoriety as to an asserted constructive possession is adequately shown whenever the party asserting the adverse constructive possession shows color of title covering the land in dispute and produces proof either: (1) that one's actual adverse possession has been maintained on a part of the land in dispute; or (2) that, while one's actual possession may not have been maintained on a part of the land in dispute, yet it has been maintained on a portion of the tract included in one's color of title, and that the conveyance which constitutes the color of title was duly recorded, or was otherwise brought to the knowledge (actual or constructive) of the person against whose title the adverse possession is asserted. On the other hand, if the possessor has no actual possession of any part of the tract claimed by the person against whom the adverse constructive possession is asserted, and one's deed (though it includes the land in dispute) is not recorded and notice of the boundaries has not otherwise been given, the possessor cannot assert adverse constructive possession to the tract in dispute. Campbell v. Gregory, 200 Ga. 684, 38 S.E.2d 295 (1946).

Cited in Parker v. Jones, 57 Ga. 204 (1876); Jones v. Patterson, 62 Ga. 527 (1879); Ford v. Williams, 73 Ga. 106 (1884); Griffin v. Lee, 90 Ga. 224, 15 S.E. 810 (1892); Johnson v. Simerly, 90 Ga. 612, 16 S.E. 951 (1892); Carstarphen v. Holt, 96 Ga. 203, 23 S.E. 904 (1895); Knight v. Isom, 113 Ga. 613, 39 S.E. 103 (1901); Baxley v. Baxley, 117 Ga. 60, 43 S.E. 436 (1903); Tison v. South Ga. Ry., 8 Ga. App. 91, 68 S.E. 651 (1910); Rowan v. Newbern, 32 Ga. App. 363, 123 S.E. 148 (1924); Tucker v. Wimpey, 158 Ga. 820, 124 S.E. 692 (1924); Anderson v. Black, 191 Ga. 627, 13 S.E.2d 650 (1941); Hardy v. Brannen, 194 Ga. 252, 21 S.E.2d 417 (1942); Holloway v. Woods, 195 Ga. 55, 23 S.E.2d 254 (1942); Elliott v. Robinson, 198 Ga. 811, 33 S.E.2d 95 (1945); Knighton v. Hasty, 200 Ga. 507, 37 S.E.2d 382 (1946); Farrar v. Gulf Oil Corp., 208 Ga. 212, 66 S.E.2d 55 (1951); Pannell v. Continental Can Co., 554 F.2d 216 (5th Cir. 1977); Wisenbaker v. Warren, 196 Ga. App. 551, 396 S.E.2d 528 (1990).

RESEARCH REFERENCES

Am. Jur. 2d. — 3 Am. Jur. 2d, Adverse Possession, §§ 27, 16 et seq., 25 et seq., 126, 127, 256 et seq.

C.J.S. — 2 C.J.S., Adverse Possession, §§ 71 et seq., 111, 228 et seq., 275.

ALR. — Adverse possession of railroad right of way, 50 ALR 303.

Tacking adverse possession of area not within description of deed or contract, 17 ALR2d 1128.

44-5-168. Adverse possession of mineral rights under certain conditions; procedure to obtain title.

(a) Whenever mineral rights are conveyed or whenever real property is conveyed in fee simple but the mineral rights to such property are reserved by the grantor, the owner of the real property in fee simple or his heirs or

assigns may gain title to such mineral rights by adverse possession if the owner of the mineral rights or his heirs or assigns have neither worked nor attempted to work the mineral rights nor paid any taxes due on them for a period of seven years since the date of the conveyance and for seven years immediately preceding the filing of the petition provided for in subsection (b) of this Code section.

(b) In order to obtain absolute title to mineral rights in the circumstances described in subsection (a) of this Code section:

(1) The owner of the real property in fee simple or his heirs or assigns may file in the superior court for the county where the land is located a petition requesting relief in the nature of declaratory judgment. The petition:

(A) Shall contain all essential, required paragraphs, including jurisdiction;

(B) Shall contain the name and last known address of the grantor of the property reserving the mineral rights and the names and last known addresses of his heirs or assigns or any other person known by the plaintiff to have an interest in the mineral rights;

(C) Shall show:

(i) That the plaintiff or his predecessors in title were granted and obtained a deed for the property in question;

(ii) That the conveyance reserved mineral rights or that the plaintiff or his predecessors in title conveyed the mineral rights and reserved or retained the fee simple title to the real property; and

(iii) That, for a period of seven years preceding the filing of the petition after the conveyance, the owner of the mineral rights or his heirs or assigns have neither worked nor attempted to work the mineral rights nor paid taxes on them; and

(D) Shall include any and all prayers regarding the land that the plaintiff may desire. Specifically, the petition may pray that the court find that the plaintiff has obtained title to the mineral rights through adverse possession and that the plaintiff be granted title to mineral rights;

(2) Upon a finding in the plaintiff's favor, the court shall issue a judgment and decree declaring that the mineral rights involved have been lost and that the plaintiff has gained absolute title to such mineral rights; and

(3) Service shall be perfected in the same manner as service on defendants in an in rem proceeding, including service by publication.

(c) Nothing in this Code section shall restrict the court from granting further plenary relief, whether legal or equitable; and the failure of the

petition in the plaintiff's favor shall not affect the right of the plaintiff to any other relief, legal or equitable, to which he may be entitled.

(d) Any person named in the petition or any person having an interest in the mineral rights shall have the right to intervene in a case brought under this Code section.

(e) In order to maintain the status quo pending the adjudication of the questions or to preserve equitable rights, the court may grant injunctions and other interlocutory extraordinary relief.

(f) Nothing in this Code section shall apply to a lease for a specific number of years nor to an owner of mineral rights who has leased the mineral rights in writing to a licensed mining operator as defined in Part 3 of Article 2 of Chapter 4 of Title 12. (Code 1933, § 85-407.1, enacted by Ga. L. 1975, p. 725, § 1; Ga. L. 1987, p. 3, § 44.)

Cross references. — Provision that owner of real property owns upward and downward indefinitely, §§ 44-1-2, 51-9-9.

Law reviews. — For article discussing the effect of Texaco, Inc. v. Short, 454 U.S. 516 (1982) on marketable title laws, see 34 Mercer L. Rev. 1005 (1983). For annual survey of law of real property, see 38 Mercer L. Rev. 319 (1986).

JUDICIAL DECISIONS

Section constitutional. — Application of O.C.G.A. § 44-5-168 does not violate the state constitutional prohibition against impairment of the obligation of contracts. The preservation of the mineral owner's claim under § 44-5-168 depends only upon the owner's use of the minerals or upon returning them for taxes, which is a minimal burden that does not impair contractual obligations. Hayes v. Howell, 251 Ga. 580, 308 S.E.2d 170 (1983); Georgia Marble Co. v. Whitlock, 260 Ga. 350, 392 S.E.2d 881 (1990), cert. denied, 498 U.S. 1025, 111 S. Ct. 675, 112 L. Ed. 2d 667 (1991).

Protection against retroactive (or retrospective) laws prohibits the impairment of vested rights. Although owners of mineral interests may be said to have ''vested rights,'' that property is held subject to the proper exercise of the police power by legislative bodies. O.C.G.A. § 44-5-168 does not divest the mineral owner of the owner's rights; it conditions the retention of those rights upon the requirements of either using the minerals or paying taxes upon the minerals for the public benefit. Hayes v. Howell, 251 Ga. 580, 308 S.E.2d 170 (1983).

Exclusion of fixed duration leases and leases to certain licensed mining operators contained in subsection (f) of O.C.G.A. § 44-5-168 does not violate the equal protection clause of the fourteenth amendment. Mixon v. One Newco, Inc., 863 F.2d 846 (11th Cir. 1989).

Phrase ''worked'' or ''attempted to work the mineral rights'' is not unconstitutionally vague under the first amendment of the state or federal constitutions. Fisch v. Randall Mill Corp., 262 Ga. 861, 426 S.E.2d 883, cert. denied, 510 U.S. 824, 114 S. Ct. 84, 126 L. Ed. 2d 52 (1993).

O.C.G.A. § 44-5-168 actually is a "lapse" statute rather than a traditional ''adverse possession'' law. Mixon v. One Newco, Inc., 863 F.2d 846 (11th Cir. 1989).

Section strictly construed. — O.C.G.A. § 44-5-168 is in derogation of the common law and must be strictly construed. Larkin v. Laster, 254 Ga. 716, 334 S.E.2d 158 (1985).

Word "since" in subsection (a) of O.C.G.A. § 44-5-168 does not necessarily imply "immediately following." Moreover, use of the indefinite article in the reference to ''a period of seven years'' as opposed to ''the period'' indicates that any seven-year period of nonuse or nonpayment of taxes following the date of conveyance would suf-

fice. Mixon v. One Newco, Inc., 863 F.2d 846 (11th Cir. 1989).

Applicability to mineral rights obtained prior to 1975. — O.C.G.A. § 44-5-168 may be applied to mineral rights obtained prior to the statute's effective date, 1975, although suit could not be brought until 1982, seven years after the statute's effective date. Milner v. Bivens, 255 Ga. 49, 335 S.E.2d 288 (1985).

Venue. — Landowner's suit is clearly not in equity if the landowner seeks to establish legal title by adverse possession as a matter of law in reliance on a statute. Venue is constitutionally in the county in which the land lies, as provided in paragraph (b)(1) of O.C.G.A. § 44-5-168. Hayes v. Howell, 251 Ga. 580, 308 S.E.2d 170 (1983).

Words "heirs" and "assigns" means only heirs and assigns of the real property in fee simple. Larkin v. Laster, 254 Ga. 716, 334 S.E.2d 158 (1985).

"Work" defined. — To meet the requirement of working or attempting to work mineral rights under O.C.G.A. § 44-5-168, the owner of the mineral interests must carry on an operation to explore for, use, produce, or extract minerals in the land—the owner must do more than conduct genealogical research and pick up rock samples to meet this standard. Fisch v. Randall Mill Corp., 262 Ga. 861, 426 S.E.2d 883, cert. denied, 510 U.S. 824, 114 S. Ct. 84, 126 L. Ed. 2d 52 (1993).

Complaint deemed "filed" on date attorney instructs delivery. — When attorney delivered petition claiming adverse possession to clerk on June 30 but instructed clerk to withhold delivery of summons and complaint to sheriff for service until further notice, complaint was deemed ''filed'' on the date attorney instructed delivery to be made, even though it was stamped ''filed'' on June 30. ITT Rayonier, Inc. v. Hack, 254 Ga. 324, 328 S.E.2d 542 (1985).

Rights protected under subsection (f). — General Assembly intended to exclude from O.C.G.A. § 44-5-168, and thereby protect the rights of, lessees of mineral rights whether such lessees held leases for a specific number of years or were licensed mining operators. Hinson v. Loper, 251 Ga. 239, 304 S.E.2d 722 (1983).

Rights of successors in interest of party reserving mineral rights were protected under subsection (f) of O.C.G.A. § 44-5-168. Hinson v. Loper, 251 Ga. 239, 304 S.E.2d 722 (1983).

Adverse possession rights nonassignable. — Right to seek good title to mineral rights by adverse possession under O.C.G.A. § 44-5-168 cannot be assigned. Larkin v. Laster, 254 Ga. 716, 334 S.E.2d 158 (1985).

Knowledge of record title holder. — Nothing in O.C.G.A. § 44-5-168 precludes the holder of record title from acquiring title to mineral rights if one is aware of the mineral right owner's failure to use the rights or to pay taxes during a seven year period. James F. Nelson, Jr. Family Ltd. Partnership v. Miller, 267 Ga. 466, 479 S.E.2d 737 (1997).

Payment of taxes by corporation instead of stockholders avoided lapse of mineral rights. — Plaintiffs, a corporation and the corporation's three primary stockholders, avoided the lapse of their mineral rights under O.C.G.A. § 44-5-168(a) by paying taxes on the mineral rights, and the fact that taxes were paid by the corporation rather than by simply the individual stockholders for certain periods did not change the outcome since, for the purpose of payment of taxes on the mineral rights, there was such an identity of ownership and interest among the individual stockholders and the corporation that it was impossible to distinguish among the various plaintiffs in the allocation of the tax liability or its payment. Allgood Farm, LLC v. Johnson, 275 Ga. 297, 565 S.E.2d 471 (2002).

Mineral owners cannot claim benefit of tax payments made by landowners. — O.C.G.A. § 44-5-168 contemplates payment of taxes upon the mineral rights, as such, by the holder of the mineral rights who is not the owner of the real property in fee simple. Having failed to make such payments, the mineral owner is not entitled to claim the benefit of tax payments made by the landowners. Hayes v. Howell, 251 Ga. 580, 308 S.E.2d 170 (1983).

Payment of back taxes after suit immaterial. — Payment of the seven year's back taxes owed by the owner of mineral rights, after the petition for adverse possession was filed, had no effect under O.C.G.A. § 44-5-168. Larkin v. Laster, 254 Ga. 716, 334 S.E.2d 158 (1985).

Mineral owner must show work or payment of ad valorem taxes. — To retain one's interest in the mineral rights, the owner

must attempt to work or work the mineral rights or return the property for and pay ad valorem taxes. Dubbers-Albrecht v. Nathan, 257 Ga. 111, 356 S.E.2d 205 (1987).

Payment of estate taxes will not suffice. — Payment of state or federal estate taxes on the interest of the mineral rights owner does not further the purposes of O.C.G.A. § 44-5-168, as there is no assurance payment of such taxes will be required or occur during the seven-year period. Dubbers-Albrecht v. Nathan, 257 Ga. 111, 356 S.E.2d 205 (1987).

Lump-sum tax payments without itemizing specific property interests. — When an owner of mineral rights had entered into an agreement with the county where the property was located to pay lump-sum taxes without itemizing the specific property interests, the agreement did not meet the requirements of O.C.G.A. § 48-5-15(c), nor did it constitute payment of taxes due within the meaning of O.C.G.A. § 44-5-168. Georgia Marble Co. v. Whitlock, 260 Ga. 350, 392 S.E.2d 881 (1990), cert. denied, 498 U.S. 1025, 111 S. Ct. 675, 112 L. Ed. 2d 667 (1991).

Term of lease construed. — Agreement which created a lease to mine for a 50-year period and gave an option to continue that had to be exercised by mining within that period, qualified as a lease for a specific number of years, even though it was provided that the lease would continue indefinitely if the option were exercised. Parker v. Reynolds Metals Co., 747 F. Supp. 711 (M.D. Ga. 1990).

Failure to perform duties. — Trial court did not err in granting the personal representatives of a sister's estate summary judgment in their action against a brother's heirs seeking a declaration that a one-half mineral interest the brother held in certain land had reversed to the sister by operation of O.C.G.A. § 44-5-168 because there was no evidence presented that the brother or the brother's heirs performed the duties that would have avoided the effect of § 44-5-168; neither the heirs nor the brother paid any taxes on the one-half mineral interest after the land became titled in the sister, and there was no evidence that there was any attempt to work the mineral rights during the seven years prior to suit being filed. Knox v. Wilson, 286 Ga. 474, 689 S.E.2d 829 (2010).

Equitable estoppel inapplicable. — Brother's heirs failed to present evidence justifying the application of the doctrine of equitable estoppel in an action filed by the personal representatives of a sister's estate, seeking a declaration that a one-half mineral interest the brother held in certain land had reversed to the sister by operation of O.C.G.A. § 44-5-168 because there was no evidence of an agreement by which the sister undertook to relieve the brother, and later his heirs, of the obligation to comply with the requirements of § 44-5-168, and there was no evidence that the sister ever made any promise or commitment intended to influence the holders of the one-half mineral interest to neglect their obligations under § 44-5-168; there was no reasonable inference that any holder of any mineral interest relied upon any representation of the sister in neglecting to follow § 44-5-168. Knox v. Wilson, 286 Ga. 474, 689 S.E.2d 829 (2010).

Cited in Nelson v. Bloodworth, 238 Ga. 264, 232 S.E.2d 547 (1977); Johnson v. Bodkin, 241 Ga. 336, 247 S.E.2d 764 (1978); Watson v. Wachovia Nat'l Bank, 207 Ga. App. 780, 429 S.E.2d 111 (1993).

RESEARCH REFERENCES

Am. Jur. 2d. — 3 Am. Jur. 2d, Adverse Possession, § 278 et seq. 53A Am. Jur. 2d, Mines and Minerals, §§ 19, 20, 119.

C.J.S. — 58 C.J.S., Mines and Minerals, §§ 129 et seq., 150 et seq., 168, 195.

ALR. — Oil or gas or other mineral rights in land as affected by language in conveyance specifying purpose for which the property is to be used, 39 ALR 1340.

May adverse possession be predicated upon use or occupancy by one spouse of real property of other, 74 ALR 138.

Acquisition of title to mines or minerals by adverse possession, 35 ALR2d 124.

Title by or through adverse possession as marketable, 46 ALR2d 544.

Validity and construction of statutes providing for reversion of mineral estates for abandonment or nonuse, 16 ALR4th 1029.

Method of calculating attorneys' fees

awarded in common-fund or common-benefit cases — state cases, 56 ALR5th 107.

44-5-169. Possession of land as notice; presumption from possession of husband and wife.

Possession of land shall constitute notice of the rights or title of the occupant. Possession by the husband with the wife is presumptively the possession of the husband, but this presumption may be rebutted. (Civil Code 1895, § 3931; Civil Code 1910, § 4528; Code 1933, § 85-408.)

History of Code section. — This Code section is derived from the decision in Broome v. Davis, 87 Ga. 584, 13 S.E. 749 (1891).

Cross references. — Gender-neutral statutory construction, § 1-3-1.

Law reviews. — 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 comment on NeSmith v. Calder, 163 Ga. 4, 135 S.E. 67 (1926), see 1 Ga. L. Rev. No. 1 P. 49 (1927). For comment on Wren v. Wren, 199 Ga. 851, 36 S.E.2d 77 (1945), see 9 Ga. B.J. 88 (1946).

JUDICIAL DECISIONS

Analysis

General Consideration
Possession of Land as Notice
1. Required Elements
2. Occupant's Right or Title
3. Purchaser's Duty to Inquire
4. Grantor Remaining in Possession
5. Proof
6. Illustrative Cases
Gifts
Husband and Wife

General Consideration

Principle is not a new one and has always been the law of this state. Hadaway v. Smedley, 119 Ga. 264, 46 S.E. 96 (1903).

Statute operates only in favor of a bona fide purchaser without notice. Williamson v. Floyd County Wildlife Ass'n, 216 Ga. 760, 119 S.E.2d 344 (1961) (see O.C.G.A. § 44-5-169).

Provisions on cotenants construed in connection with this section. — Former Code 1933, §§ 85-1001, 85-1003, and 85-1005 (see O.C.G.A. §§ 44-6-120, 44-6-121, and 44-6-123), relating to the rights of cotenants, must be construed in connection with former Code 1933, § 85-408 (see O.C.G.A. § 44-5-169) relating to possession of land as notice of right and title. Wren v. Wren, 199 Ga. 851, 36 S.E.2d 77 (1945); 9 Ga. B.J. 88 (1946).

Section has been applied in favor of the following persons: (1) a grantor after making a deed, Kent v. Simpson, 142 Ga. 49, 82 S.E. 440 (1914); (2) a trustee holding through his tenants, Bridger v. Exchange Bank, 126 Ga. 821, 56 S.E. 97, 115 Am. St. R. 118, 8 L.R.A. (n.s.) 463 (1906); (3) a cestui que trust in possession, Broadwell v. Maxwell, 30 Ga. App. 738, 119 S.E. 344 (1923); and (4) a vendee, under bond for title, Burr v. Toomer, 103 Ga. 159, 29 S.E. 692 (1897); Georgia State Bldg. & Loan Ass'n v. Faison, 114 Ga. 655, 40 S.E. 760 (1902); Mayor of Savannah v. Standard Fuel Supply Co., 151 Ga. 145, 106 S.E. 178 (1921).

For an exhaustive review of cases decided

General Consideration (Cont'd)

upon the principle inculcated by this statute, see McDonald v. Dabney, 161 Ga. 711, 132 S.E. 547 (1926) (see O.C.G.A. § 44-5-169).

Cited in De Loach v. Sikes, 169 Ga. 465, 150 S.E. 591 (1929); James v. Hudson, 170 Ga. 321, 152 S.E. 829 (1930); Walker v. First Nat'l Bank, 178 Ga. 542, 173 S.E. 430 (1934); Fite v. Walker, 183 Ga. 46, 187 S.E. 95 (1936); Williford v. Swint, 183 Ga. 375, 188 S.E. 685 (1936); Fulmore v. Macon Fed. Savs. & Loan Ass'n, 191 Ga. 151, 11 S.E.2d 790 (1940); Joel v. Publix-Lucas Theater, Inc., 193 Ga. 531, 19 S.E.2d 730 (1942); Pope v. Williams, 70 Ga. App. 834, 29 S.E.2d 808 (1944); Davis v. Akridge, 199 Ga. 867, 36 S.E.2d 102 (1945); Toms v. Knighton, 199 Ga. 858, 36 S.E.2d 315 (1945); Rogers v. Manning, 200 Ga. 844, 38 S.E.2d 724 (1946); Smith v. Lanier, 202 Ga. 165, 42 S.E.2d 495 (1947); Clarke v. Phillips, 204 Ga. 772, 51 S.E.2d 848 (1949); Lewis v. Lewis, 210 Ga. 330, 80 S.E.2d 312 (1954); Phillips v. Wheeler, 212 Ga. 603, 94 S.E.2d 732 (1956); Allen v. Bobo, 215 Ga. 707, 113 S.E.2d 138 (1960); Ammons v. Central of Ga. Ry., 215 Ga. 758, 113 S.E.2d 438 (1960); Williamson v. Floyd County Wildlife Ass'n, 215 Ga. 789, 113 S.E.2d 626 (1960); Seay v. Malone, 219 Ga. 149, 132 S.E.2d 261 (1963); Waddell v. City of Atlanta, 121 Ga. App. 94, 172 S.E.2d 862 (1970); Davis v. Leach, 228 Ga. 139, 184 S.E.2d 454 (1971); Gauker v. Eubanks, 230 Ga. 893, 199 S.E.2d 771 (1973); Mrs. E.B. Smith Realty Co. v. Hubbard, 130 Ga. App. 672, 204 S.E.2d 366 (1974); Cloud v. Jacksonville Nat'l Bank, 239 Ga. 353, 236 S.E.2d 587 (1977); Pierce v. Thomas, 258 Ga. 469, 369 S.E.2d 742 (1988).

Possession of Land as Notice

1. Required Elements

Possession must be present, peaceable, open, and notorious. Wilkinson v. Dix, 151 Ga. 605, 107 S.E. 844 (1921).

Possession must be actual, exclusive, and unambiguous. — In order for the possession to have the effect of notice possession must be actual, open, visible, exclusive, and unambiguous. McDonald v. Dabney, 161 Ga. 711, 132 S.E. 547 (1926).

To operate as notice, the possession must be open, visible, exclusive, unambiguous, and not liable to be misconstrued or misunderstood. It must not be a mixed or ambiguous possession. Yancey v. Harris, 234 Ga. 320, 216 S.E.2d 83 (1975).

In order for possession to have the effect of notice, it must be actual, open, visible, exclusive, and unambiguous. Bacote v. Wyckoff, 251 Ga. 862, 310 S.E.2d 520 (1984).

"Possession," such as would constitute notice, is restricted to "actual possession," for the notice is of whatever right the occupant has. Chandler v. Georgia Chem. Works, 182 Ga. 419, 185 S.E. 787 (1936).

Actual possession by the cestui que trust is constructive notice to a purchaser of the occupant's equitable title, and a purchaser bona fide and for value from the trustee takes with notice of the equitable title. Bank of Arlington v. Sasser, 182 Ga. 474, 185 S.E. 826 (1936).

Children's residence with father not sufficient to put purchaser upon notice of children's equity. — When minor children reside with their father, who is in possession of land to which he has the legal title, the children's residence on the land is not sufficient to put a purchaser from the father upon notice or inquiry as to any secret equity the children might have therein. Citizens' Bank v. Taylor, 169 Ga. 203, 149 S.E. 861 (1929).

Possession of land must have element in it indicative that occupancy is exclusive in nature. McDonald v. Taylor, 200 Ga. 445, 37 S.E.2d 336 (1946).

Exclusive nature of occupancy. — Possession of land effectual to impute notice must have some element in it indicative that the occupancy is exclusive in nature. Manning v. Manning, 135 Ga. 597, 69 S.E. 1126 (1911).

Possession of land which will be notice of the occupant's title must have some element in it indicative that the occupancy is exclusive in its nature. McDonald v. Dabney, 161 Ga. 711, 132 S.E. 547 (1926).

Effect of occupancy connected with another with relationship sufficient to account for situation. — Correct rule is that when the occupation by one is not exclusive, but in connection with another, with respect to whom there exists a relationship sufficient to account for the situation, and the circumstances do not suggest an inconsistent claim, then such a possession will not give notice of a right by an unrecorded grant. If, of the two

occupants, one has the record title, a purchaser has the right to assume that the other has no title. Yancey v. Harris, 234 Ga. 320, 216 S.E.2d 83 (1975).

Possession under unrecorded deed, together with grantor, not constructive notice. — Possession of land by the grantee, holding under an unrecorded deed, together with the grantor, is not constructive notice of the unrecorded deed to a subsequent purchaser. Bell v. Bell, 178 Ga. 225, 172 S.E. 566 (1934).

Possession of land must be open, visible, exclusive, unambiguous, and not liable to be misconstrued or misunderstood. It must not be a mixed or ambiguous possession. Accordingly, possession of land by a grantee, holding under an unrecorded deed, together with the grantor, is not constructive notice of the unrecorded deed to a subsequent purchaser. McDonald v. Taylor, 200 Ga. 445, 37 S.E.2d 336 (1946).

Purchaser from landlord takes with notice of tenant's rights. — When one purchases realty from a landlord, one takes with notice of whatever right or title the tenant in possession at the time may have. Blanton v. Moseley, 133 Ga. App. 144, 210 S.E.2d 368 (1974).

Purchaser with absolute, recorded deed authorized to assume tenant's possession not adverse. — 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, the purchaser would be authorized to assume that, as a matter of law, the possession of the tenant was held under the grantee, and not adversely to the latter's title. Chestnut v. Weekes, 180 Ga. 701, 180 S.E. 716 (1935).

Possession at time purchaser obtains title charges notice. — 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. Wood v. Bowden, 182 Ga. 329, 185 S.E. 516 (1936); McDonald v. Taylor, 200 Ga. 445, 37 S.E.2d 336 (1946).

Builder's possession of a lot in a subdivision which was not a development of the builder did not give notice of the builder's ownership of that lot. Palmer v. Forrest, Mackey & Assocs., 251 Ga. 304, 304 S.E.2d 704 (1983).

2. Occupant's Right or Title

Party not estopped to claim land by allowing legal title in another. — Statute establishes a flat rule that one is not estopped to claim land by the mere act of allowing legal title to stand in the name of another. Yancey v. Harris, 234 Ga. 320, 216 S.E.2d 83 (1975) (see O.C.G.A. § 44-5-169).

Actual possession is notice to the world of the right or title of the occupant. Chandler v. Georgia Chem. Works, 182 Ga. 419, 185 S.E. 787 (1936); Perimeter Dev. Corp. v. Haynes, 234 Ga. 437, 216 S.E.2d 581 (1975).

Possession is not only notice of the rights of the possessor, but of those under whom the possessor claims. Walker v. Neil, 117 Ga. 733, 45 S.E. 387 (1903); Austin v. Southern Home Bldg. & Loan Ass'n, 122 Ga. 439, 50 S.E. 382 (1905); McDonald v. Dabney, 161 Ga. 711, 132 S.E. 547 (1926).

Bona fide possession under unrecorded deed is notice of character and extent of occupant's title as to the whole lot described. Terrell v. McLean, 130 Ga. 633, 61 S.E. 485 (1908).

Possession of land is generally notice of whatever right or title the occupant has, and to have this effect the possession must have some element in it indicative that the occupancy is exclusive in its nature, and such possession must be open, visible, exclusive, unambiguous, and not liable to be misconstrued or misunderstood. Bell v. Bell, 178 Ga. 225, 172 S.E. 566 (1934).

Notice not limited to what discovered by examining public records. — Possession of land is notice of whatever right or title the occupant has, and such a notice is not limited to what would be discovered by an examination of the public records. Moore v. Hartford Accident & Indem. Co., 102 Ga. App. 514, 117 S.E.2d 206 (1960).

Mere naked possession may in time ripen into perfect and indefeasible title. — Actual occupation or mere naked possession of land is prima facie evidence of legal title in the possessor, and it may by length of time ripen into a perfect and indefeasible title, and if one dies in possession of land under a claim of ownership, such possession is prima facie evidence of title in the occupant and can be the basis of recovery in ejectment, unless a better title by adverse title or otherwise appears. Hicks v. Hicks, 193 Ga. 382, 18 S.E.2d 763 (1942).

Possession of Land as Notice (Cont'd)

3. Purchaser's Duty to Inquire

Purchaser or contractor for lien must inquire into possessor's rights. — It is incumbent upon one who purchases or contracts for a lien on land to inquire into the right of any person in possession thereof. Neal v. Jones, 100 Ga. 765, 28 S.E. 427 (1897); Yancey v. Montgomery & Young, 173 Ga. 178, 159 S.E. 571 (1931); Collins v. Freeman, 226 Ga. 610, 176 S.E.2d 704 (1970).

Knowledge chargeable to inquirer not limited to that in public records. — 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).

Presumption that inquiry will disclose real adverse holder. — Principle upon which the rule embodied in this statute is found is that adverse possession of land is notice of whatever facts in reference to the title would be developed by an inquiry of the person in possession, the presumption being that an inquiry of one will disclose how, or under what right, one holds possession, and therefore lead to the discovery of the real adverse holder, whether one or another for whom one holds possession. Hall v. Turner, 198 Ga. 763, 32 S.E.2d 829 (1945) (see O.C.G.A. § 44-5-169).

4. Grantor Remaining in Possession

Grantor must take step beyond mere possession. — While grantor may not adversely possess against a grantee where the grantor simply remains in possession after a conveyance, where a grantor in possession takes some additional step which gives unequivocal notice that one is claiming property as one's own, the prescriptive period begins to run. Seignious v. Metropolitan Atlanta Rapid Transit Auth., 252 Ga. 69, 311 S.E.2d 808 (1984).

Section inapplicable to party in possession against own warranty deed. — Provisions of this statute can have no application to the case of a party who is endeavoring to avail oneself of one's possession in the fact of one's own warranty deed, spread on the record, as against an innocent purchaser for value and without notice. Malette v. Wright, 120 Ga. 735, 48 S.E. 229 (1904) (see O.C.G.A. § 44-5-169).

Possession of land remaining with grantor and never surrendered is deemed as held under grantee. Such possession will be construed as consistent with the grantor's recorded deed, and is not notice to an innocent purchaser from the grantee of any mistake in the deed whereby a larger tract was inadvertently conveyed than the parties to the deed intended. Under these circumstances, such possession, although remaining with the grantor and never surrendered, is not deemed adverse to the title of the grantor's grantee, and a prescriptive title in favor of the grantor can never ripen under such possession. Stepp v. Stepp, 195 Ga. 595, 25 S.E.2d 6 (1943).

That grantor found in possession after delivery suggestive of retention of some interest. — An absolute deed divests the grantor of the right of possession, as well as of the legal title, and when one is found in possession after delivery of one's deed, it is a fact inconsistent with the legal effect of the deed, and is suggestive that one still retains some interest in the premises; to say that the grantor is estopped by this deed is begging the question, for one's possession is notice to third parties of one's rights, and there is no principle of estoppel that would prevent one from asserting against purchasers or creditors any claim to the premises which one might assert against one's grantee. Chandler v. Georgia Chem. Works, 182 Ga. 419, 185 S.E. 787 (1936).

Continued possession by grantor demands inquiry from purchaser. — Continued possession of a grantor who executes an absolute deed demands that one who purchases from the grantee inquire into the right of one's occupancy. Chandler v. Georgia Chem. Works, 182 Ga. 419, 185 S.E. 787 (1936).

"Absolute" deed may be shown to be for grantor-possessor's benefit. — Deed "absolute" in form may be shown by parol evidence to have been made in trust for the benefit of the grantor if the maker remains in possession of the land. Chandler v. Georgia Chem. Works, 182 Ga. 419, 185 S.E. 787 (1936).

When a vendor remains in possession after an absolute sale, this is prima facie evidence of fraud, which may be explained, and after possession is proved, the burden of

explaining it rests upon those claiming under the sale. Robinson v. Wright, 217 Ga. 199, 121 S.E.2d 640 (1961).

Possession retained by the vendor, after the 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. Perimeter Dev. Corp. v. Haynes, 234 Ga. 437, 216 S.E.2d 581 (1975).

Possession remaining with vendor after conveyance evidence of fraud. — Possession of property, real or personal, remaining with the vendor after an absolute deed of conveyance, is evidence of fraud. Perimeter Dev. Corp. v. Haynes, 234 Ga. 437, 216 S.E.2d 581 (1975).

5. Proof

Proof of possession must be clear and satisfactory. — Possession of land which will be notice of the occupant's right to title must be actual, open, visible, exclusive, and unambiguous at the time of the land's purchase by another, and the protection which the registration law gives to one taking title to lands upon the faith of the record title requires that proof of such possession be clear and satisfactory. Anderson v. Barron, 208 Ga. 785, 69 S.E.2d 874 (1952).

Onus of explanation, after possession is proven, is upon the grantee. Perimeter Dev. Corp. v. Haynes, 234 Ga. 437, 216 S.E.2d 581 (1975).

When no proof of title by plaintiff, claimant bound to make good title. — Burden of proof in the trial of claim cases is on the plaintiff, when the defendant is not in possession of the property. The bare possession of the property by the defendant is evidence of defendant's ownership, and the claimant is bound, when that is shown, without any proof of title in the claimant by the plaintiff, to make good title. Hicks v. Hicks, 193 Ga. 382, 18 S.E.2d 763 (1942).

6. Illustrative Cases

Subsequent purchaser of timber leases takes subject to first lessee in possession. — When a lessee of timber for turpentine purposes, while in possession of the timber under recorded leases, obtained and paid for extensions of such leases for one year, and after the purchase of such extensions, which were not recorded, a third person acquired by purchase from the same lessors conflicting leases on the same timber, to commence immediately after the expiration of the recorded leases of the first lessee, it could not be said as a matter of law that the subsequent purchaser, in the absence of an inquiry of the first lessee as to that lessee's rights in the timber as evidenced by that lessee's possession and use of the same for turpentine purposes, did not take subject to the interest of the latter under the latter's unrecorded extensions. Dyal v. McLean, 188 Ga. 229, 3 S.E.2d 571 (1939).

Church property held in trust. — In a quiet title action involving church property, the trial court erred in making the legal conclusion that the founding pastor held the church property in fee simple absolute instead of in trust for and on behalf of the religious corporation as Georgia law expressly authorizes the creation of religious land trusts and the deed expressly referred to the pastor as a trustee. As such, the trial court erred in ruling that fee simple absolute title to the property vested in another congregation by virtue of a 1998 warranty deed executed by the pastor as the pastor had no legal authority to transfer the property without the consent and approval of the religious corporation. Second Refuge Church of Our Lord Jesus Christ, Inc. v. Lollar, 282 Ga. 721, 653 S.E.2d 462 (2007).

Gifts

Successor tenant in common by gift takes with notice of other tenant's equities. — When a successor tenant in common acquired that tenant's interest by deed of gift, that 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).

Donee by mere parol gift not vested with any rights against subsequent purchaser. — 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 the holder cannot be ousted by the donor, or by a purchaser from the holder with notice; a mere parol gift, however, is not, without

Gifts (Cont'd)

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).

Parol gift becomes irrevocable when donee takes possession and makes valuable improvements. — Oral gift of land becomes complete and irrevocable when the donee takes possession of the donated premises and, on the faith of the gift, makes valuable improvements, and, as against the donor and those claiming under the donor 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).

Sufficiency of improvements jury question. — Sufficiency of improvements which the donee must have made to complete a parol gift of land is a question for the jury to determine. Barfield v. Hilton, 235 Ga. 407, 219 S.E.2d 719 (1975).

Evidence sufficient to find completed gift. — In an action to enjoin trespass on a certain acre of land, since the plaintiff's predecessor in title had orally given the land to a church for cemetery uses, pursuant to which corner stakes and lines were set up and two graves placed thereon, and there was testimony that the plaintiff, prior to the plaintiff's purchase of a 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).

Husband and Wife

Possession of wife alone not notice to third party. — When the husband and the wife were in possession of land, the record title being in the husband, and the husband offered to sell and executed to a third party the bond for title, the possession of the wife did not constitute notice of her right and title to the land. Gleaton v. Wright, 149 Ga. 220, 100 S.E. 72 (1919).

Effect of buyer's failure to make inquiry. — When the buyer failed to make inquiries as to the extent of a husband's interest therein, he is charged with notice of whatever facts would be developed by such an inquiry. Austin v. Southern Home Bldg. & Loan Ass'n, 122 Ga. 439, 50 S.E. 382 (1905).

Title of lender to husband with record title superior to wife's equitable title. — When a husband and wife are in possession of land and the record title thereto is in the husband, who borrows money from another and executes his deed to the land to the lender to secure the money so borrowed, the title of the lender is superior to the wife's equitable title of which the lender had no notice, growing out of the fact that the wife's money had paid for the land. Federal Land Bank v. Harris, 176 Ga. 732, 168 S.E. 778 (1933).

When wife in continuous actual possession under trust agreement without husband, husband not presumed possessor. — When a wife had been in continuous actual possession of the premises in dispute, claiming under a trust agreement, from a time prior to the execution of a security deed to a bank, up to the trial of the case, and it not otherwise appearing that her possession was with or in the right of her husband, the rule that possession by the husband with the wife is presumptively his possession does not apply. Bank of Arlington v. Sasser, 182 Ga. 474, 185 S.E. 826 (1936).

Possession of land by the tenants of the wife gave notice to the purchaser under an execution sale against the husband. Sikes v. Seckinger, 164 Ga. 96, 137 S.E. 833 (1927).

Prima facie case for widow's year's support when execution on deceased husband's possessed property. — When an execution is based on a judgment for a year's support and is levied on the land as the property of the deceased husband, and it is made to appear from the evidence that the husband claimed the property as his own, was in possession of it for many years, and died in possession, a prima facie case is made out for the widow, the burden shifts, and it is then incumbent upon the other claimants to establish their title. Hicks v. Hicks, 193 Ga. 382, 18 S.E.2d 763 (1942).

RESEARCH REFERENCES

Am. Jur. 2d. — 3 Am. Jur. 2d, Adverse Possession, §§ 15, 17 et seq., 41, 42, 62 et seq., 154.

C.J.S. — 2 C.J.S., Adverse Possession, §§ 55, 56. 41 C.J.S., Husband and Wife, §§ 30, 31, 41.

ALR. — Writing as essential to color of title in adverse occupant of land, 2 ALR 1457.

Right of wife to exclude husband from possession, use, or enjoyment of family residence or homestead owned by her, 21 ALR 745.

Dower as affected by adverse possession, 41 ALR 1115.

Presumption of ownership of personal property as between husband and wife, 111 ALR 1374.

Possession of land by cotenant after acquisition of interest of another cotenant as notice to subsequent purchaser from or creditor of latter, 162 ALR 209.

Occupancy of premises by both record owner and another as notice of title or interest of latter, 2 ALR2d 857.

Possession of real property by tenant as charging another purchaser with notice of tenant's agreement with owner-landlord to purchaser of property, 37 ALR2d 1112.

44-5-170. Effect of disabilities on commencement of prescription.

Prescription shall not run against the rights of a minor during his minority, a person incompetent by reason of mental illness or retardation as long as the mental illness or retardation lasts, or a person imprisoned during his imprisonment. After any such disability is removed, prescription shall run against the person holding a claim to realty or personalty. (Laws 1767, Cobb's 1851 Digest, p. 559; Ga. L. 1855-56, p. 233, § 19; Code 1863, § 2645; Code 1868, § 2644; Code 1873, § 2686; Code 1882, § 2686; Civil Code 1895, § 3593; Civil Code 1910, § 4173; Code 1933, § 85-411.)

JUDICIAL DECISIONS

History of section. — See Bagley v. Forrester, 53 F.2d 831 (5th Cir. 1931).

Exceptions named in statute. Dean v. Feely, 69 Ga. 804 (1883).

Prescription may run against wife in favor of husband. — Prescription as to property, other than the home, may run against a wife in favor of the husband, though living together. Bagley v. Forrester, 53 F.2d 831 (5th Cir. 1931).

Prescription will not defeat rights of minors during infancy, nor persons under disability or pending disability. Miles v. Blanton, 211 Ga. 754, 88 S.E.2d 273 (1955).

As to infancy in general, see Ladd & Wilson v. Jackson, 43 Ga. 288 (1871); Buchan v. Williamson, 131 Ga. 501, 62 S.E. 815 (1908).

Transferee's claim of adverse possession failed as such could not be based on a period of time in which the opposing landowner was a minor. Reece v. Smith, 276 Ga. 404, 577 S.E.2d 583 (2003).

Prescription cannot run against infants with legal title. — When the legal title to property is vested in a trustee for an infant, and when the trustee fails to sue for the title, so that the trustee's right of action is barred, the infant cestui que trusts, who have only an equitable interest in the property, will be also barred, but when the legal title is vested in the infants, or cast upon them by operation of law, then the statute does not run against them during their infancy. Wingfield v. Virgin, 51 Ga. 139 (1874).

Prescription cannot run against equitable estate when no one authorized to assert rights. — Time does not run against the equitable estate of minors since the legal estate does not reside in one authorized to assert their rights. Vinton v. Powell, 136 Ga. 687, 71 S.E. 1119 (1911). See also Buchan v. Daniel, 147 Ga. 450, 94 S.E. 578 (1917).

Grantor without mental capacity to understand simple subjects or transact business cannot undertake recovery suit. — If the grantor as alleged did not have the mental capacity to understand simple subjects or to transact any business during the time in question, the grantor would not have had the sufficient mental capacity to undertake to maintain a suit for the recovery of the grantor's property. Mullins v. Barrett, 204 Ga. 11, 48 S.E.2d 842 (1948).

Cancellation of deed authorized when pronounced mental weakness, united with undue influence by fiduciary. — While a mere allegation of weakness of mind not amounting to imbecility is not sufficient to set forth a cause of action for the cancellation of a deed, there being no allegation of fraud or undue influence, nevertheless, when the mental weakness is pronounced, such as would prevent the grantor for understanding the nature of the grantor's act at the time the deed was executed, and especially when as alleged the 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).

Widow insane at date of husband's death is not barred from applying for dower until seven years after the removal of her disability. LaGrange Mills v. Kener, 121 Ga. 429, 49 S.E. 300 (1904).

Lucid intervals may be aggregated to bar action. — Though no prescription works against the rights of an insane person so long as the insanity continues, yet different lucid intervals, amounting in the aggregate to as much as seven years, may be put together, and the effect will be to bar the right of action. Verdery v. Savannah, F. & W. Ry., 82 Ga. 675, 9 S.E. 1133 (1889).

As a general rule, a party cannot hold a lien on one's own property; and this is never allowed except when equity intervenes to protect the title and thereby prevent a failure of justice. Wrenn v. Massell Inv. Co., 56 Ga. App. 802, 194 S.E. 263 (1937).

Cited in Kelley v. Spivey, 182 Ga. 507, 185 S.E. 783 (1936); Latham v. Fowler, 192 Ga. 686, 16 S.E.2d 591 (1941); Gay v. Radford, 207 Ga. 38, 59 S.E.2d 915 (1950); Blanton v. Moody, 265 F.2d 533 (5th Cir. 1959); Jordan v. Robinson, 229 Ga. 761, 194 S.E.2d 452 (1972); Whitworth v. Whitworth, 233 Ga. 53, 210 S.E.2d 9 (1974); Mobley v. Jackson Chapel Church, 281 Ga. 122, 636 S.E.2d 535 (2006).

RESEARCH REFERENCES

Am. Jur. 2d. — 3 Am. Jur. 2d, Adverse Possession, §§ 152, 153, 166, 167, 171 et seq. 25 Am. Jur. 2d, Easements and Licenses, § 34. 51 Am. Jur. 2d, Limitations of Actions, § 223 et seq.

C.J.S. — 2 C.J.S., Adverse Possession, §§ 7, 117, 152, 194, 263, 264. 43 C.J.S., Infants, §§ 163, 164.

ALR. — Prescription or adverse possession as against one under disability of infancy, coverture, or mental incompetency, 43 ALR 941; 147 ALR 236.

44-5-171. Effect of intervening disabilities; tacking.

Prescription shall not run against persons under disability during the period of the disability. Upon removal of the disability the prior possession may be tacked or added to the subsequent possession to make out the prescription. (Orig. Code 1863, § 2646; Code 1868, § 2645; Code 1873, § 2687; Code 1882, § 2687; Civil Code 1895, § 3594; Civil Code 1910, § 4174; Code 1933, § 85-412.)

JUDICIAL DECISIONS

Rights of minors and persons under disability protected. — Prescription will not defeat rights of minors during infancy, nor persons under disability pending disability.

Miles v. Blanton, 211 Ga. 754, 88 S.E.2d 273 (1955).

RESEARCH REFERENCES

Am. Jur. 2d. — 3 Am. Jur. 2d, Adverse Possession, §§ 73, 76 et seq., 152 et seq., 166, 167, 171 et seq.

C.J.S. — 2 C.J.S., Adverse Possession, §§ 152, 194. 43 C.J.S., Infants, §§ 163, 164.

ALR. — Prescription or adverse possession as against one under disability of infancy, coverture, or mental incompetency, 43 ALR 941; 147 ALR 236.

Rule that adverse possession of successive holders may be tacked, in determination of period of limitation, as applicable chattels, 135 ALR 711.

Adverse possession: right of remainderman or reversioner to tack his possession to that of life tenant, 150 ALR 557.

Tacking as applied to prescriptive easements, 72 ALR3d 648.

44-5-172. Tacking of successive possessions.

An inchoate prescriptive title may be transferred by a person in possession to his successor so that successive possessions may be tacked to make out the prescription. (Orig. Code 1863, § 2648; Code 1868, § 2647; Code 1873, § 2689; Code 1882, § 2689; Civil Code 1895, § 3598; Civil Code 1910, § 4178; Code 1933, § 85-416.)

JUDICIAL DECISIONS

Nature of successive possessions. — Although it is unnecessary that adverse possession be maintained for the statutory period by the same person, since continuity may be shown by the successive bona fide possessions of several persons, provided the requisite privity exists between the people, still it is necessary that the several possessions be of such a character as to the foundation of prescriptive title. Campbell v. Gregory, 200 Ga. 684, 38 S.E.2d 295 (1946).

Requirement that prior possession be accompanied by claim of right. — For owners to tack onto the period of their possession the time that the property was used by a tenant of the owner, the burden is upon them to show by a preponderance of the evidence that prior possession was of such character as to be the foundation of prescription, and be adverse, and the foundation must meet all the requirements of former Code 1933, § 85-402 (see O.C.G.A. § 44-5-161), including the requirement that the possession must be accompanied by a claim of right. Olsen v. Noble, 209 Ga. 899, 76 S.E.2d 775 (1953).

Reference in deed to former conveyance must be mentioned in conveyance by nonpossessor. — Mere color of title held by one who never takes possession, but who (without referring in one's deed to the former conveyance) subsequently conveys to another, who takes possession under such a conveyance, does not create by virtue of law any color of title in favor of the latter, additional to that arising from the conveyance. Turner v. Neisler, 141 Ga. 27, 80 S.E. 461 (1913). See also Walker v. Steffes, 139 Ga. 520, 77 S.E. 580 (1913).

Continuous successive possession of chattels tacked to make up prescribed time of adverse holding. — As in case of adverse possession of realty, adverse possession of chattels for the statutory period operates not merely to bar the remedy but vests absolute title in the possessor, which is equally available for attack or defense, and continuous possession in any one person is not necessary for the acquisition of title by adverse possession if there is a privity between successive occupants holding adversely to the true title continuously, the successive periods of occupation may be united or tacked to each other to make up the time of adverse holding prescribed by the statute as against

the title. Woodcliff Gin Co. v. Kittles, 173 Ga. 661, 161 S.E. 119 (1931).

Innocent purchaser cannot tack on possession of grantor whose possession originated in fraud. — An inchoate prescriptive title may be transferred by a possessor to a successor so that the successive possessions may be tacked to make out the prescription, except that the innocent purchaser may not tack to the purchaser's own the possession of a grantor whose possession originated in fraud of the true owner. Fraser v. Dolvin, 199 Ga. 638, 34 S.E.2d 875 (1945).

One entering into portion of lot under unrecorded deed cannot prescribe against contiguous lots until the deed is recorded; when the deed is not recorded, the incomplete prescriptive title of one's predecessor cannot inure to one's benefit insofar as the constructive possession of the contiguous lots is concerned. Campbell v. Gregory, 200 Ga. 684, 38 S.E.2d 295 (1946).

Inchoate prescriptive title was transferred by the possessor when successor produced stock certificates with blank assignments and a power of attorney to transfer the shares on the books of the company signed by original issue. Woodcliff Gin Co. v. Kittles, 173 Ga. 661, 161 S.E. 119 (1931).

Evidence sufficient to show ripening of prescriptive title. — When the evidence conclusively showed that the defendant and defendant's predecessors in title acquired color of title to the property in dispute and bona fide entered into possession under their respective paper titles under a claim of right, and that the adverse possession of the defendant, together with that of defendant's predecessors in title, was for about 13 years (more than seven years), the prescriptive title of the defendant thereby ripened, extinguished all inconsistent titles, and became the true title to the property. Fraser v. Dolvin, 199 Ga. 638, 34 S.E.2d 875 (1945).

Cited in Reynolds v. Smith, 186 Ga. 838, 199 S.E. 137 (1938); Hasty v. Wilson, 223 Ga. 739, 158 S.E.2d 915 (1967); Adams v. Talmadge, 240 Ga. 193, 240 S.E.2d 9 (1977); Swicord v. Hester, 240 Ga. 484, 241 S.E.2d 242 (1978); Nebb v. Butler, 257 Ga. 145, 357 S.E.2d 257 (1987); BMH Real Estate P'ship v. Montgomery, 246 Ga. App. 301, 540 S.E.2d 256 (2000); Trammell v. Whetstone, 250 Ga. App. 503, 552 S.E.2d 485 (2001).

RESEARCH REFERENCES

Am. Jur. 2d. — 3 Am. Jur. 2d, Adverse Possession, § 76 et seq.

C.J.S. — 2 C.J.S., Adverse Possession, § 154 et seq.

ALR. — Time during which dominant and servient tracts were in same ownership or under same control as excluded or included in determining easement by prescription, 98 ALR 591.

Adverse possession: right of remainderman or reversioner to tack his possession to that of life tenant, 150 ALR 557.

Tacking as applied to prescriptive easements, 72 ALR3d 648.

44-5-173. Prescription involving unrepresented estates, joint tenancies, or dismissed actions.

(a) Prescription shall not run against an unrepresented estate until representation is had thereon, provided such representation commences within five years.

(b) Prescription shall not run against a joint title which cannot be severally enforced or where any of the joint owners labor under one of the disabilities specified in Code Section 44-5-170.

(c) Prescription shall not run against a party when his action, timely commenced, is involuntarily dismissed or voluntarily dismissed for the first time if he recommences the same within six months. (Laws 1847, Cobb's

1851 Digest, p. 569; Ga. L. 1855-56, p. 233, §§ 21, 24, 33; Code 1863, § 2647; Code 1868, § 2646; Code 1873, § 2688; Code 1882, § 2688; Civil Code 1895, § 3595; Civil Code 1910, § 4175; Code 1933, § 85-413.)

JUDICIAL DECISIONS

For history of section and changes made in the common-law rule, see Bullock & Co. v. Dunbar, 114 Ga. 754, 40 S.E. 783 (1902). See also Ross v. Central R.R. & Banking Co., 53 Ga. 371 (1874); Buchan v. Williamson, 131 Ga. 501, 62 S.E. 815 (1908); Overby v. Scarborough, 145 Ga. 875, 90 S.E. 67 (1916) (see O.C.G.A. § 44-5-173).

Provisions of this statute do not apply to trust estates. Ayer v. Chapman, 146 Ga. 608, 91 S.E. 548 (1917) (see O.C.G.A. § 44-5-173).

Prescriptive title would not fail merely because possession of prescriber commenced after trustee's death. Jones v. Rountree, 138 Ga. 757, 76 S.E. 55 (1912). See also Cushman v. Coleman, 92 Ga. 772, 19 S.E. 46 (1894).

Homestead rights insufficient to prevent ripening of prescriptive title prior to administratrix's appointment. — Whatever rights may have existed under an alleged homestead are not sufficient to prevent title by prescription from ripening in the claimant by prescription prior to the appointment of an administratrix of the estate of the claimant under the alleged homestead. Slade v. Barber, 200 Ga. 405, 37 S.E.2d 143 (1946).

Proof of date of intestate's death not required. — When there is proof of an interval of more than five years from an intestate's death, it is not required that the date of the intestate's death be proved. Brown v. Caraker, 147 Ga. 498, 94 S.E. 759 (1917).

Prescription not suspended for any length of time due to estate's unrepresentation. — Prescription will not run against an unrepresented estate, provided the lapse of time does not exceed five years, but when an unrepresented estate continues without representation for more than five years, prescription will not be suspended for any length of time on account of the estate being unrepresented. Miles v. Blanton, 211 Ga. 754, 88 S.E.2d 273 (1955).

When more than five years elapse after the death of an intestate before administration upon the intestate's estate, prescription will not be suspended for any length of time on account of the estate being unrepresented. Dozier v. Parker, 219 Ga. 725, 135 S.E.2d 857 (1964).

No deduction from adverse possessor's term after five years. — If the estate remains unrepresented for more than five years, no deduction at all from the adverse possessor's term will be allowed in favor of the personal representative. Powell's Actions for Land, 448. Danielly v. Lowe, 161 Ga. 279, 130 S.E. 687 (1925).

When intestate's spouse in possession at expiration of statutory period. — When, after the death of an intestate, the intestate's husband acquired possession of livestock belonging to the estate, and also acquired possession of the increase thereof, and from time to time sold some of the property and kept the proceeds for himself, and where the estate remained unrepresented for more than 13 years until the appointment of a temporary administrator, and where within the period of nine years from the death of the intestate no claim of title adverse to that of the husband was asserted to any of the property by anyone representing the heirs or creditors of the intestate, the husband, at the expiration of the nine years, had acquired title to the property by prescription, and no title to the property or right of possession thereof was vested in the temporary administrator of the estate afterwards appointed. Ulmer v. Ulmer, 53 Ga. App. 417, 186 S.E. 433 (1936).

Concealment of right by one with duty to disclose prevents running of statute of limitations in favor of the party in default. It is a legal fraud. Hoyle v. Jones, 35 Ga. 40, 89 Am. Dec. 273 (1866). See also Southwestern R.R. v. Atlantic & G.R.R., 53 Ga. 401 (1874).

When suit, proper for involuntary dismissal, reversed within six months of verdict, second suit saved. — When a suit which was not in fact nonsuited (now involuntarily dismissed), but which might properly have

been is reversed in equity within six months of the verdict, the second suit will be held within the rule of this statute and saved from the statute of limitations. Jordan v. Faircloth, 27 Ga. 372 (1859) (see O.C.G.A. § 44-5-173).

For an illustration of a nonsuit (now involuntary dismissal), see McLaren v. Irvin, 63 Ga. 275 (1879).

Cited in Ewing v. Tanner, 184 Ga. 773, 193 S.E. 243 (1937); Harris v. Mandeville, 195 Ga. 251, 24 S.E.2d 23 (1943); Blanton v. Moody, 265 F.2d 533 (5th Cir. 1959); Georgia Power Co. v. Gibson, 226 Ga. 165, 173 S.E.2d 217 (1970).

RESEARCH REFERENCES

Am. Jur. 2d. — 3 Am. Jur. 2d, Adverse Possession, §§ 96, 109, 110, 149, 171, 201 et seq. 27A Am. Jur. 2d, Equity, § 124 et seq. 51 Am. Jur. 2d, Limitations of Actions, § 222.

C.J.S. — 2 C.J.S., Adverse Possession, §§ 201, 283, 293.

44-5-174. Tacking of prior possession originating in fraud.

In making out a prescriptive title, an innocent purchaser may not tack to the time period of his own possession the time of possession of a grantor whose possession originated through fraud against the true owner. (Civil Code 1895, § 3596; Civil Code 1910, § 4176; Code 1933, § 85-415.)

History of Code section. — This Code section is derived from the decision in Farrow v. Bullock, 63 Ga. 360 (1879).

JUDICIAL DECISIONS

Innocent purchaser cannot tack on possession of grantor whose possession originated in fraud. — An inchoate prescriptive title may be transferred by a possessor to a successor, so that the successive possessions may be tacked to make out the prescription, except that the innocent purchaser may not tack to one's own the possession of a grantor whose possession originated in fraud of the true owner. Fraser v. Dolvin, 199 Ga. 638, 34 S.E.2d 875 (1945).

Evidence sufficient to show ripening of prescriptive title. — When the evidence conclusively showed that the defendant and the defendant's predecessors in title acquired color of title to the property in dispute and bona fide entered into possession under their respective paper titles under a claim of right, and that the adverse possession of the defendant, together with that of the defendant's predecessors in title, was for about 13 years (more than seven years), the prescriptive title of the defendant thereby ripened, extinguished all inconsistent titles, and became the true title to the property. Fraser v. Dolvin, 199 Ga. 638, 34 S.E.2d 875 (1945).

Cited in Ellis v. Dasher, 101 Ga. 5, 29 S.E. 268 (1897); Bedingfield v. Moye, 143 Ga. 563, 85 S.E. 856 (1915).

RESEARCH REFERENCES

Am. Jur. 2d. — 3 Am. Jur. 2d, Adverse Possession, § 76 et seq.

C.J.S. — 2 C.J.S., Adverse Possession, §§ 163, 207, 208.

ALR. — Adverse possession: right of remainderman or reversioner to tack his possession to that of life tenant, 150 ALR 557.

Tacking as applied to prescriptive easements, 72 ALR3d 648.

44-5-175. Prescription involving incorporeal rights.

An incorporeal right which may be lawfully granted, such as a right of way or the right to throw water upon the land of another, may be acquired by prescription. (Civil Code 1895, § 3590; Civil Code 1910, § 4170; Code 1933, § 85-409.)

History of Code section. — This Code section is derived from the decisions in Phinizy v. City Council, 47 Ga. 260 (1872), and Mitchell v. Mayor of Rome, 49 Ga. 260 (1872).

Law reviews. — For article, ''Some Aspects of the Law of Easements,'' see 9 Ga. St. B.J. 287 (1973).

JUDICIAL DECISIONS

Analysis

General Consideration
Rules
Particular Rights
Illustrative Cases

General Consideration

Cited in Waters v. Baker, 190 Ga. 186, 8 S.E.2d 637 (1940); Warlick v. Rome Loan & Fin. Co., 194 Ga. 419, 22 S.E.2d 61 (1942); Georgia R.R. & Banking Co. v. Flynt, 93 Ga. App. 514, 92 S.E.2d 330 (1956); Forsyth Corp. v. Rich's, Inc., 215 Ga. 333, 110 S.E.2d 750 (1959); City of Atlanta v. Williams, 218 Ga. 379, 128 S.E.2d 41 (1962); Chancey v. Georgia Power Co., 238 Ga. 397, 233 S.E.2d 365 (1977).

Rules

Prescriptive title to easement is governed by the same rules as prescriptive title to land. Georgia Power Co. v. Gibson, 226 Ga. 165, 173 S.E.2d 217 (1970).

Right to prescription is measured by the actual use, and not by a capacity for more extended use, and the right does not begin to run until an actionable injury has been inflicted. Goble v. Louisville & N.R.R., 187 Ga. 243, 200 S.E. 259 (1938).

Easement acquired by prescription in seven or 20 years. — An easement may be acquired by prescription in 20 years, unless there is some color of title, in which case only seven years is required. Smith v. Clay, 239 Ga. 220, 236 S.E.2d 346 (1977).

Prescriptive period relates to the time of the use of the easement without regard to the actual entry by the prescriber on the adjacent tract over which the easement is asserted. Hogan v. Cowart, 182 Ga. 145, 184 S.E. 884 (1936).

Particular Rights

Prescriptive right to maintain signs fails to arise if no use for 20 years. — Prescriptive right to maintain signs on the building of an owner does not arise if the use and enjoyment of the privilege has not existed for a period of 20 years, in the absence of color of title. Smith v. Jensen, 156 Ga. 814, 120 S.E. 417 (1923).

Possession of road by public for 20 years ripens into title. — Possession, use, and upkeep of a road by the public as a highway for 20 years ripens into a prescriptive title. Hyde v. Chappell, 194 Ga. 536, 22 S.E.2d 313 (1942).

Public authorities must have accepted road. — In order for a road to be declared a public one by prescription, the public authorities must have accepted the road or exercised dominion over the road. Maintenance or repair can constitute such acceptance. Jordan v. Way, 235 Ga. 496, 220 S.E.2d 258 (1975).

When alley used by public for statutory period prior to obstruction, obstruction must be removed. — When the evidence was uncontradicted that an alley had been used

Particular Rights (Cont'd)

by the public in general for more than 20 years prior to its obstruction for 30 years prior to trial, a finding was demanded that the public had acquired a prescriptive right to the free and unobstructed use of the alley and that it was a public alley, and since prescription does not run against a municipality as to land held for the benefit of the public, such as a public alley, the obstruction must be removed. Henderson v. Ezzard, 75 Ga. App. 724, 44 S.E.2d 397 (1947).

Right to use water may be acquired by prescription. — Special right to a use of a watercourse, or to flow water upon the land of another, may in all cases be acquired by prescription. Anneberg v. Kurtz, 197 Ga. 188, 28 S.E.2d 769 (1944).

As to the backflow of water, see Columbus Power Co. v. City Mills Co., 114 Ga. 558, 40 S.E. 800 (1902).

As to the use of a watercourse for floating timber, see Seaboard Air-Line Ry. v. Sikes, 4 Ga. App. 7, 60 S.E. 868 (1908).

Right to maintain a private nuisance may be acquired by prescription. This is especially true if the nuisance is in the nature of an easement. Anneberg v. Kurtz, 197 Ga. 188, 28 S.E.2d 769 (1944).

As to burial rights, see Roumillot v. Gardner, 113 Ga. 60, 38 S.E. 362, 53 L.R.A. 729 (1901).

Illustrative Cases

Right to use open agricultural ditch through lands of adjoining proprietor may be prescriptively acquired. — Owner of land may acquire by prescription an easement over the lands of another, the prescriptive period of adverse use being 20 years or longer, unless under color of title, and this may apply to the right of a proprietor to use an open agricultural ditch extending from the proprietor's lands through the lands of an adjoining proprietor and there connecting with a river, for the purpose of drainage, whether or not the prescriber ever actually entered or occupied the adjacent land. Hogan v. Cowart, 182 Ga. 145, 184 S.E. 884 (1936).

Once general area for telephone line use outlined, stringing additional lines within easement permissible. — When poles and wires were used in the operation of a telephone line or lines over the lands of another, they should be considered as having marked or outlined a general area in use according to the usual and ordinary manner, and if the outer limits of this space remained the same for the prescriptive period of 20 years, the resulting easement would apply at least to the general area, so that the stringing of additional wires anywhere therein consistently with customary location would be permissible as territorially within the easement, whether or not the identical space to be physically occupied by such wires had ever before been so occupied by other wires. Kerlin v. Southern Bell Tel. & Tel. Co., 191 Ga. 663, 13 S.E.2d 790 (1941).

Evidence demanded finding wall was subject to easement for support of adjacent building. — In an action by the owners of a lot against the corporate owner of an adjoining lot and a contractor to prevent the corporation from encroachment by inserting girders of its new building into the wall on the plaintiffs' lot, and to eject the corporation from the occupation of any part of the wall, the evidence demanded a finding that the wall in question was subject to an easement in favor of the corporation, giving the latter a right of a user in the wall for the support of its building, and that the use being exercised imposed on the wall no greater burden than that which had previously existed through the use by the corporation's predecessor in title, the former use having been under and by virtue of a valid claim of right, and having been acquiesced in by the plaintiffs and their predecessors for a length of time in excess of the prescriptive period. Joel v. Publix-Lucas Theater, Inc., 193 Ga. 531, 19 S.E.2d 730 (1942).

Right to empty refuse into stream acquired by 20-year prescriptive use. — When a person in the operation of a canning plant has from June 1st to November 1st of each year, for more than 20 years emptied the refuse from the plant into a nonnavigable stream, the person has thereby acquired a prescriptive right so to do. Anneberg v. Kurtz, 197 Ga. 188, 28 S.E.2d 769 (1944).

Easement to flood lands not acquired by merely maintaining trestle over flowing stream. — Railroad company which has for 25 years maintained a trestle, under which a stream flows, and abutments does not thereby acquire a prescriptive easement to

flood lands, unless such flooding has been continuous and uninterrupted for a period sufficient to ripen into prescription. Goble v. Louisville & N.R.R., 187 Ga. 243, 200 S.E. 259 (1938).

Beaver dams. — Landowner enjoys no prescriptive right to the continued existence of beaver dams in a creek which form a border of the landowner's property, because the dams are not erected through human agency. Dawson v. Wade, 257 Ga. 552, 361 S.E.2d 181 (1987).

RESEARCH REFERENCES

Am. Jur. 2d. — 3 Am. Jur. 2d, Adverse Possession, §§ 121, 122, 308. 25 Am. Jur. 2d, Easements and Licenses, §§ 33 et seq., 73, 96, 101 et seq., 106.

C.J.S. — 2 C.J.S., Adverse Possession, § 62. 28A C.J.S., Easements, § 4 et seq.

ALR. — Implied easement upon severance of tract where building is near or encroaches upon the dividing line, 41 ALR 1210; 53 ALR 910.

Easement by prescription for use of land near boundary line, 58 ALR 1037.

Use by public as affecting acquisition by individual of right of way by prescription, 111 ALR 221.

Nature and extent of interest acquired by railroad in right of way by adverse possession or prescription, 127 ALR 517.

Acquisition of right of way by prescription as affected by change of location or deviation during prescriptive period, 143 ALR 1402; 80 ALR2d 1095.

Acquisition of easement or other property right by prescription, predicated upon acts amounting to a private nuisance, 152 ALR 343.

Easement by prescription: presumption and burden of proof as to adverse character of use, 170 ALR 776.

Extinguishment of easement by implication or prescription, by sale of servient estate to purchaser without notice, 174 ALR 1241.

Rights derived from use by adjoining owners for driveway, or other common purpose, of strip of land lying over and along their boundary, 27 ALR2d 332.

Necessary parties defendant to suit to prevent or remove obstruction or interference with easement of way, 28 ALR2d 409.

Acquisition by user of prescription of right of way over unenclosed land, 46 ALR2d 1140.

Right to maintain gate or fence across right of way, 52 ALR3d 9.

Tacking as applied to prescriptive easements, 72 ALR3d 648.

Extinguishment by prescription of natural servitude for drainage of surface waters, 42 ALR4th 462.

Scope of prescriptive easement for access (easement of way), 79 ALR4th 604.

44-5-176. Effect on prescription of notice of instrument creating a lien.

Prescription shall not run against the owner or holder of a mortgage, a deed to secure debt, a bill of sale to secure debt, or any other instrument creating a lien on or conveying an interest in real or personal property as security for debt in favor of a person who has actual or constructive notice of such instrument. (Ga. L. 1937, p. 755, § 1.)

JUDICIAL DECISIONS

Statute cannot be given retroactive effect. Fraser v. Dolvin, 199 Ga. 638, 34 S.E.2d 875 (1945) (see O.C.G.A. § 44-5-176).

Legislative intent. — There is nothing in this statute indicating an intention by the legislature to deprive a party in possession of any right the party had already acquired, or that the possession which had been running and ripening into title before the date this statute became effective, should be lost. Fraser v. Dolvin, 199 Ga. 638, 34 S.E.2d 875 (1945) (see O.C.G.A. § 44-5-176).

Cited in Sweat v. Arline, 186 Ga. 460, 197 S.E. 893 (1938); Lankford v. Holton, 187 Ga. 94, 200 S.E. 243 (1938); Thomas v. Stedham, 208 Ga. 603, 68 S.E.2d 560 (1952); Reid v.

Wilkerson, 222 Ga. 282, 149 S.E.2d 700 (1966).

RESEARCH REFERENCES

Am. Jur. 2d. — 3 Am. Jur. 2d, Adverse Possession, §§ 12, 13, 15, 112 et seq., 169, 224 et seq. 264, 301.

C.J.S. — 2 C.J.S., Adverse Possession, § 208. 59 C.J.S., Mortgages, §§ 255, 695.

ALR. — Adverse possession by stranger as against mortgagee, 136 ALR 782.

Adverse possession: mortgagee's possession before foreclosure as barring right of redemption, 7 ALR2d 1131.

44-5-177. Adverse possession of personal property.

Possession of personal property in conformance with the requirements of Code Section 44-5-161 for a period of four years confers title to the property by prescription. No prescription arises if the property is concealed, is removed from the state, or is otherwise not subject to reclamation. (Laws 1847, Cobb's 1851 Digest, p. 569; Ga. L. 1855-56, p. 233, §§ 2, 4; Code 1863, § 2644; Code 1868, § 2643; Code 1873, § 2685; Code 1882, § 2685; Civil Code 1895, § 3592; Civil Code 1910, § 4172; Code 1933, § 85-1706.)

JUDICIAL DECISIONS

Purpose. — Statute is designed to protect a possession held under a title acquired in good faith, and not one taken in disregard of the rights of another person, of whose title the claimant had been informed, and about which, with proper inquiry, one might have had full knowledge. Hunt v. Dunn, 74 Ga. 120 (1884); Hicks v. Moyer, 10 Ga. App. 488, 73 S.E. 754 (1912); Taylor v. Wilkins, 22 Ga. App. 723, 97 S.E. 101 (1918) (see O.C.G.A. § 44-5-177).

Statute embodies the statute of limitations as to trover. Blocker v. Boswell, 109 Ga. 230, 34 S.E. 289 (1889) (see O.C.G.A. § 44-5-177).

Prescription vests absolute title. — As in case of adverse possession of realty, adverse possession of chattels for the statutory period operates not merely to bar the remedy but vests absolute title in the possessor, which is equally available for attack or defense. Woodcliff Gin Co. v. Kittles, 173 Ga. 661, 161 S.E. 119 (1931).

Nature of required possession same as for realty. — Nature of the possession of personal property and that of realty, required to give title by prescription is the same. Ewing v. Tanner, 184 Ga. 773, 193 S.E. 243 (1937).

Rules for determining whether title to personalty has ripened by prescription are the same as those applying to real estate. 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).

Successive periods of possession may be united or tacked to each other to make up the time of adverse holding prescribed by the statute. Woodcliff Gin Co. v. Kittles, 173 Ga. 661, 161 S.E. 119 (1931).

Property must be adversely held under claim of title. — Title by prescription does not arise unless the property is held adversely under a claim of title as when the property is held by a bailee for the true owner. Rawson v. Tift, 53 Ga. App. 248, 185 S.E. 397 (1936).

In order for the possession of a chattel to ripen into a prescriptive title, under the provisions of this statute, the possession must be adverse to the true owner. Culbreath v. Patton, 73 Ga. App. 667, 37 S.E.2d 719 (1946) (see O.C.G.A. § 44-5-177).

Since there is a fiduciary relation between a corporation and the corporation's stockholders giving rise to the duty on its part to protect the stockholder against fraudulent transfers based upon forged or unauthorized endorsements or stock powers, there can be no adverse possession of the stock by

the corporation which can become the foundation of a prescriptive title unless the facts clearly and unmistakably demonstrate that the character of its possession is in truth and in fact adverse. 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).

Statute will not run until possession adverse. — If one claiming prescriptive title entered into permissive possession of a chattel, acknowledging that title thereto was in the original owner, before the owner could convert such permissive possession into an adverse possession, the owner would have to show knowledge on the part of the original owner that the owner claimed the property as the owner's own before the statute would commence to run in the owner's favor. Culbreath v. Patton, 73 Ga. App. 667, 37 S.E.2d 719 (1946).

Statute of limitations does not run in favor of a bailee until the bailee sets up an adverse claim in respect of the bailment. Culbreath v. Patton, 73 Ga. App. 667, 37 S.E.2d 719 (1946).

Statute does not begin to run until the possession of the trustee becomes adverse, tortious and wrongful, by the disloyal acts of the trustee, which must be open, continued and notorious, so as to preclude all doubt as to the character of the holding of the property, or the want of knowledge on the part of the cestui que trust. 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).

Possession without claim of title will not ripen into title. — Possession of a chattel for more than four years without a claim of title thereto adverse to that of the owner will not ripen into a prescriptive title. Culbreath v. Patton, 73 Ga. App. 667, 37 S.E.2d 719 (1946).

Possession must be for four years. — Adverse possession of personal property for less than four years does not give title thereto by prescription. Culbreath v. Patton, 73 Ga. App. 667, 37 S.E.2d 719 (1946).

Payment of taxes on personal property by one in possession is not evidence in itself of a claim of title thereto adverse that of the owner, but is a circumstance to be considered by the court along with the other evidence in the case. Culbreath v. Patton, 73 Ga. App. 667, 37 S.E.2d 719 (1946).

Abandonment of wife, without more, is insufficient to put the wife on notice that the husband was holding her property adversely. Allen v. Allen, 196 Ga. 736, 27 S.E.2d 679 (1943).

Title acquired by prescription. — See Ulmer v. Ulmer, 53 Ga. App. 417, 186 S.E. 433 (1936).

Cited in Southwestern R.R. v. Atlantic & G.R.R., 53 Ga. 401 (1874); Slay v. George, 145 Ga. 771, 89 S.E. 830 (1916); Rogers v. Citizens Bank, 92 Ga. App. 399, 88 S.E.2d 548 (1955).

RESEARCH REFERENCES

Am. Jur. 2d. — 3 Am. Jur. 2d, Adverse Possession, § 8.

C.J.S. — 73 C.J.S., Property, § 37.

ALR. — Larceny by finder of property, 36 ALR 372.

ARTICLE 8

ESCHEAT

44-5-190 through 44-5-199.

Reserved. Repealed by Ga. L. 1996, p. 504, § 9, effective January 1, 1998.

Editor's notes. — Ga. L. 1996, p. 504, § 9, effective January 1, 1998, repealed the Code sections formerly codified at this article, which consisted of §§ 44-5-190 through 44-5-199 and was based on Ga. L. 1984, p. 1124, § 1; Ga. L. 1985, p. 149, § 44. For new provisions concerning escheat, see Title 53, Chapter 2, Article 5.

Ga. L. 1984, p. 1124, § 1, effective March 29, 1984, repealed the Code sections formerly codified at this article, which consisted of §§ 44-5-190 through 44-5-195 and was

based on Laws 1801, Cobbs 1851 Digest, pp 251, 254; Laws 1805, Cobbs 1851 Digest, p 252; Laws 1817, Cobbs 1851 Digest, p 254; Laws 1836, Cobbs 1851 Digest, p 255; Orig. Code 1863, §§ 2627, 2630-2633; Code 1868, §§ 2627, 2630-2633; Code 1873, §§ 2669, 2671-2674; Code 1882, §§ 2669, 2671-2674; Civil Code 1895, §§ 3575, 3577-3580; Civil Code 1910, §§ 4155, 4157-4160; Ga. L. 1917, p 101, § 2; Code 1933, §§ 85-1101, 85-1103 — 85-1108.

ARTICLE 9

FORFEITURE

Cross references. — Forfeiture based on convictions, Ga. Const. 1983, Art. I, Sec. I, Para. XX. Construction against forfeiture in equity, § 23-1-23. Forfeiture of estates granted on condition, § 44-6-41. Forfeiture of life estates generally, § 44-6-83. Forfeiture of life estates in personalty, § 44-6-89. Forfeiture of estates for years, § 44-6-103. Forfeiture of easements, § 44-9-6.

44-5-210. Lien of state for costs of prosecution.

The state shall hold a lien upon all the property of a convicted offender for the costs of the prosecution against him. (Orig. Code 1863, § 2634; Code 1868, § 2634; Code 1873, § 2675; Code 1882, § 2675; Civil Code 1895, § 3581; Civil Code 1910, § 4161; Code 1933, § 85-1109.)

Cross references. — Prohibition against forfeiture of estate, Ga. Const. 1983, Art. I, Sec. I, Para. XX. Further provisions regarding lien for costs of prosecution, § 17-11-1.

Law reviews. — For article on whether one's property is forfeited after a conviction based on a nolo contendere plea, see 13 Ga. L. Rev. 723 (1979).

JUDICIAL DECISIONS

Inheritance provisions not changed by heir killing person inherited from. — Under the laws of Georgia, the fact that an heir kills the person from whom one expects to inherit will not change the application of the statutes of descent. The policy of this state is shown in this statute. Hagan v. Cone, 21 Ga. App. 416, 94 S.E. 602 (1917) (see O.C.G.A. § 44-5-210).

Where a wife dies without issue, her husband is her sole heir, and his right of inheritance is not forfeited by reason of having murdered his wife. Crumley v. Hall, 202 Ga. 588, 43 S.E.2d 646 (1947).

Section not violated by municipal ordinance requiring liquor seller to give bond. — Municipal ordinance, requiring one who engages in the sale of ''near beer'' in the municipality to give a good and solvent bond, conditioned that one will keep an orderly house and will not violate the state liquor laws or disobey the ordinances of the city regulating the liquor business, and the bond taken in pursuance thereof are not in violation of this statute, nor do they violate the Constitution. City of Albany v. Cassel, 11 Ga. App. 745, 76 S.E. 105 (1912) (see O.C.G.A. § 44-5-210).

Confiscation of bribe money for payment of fine not a forfeiture. — When the trial court, in a bribery case, ordered the confiscation of bribe money and ruled that the money might be used toward the payment of the fine assessed in the case, and when the money did not exceed the maximum fine under former Code 1933, § 26-2301 (see O.C.G.A. § 16-10-2), the confiscation was not tantamount to a forfeiture. Hall v. State, 155 Ga. App. 724, 272 S.E.2d 578 (1980).

Cited in Tennesco, Inc. v. Berger, 144 Ga. App. 45, 240 S.E.2d 586 (1977).

RESEARCH REFERENCES

Am. Jur. 2d. — 27A Am. Jur. 2d, Escheat, § 10. 36 Am. Jur. 2d, Forfeitures and Penalties, § 14.

C.J.S. — 18 C.J.S., Convicts, §§ 3, 7. 37 C.J.S., Forfeitures, § 2 et seq.

ALR. — Forfeiture of property unauthorizedly used by servant in violating law, 5 ALR 213.

Items of cost of prosecution for which defendant may be held, 65 ALR2d 854.

44-5-211. Forfeiture of abandoned cemetery lots; proceedings for reclamation and subsequent sale; disposition of proceeds.

(a) As used in this Code section, the term ''lot'' means any lot or portion of a lot in a cemetery owned by a county, municipality, or consolidated government which has not been used for the interment of human remains and for which no provision for perpetual care was made at the time the lot was sold or at any time subsequent to the time the lot was sold.

(b) The owner, the governing board, or other officials having control over a cemetery may maintain, in the superior court in the county in which the cemetery is located, a proceeding for the termination and forfeiture of the rights and interests of an owner of any lot or lots in the cemetery whenever the present owner of the lot is unknown to the owner, the governing board, or other officials and a period of at least 75 years has passed since any portion of the lot has been used for interment purposes.

(c)(1) The proceeding shall be commenced by the filing of a verified petition with the clerk of the superior court.

(2) The petition shall:

(A) Identify the lot or lots;

(B) State that the portion of the lot to be reclaimed has not been used for the interment of human remains and that a core or sound test has been conducted to determine that the portion contains no remains;

(C) State that the present owner of the lot is unknown to the owner, governing board, or other officials;

(D) State that a period of at least 75 years has passed since any portion of the lot was used for interment purposes; and

(E) Request that the court issue an order declaring the lot abandoned and further declaring all of the rights and interests of the owner therein terminated and forfeited.

(3) The petition shall be accompanied by an affidavit by the owner, the governing board, or other officials stating that a diligent search to locate the present owner of the lot has been made but that such owner has not been located.

(d) Upon the filing of the petition and affidavit, the clerk of the superior court shall fix a time for a hearing on the petition, which time shall be not less than 30 days nor more than 90 days after the date of the filing.

(e)(1) Notice of the hearing shall be given by the owner, the governing board, or other officials by posting copies of the notice in three conspicuous places in the cemetery which is owned or operated by the owner, the governing board, or other officials and by mailing a copy of the notice by registered or certified mail or statutory overnight delivery to the last known owner of the lot; and a notice of the hearing shall be published once each week for three successive weeks in some newspaper of general circulation in the county, the first publication being made not less than 30 days before the date of the hearing.

(2) The notice shall identify the lot and shall state:

(A) The name and address of the last known owner of the lot;

(B) That a hearing will be held to determine whether or not the present owner of the lot shall have his rights and interests therein terminated and forfeited by a declaration of abandonment of the lot; and

(C) The time and place of the hearing.

(f) If, upon the hearing, the court determines from the evidence presented that the present owner of the lot is unknown, that the owner, the governing board, or other officials have made a diligent search to locate the present owner, that a period of 75 years or more has passed since any portion of the lot has been used for human interment, and that a core or sound test has been conducted to determine that the lot contains no remains, a decree shall be entered adjudicating such lot, lots, or parts thereof to have been abandoned and further ordering the subsequent termination and forfeiture of all rights and interests of the owner therein.

(g) The court shall dismiss the proceeding if it determines any of the following from the evidence which is presented:

(1) That any of the material facts stated in the petition are not true;

(2) That the identity of the present owner of the lot is known; or

(3) That the owner, the governing board, or other officials have not made a diligent search to locate the present owner.

(h)(1) Upon order of the court declaring the lot to be abandoned, the full title to such lot shall revert to the cemetery.

(2) The order of the court shall not become final until one year after the date on which it is entered. During that time, any person may petition the court to reopen the proceeding; and the court, after notice to the board or other officials, may reopen the proceeding, may hear and

consider any additional evidence regarding the ownership of the lot, and may modify or amend the order which it made, provided that, if the court makes any of the determinations mentioned by subsection (g) of this Code section, it shall dismiss the proceeding.

(i)(1) Within 30 days after the date on which the court order is entered, the cemetery owner, the governing board, or other officials shall publish notice of the order once in a newspaper of general circulation in the county in which the cemetery is located and shall mail a copy of the order by registered or certified mail or statutory overnight delivery to the last known owner of the lot or to the last known owner of the right of interment in the lot.

(2) The notice which is mailed and published shall identify the lot which is covered by the order and shall state:

(A) The name and address of the last known owner of the lot;

(B) That the court has ordered that the lot is to be declared abandoned and that the court has further ordered that the rights and interests of the owner therein are to be subsequently terminated and forfeited; and

(C) The date upon which the order of the court will become final.

(j) The lot shall be deemed abandoned and the rights and interests of the present owner therein shall be terminated and forfeited as of the date upon which the order of the court becomes final. Thereafter, the cemetery shall be the owner of the lot and may resell or otherwise recover it.

(k) The proceeds derived from any sale of a lot, ownership of which is obtained as provided in this Code section, shall be used as follows:

(1) First, to reimburse the petitioner for the costs of the action and necessary expenses, including attorney's fees, incurred by the petitioner in the proceeding; and

(2) Then, of the remainder of the proceeds:

(A) Not less than 75 percent shall be held in trust and shall be used only for the expenses of administration, maintenance, restoration, preservation, and other improvements of the cemetery; and

(B) Any amounts remaining thereafter shall be used for immediate improvements and maintenance of the cemetery.

(l) In no event shall any existing monument, retaining wall, fence, bench, or other ornamentation be altered or removed by the petitioner, by his agent or employee, or by any subsequent owner of a lot reclaimed and sold as provided in this Code section. (Code 1933, § 85-420, enacted by Ga. L. 1977, p. 1249, § 1; Ga. L. 2000, p. 1589, § 3.)

Editor's notes. — Ga. L. 2000, p. 1589, s. 16, not codified by the General Assembly, provides that the amendment to this Code section shall apply with respect to notices delivered on or after July 1, 2000.

RESEARCH REFERENCES

Am. Jur. 2d. — 3 Am. Jur. 2d, Adverse Possession, §§ 160, 266. 14 Am. Jur. 2d., Cemeteries, § 19 et seq.

C.J.S. — 1 C.J.S., Abandonment, § 12 et seq. 2 C.J.S., Adverse Possession, §§ 10, 46. 14 C.J.S., Cemeteries, §§ 23, 24. 30A C.J.S., Equity, §§ 122, 126, 127.

ALR. — Validity and reasonableness of rules and regulations of cemetery company or association as to improvement or care of lot; 32 ALR 1406; 47 ALR 70.

Injunction against removal of, or interference with, remains interred in burial lot, 33 ALR 1432.

Adverse possession or prescription in respect of burial lot, 107 ALR 1294.

Acquisition of title to ground through adverse possession by cemetery or graveyard authorities, 41 ALR2d 925.

Measure of damages for condemnation of cemetery land, 42 ALR3d 1314.

ARTICLE 10

DEDICATION

44-5-230. Dedication of lands to public use.

After an owner dedicates land to public use either expressly or by his actions and the land is used by the public for such a length of time that accommodation of the public or private rights may be materially affected by interruption of the right to use such land, the owner may not afterwards appropriate the land to private purposes. (Orig. Code 1863, § 2643; Code 1868, § 2642; Code 1873, § 2684; Code 1882, § 2684; Civil Code 1895, § 3591; Civil Code 1910, § 4171; Code 1933, § 85-410.)

Law reviews. — For a note discussing the historical aspects and current law concerning the state's ownership rights in tidelands, see 17 Ga. L. Rev. 851 (1983).

JUDICIAL DECISIONS

Analysis

General Consideration
Requirements for Dedication
1. In General
2. Dedication by Owner
3. Acceptance
Implied Dedication
Express Dedication
Reversion to Owner

General Consideration

Dedication is the setting apart of land for the public use. Hutchinson v. Clark, 169 Ga. 511, 150 S.E. 905 (1929); Lowry v. Rosenfeld, 213 Ga. 60, 96 S.E.2d 581, later appeal, 213 Ga. 578, 100 S.E.2d 447 (1957).

By dedication one may give a right to the public to use one's land. Jergens v. Stanley, 247 Ga. 543, 277 S.E.2d 651 (1981).

Dedication must be to public. — Dedica-

tion, strictly speaking, must be made to the public generally. Western Union Tel. Co. v. Georgia R.R. & Banking Co., 227 F. 276 (S.D. Ga. 1915).

Establishment of public road. — A public road may be established in two ways: (1) by the public authorities; and (2) by immemorial usage, or dedication. In the latter case two things must be proven: (1) the dedication, and (2) the acceptance of it by the public. Chatham Motorcycle Club, Inc. v. Blount, 214 Ga. 770, 107 S.E.2d 806 (1959).

Prescriptive title to highway possible. — Possession, use, and upkeep of a road by the public as a highway for 20 years ripens into prescriptive title. Hyde v. Chappell, 194 Ga. 536, 22 S.E.2d 313 (1942).

If there is no intention to dedicate, but the public has taken possession of the property of an individual and used and maintained the property as a highway for a period of 20 years or more, a highway by prescription becomes complete. When there is an intention to dedicate, the maintenance of a way for less time will bring into existence a completed highway by dedication. Atlantic Coast Line Ry. v. Sweatman, 81 Ga. App. 269, 58 S.E.2d 553 (1950), later appeal, 88 Ga. App. 674, 77 S.E.2d 565 (1953).

Property devoted to public uses of sidewalks and public parking. — Trial court erred in finding that the area in which a lessee displayed merchandise came under the purview of City of Forest Park, Ga., Ordinance § 9-8-45 since it had been expressly dedicated to the public under O.C.G.A. § 44-5-230 because no deed or other public record was introduced that made an express dedication, and there was no evidence that the owner of the property on which the lessee's business sat specifically intended to make an express dedication of the property by installing parking areas and pathways; nonetheless, it was not necessary that there be an express dedication of property for that property to be brought into the ambit of § 9-8-45 because the trial court's order granting the city summary judgment also stated that a portion of the property had been devoted to the public uses of sidewalks and public parking, and it was clear from the evidence that such areas were created with the intention of pedestrian travel and vehicular parking. Braley v. City of Forest Park, 286 Ga. 760, 692 S.E.2d 595 (2010).

Nature of title obtained. — Upon acceptance of dedication, the public stands in the position of a purchaser for value. Chapman v. Floyd, 68 Ga. 455 (1882).

Dedication may be estate in, or easement across, property. — Dedication of property can consist of the dedication of either an estate in, or an easement across, the dedicated property, and a dedication of only an easement across the property does not deprive the holder of legal title of one's estate in the property. Rather, the holder retains one's estate for every purpose of user and profit not inconsistent with the easement. Wiggins v. Southern Bell Tel. & Tel. Co., 245 Ga. 526, 266 S.E.2d 148 (1980).

Dedication is jury question. — Dedication is a conclusion of fact to be drawn by the jury from the circumstances of each particular case. The whole question, as against the owner of the property, is whether there is sufficient evidence of an intention on this part to dedicate the land to the public use as a highway. Atlantic Coast Line Ry. v. Sweatman, 81 Ga. App. 269, 58 S.E.2d 553 (1950), later appeal, 88 Ga. App. 674, 77 S.E.2d 565 (1953).

Finding of dedication precludes taking of private property without just compensation. — Determination by Supreme Court that there had been a dedication of private property to public use precludes there having been a taking of private property for public use without just and adequate compensation. Jergens v. Stanley, 247 Ga. 543, 277 S.E.2d 651 (1981).

Cited in East Atlanta Land Co. v. Mower, 138 Ga. 380, 75 S.E. 418 (1912); Gartrell v. McCravey, 144 Ga. 688, 87 S.E. 917 (1916); Smith v. Lemon, 166 Ga. 93, 142 S.E. 554 (1928); Rosser v. Styron, 171 Ga. 238, 155 S.E. 23 (1930); Morgan v. Shirley, 172 Ga. 727, 158 S.E. 581 (1931); Gordon v. Whittle, 206 Ga. 339, 57 S.E.2d 169 (1950); Norton v. City of Gainesville, 211 Ga. 387, 86 S.E.2d 234 (1955); City Council v. Newsome, 211 Ga. 899, 89 S.E.2d 485 (1955); East v. Mayor of Wrightsville, 217 Ga. 846, 126 S.E.2d 407 (1962); Pridgen v. Coffee County Bd. of Educ., 218 Ga. 326, 127 S.E.2d 808 (1962); Fountain v. Bryan, 229 Ga. 120, 189 S.E.2d 400 (1972); Jackson v. McIntosh County, 232 Ga. 712, 208 S.E.2d 813 (1974); Pair Dev. Co. v. City of Atlanta, 144 Ga. App. 239, 240 S.E.2d 897 (1977); Smith v. Bruce, 241 Ga.

General Consideration (Cont'd)

133, 244 S.E.2d 559 (1978); Hughes v. Cobb County, 264 Ga. 128, 441 S.E.2d 406 (1994); Givens v. Ichauway, Inc., 268 Ga. 710, 493 S.E.2d 148 (1997); Strozzo v. Coffee Bluff Marina Property, 250 Ga. App. 212, 550 S.E.2d 122 (2001).

Requirements for Dedication

1. In General

There is no particular form of making a dedication. — Dedication may be done in writing, or by parol; or the dedication may be inferred from the owner's acts, or implied, in certain cases, from long use. A grant is not necessary to create the dedication. Dunaway v. Windsor, 197 Ga. 705, 30 S.E.2d 627 (1944); Moon v. City of Conyers, 222 Ga. 526, 150 S.E.2d 873 (1966).

Owner's intention and public acceptance required. — Dedication to a public use is effected when one, being the owner of lands, consents, either expressly or by one's action, that it may be used by the public for a particular purpose. Mayor of Macon v. Franklin, 12 Ga. 239 (1852); Parsons v. Trustees of Atlanta Univ., 44 Ga. 529 (1871); Chapman v. Floyd, 68 Ga. 455 (1882); Southwestern R.R. v. Mitchell, 69 Ga. 114 (1882); City Council v. Burum & Co., 93 Ga. 68, 19 S.E. 820, 26 L.R.A. 340 (1893); Atlanta Ry. & Power Co. v. Atlanta Rapid Transit Co., 113 Ga. 481, 39 S.E. 12 (1901); Davis v. State, 9 Ga. App. 430, 71 S.E. 603 (1911); Smith v. State, 248 Ga. 154, 282 S.E.2d 76 (1981); Department of Transp. v. Ladson Invs., 158 Ga. App. 687, 282 S.E.2d 171 (1981); Smith v. Gwinnett County, 248 Ga. 882, 286 S.E.2d 739 (1982).

Dedication is not complete until two things appear: the owner's intention to dedicate the owner's property to the public use and the acceptance thereof by the public. Healey v. City of Atlanta, 125 Ga. 736, 54 S.E. 749 (1906); Johnson v. State, 1 Ga. App. 195, 58 S.E. 265 (1907); City of La Fayette v. Walker County, 151 Ga. 786, 108 S.E. 218 (1921); Atlantic Coast Line Ry. v. Sweatman, 81 Ga. App. 269, 58 S.E.2d 553 (1950), later appeal, 88 Ga. App. 674, 77 S.E.2d 565 (1953); Lowry v. Rosenfeld, 213 Ga. 60, 96 S.E.2d 581, later appeal, 213 Ga. 578, 100 S.E.2d 447 (1957); Chatham Motorcycle Club, Inc. v. Blount, 214 Ga. 770, 107 S.E.2d 806 (1959); Moon v. City of Conyers, 222 Ga. 526, 150 S.E.2d 873 (1966); Hasty v. Wilson, 223 Ga. 739, 158 S.E.2d 915 (1967); Waldrep v. Hall County, 227 Ga. 554, 181 S.E.2d 833 (1971); Lines v. State, 245 Ga. 390, 264 S.E.2d 891 (1980); Jackson v. Stone, 210 Ga. App. 465, 436 S.E.2d 673 (1993).

Essentials of dedication to public use are an offer, either express or implied, by the owner and an acceptance, either express or implied, of the use of the land by the public or public authorities. Carroll v. De Kalb County, 216 Ga. 663, 119 S.E.2d 258 (1961).

Two basic requirements of dedication of property to public use are: (1) an intention by the owner to dedicate the land to public use; and (2) an acceptance thereof by the public. Such intention to dedicate need not be expressed, and neither must the acceptance by the public be expressed. Jergens v. Stanley, 247 Ga. 543, 277 S.E.2d 651 (1981).

Dedication complete if public or private rights materially affected by interruption of enjoyment. — When public use has been made of the land for such a length of time that accommodation of public or private rights might be materially affected by the interruption of the enjoyment, the dedication is complete. Smith v. State, 248 Ga. 154, 282 S.E.2d 76 (1981).

Mere use of property by public insufficient. — Mere use of one's property by a small portion of the public, even for an extended period of time, is not sufficient to authorize an inference that the property has been dedicated to a public use, unless it clearly appears that there was an intention to dedicate, and that this dedication was accepted by the public authorities, either in express terms or by implication resulting from the maintenance of a way public in its nature. Dunaway v. Windsor, 197 Ga. 705, 30 S.E.2d 627 (1944); Atlantic Coast Line Ry. v. Sweatman, 81 Ga. App. 269, 58 S.E.2d 553 (1950), later appeal, 88 Ga. App. 674, 77 S.E.2d 565 (1953); Chatham Motorcycle Club, Inc. v. Blount, 214 Ga. 770, 107 S.E.2d 806 (1959); Hasty v. Wilson, 223 Ga. 739, 158 S.E.2d 915 (1967); Waldrep v. Hall County, 227 Ga. 554, 181 S.E.2d 833 (1971); Lines v. State, 245 Ga. 390, 264 S.E.2d 891 (1980).

Intention to dedicate and acceptance may be inferred. — Neither the intention nor the acceptance need be express, but if not

express they must be clearly inferred from the character of the use and the owner's acquiescence in such use. Healy v. City of Atlanta, 125 Ga. 736, 54 S.E. 749 (1906); Johnson v. State, 1 Ga. App. 195, 58 S.E. 265 (1907); City of La Fayette v. Walker County, 151 Ga. 786, 108 S.E. 218 (1921).

Intention to dedicate need not be shown by an express declaration, but may be inferred from acquiescence in the public use of the property. Acceptance likewise need not be express, but if the property be improved and maintained by the authorized public authorities and used by the public for such a length of time that the public accommodation and private rights might be materially affected by an interruption of the enjoyment, the dedication is complete. Lowry v. Rosenfeld, 213 Ga. 60, 96 S.E.2d 581, later appeal, 213 Ga. 578, 100 S.E.2d 447 (1957); Moon v. City of Conyers, 222 Ga. 526, 150 S.E.2d 873 (1966); Doby v. Brown, 232 Ga. 42, 205 S.E.2d 299 (1974).

Both dedication and acceptance may be express or implied as long as a clear intent is manifested. Ross v. Hall County Bd. of Comm'rs, 235 Ga. 309, 219 S.E.2d 380 (1975).

Burden of proof. — Party relying upon an express or implied offer of dedication of land and the acceptance of any such offer has the burden of proving the dedication. Lines v. State, 245 Ga. 390, 264 S.E.2d 891 (1980).

Right to use need not be vested in corporate body. — It is not essential to constitute a valid dedication to the public that the right of use should be vested in a corporate body. If there be a dedication of land to public use prior to the existence of a municipal corporation, then, upon such corporation being organized, including such land within its limits, the use of the land in trust for the public at once vests in it. City of La Fayette v. Walker County, 151 Ga. 786, 108 S.E. 218 (1921); Chatham Motorcycle Club, Inc. v. Blount, 214 Ga. 770, 107 S.E.2d 806 (1959).

2. Dedication by Owner

Intention to dedicate required. — Whether express or implied, an intention on the part of the owner to dedicate one's property to the public use must be shown. Dunaway v. Windsor, 197 Ga. 705, 30 S.E.2d 627 (1944); Hasty v. Wilson, 223 Ga. 739, 158 S.E.2d 915 (1967); Waldrep v. Hall County, 227 Ga. 554, 181 S.E.2d 833 (1971).

Intention may be shown by owner's acts. — Intention to dedicate property to public use is essential to a dedication, but this may be proved by acts showing an assent that property should be so used and enjoyed. Dunaway v. Windsor, 197 Ga. 705, 30 S.E.2d 627 (1944).

An intent on the part of the owner to dedicate must be manifested by the conduct of the owner from the facts and circumstances of the particular case, based upon the acts of the owner, and not upon what is secreted in one's heart. Dunaway v. Windsor, 197 Ga. 705, 30 S.E.2d 627 (1944).

Acts relied on must clearly indicate owner's purpose. — When an established dedication is claimed, the acts relied on to establish the dedication must be such as to clearly and satisfactorily indicate a purpose on the part of the owner to abandon the owner's personal dominion over the property and to devote the same to a definite public use. Swift v. Mayor of Lithonia, 101 Ga. 706, 29 S.E. 12 (1897); Dunaway v. Windsor, 197 Ga. 705, 30 S.E.2d 627 (1944); Atlantic Coast Line Ry. v. Sweatman, 81 Ga. App. 269, 58 S.E.2d 553 (1950), later appeal, 88 Ga. App. 674, 77 S.E.2d 565 (1953); Hasty v. Wilson, 223 Ga. 739, 158 S.E.2d 915 (1969); Waldrep v. Hall County, 227 Ga. 554, 181 S.E.2d 833 (1971); Lines v. State, 245 Ga. 390, 264 S.E.2d 891 (1980).

Public use not inconsistent with retention of dominion by owner. — Mere fact that the public uses the property of a private individual is not necessarily inconsistent with the retention of dominion by the owner. Dunaway v. Windsor, 197 Ga. 705, 30 S.E.2d 627 (1944); Lines v. State, 245 Ga. 390, 264 S.E.2d 891 (1980). See Seaboard Air-Line Ry. v. Greenfield, 160 Ga. 407, 128 S.E. 430 (1925).

Dedication with reservation by owner permissible. — Land may be dedicated for a particular public use with a reservation by the owner of a right to use the land for a specified purpose not inconsistent with the legal character of the dedication. City of Abbeville v. Jay, 205 Ga. 743, 55 S.E.2d 129 (1949).

When plat is made and recorded and lots are sold with reference thereto, the requisite intention is generally indisputable. Depart-

Requirements for Dedication (Cont'd)
2. Dedication by Owner (Cont'd)

ment of Transp. v. Ladson Invs., 158 Ga. App. 687, 282 S.E.2d 171 (1981).

Recording subdivision plat showing areas for public use. — Recording of a subdivision plat showing areas set apart for the use of the public acts not only as a grant of an easement to the purchasers of the property, but also raises a presumption of intent to dedicate to the public. Smith v. Gwinnett County, 248 Ga. 882, 286 S.E.2d 739 (1982).

3. Acceptance

Lack of public acceptance bars dedication. — Dedication of land by the owner thereof for public use as a public road, and the use of such road by the public as a route of travel, without some recognition of such road on the part of the county authorities, would not make such road a public road. Penick v. County of Morgan, 131 Ga. 385, 62 S.E. 300 (1908); Hillside Cotton Mills v. Ellis, 23 Ga. App. 45, 97 S.E. 459 (1918).

When dedication of land by a donor to a city for the purpose of a public street is in issue, the evidence must show not only that the owner gave the land, but that the public accepted the land before there can be a dedication. Hutchinson v. Clark, 169 Ga. 511, 150 S.E. 905 (1929).

Before a municipality can acquire by dedication an easement over land, for use by the public as a street, there must be an acceptance of the dedication by the municipality. Chatham Motorcycle Club, Inc. v. Blount, 214 Ga. 770, 107 S.E.2d 806 (1959).

When there has been an express offer on the part of the owner to dedicate land to the public, there must still be shown an acceptance, express or implied, of the use of the land by the public authorities. Jackson v. Chatham County, 225 Ga. 641, 170 S.E.2d 418 (1969).

Private landowner may dedicate land by setting the land apart for public use, but the land must be accepted by the county before the land becomes a county road. Ross v. Hall County Bd. of Comm'rs, 235 Ga. 309, 219 S.E.2d 380 (1975).

Repair or paving of road shows acceptance by public. — Frequent way of showing acceptance by the public in the case of a road or street is to prove that the proper authorities assumed control over such road or street as by having the road worked, graded, or paved. Moon v. City of Conyers, 222 Ga. 526, 150 S.E.2d 873 (1966).

An implied acceptance by the public authority may be shown by proof that such authority maintained, improved, or repaired the strip as a public road. Jackson v. Chatham County, 225 Ga. 641, 170 S.E.2d 418 (1969).

Proof that a public authority has impliedly accepted an offer of dedication may be made by showing that the authority has exercised control over the property, made improvements, or maintained the property's upkeep. Smith v. State, 248 Ga. 154, 282 S.E.2d 76 (1981).

Entire street dedicated need not be improved to complete the acceptance. — When the extent of the grant is defined by the landowner personally in the landowner's statement making an express dedication to a municipality, it is not necessary that the public authorities should work the entire street within the confines of the grant to make effectual the act of acceptance; any improvements or repairs done on the street by the public authorities in recognition of the dedication of a defined strip of land for a street may be regarded as an acceptance of the dedication. Department of Transp. v. Ladson Invs., 158 Ga. App. 687, 282 S.E.2d 171 (1981).

Occasional road-working is insufficient acceptance. — An occasional road-working of property by public authorities, there being no other evidence of maintenance, is not of itself sufficient to create the presumption of an intention to dedicate. The use and maintenance must be of the character, and for the length of time, sufficient to create a presumptive right of the public therein. Dunaway v. Windsor, 197 Ga. 705, 30 S.E.2d 627 (1944); Chatham Motorcycle Club, Inc. v. Blount, 214 Ga. 770, 107 S.E.2d 806 (1959).

Mere approval of plats insufficient to constitute acceptance. — County did not accept offers of dedication of land for public use contained in subdivision plats merely by approving plats containing offers of dedication. Smith v. Gwinnett County, 248 Ga. 882, 286 S.E.2d 739 (1982).

Minutes of city officers sufficient to show acceptance. — Minutes of the mayor and

council of a city are sufficient to prove ratification of a previous parol agreement dedicating certain lands owned by the city to a particular public use. Tillman v. Mayor of Athens, 206 Ga. 289, 56 S.E.2d 624 (1949).

Right to accept continues until the wants and convenience of the public require the use, or until the offer has been withdrawn or revoked. Department of Transp. v. Ladson Invs., 158 Ga. App. 687, 282 S.E.2d 171 (1981).

Public use need not be immediate or of entire property dedicated. — Acceptance by the public need not be immediate, but may be made when public necessity or convenience arises. As a corollary to this proposition, it follows that it is not necessary that the public use the entire property dedicated; any public use of a part of the property indicating a purpose to accept the gift fixes the public right to the whole. Smith v. State, 248 Ga. 154, 282 S.E.2d 76 (1981).

Right of acceptance not forfeited by delay. — Department of Transportation did not forfeit its right of acceptance merely by waiting three years from the most recent expression of an intention to dedicate the property before exercising that right. Department of Transp. v. Ladson Invs., 158 Ga. App. 687, 282 S.E.2d 171 (1981).

Acceptance by the public for public use is sufficient to complete the dedication without acceptance by the appropriate public authorities. Smith v. State, 248 Ga. 154, 282 S.E.2d 76 (1981).

Length of time of public use is not as significant as the character of the use in determining whether the public has accepted the offer of dedication. Smith v. State, 248 Ga. 154, 282 S.E.2d 76 (1981).

Acceptance of express offer to dedicate property may be shown by public use of the property for a period of time sufficient to indicate that the public is acting on the basis of a claimed right resulting from the dedicatory acts by the owner. Smith v. State, 248 Ga. 154, 282 S.E.2d 76 (1981).

Public not required to use land for any specific period of time in order to accept impliedly the offer of dedication; rather, the public use must simply be over a period of time long enough to indicate an intent or purpose to accept the offer. Smith v. State, 248 Ga. 154, 282 S.E.2d 76 (1981).

Seven-year period of use sufficient. — Because a seven-year period is sufficient time to raise the presumption of gift, the courts have held that seven years is a sufficient period of public use to establish the length of time necessary for the public to use the property allegedly dedicated to public use before acceptance of such dedication by the public may be implied. Jergens v. Stanley, 247 Ga. 543, 277 S.E.2d 651 (1981).

When a county did not expressly accept a dedication of land for public use, no implication of acceptance may be inferred when the county has not improved or maintained any part of the area or when there is no evidence of any use of the area by the general public. Smith v. Gwinnett County, 248 Ga. 882, 286 S.E.2d 739 (1982).

Public uses insufficient to prove intent to dedicate may constitute implied acceptance of express offer. — Public uses of a beach which are insufficient to prove that the owner of the property intended to dedicate the land to the public may be sufficient to constitute an implied acceptance of the property when an express offer of dedication has been made. Smith v. State, 248 Ga. 154, 282 S.E.2d 76 (1981).

Implied Dedication

Dedication may under certain circumstances be implied. Dunaway v. Windsor, 197 Ga. 705, 30 S.E.2d 627 (1944).

Intention to dedicate need not be shown by an express declaration to that effect. Atlantic Coast Line Ry. v. Sweatman, 81 Ga. App. 269, 58 S.E.2d 553 (1950), later appeal, 88 Ga. App. 674, 77 S.E.2d 565 (1953).

Mere showing of public use insufficient. — When theory that owner has impliedly dedicated property is relied on, party so contending must show more than simply that the public made uses of the property which were consistent with the uses made by the owner. Smith v. State, 248 Ga. 154, 282 S.E.2d 76 (1981).

Acquiescence by owner in public's use of land. — Intention to dedicate property to public use may be inferred from acquiescence by the owner in the use of the owner's land by the public, if the use be of such character as to clearly indicate that the public accepted the dedication to public use. Atlantic Coast Line Ry. v. Sweatman, 81 Ga. App. 269, 58 S.E.2d 553 (1950), later appeal, 88 Ga. App. 674, 77 S.E.2d 565 (1953);

Implied Dedication (Cont'd)

Moon v. City of Conyers, 222 Ga. 526, 150 S.E.2d 873 (1966).

Exclusive public control of property for period of time. — In every case of implied dedication, it must appear that the property has been in the exclusive control of the public for a period long enough to raise a presumption of a gift. Hutchinson v. Clark, 169 Ga. 511, 150 S.E. 905 (1929); Dunaway v. Windsor, 197 Ga. 705, 30 S.E.2d 627 (1944); Lines v. State, 245 Ga. 390, 264 S.E.2d 891 (1980).

Length of time of public use critical when needed to prove implied dedication. — Length of time of public use becomes critical only when its proof is necessary in order to establish the owner's dedicatory intent as in the case of proving an implied dedication. Smith v. State, 248 Ga. 154, 282 S.E.2d 76 (1981).

Isolated instances of public travel over property insufficient. — An acquiescence cannot be effective to deprive the owner of the owner's property when the claimed acquiescence amounts to no more than a failure to protect in isolated instances when some members of the public travel over one's land. Dunaway v. Windsor, 197 Ga. 705, 30 S.E.2d 627 (1944); Waldrep v. Hall County, 227 Ga. 554, 181 S.E.2d 833 (1971).

Use by trespassers can give rise to no rights in the public under this statute. Central R.R. v. Brinson, 70 Ga. 207 (1883); City of Atlanta v. Georgia R.R., 148 Ga. 635, 98 S.E. 83 (1919) (see O.C.G.A. § 44-5-230).

Owner's acquiescence implies knowledge of public's claim on land. — While an intention to dedicate need not be shown by an express declaration to that effect, but may be inferred under certain circumstances from an acquiescence by the owner in the use of the owner's property by the public, such acquiescence is in the nature of an estoppel in pais, and implies a knowledge on the part of the owner of the claim by the public to the right to appropriate the owner's property to the public use. Dunaway v. Windsor, 197 Ga. 705, 30 S.E.2d 627 (1944).

Proof that whole area taken to exclusion of owner required. — When an implied dedication is relied upon, it is necessary for the contending party to show that the whole area contended for was taken in possession by the public adversely to, and to the exclusion of, the contended dedicating owner. Lines v. State, 245 Ga. 390, 264 S.E.2d 891 (1980).

Unimproved property shows failure to dedicate. — Although the offer to dedicate may be implied from conduct, when the property is not improved and the public use and enjoyment of private rights would not be materially injured by interruption no dedication is shown. Lines v. State, 245 Ga. 390, 264 S.E.2d 891 (1980).

Mere ownership of a parcel of land by a cemetery corporation does not constitute a dedication of that parcel for cemetery purposes. Melwood, Inc. v. DeKalb County, 255 Ga. 247, 336 S.E.2d 571 (1985).

Absence of abandonment of personal dominion and public use. — Because the facts relied upon by an adjacent landowner failed to clearly indicate a purpose to abandon both personal dominion over the property and devote the property to a definite public use, and the declaration involving the property at issue specifically provided that any easements created under the declaration were not to be construed as creating any rights by the general public, the appeals court declined to find that an implied dedication existed. Wilcox Holdings, Ltd. v. Hull, 290 Ga. App. 179, 659 S.E.2d 406 (2008).

Express Dedication

There are express means other than by deed to dedicate land for public use. Ross v. Hall County Bd. of Comm'rs, 235 Ga. 309, 219 S.E.2d 380 (1975).

Express dedication by recorded map. — When the owner of a tract of land subdivides the land into lots and records a map or plat showing such lots, with designated streets, and sells lots with reference to such map or plat, the owner will be presumed to have expressly dedicated the streets designated on the map to the public. Ross v. Hall County Bd. of Comm'rs, 235 Ga. 309, 219 S.E.2d 380 (1975); Smith v. State, 248 Ga. 154, 282 S.E.2d 76 (1981).

Express dedication may be found even though plat was unrecorded. — Since an express dedication may be shown by parol evidence as well as by documentary evidence, it would be illogical to hold that evidence fails to establish an express dedication simply because a plat is unrecorded.

Department of Transp. v. Ladson Invs., 158 Ga. App. 687, 282 S.E.2d 171 (1981).

Acceptance by public without acceptance by authorities is sufficient. — When the owner of lands expressly dedicates the land to public use as a public road, acceptance by public use is sufficient to complete the dedication without acceptance by the public authorities of the county; when the land is so used for such a length of time that the public accommodation and private rights will be materially affected by an interruption of the enjoyment, the owner and those holding under the owner may not afterwards appropriate the land to private purposes. Chatham Motorcycle Club, Inc. v. Blount, 214 Ga. 770, 107 S.E.2d 806 (1959).

Acceptance may be shown by use. — When the dedication is express, acceptance may be shown by use in fact, even though the period of such use be less than seven years. Davis v. State, 9 Ga. App. 430, 71 S.E. 603 (1911); Hillside Cotton Mills v. Ellis, 23 Ga. App. 45, 97 S.E. 459 (1918).

Dedication found. — Curb cut had been dedicated to public use by the trust that owned the land in question, and under O.C.G.A. § 44-5-230, the dedication could not be revoked; it was undisputed that in 1976, the trustees had given express oral permission for the curb cut to be created on their property and that they understood that it would be used by the public, and acceptance by the public was implied by the public's use of the curb cut for over 20 years. Postnieks v. Chick-fil-A, Inc., 285 Ga. App. 724, 647 S.E.2d 281 (2007).

In a quiet title action, the trial court properly determined that there was no issue of fact with regard to dedication of a road. A recorded plat survey created a presumption of express dedication, which was not contradicted by an unrecorded plat document, and a county had accepted the dedication by partially paving and maintaining the street. Harbuck v. Houston County, 284 Ga. 4, 662 S.E.2d 107 (2008), cert. denied, 129 S. Ct. 641, 172 L.Ed.2d 613 (2008).

Reversion to Owner

Streets or highways cannot be vacated unless it is for the benefit of the public that such action should be taken. Kinney v. Brown, 234 Ga. 578, 216 S.E.2d 798 (1975).

Title may be lost only by legal abandonment. — Statute is silent as to what would be the effect of a failure to keep the way in repair after a prescriptive title has been acquired by seven years' use. The duty to repair, no doubt, continues, but on principle it would seem that when the title vested, it could not be divested by neglect, but only by abandonment. Kirkland v. Pitman, 122 Ga. 256, 50 S.E. 117 (1904) (see O.C.G.A. § 44-5-230).

Title or easement, once vested in the public, is not lost by neglect of the governing or controlling officials, but may be lost only by a legal abandonment under the statutes and general law, not by such officials alone, but also by the public which has used and may continue to use the land. Calfee v. Jones, 54 Ga. App. 481, 188 S.E. 307 (1936); Southern Ry. v. Wages, 203 Ga. 502, 47 S.E.2d 501 (1948).

Mere nonuse does not work a forfeiture of the right to the use of a public road. Doby v. Brown, 232 Ga. 42, 205 S.E.2d 299 (1974).

Mere nonuse of a dedicated street is insufficient to show abandonment. Garner v. Young, 214 Ga. 109, 103 S.E.2d 302 (1958).

Improved dedicated lands may not be revoked at will. — If lands of a city are dedicated to a particular public use, and citizens contribute money for necessary improvements to effectuate such use, the city may not revoke at will the dedication or license. Tillman v. Mayor of Athens, 206 Ga. 289, 56 S.E.2d 624 (1949).

Title is in adjacent landowners upon vacation of street. — Whenever a street is vacated, the presumption is that the fee is in the adjacent landowners, and that the right of each extends to the middle of the way. Calvary Independent Baptist Church v. City of Rome, 208 Ga. 312, 66 S.E.2d 726 (1951).

Owner may not revoke dedication by sale of land. — Dedication of land to public use is in the nature of an estoppel in pais, and if an attempt is made by the original owner to revoke the dedication by a sale of the land, the owner may be enjoined by any person interested in the use. City of Abbeville v. Jay, 205 Ga. 743, 55 S.E.2d 129 (1949).

When lands are dedicated, and are enjoyed as such, and rights are acquired by individuals in reference to such dedication, the law considers it in the nature of an estoppel in pais, which precludes the origi-

Reversion to Owner (Cont'd)

nal owner from revoking it; the proprietor is still the owner of the fee and can alien that, or maintain an action for an injury done to the freehold, but the use in the public follows the fee wherever it may go. Tillman v. Mayor of Athens, 206 Ga. 289, 56 S.E.2d 624 (1949).

Standing to oppose reappropriation by owner. — When a county adopts a zoning ordinance for the accommodation of the public, since the public accommodation will be materially affected by the reappropriation of the land impliedly dedicated for street purposes, the county has standing to enforce the county's implied dedication and prohibit the county's reappropriation by the former fee owner. Lee v. Warren, 230 Ga. 165, 195 S.E.2d 909 (1973); Kinney v. Brown, 234 Ga. 578, 216 S.E.2d 798 (1975).

Owner prohibited from appropriating land for private purposes. — See Haslerig v. Watson, 205 Ga. 668, 54 S.E.2d 413 (1949).

OPINIONS OF THE ATTORNEY GENERAL

No funeral home on property for cemetery use. — Funeral home may not be established on real property dedicated to cemetery use. 1990 Op. Att'y Gen. No. 90-26.

RESEARCH REFERENCES

Am. Jur. 2d. — 3 Am. Jur. 2d, Adverse Possession, §§ 71, 72, 268 et seq.

C.J.S. — 2 C.J.S., Adverse Possession, § 13 et seq.

ALR. — Necessity of acceptance of dedicated street to relieve it from taxation, 5 ALR 1537.

Implied or constructive dedication of land between street line and building, 7 ALR 727.

Validity and effect of condition of dedication that remaining property shall not be subject to assessments for improvements, 16 ALR 499; 37 ALR 1357.

Validity and effect of restrictions or reservations in dedication of property in respect of right to operate public utilities, 58 ALR 854.

Attempted dedication as affecting right to assert after-acquired title, 62 ALR 480.

Sufficiency as common-law dedication of incomplete statutory dedication, or ineffectual attempt to make statutory dedication, 63 ALR 667.

Dedication: time for acceptance, 66 ALR 321.

Validity and effect of conditions or covenants in deed of property for streets relating to the use of the property or the street, 69 ALR 1047.

Use by public as affecting acquisition by individual of right of way by prescription, 111 ALR 221.

Reservation of right of way for railroad or street railway in dedicating property for highway, 131 ALR 1472.

Dedication: acceptance of some streets, alleys, and the like appearing on plat as acceptance of all, 32 ALR2d 953.

Construction or maintenance of sewers, water pipes, or the like by public authorities in roadway, street, or alley as indicating dedication or acceptance thereof, 52 ALR2d 263.

Right of owner of servient tenement subject to right of way to dedicate his land, 69 ALR2d 1236.

Width and boundaries of public highway acquired by prescription or adverse user, 76 ALR2d 535.

Revocation or withdrawal of dedication by grantees or successors in interest of dedicator, 86 ALR2d 860.

Use of property by public as affecting acquisition of title by adverse possession, 56 ALR3d 1182.

Implied acceptance, by public use, of dedication of beach or shoreline adjoining public waters, 24 ALR4th 294.

CHAPTER 6

ESTATES

Article 1

In General

Sec.

44-6-1. Rule against perpetuities; exception for certain trusts for employees [Repealed].

44-6-2. Merger of lesser estate into greater.

44-6-3. Lien on one's own property; purchase of lien on own property and enforcement thereof.

Article 2

Fee Simple Estates

44-6-20. ''Absolute or fee simple estate'' defined.

44-6-21. Words necessary to create absolute estate; preference for construing as conveyance; maker's intention controls; parol evidence.

44-6-22. Creation of estate to commence in future; fee in abeyance; fee limited upon fee.

44-6-23. Construction of words such as ''heirs'' or ''heirs of body.''

44-6-24. Estates tail abolished; effect of limitations which would create estate tail by implication.

44-6-25. Construction and effect of limitations over after death of first taker.

Article 3

Estates Granted upon Conditions

44-6-40. Grant of estates upon conditions.

44-6-41. Conditions precedent and subsequent distinguished; preferred construction and remedy.

44-6-42. Right of entry after breach of condition subsequent.

44-6-43. Certain conditions void.

44-6-44. Effect of legal disabilities on conditions; notice of condition.

Sec.

Article 4

Remainders and Reversions

44-6-60. Nature of estates in remainder and in reversion; rights of reversioner.

44-6-61. Vested and contingent remainders distinguished.

44-6-62. Effect of defeat of estate on remainder.

44-6-63. Interest of heirs of remainderman [Repealed].

44-6-64. Creation of remainders by parol.

44-6-65. Creation of remainder for persons not in being; vested remainder subject to open.

44-6-66. Preference for vested remainders; construction of words of survivorship in wills.

44-6-67. Effect of executor's assent to legacy to life tenant on remainderman; possession at termination of life estate.

44-6-68. Validity of limitations over upon marriage of widow.

Article 5

Life Estates

44-6-80. Nature of life estates; estates during widowhood.

44-6-81. Length of life estate.

44-6-82. How and in what property life estate may be created.

44-6-83. Rights and duties of life tenant; forfeiture of interest to remainderman.

44-6-84. Ownership of increase of property.

44-6-85. When life tenant entitled to emblements.

44-6-86. Rights of lessee upon termination of life estate.

44-6-87. Effect of purported sale of estate by life tenant.

44-6-88. Demand for bond by purchaser of life estate in personalty; effect of failure to give bond.

Sec.
44-6-89. Removal of personalty beyond state by life tenant; forfeiture; restraint.
44-6-90. Jurisdiction of judge of superior court as to life estates and contingent remainders.

Article 6

Estates for Years

44-6-100. "Estate for years" defined; estate for years in lands passes as realty.
44-6-101. Estate for years distinguished from contract of hiring and from landlord and tenant relationship.
44-6-102. "Lease" defined; extent of interest; when mining interest passes.
44-6-103. Tenant's rights and duties; grounds of forfeiture.
44-6-104. Right of tenant for years to emblements.
44-6-105. Liability of tenant for years for repairs and expenses.
44-6-106. Dependent and independent covenants or conditions.

Article 7

Tenancy in Common

Part 1

In General

44-6-120. "Tenancy in common" defined; presumption of equality of shares; effect of inequality of shares on right of possession.
44-6-121. Rights and liabilities of cotenants; accounting.
44-6-122. Accounting between cotenants for unequal share of rents or profits; priority of claim over certain liens.
44-6-123. Adverse possession against cotenant; action to recover possession.

Part 2

Partition

Subpart 1

Equitable Partition

44-6-140. When equitable partition authorized.
44-6-141. Molding of decree; discretion of court.
44-6-142. Effect of decree on title.

Subpart 2

Statutory Partition

44-6-160. Grounds for partition; jurisdiction; contents of petition.
44-6-161. Who may apply for partition.
44-6-162. Notice of intention to apply for writ of partition.
44-6-163. Issuance of writ of partition; appointment of partitioners.
44-6-164. Appointment of surveyor; notice of time of execution of writ; oath of partitioners; principles governing partition; partitioner's return.
44-6-165. Objections and defenses to right of applicant, writ, or return; jury trial.
44-6-166. Return of partitioners as judgment of court; conclusiveness; when second partition ordered; effect.
44-6-166.1. Partition when physical division of property is inequitable.
44-6-167. When sale of lands ordered; procedure; place of sale; notice.
44-6-168. Commissioners' return; distribution of proceeds; liability of commissioners for moneys received; contempt.
44-6-169. Title to property sold; execution of deed of conveyance by commissioners.
44-6-170. Treatment of extraordinary cases; denial of sale or partition.
44-6-171. Setting aside judgment by parties under disability, absent, or not notified; time limitations; conclusiveness of judgment; effect of proceedings on bona fide purchaser.
44-6-172. Partition of realty by life tenants — Effect on other parties; conditions.
44-6-173. Partition of realty by life tenants — Appointment of guardians ad litem; service of notice of application; time for answer.
44-6-174. Partition of realty by life tenants — Cumulative effect.

Article 8

Joint Tenancy with Survivorship

Sec.
44-6-190. Creating joint tenancy with survivorship; severance; effect of Code section on other laws.

Article 9

Uniform Statutory Rule Against Perpetuities

44-6-200. Short title.
44-6-201. Validity of nonvested property interest or power of appointment.
Sec.
44-6-202. Time of creation of nonvested property interest or power of appointment.
44-6-203. Reform of disposition by court to approximate transferor's plan of distribution.
44-6-204. Exceptions to applicability of article.
44-6-205. Applicability of article; court reform of nonvested dispositions created before article became effective.
44-6-206. Application and construction of article.

Cross references. — Applicability of estates law to both real and personal property, § 44-1-11.

Law reviews. — For article regarding ''Usufructs and Estates for Years Distinguished,'' see 18 Ga. St. B.J. 116 (1982).

RESEARCH REFERENCES

ALR. — Estate created by deed to persons described as husband and wife but not legally married, 9 ALR4th 1189.

Contract of sale or granting of option to purchase, to third party, by both or all of joint tenants or tenants by entirety as severing or terminating tenancy, 39 ALR4th 1068.

Validity and effect of one spouse's conveyance to other spouse of interest in property held as estate by the entireties, 18 ALR5th 230.

ARTICLE 1

IN GENERAL

Law reviews. — For article, ''Georgia's Proposed Dynasty Trust: Giving the Dead Too Much Control,'' see 35 Ga. L. Rev. 1 (2000).

44-6-1. Rule against perpetuities; exception for certain trusts for employees.

Reserved. Repealed by Ga. L. 1990, p. 1837, § 1, effective May 1, 1990.

Editor's notes. — Former § 44-6-1, pertaining to the rule against perpetuities, was based on Orig. Code 1863, § 2249; Code 1868, § 2241; Code 1873, § 2267; Code 1882, § 2267; Civil Code 1895, § 3102; Civil Code 1910, § 3678; Code 1933, § 85-707; Ga. L. 1953, Jan.-Feb. Sess., p. 42, § 1. For present provisions as to the rule against perpetuities, see § 44-6-200 et seq.

44-6-2. Merger of lesser estate into greater.

If two estates in the same property shall unite in the same person in his individual capacity, the lesser estate shall be merged into the greater. (Orig. Code 1863, § 2253; Code 1868, § 2245; Code 1873, § 2271; Code 1822, § 2271; Civil Code 1895, § 3106; Civil Code 1910, § 3682; Code 1933, § 85-710.)

Law reviews. — For article, ''Descendible Future Interests in Georgia: The Effect of the Preference for Early Vesting,'' see 7 Ga. L. Rev. 443 (1973).

For comment on Lathem v. Smith, 188 Ga. 472, 4 S.E.2d 27 (1939), see 2 Ga. B.J. 44 (1939).

JUDICIAL DECISIONS

Analysis

General Consideration
Requirements for Merger
Intent of Parties
Courts of Equity
Mortgages
Illustrative Cases

General Consideration

Purpose of doctrine of merger. — Doctrine of merger of estates is designed primarily for the benefit of one who acquires an interest in property greater than one possessed in the first instance, and will not be held to apply, against one's will, to one's disadvantage. Seaboard Air-Line Ry. v. Holliday, 165 Ga. 200, 140 S.E. 507 (1927); Pope v. Hammond, 168 Ga. 818, 149 S.E. 204 (1929); Landrum v. Carey, 185 Ga. 76, 194 S.E. 362 (1937); Gosnell v. Waldrip, 158 Ga. App. 685, 282 S.E.2d 168 (1981).

Merger incomplete without title. — Because at the time the appellee executed the deed to the appellant the appellee had no title to the easement which the appellee attempted to convey to appellant, the appellant's claim of title by estoppel was completely without merit. Elrod v. Elrod, 272 Ga. 188, 526 S.E.2d 339 (2000).

Doctrine of merger has its foundation in the convenience of the parties interested; therefore whenever the rights of strangers, not parties to the act, that would otherwise work an extinguishment of the particular estate, require it, the two estates will still be considered as having a separate continuance. Fraser v. Martin, 195 Ga. 683, 25 S.E.2d 307 (1943).

Doctrine applies to rights other than rights in land. — While in strict technical meaning, the doctrine of merger of estates appears to have been derived from the principles applicable to feudal tenures, and hence have relation only to estates in land, the term ''merger'' is applicable to rights other than rights in land. Bostwick v. Felder, 73 Ga. App. 118, 35 S.E.2d 783 (1945).

Doctrine of legal merger is now practically extinct both in England and the United States, equitable principles being generally applied by the courts of both countries. Pope v. Hammond, 168 Ga. 818, 149 S.E. 204 (1929).

Merged estate liable for debts. — When the lesser estate was destroyed by merging in the greater, the limitations and restrictions thrown around the lesser as to its not being subject to levy and sale were also removed when it ceased to exist; having become an absolute estate or estate in fee, it is subject to the debts of the owner, just as other estates held in the same manner. Lowe v. Webb, 85 Ga. 731, 11 S.E. 845 (1890).

Cited in Marshall v. Dixon, 82 Ga. 435, 9 S.E. 167 (1889); Ferris v. Van Ingen & Co., 110 Ga. 102, 35 S.E. 347 (1900); Coleman & Burden Co. v. Rice, 115 Ga. 510, 42 S.E. 5 (1902); Thompson v. Sanders, 118 Ga. 928,

45 S.E. 715 (1903); Muscogee Mfg. Co. v. Eagle & Phenix Mills, 126 Ga. 210, 54 S.E. 1028, 7 L.R.A. (n.s.) 1139 (1906); Wellhouse v. Central Leases, Inc., 41 Ga. App. 731, 154 S.E. 708 (1930); Thomas v. Couch, 171 Ga. 602, 156 S.E. 206 (1930); Dodson v. Trust Co., 216 Ga. 499, 117 S.E.2d 331 (1960); Wallace v. City of Atlanta, 228 Ga. 166, 184 S.E.2d 576 (1971); Summers v. Allison, 127 Ga. App. 217, 193 S.E.2d 177 (1972); Tomkus v. Parker, 236 Ga. 478, 224 S.E.2d 353 (1976); Nash v. Miller, 212 Ga. App. 513, 441 S.E.2d 924 (1994).

Requirements for Merger

Necessity of being in same person. — One estate cannot be merged in another unless both estates are owned by the same person in the same right. Pool v. Morris, 29 Ga. 374, 74 Am. Dec. 68 (1859); Seaboard Air-Line Ry. v. Holliday, 165 Ga. 200, 140 S.E. 507 (1927).

Doctrine of merger of estates rests upon actualities, not upon mere possibilities. Coincidence of two independent estates, presently held by one and the same person or class of persons, is a necessary prerequisite to merger. Luquire v. Lee, 121 Ga. 624, 49 S.E. 834 (1905).

No merger can take place until such identity of person and of present interest in point of fact exists. Luquire v. Lee, 121 Ga. 624, 49 S.E. 834 (1905); Seaboard Air-Line Ry. v. Holliday, 165 Ga. 200, 140 S.E. 507 (1927).

Absolute proprietary interest in at least one estate required. — If there is to be a merger of two estates, the person in whom the two estates unite must have an absolute proprietary interest in at least one of the two separate estates. An example of such a merger as is intended by this statute would be where one owning in one's own right and individual capacity a remainderman's interest in certain property, secures the outstanding life estate in the same property, thereby merging the life estate, the lesser, in the remainderman's estate, the greater. Bostwick v. Felder, 73 Ga. App. 118, 35 S.E.2d 783 (1945) (see O.C.G.A. § 44-6-2).

Estates must be coextensive and commensurate. — In order for legal and equitable estates to merge, the estates must be coextensive and commensurate. Seaboard Air-Line Ry. v. Holliday, 165 Ga. 200, 140 S.E. 507 (1927).

Fractional legal estates and fractional equitable estates cannot merge when fractions are not the same. An equitable undivided interest in an equity of redemption cannot merge with the legal fee. Seaboard Air-Line Ry. v. Holliday, 165 Ga. 200, 140 S.E. 507 (1927).

Intent of Parties

An intent not to merge will be presumed and will control. Gosnell v. Waldrip, 158 Ga. App. 685, 282 S.E.2d 168 (1981); Tompkins v. United States, 946 F.2d 817 (11th Cir. 1991).

Intent as affecting merger. — Merger does not, in general, take place when the person in whom the two estates meet intends that it shall not take place. Knowles v. Lawton, 18 Ga. 476, 63 Am. Dec. 29, overruled on other grounds, Williams v. Terrell, 54 Ga. 462 (1855); Edmonds v. Beatie, 62 Ga. App. 246, 8 S.E.2d 559 (1940).

Intention of the holder of two estates in the same property that they shall not merge generally prevents merger. Landrum v. Carey, 185 Ga. 76, 194 S.E. 362 (1937).

When a property owner did not intend that a covenant merge when the owner acquired a larger estate, that intention controlled and the covenant did not merge. Desai v. OK Oil, Inc., 233 Ga. App. 855, 505 S.E.2d 271 (1998).

Intent is controlling consideration. — Wherever a merger will operate inequitably, it will be prevented. The controlling consideration is the intention, express or implied, of the person in whom the estates unite, provided the intention is just and fair, and a merger will not be permitted contrary to such intent. Fraser v. Martin, 195 Ga. 683, 25 S.E.2d 307 (1943); Gosnell v. Waldrip, 158 Ga. App. 685, 282 S.E.2d 168 (1981).

Merger of estates does not occur if the result would extinguish a loan, contrary to the expectations and intentions of the parties. In re Gaites, 466 F. Supp. 248 (M.D. Ga. 1979).

Equity presumes intent consistent with party's best interests. — If there is no expression of intention with respect to a merger, it will be sought for in all the circumstances of the transaction, and may be gathered not only from the acts and declarations of the owner of the several independent rights, but from a view of the situation as affecting one's

Intent of Parties (Cont'd)

interests, at least prior to the presence of some right in a third person. Equity will presume such an intent as is consistent with the best interests of the party. Fraser v. Martin, 195 Ga. 683, 25 S.E.2d 307 (1943).

Merger cannot be defeated by other parties. — When it is manifest that the person in whom the two estates meet intends that the merger shall take place, it cannot be defeated by other parties. Wilder v. Holland, 102 Ga. 44, 29 S.E. 134 (1897); Muscogee Mfg. Co. v. Eagle & Phenix Mills, 126 Ga. 210, 54 S.E. 1028, 7 L.R.A. (n.s.) 1139 (1906).

Burden of proof that no merger was intended. — If two estates in the same property united in the same person in the same capacity, and it is contended that no merger took place, the person making such contention, if entitled to do so, must allege and prove facts negativing the existence of such merger. Muscogee Mfg. Co. v. Eagle & Phenix Mills, 126 Ga. 210, 54 S.E. 1028, 7 L.R.A. (n.s.) 1139 (1906); Pitts Banking Co. v. Fenn, 160 Ga. 854, 129 S.E. 105 (1925); Franklin Mtg. Co. v. McDuffie, 43 Ga. App. 604, 159 S.E. 599 (1931).

When one person is the owner of different estates in the same land, the burden of showing that no merger took place is on the party asserting that a merger did not take place. Landrum v. Carey, 185 Ga. 76, 194 S.E. 362 (1937).

Question is one of fact. — Question of intention on the part of a person acquiring both the equitable interest in land and the legal title thereto is one of fact. Franklin Mtg. Co. v. McDuffie, 43 Ga. App. 604, 159 S.E. 599 (1931).

Courts of Equity

Doctrine of merger is not favored. — In equity the rules of law are not followed, and the doctrine of merger is not favored. Equity will prevent or permit a merger as will best subserve the purposes of justice and the actual and just intent of the parties, whether express or implied. Fraser v. Martin, 195 Ga. 683, 25 S.E.2d 307 (1943).

Court will act according to intent of parties. — Since a court of equity is not bound by the legal rules of merger, it will prevent or permit a merger of estates according to the intent of the parties, either actually proved or implied from the fact that the merger would be against the interest of the party in whom the several estates or interests have united. Pope v. Hammond, 168 Ga. 818, 149 S.E. 204 (1929); Fraser v. Martin, 195 Ga. 683, 25 S.E.2d 307 (1943).

Whether a merger of estates occurs is governed by the intentions of the parties and principles of equity. In re Gaites, 466 F. Supp. 248 (M.D. Ga. 1979).

General rule at law is that the mortgage becomes merged in the deed, the latter conveying a greater estate than the mortgage; but in equity the lesser security is not merged in the greater when it appears that the holder of both intended that a merger should not take place. The intent controls. Ferris v. Van Ingen & Co., 110 Ga. 102, 35 S.E. 347 (1900); Pitts Banking Co. v. Fenn, 160 Ga. 854, 129 S.E. 105 (1925).

In equity there are exceptions to the rule propounded by law, one of which is that the lesser is not merged in the greater when it appears that the person in whom the two estates meet intends that it shall not take place. Fraser v. Martin, 195 Ga. 683, 25 S.E.2d 307 (1943).

Mortgages

Presumptively a mortgage is merged when the mortgagee takes from the mortgagor a warranty deed absolute in form to the mortgaged property. Furthermore, such a deed is presumptively one of bargain and sale. Pitts Banking Co. v. Fenn, 160 Ga. 854, 129 S.E. 105 (1925).

An absolute deed conveying land as security for a debt is a security of a higher nature than a mortgage for the same debt on the same premises, and when the mortgage is entered satisfied, and surrendered up because of the execution of such deed, the transaction operates as a novation and amounts to a merger. Pitts Banking Co. v. Fenn, 160 Ga. 854, 129 S.E. 105 (1925); Bostwick v. Felder, 73 Ga. App. 118, 35 S.E.2d 783 (1945).

Merger extinguishes mortgage. — When the mortgagee purchases the mortgaged property from the mortgagor, the mortgage is extinguished by merger. Pitts Banking Co. v. Fenn, 160 Ga. 854, 129 S.E. 105 (1925).

When the mortgagee purchases the equity or redemption under a junior lien, the

whole estate is vested in the mortgagee; and both the mortgage and the debt upon which it is founded are extinguished, unless the actual value of the mortgaged property is ascertained by foreclosure and sale, or express stipulation between the parties. Pitts Banking Co. v. Fenn, 160 Ga. 854, 129 S.E. 105 (1925); Franklin Mtg. Co. v. McDuffie, 43 Ga. App. 604, 159 S.E. 599 (1931); Wrenn v. Massell Inv. Co., 56 Ga. App. 802, 194 S.E. 263 (1937).

Interest under first mortgage is merged into title of purchaser. Bank of Stephens v. Growers Fin. Corp., 168 Ga. 108, 147 S.E. 113 (1929).

If the owner of the equitable or beneficial interest in land acquires the outstanding legal title, conveyed by one's predecessor in title to a third person to secure a debt, the equitable interest and the legal title become merged, and the debt for which the legal title was held as security is extinguished, unless there is an agreement to the contrary, or it is the manifest intention of the party in whom such equitable and legal estate unite that there should be no merger. Franklin Mtg. Co. v. McDuffie, 43 Ga. App. 604, 159 S.E. 599 (1931).

Intent not to merge. — If the holder of a security deed subsequently receives a warranty deed subject to the loan evidenced by the security deed to the land conveyed in the former deed, but does not surrender or cancel the note or the deed securing the note, a merger of the two estates being against the interest of such holder, and inequitable, and there being no evidence of an intent upon one's part to effect a merger, an intent not to merge will be presumed, and a court of equity will decree that no merger was effected. Fraser v. Martin, 195 Ga. 683, 25 S.E.2d 307 (1943).

Effect of such intent. — When the mortgagee became the purchaser of the equity of redemption in the two halves of the mortgaged lot of land, and the facts were such as to require the presumption that the purchaser intended the equity of redemption in one of the halves to merge; but the equity of redemption in the other not to merge, the decision was that as to the first mentioned half, there was a merger; and as to the other half, none. Jackson v. Tift, 15 Ga. 557 (1854).

Holder of security interests from different debts. — Merger of estates in one holding only security interests in the property as the result of two different debts has never been permitted. Bostwick v. Felder, 73 Ga. App. 118, 35 S.E.2d 783 (1945).

No merger of judgment lien and subsequent security interest. — When a judgment creditor accepted a bill of sale as security for a second loan (the judgment being on the first loan) which the creditor had made to the debtor, and obtained thereby only a security interest in the property covered by the bill of sale, such security interest being subject to the prior judgment lien in the absence of any stipulation to the contrary, the security interest instead of being in itself a proprietary interest in the property, is but incidental to the ownership of the debt secured, and so long as that debt retains its identity the security will also retain a distinct identity, and no merger of the lien in the bill of sale occurred. Bostwick v. Felder, 73 Ga. App. 118, 35 S.E.2d 783 (1945).

Security title does not merge with subsequent title subject to a life estate, acquired by deed. Drake v. Barrs, 225 Ga. 597, 170 S.E.2d 684 (1969).

Illustrative Cases

Single trustee who is sole beneficiary. — If there is but a single trustee who is also the sole beneficiary, merger of legal and equitable interests results. Smith v. Francis, 221 Ga. 260, 144 S.E.2d 439 (1965).

Plural trustees, one of whom is sole beneficiary. — When there are plural trustees, one of whom is the sole beneficiary, there is no merger and the trust is valid. Smith v. Francis, 221 Ga. 260, 144 S.E.2d 439 (1965).

Two life estates for two separate persons. — Two life estates in the same property being for the lives of two separate persons cannot merge as one life estate within the meaning of this statute. McDaniel v. Bagby, 204 Ga. 750, 51 S.E.2d 805 (1949) (see O.C.G.A. § 44-6-2).

Debt secured by two parcels of property was not extinguished prior to foreclosure under the doctrine of merger of estates by the voluntary surrender of one of the parcels of property. Reeves v. Sanderlin Agric. Servs., Inc., 249 Ga. App. 882, 549 S.E.2d 837 (2001).

Intervening judgment lien. — There is no merger by a security deed holder taking a quitclaim deed and transfer of tax execu-

Illustrative Cases (Cont'd)

tions after judgment lien has intervened. Pope v. Hammond, 168 Ga. 818, 149 S.E. 204 (1929).

Merger of homestead and reversionary interest. — When the sole beneficiary of a homestead estate acquires an absolute title to the reversionary interest in the property out of which the homestead estate was carved, and it does not appear that it was the intention of such beneficiary to keep the two estates separate, the lesser, or homestead estate, would become merged in the absolute estate, and the property would be subject to the payment of the debts of the person in whom the two estates united. Goodell v. Hall, 112 Ga. 435, 37 S.E. 725 (1900); Pitts Banking Co. v. Fenn, 160 Ga. 854, 129 S.E. 105 (1925).

Merger of life estate, power of disposition, and reversion. — When one had vested in oneself a life estate annexed to which was a power of disposition by will, which was derived from the will of one's grandfather, and one had also vested in one the reversion which was undisposed of by one's grandfather's will; the life estate, coupled with the power, became merged into the greater estate, that is, the fee represented by the reversion. Wilder v. Holland, 102 Ga. 44, 29 S.E. 134 (1897).

Merger of life estate and absolute fee. — Merger of estates occurs if two or more persons having, as tenants in common, a life estate in realty, acquire in common the absolute fee thereto. Lowe v. Webb, 85 Ga. 731, 11 S.E. 845 (1890); Stringfellow v. Stringfellow, 112 Ga. 494, 37 S.E. 767 (1900); Bardwell & Co. v. Edwards, 117 Ga. 824, 45 S.E. 40 (1903); Luquire v. Lee, 121 Ga. 624, 49 S.E. 834 (1905).

When the possible remaindermen hold a life estate together with X, but the remainder is limited to those only who survive X, the uncertainty of knowing who will actually survive would alone prevent the merger of the estates. Luquire v. Lee, 121 Ga. 624, 49 S.E. 834 (1905).

Merger of life estate and year's support. — Having a life estate in the use of the property by reason of the homestead, and having afterwards acquired an absolute estate in the same property by reason of its being set apart to the wife as a year's support, the life estate, being the lesser, is merged in the absolute estate. Lowe v. Webb, 85 Ga. 731, 11 S.E. 845 (1890).

Equitable title of decedent and year's support were merged into an absolute estate by deed to the widow and children. Hines v. Moore, 168 Ga. 451, 148 S.E. 162 (1929).

Merger of easement upon union of dominant and servient estates. — When there is a union of an absolute title to and possession of the dominant and servient estates in the same person, it operates to extinguish any such easement absolutely and forever for the single reason that no man can have an easement in one's own land. Muscogee Mfg. Co. v. Eagle & Phenix Mills, 126 Ga. 210, 54 S.E. 1028, 7 L.R.A. (n.s.) 1139 (1906).

Merger doctrine operated to extinguish a purported perpetual easement. Because one could not have an easement in one's own land, a common grantor's attempt to create an easement across one portion of the grantor's property for the benefit of another portion while the grantor still owned both was ineffective, and the purported easement was invalid. Gilbert v. Fine, 288 Ga. App. 20, 653 S.E.2d 775 (2007), cert. denied, 2008 Ga. LEXIS 232 (Ga. 2008).

Merger in class. — It is doubtless true that if the entire interest in a life estate is held by a class of persons, under a deed or will which does not provide for survivorship, and subsequently the estate in remainder is vested in all of the members of this class, as tenants in common, by inheritance or otherwise, the life estate becomes merged into the greater estate which they acquire. But if it is vested in a lesser number than the whole, they do not merge. Luquire v. Lee, 121 Ga. 624, 49 S.E. 834 (1905).

Merger of water rights with estates. — When four persons formed a water company, there was no legislative restriction preventing a merger of rights running in favor of some of the lots purchased for the benefit of others, when all became the property of one person, although before the incorporation. Muscogee Mfg. Co. v. Eagle & Phenix Mills, 126 Ga. 210, 54 S.E. 1028, 7 L.R.A. (n.s.) 1139 (1906).

When lessee has only right of possession and use of the leased premises, not a proprietary interest therein, there is no ''merger of estates'' when the lessee purchases the subject property. Life

Chiropractic College, Inc. v. Carter & Assocs., 168 Ga. App. 38, 308 S.E.2d 4 (1983).

Equitable exception to merger doctrine did not apply. — Equitable exception to the merger doctrine did not apply. Whether merger operated against the interest of the common grantor was irrelevant, as the common grantor was not a party to the action and was not harmed by the trial court's ruling; furthermore, it would be inequitable to find that the plaintiffs' property was subject to an easement for the defendants' benefit when the deed from the common grantor to the plaintiffs did not mention such an easement. Gilbert v. Fine, 288 Ga. App. 20, 653 S.E.2d 775 (2007), cert. denied, 2008 Ga. LEXIS 232 (Ga. 2008).

RESEARCH REFERENCES

Am. Jur. 2d. — 28 Am. Jur. 2d, Estates, §§ 378, 423 et seq.

C.J.S. — 26A C.J.S., Deeds, § 263. 31 C.J.S., Estates, §§ 116, 134, 148 et seq., 177. 96 C.J.S., Wills, § 1192. 97 C.J.S., Wills, §§ 1348, 1349.

ALR. — Merger, as to other than intervening lienor, on purchase of paramount mortgage by owner of fee, 46 ALR 322.

Merger of estate for years in fee or lesser estate, 143 ALR 93.

Deed from mortgagor to mortgagee or from purchaser to vendor as merger of mortgage or of vendor's lien as regards intervening liens, 148 ALR 816.

44-6-3. Lien on one's own property; purchase of lien on own property and enforcement thereof.

As a general rule, a party may not hold a lien on his own property; but the owner of property which is subject to a lien created or imposed against the property by another person may protect himself by purchasing the lien and levying it on other property of the person liable to pay the same or holding it as a claim against such person. (Civil Code 1895, § 3107; Civil Code 1910, § 3683; Code 1933, § 85-711.)

History of Code section. — This Code section is derived from the decisions in Clay v. Banks, 71 Ga. 363 (1883); Georgia Chem. Works v. Chartledge, 77 Ga. 547, 4 Am. St. R. 96 (1886).

Cross references. — Liens generally, Ch. 14 of this title.

JUDICIAL DECISIONS

Cited in Bearden v. Carter Merchandise Co., 101 Ga. 169, 28 S.E. 678 (1897); McDuffie v. Merchants Bank, 168 Ga. 231, 147 S.E. 111 (1929); Franklin Mtg. Co. v. McDuffie, 43 Ga. App. 604, 159 S.E. 599 (1931); Edmonds v. Beatie, 62 Ga. App. 246, 8 S.E.2d 559 (1940); Bostwick v. Felder, 73 Ga. App. 118, 35 S.E.2d 783 (1945); Barron Buick, Inc. v. Kennesaw Fin. Co., 105 Ga. App. 451, 124 S.E.2d 918 (1962).

RESEARCH REFERENCES

Am. Jur. 2d. — 28 Am. Jur. 2d, Estates, §§ 89, 90. 51 Am. Jur. 2d, Liens, § 10 et seq.

C.J.S. — 31 C.J.S., Estates, § 104 et seq.

ALR. — Subrogation of purchaser who discharges superior lien as part of purchase price, as against recorded junior lien, 37 ALR 384; 113 ALR 958.

Requiring security from life tenant for

protection of remainderman, 101 ALR 271; 138 ALR 440.

ARTICLE 2

FEE SIMPLE ESTATES

Law reviews. — For article surveying Georgia cases in the area of real property from June 1977 through May 1978, see 30 Mercer L. Rev. 167 (1978).

JUDICIAL DECISIONS

Cited in Southwell v. Purcell, 172 Ga. 739, 158 S.E. 588 (1931).

RESEARCH REFERENCES

ALR. — Scope and import of term ''owner'' in statutes relating to real property, 2 ALR 778; 95 ALR 1085.

Perpetual lease or covenant to renew lease perpetually as violation of rule against perpetuities or the suspension of the power of alienation, 3 ALR 498; 162 ALR 1147.

Right of purchaser under land contract to anticipate time of payment fixed by contract, 17 ALR 866.

Right of vendee who enters under parol contract, to recover for improvements where vendor refuses to convey, 17 ALR 949.

Right of owner of fee burdened with easement in nature of street, private or public, to compensation on condemnation of property for public street, 17 ALR 1249.

Absolute power of disposition in life tenant as elevating life estate to fee, 76 ALR 1153

Nature of estates or interests created by grant or devise to one and heirs if donee should have any heirs, 16 ALR2d 670.

Grant, reservation, or exception as creating separate and independent legal estate in solid minerals or as passing only incorporeal privilege or license, 66 ALR2d 978.

Deed to railroad company as conveying fee or easement, 6 ALR3d 973.

44-6-20. "Absolute or fee simple estate" defined.

An absolute or fee simple estate is one in which the owner is entitled to the entire property with unconditional power of disposition during his life and which descends to his heirs and legal representatives upon his death intestate. (Orig. Code 1863, § 2226; Code 1868, § 2220; Code 1873, § 2246; Code 1882, § 2246; Civil Code 1895, § 3081; Civil Code 1910, § 3657; Code 1933, § 85-501.)

JUDICIAL DECISIONS

Fee simple is the greatest estate that any person can hold in property. Regents of Univ. Sys. v. Trust Co., 186 Ga. 498, 198 S.E. 345 (1938).

Since a fee simple estate is the greatest estate that can be owned or conveyed, anything different must be less. Regents of Univ. Sys. v. Trust Co., 186 Ga. 498, 198 S.E. 345 (1938).

An estate in fee simple is the entire and absolute property in the land; no person can have a greater estate or interest. Jenkins v. Shuften, 206 Ga. 315, 57 S.E.2d 283 (1950); Houston v. Coram, 215 Ga. 101, 109 S.E.2d 41 (1959).

Court will not by construction reduce an estate once devised absolutely in fee, by limitations contained in subsequent parts of

the will, unless the intent to limit the devise is clearly and unmistakably manifested. Houston v. Coram, 215 Ga. 101, 109 S.E.2d 41 (1959).

Cited in Sanders v. Hinton, 171 Ga. 702, 156 S.E. 812 (1931); Atlantic Coast Line R.R. v. Sweat, 177 Ga. 698, 171 S.E. 123 (1933); Comer v. Citizens & S. Nat'l Bank, 182 Ga. 1, 185 S.E. 77 (1935); Milner v. Allgood, 184 Ga. 288, 191 S.E. 132 (1937); Taylor v. Trustees of Jesse Parker Williams Hosp., 190 Ga. 349, 9 S.E.2d 165 (1940); First Nat'l Bank v. Robinson, 209 Ga. 582, 74 S.E.2d 875 (1953); National Bank v. First Nat'l Bank, 234 Ga. 734, 218 S.E.2d 23 (1975); Peacock v. Owens, 244 Ga. 203, 259 S.E.2d 458 (1979); DeKalb County Bd. of Tax Assessors v. W.C. Harris & Co., 248 Ga. 277, 282 S.E.2d 880 (1981).

RESEARCH REFERENCES

Am. Jur. 2d. — 28 Am. Jur. 2d, Estates, § 12 et seq.

C.J.S. — 31 C.J.S., Estates, §§ 7, 8.

ALR. — Validity and effect of contract or deed which purports to cover or convey an undivided interest in land without specifying the amount of the interest, 123 ALR 912.

Construction of deed of undivided interest in land, as to fractional interest in oil, gas, or other minerals, or in royal reserved or excepted, 163 ALR 1132.

Gift or grant in terms sufficient to carry the whole property absolutely as so operating where followed by a purported limitation over of property not disposed of by the first taker, 17 ALR2d 7.

Validity of restraint, ending not later than expiration of a life or lives in being, on alienation of an estate in fee, 42 ALR2d 1243.

Conveyance of ''right of way,'' in connection with conveyancing of another tract, as passing fee or easement, 89 ALR3d 767.

44-6-21. Words necessary to create absolute estate; preference for construing as conveyance; maker's intention controls; parol evidence.

The word ''heirs'' or its equivalent is not necessary to create an absolute estate. Every properly executed conveyance shall be construed to convey the fee unless a lesser estate is mentioned and limited in that conveyance. If a lesser estate is expressly limited, the courts shall not, by construction, increase such estate into a fee but, disregarding all technical rules, shall give effect to the intention of the maker of the instrument, as far as the same is lawful, if the intention can be gathered from the contents of the instrument. If the court cannot gather the intention of the maker from the contents of the instrument, it may hear parol evidence to prove the maker's intention. (Laws 1821, Cobb's 1851 Digest, p. 169; Code 1863, § 2228; Code 1868, § 2222; Code 1873, § 2248; Code 1882, § 2248; Civil Code 1895, § 3083; Civil Code 1910, § 3659; Code 1933, § 85-503.)

Law reviews. — For comment on Grant v. Haymes, 164 Ga. 371, 138 S.E. 892 (1927), see 1 Ga. L. Rev. 45 (1927). For comment on Bienvenu v. First Nat'l Bank, 193 Ga. 101, 17 S.E.2d 257 (1941), see 4 Ga. B.J. 45 (1942).

JUDICIAL DECISIONS

Analysis

General Consideration
Rules of Construction

General Consideration

Purpose of section. — In England, it was necessary in order to create a fee that some word of inheritance should be contained in the conveyance. A deed of land to A vested a life estate only. In this state every man is his own scrivener. It was found that in many, if not in most deeds, words of inheritance were omitted, notwithstanding it was the intention of the parties to pass the fee. Clements v. Glass, 23 Ga. 395 (1857).

Purpose of this statute is to enlarge estates and make a fee more easily created than at common law. Burton v. Black, 30 Ga. 638 (1860) (see O.C.G.A. § 44-6-21).

Estates by implication are not favored. McCord v. Whitehead, 98 Ga. 381, 25 S.E. 767 (1896); Comer v. Citizens & S. Nat'l Bank, 182 Ga. 1, 185 S.E. 77 (1935); Raines v. Duskin, 247 Ga. 512, 277 S.E.2d 26 (1981).

Construction to favor fee. — Whenever one seeks to sell property or negotiates for its sale, the presumption is that one's purpose is to convey an absolute estate, unless a lesser estate is expressly mentioned and limited. Richards v. East Tenn., V. & Ga. Ry., 106 Ga. 614, 33 S.E. 193 (1899).

Every conveyance properly executed shall be a fee unless expressly limited. Hill v. Terrell, 123 Ga. 49, 51 S.E. 81 (1905).

Every conveyance should be construed to convey the fee unless a lesser estate is mentioned and limited. Comer v. Citizens & S. Nat'l Bank, 182 Ga. 1, 185 S.E. 77 (1935).

Applicability to estates in easements. — No less estate in an easement being expressed, an estate in fee therein should be understood, in harmony with this statute. Trustees, Atlanta Univ. v. City of Atlanta, 93 Ga. 468, 21 S.E. 74 (1893) (see O.C.G.A. § 44-6-21).

Words importing fee unnecessary. — Any word or words which import a fee simple can have no effect upon the conveyance as to the quantity of the estate, but the conveyance will pass the fee without, as effectually as with them; except when a less estate is expressed, the fee always passes. Wilkerson v. Clark, 80 Ga. 367, 7 S.E. 319, 12 Am. St. R. 258 (1888); Featherston Mining Co. v. Young, 118 Ga. 564, 45 S.E. 414 (1903).

Use of the word "heirs" is wholly unnecessary under this statute. Andrews v. Atlanta Real Estate Co., 92 Ga. 260, 18 S.E. 548 (1893) (see O.C.G.A. § 44-6-21).

Words of inheritance are no longer necessary to convey an estate in fee simple to the grantor by reservation in a deed. In the case of an exception, words of inheritance are necessary. Grant v. Haymes, 164 Ga. 371, 138 S.E. 892 (1927).

No mention of heirs or successors or assigns is necessary to convey a complete title. 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).

Intent to pass lesser estate must be clear. — Court will not by construction reduce an estate once devised absolutely in fee by limitations contained in subsequent parts of the will, unless the intention to limit the estate is clearly and unmistakably manifest. Smith v. Slade, 151 Ga. 176, 106 S.E. 106 (1921); Daniel v. Stewart, 152 Ga. 423, 110 S.E. 178 (1921); Nicholls v. Wheeler, 182 Ga. 502, 185 S.E. 800 (1936); Frost v. Dixon, 204 Ga. 268, 49 S.E.2d 664 (1948); Aiken v. Aiken, 209 Ga. 819, 76 S.E.2d 481 (1953); Dillard v. Dillard, 217 Ga. 176, 121 S.E.2d 766 (1961).

Estate in fee will not be reduced to a life estate by a subsequent limitation in a deed or will unless the intent to limit is unmistakable. Budreau v. Mingledorff, 207 Ga. 538, 63 S.E.2d 326 (1951).

Failure to mention lesser estate passes fee. — Deed providing "and sold to said D, for the support of herself, her present and future children. . . to have and to hold the same in fee simple for the purpose aforesaid" does not mention an estate less than a fee and thus conveys fee. Morris v. Davis, 75 Ga. 169 (1885).

When a deed otherwise purports to convey the fee, and contains no words such as would impose a limitation as to the quantum of the estate conveyed, a clause which does nothing more than inform the grantee that there is a prior mortgage or security deed on the property, and states that it is understood and agreed that such is the case, cannot properly be construed as cutting down the quantum of the estate sought to be conveyed. Federal Land Bank v. Bank of Lenox, 192 Ga. 543, 16 S.E.2d 9 (1941).

Effect of failure to clearly indicate limitation on fee. — When by codicil to a will an absolute estate is given, without any referential words carrying back the bequest, under limitations in previous provisions, courts

cannot supply such intent by construction. If the devise is complete, separate, and unequivocal, the law inhibits the construction of lesser estates when no words of limitation are employed by the testator. Felton v. Hill, 41 Ga. 554 (1871).

Devise conveying property to X ''without limitation or reserve, for her to do as she thinks best for herself and all my lawful heirs,'' conveys a fee. Wood v. Owen, 133 Ga. 751, 66 S.E. 951 (1910).

Language, ''It is my will that one-half of my property. . . shall belong to my wife in fee simple,'' created a fee simple estate. The words that follow those in the will, ''and to be disposed of by her at her death as she may think proper,'' did not diminish the quantity of interest which the devisee took in the property, and was not a limitation creating a less estate than that which the words first quoted import. Lane v. Malcolm, 141 Ga. 424, 81 S.E. 125 (1914).

When, under a joint will of a husband and wife, the survivor is expressly devised a fee simple estate in the property of the testator first dying, and following such a devise are the words, ''to be used and owned fully in any way such survivor may desire,'' these words are clearly not a limitation upon the fee and do not show an intention of the testator to reduce the estate of the survivor from a fee simple to a life estate. Callaway v. Faust, 212 Ga. 596, 94 S.E.2d 379 (1956).

Express intent to limit estate will pass restricted estate. — When a lesser estate than a fee is expressly limited, the court is bound to give effect to the manifest intention of the testator. Nussbaun & Dannenberg v. Evans, 71 Ga. 753 (1883).

When a testator gives an absolute estate in one part of the testator's will, and by a subsequent clause expressly cuts down such absolute estate to a lesser estate, the prior gift is restricted accordingly. Budreau v. Mingledorff, 207 Ga. 538, 63 S.E.2d 326 (1951).

Intent of the parties is of prime importance in conveyancing. Parker v. Smith, 140 Ga. 789, 80 S.E. 12 (1913); Burch v. King, 14 Ga. App. 153, 80 S.E. 664 (1914); DOT v. Knight, 238 Ga. 225, 232 S.E.2d 72 (1977).

Terms of the whole instrument are to be construed together to give effect to the entire deed and to uphold the intention of the grantor. Cole v. Thrasher, 246 Ga. 683, 272 S.E.2d 696 (1980).

All technical rules must be disregarded so as to give effect to the intention of the maker of the instrument if the intention can be gathered from its contents. Burch v. King, 14 Ga. App. 153, 80 S.E. 664 (1914); Banks v. Morgan, 163 Ga. 468, 136 S.E. 434 (1927).

Doubts resolved in favor of fee. — If the expression relied upon to limit the fee is doubtful, the doubt should be resolved in favor of the absolute estate. Nicholls v. Wheeler, 182 Ga. 502, 185 S.E. 800 (1936), overruled on other grounds, Bailey v. Johnson, 245 Ga. 823, 268 S.E.2d 147 (1980); Aiken v. Aiken, 209 Ga. 819, 76 S.E.2d 481 (1953); Dillard v. Dillard, 217 Ga. 176, 121 S.E.2d 766 (1961).

Law favors the vesting of estates at the earliest possible period. Bailey v. Ross, 66 Ga. 274 (1881); Sumpter v. Carter, 115 Ga. 893, 42 S.E. 324, 60 L.R.A. 274 (1902); Perdue v. Anderson, 142 Ga. 309, 82 S.E. 884 (1914); Patterson v. Patterson, 147 Ga. 44, 92 S.E. 882 (1917).

Cited in Harris v. Smith, 16 Ga. 545 (1855); Hill v. Alford, 46 Ga. 247 (1872); Gibson v. Hardaway, 68 Ga. 370 (1882); Wetter v. United Hydraulic Cotton Press Co., 75 Ga. 540 (1885); Craig v. Ambrose, 80 Ga. 134, 4 S.E. 1 (1887); Matthews v. Hudson, 81 Ga. 120, 7 S.E. 286, 12 Am. St. R. 305 (1888); Chewning v. Shumate, 106 Ga. 751, 32 S.E. 544 (1889); McDonough & Co. v. Martin, 88 Ga. 675, 16 S.E. 59, 18 L.R.A. 343 (1892); McCord v. Whitehead, 98 Ga. 381, 25 S.E. 767 (1896); Terrell v. Huff, 108 Ga. 655, 34 S.E. 345 (1899); Davis v. Hollingsworth, 113 Ga. 210, 38 S.E. 827, 84 Am. St. R. 233 (1901); Sumpter v. Carter, 115 Ga. 893, 42 S.E. 324, 60 L.R.A. 274 (1902); Hill v. Terrell, 123 Ga. 49, 51 S.E. 81 (1905); Stamey v. McGinnis, 145 Ga. 226, 88 S.E. 935 (1916); Megahee v. Hatcher, 146 Ga. 498, 91 S.E. 677 (1917); Hollomon v. Board of Educ., 168 Ga. 359, 147 S.E. 882 (1929); Lumpkin v. Patterson, 170 Ga. 94, 152 S.E. 448 (1930); Woods v. Flanders, 180 Ga. 835, 181 S.E. 83 (1935); McArthur v. Bone, 183 Ga. 796, 189 S.E. 831 (1937); Watts v. Finley, 187 Ga. 629, 1 S.E.2d 723 (1939); Palmer v. Atwood, 188 Ga. 99, 3 S.E.2d 63 (1939); Sanders v. First Nat'l Bank, 189 Ga. 450, 6 S.E.2d 294 (1939); Walden v. Walden, 191 Ga. 182, 12 S.E.2d 345 (1940); Bienvenu v. First Nat'l Bank, 193 Ga. 101, 17 S.E.2d 257 (1941); Trimble v.

General Consideration (Cont'd)

Fairbanks, 209 Ga. 741, 76 S.E.2d 16 (1953); Wright v. Pritchett, 213 Ga. 865, 102 S.E.2d 602 (1958); Stephens v. Stephens, 218 Ga. 671, 130 S.E.2d 208 (1963); White v. Howell, 117 Ga. App. 778, 161 S.E.2d 892 (1968); Floyd v. Hoover, 141 Ga. App. 588, 234 S.E.2d 89 (1977); LeBlanc v. Easterwood, 242 Ga. 99, 249 S.E.2d 567 (1978); O'Neill v. Myers, 148 Ga. App. 749, 252 S.E.2d 638 (1979); Tucker v. Black, 253 Ga. 46, 315 S.E.2d 910 (1984); Bandy v. Henderson, 284 Ga. 692, 670 S.E.2d 792 (2008).

Rules of Construction

Conveyances at common law. — By the common law, the word ''heirs'' is necessary to be employed in a grant, in order to pass an inheritable fee; but, under statutory law, words of restraint must be added in order to carry a less estate. Cook v. Walker, 15 Ga. 457 (1854).

Conveyance ''to A'' would have, by the English rules of construction, only conveyed a life estate. The Georgia rule, however, is to the contrary. Raines v. Duskin, 247 Ga. 512, 277 S.E.2d 26 (1981).

Effect. — Conveyance to a person is a conveyance to the person, the person's heirs, and assigns, and a conveyance to a corporation is one to the corporation and the corporation's successors and assigns. 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).

Devise or a grant to A and A's heirs conveys a fee to A. Craig v. Ambrose, 80 Ga. 134, 4 S.E. 1 (1887); Ewing v. Shropshire, 80 Ga. 374, 7 S.E. 554 (1888); Douglas v. Johnson, 130 Ga. 472, 60 S.E. 1041 (1908); Thomas v. Owens, 131 Ga. 248, 62 S.E. 218 (1908); Ragan v. Rogers, 146 Ga. 818, 92 S.E. 647 (1917).

Rule in Shelley's Case. — This statute, which requires that technical rules be disregarded, is an obstacle to any possible application of the Rule in Shelley's Case to a conveyance with the remainder limited to heirs, lineal heirs, lawful heirs, issue, or the like, and inhibits the enlargement of the estate granted to A into a fee by construction, a less estate, to wit, one for life, being mentioned and limited. Ewing v. Shropshire, 80 Ga. 374, 7 S.E. 554 (1888) (see O.C.G.A. § 44-6-21).

Conveyance ''to B for life, remainder to his heirs'' gave B a fee simple estate at common law, by the Rule in Shelley's Case. The Rule in Shelley's Case is not followed in Georgia. Raines v. Duskin, 247 Ga. 512, 277 S.E.2d 26 (1981).

Defeasible fee with an executory limitation is created when a testator devises real estate to two persons in fee simple, but provides that upon the death of one of the people the property shall vest in fee simple in the survivor. Trimble v. Fairbanks, 209 Ga. 741, 76 S.E.2d 16 (1953).

Estate with limitation over. — Annexing of a limitation over to an estate otherwise made a fee would not reduce such estate to an estate tail, inasmuch as such condition would not have reduced it to an estate tail at common law. The estate is a fee determinable upon condition. Burton v. Black, 30 Ga. 638 (1860).

Life estate with right of disposition. — If A was given a life estate with absolute right of disposition, and A exercised the right by executing a quitclaim, the estate A conveyed was presumed a fee simple in the absence of a less estate being limited. Prudential Inv. & Dev. Co. v. Hilton, 153 Ga. 415, 112 S.E. 464 (1922).

Conveying for specified purpose. — Deed providing that the estate shall be used only for specified purposes conveys an absolute unconditional fee. If, by its terms, this covenant had created a forfeiture upon condition broken, the court ought to construe it to prevent that result. Doe v. Roe, 39 Ga. 202 (1869).

An estate to X as long as X shall remain satisfied thereon, to revert in case X is not satisfied conveys a fee making it X's duty to elect to become satisfied within a reasonable time. Crumpler v. Barfield & Wilson Co., 114 Ga. 570, 40 S.E. 808 (1902).

When a deed contains no words of forfeiture, but does contain a stipulation that the property would be used to terminate a railroad line and for the building of offices, such stipulation in the deed is a covenant and not a forfeiture which would cause title to the property to revert to the grantor upon abandonment of the property for the purposes stipulated in the deed. Richmond County Property Owners Ass'n v.

Augusta-Richmond County Coliseum Auth., 233 Ga. 94, 210 S.E.2d 172 (1974).

RESEARCH REFERENCES

Am. Jur. 2d. — 23 Am. Jur. 2d, Deeds, §§ 212, 226 et seq. 28 Am. Jur. 2d, Estates, § 15 et seq. 80 Am. Jur. 2d, Wills, §§ 1119, 1260 et seq.

C.J.S. — 26A C.J.S., Deeds, §§ 169 et seq., 182 et seq., 245 et seq., 280 et seq. 96 C.J.S., Wills, § 1192 et seq.

ALR. — Meaning of term ''issue'' where used as a word of purchase, 2 ALR 930; 117 ALR 691.

Effect of omission of words of inheritance from a reservation, exception, or provision for forfeiture in a deed, 34 ALR 695.

Nature of estate created by grant or gift to one and his children, 161 ALR 612.

Nature of estates or interests created by grant or devise to one and heirs if donee should have any heirs, 16 ALR2d 670.

Conveyance of ''right of way,'' in connection with conveyance of another tract, as passing fee or easement, 89 ALR3d 767.

44-6-22. Creation of estate to commence in future; fee in abeyance; fee limited upon fee.

An absolute estate may be created to commence in the future, and the fee may be in abeyance without detriment to the rights of subsequent remainders. A fee may be limited upon a fee, either by deed or will, where the plain intention of the grantor or testator requires it and no other rule of law is violated thereby. (Orig. Code 1863, § 2227; Code 1868, § 2221; Code 1873, § 2247; Code 1882, § 2247; Civil Code 1895, § 3082; Civil Code 1910, § 3658; Code 1933, § 85-502.)

Law reviews. — For article, ''Creation of Defeasible Fees,'' see 15 Ga. B.J. 20 (1952). For article, ''Descendible Future Interests in Georgia: The Effect of the Preference for Early Vesting,'' see 7 Ga. L. Rev. 443 (1973). For article, ''The Rule Against Perpetuities as Applied to Georgia Wills and Trusts,'' see 16 Ga. L. Rev. 235 (1982).

For comment on Jenkins v. Shuften, 266 Ga. 315, 57 S.E.2d 283 (1950), see 12 Ga. B.J. 477 (1950).

JUDICIAL DECISIONS

Remainder or executory devise at common law could not be limited upon a fee, but since the Code of 1863 this statute has been the law. Greer v. Pate, 85 Ga. 552, 11 S.E. 869 (1890) (see O.C.G.A. § 44-6-22).

Common-law rule that a fee cannot be limited on a fee has been abolished. Sanders v. First Nat'l Bank, 189 Ga. 450, 6 S.E.2d 294 (1939).

Determinable fee legal. — Grant of a qualified or determinable fee subject to be divested upon the sufficiency of certain conditions is legal because a fee may be limited upon a fee. Davis v. Hollingsworth, 113 Ga. 210, 38 S.E. 827, 84 Am. St. R. 233 (1901); Shealy v. Wammock, 115 Ga. 913, 42 S.E. 239 (1902); Dean v. Wall, 154 Ga. 637, 115 S.E. 78 (1922).

There is no obstacle to a holding that though the remaindermen took estates in fee, vested as of the date of the death of the testator, yet, since the fees were defeasible fees, the executory devise would take effect if the contingency provided for in the will should eventuate. Sanders v. First Nat'l Bank, 189 Ga. 450, 6 S.E.2d 294 (1939).

Defeasible fee is a present, possessory freehold estate of inheritance; it may endure forever, but may also be brought to an end by a stated event. It has the attributes of a fee interest, such as general inheritability, but is not a fee simple due to the fact that it may be

defeased. The event may be the continuance or end of some situation, the happening or failure of happening of some occurrence or the performance or nonperformance of some condition. McDonald v. Suarez, 212 Ga. 360, 93 S.E.2d 16 (1956).

Essentials of a defeasible fee are that the grantee must first take an estate in fee; that is to say, an estate which may run indefinitely with the general attributes of a fee simple, but subject to being defeated by some contingency which may arise after the grantee's estate has become vested. Sanders v. First Nat'l Bank, 189 Ga. 450, 6 S.E.2d 294 (1939); McDonald v. Suarez, 212 Ga. 360, 93 S.E.2d 16 (1956).

Creation of defeasible fee with executory limitation. — A defeasible fee with an executory limitation is created when a testator gives land to one in fee simple, but subsequently provides in the testator's will that, in case a certain event does or does not happen, the estate will go to another. Jenkins v. Shuften, 206 Ga. 315, 57 S.E.2d 283 (1950); Trimble v. Fairbanks, 209 Ga. 741, 76 S.E.2d 16 (1953); McDonald v. Suarez, 212 Ga. 360, 93 S.E.2d 16 (1956).

Fee need not pass out of grantor. — It is not necessary, whether a trust for the life tenant is created or not, for the fee to pass out of the grantor or devisor with the particular estate. Fleming v. Hughes, 99 Ga. 444, 27 S.E. 791 (1896).

Reversionary interest created by a fee simple determinable is alienable. Flaum v. Middlebury, Inc., 246 Ga. 682, 272 S.E.2d 695 (1980).

Fee simple determinable provides for automatic reversion of the estate upon the occurrence of the limitation. Flaum v. Middlebury, Inc., 246 Ga. 682, 272 S.E.2d 695 (1980).

Devise to the wife and children of a yet-unmarried son is valid and the executor holds the property in abeyance as quasi-trustee until the marriage of the son, when it vests in the wife, subject to be shared by future born children of the husband. Knowles v. Knowles, 132 Ga. 806, 65 S.E. 128 (1909).

Power of appointment upon divesting qualified fee. — When, under a deed, a base or qualified fee is conveyed subject to be divested upon the happening or nonhappening of an event, with power in the grantee to appoint the property to any member of a designated class in the event the qualified fee is divested, the nonexercise of such power by the grantee does not enlarge the qualified fee into an absolute fee. Guess v. Morgan, 196 Ga. 265, 26 S.E.2d 424 (1943).

Interpretation of will to avoid creation of estate tail. — Since an estate tail is void but a fee may be limited upon a fee, the court held that the probable intent of the testator was to give a fee, subject to be reduced or divested upon certain contingencies, such interpretation being possible, rather than an estate tail. Phinizy v. Wallace, 136 Ga. 520, 71 S.E. 896 (1911).

Cited in Nelson v. Estill, 175 Ga. 526, 165 S.E. 820 (1932); Taylor v. Trustees of Jesse Parker Williams Hosp., 190 Ga. 349, 9 S.E.2d 165 (1940); Padgett v. Hatton, 200 Ga. 209, 36 S.E.2d 664 (1946); Jenkins v. Shuften, 206 Ga. 315, 57 S.E.2d 283 (1950); Stahl v. Russell, 206 Ga. 699, 58 S.E.2d 135 (1950); Trimble v. Fairbanks, 209 Ga. 741, 76 S.E.2d 16 (1953); Lanier v. Lanier, 218 Ga. 137, 126 S.E.2d 776 (1962); Mann v. Blalock, 286 Ga. 541, 690 S.E.2d 375 (2010).

RESEARCH REFERENCES

Am. Jur. 2d. — 28 Am. Jur. 2d, Estates, §§ 13, 14, 403.

C.J.S. — 31 C.J.S., Estates, §§ 3, 16.

ALR. — Gift or grant in terms sufficient to carry the whole property absolutely as so operating where followed by a purported limitation over of property not disposed of by the first taker, 17 ALR2d 7.

44-6-23. Construction of words such as "heirs" or "heirs of body."

Limitations over to ''heirs,'' ''heirs of the body,'' ''lineal heirs,'' ''lawful heirs,'' ''issue,'' or words of similar meaning shall be held to mean ''children'' whether the parents are alive or dead. Under such words the

children and the descendants of deceased children by representation in being at the time of the vesting of the estate shall take. (Orig. Code 1863, § 2229; Code 1868, § 2223; Code 1873, § 2249; Code 1882, § 2249; Civil Code 1895, § 3084; Civil Code 1910, § 3360; Code 1933, § 85-504.)

Law reviews. — For article discussing problems in construction of instrument conveying gift to a group or class, see 6 Ga. St. B.J. 169 (1969). For article, ''Descendible Future Interests in Georgia: The Effect of the Preference for Early Vesting,'' see 7 Ga. L. Rev. 443 (1973). For article surveying legislative and judicial developments in Georgia's will, trusts, and estate laws, see 31 Mercer L. Rev. 281 (1979).

For comment on Walters v. Donaldson, 184 Ga. 45, 191 S.E. 429 (1937), see 5 Ga. B.J. 64 (1943). For comment on Brooks v. Williams, 227 Ga. 59, 178 S.E.2d 880 (1970), see 23 Mercer L. Rev. 399 (1972).

JUDICIAL DECISIONS

Analysis

General Consideration
Words of Similar Import
Taking by Children and Descendants

General Consideration

Purpose and effect of section. — This statute works a radical change in the prior law by making certain words and phrases, or other like words, always import purchase and not limitation when used in limitations over. According to the Rule in Shelley's Case, such words, so used, would generally be taken as words of limitation and not of purchase. This statute totally extirpates that celebrated rule, and establishes the very reverse of its doctrine, as to all limitations over. Ewing v. Shropshire, 80 Ga. 374, 7 S.E. 554 (1888) (see O.C.G.A. § 44-6-23).

Section enlarges class of remaindermen. — Statute introduces children of deceased children into the class, and its effect upon the general rule is to enlarge the class of remaindermen, when designated as heirs, lawful heirs, or the like, so as to include children of deceased children. Lumpkin v. Patterson, 170 Ga. 94, 152 S.E. 448 (1930) (see O.C.G.A. § 44-6-23).

Effect upon Rule in Shelley's Case. — This statute, which provides that any descriptions which embrace children will enable the children to take, if the children are in being at the time of the vesting of the estate, is an obstacle to any possible application of the Rule in Shelley's Case to a conveyance with the remainder limited to heirs, lineal heirs, lawful heirs, issue, or the like. Ewing v. Shropshire, 80 Ga. 374, 7 S.E. 554 (1888) (see O.C.G.A. § 44-6-23).

Code abrogates the Rule in Shelley's Case, wipes it out utterly as a rule of law in limitations over, but this is only as to conveyances executed since 1862. Wilkerson v. Clark, 80 Ga. 367, 7 S.E. 319, 12 Am. St. R. 258 (1888).

This statute worked a radical change in the prior law, and modified the Rule in Shelley's Case by making the words, ''heirs,'' ''heirs of body,'' and words of similar import, always import purchase and not limitation when used in limitation over. McArthur v. Bone, 183 Ga. 796, 189 S.E. 831 (1937) (see O.C.G.A. § 44-6-23).

A conveyance ''to B for life, remainder to his heirs'' gave B a fee simple estate by the Rule in Shelley's Case. The law is now to the contrary in Georgia. Raines v. Duskin, 247 Ga. 512, 277 S.E.2d 26 (1981).

A deed to A for life and after A's death to the heirs of A, or to devisee if A should make a will and dispose of the same is a life estate with remainder over, and not a conveyance to A and A's children or issues, and falls directly within the terms of this statute. Brown v. Brown, 97 Ga. 531, 25 S.E. 353, 33 L.R.A. 816 (1895); Wright v. Hill, 140 Ga. 554, 79 S.E. 546 (1913); Bush v. Williams, 141 Ga. 62, 80 S.E. 286 (1913) (see O.C.G.A. § 44-6-23).

Under this statute, a deed to A, and at A's

General Consideration (Cont'd)

decease to A's child or children or representative of child or children as A may leave in life, conveys a life estate to A, with remainder to the designated remaindermen. Goodrich v. Pearce, 83 Ga. 781, 10 S.E. 451 (1889); King v. McDuffie, 144 Ga. 318, 87 S.E. 22 (1915); Megahee v. Hatcher, 146 Ga. 498, 91 S.E. 677 (1917); Edwards v. Edwards, 147 Ga. 12, 92 S.E. 540 (1917); Stanley v. Reeves, 149 Ga. 151, 99 S.E. 376 (1919) (see O.C.G.A. § 44-6-23).

Rule where conveyance has no limitation over. — Grants to one and the heirs of one's body, or one's bodily heirs, or one's heirs by a particular person, convey an absolute fee, when the conveyance contains no limitation over. In that class of cases, the expression ''bodily heirs'' or words of similar import are words of limitation and not of purchase, and are inoperative to qualify or limit the character of the estate that passes under the deed. Rainey v. Spence, 185 Ga. 763, 196 S.E. 416 (1938).

While a gift or grant to A and the heirs of A's body, or words of similar import, operates to vest the full fee simple title in A, that rule would not apply when a less estate has been carved out, and the term ''heirs of his body'' is used in connection with a limitation over in remainder. McArthur v. Bone, 183 Ga. 796, 189 S.E. 831 (1937).

Grant or devise without a limitation over, not to A and A's ''heirs,'' or ''heirs of her body,'' but to A and A's children, where there are no children at the time the instrument becomes effective, operates to vest full fee simple title in A. Singer v. First Nat'l Bank & Trust Co., 195 Ga. 269, 24 S.E.2d 47 (1943).

Meaning of statute. — This statute means that in limitations over, as, for instance, in a devise to A for life and at A's death to A's heirs, such words shall give a vested remainder to the children of A at the testator's death and who might afterwards be born, and in case any such child dies in the lifetime of the life tenant, the deceased child's descendants in esse when the life estate falls in shall take the share by representation; just as is now done in an express devise in remainder to the children of A and to the descendants of such children who die before the life tenant. Both of the devises, being defeasible vested remainders in the children, are clearly distinguishable from a devise in remainder to the children of A as a class. Crawley v. Kendrick, 122 Ga. 183, 50 S.E. 41, 2 Ann. Cas. 643 (1905) (see O.C.G.A. § 44-6-23).

This statute is expressly confined to limitations over, in which the enumerated words of limitation are used, and was solely intended to change the common law as to such limitations over, by changing these words into words of purchase, so as to cut down the first taker's estate to a life tenancy and include all persons who could fall within these words as words of purchase. Crawley v. Kendrick, 122 Ga. 183, 50 S.E. 41, 2 Ann. Cas. 643 (1905) (see O.C.G.A. § 44-6-23).

''Limitation over'' construed. — A ''limitation over'' in the sense intended by this statute includes any estate in the same property created or contemplated by the conveyance to be enjoyed after the first estate granted expires or is exhausted. Thus in a gift to A for life, remainder to the heirs of A's body, the remainder is ''a limitation over'' to the heirs of the body, and under this statute the children of A and the descendants of deceased children would take the remainder as purchasers. And the same persons would take the same estate in the same capacity were the remainder limited to heirs, lineal heirs, lawful heirs, issue, or the like. Ewing v. Shropshire, 80 Ga. 374, 7 S.E. 554 (1888); Rainey v. Spence, 185 Ga. 763, 196 S.E. 416 (1938); Lane v. Citizens & S. Nat'l Bank, 195 Ga. 828, 25 S.E.2d 800 (1943); Dodson v. Trust Co., 216 Ga. 499, 117 S.E.2d 331 (1960) (see O.C.G.A. § 44-6-23).

When two or more estates of freehold in the same property are granted by the same conveyance to be enjoyed successively, or one in lieu of another, each of them, except the first, is a limitation over. Ewing v. Shropshire, 80 Ga. 374, 7 S.E. 554 (1888); Lane v. Citizens & S. Nat'l Bank, 195 Ga. 828, 25 S.E.2d 800 (1943).

Section inapplicable to adoption rights. — This statute was enacted only as a rule of property different from the former law, and does not purport to deal in any manner with the adoption of children or with any right flowing from such adoption. Comer v. Comer, 195 Ga. 79, 23 S.E.2d 420 (1942).

Cited in Herring v. Rogers, 30 Ga. 615 (1860); Butler v. Ralston, 69 Ga. 485 (1882);

Cooper v. Mitchell Inv. Co., 133 Ga. 769, 66 S.E. 1090, 29 L.R.A. (n.s.) 291 (1910); Burch v. King, 14 Ga. App. 153, 80 S.E. 664 (1914); Rogers v. Smith, 145 Ga. 234, 88 S.E. 963 (1916); Rumble v. Strange, 154 Ga. 512, 114 S.E. 881 (1922); Bristol Sav. Bank v. Nixon, 169 Ga. 282, 150 S.E. 148 (1929); Aiken v. Baynes, 170 Ga. 784, 154 S.E. 451 (1930); Ward v. Ward, 176 Ga. 849, 169 S.E. 120 (1933); Aycock v. Williams, 185 Ga. 585, 196 S.E. 54 (1938); Curtis v. Moss, 189 Ga. 165, 5 S.E.2d 654 (1939); Jones v. Federal Land Bank, 189 Ga. 419, 6 S.E.2d 52 (1939); Deck v. Deck, 193 Ga. 739, 20 S.E.2d 1 (1942); English v. Davis, 195 Ga. 89, 23 S.E.2d 394 (1942); Patellis v. Tanner, 197 Ga. 471, 29 S.E.2d 419 (1944); Cooper v. Littleton, 197 Ga. 381, 29 S.E.2d 606 (1944); Padgett v. Hatton, 200 Ga. 209, 36 S.E.2d 664 (1946); Smith v. Smith, 200 Ga. 373, 37 S.E.2d 367 (1946); Brooks v. Williams, 227 Ga. 59, 178 S.E.2d 880 (1970); Dunn v. Sanders, 243 Ga. 684, 256 S.E.2d 366 (1979); McGill v. McGill, 247 Ga. 428, 276 S.E.2d 587 (1981).

Words of Similar Import

Terms are words of purchase. — Words in the first sentence were previously construed as words of limitation; but subsequently to the adoption of the Code of 1863 those words and words of similar import were construed to mean children, and that word has been taken as a word of purchase, and not of limitation. Lumpkin v. Patterson, 170 Ga. 94, 152 S.E. 448 (1930).

In a deed or devise to ''A for life,'' with remainder to ''his heirs,'' or words of like import, the words ''his heirs'' are words of purchase, and not of limitation, and the instrument creates two estates, one to A for life, and at A's death another estate to A's children. Cooper v. Harkness, 188 Ga. 121, 2 S.E.2d 918 (1939).

Effect if children are in esse at time of vesting. — ''Children'' or words made of that import are words of purchase if the children are in esse at the time of vesting, otherwise the common law is unchanged and they are words of limitation. Cooper v. Mitchell Inv. Co., 133 Ga. 769, 66 S.E. 1090, 29 L.R.A. (n.s.) 291 (1910).

''Heirs at law'' is a phrase of description, under which are to be determined the substitute takers in the event the name taker fails to qualify as tenant. The phrase is referable to the testator, and the persons who may ultimately take by reason of being within its description take directly from the testator, as purchasers. Cooper v. Harkness, 188 Ga. 121, 2 S.E.2d 918 (1939).

''Heirs at law'' construed. — Whenever the words ''heirs at law'' are found in a will, unaccompanied by any qualifying or explanatory expressions, those words will be given the meaning which the law ordinarily gives those words, and only the persons will come within the class thus described who would take the property of the decedent under the statute of distributions if there had been no will. Cooper v. Harkness, 188 Ga. 121, 2 S.E.2d 918 (1939).

Words ''heirs at law'' must be treated as words of similar import to those mentioned in this statute. Lane v. Citizens & S. Nat'l Bank, 195 Ga. 828, 25 S.E.2d 800 (1943) (see O.C.G.A. § 44-6-23).

Terms ''heirs'' and ''lawful heirs'' necessarily mean the same as ''heirs at law.'' No one can be an ''heir'' or a ''lawful heir'' unless one is made so by law, there being no absolute right on the part of anyone to inherit from another, and all inheritance being the result of a statute, of ''law.'' Lane v. Citizens & S. Nat'l Bank, 195 Ga. 828, 25 S.E.2d 800 (1943).

Since the words ''heirs at law'' are words of similar import to those listed in this statute, the words must be construed as meaning children and the descendants of children, no intention to the contrary being manifested. Dodson v. Trust Co., 216 Ga. 499, 117 S.E.2d 331 (1960) (see O.C.G.A. § 44-6-23).

''Legal heirs'' construed. — Statute established the meaning of the words ''legal heirs'' (being words of similar import to those contained in the section) to be children and the descendants of children. Dodson v. Trust Co., 216 Ga. 499, 117 S.E.2d 331 (1960) (see O.C.G.A. § 44-6-23).

''Living heirs'' construed. — Words ''and her living heirs,'' as used in a legacy to K ''and her living heirs,'' are to be taken as words of purchase, if, at the time of the execution of the will and at the time of the death of the testatrix, K had two living children, and under such a construction, these children, together with their mother, all took equal shares as tenants in common in the property left by the legacy. McArthur v. Bone, 183 Ga. 796, 189 S.E. 831 (1937).

Words of Similar Import (Cont'd)

When there is no limitation over, so as to come within the provisions of this statute, the words, ''heirs,'' ''heirs of body,'' etc., imply limitation and not purchase; but addition of the word ''living'' to the word ''heirs'' (so that devise was ''to K and her living heirs'') would operate to change the rule. McArthur v. Bone, 183 Ga. 796, 189 S.E. 831 (1937) (see O.C.G.A. § 44-6-23).

"Bodily heirs," or words of similar import, are held to mean children. Craig v. Ambrose, 80 Ga. 134, 4 S.E. 1 (1887); Stanley v. Reeves, 149 Ga. 151, 99 S.E. 376 (1919); Thomas v. Berry, 151 Ga. 7, 105 S.E. 478 (1921); Starnes v. Sanders, 151 Ga. 632, 108 S.E. 37 (1921).

"Heirs by a particular person". — In cases where there is a limitation over to heirs or issue, the words ''heirs or issue'' shall be held to mean children. But grants to one and ''her heirs by a particular person,'' or ''her issue'' (as distinguished from a grant to A for life with limitation over to A's issue) convey an absolute estate, to the exclusion of any children that may be in life at the time of the conveyance. Johnson v. Sirmans, 69 Ga. 617 (1882); Whatley v. Barker, 79 Ga. 790, 4 S.E. 387 (1887); Ewing v. Shropshire, 80 Ga. 374, 7 S.E. 554 (1888); McCraw v. Webb, 134 Ga. 579, 68 S.E. 324 (1910).

"Children" does not mean grandchildren. — Word ''children'' has never included grandchildren. The term only embraces the first generation. Willis v. Jenkins, 30 Ga. 167 (1860).

"Heirs of the body" means children. — Under this statute the words ''heirs of the body'' mean children, and not grandchildren. Baynes v. Aiken, 166 Ga. 898, 144 S.E. 736 (1928) (see O.C.G.A. § 44-6-23).

Taking by Children and Descendants

"The time of the vesting of the estate," mentioned in this statute, when the children and descendants of deceased children, by representation, take the estate in remainder absolutely, must mean the vesting of the remainder in possession at the life tenant's death, in order to give the words a proper and legal sense. Crawley v. Kendrick, 122 Ga. 183, 50 S.E. 41, 2 Ann. Cas. 643 (1905) (see O.C.G.A. § 44-6-23).

Time for determining heirs at law. — Language in this statute, to wit, ''in being at the time of the vesting of the estate,'' refers to ''the descendants of deceased children, by representation,'' and does not refer to and does not qualify the word ''children.'' In other words, this statute properly punctuated in the second sentence, means that ''children'' shall take in the instances enumerated, and that ''the descendants of deceased children, by representation, in being at the time of the vesting of the estate, shall take.'' Lumpkin v. Patterson, 170 Ga. 94, 152 S.E. 448 (1930) (see O.C.G.A. § 44-6-23).

Man has heirs at law who inherit from him at only one time and that is at the moment of death. Prior to death, his children and possibly his wife, and if none of these his next kin, are heirs expectant and have no vested inheritable rights. They continue to be heirs only because they attained that identity at their ancestor's death. Raney v. Smith, 242 Ga. 809, 251 S.E.2d 554 (1979).

Title must have vested in child for descendants to take. — When the estate is a vested remainder in the children, defeasible only upon the contingency of their dying in the lifetime of the life tenant, leaving children, no descendants of a deceased child could take under it by representation, unless their parent was seized of a vested interest in the lifetime of the life tenant. Crawley v. Kendrick, 122 Ga. 183, 50 S.E. 41, 2 Ann. Cas. 643 (1905); Lumpkin v. Patterson, 170 Ga. 94, 152 S.E. 448 (1930).

This statute means that title to the remainder must first have vested in a child before the descendants of such child could take by purchase under the instrument by representation. If title had first vested, then, whether the deceased remainderman be alive or dead at the time of the vesting of the estate in possession at the death of the life tenant, descendants of deceased children would take by representation as purchasers under the instrument. Britt v. Fincher, 202 Ga. 661, 44 S.E.2d 372 (1947) (see O.C.G.A. § 44-6-23).

Child need not be in esse at time of vesting of possession. — Child or children having already taken during the existence of the life estate a vested remainder, it is not necessary for such child or children to be in esse at the time of the vesting of the estate in possession when the life estate ended, in

order for her heirs to take by inheritance. The foregoing is subject to the rule that the vested remainder, in such case, may open and take in other children who may be born subsequently to the death of the testator and prior to the death of the life tenant. Lumpkin v. Patterson, 170 Ga. 94, 152 S.E. 448 (1930).

Deceased child with no descendants. — Under a deed from a father conveying real property to his daughter ''for and during her natural life, and at her death to her heirs,'' where the life tenant gave birth to only one child, and it was born dead, the husband did not take the property as her sole heir, but the remainder estate failed; for no estate beyond that granted to the life tenant passed out of the grantor, and, upon the death of the life tenant and the failure of the remainder, the grantor or his heirs were entitled to the property. Beasley v. Calhoun, 178 Ga. 613, 173 S.E. 849 (1934).

First taker must have less than fee simple. — Before the heirs will take as children, there must be an estate less than a fee simple in the parent or the first taker. Munford v. Peeples, 152 Ga. 31, 108 S.E. 454 (1921).

RESEARCH REFERENCES

Am. Jur. 2d. — 23 Am. Jur. 2d, Deeds, § 243 et seq. 28 Am. Jur. 2d, Estates, §§ 332 et seq. 80 Am. Jur. 2d, Wills, §§ 1018, 1047 et seq.

C.J.S. — 26A C.J.S., Deeds, § 264 et seq. 96 C.J.S., Wills, §§ 910, 911, 917, 926 et seq., 935, 947, 949, 957 et seq., 1202 et seq.

ALR. — Meaning of term ''issue'' where used as a word of purchase, 2 ALR 930; 117 ALR 691.

Fee simple conditional, 114 ALR 602.

Doctrine as to possibility of issue being extinct as affecting property rights or taxation, 146 ALR 794; 98 ALR2d 1285.

Nature of estate created by grant or gift to one and his children, 161 ALR 612.

Time of ascertaining persons to take, under deed or inter vivos trust, where designated as the ''heirs,'' ''next of kin,'' ''children,'' ''relations,'' etc., of life tenant or remainderman, 65 ALR2d 1408.

Husband or wife as heir within provision of will or trust, 79 ALR2d 1438.

Modern status of the Rule in Shelley's Case, 99 ALR2d 1161.

44-6-24. Estates tail abolished; effect of limitations which would create estate tail by implication.

(a) Estates tail are prohibited and abolished and the law shall not presume or imply such an estate. Gifts or grants to a person and the heirs of his body, to his male heirs or female heirs, to his heirs by a particular person, to his children, or to his issue shall convey an absolute fee.

(b) Limitations which, by the English rules of construction, would create an estate tail by implication shall give a life estate to the first taker and with remainder over in fee to his children and their descendants, as provided in Code Section 44-6-23, and, if none is living at the time of his death, with remainder over in fee to the beneficiaries intended by the maker of the instrument. (Laws 1799, Cobb's 1851 Digest, p. 167; Laws 1821, Cobb's 1851 Digest, p. 169; Code 1863, § 2230; Code 1868, § 2224; Code 1873, § 2250; Code 1882, § 2250; Civil Code 1895, § 3085; Civil Code 1910, § 3661; Code 1933, § 85-505; Ga. L. 1984, p. 22, § 44.)

Law reviews. — For article, ''Estates Tail in Georgia,'' see 13 Ga. B.J. 27 (1950). For article surveying real property law, see 34 Mercer L. Rev. 255 (1982).

For comment on Brooks v. Williams, 227 Ga. 59, 178 S.E.2d 880 (1970), see 23 Mercer L. Rev. 399 (1972).

JUDICIAL DECISIONS

Analysis

General Consideration
Conveyance of Absolute Fee
Implied Estates Tail

General Consideration

Estate tail never presumed. — Estates tail being illegal, the law will never presume or imply such an estate. Ewing v. Shropshire, 80 Ga. 374, 7 S.E. 554 (1888).

Clear intention to create estate tail required. — By this statute, before an estate tail can be held to be created by any words in a will, those words must show such intention in the testator's mind very clearly. Gibson v. Hardaway, 68 Ga. 370 (1882) (see O.C.G.A. § 44-6-24).

Test for creation of estate tail. — Question whether or not an estate tail is created is always resolvable into two others, of which one is, what persons are intended to take the property and the other is, do these persons constitute a class, having succession from generation to generation, and to the end of the blood? Gaboury v. McGovern, 74 Ga. 133 (1884).

To create an estate tail, the limitation over must be to the heirs, general or special, of the holder of the freehold to be affected. Smith v. Collins, 90 Ga. 411, 17 S.E. 1013 (1892).

Intent deduced from whole instrument. — Devise to ''the children of my first wife and their children after them'' created an estate in remainder rather than an estate tail, for the law will never presume an estate tail if a remainder was likely intended, as deduced from the instrument as a whole. Cooper v. Mitchell Inv. Co., 133 Ga. 769, 66 S.E. 1090, 29 L.R.A. (n.s.) 291 (1910); Phinizy v. Wallace, 136 Ga. 520, 71 S.E. 896 (1911).

Section applicable to personalty. — Bequests of personal property expressed in such terms as would have passed an estate tail by the Statute De Donis Conditionalibus, will vest in the persons to whom they are made an absolute, unconditional, fee simple estate. Gray v. Gray, 20 Ga. 804 (1856).

No distinction as to creation of estate by will or deed. — This statute makes no distinction as to whether such estates are created by deed or by will. Baird v. Brookin, 86 Ga. 709, 12 S.E. 981, 12 L.R.A. 157 (1891) (see O.C.G.A. § 44-6-24).

Section inapplicable to fee conditional estate. — When estate is given to the widow during her widowhood to be divided between her and the testator's children upon her marriage, and if she should die without children by second marriage, her part to go to testator's children, this did not create an estate tail so as to become a fee simple under this statute. It created a fee conditional estate. Clements v. Glass, 23 Ga. 395 (1857) (see O.C.G.A. § 44-6-24).

Or to determinable fee. — Devise to T, T's heirs, executors, and assigns forever, except should T die ''without lineal descendants'' to go over to X, does not create an estate tail, because it cannot be inferred that ''lineal descendants'' created an estate in perpetuity; for the estate of the first taker is to be a fee simple excluding the ''lineal descendants,'' if T dies with lineal descendants, but if T does not die with them, the property is to go over. There is no entailment, devisor leaving it to devisee to provide for devisee's own issue, and hence this statute has no application. Forman v. Troup, 30 Ga. 496 (1860); Burton v. Black, 30 Ga. 638 (1860) (see O.C.G.A. § 44-6-24).

Devise to D ''and her child or children, should she have any,'' with remainder over to X, should she die leaving no children or grandchildren, creates a determinable fee in D and not an estate tail. Greer v. Pate, 85 Ga. 552, 11 S.E. 869 (1890).

Devise in a will to J in fee simple, ''and should my son J die without leaving any child or children, to revert back to my estate to be sold,'' conveys to J an estate in fee, defeasible on J's dying childless. Kinard v. Hale, 128 Ga.

485, 57 S.E. 761 (1907).

Estate tail converted to absolute fee. — See Hose v. King, 24 Ga. 424 (1858); Wayne v. Lawrence, 58 Ga. 15 (1877); Johnson v. Sirmans, 69 Ga. 617 (1882); Craig v. Ambrose, 80 Ga. 134, 4 S.E. 1 (1887); Whatley v. Barker, 79 Ga. 790, 4 S.E. 387 (1887); Griffin v. Stewart, 101 Ga. 720, 29 S.E. 29 (1897); Ellis v. Gray, 110 Ga. 611, 36 S.E. 97 (1900); McCraw v. Webb, 134 Ga. 579, 68 S.E. 324 (1910); Stamey v. McGinnis, 145 Ga. 226, 88 S.E. 935 (1916); Perkins v. Perkins, 147 Ga. 122, 92 S.E. 875 (1917); Lane v. Cordell, 147 Ga. 100, 92 S.E. 887 (1917); Harper v. John Hancock Mut. Life Ins. Co., 173 Ga. 51, 159 S.E. 687 (1931); Cole v. Ogg, 180 Ga. 343, 179 S.E. 116 (1935).

Estates made determinable fees or life estates with remainders over. — See Gibson v. Hardaway, 68 Ga. 370 (1882); Daniel v. Daniel, 102 Ga. 181, 28 S.E. 167 (1897); Chewning v. Shumate, 106 Ga. 751, 32 S.E. 544 (1899); Hertz v. Abrahams, 110 Ga. 707, 36 S.E. 409, 50 L.R.A. 361 (1900); English v. Davis, 195 Ga. 89, 23 S.E.2d 394 (1942).

Cited in Mallery v. Dudley, 4 Ga. 52 (1848); Kemp v. Daniel, 8 Ga. 385 (1850); Robert v. West, 15 Ga. 122 (1854); Smith v. Dunwoody, 19 Ga. 237 (1856); Childers v. Childers, 21 Ga. 377 (1857); Carroll v. Carroll, 25 Ga. 260 (1858); Andrews v. Bonner, 26 Ga. 520 (1858); Brown v. Weaver, 28 Ga. 377 (1859); Caraway v. Smith, 28 Ga. 541 (1859); Ford v. Cook, 73 Ga. 215 (1884); Wilkerson v. Clark, 80 Ga. 367, 7 S.E. 319, 12 Am. St. R. 258 (1888); Griffin v. Stewart, 101 Ga. 720, 29 S.E. 29 (1897); Hertz v. Abrahams, 110 Ga. 707, 36 S.E. 409, 50 L.R.A. 361 (1900); Hill v. Terrell, 123 Ga. 49, 51 S.E. 81 (1905); Phinizy v. Wallace, 136 Ga. 520, 71 S.E. 896 (1911); Pace v. Forman, 148 Ga. 507, 97 S.E. 70 (1918); Slappey v. Vining, 150 Ga. 792, 105 S.E. 353 (1920); Reynolds v. Dolvin, 154 Ga. 496, 114 S.E. 879 (1922); Lumpkin v. Patterson, 170 Ga. 94, 152 S.E. 448 (1930); Southwell v. Purcell, 172 Ga. 739, 158 S.E. 588 (1931); Beasley v. Calhoun, 178 Ga. 613, 173 S.E. 849 (1934); Palmer v. Atwood, 188 Ga. 99, 3 S.E.2d 63 (1939); Jones v. Federal Land Bank, 189 Ga. 419, 6 S.E.2d 52 (1939); Guess v. Morgan, 196 Ga. 265, 26 S.E.2d 424 (1943); Patellis v. Tanner, 197 Ga. 471, 29 S.E.2d 419 (1944); Folds v. Hartry, 201 Ga. 783, 41 S.E.2d 142 (1947); Brooks v. Williams, 227 Ga. 59, 178 S.E.2d 880 (1970); Whittle v. Speir, 235 Ga. 14, 218 S.E.2d 775 (1975); Worley v. Smith, 236 Ga. 888, 225 S.E.2d 911 (1976); Dunn v. Sanders, 243 Ga. 684, 256 S.E.2d 366 (1979).

Conveyance of Absolute Fee

Effect of enumerated words of entail. — Scheme of this statute with regard to words of entail pure and simple, used as such, unqualified by concomitant or explanatory terms, is briefly this: In the examples enumerated in subsection (a) and in them only, they are words of limitation, and as the law recognizes but one species of inheritance, that of heirs general, they pass an absolute fee. In all other instances of their use, they are treated as limitations over, and the words of entail are converted into words of purchase. Ewing v. Shropshire, 80 Ga. 374, 7 S.E. 554 (1888) (see O.C.G.A. § 44-6-24).

Terms are not words of purchase. — Words creating estates tail as enumerated here are not intended as words of purchase because former Code 1882, § 2249 (see O.C.G.A. § 44-6-23) made the generic terms, ''heirs of body'' and ''issue,'' words of purchase only in ''limitations over.'' Ewing v. Shropshire, 80 Ga. 374, 7 S.E. 554 (1888).

Although in cases when there is a limitation over to heirs or issue, the words ''heirs or issue'' shall be held to mean children under former Civil Code 1895, § 3084 (see O.C.G.A. § 44-6-23), granted to one and ''her heirs by a particular person,'' or ''her issue,'' convey an absolute estate under former Civil Code 1895, § 3085 (see O.C.G.A. § 44-6-24) to the exclusion of any children that may be in life at the time of the conveyance. The grant being to her, ''her heirs and issue by W,'' the combination of two sets of words of limitation cannot by any sort of legal alchemy convert them into words of purchase. McCraw v. Webb, 134 Ga. 579, 68 S.E. 324 (1910).

Terms are words of purchase in limitation over. — It is only when the distributive words change the line of descent marked out for property, by the words upon which they are engrafted, that the latter are taken as words of purchase. Hollifield v. Stell, 17 Ga. 280 (1855).

When a particular estate was created with a limitation over to heirs, heirs of the body, lineal heirs, lawful heirs, issue, or words of

Conveyance of Absolute Fee (Cont'd)

similar import, the words will be held to mean children, and hence words of purchase under former Code 1882, § 2249 (see O.C.G.A. § 44-6-23), but if a devise was made to one and one's bodily heirs, this, under the Rule in Shelley's Case, would create an estate in perpetuity, and would convey a fee simple to the devisee named. Craig v. Ambrose, 80 Ga. 134, 4 S.E. 1 (1887).

Interpretation of "heirs of the body" as words of purchase. — While the words ''heirs of the body'' prima facie import an estate tail, yet notwithstanding they sound like words of limitation upon circumstances and the intention of the parties, they may be construed as words of purchase, and descriptive of the person who is to take. Evans v. Edenfield, 170 Ga. 805, 154 S.E. 257 (1930).

While a gift or grant to A and the heirs of A's body, or words of similar import, operates to vest the full fee simple title in A, this rule would not apply if a less estate has been carved out, and the term ''heirs of his body'' is used in connection with a limitation over in remainder. McArthur v. Bone, 183 Ga. 796, 189 S.E. 831 (1937).

Words of "living heirs". — If there is no limitation over, so as to come within the provisions of this statute, the words ''heirs,'' ''heirs of body,'' etc., imply limitation and not purchase; but the addition of the word ''living'' to the word ''heirs'' (so that devise was ''to K and her living heirs'') would operate to change the rule. McArthur v. Bone, 183 Ga. 796, 189 S.E. 831 (1937) (see O.C.G.A. § 44-6-24).

Interpretation of "heirs of the body" as words of limitation. — Prior to the adoption of this statute, the term ''heirs of the body,'' when used in conveyances, unless modified or controlled by qualifying or explanatory words, were words of limitation, not words of purchase. This statute leaves them still words of limitation, if no less estate than the fee is expressed, and if they are used not by way of limitation over, but of direct and immediate limitation of the estate granted. When they take effect as words of limitation, they pass not a fee tail but a fee simple. Wilkerson v. Clark, 80 Ga. 367, 7 S.E. 319, 12 Am. St. R. 258 (1888) (see O.C.G.A. § 44-6-24).

Limitation power of the term, ''heirs of the body,'' is neither more nor less than that of ''heirs,'' but just the same. Wilkerson v. Clark, 80 Ga. 367, 7 S.E. 319, 12 Am. St. R. 258 (1888).

Language to "the buyer, his heirs and assigns" referring to conveyance of property operates to convey an absolute fee simple only in the named purchasers. Black v. Georgia Mem. Park Cem., 173 Ga. App. 290, 325 S.E.2d 901 (1985).

Interpretation of "issue". — Words ''after her death, if no lawful issue'' were construed to mean without lawful issue at the death of the deceased, and to constitute a good limitations in an executory devise. Atwell Ex'rs v. Barney, 1 Dudley 207 (1831).

Devise over on failure of increase. — Devise to A as trustee and testamentary guardian for S and S's increase ''to deliver over the entire estate to E in case of failure of increase,'' could not mean a delivery over in case of an indefinite failure of issue, but referred to issue living at death of S. Benton v. Patterson, 8 Ga. 146 (1850). See Tucker v. Adams, 14 Ga. 548 (1854); Hollifield v. Stell, 17 Ga. 280 (1855).

Definite failure of issue prevents entailment. — When the limitation over is upon a definite failure of issue an estate tail could never be implied, and this statute could have no application in such cases. The definiteness of the failure may be shown by the terms themselves limiting the failure to the life of the life tenant either expressly or by superadded words having that effect, as when the will designates that the executor is to make the division upon such failure. Groce v. Rittenberry, 14 Ga. 232 (1853); Claxton v. Weeks, 21 Ga. 265 (1857); Doe v. Roe, 30 Ga. 453 (1860); Forman v. Troup, 30 Ga. 496 (1860); Burton v. Black, 30 Ga. 638 (1860); Tennell v. Ford, 30 Ga. 707 (1860); Hill v. Alford, 46 Ga. 247 (1872); Matthews v. Hudson, 81 Ga. 120, 7 S.E. 286, 12 Am. St. R. 305 (1888); Greer v. Pate, 85 Ga. 552, 11 S.E. 869 (1890); Hertz v. Abrahams, 110 Ga. 707, 36 S.E. 409, 50 L.R.A. 361 (1900) (see O.C.G.A. § 44-6-24).

Meaning of "children". — According to the English law, all the words enumerated in subsection (a) are primarily words of entail except ''children,'' which is primarily a word of purchase. While the other words when used alone are not ambiguous, this one is; and its introduction into the clause with the others upon an apparent equality, as though

it were as free as they from ambiguity, is what makes the chief difficulty of construction. According to Wilde's case, when this word is coupled in the gift or grant immediately with the ancestor, as in the language of the Code, it imports limitation, and consequently an estate tail, if there be no child or children in esse at the time of the conveyance; but otherwise, even when so connected, it is a word of purchase. Its real quality in any given instance, where it is used alone in such connection, depends upon an extrinsic fact, to wit, the existence or nonexistence at the time of the gift or grant of persons, or at least of a person to whom the word can properly be applied. The Code betrays not the slightest consciousness of this double or conditional signification of the term, but seems to treat it as if its meaning were as fixed and invariable as that of the words with which it is associated. Ewing v. Shropshire, 80 Ga. 374, 7 S.E. 554 (1888) (see O.C.G.A. § 44-6-24).

When attention is confined to the word ''children'' as a word of entail, the ambiguity of the word, though still existing in the law as whole, disappears from this statute and ceases to disturb it. As one of entail, the word has but a single meaning, and that alone is within the clause; consequently the clause, though apparently ambiguous, is not really so, but is wholly free from ambiguity. Ewing v. Shropshire, 80 Ga. 374, 7 S.E. 554 (1888) (see O.C.G.A. § 44-6-24).

Application of "children" limited. — Word ''children,'' as used in this statute, applies only when the grantee has no children in esse when the grant takes effect. Stamey v. McGinnis, 145 Ga. 226, 88 S.E. 935 (1916) (see O.C.G.A. § 44-6-24).

Effect of "children" when there are no children in esse. — Devise to the daughters of a testator of property to be settled upon them before the consummation of any marriage, ''so that the same may be enjoyed by them and their children after them;'' there being no children in esse, would create an estate tail, and therefore a fee simple title would vest in the first taker under this statute. Butler v. Ralston, 69 Ga. 485 (1882) (see O.C.G.A. § 44-6-24).

Devise to X and X's children creates a tenancy in common if the children be in life, but, if they be not in life, it is an estate tail converted into a fee simple by this statute. Ewing v. Shropshire, 80 Ga. 374, 7 S.E. 554 (1888); Estill v. Beers, 82 Ga. 608, 9 S.E. 596 (1889); Baird v. Brookin, 86 Ga. 709, 12 S.E. 981, 12 L.R.A. 157 (1891); McCord v. Whitehead, 98 Ga. 381, 25 S.E. 767 (1896); Hollis v. Lawton, 107 Ga. 102, 32 S.E. 846, 73 Am. St. R. 114 (1899); Sumpter v. Carter, 115 Ga. 893, 42 S.E. 324, 60 L.R.A. 274 (1902) (see O.C.G.A. § 44-6-24).

Under this statute, a conveyance to three daughters and their children, one of them having a child at the time and the others none, passes an estate in common to the one daughter and her child, and sole estate in fee to each of the other daughters. Estill v. Beers, 82 Ga. 608, 9 S.E. 596 (1889) (see O.C.G.A. § 44-6-24).

When the testator devised to the testator's daughter certain land ''to her and her children,'' the daughter then having no children, the daughter took an absolute estate, and children born to her after the testator's death took under the will no estate by way of remainder or otherwise. Bank of Graymont v. Kingery, 170 Ga. 771, 154 S.E. 355 (1930).

Effect of "children, should any be born". — Legal effect of the words ''and her children or child, should any be born to her,'' is the same as if it had been made to D and D's children (D having no children at the time), which, standing alone would create an express estate tail and invest D, under this statute, with the absolute fee. Butler v. Ralston, 69 Ga. 485 (1882); Lofton v. Murchison, 80 Ga. 391, 7 S.E. 322 (1888); Ewing v. Shropshire, 80 Ga. 374, 7 S.E. 554 (1888); Estill v. Beers, 82 Ga. 608, 9 S.E. 596 (1889); Goodrich v. Pearce, 83 Ga. 781, 10 S.E. 451 (1889); Baird v. Brookin, 86 Ga. 709, 12 S.E. 981, 12 L.R.A. 157 (1891); Davis v. Hollingsworth, 113 Ga. 210, 38 S.E. 827, 84 Am. St. R. 233 (1901) (see O.C.G.A. § 44-6-24).

Section inapplicable when "children" is word of purchase. — Will ''to C and at her death to go to her children,'' created an estate for life in the daughter of the testator with remainder to her children living at her death and therefore is not an entailment under this statute. Ford v. Cook, 73 Ga. 215 (1884) (see O.C.G.A. § 44-6-24).

Word ''children'' is a word of purchase and not of limitation, and a conveyance to a husband and wife and ''to their children'' carries title in fee simple to such children of

Conveyance of Absolute Fee (Cont'd)

the husband and wife as are in esse at the time of the conveyance, as tenants in common with their parents, even though such children are not designated by their names. This statute has no application to such a case. Keith v. Chastain, 157 Ga. 1, 121 S.E. 233 (1923) (see O.C.G.A. § 44-6-24).

Limitation over or reversion limits to determinable fee. — Deed to X "and her children should any be born to her" (she having no child at that time), "and in the event she die without any in life, then to revert" conveys a determinable fee to X. Davis v. Hollingsworth, 113 Ga. 210, 38 S.E. 827, 84 Am. St. R. 233 (1901).

Deed to X and heirs of X's body with provision of reverter in case of such failure of heirs conveys a fee tail which is converted into a fee simple under this statute and made a determinable fee by the reverter provision. Shealy v. Wammock, 115 Ga. 913, 42 S.E. 239 (1902) (see O.C.G.A. § 44-6-24).

Life estate with remainder in fee created. — Under this statute, a deed to one and the heirs of one's body after one's death conveys a life estate to the first taker, with a remainder over to one's children. Bristol Sav. Bank v. Nixon, 169 Ga. 282, 150 S.E. 148 (1929); Evans v. Edenfield, 170 Ga. 805, 154 S.E. 257 (1930) (see O.C.G.A. § 44-6-24).

Implied Estates Tail

Construction of subsection (b). — Subsection (b) of this statute should be held to mean that limitations which, under the English rules of construction, would create an estate tail by implication, and which are not illegal, are to be construed as provided by it. In other words, it would in some cases save provisions in deeds and wills which might otherwise be brought under the ban of the statute making all estates tail illegal. Slappey v. Vining, 150 Ga. 792, 105 S.E. 353 (1920) (see O.C.G.A. § 44-6-24).

Estates tail by implication arose in England under devises wherein a greater estate than for the life of the first taker was irresistibly inferred when the devise was to A, without the added words "and his heirs," and the same estate was limited over upon words importing an indefinite failure of issue; and hence, in such devises, as, to A, and if A dies without issue, to B, the devise was construed by necessary implication to be equivalent to a devise to A and A's issue, and if A dies without issue, to B, so as to bring it within the intent, if not the letter, of the statute De Donis. Hertz v. Abrahams, 110 Ga. 707, 36 S.E. 409, 50 L.R.A. 361 (1900) (see O.C.G.A. § 44-6-24).

Life estate to A, remainder to children, does not create estate tail. — An estate to B for life, remainder to B's children, if any, but if none, then to R, cannot possibly be made an estate tail, for the term "children" does not describe any such class. In its proper sense, it includes only the next generation to B and to make it include more, there must be something in the will to show that it is used in a broader sense. The persons who take under the description of children must all be in life at the death of B. The conveyance exhausts itself on a single generation, and creates nothing which bears a resemblance to an estate tail. An estate tail by implication can arise only in cases of the absence of an expressed intention. Burton v. Black, 30 Ga. 638 (1860); Tennell v. Ford, 30 Ga. 707 (1860).

When a limitation is to a parent for life, and to the parent's children by way of remainder, there seems to be no ground, whether there are children or not, for holding the parent to be a tenant in tail. Gaboury v. McGovern, 74 Ga. 133 (1884).

Subsection (b) inapplicable to conveyance with limitation referred to in § 44-6-25. — Since a limitation of the type referred to in former Code 1933, § 85-506 (see O.C.G.A. § 44-6-25) will no longer be construed to refer to an indefinite failure of issue, but must now be construed to mean a definite failure of issue at the death of the first taker, no fee tail can be implied from such a limitation by the English rules of construction. Thus, the portion of subsection (b) of former Code 1933, § 85-505 (see O.C.G.A. § 44-6-24) referring to implied fee tails by the English rules of construction was inapplicable to a conveyance containing such a limitation. Raines v. Duskin, 247 Ga. 512, 277 S.E.2d 26 (1981).

RESEARCH REFERENCES

Am. Jur. 2d. — 28 Am. Jur. 2d, Estates, §§ 48 et seq., 415 et seq. 80 Am. Jur. 2d, Wills, §§ 993, 1010.

C.J.S. — 26A C.J.S., Deeds, §§ 247, 249, 263 et seq., 274 et seq. 31 C.J.S., Estates, § 24 et seq. 96 C.J.S., Wills, §§ 1258 et seq., 1270, 1310.

ALR. — Fee simple conditional, 114 ALR 602.

Restraint upon voluntary alienation of legal life estate, 160 ALR 639.

Nature of estate created by grant or gift to one and his children, 161 ALR 612.

Husband or wife as heir within provision of will or trust, 79 ALR2d 1438.

Estate created by deed to one and his ''blood heirs'' or ''blooded heirs,'' 89 ALR2d 1222.

Modern status of the Rule in Shelley's Case, 99 ALR2d 1161.

44-6-25. Construction and effect of limitations over after death of first taker.

All limitations over after the death of the first taker, upon his ''dying without heirs,'' ''dying without issue,'' ''dying without leaving heirs or issue,'' ''on failure of issue,'' or other and equivalent terms, shall be construed to mean a failure of heirs or issue at the time of the death of the first taker and shall convey the estate in the manner prescribed in Code Section 44-6-24. (Ga. L. 1853-54, p. 72, § 1; Code 1863, § 2231; Code 1868, § 2225; Code 1873, § 2251; Code 1882, § 2251; Civil Code 1895, § 3086; Civil Code 1910, § 3662; Code 1933, § 85-506.)

Law reviews. — For article, ''Descendible Future Interests in Georgia: The Effect of the Preference for Early Vesting,'' see 7 Ga. L. Rev. 443 (1973). For article surveying real property law, see 34 Mercer L. Rev. 255 (1982).

JUDICIAL DECISIONS

Will made prior to 1854 controlled by common law. — Whether words in a will made by a testator who died before the Act of February 17, 1854, create an estate tail is to be controlled by the decisions of the English courts construing such or similar words in devises of real property in connection with the Statute De Donis Conditionalibus. Hertz v. Abrahams, 110 Ga. 707, 36 S.E. 409, 50 L.R.A. 361 (1900).

Common-law devise limited upon indefinite failure of issue. — At common law, a devise to A and, in case of A's death without issue, to B, was a devise limited upon an indefinite failure of issue, which, under the English rules of interpretation, created an estate tail by implication under the Statute De Donis. An executory devise which was limited upon words importing an indefinite failure of issue of the first taker was void for remoteness. Hertz v. Abrahams, 110 Ga. 707, 36 S.E. 409, 50 L.R.A. 361 (1900).

Effect. — This statute swept away at one blow all the mass of legal lore on limitations and perpetuities. Gray v. Gray, 20 Ga. 804 (1856); Forman v. Troup, 30 Ga. 496 (1860) (see O.C.G.A. § 44-6-25).

This statute is not a declaratory statute of any former law, and the statute converts into a defeasible fee what before the statute's enactment was an estate tail by implication. Worrill v. Wright, 25 Ga. 657 (1858); Hertz v. Abrahams, 110 Ga. 707, 36 S.E. 409, 50 L.R.A. 361 (1900) (see O.C.G.A. § 44-6-25).

Effect upon Rule in Shelley's Case. — Effect of this statute is the vertical abolition of the Rule in Shelley's Case as to limitations over in conveyances. This abolition results only incidentally from the change in the rules of construction which previously ob-

tained, so that now the words of limitation enumerated are made words of purchase and the children take from the grantor or devisor as purchasers rather than from the devisee or grantee by inheritance. Smith v. Collins, 90 Ga. 411, 17 S.E. 1013 (1892) (see O.C.G.A. § 44-6-25).

Section prevents creation of implied fee tail. — Since a limitation of the type referred to in O.C.G.A. § 44-6-25 will no longer be construed to refer to an indefinite failure of issue, but must now be construed to mean a definite failure of issue at the death of the first taker, no fee tail can be implied from such a limitation by the English rules of construction. Raines v. Duskin, 247 Ga. 512, 277 S.E.2d 26 (1981).

"Lineal heirs" equivalent to "issue". — It is quibbling to say that ''lineal heirs'' is not an equivalent term to ''issue.'' The mischief in both cases is the same, and the same remedy applies. Forman v. Troup, 30 Ga. 496 (1860).

Dying "without bodily heirs". — ''Bodily heirs'' is not specifically enumerated in O.C.G.A. § 44-6-25. However, dying ''without bodily heirs'' is equivalent to dying ''without issue.'' Raines v. Duskin, 247 Ga. 512, 277 S.E.2d 26 (1981).

Section applied to create determinable fee. — See Greer v. Pate, 85 Ga. 552, 11 S.E. 869 (1890); Davis v. Hollingsworth, 113 Ga. 210, 38 S.E. 827, 84 Am. St. R. 233 (1901); Shealy v. Wammock, 115 Ga. 913, 42 S.E. 239 (1902); Kinard v. Hale, 128 Ga. 485, 57 S.E. 761 (1907); Nottingham v. McKelvey, 149 Ga. 463, 100 S.E. 371 (1919); Scranton-Lackawanna Trust Co. v. Bruen, 206 Ga. 872, 59 S.E.2d 397 (1950).

Will devising to T to hold the same to T's heirs, executors, and assigns forever, except should T die without lineal heirs to go to the children of X, or the survivors, refers to a definite failure of issue, and creates a fee simple determinable upon death without lineal descendants; passing in such case to the children of X, rather than creating a fee tail and hence a fee simple in T, under Laws 1821, Cobb's 1851 Digest, p. 169 (see O.C.G.A. § 44-6-24). Forman v. Troup, 30 Ga. 496 (1860); Burton v. Black, 30 Ga. 638 (1860).

Unless there is something to indicate a contrary intent on the part of the testator, a devise or bequest to a named person, followed by a provision that if one shall die childless the property shall pass to some other person, conveys to one a fee, subject to be divested upon one's dying childless, or, as it is sometimes called, a base or qualified fee. Scranton-Lackawanna Trust Co. v. Bruen, 206 Ga. 872, 59 S.E.2d 397 (1950).

Section applied to create life estate with contingent remainder. — See Fulcher v. Mixon, 55 Ga. 72 (1875); Nussbaun & Dannenberg v. Evans, 71 Ga. 753 (1883); Lumpkin v. Patterson, 170 Ga. 94, 152 S.E. 448 (1930).

Devise to X ''for his life with remainder in fee to his surviving issue, if any; and if none then to the heirs'' of Y, created a life estate in X with a contingent remainder in X's heirs which accords with this statute. Wright v. Hill, 140 Ga. 554, 79 S.E. 546 (1913) (see O.C.G.A. § 44-6-25).

Cited in Cook v. Walker, 15 Ga. 457 (1854); Hollifield v. Stell, 17 Ga. 280 (1855); Childers v. Childers, 21 Ga. 377 (1857); Wilkerson v. Clark, 80 Ga. 367, 7 S.E. 319, 12 Am. St. R. 258 (1888); Ewing v. Shropshire, 80 Ga. 374, 7 S.E. 554 (1888); Crawley v. Kendrick, 122 Ga. 183, 50 S.E. 41, 2 Ann. Cas. 643 (1905); Megahee v. Hatcher, 146 Ga. 498, 91 S.E. 677 (1917); Whittle v. Speir, 235 Ga. 14, 218 S.E.2d 775 (1975); Dunn v. Sanders, 243 Ga. 684, 256 S.E.2d 366 (1979).

RESEARCH REFERENCES

Am. Jur. 2d. — 28 Am. Jur. 2d, Estates, §§ 48 et seq., 415 et seq.

C.J.S. — 26A C.J.S., Deeds, §§ 247, 253, 254, 264 et seq., 274 et seq. 31 C.J.S., Estates, §§ 24 et seq., 145 et seq. 70 C.J.S., Perpetuities, §§ 11, 13, 18. 96 C.J.S., Wills, §§ 1258, 1261 et seq., 1270.

ALR. — Meaning of term ''issue'' where used as a word of purchase, 2 ALR 930; 117 ALR 691.

Fee simple conditional, 114 ALR 602.

Nature of estates or interests created by grant or devise to one and heirs if donee should have any heirs, 16 ALR2d 670.

Validity of restraint, ending not later than expiration of a life or lives in being, on

alienation of an estate in fee, 42 ALR2d 1243.

ARTICLE 3

ESTATES GRANTED UPON CONDITIONS

Law reviews. — For article, ''Creation of Defeasible Fees,'' see 15 Ga. B.J. 20 (1952). For article surveying Georgia cases in the area of real property from June 1977 through May 1978, see 30 Mercer L. Rev. 167 (1978).

For comment on Phillips v. Naff, 332 Mich. 389, 52 N.W.2d 158 (1952), see 15 Ga. B.J. 71 (1952).

JUDICIAL DECISIONS

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).

Cited in Golden v. National Life & Accident Ins. Co., 189 Ga. 79, 5 S.E.2d 198 (1939).

RESEARCH REFERENCES

ALR. — Commencement of development within fixed term as extending term of oil and gas lease, 67 ALR 526.

Deed in consideration of support of grantor as creating an estate upon condition or a conditional limitation, 76 ALR 742.

Use or exploitation of property for a purpose other than, but not exclusive of, use specified by a deed creating a determinable fee or a fee simple subject to condition subsequent, 137 ALR 639.

''Divide and pay over'' rule, for purpose of determining vested or contingent character of future estate, 144 ALR 1155; 16 ALR2d 1383.

Commencement of running of statute of limitations respecting actions by owners of right of re-entry, or actions against third persons by reversioners, 19 ALR2d 729.

Construction and application of ''first refusal'' option contained in trust instrument and relating to sale or shares of stock, 51 ALR3d 1327.

Laches or delay in bringing suit as affecting right to enforce restrictive building covenant, 25 ALR5th 233.

44-6-40. Grant of estates upon conditions.

An estate may be granted upon either express or implied conditions. The estate shall commence, be enlarged, or be defeated upon the performance or breach of the conditions. (Orig. Code 1863, § 2275; Code 1868, § 2268; Code 1873, § 2294; Code 1882, § 2294; Civil Code 1895, § 3136; Civil Code 1910, § 3716; Code 1933, § 85-901.)

JUDICIAL DECISIONS

Instruments containing conditions construed to enforce intent. — Cardinal rule of construction, under both common and statutory law, is that instruments containing conditions, limitations, and restrictions are to be construed in each case in such a way as

to carry into effect the intent of the parties as gathered from the instrument as a whole. Wadley Lumber Co. v. Lott, 130 Ga. 135, 60 S.E. 836 (1908).

General rule of construction for condition subsequent. — 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 the estate, 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 after taking possession, then the condition is subsequent. Gordon v. Whittle, 206 Ga. 339, 57 S.E.2d 169 (1950).

Words necessary to create conditions in wills. — No precise form of words is necessary to create conditions in wills. Any expression disclosing the intention will be sufficient to create a condition, but such intention must be definitely expressed. Hilton v. Sherman, 155 Ga. 624, 118 S.E. 356 (1923).

Deed not construed as grant on condition subsequent unless express language used or intent clear. — 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); Floyd v. Hoover, 141 Ga. App. 588, 234 S.E.2d 89 (1977).

Words of covenant distinguished from condition. — When the words, ''On the express understanding and agreement on the part of said A.H.S. (the grantee) that the lot of land so conveyed is never to be sold to or occupied by negroes,'' are attached to a deed, those are words of covenant and not of condition. Anthony v. Stephens, 46 Ga. 241 (1872).

Words of forfeiture, avoidance, or defeasance will convey estate in fee on a condition subsequent. Floyd v. Hoover, 141 Ga. App. 588, 234 S.E.2d 89 (1977).

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 act of God or by subsequent conduct of the grantor. Evans v. Brown, 196 Ga. 634, 27 S.E.2d 300 (1943).

Deed conditioned upon paying judgments by time certain deemed condition subsequent. — Deed which was conditioned upon the payment of certain judgments by a time certain and to become absolute on default thereof is a deed upon a condition subsequent and not a mortgage. Burnside v. Terry, 45 Ga. 621 (1872).

Grantor may convey land on condition that grantee shall care for grantor for life, and provide therein that a failure to perform the condition shall have the effect of defeating the estate granted. Jones v. Williams, 132 Ga. 782, 64 S.E. 1081 (1909).

Without proper words, grantor given only equity action to rescind support contract if grantee insolvent. — Deed executed upon a consideration to support the grantor, without apt or proper words to create a condition, a breach of which would render the estate defeasible at the grantor's election, passes title to the grantee, and the failure of the grantee to maintain and support the grantor may give the latter a right of action in equity to rescind the contract if the grantee is insolvent. McCardle v. Kennedy, 92 Ga. 198, 17 S.E. 1001, 44 Am. St. R. 85 (1893); Jones v. Williams, 132 Ga. 782, 64 S.E. 1081 (1909).

Devise with condition subsequent inhibiting alienation to devisee's wife or her children valid. — Devise of land in fee with a condition subsequent inhibiting alienation to the wife of the devisee or her children directly, or indirectly as by ''any legal proceedings or order of court,'' as the restriction against alienation was limited to one person and her children and did not extend generally to all persons, was valid as against the objection that it was repugnant to the estate devised, nor was it void on the ground that it was repugnant to the nature of the estate granted, contrary to law, contrary to public policy, or prevented performance of parental duties. Blevins v. Pittman, 189 Ga. 789, 7 S.E.2d 662 (1940).

Grant of land "so long as". — Provision granting land so long as used for school purposes creates estate upon condition subsequent, upon the breach of which the land

would revert to the grantor, the grantor's estate, or heirs. Williams v. Thomas County, 208 Ga. 103, 65 S.E.2d 412 (1951).

Conditional estate not created by deed entitling grantor to purchase property upon violation of agreement. — When a deed in consideration of $10.00 was executed by a corporation and delivered, purporting to convey fee simple title to a tract of land, which deed contained an agreement that the property ''will be used for county school purposes only, and should this provision be violated, the grantor herein shall have the right to purchase the above property for $2,000.00,'' such clause did not create a conditional estate dependent upon a condition subsequent. Gearhart v. West Lumber Co., 212 Ga. 25, 90 S.E.2d 10 (1955).

Cited in Johnson v. Hobbs, 149 Ga. 587, 101 S.E. 583 (1919); Hollomon v. Board of Educ., 168 Ga. 359, 147 S.E. 882 (1929); Lucas v. Lucas, 171 Ga. 806, 156 S.E. 680 (1931); Moore v. Wells, 212 Ga. 446, 93 S.E.2d 731 (1956); Roe v. Doe, 246 Ga. 138, 268 S.E.2d 901 (1980).

RESEARCH REFERENCES

Am. Jur. 2d. — 28 Am. Jur. 2d, Estates, § 148.

C.J.S. — 21 C.J.S., Covenants, § 1. 26A C.J.S., Deeds, §§ 246, 273, 304 et seq., 326. 31 C.J.S., Estates, §§ 7, 8, 10, 12, 21 et seq. 96 C.J.S., Wills, §§ 1238, 1239, 1254 et seq, 1280. 97 C.J.S., Wills, § 1380.

ALR. — Reservation by successive grantors of re-entry for breach of conditions subsequent in deeds, 114 ALR 566.

Distinction between contingent estates and estates vested, subject to defeasance, 131 ALR 712.

Provision of will for forfeiture in case of contest, as applied to contest by one not a beneficiary, 7 ALR2d 1357.

Nature of estate conveyed by deed for park or playground purposes, 15 ALR2d 975.

Validity and effect of transfer of possibility of reverter or right of re-entry, following conveyance of determinable fee or fee subject to condition subsequent, 53 ALR2d 224.

44-6-41. Conditions precedent and subsequent distinguished; preferred construction and remedy.

Conditions may be either precedent or subsequent; conditions precedent require performance before the estate shall vest, and conditions subsequent may cause a forfeiture of a vested estate. The law favors conditions to be subsequent rather than precedent and to be remediable by damages rather than by forfeiture. (Orig. Code 1863, § 2276; Code 1868, § 2269; Code 1873, § 2295; Code 1882, § 2295; Civil Code 1895, § 3137; Civil Code 1910, § 3717; Code 1933, § 85-902.)

Law reviews. — For article discussing problems in construction of instrument conveying gift to a group or class, see 6 Ga. St. B.J. 169 (1969).

JUDICIAL DECISIONS

Analysis

General Consideration
Conditions Precedent
Conditions Subsequent
1. Rules of Construction
2. Illustrative Cases
Remedies

General Consideration

Estate vested when immediate or fixed right of enjoyment. — An estate is vested when there is an immediate right of enjoyment, or a present fixed right of future enjoyment. Lassiter v. Bank of Dawson, 191 Ga. 208, 11 S.E.2d 910 (1940).

Cited in Grantham v. Royal Ins. Co., 34 Ga. App. 415, 130 S.E. 589 (1925); Roberts v. Hardin, 179 Ga. 114, 175 S.E. 362 (1934); Perkins v. Citizens & S. Nat'l Bank, 190 Ga. 29, 8 S.E.2d 28 (1940); Hogan v. Brodgon, 194 Ga. 474, 22 S.E.2d 54 (1942); Mendel v. Pinkard, 108 Ga. App. 128, 132 S.E.2d 217 (1963); Churches Homes for Bus. Girls, Inc. v. Manget Found., Inc., 110 Ga. App. 539, 139 S.E.2d 138 (1964); Raby v. Minshew, 238 Ga. 41, 231 S.E.2d 53 (1976).

Conditions Precedent

Vesting of prior estate dependent upon prescribed event not condition precedent. — Generally where a prior estate is made to depend upon any prescribed event, and the second estate is to arise upon the determination of that event, the vesting of the prior estate is not to be taken as a condition precedent, but upon its failure the second estate takes effect. Jossey v. Brown, 119 Ga. 758, 47 S.E. 350 (1904).

Stipulation providing for payment before entry to cut timber. — Stipulation in an instrument conveying timber, providing for part payment down and the remainder upon entering to cut, does not make payment of the balance a condition precedent to the entering to cut. McRae v. Stillwell, Millen & Co., 111 Ga. 65, 36 S.E. 604, 55 L.R.A. 513 (1900).

Direction that executors furnish home to testator's wife. — When a testator directs that his executors shall furnish to his wife a home to be selected by her and to be her property, to be used as a home for herself and his minor children and any other of his children who may desire to reside there, such gift is absolute and unconditional; and failure of the wife to select the home during her life will not defeat the legacy, the right of section of the home not being a condition precedent, the nonperformance of which will defeat the gift. Hilton v. Sherman, 155 Ga. 624, 118 S.E. 356 (1923).

Provision held to be covenant, not words of condition. — Lease provision requiring lessor to modify building in accordance with blueprint and city requirements was a covenant, and not words of condition; the remedy for a breach was an action for damages, 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).

Conditions Subsequent

1. Rules of Construction

Termination of estate for years. — Estate for years may be made to terminate upon contingency or condition subsequent. P.H. Snook & Austin Furn. Co. v. Steiner & Emery, 117 Ga. 363, 43 S.E. 775 (1903).

General rule of construction. — 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 the estate, 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 after taking possession, then the condition is subsequent. Gordon v. Whittle, 206 Ga. 339, 57 S.E.2d 169 (1950).

Conditions subsequent are construed strictly, because conditions tend to destroy estates, and the rigorous exaction of the conditions is a species of summum jus, and in many cases hardly reconcilable with conscience. If it is doubtful whether a clause in a deed is a covenant or a condition, the courts will incline against the latter construction, for a covenant is far preferable to the tenant. Doe v. Roe, 39 Ga. 202 (1869).

Distinction between condition subsequent and limitation upon condition. — Difference between a limitation and a condition subsequent is that in the latter the grantor must reenter, or make a claim in case reentry is impossible or impracticable. In case of a condition at common law, the grantor or the grantor's heirs alone can defeat the estate by entry for condition broken. In a conditional limitation, the estate determines, ipso facto, upon the happening of the event, and goes over at once to the grantor by reverter, or to the person to whom it is limited upon the

happening of the contingency. Atlanta Consol. S. Ry. v. Jackson, 108 Ga. 634, 34 S.E. 184 (1899).

When instrument doubtful, words construed to create covenant. — 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 a condition subsequent, or the words employed imported a covenant, the latter construction should be adopted. Fulford v. Fulford, 225 Ga. 9, 165 S.E.2d 848 (1969).

Construction when no provision for forfeiture or reversion. — 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 the grantee'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).

Deed not construed as condition subsequent unless express language or manifest intent. — 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. Thompson v. Hart, 133 Ga. 540, 66 S.E. 270 (1909); Self v. Billings, 139 Ga. 400, 77 S.E. 562 (1913); Johnson v. Hobbs, 149 Ga. 587, 101 S.E. 583 (1919); Jones v. Reid, 184 Ga. 764, 193 S.E. 235 (1937); Gordon v. Whittle, 206 Ga. 339, 57 S.E.2d 169 (1950); Fulford v. Fulford, 225 Ga. 9, 165 S.E.2d 848 (1969); DOT v. Knight, 238 Ga. 225, 232 S.E.2d 72 (1977).

Technical words are not required to create condition subsequent. Jones v. Williams, 132 Ga. 782, 64 S.E. 1081 (1909).

Construction depends upon parties' intention. — Authorities generally agree that the construction must depend upon the intention of the parties as gathered from the whole instrument; technical rules of construction are to be disregarded when obedience to such rules would defeat the intention of the parties. Mayor of Gainesville v. Brenau College, 150 Ga. 156, 103 S.E. 164 (1920).

No precise technical words are required to create a condition subsequent; and the construction must always be founded upon the intention of the parties as disclosed in the conveyance. Lucas v. Lucas, 171 Ga. 806, 156 S.E. 680 (1931); Rustin v. Butler, 195 Ga. 389, 24 S.E.2d 318 (1943).

Words used may serve as guides to construction. Words of time, such as ''so long as,'' ''while,'' ''until,'' and ''during,'' usually denote limitation. Words of qualification or condition, such as ''provided'' and ''upon condition,'' are most often used to create conditions subsequent. DOT v. Knight, 238 Ga. 225, 232 S.E.2d 72 (1977).

Presence of reentry clause. — Important consideration in determining whether clause is condition subsequent is presence of reentry clause by the grantor or the grantor's heirs. Floyd v. Hoover, 141 Ga. App. 588, 234 S.E.2d 89 (1977).

Words "to make right of way for said road" do not alone create conditional estate. DOT v. Knight, 238 Ga. 225, 232 S.E.2d 72 (1977).

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 act of God or by subsequent conduct of the grantor. Evans v. Brown, 196 Ga. 364, 27 S.E.2d 300 (1943).

Possibility of reverter not taxable. — If condition subsequent exists, mere possibility of reverter which remains is not an estate in land and is not subject to taxation. Moss v. Chappell, 126 Ga. 196, 54 S.E. 968, 11 L.R.A. (n.s.) 398 (1906); Wadley Lumber Co. v. Lott, 130 Ga. 135, 60 S.E. 836 (1908); Mayor of Gainesville v. Brenau College, 150 Ga. 156, 103 S.E. 164 (1920).

2. Illustrative Cases

Condition subsequent found. — Instrument showed that the contract was for a sale of machinery and an interest in land for the purpose of maintaining and operating a gin at the designated location, upon condition subsequent that the location should revert to the owner of the balance of the tract when the buyer should cease to use the tract for such purpose. Doe v. Roe, 39 Ga. 202 (1869); P.H. Snook & Austin Furn. Co. v. Steiner & Emery, 117 Ga. 363, 43 S.E. 775 (1903); Jones v. Williams, 132 Ga. 782, 64 S.E. 1081

Conditions Subsequent (Cont'd)
2. Illustrative Cases (Cont'd)

(1909); Thompson v. Hart, 133 Ga. 540, 66 S.E. 270 (1909); Lawson v. Georgia S. & F. Ry., 142 Ga. 14, 82 S.E. 233 (1914); Hilton v. Central of Ga. Ry., 146 Ga. 812, 92 S.E. 642 (1917); Davis v. Jones, 153 Ga. 639, 112 S.E. 891 (1922).

Although the words ''condition precedent'' may be used in a will in connection with a bequest of income, yet when the duty imposed was a continuing one of furnishing the testator's child with a home in a benevolent institution and caring for the child ''as comfortably as the facts and circumstances of the case will warrant,'' when the corpus was given to the institution in remainder, after the death of the child, provided a Christian burial should be given to the child, and when from the entire will it is apparent that the estate was not intended to be left to the legatee upon a condition precedent, properly so called, the title will be construed to have vested, and the condition for support, made in connection with the bequest of the income, will be held to be in the nature of a condition subsequent. Winn v. Tabernacle Infirmary, 135 Ga. 380, 69 S.E. 557, 32 L.R.A. (n.s.) 512 (1910).

Conveyance upon condition that the grantee assume certain indebtedness, and if the grantee fails, to revert, creates a condition subsequent. Mayor of Gainesville v. Brenau College, 150 Ga. 156, 103 S.E. 164 (1920).

Devise of land in fee with a condition subsequent inhibiting alienation to the wife of the devisee or her children directly, or indirectly as by ''any legal proceedings or order of court,'' as the restriction against alienation was limited to one person and her children and did not extend generally to all persons was valid as against the objection that it was repugnant to the estate devised, nor was it void on the ground that it was repugnant to the nature of the estate granted, contrary to law, contrary to public policy, or prevented performance of parental duties. Blevins v. Pittman, 189 Ga. 789, 7 S.E.2d 662 (1940).

When the grantor put into a deed of property for a school the condition that ''should the same not be used for school purposes,'' the title was to revert, there arose a condition subsequent with a right of reentry on abandonment of the property for school uses. Rustin v. Butler, 195 Ga. 389, 24 S.E.2d 318 (1943).

Provision in a deed granting land for a schoolhouse and yard so long as it was used for school purposes creates an estate upon a condition subsequent, upon the breach of which the land would revert to the grantor, the grantor's estate, or heirs. Williams v. Thomas County, 208 Ga. 103, 65 S.E.2d 412 (1951).

Condition subsequent not found. — In the case of Moss v. Chappell, 126 Ga. 196, 54 S.E. 968, 11 L.R.A. (n.s.) 398 (1906), it appears that the deed to the railroad company conveying the land in controversy contained this provision: ''provided that should said strips of land cease to be used for railroad purposes, it shall revert to the grantors.'' And it was held that the words created a condition subsequent, a breach of which would work a forfeiture. The deed under consideration in the present case contains no such stipulation. Harrold v. Seaboard Air-Line Ry., 131 Ga. 360, 62 S.E. 326 (1908).

When an owner of land conveys the land to a city, and states in the deed that the land is to be used for a specified purpose, the owner may have such an interest as to prevent the land's sale or diversion from that purpose to others, or perhaps the owner may have an action of covenant. But such language alone does not create a condition subsequent, on breach of which a forfeiture results and the original owner may recover the land. City of Atlanta v. Jones, 135 Ga. 376, 69 S.E. 571 (1910). See also Wadley Lumber Co. v. Lott, 130 Ga. 135, 60 S.E. 836 (1908).

Conveyance by warranty deed to the Board of Education of Stewart County of an acre of land, in consideration of $5.00 to the grantor in hand paid, the land ''to be used by said board of education as a public school for whites,'' with the habendum clause, ''to have and to hold the same for the uses aforesaid forever,'' did not create an estate upon a condition subsequent, or an estate with a conditional limitation; such conveyance does not convey a mere easement, and an implied trust did not arise in favor of the grantor in this deed from the fact that the board of education had discontinued the operation of a school for whites on this lot.

Heyward v. Hatfield, 182 Ga. 373, 185 S.E. 519 (1936).

Deed that the grantor, in consideration of payment by the grantees of a certain indebtedness and of their support and maintenance of the grantor during the remainder of the grantor's life, conveyed the described premises, but did not create a condition subsequent which, upon 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 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).

When the deed did not expressly state a condition that the breach thereof should cause forfeiture of the estate granted, the clause as to providing a home and necessaries of life for the grantor might, by acceptance of the deed and entry of possession thereunder, become binding upon the grantee as a covenant, but the deed did not create a condition subsequent, the breach of which would cause a forfeiture or termination of title conveyed by the deed. Arrington v. Arrington, 189 Ga. 725, 7 S.E.2d 665 (1940).

When a deed in consideration of $10.00 was executed by a corporation and delivered, purporting to convey fee simple title to a tract of land, which deed contained an agreement that the property ''will be used for county school purposes only, and should this provision be violated, the grantor herein shall have the right to purchase the above property for $2,000.00,'' this clause did not create a conditional estate dependent upon a condition subsequent. Gearhart v. West Lumber Co., 212 Ga. 25, 90 S.E.2d 10 (1955).

Remedies

Forfeitures are not favored. Goss v. Finger, 28 Ga. App. 410, 111 S.E. 212 (1922).

Forfeitures are abhorred in equity and are favored in law, and provisions for forfeitures are regarded with disfavor and construed with strictness, when applied to contracts and the forfeiture relates to a matter admitting of compensation or restoration. When adequate compensation can be made, the law in many cases and equity in all cases discharges the forfeiture upon such compensation being made. The law inclines to remedy breach of condition by damages rather than by forfeiture. Hays v. Jordan & Co., 85 Ga. 741, 11 S.E. 833, 9 L.R.A. 373 (1890).

Law does not incline to construe conditions or covenants so as to work a forfeiture. City of Atlanta v. Jones, 135 Ga. 376, 69 S.E. 571 (1910).

Forfeiture provisions in contracts are not favored, and the law inclines to construe such conditions as remediable by damages rather than by forfeiture. J.G.T., Inc. v. Brunswick Corp., 119 Ga. App. 719, 168 S.E.2d 847 (1969).

Courts of equity have struggled hard to construe conditions subsequent into covenants, and send the party aggrieved to law to get the party's damages for the nonperformance. Taylor v. Sutton, 15 Ga. 103, 60 Am. Dec. 682 (1854).

Forfeiture favored in mining leases. — In leases of lands for mining purposes, when the rent reserved is a royalty, the courts do not hesitate, but look with favor upon provisions for forfeiture for nonexploitation. Such a covenant is a condition, the breach of which works a forfeiture. Duncan v. Campbell, 154 Ga. 824, 115 S.E. 651 (1923).

Equity seeks to relieve against forfeitures when rules of construction will allow. Kiser v. Warner Robins Air Park Estates, Inc., 237 Ga. 385, 228 S.E.2d 795 (1976).

Parties desiring forfeiture should so state. — If parties desire that a forfeiture shall result, or that an estate shall terminate because of breach of covenant or failure to use property for the purpose mentioned in the deed, the parties should so state. City of Atlanta v. Jones, 135 Ga. 376, 69 S.E. 571 (1910).

Forfeiture where expressly provided. — Law inclines to construe conditions subsequent so as to render their breach remediable in damages rather than by forfeiture, but when the plain words of the grant declare that a breach of the condition shall defeat the estate granted, there is no room for construction. Jones v. Williams, 132 Ga. 782, 64 S.E. 1081 (1909).

Remedies (Cont'd)

It is true that the law inclines to construe conditions to be subsequent rather than precedent, and to be remediable by damages rather than by forfeiture. But when the parties expressly stipulate for forfeiture for breach of covenant, and when precise compensation cannot be made for such breach, the forfeiture will be enforced. While equity generally abhors a forfeiture, it does not do so when the forfeiture is equitable and just, and when the enforcement of the forfeiture is the only means of protecting the landowner against the laches of the lessee, and when the lease is of no value to the landowner until developed. Duncan v. Campbell, 154 Ga. 824, 115 S.E. 651 (1923).

Condition subsequent, with right of reentry, and forfeiture of the estate conveyed to the 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).

Whole estate does not cease when land put to minor use. — When land is conveyed to be used for a certain purpose, with a clause of forfeiture if it cease to be used for the object specified, the whole estate does not cease if the land is permitted to be put to a minor use, provided that in the main the land is used for the purpose for which the land was conveyed. Lawson v. Georgia S. & F. Ry., 142 Ga. 14, 82 S.E. 233 (1914); Hilton v. Central of Ga. Ry., 146 Ga. 812, 92 S.E. 642 (1917).

Fee in grantee until entry or legal recovery. — Breach of a condition subsequent in a deed does not, of itself alone, defeat the grantee's estate nor revest title in the grantor until after entry or recovery in an action brought by him or his heirs; and the same rule is applicable in case of the lease of realty for a term of years. Peacock & Hunt Naval Stores Co. v. Brooks Lumber Co., 96 Ga. 542, 23 S.E. 835 (1895).

When a conveyance of land is made upon a condition subsequent, the fee remains in the grantee until a breach of condition and a reentry by the grantor. Wadley Lumber Co. v. Lott, 130 Ga. 135, 60 S.E. 836 (1908).

Forfeiture may be expressly released, or waived. — As was said in Moss v. Chappell, 126 Ga. 196, 54 S.E. 968, 11 L.R.A. (n.s.) 398 (1906), ''forfeitures resulting from the breach of a condition may be expressly released, or may be the subject of a waiver, and a waiver may result from circumstances, as well as express language to that effect.'' All this is well settled, and when the release or waiver extends to the whole forfeiture, all benefit to be derived from the forfeiture is gone. Jones v. Williams, 132 Ga. 782, 64 S.E. 1081 (1909); Wilkes v. Groover, 138 Ga. 407, 75 S.E. 353 (1912).

When no forfeiture, action for damages is remedy for breach. — 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 same 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).

Remedy when promise by grantee to support grantor is consideration of deed. — When the consideration recited in a deed is ''one dollar, furnishing grantor a home, food, medicine, doctor's bills, hospital bills, burial expenses, and all the other necessities of life during grantor's lifetime,'' and the grantee has failed and refused to furnish the grantor the specified items, ordinarily the remedy of the grantor is an action for damages. Dumas v. Dumas, 205 Ga. 238, 52 S.E.2d 845 (1949).

When the consideration of a deed is a promise by the grantee to support the grantor and the grantee breaches the contract, ordinarily the remedy of the grantor would be an action for damages. Dillard v. Brannan, 217 Ga. 179, 121 S.E.2d 768 (1961).

Forfeiture not found. — Forfeitures are abhorred in equity and are never favored in law, and a contract will not be construed so as to work a forfeiture, unless the terms of the contract plainly require such construction. It is not at all likely that the parties to this contract intended that the land conveyed, which according to the evidence was worth several times the amount of the debt, should vest absolutely in the creditor upon the failure to pay the debt on the day the

debt fell due; and the terms of the contract do not make it clear that they so intended. McDaniel v. Gray & Co., 69 Ga. 433 (1882); Chapman v. Ayer, 95 Ga. 581, 23 S.E. 131 (1895).

Deed executed partly upon a consideration to support the grantor during the remainder of the grantor's life, without apt or proper words to create a condition a breach of which would render the estate defeasible at the grantor's election, passes title to the grantees, and in such a case, upon failure of the grantees to support and maintain the grantor as provided, there would be no forfeiture of the estate conveyed, but a right of action in the grantor for a breach of covenant. Jones v. Reid, 184 Ga. 764, 193 S.E. 235 (1937).

OPINIONS OF THE ATTORNEY GENERAL

Conveyance providing title reverts should stated purposes cease gives grantee fee on condition subsequent. — Conveyance of land which provides that it is for stated purposes, and that should it cease to be used for such purposes the title is to revert back, gives the grantee a fee on condition subsequent, and upon breach thereof, the grantor has a right of reentry; this right of reentry can also be asserted against the state as grantee. 1958-59 Op. Att'y Gen. p. 281.

RESEARCH REFERENCES

Am. Jur. 2d. — 28 Am. Jur. 2d, Estates, § 151 et seq.

C.J.S. — 26A C.J.S., Deeds, §§ 304 et seq., 315, 316, 320, 335 et seq., 353 et seq., 369 et seq. 31 C.J.S., Estates, §§ 1, 10, 21 et seq. 51 C.J.S., Landlord and Tenant, § 178 et seq. 96 C.J.S., Wills, §§ 1238, 1239, 1254 et seq., 1323, 1336, 1337, and 1360. 97 C.J.S., Wills §§ 1394 et seq., 1403, 1404.

ALR. — Commencement of development within fixed term as extending term of oil and gas lease, 67 ALR 526.

Provision of will for forfeiture in case of contest, as applied to contest by one not a beneficiary, 7 ALR2d 1357.

Nature of estate conveyed by deed for park or playground purposes, 15 ALR2d 975.

Nature of estates or interests created by grant or devise to one and heirs if donee should have any heirs, 16 ALR2d 670.

Devisability of possibility of reverter, or of right of re-entry for breach of condition subsequent, 16 ALR2d 1246.

Validity and effect of transfer of possibility of reverter or right of re-entry, following conveyance of determinable fee or fee subject to condition subsequent, 53 ALR2d 224.

Testamentary devise or bequest conditioned upon beneficiary's supporting or rendering services to named person as providing for condition subsequent or precedent, 25 ALR3d 762.

44-6-42. Right of entry after breach of condition subsequent.

Upon the breach of a condition subsequent, which breach works a forfeiture of the estate, the person to whom the estate is limited may enter immediately. (Orig. Code 1863, § 2280; Code 1868, § 2273; Code 1873, § 2299; Code 1882, § 2299; Civil Code 1895, § 3141; Civil Code 1910, § 3721; Code 1933, § 85-906.)

JUDICIAL DECISIONS

Provision that title reverts upon breach of condition creates valid condition subsequent. — Provision in a 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 that a breach of the condition

by the grantee husband would cause the title to revert; 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).

Provision in a deed granting land for a schoolhouse and yard so long as it was for school purposes creates an estate upon condition subsequent, upon the breach of which the land would revert to the grantor, the grantor's estate, or heirs. Williams v. Thomas County, 208 Ga. 103, 65 S.E.2d 412 (1951).

Breach of condition subsequent in deed does not ipso facto defeat the grantee's estate, or revest title in the grantor; until reentry or an action for recovery of the land by the grantor, the possession by the grantee continues to be lawful. Evans v. Brown, 196 Ga. 634, 27 S.E.2d 300 (1943).

Grantor has a right to reenter upon condition being broken. Wilkes v. Groover, 138 Ga. 407, 75 S.E. 353 (1912).

Grantor not revested with title until entry. — Grantor in a deed containing a condition subsequent, upon a breach thereof, is not revested with the title until there has been an entry. City of Barnesville v. Stafford, 161 Ga. 588, 131 S.E. 487, 43 A.L.R. 1045 (1926).

Grantor must perform grantor's part of contract prior to reentry. — Grantor, in order to reenter upon breach of the condition, must, as a condition to such reentry perform the grantor's part of the grantor's contract. Wadley Lumber Co. v. Lott, 130 Ga. 135, 60 S.E. 836 (1908).

Stranger cannot make reentry. Richmond Cotton Oil Co. v. Castellaw, 134 Ga. 472, 67 S.E. 1126 (1910).

Grantor, upon breach, can enter peaceably or maintain action for recovery. — Grantor in a deed containing a condition subsequent may, upon the condition's breach, enter peaceably if the grantor can do so, or the grantor may maintain the grantor's action for recovery of the premises in event the grantee refuses to surrender possession. Such an action is the equivalent of an entry. Until there has been an entry, the grantee or those holding under the grantee are entitled to the possession and are to be treated as the owners. But they are subject to be evicted by a judgment rendered in an action by the grantor brought for the purpose of enforcing the forfeiture. Georgia R.R. & Banking Co. v. Mayor of Macon, 86 Ga. 585, 13 S.E. 21 (1891); Peacock & Hunt Naval Stores Co. v. Brooks Lumber Co., 96 Ga. 542, 23 S.E. 835 (1895); Moss v. Chappell, 126 Ga. 196, 54 S.E. 968, 11 L.R.A. (n.s.) 398 (1906); Wadley Lumber Co. v. Lott, 130 Ga. 135, 60 S.E. 836 (1908).

Grantor in a deed containing a condition subsequent may, upon the condition's breach, enter peaceably if the grantor can do so, or the grantor may maintain the grantor's action for the recovery of the premises in the event the grantee refuses to surrender possession. Such an action is the equivalent of an entry. Moss v. Chappell, 126 Ga. 196, 54 S.E. 968, 11 L.R.A. (n.s.) 398 (1906).

Person to whom the condition subsequent is limited may, upon breach of the condition, enter peaceably if the person can, or assert the person's right to enter by an action for recovery of possession of the land against the grantee and those claiming under the grantee. Blevins v. Pittman, 189 Ga. 789, 7 S.E.2d 662 (1940).

Grantor may waive grantor's right of reentry. Wilkes v. Groover, 138 Ga. 407, 75 S.E. 353 (1912).

Cited in Fulford v. Fulford, 225 Ga. 9, 165 S.E.2d 848 (1969); Preferred Real Estate Equities, Inc. v. Hous. Sys., 248 Ga. App. 745, 548 S.E.2d 646 (2001).

RESEARCH REFERENCES

Am. Jur. 2d. — 28 Am. Jur. 2d, Estates, §§ 175 et seq., 189.

C.J.S. — 26A C.J.S., Deeds, §§ 304 et seq., 315 et seq., 320, 326, 331 et seq., 339 et seq., 351. 31 C.J.S., Estates, § 21 et seq. 52A C.J.S., Landlord and Tenant, § 178 et seq. 52B C.J.S., Landlord and Tenant, § 1329 et seq. 97 C.J.S., Wills, § 1414.

ALR. — Reservation by successive grantors of reentry for breach of conditions subsequent in deeds, 114 ALR 566.

Provision of will for forfeiture in case of

contest, as applied to contest by one not a beneficiary, 7 ALR2d 1357.

Devisability of possibility of reverter, or of right of reentry for breach of condition subsequent, 16 ALR2d 1246.

Waiver of, or estoppel to assert, condition subsequent or its breach, 39 ALR2d 1116.

44-6-43. Certain conditions void.

Conditions which are repugnant to the estate granted, which require impossible or illegal acts to be performed, or which in themselves are contrary to the policy of the law are void. (Orig. Code 1863, § 2277; Code 1868, § 2270; Code 1873, § 2296; Code 1882, § 2296; Civil Code 1895, § 3138; Civil Code 1910, § 3718; Code 1933, § 85-903.)

Law reviews. — For annual survey of wills, trusts, and administration, see 43 Mercer L. Rev. 457 (1991). For summary review article on zoning and land use law, see 60 Mercer L. Rev. 457 (2008).

For comment criticizing Williams v. S.M. High Co., 200 Ga. 230, 36 S.E.2d 667 (1946), holding perpetual right of renewal in lease granted to corporation did not violate rule against perpetuities, see 8 Ga. B.J. 420 (1946). For comment on Jenkins v. Shuften, 206 Ga. 315, 57 S.E.2d 283 (1950), see 12 Ga. B.J. 477 (1950). For comment, ''Injunction Remedy for Breach of Restrictive Covenants: An Economic Analysis,'' see 45 Mercer L. Rev. 543 (1993).

JUDICIAL DECISIONS

Analysis

General Consideration
Conditions Void
Conditions Not Void

General Consideration

Right to dispose of land incident to fee simple estate. — An estate in fee simple carries with it as a natural incident the right to sell or otherwise dispose of the land conveyed. Alderman v. Crenshaw, 84 Ga. App. 344, 66 S.E.2d 265 (1951).

Repugnant conditions are those which tend to the utter subversion of the estate, such as those that prohibit entirely the alienation or use of the property. Conditions which prohibit the property's alienation to particular persons or for a limited period, or the property's subjection to particular uses, are not subversive of the estate; those conditions do not destroy or limit the property's alienable or inheritable character. Floyd v. Hoover, 141 Ga. App. 588, 234 S.E.2d 89 (1977).

Cited in Lassiter v. Bank of Dawson, 191 Ga. 208, 11 S.E.2d 910 (1940); Wright v. Pritchett, 213 Ga. 865, 102 S.E.2d 602 (1958); Fulford v. Fulford, 225 Ga. 9, 165 S.E.2d 848 (1969); DOT v. City of Atlanta, 255 Ga. 124, 337 S.E.2d 327 (1985); Phillips v. Phillips, 260 Ga. 265, 392 S.E.2d 523 (1990).

Conditions Void

Restriction on power of alienation of fee void. — Statute declares that a condition repugnant to the estate granted is void. It requires no argument to support the proposition that a restriction on the power of alienation is repugnant to a grant in fee. Freeman v. Phillips, 113 Ga. 589, 38 S.E. 943 (1901) (see O.C.G.A. § 44-6-43).

Power of alienation is necessarily incident to every estate in fee, and a condition in a devise of lands in fee simple altogether preventing alienation is repugnant to the estate and void. Crumpler v. Barfield & Wilson Co., 114 Ga. 570, 40 S.E. 808 (1902).

Restraint upon alienation being repugnant to the nature of a fee simple estate is void. Cowart v. Singletary, 140 Ga. 435, 79

Conditions Void (Cont'd)

S.E. 196, 47 L.R.A. (n.s.) 621, 1915A Ann. Cas. 1116 (1913).

Devise in fee with an inhibition against alienation is repugnant to the fee, and is therefore void. Farkas v. Farkas, 200 Ga. 886, 38 S.E.2d 924 (1946).

It has always been the rule in Georgia that a restriction in a deed inhibiting alienation is void. This rule applies to a restriction in a deed inhibiting alienation without the consent of the grantor, and this is true even though the grantor is a tenant in common. Alderman v. Crenshaw, 84 Ga. App. 344, 66 S.E.2d 265 (1951).

Provision in a deed or will that a fee simple estate may not be sold is void as being repugnant to the estate granted. Wills v. Pierce, 208 Ga. 417, 67 S.E.2d 239 (1951).

Power of alienation is necessarily incident to every estate in fee simple absolute, and no one can create what is intended in law to be a fee simple absolute and at the same time deprive the owner of those rights and privileges which the law attaches to that estate. Such a condition is inconsistent with the fee, repugnant to the estate granted, and is void. Floyd v. Hoover, 141 Ga. App. 588, 234 S.E.2d 89 (1977).

Will provision which allowed the decedent's sons to build a house on bequeathed real estate did not grant the sons an easement in gross as to the property because such a grant would have been repugnant to the fee simple interest in the property granted to one son, and the lack of any limitation as to time, place, or manner would have impermissibly restricted the property's alienability. Dyer v. Dyer, 275 Ga. 339, 566 S.E.2d 665 (2002).

Grantor could not create a fee simple estate in certain property and simultaneously prohibit entirely the alienation or use of the property, despite grantor's intention on creating a fee simple subject to a condition subsequent. Statham v. Kelly, 276 Ga. 877, 584 S.E.2d 246 (2003).

Will gave the decedent's spouse a fee simple estate in the decedent's undivided half-interest in certain realty. As the will attempted to bar the spouse's sale of the property without the approval of the executor, this was a restraint on the alienation of a fee simple estate, and therefore void under O.C.G.A. § 44-6-43. Bandy v. Henderson, 284 Ga. 692, 670 S.E.2d 792 (2008).

Habendum repugnant to premises is void. — First part of a deed clearly conveys the title and the present estate in the land to the grantee and the attempt by the grantor in a subsequent part of the deed to retain the title in the grantor is inconsistent with the first part of the deed, wherein the grantor had already conveyed the title out of the grantor, and the former must prevail. If the habendum be repugnant to the premises, it is void, for a condition repugnant to the estate granted is void. White v. Hopkins, 80 Ga. 154, 4 S.E. 863 (1887).

Provisions granting broad powers in trustee also retaining interest in grantor. — If any of the provisions granting broad powers to the trustee should be construed as retaining an interest in the grantor, such provisions would be void as repugnant to the grant. Lewman v. Owens, 132 Ga. 484, 64 S.E. 544 (1909); Galland v. Reuben, 155 Ga. 293, 116 S.E. 302 (1923).

Conditions Not Void

Incumbrance upon property requested by grantor and grantee not repugnant to grant. — When a husband settled property on his wife free from all his liabilities except such incumbrances as the two together shall request the trustee to make, the exception is not repugnant to the grant, but is merely a qualification thereof. Aetna Ins. Co. v. Brodinax, 48 F. 892 (C.C.S.D. Ga. 1883), aff'd, 128 U.S. 236, 9 S. Ct. 61, 32 L. Ed. 445 (1888).

Spendthrift trusts are allowed by statute, but only in certain defined cases under former Civil Code 1910, § 3729. Wright v. Hill, 140 Ga. 554, 79 S.E. 546 (1913).

Limitation over not inconsistent with determinable fee. — Provision that should the wife's sister die childless before the wife is not inconsistent with the grant to the wife of a fee determinable upon condition. If the devisee in remainder under such condition should die without child or children, the wife would have the added right of disposition. Tyler v. Theilig, 124 Ga. 204, 52 S.E. 606 (1905).

Devise of fee with condition subsequent inhibiting alienation to wife of devisee or children valid. — Devise of land in fee with a condition subsequent inhibiting alienation

to the wife of the devisee or her children directly, or indirectly as by ''any legal proceedings or order of court,'' as the restriction against alienation was limited to one person and her children and did not extend generally to all persons, was valid as against the objection that it was repugnant to the estate devised. Nor was it void on the ground that it was repugnant to the nature of the estate granted, contrary to law, contrary to public policy, or prevented performance of parental duties. Blevins v. Pittman, 189 Ga. 789, 7 S.E.2d 662 (1940).

Testator has right to place executory limitation upon estate devised by testator's will; this is not such a condition repugnant to the estate granted as is prohibited by this statute. McDonald v. Suarez, 212 Ga. 360, 93 S.E.2d 16 (1956) (see O.C.G.A. § 44-6-43).

Testator's right to place executory limitation upon estate. — Residuary clause of a will devising all the residue of the testator's real and personal property to his wife free from all charge and limitation, with the provision that should she not dispose of the same in her lifetime it would pass in fee simple to the testator's brothers and sisters, created and vested in the testator's widow a defeasible fee subject to an executory limitation, which does not offend the provisions of this statute. Jenkins v. Shuften, 206 Ga. 315, 57 S.E.2d 283 (1950), for comment, see 12 Ga. B.J. 477 (1950) (see O.C.G.A. § 44-6-43).

Under the provisions of a will, the plaintiff had an estate in fee of a one-half undivided interest in the property, subject to being divested by her dying before the defendant, in which event the defendant, as the survivor, would become vested with the fee simple title to the entire interest. The provisions as to the use and sale of the property during the lifetime of the devisees did not create a trust estate, nor did the limitation placed on the sale of the property during the lifetime of the devisees violate this statute. Trimble v. Fairbanks, 209 Ga. 741, 76 S.E.2d 16 (1953) (see O.C.G.A. § 44-6-43).

Restriction against alienating life estate valid. — Devise of the life interest to the wife was not such a grant of an estate to her as to make the subsequent provision against its transfer void on account of repugnancy. Trammell v. Johnston, 54 Ga. 340 (1875).

Inhibition against selling a life estate is valid when the creation of the life estate is accompanied by an estate over in remainder to another, with a provision for a forfeiture of the life estate in favor of the remainderman, to take effect upon the prohibited attempted alienation. Farkas v. Farkas, 200 Ga. 886, 38 S.E.2d 924 (1946).

Restrictive covenant preventing "For Sale" signs. — Restrictive covenant preventing ''For Sale'' signs in a subdivision was not an unenforceable restraint on alienation under O.C.G.A. § 44-6-3. The covenant did not directly prohibit the sale of a homeowner's residence. Godley Park Homeowners Ass'n v. Bowen, 286 Ga. App. 21, 649 S.E.2d 308 (2007).

Occupancy age restrictions. — Condominium occupancy limitation restricting permanent residence to persons 16 years old or older is not so unusual or so unreasonable as to be repugnant to the estate granted. Hill v. Fontaine Condominium Ass'n, 255 Ga. 24, 334 S.E.2d 690 (1985).

RESEARCH REFERENCES

Am. Jur. 2d. — 28 Am. Jur. 2d, Estates, §§ 154 et seq., 192 et seq.

C.J.S. — 26A C.J.S., Deeds, §§ 310 et seq., 324, 325, 345 et seq. 31 C.J.S., Estates, § 21 et seq. 96 C.J.S., Wills, §§ 1215 et seq., 1231. 97 C.J.S., Wills, §§ 1383 et seq., 1412, 1415 et seq.

ALR. — Restraint upon voluntary alienation of legal life estate, 160 ALR 639.

Provision of will for forfeiture in case of contest, as applied to contest by one not a beneficiary, 7 ALR2d 1357.

Gift or grant in terms sufficient to carry the whole property absolutely as so operating where followed by a purported limitation over of property not disposed of by the first taker, 17 ALR2d 7.

Validity and effect of provision or condition against alienation in gift for charitable trust or to charitable corporation, 100 ALR2d 1208.

Pre-emptive rights to realty as violation of rule against perpetuities or rule concerning restraints on alienation, 40 ALR3d 920.

44-6-44. Effect of legal disabilities on conditions; notice of condition.

No legal disability except that of being non compos mentis shall excuse a person from failing to comply with a condition annexed to his estate. No notice of such condition is required to be given by the person claiming under the limitation over. (Orig. Code 1863, § 2278; Code 1868, § 2271; Code 1873, § 2297; Code 1882, § 2297; Civil Code 1895, § 3139; Civil Code 1910, § 3719; Code 1933, § 85-904.)

JUDICIAL DECISIONS

Interest in property by reason of rights as judgment creditor is estate with condition annexed, and that condition requires, in case of a sale of land by the defendant to a bona fide purchaser for a valuable consideration, who is in possession of the land, that the plaintiff proceed by a levy within four years from the time when the possession commences or the estate is divested and the bona fide purchaser holds the land discharged from the lien of the judgment. In this view of the case, no legal disability whatever, except being non compos mentis, will relieve the plaintiff from failing to comply with the condition. Chapman v. Akin, 39 Ga. 347 (1869).

Cited in Evans v. Brown, 196 Ga. 634, 27 S.E.2d 300 (1943).

RESEARCH REFERENCES

C.J.S. — 26A C.J.S., Deeds, §§ 318, 324, 325.

ARTICLE 4

REMAINDERS AND REVERSIONS

Law reviews. — For article surveying Georgia cases in the area of real property from June 1977 through May 1978, see 30 Mercer L. Rev. 167 (1978).

RESEARCH REFERENCES

ALR. — Effect of premature termination of precedent estate to accelerate remainder of which there is an alternative substitutional gift, 5 ALR 460; 164 ALR 1297.

Effect of premature termination of precedent estate to accelerate contingent remainder, 5 ALR 473; 164 ALR 1433.

Failure or renunciation of the precedent life estate given by a will, as accelerating the vesting of a remainder limited thereon where enjoyment is postponed by the allotment of dower of the necessity of compensating disappointed legatees, 5 ALR 480.

Requiring security from life tenant for protection of remaindermen, 14 ALR 1066; 101 ALR 271; 138 ALR 440.

Time of assessment of succession tax on future contingent interests, 30 ALR 478.

Right of remainderman or his privies to require disclosure or accounting by life tenant, 45 ALR 519.

Doctrine as to possibility of issue extinct as affecting property rights or taxation, 67 ALR 538; 146 ALR 794; 98 ALR2d 1285.

Future estate or interest in property as asset in bankruptcy, 68 ALR 773.

Deed in consideration of support of grantor as creating an estate upon condition or a conditional limitation, 76 ALR 742.

Contribution or allowance as between cotenants in remainder as affected by fact that one or more of them owns, or did own, the life estate or an interest therein, 98 ALR 859.

Life interest and remainder in corporate

stock as affecting stockholder's statutory liability, 99 ALR 505.

Income tax in respect of that part of extraordinary cash dividend on stock held by trustee that is allocated to corpus as regards respective rights of life beneficiary and remaindermen, 99 ALR 518.

Relative rights of life beneficiary and remainderman as to return on bonds or other obligations for the payment of money, bought at a premium or at a discount, 101 ALR 7; 131 ALR 1426.

Words of survivorship in will disposing of remainder upon termination of life or other precedent or intervening estate as referable to time of testator's death or to time of termination of such intervening estate, 114 ALR 4; 20 ALR2d 830.

Rights of life tenant (legal or equitable) and remaindermen in respect of amount paid by lessee in consideration of release, 121 ALR 900.

Grant to one for life, and afterwards, either absolutely or contingently, to grantor's heirs or next of kin, as leaving reversion or creating remainder, 125 ALR 548; 16 ALR2d 691.

Death of life tenant before death of testator as causing lapse or ''acceleration'' of remainder, 133 ALR 1367.

Remaindermen as necessary or proper parties to action or proceeding between life tenant and trustee, 136 ALR 696.

''Divide and pay over'' rule, for purpose of determining vested or contingent character of future estate, 144 ALR 1155; 16 ALR2d 1383.

Death of life beneficiary without ever having had a child as equivalent of death of all his children, which by terms of will was condition of remainder interest, 161 ALR 181.

Uniform Principal and Income Act as applicable to estates under administration, 166 ALR 428.

Prior estate as affected by remainder void for remoteness, 168 ALR 321.

Commencement of running of statute of limitations respecting actions by owners of right of reentry, or actions against third persons by reversioners, 19 ALR2d 729.

Murder of life tenant by remainderman or reversioner as affecting latter's rights to remainder or reversion, 24 ALR2d 1120.

Title to buildings when school lands revert for nonuse for school purposes, 28 ALR2d 564.

Time as of which members of class described as remainderman's or life tenant's ''heirs,'' ''next of kin,'' ''descendants,'' ''issue,'' ''family,'' or the like, substituted by will to take in place of deceased remainderman, are to be ascertained, 33 ALR2d 242.

Provision of will that children, etc., of remainderman who dies before expiration of precedent estate or time fixed for distribution to remaindermen, shall take the share to which he would have been entitled, as affecting the character of remainder as vested or contingent, 47 ALR2d 900.

When is a gift by will or deed or trust one to a class, 61 ALR2d 212; 13 ALR4th 978.

Nature of remainder created by inter vivos trust giving settlor, trustee, or life beneficiary power to exhaust trust fund or otherwise terminate trust, 61 ALR2d 477.

Disposition of decedent's share of income or property during interval between deaths of life beneficiaries sharing therein, where remainder was given over after death of all life beneficiaries, 71 ALR2d 1332.

Distribution as between life tenant and remainderman of proceeds of condemned property, 91 ALR2d 963.

Duty as between life tenant and remainderman as respects payment of improvement assessments, 10 ALR3d 1309.

Time to which condition of remainderman's death refers, under gift or grant to one for life or term of years and then to remainderman, but if remainderman dies without issue, then over to another, 26 ALR3d 407.

Validity and effect of provision in deed attempting to make reservation or exception in favor of grantor's spouse, 52 ALR3d 753.

Wills: gift to persons individually named but also described in terms of relationship to testator or another as class gift, 13 ALR4th 978.

44-6-60. Nature of estates in remainder and in reversion; rights of reversioner.

(a) An estate in remainder is one limited to be enjoyed after another estate is terminated or at a time specified in the future.

(b) An estate in reversion is the residue of an estate, usually the fee left in the grantor and his heirs after the termination of a particular estate which he has granted out of it.

(c) The rights of the reversioner are the same as those of a vested remainderman in fee. (Orig. Code 1863, § 2245; Code 1868, § 2237; Code 1873, § 2263; Code 1882, § 2263; Civil Code 1895, § 3098; Civil Code 1910, § 3674; Code 1933, § 85-701.)

Cross references. — Right of action for injury to remainder or reversionary interest in personalty, § 51-10-5.

Law reviews. — For article, ''Descendible Future Interests in Georgia: The Effect of the Preference for Early Vesting,'' see 7 Ga. L. Rev. 443 (1973).

For note discussing construction and interpretation of wills, see 1 Ga. L. Rev. No. 1, p. 46 (1927).

JUDICIAL DECISIONS

Analysis

General Consideration
Estates in Remainder
Estates in Reversion

General Consideration

Rules on salability and leviable interests applicable to both remainders and reversions. — As both a remainder and a reversion are referred to in this statute as ''an estate,'' whatever rule is properly applied as to the salability or leviable interest in the one would apply to the other. Cooper v. Davis, 174 Ga. 670, 163 S.E. 736 (1932) (see O.C.G.A. § 44-6-60).

Rule against perpetuities is not applicable to vested remainder or reversion. Smith v. Francis, 221 Ga. 260, 144 S.E.2d 439 (1965).

Cited in Taylor v. Trustees of Jesse Parker Williams Hosp., 190 Ga. 349, 9 S.E.2d 165 (1940); Buchanan v. Nicholson, 192 Ga. 754, 16 S.E.2d 743 (1941); Saxon v. Aycock, 72 Ga. App. 728, 34 S.E.2d 914 (1945); Shedden v. Donaldson, 207 Ga. 77, 60 S.E.2d 158 (1950); Stokes v. Trust Co., 507 F.2d 177 (5th Cir. 1975); Seymour v. Presley, 239 Ga. 572, 238 S.E.2d 347 (1977); Georgia Dist. Council of Assemblies of God, Inc. v. Atlanta Faith Mem. Church, Inc., 267 Ga. 59, 472 S.E.2d 66 (1996).

Estates in Remainder

No technical language is needed to create a remainder. Smith v. Smith, 200 Ga. 373, 37 S.E.2d 367 (1946).

Words creating multiple estates with temporary exclusive possession create remainder. — Any words that show it was the intention of the creator to create, by one instrument, two or more estates, so that the possession incident to one is temporarily exclusive of the possession incident to another, will create an estate in remainder. Smith v. Smith, 200 Ga. 373, 37 S.E.2d 367 (1946).

Estate in remainder is one limited to be enjoyed upon the determination of another estate. National Audubon Soc'y, Inc. v. Marshall, 424 F.2d 717 (5th Cir. 1970).

''Limitation over'', or remainder, includes any estate in the same property created or contemplated by the conveyance to be enjoyed after the first estate granted expires or is exhausted. When two or more estates of freehold in the same property are granted by the same conveyance to be enjoyed succes-

sively, or one in lieu of another, each of the estates, except the first, is a limitation over. Lane v. Citizens & S. Nat'l Bank, 195 Ga. 828, 25 S.E.2d 800 (1943).

Remainder part of whole title. — While no particular estate is necessary to sustain a remainder, nevertheless an estate in remainder is but a part of the whole title. Torbit v. Jones, 145 Ga. 610, 89 S.E. 696 (1916).

Life estate not inconsistent with remainder. — When estates for life under former Civil Code 1910, § 3663 (see O.C.G.A. § 44-6-81) and estates in remainder under former Civil Code 1910, § 3674 (see O.C.G.A. § 44-6-60) were created by the same grant in the same land in favor of different persons, the possession of the life tenant was not adverse to the estate in remainder; accordingly, in such cases prescription will not run against the remaindermen, based on the possession of the life tenant or the life tenant's privy in estate, during the term of the life tenant. Ayer v. Chapman, 146 Ga. 608, 91 S.E. 548 (1917).

Remainder estate is not necessarily entire estate that is left after previous estate is determined. A legatee may have an estate for life, the legatee's own or that of some other person, and still be a remainderman. Dodson v. Trust Co., 216 Ga. 499, 117 S.E.2d 331 (1960).

Contingent remainder an estate. — Some courts and text writers declare a contingent remainder not an estate, but only a chance to have one; whatever differences may have heretofore existed between courts and text writers upon this subject, this statute has settled it by declaring that a contingent remainder is an estate. McGowan v. Lufburrow, 82 Ga. 523, 9 S.E. 427, 14 Am. St. R. 178 (1889) (see O.C.G.A. § 44-6-60).

Contingent remainder is an estate. Cooper v. Davis, 174 Ga. 670, 163 S.E. 736 (1932).

Contingent remainder interest in land is an ''estate''. Phelps v. Palmer, 192 Ga. 421, 15 S.E.2d 503 (1941).

Contingent remainderman may sell and assign the contingent estate. Cooper v. Davis, 174 Ga. 670, 163 S.E. 736 (1932).

Reversion of remainder to testator's estate. — When contingency on which it is based never happens, remainder estate reverts to testator's estate. Kemp v. Lewis, 147 Ga. 254, 93 S.E. 404 (1917).

Remainder vested when present capacity for possession exits. — An estate is vested when there is an immediate right of enjoyment or a present fixed right of future enjoyment. It is the present capacity of taking effect in possession, if the possession were to become vacant, that distinguishes a vested from a contingent remainder. Refinance Corp. v. Wilson, 183 Ga. 336, 188 S.E. 707 (1936).

Interest limited to stockholder upon death of another vested remainder. — When a corporate resolution uses the term ''reversion'' to describe the estate of a stockholder, the estate is a vested remainder if the remainder interest is limited to that stockholder upon the death of another, and the stockholder's rights are the same as those of a vested remainderman. J.B. McCrary Co. v. Peacock, 223 Ga. 476, 156 S.E.2d 57 (1967).

Construction of defeasible fee as remainder. — If remainder is a defeasible fee, law favors construction making fee absolute at earliest time, consistent with intent of the testator, as expressed in the will. Sanders v. First Nat'l Bank, 189 Ga. 450, 6 S.E.2d 294 (1939).

Estates in Reversion

Land reverts to grantor when company abandons right of way with conditional limitation. — If the grant had been to the railroad company or the company's assigns ''for railroad purposes only,'' with no words of reverter or of limitation, the deed would pass the fee. The phrase ''for railroad purposes only'' would be merely a declaration of the purpose for which the land conveyed was intended to be used. There would be no reversion. But there are the added words, ''and for the time that they shall so use it.'' The habendum clause was a conditional limitation, and the land reverted to the grantor when the company abandoned the right of way. Lawson v. Georgia S. & F. Ry., 142 Ga. 14, 82 S.E. 233 (1914).

Reversion created in estate when will creates beneficiary for life with no remainder. — When one is a beneficiary for life with no remainder created by the will, a reversion is created in the estate, which reversionary interest vests immediately upon the testator's death. Smith v. Francis, 221 Ga. 260, 144 S.E.2d 439 (1965).

Estates in Reversion (Cont'd)

When remainder estate fails because of want of remainderman, realty reverts to estate of testatrix, to be disposed of as intestate property. Armstrong Junior College Comm'n v. Livesey, 189 Ga. 825, 7 S.E.2d 678 (1940).

Testator by will created a trust estate with a limitation over to the testator's heirs at law who might be in life at the time of the termination of the trust estate. Applying the provisions of former Code 1933, § 85-504 (see O.C.G.A. § 44-6-23), the words ''heir at law'' would mean children and the descendants of children, and since the only children of the testator had died without issue, this remainder failed, and the reversionary interest in the testator's estate vested, upon the testator's death, in those who were then the testator's heirs at law, with the right of possession postponed until the death of the last life tenant. Dodson v. Trust Co., 216 Ga. 499, 117 S.E.2d 331 (1960).

Effect of qualified fee with power of appointment. — When the owner, by deed of gift, conveyed certain described lands to the owner's daughter, her bodily heirs and assigns forever, and if no bodily heirs then to be left to her choice any member of her family, brother or sister, nephew or niece, she took a base, or qualified fee, subject to be divested upon her dying without bodily heirs, and having died without bodily heirs subsequent to the death of the grantor intestate, and having failed to exercise the power of appointment, a reversion resulted upon her death to the heirs at law of the grantor. Guess v. Morgan, 196 Ga. 265, 26 S.E.2d 424 (1943).

Title reverting to testator's estate goes to those who were testator's heirs at testator's death. — When a will provides that the title, on a certain contingency, reverts to the testator's estate, the language means that it goes to the heirs of the testator. This means those who were the heirs at law of the testator at the time of the testator's death. Shockley v. Storey, 185 Ga. 790, 196 S.E. 702 (1938).

Heirs previously took such contingent estate as assignable during devisee's lifetime. — Under a will which gave lands to a certain devisee but contained a provision that, if the devisee dies without issue, the land should revert to the devisee's estate, the heirs at law of the testator took such a contingent estate therein as was assignable during the lifetime of the devisee. Shockley v. Storey, 185 Ga. 790, 196 S.E. 702 (1938).

No reversion when grant for named purpose only. — When the grant is for a named purpose only, with no words of reverter or of limitation, the grant is a mere declaration of the purpose to which the land conveyed was intended to be used, and in such a case there is no reversion. Heyward v. Hatfield, 182 Ga. 373, 185 S.E. 519 (1936).

Rights of a reversioner are the same as those of a vested remainderman, and such an estate devolves by operation of law upon those who answer the description of heirs at law as of the time of the testator's or grantor's death, with possession postponed until the termination of the prior estate. Guess v. Morgan, 196 Ga. 265, 26 S.E.2d 424 (1943).

When a reversion is contingent, the rights would be the same as contingent remainders. Cooper v. Davis, 174 Ga. 670, 163 S.E. 736 (1932).

RESEARCH REFERENCES

Am. Jur. 2d. — 28 Am. Jur. 2d, Estates, §§ 197 et seq., 217 et seq.

C.J.S. — 26A C.J.S., Deeds, § 249 et seq. 31 C.J.S., Estates, §§ 97, 130, 131. 96 C.J.S., Wills, §§ 1269, 1302.

ALR. — Postponing distribution until payment of debts or settlement of estate as violating rule against perpetuities, 13 ALR 1033.

Conveyance by life tenant and remaindermen in esse as cutting off interest of unborn persons under devise for life with remainder to a class, 25 ALR 770.

Relative rights of life beneficiary and remainderman as to return on bonds or other obligations for the payment of money, bought at a premium or at a discount, 101 ALR 7; 131 ALR 1426.

Necessity that living members of the same class be parties to give court jurisdiction,

under the doctrine of representation in respect of interests of unborn contingent remaindermen, 120 ALR 876.

Relative rights of tenant for years or life and remainderman as to return on bonds or other obligations for the payment of money bought at a premium or discount, 131 ALR 1426.

Rule limiting duration of restraints on alienation as applicable to covenant in deed restricting use of property, 10 ALR2d 824.

Grant to one for life, and afterwards, either absolutely or contingently, to grantor's heirs or next of kin, as leaving reversion or creating remainder, 16 ALR2d 691.

Devisability of possibility of reverter, or of right of reentry for breach of condition subsequent, 16 ALR2d 1246.

Title to buildings when school lands revert for nonuse for school purposes, 28 ALR2d 564.

Provision of will that children, etc., of remainderman who dies before expiration of precedent estate or time fixed for distribution to remaindermen, shall take the share to which he would have been entitled, as affecting the character of remainder as vested or contingent, 47 ALR2d 900.

44-6-61. Vested and contingent remainders distinguished.

Remainders are either vested or contingent. A vested remainder is a remainder which is limited to a certain person at a certain time or which is dependent upon the happening of a necessary event. A contingent remainder is a remainder which is limited to an uncertain person or which is dependent upon an event which may or may not happen. (Orig. Code 1863, § 2247; Code 1868, § 2239; Code 1873, § 2265; Code 1882, § 2265; Civil Code 1895, § 3100; Civil Code 1910, § 3676; Code 1933, § 85-703.)

Law reviews. — For article discussing problems in construction of instrument conveying gift to a group or class, see 6 Ga. St. B.J. 169 (1969). For article, ''Descendible Future Interests in Georgia: The Effect of the Preference for Early Vesting,'' see 7 Ga. L. Rev. 443 (1973). For article, ''The Rule Against Perpetuities as Applied to Georgia Wills and Trusts,'' see 16 Ga. L. Rev. 235 (1982).

For note discussing construction and interpretation of wills, see 1 Ga. L. Rev. 46 (1927).

For comment on Cunningham v. Cunningham, 230 Ga. 493, 197 S.E.2d 731 (1973), see 8 Ga. L. Rev. 502 (1974).

JUDICIAL DECISIONS

Analysis

General Consideration
Vested Remainders
1. Rules of Construction
2. Illustrative Cases
Contingent Remainders

General Consideration

One named as the beneficiary of a life estate may also take a remainder interest. Schriber v. Anderson, 205 Ga. 343, 53 S.E.2d 490 (1949).

Statute merely defines the terms "vested remainder" and "contingent remainder" but confers no rights. Owens v. Davis, 224 Ga. 146, 160 S.E.2d 352 (1968) (see O.C.G.A. § 44-6-61).

Distinction between vested and contingent remainders. — Taking effect of a remainder in possession may be uncertain, and yet be a vested remainder. The question whether it is a vested remainder does not depend upon the fact of the remaindermen outliving the life tenant, but upon their capacity to have

General Consideration (Cont'd)

taken by any means which might have determined the life estate. The present capacity of taking effect in possession if the possession will become vacant, and not the certainty that the possession will become vacant before the estate limited in remainder determines, universally distinguishes a vested remainder from one that is contingent. Olmstead v. Dunn, 72 Ga. 850 (1884); Roberts v. Wadley, 156 Ga. 35, 118 S.E. 664 (1923).

An estate is vested when there is an immediate right of enjoyment, or a present fixed right of future enjoyment. It is the present capacity of taking effect in possession, if the possession were to become vacant, that distinguishes a vested from a contingent remainder. Wilbur v. McNulty, 75 Ga. 458 (1885).

Various tests have been suggested for determining whether in a given case a future estate is a vested or a contingent remainder. One of these tests is: "The present capacity of taking effect in possession, if the possession were to become vacant, distinguishes a vested remainder from one that is contingent." Schley v. Williamson, 153 Ga. 245, 111 S.E. 917 (1922).

Present capacity of taking effect in possession, if the possession were to become vacant, distinguishes a vested remainder from one that is contingent. Lumpkin v. Patterson, 170 Ga. 94, 152 S.E. 448 (1930).

A gift which is made presently with payment postponed creates a vested interest, but a gift which is suspended altogether until a future time creates a contingent interest. Stokes v. Trust Co., 507 F.2d 177 (5th Cir. 1975).

Transferability of remainders. — Vested remainder is transferable by the party in whom it is vested, while a contingent remainder is nontransferable. Stokes v. Trust Co., 507 F.2d 177 (5th Cir. 1975).

Cited in McCoy v. Olive, 168 Ga. 492, 148 S.E. 327 (1929); Cooper v. Davis, 174 Ga. 670, 163 S.E. 736 (1932); Padgett v. Hatton, 200 Ga. 209, 36 S.E.2d 664 (1946); Shedden v. Donaldson, 207 Ga. 77, 60 S.E.2d 158 (1950); Erskine v. Klein, 218 Ga. 112, 126 S.E.2d 755 (1962); Scott v. Scott, 218 Ga. 732, 130 S.E.2d 499 (1963); Nash v. Crowe, 222 Ga. 173, 149 S.E.2d 88 (1966); Walker v. Bogle, 244 Ga. 439, 260 S.E.2d 338 (1979); First Presbyterian Church v. Price, 248 Ga. 38, 280 S.E.2d 830 (1981).

Vested Remainders

1. Rules of Construction

Law favors vesting of remainders. — Law favors vested remainders, and it is an established rule that the court never construes a remainder to be contingent when it can be taken to be vested. Vickers v. Stone, 4 Ga. 461 (1848); Fields v. Lewis, 118 Ga. 573, 45 S.E. 437 (1903); Lumpkin v. Patterson, 170 Ga. 94, 152 S.E. 448 (1930).

A vested remainder is one limited to a certain person at a certain time, or upon the happening of a certain event. The law favors the vesting of remainders in all cases of doubt, and in construing wills, words of survivorship will refer to the death of the testator in order to vest remainders, unless a manifest intention to the contrary appears. Olmstead v. Dunn, 72 Ga. 850 (1884).

Under the provisions of state law, and under the decisions of the Supreme Court, it is well established that in Georgia the policy of the law is to favor the vesting of remainders at the earliest possible time unless the intention of the testator is clearly manifest to the contrary. Miller v. Brown, 215 Ga. 148, 109 S.E.2d 741 (1959).

Instrument so construed to favor vesting. — When an instrument is susceptible to two constructions, the one favorable to vested and unfavorable to contingent remainders should be adopted. Miller v. Brown, 215 Ga. 148, 109 S.E.2d 741 (1959).

Conditions for a vested remainder are: that the estate is certain, the person or class of persons to whom it is devised is certain, and the event fixing the time when its enjoyment should commence is a necessary one. Bull v. Walker, 71 Ga. 195 (1883).

Estate vested when present right of enjoyment exists. — An estate is vested when there is an immediate right of enjoyment, or a present fixed right of future enjoyment. Lumpkin v. Patterson, 170 Ga. 94, 152 S.E. 448 (1930).

Any form of present enjoyment in an estate will indicate that the estate vests presently, even though full payment may be postponed until a future time. Stokes v. Trust Co., 507 F.2d 177 (5th Cir. 1975).

Classes of vested remainders may be stated as follows: (1) vested remainders that are absolutely and indefeasibly fixed and determined; (2) vested remainders to a class, which is subject to open and take in additional remaindermen after the time the estate becomes vested; and (3) vested remainders whether to a person or to a class, but subject to be thereafter divested upon the happening of a contingent event. A vested remainder may in its nature partake of the characteristics of both of the last-mentioned classes. Britt v. Fincher, 202 Ga. 661, 44 S.E.2d 372 (1947).

Vested remainder may be subject to being divested. Cunningham v. Cunningham, 230 Ga. 493, 197 S.E.2d 731 (1974).

When remainders are subject to be divested, in whole or in part, by the disposition of the whole or some part of the property left by the testator, this contingency does not deprive the remainder of its character as vested. Walters v. Walters, 163 Ga. 884, 137 S.E. 386 (1927). See also Melton v. Camp, 121 Ga. 693, 49 S.E. 690 (1905).

Divesting clauses, especially as to remainders, following grant of absolute estate should be strictly construed so as to vest the estate absolutely at the earliest possible time. Miller v. Brown, 215 Ga. 148, 109 S.E.2d 741 (1959).

Distinction between vesting of title and vesting of possession excludes those dying before title vested. — On account of the remainder being vested absolutely in the children in esse at the time of the vesting of title, the shares of such children who should die between the vesting of the title and the vesting of the estate in possession would go to their heirs under this statute, which would include their descendants. Thus, we see, there are two vestings of a vested remainder — viz.; one of the title, and the other of the estate in possession, — each of which is important in fixing the devolution of the title to such remainders; that the law designating the beneficiaries thereunder excludes a grandchild of the life tenant whose parent died before the testator died. Davie v. Wynn, 80 Ga. 673, 6 S.E. 183 (1888); Tolbert v. Burns, 82 Ga. 213, 8 S.E. 79 (1888); Martin v. Trustees of Mercer Univ., 98 Ga. 320, 25 S.E. 522 (1896). See also Crawley v. Kendrick, 122 Ga. 183, 50 S.E. 41, 2 Ann. Cas. 643 (1905) (see O.C.G.A. § 44-6-61).

In "limitation over" to "heirs," persons answering description given vested remainder. — By former Code 1882, § 2249 (see O.C.G.A. § 44-6-23), in a ''limitation over'' to ''heirs'', ''heirs of body'', ''lawful heirs'', and ''lineal heirs'', persons answering the description take as purchasers upon the vesting of the estate. The term ''limitation over'' is made to mean any estate in the same property to be enjoyed after the expiration of the first estate, whether by succession or substitution. This seems to give such persons a vested remainder. Ewing v. Shropshire, 80 Ga. 374, 7 S.E. 554 (1888); Crawley v. Kendrick, 122 Ga. 183, 50 S.E. 41, 2 Ann. Cas. 643 (1905).

When "heir" dies without issue, remainder fails and estate reverts to testator's estate. — Testator by will created a trust estate with a limitation over to the testator's ''heirs at law'' who might be in life at the time of the termination of the trust estate. Applying the provisions of former Code 1933, § 85-504 (see O.C.G.A. § 44-6-23), the words ''heir at law'' would mean children and the decedents of children, and since the only children of the testator had died without issue, this remainder failed, the estate reverted, and the reversionary interest in the testator's estate vested, upon the testator's death, in those who were then the testator's heirs at law, with the right of possession postponed until the death of the last life tenant. Dodson v. Trust Co., 216 Ga. 499, 117 S.E.2d 331 (1960).

Section 44-6-23 inapplicable to express devise to life tenant's children, or children as class. — Former Civil Code 1895, § 3084 (see O.C.G.A. § 44-6-23) had no application to remainders to children as a class, nor to an expressed devise of a remainder to children of a life tenant. The law governing this has been fixed for centuries and vests the title absolutely in the children in esse at the death of the testator (subject to open in certain cases), and such remainder being vested, the shares of such children who should die between the vesting of title and the vesting of the estate in possession would go under former Civil Code 1895, § 3100 (see O.C.G.A. § 44-6-61), to their heirs, which would include their descendants. Crawley v. Kendrick, 122 Ga. 183, 50 S.E. 41, 2 Ann. Cas. 643 (1905).

Referring to a devise to A for life with

Vested Remainders (Cont'd)
1. Rules of Construction (Cont'd)

remainder to A's children as a class, both at common law and under the decisions of this court, such a devise in remainder has always been held, in accordance with an established principle of law which has become a rule of property to vest the title only in the children in esse at the death of the testator, subject to open and take in all other children born up to the vesting of the estate in possession at the life tenant's death. Crawley v. Kendrick, 122 Ga. 183, 50 S.E. 41, 2 Ann. Cas. 643 (1905); Lamkin v. Hines Lumber Co., 158 Ga. 785, 124 S.E. 694 (1924).

Remainder to "children". — When remainder is to ''children'', children of deceased child take interest of deceased parent. The remainders to the children vested at the time of the execution and delivery of the deed. Ward v. Ward, 176 Ga. 849, 169 S.E. 120 (1933).

Children of daughter of testator who dies before father. — Property being given to the testator's children as a class, the children of the daughter of the testator, who died before her father, took no interest under the will. Toucher v. Hawkins, 158 Ga. 482, 123 S.E. 618 (1924).

Interest created where death between vesting of title and vesting of possession. — A devise to X for life, then in fee to M and M's heirs, and if M has none to the children of J, two of whom, S and P, died after the testator but before the vesting of the possession of the estate, created a vested remainder in S and P, which was transmissible to their heirs. Payne v. Rosser, 53 Ga. 662 (1875).

As the parents were in esse when the deed was executed and delivered to the trustee, their rights to the property in dispute became vested, and their dying before the life tenant did not defeat the rights of their children to their several distributive shares. Wilbur v. McNulty, 75 Ga. 458 (1885).

As a general rule, when there is a devise to a class, the members of the class are to be ascertained upon the death of the testator as the will takes effect on that date. In a devise to children as a class by way of a remainder, children in esse at the death of the testator take vested interests and the interest of any that might die before the period of distribution passed to their heirs. Crawley v. Kendrick, 122 Ga. 183, 50 S.E. 41, 2 Ann. Cas. 643 (1905); Irvin v. Porterfield, 126 Ga. 729, 55 S.E. 946 (1906); Milner v. Gay, 145 Ga. 858, 90 S.E. 65 (1916); Gibbons v. International Harvester Co., 146 Ga. 467, 91 S.E. 482 (1917); Powell v. McKinney, 151 Ga. 803, 108 S.E. 231 (1921).

When a will gave a tract to the plaintiff's grandmother for life, with a remainder at her death to their father, ''his heirs and assigns,'' but without any limitation over to any ''heirs'' of the father after his death, the father therefore acquired a vested remainder, and when he died intestate after the testator died, and before the death of the life tenant, without having disposed of the remainder, the plaintiffs took nothing as devisees directly under the will of their grandfather, but only such interest as they might have acquired solely as heirs of their father, which was subject to a year's support from his estate, if that support was valid or good against them. Jones v. Federal Land Bank, 189 Ga. 419, 6 S.E.2d 52 (1939).

Under former Code 1933, § 85-504 (see O.C.G.A. § 44-6-63), if the deceased remainderman had at the time of the deceased's death an estate which had absolutely and indefeasibly vested, the deceased's heirs at law inherited the deceased's vested remainder interest with right of possession deferred until the termination of the antecedent estate. Britt v. Fincher, 202 Ga. 661, 44 S.E.2d 372 (1947).

When under a will two named daughters took a remainder interest in a one-third share of the estate devised to the testator's wife for life or widowhood, which remainder interest had become vested at the time the estate was divided (by provision of the will), but was subject to be divested in favor of the respective grandchildren in the event such named children should predecease the life tenant leaving children of their own, the divesting contingency in favor of the grandchildren became impossible of happening as to one daughter in that she had no children at the time of her dying intestate prior to the termination of the life estate. Upon the death of the life tenant, the husband of this daughter was entitled to take, not under the will, but by inheritance from his wife, that vested share of the estate to which his wife would have been entitled had she not predeceased the life tenant. McDougald v.

Kennedy, 203 Ga. 144, 45 S.E.2d 654 (1947).

Vested remainder interest in life tenant not prevented. — Fact that a life tenant could not enjoy the estate in remainder, because the remainder interest would not be distributed until the death of the life tenant, does not prevent a vested title in the remainder interest being in the life tenant, which might be sold and conveyed by the remainderman, or devised to, or be inherited by, the remainderman's heirs, who would take a vested remainder interest. Schriber v. Anderson, 205 Ga. 343, 53 S.E.2d 490 (1949).

When the heirs at law of the testator at the time of the testator's death were the testator's two sons, the fact that the sons were life tenants of the trust estate created by the testator would not prevent the vesting in them of the reversionary interest in the remainder estate. Dodson v. Trust Co., 216 Ga. 499, 117 S.E.2d 331 (1960).

2. Illustrative Cases

Vested remainder found. — When property was settled upon the wife for life, remainder to the husband for life, remainder to the heirs general of the husband, the husband took a vested remainder in fee. Varner v. Boynton, 46 Ga. 508 (1872).

When a testator devised certain lands to his wife for life, and after her death to his son for life, and after his death to his children living at his death, in fee, the son took a vested remainder estate, subject to be divested upon his death before that of the first life tenant. Lufburrow v. Koch, 75 Ga. 448 (1885).

Devise to ''A for life with remainder to the children of my brothers and sisters'' created a vested remainder in the children living at the testator's death, under this statute and the holding of McGinnis v. Foster, 4 Ga. 377 (1848); Legwin v. McRee, 79 Ga. 430, 4 S.E. 863 (1887) (see O.C.G.A. § 44-6-61).

When an estate was given to X for life with remainder to Y if living, Y took a vested remainder, subject to be divested upon dying before the life tenant. McDonald v. Taylor, 107 Ga. 43, 32 S.E. 879 (1899).

An estate to X for life, then to her children by her present husband, four of the children being in esse at the time and another being born later, created under this statute a vested remainder in all of the children except the unborn child, and a contingent remainder in it before birth, but upon birth, the remainder to the other children opened to take in such a child. Fields v. Lewis, 118 Ga. 573, 45 S.E. 437 (1903) (see O.C.G.A. § 44-6-61).

Where one bequeaths property to his wife ''during her lifetime,'' and further provides that at her death it shall belong to a named daughter and the heirs of her body, the remainder is one limited to certain person upon the happening of a necessary event, and such remainder is vested. Pearson v. Cochran, 152 Ga. 276, 109 S.E. 498 (1921).

An estate to X and Y for life, and if Y should die without marrying then to S, or if Y should marry one half to S, created a vested remainder in S. Schley v. Williamson, 153 Ga. 245, 111 S.E. 917 (1922).

Will to X and Y during life or the period of remaining single, then to S in fee, created a vested remainder in S. De Vane v. Young, 154 Ga. 832, 115 S.E. 661 (1923).

When a testator by will bequeathed and devised a life estate in described property to his wife and daughters, and the will further provided, ''in case any of my daughters should die leaving no children or grandchildren surviving her, I direct that her share of my estate revert to the other legatees herein named, if all are living at the time; if not, to those living or to the children or grandchildren of such as may be dead taking per stirpes,'' and where one of the daughters of the testator had three children, one of whom predeceased his mother, and before his death mortgaged his interest in the estate, this grandchild of the testator took a vested remainder in the property in controversy, subject to be divested upon the mother dying without child or grandchildren. Federal Reserve Bank v. Spearman, 176 Ga. 236, 167 S.E. 603 (1933).

When an unqualified limitation over in a deed is expressly to the children of a life tenant as a class, the children in esse at the time the instrument creating the remainder becomes effective, take, as purchasers under the instrument, a vested remainder interest, which is subject to open and in like manner take in other children of the life tenant born subsequently to the vesting of title in the first-born remainderman. Britt v. Fincher, 202 Ga. 661, 44 S.E.2d 372 (1947).

Provision of the will of a testatrix that ''the

Vested Remainders (Cont'd)
2. Illustrative Cases (Cont'd)

remaining assets of my estate of whatever kind and nature * * *. I hereby give, bequeath, and devise to my stepson,'' upon the death of the testatrix conveyed a vested remainder interest to the stepson in the residue of the estate. Schriber v. Anderson, 205 Ga. 343, 53 S.E.2d 490 (1949).

When a testator bequeaths a certain fund to a trustee, providing that the trustee shall manage, invest, sell, exchange, and reinvest the fund, and pay a stated amount therefrom each month to ''A'' during A's lifetime, and at the death of ''A'' the balance of the fund, if any, shall be divided between ''B'' and ''C'' (children of ''A''), and in the next succeeding paragraph of the will provides that if ''B'' or ''C'' does not live until the time for payment to ''B'' or ''C'', leaving children surviving ''B'' or ''C'', then such children of ''B'' and ''C'' as survive the parent shall take the parent's share — the remainder interest of ''B'' and ''C'' in the trust fund is a defeasible vested interest, subject to be divested by their death without children before the death of ''A.'' Love v. McManus, 208 Ga. 447, 67 S.E.2d 218 (1951).

When a corporate resolution uses the term ''reversion'' to describe the estate of a stockholder, the estate is a vested remainder if the remainder interest is limited to that stockholder upon the death of another, and the stockholder's rights are the same as those of a vested remainderman. J.B. McCrary Co. v. Peacock, 223 Ga. 476, 156 S.E.2d 57 (1967).

Effect of legislation on vested right to pension benefits. — When fireman had been retired in 1932, and was receiving a ''pension'' of $100.00 a month up to the time of his death in 1937, and when, during the period of such payments and at the time of his death, he had a wife, the widow, even though she had not yet drawn the ''pension'' at the time of the 1935 statutory provision reducing pensions, and was not entitled thereto until after the death of the husband, nevertheless had a vested right which could not be altered by later legislation. Such a right was not merely contingent, but was more analogous to a vested remainder or salable interest, subject to be divested and to go to other beneficiaries upon her dying or remarrying before receiving payments. West v. Anderson, 187 Ga. 587, 1 S.E.2d 671 (1939).

Vested remainder not found. — Deed provided that ''at the death or marriage of F the property shall go to and vest in the child or children of the said J then in life, and in case of the death of such child during the life or widowhood of F leaving issue alive, such issue shall take in place of such child.'' This does not constitute a vested remainder, because in a vested remainder there is some person in esse, known and ascertained who, by the will or deed creating the estate, is to take and enjoy the estate upon the expiration of the existing particular estate, and whose right to such remainder no contingency can defeat. City Council v. Radcliffe, 66 Ga. 469 (1881).

Contingent Remainders

Contingent remainder interest in land is an "estate." Phelps v. Palmer, 192 Ga. 421, 15 S.E.2d 503 (1941).

Different classes of contingent remainders may be stated as follows: (1) contingent remainders when the estate is to an uncertain person; (2) contingent remainders when the person is certain, but when the vesting of the estate in possession is conditioned upon the happening of an uncertain event. Britt v. Fincher, 202 Ga. 661, 44 S.E.2d 372 (1947).

There is distinction between uncertainty of contingent remainder and uncertainty of estate ever taking effect in possession, which is incidental to even a vested remainder. In a vested remainder, the time of possession and the enjoyment being deferred, there is always an uncertainty as to whether the estate will ever be enjoyed in possession. Walters v. Walters, 163 Ga. 884, 137 S.E. 386 (1927).

Uncertainty as to mere quantum of property to be possessed does not make remainders contingent. The remaindermen are subject to be divested in whole or in part by the sale or disposal of the whole, or some part, of the property left by the testator. This contingency, however, does not deprive the remainders of their character of being vested. Cochran v. Groover, 156 Ga. 323, 118 S.E. 865 (1923).

Contingent remainder must vest on or before termination of preceding estate, or happening of contingency. — Though a con-

tingent remainder may become vested, if persons answering the description of the remaindermen come into being during the existence of the particular estate, or by the time the remainder is to vest (Ardis v. Printup, 39 Ga. 648 (1869); Kollock v. Webb, 113 Ga. 762, 39 S.E. 339 (1901)), nevertheless, when the remaindermen are not in esse at the time of the making of the deed, nor come into existence pending the precedent estate when the remainder is to vest, the remainder can never thereafter vest. A contingent remainder must vest on or before the termination of the particular estate, or the happening of the contingency, which is to vest it, or it will be defeated. Edwards v. Edwards, 147 Ga. 12, 92 S.E. 540 (1917).

Remaindermen cannot be divested during existence of life estate except by appropriate legal proceedings. — It is the general rule that the right of contingent remaindermen constitutes an estate in land of which they cannot be divested during the existence of the life estate except by appropriate legal proceedings to which they are made parties. Mason v. Young, 203 Ga. 121, 45 S.E.2d 643 (1947).

Remainderman should be held amenable to court processes by one holding apparent preexisting title to remove what amounts to a cloud thereon. Mason v. Young, 203 Ga. 121, 45 S.E.2d 643 (1947).

Contingent remainderman cannot cancel deed executed by life tenant. — Remainderman whose estate is equitable and contingent cannot, during the existence of a precedent life estate, maintain a suit to cancel a security deed executed by the life tenant and the trustees, purporting to convey the entire trust estate. Stout v. Massachusetts Mut. Life Ins. Co., 183 Ga. 649, 189 S.E. 248 (1936).

Contingent remainder found. — Bequest to A at the death of the wife of the testator, or when A marries or becomes of age, is a contingent interest, dependent for its transmission to A's representatives upon her being in life at the happenings of some one of the named contingencies. If she dies before that time (as the legatee did in this case), there is nothing in her to pass to her administrator. Allen v. Whitaker, 34 Ga. 6 (1864).

After S deeded land to X in trust for Y, and upon Y's death to her children, and if she dies without children then to X in fee, X took a contingent remainder, the remainder being limited upon an event which may or may not happen. Morse v. Proper, 82 Ga. 13, 8 S.E. 625 (1889).

Interest of the ''legal heirs'' of a beneficiary in one-half of the income of the trust property was a remainder estate, contingent on one's death prior to a termination of the trust estate, and the rules of former Code 1933, § 85-504 (see O.C.G.A. § 44-6-23) would require a construction of the words ''legal heirs'' to mean children and the descendants of children. This remainder failed because of the failure of issue of the beneficiary and the estate reverted to the testator's estate and should be distributed to the widows of the two sons of the testator. Dodson v. Trust Co., 216 Ga. 499, 117 S.E.2d 331 (1960).

OPINIONS OF THE ATTORNEY GENERAL

Remainder interest in stock in foreign corporation owned for life by nonresident is vested remainder in that it is limited upon the happening of a necessary event. 1963-65 Op. Att'y Gen. p. 49.

RESEARCH REFERENCES

Am. Jur. 2d. — 28 Am. Jur. 2d, Estates, § 248 et seq.

C.J.S. — 26A C.J.S., Deeds, §§ 251, 252. 31 C.J.S., Estates, §§ 1, 82 et seq., 168 et seq. 96 C.J.S., Wills, § 1320.

ALR. — Contingent remainder as subject to levy and sale by creditor, 60 ALR 803.

Constitutionality, construction, and effect of statutes relating to determination or extinguishment of contingent interest in real property, 69 ALR 924.

Provision of will that children, etc., of remainderman who dies before expiration of precedent estate or time fixed for distribution to remaindermen, shall take the share to which he would have been entitled, as affecting character of remainder as vested or contingent, 109 ALR 5; 47 ALR2d 900.

Vested or contingent character of remainder which is subject to be defeated by death of remainderman without issue before termination of particular estate, 109 ALR 136.

Vested or contingent character of remainder under devise of a remainder to a certain person or persons ''or'' his or their heirs or other class, 128 ALR 306.

Distinction between contingent estates and estates vested, subject to defeasance, 131 ALR 712.

Vested or contingent character of remainder as affected by fact that, if vested, certain person or persons will share in the property who were excluded by express terms of the will, 138 ALR 1435.

Right of owner of contingent or defeasible future interest to maintain action for relief in respect of property, 144 ALR 769.

Gift or grant to one upon marriage, if married, payable at marriage, or the like, as vested or contingent, 30 ALR2d 127.

Character of remainder limited generally to the life tenant's children, 57 ALR2d 103.

Character of remainder limited to surviving children of life tenant, 57 ALR2d 197.

Where will names two or more remaindermen to take under different contingencies, must the one whose contingency occurs survive the other to make his interest transmissible?, 90 ALR2d 312.

Relinquishment of interest by life beneficiary in possession as accelerating remainder of which there is substitutional gift in case primary remainderman does not survive life beneficiary, 7 ALR4th 1084.

44-6-62. Effect of defeat of estate on remainder.

Since no particular estate is necessary to sustain a remainder, the defeat of the particular estate for any cause does not destroy the remainder. (Orig. Code 1863, § 2246; Code 1868, § 2238; Code 1873, § 2264; Code 1882, § 2264; Civil Code 1895, § 3099; Civil Code 1910, § 3675; Code 1933, § 85-702; Ga. L. 1984, p. 22, § 44.)

Law reviews. — For article discussing destructibility of contingent remainders, see 3 Ga. B.J. 57 (1940). For article, ''Descendible Future Interests in Georgia: The Effect of the Preference for Early Vesting,'' see 7 Ga. L. Rev. 443 (1973). For article, ''The Rule Against Perpetuities as Applied to Georgia Wills and Trusts,'' see 16 Ga. L. Rev. 235 (1982).

JUDICIAL DECISIONS

Section presupposes some estate. Lanier v. Lanier, 218 Ga. 137, 126 S.E.2d 776 (1962) (see O.C.G.A. § 44-6-62).

Contingent-remainder interest in land is an "estate." Phelps v. Palmer, 192 Ga. 421, 15 S.E.2d 503 (1941).

Section widely differs from the common law, and wholly abrogates any defeat of remainders by the destruction or defeat of the particular estate; correspondingly, if any doctrine of representation or quasi representation by the life tenant of the remaindermen, so far as to bind the remaindermen by a judgment against the life tenant, was established, it does not exist under Georgia law. Brown v. Brown, 97 Ga. 531, 25 S.E. 353, 33 L.R.A. 816 (1895) (see O.C.G.A. § 44-6-62).

Election by widow to take against will. — Ordinarily, election of the widow to take against will has effect of accelerating any remainders limited to take effect after a life estate given to her. Toombs v. Spratlin, 127 Ga. 766, 57 S.E. 59 (1907); Bank of Statesboro v. Futch, 164 Ga. 181, 138 S.E. 60 (1927).

Remainder held not accelerated. — When an estate was left by will to support the family until the widow's death, but the widow elected to take dower, the remainder was not accelerated by her part of the life estate ending for a remainder will not fail for want of a particular estate. Nor did the estate stand as if the testator had died intestate for the defeat of a particular estate does not

destroy the remainder. Toombs v. Spratlin, 127 Ga. 766, 57 S.E. 59 (1907).

Remainder in property bequeathed to other for life vests at death of testator. — L and L's brother N each took a vested remainder in the property bequeathed to M for life, and this remainder vested in L and N when the will took effect at the death of the testator. Vason v. Estes, 77 Ga. 352, 1 S.E. 163 (1887).

Cited in Cooper v. Davis, 174 Ga. 670, 163 S.E. 736 (1932); Raney v. Smith, 242 Ga. 809, 251 S.E.2d 554 (1979).

RESEARCH REFERENCES

Am. Jur. 2d. — 28 Am. Jur. 2d, Estates, §§ 230, 241 et seq.

C.J.S. — 26A C.J.S., Deeds, § 249 et seq. 31 C.J.S., Estates, § 95 et seq. 96 C.J.S., Wills, § 910.

ALR. — Effect of premature termination of precedent estate to accelerate remainder of which there is an alternative substantial gift, 164 ALR 1297.

Effect of premature termination of precedent estate to accelerate a contingent remainder, 164 ALR 1433.

44-6-63. Interest of heirs of remainderman.

Reserved. Repealed by Ga. L. 1994, p. 364, § 2, effective March 25, 1994.

Editor's notes. — This Code section was based on Orig. Code 1863, § 2248; Code 1868, § 2240; Code 1873, § 2266; Code 1882, § 2266; Civil Code 1895, § 3101; Civil Code 1910, § 3677; Code 1933, § 85-704.

44-6-64. Creation of remainders by parol.

Estates in remainder may not be created by parol. (Orig. Code 1863, § 2250; Code 1868, § 2242; Code 1873, § 2268; Code 1882, § 2268; Civil Code 1895, § 3103; Civil Code 1910, § 3679; Code 1933, § 85-705.)

JUDICIAL DECISIONS

Former Civil Code 1910, § 3744, allowing trustees to be removed upon petition by the beneficiaries, must be construed in connection with and in the light of former Civil Code 1910, § 3679 (see O.C.G.A. § 44-6-64). Nelson v. Estill, 175 Ga. 526, 165 S.E. 820 (1932).

Remainder by parol held not attempted. — See Alderman v. Chester, 34 Ga. 152 (1865).

Cited in Cooper v. Davis, 174 Ga. 670, 163 S.E. 736 (1932); Milton v. Milton, 192 Ga. 778, 16 S.E.2d 573 (1941).

RESEARCH REFERENCES

Am. Jur. 2d. — 72 Am. Jur. 2d, Statute of Frauds, § 49 et seq.

C.J.S. — 37 C.J.S., Frauds, Statute of, § 69.

44-6-65. Creation of remainder for persons not in being; vested remainder subject to open.

Estates in remainder may be created for persons not in being. If such a remainder is vested, it will open to take in all persons within the description who come into being up to the time the enjoyment of the estate com-

mences. (Orig. Code 1863, § 2250; Code 1868, § 2242; Code 1873, § 2268; Code 1882, § 2268; Civil Code 1895, § 3103; Civil Code 1910, § 3679; Code 1933, § 85-706.)

Law reviews. — For article discussing problems in construction of instrument conveying gift to a group or class, see 6 Ga. St. B.J. 169 (1969).

JUDICIAL DECISIONS

Former Civil Code 1910, § 3744 must be construed in connection with and in the light of former Civil Code 1910, § 3679 (see O.C.G.A. § 44-6-65). Nelson v. Estill, 175 Ga. 526, 165 S.E. 820 (1932).

Section changes the rule of estates in remainder at common law. Britt v. Fincher, 202 Ga. 661, 44 S.E.2d 372 (1947) (see O.C.G.A. § 44-6-65).

Section applies to both deeds and wills. Hill v. Lang, 211 Ga. 484, 86 S.E.2d 498 (1955) (see O.C.G.A. § 44-6-65).

When children granted remainder, those living get vested right, subject to open for after-born children. — When an estate is granted to one for life, and to such of one's children as should be living after one's death, a present right to the future possession vests at once in such as are living, subject to open and let in after-born children, and to be divested as to those who shall die without issue. Doe v. Newton, 171 Ga. 418, 156 S.E. 25 (1930).

When there is a grant of a remainder to children as a class, the children in esse at the time of the execution of the deed take a vested remainder, which opens for the purpose of letting in after-born children. Ward v. Ward, 176 Ga. 849, 169 S.E. 120 (1933).

Remainder to unborn child is contingent until birth, when title vests. — Remainder given to the unborn child or children was, of course, contingent until the birth of such child, when the remainder given to the named children, if vested, would open to take in the after-born child. Wilbur v. McNulty, 75 Ga. 458 (1885); Fields v. Lewis, 118 Ga. 573, 45 S.E. 437 (1903).

T, the son of J, one of the second life tenants, not being in esse at the death of the testator, the remainder is construed to be contingent until the birth of the child in whom the title to the remainder immediately vests, subject to open and take in all other children born before the termination of the life estate. Crawley v. Kendrick, 122 Ga. 183, 50 S.E. 41, 2 Ann. Cas. 643 (1905); Gibbons v. International Harvester Co., 146 Ga. 467, 91 S.E. 482 (1917); Cock v. Lipsey, 148 Ga. 322, 96 S.E. 628 (1918).

When remainders may be created, in a deed, for the future benefit of persons not in being, if there is no child in esse when the instrument becomes effective, the remainder is at first necessarily contingent, but only so up until the time a child is born, when title to the remainder vests in the child, subject to open and take in children born after title to the remainder has vested in the first child. All such children who come into being prior to the termination of the antecedent estate take as purchasers under the instrument. Britt v. Fincher, 202 Ga. 661, 44 S.E.2d 372 (1947).

Remainder may be created for future wife. — Valid remainder can be created for children unborn and who may never be born, and a like remainder may be created for a future wife. Citizens & S. Nat'l Bank v. Howell, 186 Ga. 47, 196 S.E. 741 (1938).

Cut-off date for determining class membership. — When father reserved life estate, while conveying to his daughter and her children a future interest in his property, the critical date for determining the time the enjoyment of the estate commenced, and thus the cut-off date for class membership was not the date of the daughter's death, but the date of the father's death. Chester v. Cannon, 258 Ga. 486, 371 S.E.2d 387 (1988).

Vested remainderman proper person to prosecute action for waste by life tenant. — When the remainder vested in the remainderman upon the death of the testator, subject to being divested in the event of her predeceasing the life tenant, she alone is the proper person to prosecute an action for waste and the failure of the life tenant to protect the property. Smith v. Minich, 215 Ga. 386, 110 S.E.2d 649 (1959).

Cited in Padgett v. Hatton, 200 Ga. 209, 36 S.E.2d 664 (1946); Nash v. Crowe, 222 Ga. 173, 149 S.E.2d 88 (1966).

RESEARCH REFERENCES

Am. Jur. 2d. — 23 Am. Jur. 2d, Deeds, §§ 33, 35. 28 Am. Jur. 2d, Estates, §§ 231, 255, 258. 51 Am. Jur. 2d, Life Tenants and Remaindermen, § 6 et seq.

C.J.S. — 26A C.J.S., Deeds, § 250 et seq. 31 C.J.S., Estates, § 92. 96 C.J.S., Wills, §§ 1328, 1352, 1369.

ALR. — Conveyance by life tenant and remaindermen in esse as cutting off interest of unborn persons under devise for life with remainder to a class, 25 ALR 770.

Constitutionality, construction, and effect of statutes relating to determination or extinguishment of contingent interest in real property, 69 ALR 924.

Words of survivorship in will disposing of remainder upon termination of life or other precedent or intervening estate as referable to time of testator's death or to time of termination such intervening estate, 114 ALR 4; 20 ALR2d 830.

Death of life beneficiary without ever having had a child as equivalent of death of all his children, which by terms of will condition of remainder interest, 161 ALR 181.

Validity, under rule against perpetuities, of gift in remainder to creator's great-grandchildren, following successive life estates to children and grandchildren, 18 ALR2d 671.

Time of ascertaining persons to take, under deed or inter vivos trust, where designated as the "heirs," "next of kin," "children," "relations," etc., of life tenant or remainderman, 65 ALR2d 1408.

Where will names two or more remaindermen to take under different contingencies, must the one whose contingency occurs survive the other to make his interest transmissible?, 90 ALR2d 312.

Modern status of presumption against possibility of issue being extinct, 98 ALR2d 1285.

44-6-66. Preference for vested remainders; construction of words of survivorship in wills.

The law favors the vesting of remainders in all cases of doubt. In construing wills, words of survivorship shall refer to those survivors living at the time of the death of the testator in order to vest remainders unless a manifest intention to the contrary shall appear. (Orig. Code 1863, § 2251; Code 1868, § 2243; Code 1873, § 2269; Code 1882, § 2269; Civil Code 1895, § 3104; Civil Code 1910, § 3680; Code 1933, § 85-708.)

Law reviews. — For article, "Descendible Future Interests in Georgia: The Effect of the Preference for Early Vesting," see 7 Ga. L. Rev. 443 (1973). For annual survey article discussing wills, trusts, and administration of estates, see 51 Mercer L. Rev. 487 (1999).

For note discussing construction and interpretation of wills, see 1 Ga. L. Rev. 46 (1927).

For comment on Lanier v. Lanier, 218 Ga. 137, 126 S.E.2d 776 (1962), executory interests and the rule against perpetuities, see 14 Mercer L. Rev. 275 (1962). For comment on Burton v. Hicks, 220 Ga. 29, 136 S.E.2d 759 (1964), see 1 Ga. St. B.J. 361 (1965).

JUDICIAL DECISIONS

Analysis

General Consideration

Rules of Law
Rules of Construction
Illustrative Cases

General Consideration

Vested remainder interest in a life estate is subject to levy and sale as the property of the heir, though the life estate is not terminated, if the executor has assented to the legacy for life. Pound v. Faulkner, 193 Ga. 413, 18 S.E.2d 749 (1942).

Cited in Hudgens v. Wilkins, 77 Ga. 555 (1886); Johnson v. Johnson, 158 Ga. 534, 124 S.E. 18 (1924); Schoen v. Israel, 168 Ga. 779, 149 S.E. 124 (1929); Comer v. Citizens & S. Nat'l Bank, 182 Ga. 1, 185 S.E. 77 (1935); Bryant v. Green, 187 Ga. 89, 199 S.E. 804 (1938); Walters v. Suarez, 188 Ga. 190, 3 S.E.2d 575 (1939); Armstrong Junior College Comm'n v. Livesey, 189 Ga. 825, 7 S.E.2d 678 (1940); Perkins v. Citizens & S. Nat'l Bank, 190 Ga. 29, 8 S.E.2d 28 (1940); Shedden v. Donaldson, 207 Ga. 77, 60 S.E.2d 158 (1950); McKain v. Allen, 214 Ga. 820, 108 S.E.2d 319 (1959); Lanier v. Lanier, 218 Ga. 137, 126 S.E.2d 776 (1962); Gay v. Graham, 218 Ga. 745, 130 S.E.2d 591 (1963); Dutton v. Hughes, 219 Ga. 645, 135 S.E.2d 407 (1964); Nash v. Crowe, 222 Ga. 173, 149 S.E.2d 88 (1966); Stokes v. Trust Co., 507 F.2d 177 (5th Cir. 1975); Seymour v. Presley, 239 Ga. 572, 238 S.E.2d 347 (1977); Trust Co. Bank v. Heyward, 240 Ga. 557, 242 S.E.2d 257 (1978); Dunn v. Sanders, 243 Ga. 684, 256 S.E.2d 366 (1979); Clark v. Citizens & S. Nat'l Bank, 243 Ga. 703, 257 S.E.2d 244 (1979); Wood v. Roberts, 244 Ga. 507, 260 S.E.2d 890 (1979); Folsom v. First Nat'l Bank of Atlanta, 246 Ga. 320, 271 S.E.2d 461 (1980); Hack v. Woodward, 248 Ga. 504, 284 S.E.2d 411 (1981); Griffith v. Beavers, 259 Ga. 479, 384 S.E.2d 650 (1989); Epstein v. First Nat'l Bank, 260 Ga. 217, 391 S.E.2d 924 (1990); Lemmons v. Lawson, 266 Ga. 571, 468 S.E.2d 749 (1996); Folsom v. Rowell, 281 Ga. 494, 640 S.E.2d 5 (2007).

Rules of Law

Estate vested when present right of enjoyment exists. — Estate is vested when there is an immediate right of enjoyment or a present fixed right of future enjoyment. Lassiter v. Bank of Dawson, 191 Ga. 208, 11 S.E.2d 910 (1940).

Estate is ''vested'' when there is an immediate right of enjoyment or a present fixed right of future enjoyment. It is the present capacity of taking effect in possession, if the possession were to become vacant, that distinguishes a vested from a contingent remainder. Gilmore v. Gilmore, 197 Ga. 303, 29 S.E.2d 74 (1944).

Remainder is vested if there is no condition precedent save termination of the preceding estate. Johnson v. Wishard, 227 Ga. 355, 180 S.E.2d 738 (1971).

Vested remainder is estate in fee, although subject to defeasance by subsequent contingencies. — If the remainder vests as of the date of the testator's death, it is an estate in fee, notwithstanding it is subject to defeasance by subsequent contingencies; the presumption is in favor of prompt vesting. However, a trust is still executory until the period contemplated for its termination expires, provided it remains uncertain whether at the end of the trust period the original legatee is to take or someone else is to take. The trust is kept open to enable the trustee to ascertain the objects of the trust. Sanders v. First Nat'l Bank, 189 Ga. 450, 6 S.E.2d 294 (1939).

Devise of land is presumed to be vested and not contingent. There is a strong presumption in favor of early vesting rather than more remote vesting. Raney v. Smith, 242 Ga. 809, 251 S.E.2d 554 (1979).

Titles should vest at earliest period. — Sound policy and practical convenience require that titles should be vested at the earliest period, and it has long been a settled rule of construction in the courts of England and America that estates, legal or equitable, given by will or deed should always be regarded as vesting immediately, unless the intention is clearly to the contrary. Wilbur v. McNulty, 75 Ga. 458 (1885).

Law favors the vesting of remainders at the earliest possible moment. Federal Reserve Bank v. Spearman, 176 Ga. 236, 167 S.E. 603 (1933).

Under the provisions of state law, and under the decisions of the Supreme Court, it is well established that in Georgia the policy of the law is to favor the vesting of remain-

ders at the earliest possible time, unless the intention of the testator is clearly manifest to the contrary. Miller v. Brown, 215 Ga. 148, 109 S.E.2d 741 (1959).

Absent a manifest intention to the contrary, the law favors early vesting of remainders. First Presbyterian Church v. Price, 248 Ga. 38, 280 S.E.2d 830 (1981).

Rules of Construction

Remainder will never be construed to be contingent when it can be construed as vested. Raney v. Smith, 242 Ga. 809, 251 S.E.2d 554 (1979).

If a provision of the decedent's will could be construed both to provide a contingent remainder and a vested remainder, the vested remainder would prevail. Usry v. Farr, 274 Ga. 438, 553 S.E.2d 789 (2001).

Law favors vested remainders, and it is an established rule that the court never construes a remainder to be contingent when it can be taken to be vested. Lumpkin v. Patterson, 170 Ga. 94, 152 S.E. 448 (1930).

It is an established rule that the court never construes a remainder to be contingent when it can be taken to be vested. Gilmore v. Gilmore, 197 Ga. 303, 29 S.E.2d 74 (1944).

If remainder is defeasible fee, law favors construction which makes fee absolute at earliest time consistent with the intent of the testator as expressed in the will. Sanders v. First Nat'l Bank, 189 Ga. 450, 6 S.E.2d 294 (1939); Raney v. Smith, 242 Ga. 809, 251 S.E.2d 554 (1979).

Divesting clauses, especially as to remainders, following grant of absolute estate should be strictly construed so as to vest the estate absolutely at the earliest possible time. Miller v. Brown, 215 Ga. 148, 109 S.E.2d 741 (1959).

Construction construing remainder as vested preferred. — In cases of doubt as to the character of a remainder, if to construe it as contingent an intestacy would arise, and if to construe it as vested an intestacy would not arise, a construction construing it as vested would be preferable, since intestacies are not generally favored in construing wills. Gilmore v. Gilmore, 197 Ga. 303, 29 S.E.2d 74 (1944).

If the expression relied upon to limit a fee once devised is doubtful, the doubt should be resolved in favor of the absolute estate. Montgomery v. Pierce, 212 Ga. 545, 93 S.E.2d 758 (1956).

When an instrument is susceptible to two constructions, the one favorable to vested and unfavorable to contingent remainders should be adopted. Miller v. Brown, 215 Ga. 148, 109 S.E.2d 741 (1959).

Presumption that testator intended that remainder vests at moment will becomes operative. — In the present case there seems to be no clear manifestation of an intent to postpone the vesting of the title in the remaindermen, and therefore it is to be presumed that the testator intended that the remainder interest should vest at the moment when the will became operative. If there is doubt on this question, it must be resolved in favor of the earlier vesting. Powell v. McKinney, 151 Ga. 803, 108 S.E. 231 (1921); Toucher v. Hawkins, 158 Ga. 482, 123 S.E. 618 (1924).

Devise to children as class. — In a devise to children as a class by way of a remainder, children in esse at the death of the testator take vested interests. The interest of any that might die before the period of distribution pass to their heirs. Crawley v. Kendrick, 122 Ga. 183, 50 S.E. 41, 2 Ann. Cas. 643 (1905); Irvin v. Porterfield, 126 Ga. 729, 55 S.E. 946 (1906); Milner v. Gay, 145 Ga. 858, 90 S.E. 65 (1916); Gibbons v. International Harvester Co., 146 Ga. 467, 91 S.E. 482 (1917); Toucher v. Hawkins, 158 Ga. 482, 123 S.E. 618 (1924).

Devise to testator's "lawful heirs". — Devise of realty for life, with remainder to a testator's ''lawful heirs'', vests the remainder in those answering such a description at the time of the testator's death, unless the will evidences a manifest intention to the contrary, though the life tenant is one of the class who will take the remainder. Payne v. Brown, 164 Ga. 171, 137 S.E. 921 (1927).

Presumption gives way only if clear intent of contingency. — Presumption in favor of an early vesting will give way only if there is a clear intent to make the interest subject to a contingency. Raney v. Smith, 242 Ga. 809, 251 S.E.2d 554 (1979).

Ambiguity not created if none exists. — When the language employed by the testator is clear and unambiguous, the Supreme Court will not, just to create a vested remainder, by construction create an ambiguity if none exists. Veach v. Veach, 205 Ga. 185, 53 S.E.2d 98 (1949).

Rules of Construction (Cont'd)

When clear intent to make remainder contingent, intent controls. — While the law favors the vesting of remainders, and a remainder will be construed to become indefeasibly vested at the earliest possible moment, the language of each particular instrument construed as a whole, showing the intent and purpose of the grantor or testator, must be given effect; if the instrument creating the remainder should be specific language, consistent with a clear intent of the maker as gathered from the entire instrument, make the remainder itself subject to a contingency, the intent of the maker, if lawful, will control. Britt v. Fincher, 202 Ga. 661, 44 S.E.2d 372 (1947).

In passing on meaning of clause in will, courts should use analogies of previous cases. — While it is true that every will is a thing to itself, and when it comes to the construction of a will, precedents are of less value than is commonly true in other questions, nevertheless, courts should, in passing upon the meaning of a clause in a will, use the analogies that have occurred in previous cases. Moody v. Baxley Turpentine Corp., 195 Ga. 482, 24 S.E.2d 652 (1943).

Words of survivorship refer to time of testator's death, unless contrary intent manifested. — When no special intent is manifested to the contrary, words of survivorship will have reference to the time of the death of the testator, and not to the time of the death of the life tenant. Speer v. Roach, 145 Ga. 852, 90 S.E. 57 (1916); Moore v. Cook, 153 Ga. 840, 113 S.E. 526 (1922).

Intent deducible from language. — Whether a testator manifestly intends that words of survivorship should refer to the death of another in a given case will depend upon the language of the will. In Dudley v. Porter, 16 Ga. 613 (1855), words of survivorship expressed in a deed were held to refer to the death of one other than the grantor. Roberts v. Wadley, 156 Ga. 35, 118 S.E. 664 (1923).

Survivorship referred to future time fixed for division or distribution. — When a future time is fixed for a division or distribution, there are decisions which hold that words of survivorship will be referred to such a time, in the absence of anything to show a contrary intent. But if the instrument, whether a will or a deed, shows clearly a different intent on the part of the maker, it will control. Sterling v. Huntley, 139 Ga. 21, 76 S.E. 375 (1912).

Illustrative Cases

Vested remainder found. — In case of a devise to two daughters for their lives, and after their respective deaths, to the child or children of the daughters, the remainder vested, at the testator's death, in the children then living, to be enjoyed at the death of the surviving daughter, but subject to open and take in the children born between the time of vesting and time of enjoyment; all took per capita. Olmstead v. Dunn, 72 Ga. 850 (1884); DeVane v. Young, 154 Ga. 832, 115 S.E. 661 (1923).

By the rule in aid of the early vesting of estates in the case of gifts to unmarried women for life, with a remainder to the husband, the first who answers to the description is to be considered to have been intended by the testator as the recipient of the testator's bounty. Jossey v. Brown, 119 Ga. 758, 47 S.E. 350 (1904).

When the testator created an estate for his wife during life or widowhood, and directed that, if his wife should die or marry, "a sale be made of all my property, both real and personal, and the proceeds be equally divided among my children," the children of the testator who survived him took, at his death, a vested remainder estate, and that this was not changed by the direction to sell and divide the proceeds. Crossley v. Leslie, 130 Ga. 782, 61 S.E. 851, 14 Ann. Cas. 703 (1908).

When the language under construction was a bequest of real and personal property to the wife of the testator, for the raising and education of the testator's children, "during her natural life; and at her death to be equally divided among all his surviving children, and the legal representatives of such as may be deceased," the words of survivorship had reference to the death of the testator, and not that of the life tenant, and that the children who were in life at the testator's death took vested remainders under the testator's will, to be enjoyed after the death of the tenant for life. Crossley v. Leslie, 130 Ga. 782, 61 S.E. 851, 14 Ann. Cas. 703 (1908).

Will devised to the wife of the testator

certain land for and during her natural life, and then provided, ''after her death to be sold, and the proceeds to be equally divided between my surviving children and the children of any of my deceased children.'' The words of survivorship applied to the death of the testator, and the persons designated took a vested remainder interest at the testator's death. Crossley v. Leslie, 130 Ga. 782, 61 S.E. 851, 14 Ann. Cas. 703 (1908); Green v. Driver, 143 Ga. 134, 84 S.E. 552 (1915).

Following this section, as governing in cases when the intention of the grantor is not so expressed as to be free from doubt, not being able to say that the grantor in the deed under consideration did not intend to employ the word ''vest'' as meaning a vesting in possession, the court construes the deed which provides ''to C for life and then to vest in such child as born or may be born of our marriage'' as creating at the time of the deed's execution a vested remainder in such children as were then in life, subject to open up and let in a vested remainder interest to children thereafter born to them. Burney v. Arnold, 134 Ga. 141, 67 S.E. 712 (1910).

When a testator by will bequeathed and devised a life estate in described property to the testator's wife and daughters, and the will further provided, ''In case any of my daughters should die leaving no children or grandchildren surviving her, I direct that her share of my estate revert to the other legatees herein named, if all are living at the time; if not, to those living or to the children or grandchildren of such as may be dead taking per stirpes,'' and when one of the daughters of the testator had three children, one of whom predeceased the mother, and before the child's death mortgaged the child's interest in the estate, the grandchild of the testator took a vested remainder in the property in controversy, subject to be divested upon the mother dying without a child or grandchildren. Federal Reserve Bank v. Spearman, 176 Ga. 236, 167 S.E. 603 (1933).

When the will gave the tract to the plaintiff's grandmother for life, with remainder at her death to their father, ''his heirs and assigns,'' but without any limitation over to any ''heirs'' of the father after his death, the father therefore acquired a vested remainder; and when he died intestate after the testator died, and before the death of the life tenant, without having disposed of the remainder, the plaintiffs took nothing as devisees directly under the will of their grandfather, but only such interest as they might have acquired solely as heirs of their father, which was subject to a year's support from his estate, if that support was valid or good against them. Jones v. Federal Land Bank, 189 Ga. 419, 6 S.E.2d 52 (1939).

When a codicil in a will provides ''My house I give to my brother after the death of my wife should my wife be the longest liver,'' given the policy embodied in this statute that the law favors the vesting of remainders in all cases of doubt, and the fact that in construction of wills in general words of survivorship are presumed to refer to the death of the testator in order to vest remainders unless a manifest intention to the contrary shall appear, words of survivorship in this codicil, viz., ''should my wife be the longest liver,'' refer to the death of the testator. Gilmore v. Gilmore, 197 Ga. 303, 29 S.E.2d 74 (1944) (see O.C.G.A. § 44-6-66).

In an action in ejectment brought to recover land purchased by the defendant from a life tenant, where the will under which both parties claimed title disclosed that the petitioner, as a grandchild of the testator, received title in fee to the lands in question with a life interest in said property to his father, which was subject to a forfeiture ''should any child or children sell or move away from said lands, then and in that event, the income from the share of any such child shall be equally divided among the remaining children until the death of such child or children, when said share shall become the property of their children in the fee simple,'' and the undisputed evidence showed that the life tenant sold the fee (the defendant claiming through this chain of title) and the action was filed within a seven-year period after the death of the life tenant, verdict was demanded in favor of the petitioner, and the court did not err in directing such a verdict. O'Kelley v. Jackson, 210 Ga. 539, 81 S.E.2d 454 (1954).

When there is no language in the will which plainly manifests an intention to divest the share of a son who survived the testator, but predeceased the life tenant, leaving no child or children to be substituted devisees, the son has a vested remainder interest which will pass by inheritance.

Illustrative Cases (Cont'd)

Witcher v. Witcher, 231 Ga. 49, 200 S.E.2d 110 (1973).

For additional cases stating the rule favoring the vesting of certain legacies at testator's death, see Vason v. Estes, 77 Ga. 352, 1 S.E. 163 (1887); Legwin v. McRee, 79 Ga. 430, 4 S.E. 863 (1887); Fields v. Lewis, 118 Ga. 573, 45 S.E. 437 (1903); Crossley v. Leslie, 130 Ga. 782, 61 S.E. 851, 14 Ann. Cas. 703 (1908); Mendel v. Stein, 144 Ga. 107, 86 S.E. 220 (1915); Wilcher v. Walker, 144 Ga. 526, 87 S.E. 671 (1916); Munford v. Peeples, 152 Ga. 31, 108 S.E. 454 (1921).

When fireman had been retired in 1932, and was receiving a ''pension'' of $100.00 a month up to the time of his death in 1937, and where, during the period of such payments and at the time of his death, he had a wife, the widow, even though she had not yet drawn the ''pension'' at the time of the 1935 statutory provision reducing pensions, and was not entitled thereto until after the death of the husband, nevertheless had a vested right which could not be altered by later legislation. Such a right was not merely contingent, but was more analogous to a vested remainder or salable interest, subject to be divested and to go to other beneficiaries upon her dying or remarrying before receiving payments. West v. Anderson, 187 Ga. 587, 1 S.E.2d 671 (1939).

Vested remainder not found. — It is undoubtedly the rule declared by this statute that, in construing wills, words of survivorship shall refer to the death of the testator in order to vest remainders, unless a manifest intention to the contrary appears. The trouble in this case is that a manifest intent to the contrary appears. The testator expressly provided for the devolution of the estate if a niece should die before the testator died. Phinizy v. Wallace, 136 Ga. 520, 71 S.E. 896 (1911) (see O.C.G.A. § 44-6-66).

In case of the death of the grantor's daughter without leaving children or the representatives of children, the property was conveyed ''to her brother or brothers, and their children surviving.'' It was contended that the word ''surviving'' meant children surviving their respective parents. The word ''surviving'' refers to surviving the life tenant. This construction is more in accord with the spirit of this statute. Duke v. Huffman, 138 Ga. 172, 75 S.E. 1 (1912) (see O.C.G.A. § 44-6-66).

Language of the deed, considered as a whole, plainly shows that the grantor did not use the words ''dying without issue'' as meaning so dying before the termination of the life estate, but that those words had reference to the time of the death of the daughter. Sterling v. Huntley, 139 Ga. 21, 76 S.E. 375 (1912).

Language ''I will that in case G dies his portion to go to my other children,'' was intended to create a contingency, the happening of which would divest G of G's share in the already vested estate. In case of doubt the law favors the vesting remainders at the earliest time. It is true the word ''survivor'' is not used in this case, but the testator had in view the idea of survivorship after some one else had died. The testator had in view the death of G before the death of the life tenant — in that event G's share was to go to the ''balance'' of the testator's children. Almand v. Almand, 141 Ga. 372, 81 S.E. 228 (1914).

''Should all of my daughters marry, or should all the unmarried daughters depart this life, then, on the happening of either event, the estate to be divided between our then surviving children....'' The word ''then'' was used twice, and in the second instance, that is in the clause ''divided equally between our then surviving children'' it was employed as an adverb of time. The estate in remainder was contingent, because it was uncertain as to the person who would take until the death of the last of the testator's unmarried daughters. ''Then,'' at the death of the last of the testator's daughters who did not marry, the persons to take were definitely ascertainable, and there was no longer uncertainty as to the person who would take. The words of survivorship manifestly referred to the marriage of the last of the daughters to marry or to the death of the last unmarried daughter, and not to the death of the testator. Roberts v. Wadley, 156 Ga. 35, 118 S.E. 664 (1923).

RESEARCH REFERENCES

Am. Jur. 2d. — 28 Am. Jur. 2d, Estates, §§ 255, 280 et seq, 303 et seq.

C.J.S. — 26A C.J.S., 251, 252, 389, 390. 31 C.J.S., Estates, §§ 1, 102. 96 C.J.S., Wills, §§ 1336, 1351, 1369.

ALR. — Gift to one ''provided'' or ''providing'' he attains a certain age as vested or contingent, 71 ALR 1051.

Devise of remainder to ''husband,'' ''wife,'' or ''widow'' as vested or contingent, 86 ALR 229.

Vested or contingent character of remainder under devise of a remainder to a certain person or persons ''or'' his or their heirs or other class, 128 ALR 306.

Effect of premature termination of precedent estate to accelerate remainder of which there is an alternative substitutional gift, 164 ALR 1297.

Effect of premature termination of precedent estate to accelerate a contingent remainder, 164 ALR 1433.

''Divide and pay over'' rule, for purpose of determining vested or contingent character of estate, 16 ALR2d 1383.

Nature of remainders created by will giving life estate to spouse of testator, with remainder to be divided equally between testator's heirs and spouse's heirs, 19 ALR2d 371.

Words of survivorship in will disposing of estate in remainder as referable to death of testator or to termination of intervening estate, 20 ALR2d 830.

Provision of will that children, etc., of remainderman who dies before expiration of precedent estate or time fixed for distribution to remaindermen, shall take the share to which he would have been entitled, as affecting the character of remainder as vested or contingent, 47 ALR2d 900.

Delivery or distribution to life tenant, or assent by executor to his possession or to the life interest, as inuring to benefit of the remaindermen and operating to take the remainder out of the estate, absent a trust or will provision retaining it, 68 ALR2d 1107.

Doctrine that gift which might be void under rule against perpetuities will be given effect where contingency actually occurs within period of rule, 20 ALR3d 1094.

Time to which condition of remainderman's death refers, under gift or grant to one for life or term of years and then the remainderman, but if remainderman dies without issue, then over to another, 26 ALR3d 407.

44-6-67. Effect of executor's assent to legacy to life tenant on remainderman; possession at termination of life estate.

The assent of an executor to a legacy to a life tenant inures to the benefit of the remainderman. At the termination of the life estate, the remainderman may take possession immediately unless the will provides for a sale or other act to be done for the purpose of or prior to a division, in which case the executor may recover possession for the purpose of executing the will. (Orig. Code 1863, § 2252; Code 1868, § 2244; Code 1873, § 2270; Code 1882, § 2270; Civil Code 1895, § 3105; Civil Code 1910, § 3681; Code 1933, § 85-709.)

JUDICIAL DECISIONS

Analysis

General Consideration
Effect of Executor's Assent
Rights and Liabilities of Remainderman

General Consideration

Cited in McGlawn v. Lowe, 74 Ga. 34 (1884); Grant v. Rose, 32 F.2d 812 (N.D. Ga. 1929); Lewis v. Patterson, 191 Ga. 348, 12 S.E.2d 593 (1940); Coleman v. Durden, 193 Ga. 76, 17 S.E.2d 176 (1941); Roberts v. Wilson, 198 Ga. 428, 31 S.E.2d 707 (1944); Keen v. Rodgers, 203 Ga. 578, 47 S.E.2d 567 (1948); McDaniel v. Bagby, 204 Ga. 750, 51 S.E.2d 805 (1949); Stone v. Stone, 218 Ga. 789, 130 S.E.2d 727 (1963).

Effect of Executor's Assent

First sentence of this statute merely states the general rule. David v. David, 162 Ga. 528, 134 S.E. 301 (1926) (see O.C.G.A. § 44-6-61).

Assent of executor to a legacy to life tenant inures to benefit of the remaindermen. The rule is otherwise if the executor by the will has a trust to perform, arising out of the property, after the death of the life tenant. Dixon v. Richardson, 194 Ga. 443, 21 S.E.2d 854 (1942).

Assent of executor perfects inchoate title. — Assent of the executor to a devise of lands perfects the inchoate title of the devisee. Watkins v. Gilmore, 121 Ga. 488, 49 S.E. 598 (1904).

Devise of the executors to a life tenant perfects the title of the remaindermen, and the executors then no longer control the land or have any interest in the land. Oliver v. Irvin, 219 Ga. 647, 135 S.E.2d 376 (1964).

Upon assent, executor parts with power and control over land. — When an executor assents to a legacy to the tenant for life, the executor parts with all power and control over the land involved, when the will imposes no further duty upon the executor with respect to the land. Pound v. Faulkner, 193 Ga. 413, 18 S.E.2d 749 (1942).

Assent generally irrevocable. — Assent of the executor, when once given, is, in general, irrevocable, although the assets may prove insufficient to pay the debts. Watkins v. Gilmore, 121 Ga. 488, 49 S.E. 598 (1904).

Assent of an executor to a devise of land places title in the devisee, and assent once given is generally irrevocable. Miller v. Harris County, 186 Ga. 648, 198 S.E. 673 (1938).

Rights and Liabilities of Remainderman

After life estate lapses, remaindermen may take possession. — When, after the lapse of the life estate, there were no debts against the estate, and the executors or trustees had previously turned it over to the life tenant to be appropriated to the purpose, thereby assenting to the legacy of both the life tenant and remainderman, the estate vested in the remainderman, and there was no impediment to the remainderman entering and taking possession. Akin v. Akin, 78 Ga. 24, 1 S.E. 267 (1886).

When land is devised to one for life with remainder over to another, the executor's assent to the devise for life inures to the benefit of the remainderman, and at the termination of the life estate, the remainderman may take immediate possession of the property unless the will shows a different intention. Watkins v. Gilmore, 121 Ga. 488, 49 S.E. 598 (1904).

Principle is plain and the mandate of the statute explicit that upon the death of the life tenant the remainderman is entitled to immediate possession of the remainder estate. Perkins v. First Nat'l Bank, 221 Ga. 82, 143 S.E.2d 474 (1965).

After executor's assent, land no longer part of testator's estate. — When, under the executor's assent to a devise for life with remainder over, the remainderman, after the death of the life tenant, becomes entitled to the immediate possession of the land, such land is no longer any part of the estate of the testator. Miller v. Harris County, 186 Ga. 648, 198 S.E. 673 (1938).

Following executor's assent, land cannot be sold by executor. — When, under the executor's assent to a devise for life with remainder over, the remainderman, after the death of the life tenant, becomes entitled to the immediate possession of the land, the land is no longer any part of the estate of the testator nor subject to be sold to pay the debts of such estate; and the ordinary (now probate judge) has no power or jurisdiction to order the land sold as part of the estate. In such case, although the ordinary (now probate judge) has granted an order of sale, the executor, having no title or right to the land, cannot recover the land from the remainderman or from a third party, whether the latter have good title or not. Watkins v. Gilmore, 121 Ga. 488, 49 S.E. 598 (1904).

After assent to a devise by the executors, the land ceased to be a part of the estate of

the testator and could not be sold by the executors to pay any debts thereof, and a court of ordinary (now probate court) has no power or jurisdiction to order the land sold as part of the estate; such order, being void, may be attacked anywhere and at any time. Biggers v. Gladin, 204 Ga. 481, 50 S.E.2d 585 (1948).

Life tenant's administrator may not sell land after executor's assent. — When, under the terms of a will, the executor assented to a devise and delivered the property to the life tenant, the title passed out of the estate, and when, at the death of the life tenant, an administrator was appointed and sought to sell the property and distribute the proceeds, such an administration is void for lack of jurisdiction in the court; accordingly, in a suit by the remaindermen for equitable partition, the trial court erred in directing a verdict for the defendants. Pope v. Stanley, 202 Ga. 180, 42 S.E.2d 488 (1947).

When will provides for sale and division of proceeds among remaindermen. — Administrator may recover property from the remaindermen for the purpose of a sale, even though the executrix had assented, if the will provided that a sale should be made and the proceeds divided among the remaindermen. Evans v. Paris, 148 Ga. 44, 95 S.E. 682 (1918).

It is apparent that under the terms of the will the duty of selling for distribution, if the lands could not be divided in kind, devolved upon the executrix under this statute. Hall v. Ewing, 149 Ga. 693, 101 S.E. 807 (1920) (see O.C.G.A. § 44-6-67).

Assent of an executor to the legacy of a tenant for life inures to the benefit of the remaindermen, and the remainderman may, at the termination of the life estate, take possession immediately. The executor can recover possession only if it is necessary for the executor to have it for the purpose of executing the will, when it provides for a sale or other act to be done in order to effect a division among the remaindermen. Miller v. Harris County, 186 Ga. 648, 198 S.E. 673 (1938).

Assent of the executor inures to the benefit of the remainderman who, at the termination of the life estate, may take possession immediately, unless the will provides for a sale or other act to be done for the purpose of effecting a division among remaindermen. Biggers v. Gladin, 204 Ga. 481, 50 S.E.2d 585 (1948).

Unpaid creditor may subject land of devisees to claim. — Executors having assented to a devise and delivered to the life tenant the land, such assent perfected the inchoate title of the devisee and became irrevocable by the executors; in such a case, however, an unpaid creditor may follow the land into the hands of the devisees and subject it at law or equity to the payment of the creditor's claim. Biggers v. Gladin, 204 Ga. 481, 50 S.E.2d 585 (1948).

Vested remainder interest in life estate is subject to levy and sale as heir's property, though the life estate is not terminated, if the executor has assented to the legacy for life. Pound v. Faulkner, 193 Ga. 413, 18 S.E.2d 749 (1942).

RESEARCH REFERENCES

Am. Jur. 2d. — 28 Am. Jur. 2d, Estates, § 269.

C.J.S. — 34 C.J.S., Executors and Administrators, § 603.

ALR. — Rights and duties of life tenant with power to anticipate or enjoy principal, 2 ALR 1243; 27 ALR 1381; 69 ALR 825; 114 ALR 946.

Conveyance by life tenant and remaindermen in esse as cutting off interest of unborn persons under devise for life with remainder to a class, 25 ALR 770.

Words of survivorship in will disposing of remainder upon termination of life or other precedent or intervening estate as referable to time of testator's death or to time of termination such intervening estate, 114 ALR 4; 20 ALR2d 830.

Statute limiting period for attack on tax title as affecting remaindermen in respect of a tax sale during life tenancy, 124 ALR 1145.

Words of survivorship in will disposing of estate in remainder as referable to death of testator or to termination of intervening estate, 20 ALR2d 830.

Right as between life beneficiaries and remaindermen, or successive life beneficiaries, in corporate dividends or distributions, 44 ALR2d 1277.

Time of ascertaining persons to take, un-

der deed or inter vivos trust, where designated as the ''heirs,'' ''next of kin,'' ''children,'' ''relations,'' etc., of life tenant or remainderman, 65 ALR2d 1408.

Delivery or distribution to life tenant, or assent by executor to his possession or to the life interest, as inuring to benefit of the remaindermen and operating to take the remainder out of the estate, absent a trust or will provision retaining it, 68 ALR2d 1107.

44-6-68. Validity of limitations over upon marriage of widow.

Limitations over upon the marriage of a widow shall be valid unless such limitations are manifestly intended to operate as a restraint upon the free action of such widow in respect to marriage and are not simply prudent provisions for the protection of the interest of children or others in such event, in which case such limitations are void. (Orig. Code 1863, § 2254; Code 1868, § 2246; Code 1873, § 2272; Code 1882, § 2272; Civil Code 1895, § 3108; Civil Code 1910, § 3684; Code 1933, § 85-712.)

Law reviews. — For comment on Broach v. Hester, 217 Ga. 59, 121 S.E.2d 111 (1961), see 14 Mercer L. Rev. 471 (1963).

JUDICIAL DECISIONS

Estate for widowhood recognized. — Estate for widowhood, as known to the common law, is recognized in this state and provided for by the terms of this statute. The creation of a fee defeasible by marriage is not necessarily in restraint of marriage, because the beneficiary is submitted to an election between the acceptance of the gift and remarriage, should she prefer to remarry. Logan v. Hammond, 155 Ga. 514, 117 S.E. 428 (1923) (see O.C.G.A. § 44-6-68).

Gift for widowhood not void unless intention to impose penalty manifest and unequivocal. — Condition imposed by a testator upon a gift to his widow, to the effect that upon her remarriage the devise shall pass to his other heirs named, is not void as being in restraint of marriage. The intention to impose a penalty in terrorem must be manifest and unequivocal. Logan v. Hammond, 155 Ga. 514, 117 S.E. 428 (1923).

Statute applies to contracts as well as to the provisions of a will. Holder v. Holder, 226 Ga. 254, 174 S.E.2d 408 (1970), overruled on other grounds, Scott v. Scott, 276 Ga. 372, 578 S.E.2d 876 (2003) (see O.C.G.A. § 44-6-68).

Cotenant's estate not affected when restraints against widow invalid. — When an estate was devised to X, and widow during her widowhood, even if the provisions were invalid as being in restraint of marriage, it would not affect the estate granted to X. McCarty v. Mangham, 144 Ga. 198, 86 S.E. 555 (1915).

Estates for widowhood are subject to the same rules as life estates. Among the rules applicable to life estates are the provisions of former Civil Code 1910, § 3666 (see O.C.G.A. § 44-6-83). Lee & Bradshaw v. Rogers, 151 Ga. 838, 108 S.E. 371 (1921).

Agreement to change child custody upon remarriage not void. — Agreement for the custody of the children to change to the father upon the remarriage of the mother does not manifest an intention that the agreement will operate in restraint of remarriage, and is not void as being in restraint of marriage. Holder v. Holder, 226 Ga. 254, 174 S.E.2d 408 (1970), overruled on other grounds, Scott v. Scott, 276 Ga. 372, 578 S.E.2d 876 (2003).

Cited in McCray v. Caves, 211 Ga. 770, 88 S.E.2d 373 (1955).

RESEARCH REFERENCES

Am. Jur. 2d. — 28 Am. Jur. 2d, Estates, §§ 279, 310.

C.J.S. — 31 C.J.S., Estates, § 78. 96 C.J.S., Wills, § 1276.

ALR. — Misconduct of surviving spouse as affecting marital rights in other's estate, 139 ALR 486.

Remarriage tables, 25 ALR2d 1464.

ARTICLE 5

LIFE ESTATES

Law reviews. — For article surveying Georgia cases in the area of real property from June 1977 through May 1978, see 30 Mercer L. Rev. 167 (1978).

JUDICIAL DECISIONS

Limitations on rights of executors and life tenants to alienate estate. — Neither an executor nor a trustee has authority to enter into a contract granting an option to purchase land belonging to an estate, absent an express grant of such power. By analogy, unless express authority is granted, the life tenant with other broad authority does not have the power to will the property at the life tenant's death, nor to lease property for a time extending beyond the life tenant's own term; such leases have been described as ''absolutely void'' after the life tenant's death. Phillips v. Sexton, 243 Ga. 501, 255 S.E.2d 15 (1979).

RESEARCH REFERENCES

ALR. — Lease of property as ademption or revocation of devise, 8 ALR 1638.

Requiring security from life tenant for protection of remaindermen, 14 ALR 1066; 101 ALR 271; 138 ALR 440.

Duty of life tenant or life beneficiary to pay taxes, 17 ALR 1384; 94 ALR 311; 126 ALR 862.

Right of one who furnishes support to another entitled to life support from property, as against such property or the owners of present or future estates therein, 31 ALR 658.

Absolute power of disposition in life tenant as elevating life estate to fee, 36 ALR 1176.

Right of remainderman or his privies to require disclosure or accounting by life tenant, 45 ALR 519.

Relative rights of income or life beneficiary and of corpus or remaindermen in return on bonds or other obligations for the payment of money, and in profits from a sale thereof, and corresponding duties of trustee, 48 ALR 689; 131 ALR 1426.

Life tenant's liability for waste as affected by assignment or transfer of his interest, 71 ALR 1187.

Taking or holding by one spouse of an interest or estate terminable at death as constituting fraud on marital rights of the other spouse in the estate of the former, 79 ALR 377.

Duty of life tenant or life beneficiary to pay taxes, 94 ALR 311; 126 ALR 862.

Life interest and remainder in corporate stock as affecting stockholder's statutory liability, 99 ALR 505.

Income tax in respect of that part of extraordinary cash dividend on stock held by trustee that is allocated to corpus as regards respective rights of life beneficiary and remaindermen, 99 ALR 518.

Construction of provisions of will or other instrument creating trust to effect that losses or depreciation of corpus shall be made good out of income, 99 ALR 718.

Relative rights of life beneficiary and remainderman as to return on bonds or other obligations for the payment of money, bought at a premium or at a discount, 101 ALR 7; 131 ALR 1426.

Commutation of life tenant's interest in fund realized from sale of property into estimated present value, 102 ALR 969.

Rights and duties of life tenant with power to anticipate or enjoy principal, 114 ALR 946.

Rights of life tenant (legal or equitable) and remaindermen in respect of amount paid by lessee in consideration of release, 121 ALR 900.

Apportionment of income where right to income commences or ends during accrual period, 126 ALR 12.

Rights, duties, and liabilities of life tenant (legal or equitable) and remaindermen in respect of property insurance or proceeds thereof, 126 ALR 336.

Rights, powers, and duties in respect of sale or transfer of corporate stock in which one holds a legal life estate, 126 ALR 1298.

Disposition of decedent's share of income or property during interval between deaths of life beneficiaries sharing therein, where remainder was given over after death of all life beneficiaries, 140 ALR 841; 71 ALR2d 1332.

Rule in Shelley's Case as affected by failure of life estate prior to operative date of instrument, 145 ALR 1227.

Provision of will for life beneficiary as giving him a legal life estate or as creating a trust, 147 ALR 605.

Uniform Principal and Income Act as applicable to estates under administration, 166 ALR 428.

Invasion of principal in behalf of income beneficiary, absent or contrary to provision of trust instrument in that regard, 1 ALR2d 1328.

Murder of life tenant by remainderman or reversioner as affecting latter's right to remainder or reversion, 24 ALR2d 1120.

What acts, claims, circumstances, instruments, color of title, judgment, or thing of record will ground adverse possession in a life tenant as against remaindermen or reversioners, 58 ALR2d 299.

Grant, reservation, or exception as creating separate and independent legal estate in solid minerals or as passing only incorporeal privilege or license, 66 ALR2d 978.

Disposition of decedent's share of income or property during interval between deaths of life beneficiaries sharing therein, where remainder was given over after death of all life beneficiaries, 71 ALR2d 1332.

Validity of life tenant's exercise of power of sale as affected by fact that conveyance is, directly or indirectly, to him, his spouse, or his relative, 89 ALR2d 649.

Distribution as between life tenant and remainderman of proceeds of condemned property, 91 ALR2d 963.

Duty as between life tenant and remainderman as respects payment of improvement assessments, 10 ALR3d 1309.

Implication of right of life tenant to entrench upon or dispose of corpus from language contemplating possible diminution or elimination of gift over, 31 ALR3d 6.

Rights as between estate of life tenant and remainderman in respect of proceeds of sale or disposition made in exercise of power given life tenant, 47 ALR3d 1078.

Court's power to order sale of property subject to legal life estate, in order to relieve economic distress of life tenant, 57 ALR3d 1189.

Right of life tenant with power to anticipate or consume principal to dispose of it by inter vivos gift, 83 ALR3d 135.

44-6-80. Nature of life estates; estates during widowhood.

Estates which may extend during the life of a person but which must terminate at his death are deemed life estates during their existence. Estates during widowhood are life estates. (Orig. Code 1863, § 2234; Code 1868, § 2228; Code 1873, § 2254; Code 1882, § 2254; Civil Code 1895, § 3089; Civil Code 1910, § 3665; Code 1933, § 85-603.)

Law reviews. — For comment on Eller v. Wages, 220 Ga. 58, 136 S.E.2d 730 (1964), see 1 Ga. St. B.J. 557 (1965).

JUDICIAL DECISIONS

Life estates subject to termination under particular circumstances may be created under this statute. Mid-State Homes, Inc. v. Johnson, 218 Ga. 397, 128 S.E.2d 197 (1962) (see O.C.G.A. § 44-6-80).

Effect of termination on condition earlier than death. — Fact that estate may terminate on condition earlier than death does not destroy the estate's character as a life estate. Martin v. Heard, 239 Ga. 816, 238 S.E.2d 899 (1977).

Estate for life or widowhood found. — Will giving property to the wife ''during lifetime or widowhood to give to our children'' created an estate for life or during widowhood in the wife. Glore v. Scroggins, 124 Ga. 922, 53 S.E. 690 (1906). See also Fields v. Bush, 94 Ga. 664, 21 S.E. 827 (1894).

Burial or last-illness expenses not necessarily chargeable against life estate. — Burial expenses of a life tenant or the expenses of the tenant's last illness are not, as a matter of law, chargeable against the life estate; when the life tenancy is created by will, such expenses are not chargeable against the corpus if the will does not expressly or by clear implication so provide. Reece v. McCrary, 51 Ga. App. 746, 181 S.E. 697 (1935).

Cited in McDonald v. Suarez, 212 Ga. 360, 93 S.E.2d 16 (1956); Eller v. Wages, 220 Ga. 58, 136 S.E.2d 730 (1964).

RESEARCH REFERENCES

Am. Jur. 2d. — 28 Am. Jur. 2d, Estates, §§ 39, 40, 59 et seq., 63, 75, 81, 82, 87, 109, 110.

C.J.S. — 26A C.J.S., Deeds, § 286 et seq. 28 C.J.S., Dower, § 180 et seq. 31 C.J.S., Estates, §§ 21 et seq., 37, 78, 163. 96 C.J.S., Wills, §§ 1278, 1286.

ALR. — Devise of life estate without complete or effective disposition of remainder as negativing right of life tenant to as heir or next of kin, 128 ALR 446.

Nontrust life estate expressly given for support and maintenance, as limited thereto, 26 ALR2d 1207.

44-6-81. Length of life estate.

An estate for life may be either for the life of the tenant or for the life of some other person or persons. (Orig. Code 1863, § 2232; Code 1868, § 2226; Code 1873, § 2252; Code 1882, § 2252; Civil Code 1895, § 3087; Civil Code 1910, § 3663; Code 1933, § 85-601.)

JUDICIAL DECISIONS

Estate to be enjoyed after preceding life estates deemed remainder. — Estate granted in a will to be enjoyed in succession, after the expiration of the two particular life estates preceding it was a remainder or limitation over. Lane v. Citizens & S. Nat'l Bank, 195 Ga. 828, 25 S.E.2d 800 (1943).

Life tenant's possession not adverse to remainder. — When estates for life under former Civil Code 1910, § 3663 (see O.C.G.A. § 44-6-81) and estates in remainder under former Civil Code 1910, § 3674 (see O.C.G.A. § 44-6-60), were created by the same grant in the same land in favor of different persons, the possession of the life tenant was not adverse to the estate in remainder. Ayer v. Chapman, 146 Ga. 608, 91 S.E. 548 (1917).

Devise to "Z for life for ... home for herself and H" passes estate to Z, but does not give H a life estate. Holland v. Zeigler, 135 Ga. 512, 69 S.E. 824 (1910).

Life estate granted to two or more persons for their "joint lives" does not terminate as to the survivor until such survivor's death, provided the deed or other instrument does not contain specific limiting language directing an earlier termination of the estate granted. Raulerson v. Smithwick, 263 Ga. 805, 440 S.E.2d 164 (1994).

Cited in Taylor v. Trustees of Jesse Parker Williams Hosp., 190 Ga. 349, 9 S.E.2d 165 (1940); Buchanan v. Nicholson, 192 Ga. 754, 16 S.E.2d 743 (1941); Dodson v. Trust Co., 216 Ga. 499, 117 S.E.2d 331 (1960); White v. Howell, 117 Ga. App. 778, 161 S.E.2d 892 (1968).

RESEARCH REFERENCES

Am. Jur. 2d. — 28 Am. Jur. 2d, Estates, §§ 59 et seq., 63 et seq.

C.J.S. — 26A C.J.S., Deeds, § 248. 31 C.J.S., Estates, §§ 37, 38, 78. 96 C.J.S., Wills, § 1273 et seq.

ALR. — Conveyance by life tenant and remaindermen in esse as cutting off interest of unborn persons under devise for life with remainder to a class, 25 ALR 770.

Duration of interest given to one for life, with gift over to another upon the happening of an event which occurs during the lifetime of the first taker, 96 ALR 1347.

Commutation of life tenant's interest in fund realized from sale of property into estimated present value, 102 ALR 969.

Right of estate of named beneficiary to payments of annuity or income during period between his death and the death of third person or other event by reference to which the period of payment is limited by the terms of will or other instrument, 112 ALR 581.

44-6-82. How and in what property life estate may be created.

(a) An estate for life may be created by deed or will, by express agreement of the parties, or by operation of law.

(b) A life estate cannot be created in property which will be destroyed on being used. (Orig. Code 1863, § 2233; Code 1868, § 2227; Code 1873, § 2253; Code 1882, § 2253; Civil Code 1895, § 3088; Civil Code 1910, § 3664; Code 1933, § 85-602.)

JUDICIAL DECISIONS

Life estate created by deed or devise. — Life estate is created by devise, deed, or operation of law. Thus, a gift by deed or devise of a parent to a child of a lot of land during the life of such child, remainder to the child or children of such child, carves out a life estate for the child of the donor or devisor. Dickinson v. Jones, 36 Ga. 97 (1867).

When a husband by deed granted to his wife "and to her heirs and assigns forever" described property, with the understanding that at her death the land was to go to his youngest son, "to have and to hold said land to the only proper use and benefit and behoof of the wife, her heirs and assigns, in fee simple forever," such deed created a life estate in the wife, with remainder to the grantor's youngest son; on the death of the life tenant (wife), and remainderman (son), intestate, the son leaving a wife and no children, the wife of the son inherited the land as the sole heir at law of her deceased husband. Crews v. Crews, 174 Ga. 45, 162 S.E. 107 (1931).

Life estate created by agreement. — Life estate is created where dower, or one-third of the land for life, is assigned to the widow. All estates for life, however created, are of the same duration, have the same rights, privileges, and incidents, and are subject to the same restrictions in their enjoyment. Dickinson v. Jones, 36 Ga. 97 (1867).

Effect of the family agreement relative to the life portion reserved for dower was to give the widow a life estate. Allen v. Lindsey, 139 Ga. 648, 77 S.E. 1054 (1913).

Reservation of life estate. — When grantor alleges that agreement was to allow the grantor to use house for the rest of the grantor's life, if the allegation is deemed credible by a jury, it is sufficient to reserve a life estate in the house and curtilage. Fox v.

Washburn, 264 Ga. 617, 449 S.E.2d 513 (1994).

Life estate cannot be created in property destroyed in use. — Life estate may be created in personal property, within the limitation that the estate may not be created in such property as is destroyed in the use. First Nat'l Bank v. Geiger, 61 Ga. App. 865, 7 S.E.2d 756 (1940).

Section not applicable to long-term depreciation. — Expression ''destroyed in the use'' does not refer to property of a substantial nature which depreciates from the use over a substantial period of time. First Nat'l Bank v. Geiger, 61 Ga. App. 865, 7 S.E.2d 756 (1940).

Section alludes to things perishing with usage. — Statute prohibiting the creation of a remainder in property that is destroyed in the use, does not allude to money, but to such things as perish with the usage. Biggers v. Gladin, 204 Ga. 481, 50 S.E.2d 585 (1948) (see O.C.G.A. § 44-6-82).

Life estate may be created in money and this statute does not allude to money, but to such things as perish with the usage. Chisholm v. Lee, 53 Ga. 611 (1875); Barmore v. Gilbert, 151 Ga. 260, 106 S.E. 269, 14 A.L.R. 1060 (1921) (see O.C.G.A. § 44-6-82).

Life estate and a remainder interest may be created in money. Biggers v. Gladin, 204 Ga. 481, 50 S.E.2d 585 (1948).

Life estate may be created in livestock. — There can be no doubt but that a life estate may be created in livestock, it being property not strictly consumable in the use. Leonard v. Owen, 93 Ga. 678, 20 S.E. 65 (1894).

Burial and last illness expenses not necessarily chargeable against life estate. — Burial expenses of a life tenant or the expenses of the tenant's last illnesses are not, as a matter of law, chargeable against the life estate; when the life tenancy is created by will, such expenses are not chargeable against the corpus when the will does not expressly or by clear implication so provide. Reece v. McCrary, 51 Ga. App. 746, 181 S.E. 697 (1935).

Grant of permission for one to remain on land "for an indefinite period rent free" does not, as a matter of law, create a life estate, even if the grantee believes it to do so. Mitchell v. Mitchell, 159 Ga. App. 495, 283 S.E.2d 709 (1981).

Cited in Campbell v. Barnard, 74 Ga. App. 272, 39 S.E.2d 420 (1946); White v. Howell, 117 Ga. App. 778, 161 S.E.2d 892 (1968).

RESEARCH REFERENCES

Am. Jur. 2d. — 23 Am. Jur. 2d, Deeds, §§ 5, 27. 28 Am. Jur. 2d, Estates, § 66 et seq. 51 Am. Jur. 2d, Life Tenants and Remaindermen, § 46 et seq.

C.J.S. — 26A C.J.S., Deeds, §§ 248, 272. 31 C.J.S., Estates, §§ 38, 39, 161. 96 C.J.S., Wills, §§ 1277, 1279, 1280, 1294 et seq.

ALR. — Provision of will for life beneficiary as giving him a legal life estate or as creating a trust, 147 ALR 605.

Validity of reservation of oil and gas or other mineral rights in deed of land, as against objection of repugnancy to the grant, 157 ALR 485.

Implication of right of life tenant to entrench upon or dispose of corpus from language contemplating possible diminution or elimination of gift over, 31 ALR3d 6.

Validity and effect of provision in deed attempting to make reservation or exception in favor of grantor's spouse, 52 ALR3d 753.

44-6-83. Rights and duties of life tenant; forfeiture of interest to remainderman.

The tenant for life shall be entitled to the full use and enjoyment of the property if in such use he exercises the ordinary care of a prudent man for its preservation and protection and commits no acts which would permanently injure the remainder or reversion interest. For the want of such care or the willful commission of such acts, the tenant for life shall forfeit his

interest to the remainderman if the remainderman elects to claim immediate possession. (Orig. Code 1863, § 2235; Code 1868, § 2229; Code 1873, § 2255; Code 1882, § 2255; Civil Code 1895, § 3090; Civil Code 1910, § 3666; Code 1933, § 85-604.)

Law reviews. — For article surveying recent legislative and judicial developments in Georgia's real property laws, see 31 Mercer L. Rev. 187 (1979).

For comment on Graham v. Bryant, 211 Ga. 856, 89 S.E.2d 640 (1955), see 19 Ga. B.J. 362 (1957).

JUDICIAL DECISIONS

Analysis

General Consideration
Rights and Duties of Life Tenant
1. In General
2. Waste
3. Taxes and Expenses
Rights and Duties of Remainderman

General Consideration

Section has binding effect of statute. — This statute was included in the Code of 1863, which was regularly adopted by the Legislature, and also included in the several subsequent Codes, some of which have likewise been adopted by the Legislature, and consequently it has all the binding effect of statute. Central of Ga. Ry. v. State, 104 Ga. 831, 31 S.E. 531, 42 L.R.A. 518 (1898); Lee & Bradshaw v. Rogers, 151 Ga. 838, 108 S.E. 371 (1921) (see O.C.G.A. § 44-6-83).

Present section is declaratory, and at the same time restrictive of the common law. Brown v. Martin, 137 Ga. 338, 73 S.E. 495 (1912). See also Dickinson v. Jones, 36 Ga. 97 (1867); Woodward v. Gates, 38 Ga. 205 (1868); Belt v. Simkins, 113 Ga. 894, 39 S.E. 430 (1901); Roby v. Newton, 121 Ga. 679, 49 S.E. 694, 68 L.R.A. 601 (1905) (see O.C.G.A. § 44-6-83).

Since forfeitures are not favored by the law, this statute should be strictly construed, as is criminal law. Roby v. Newton, 121 Ga. 679, 49 S.E. 694, 68 L.R.A. 601 (1905) (see O.C.G.A. § 44-6-83).

Word "willful" should not be construed to mean simply intentional, rather than malicious or wanton, for a statute which imposes a forfeiture should be strictly construed. Roby v. Newton, 121 Ga. 679, 49 S.E. 694, 68 L.R.A. 601 (1905).

Section applied by regarding instrument's provisions and property's nature and prior use. — In applying this statute, regard must be had for the provisions of the instrument creating the life estate and the nature of the property in which the life estate was given, and the use to which it was put at the time the will was executed and when it went into effect. Lee & Bradshaw v. Rogers, 151 Ga. 838, 108 S.E. 371 (1921); Fort v. Fort, 223 Ga. 400, 156 S.E.2d 23 (1967) (see O.C.G.A. § 44-6-83).

Code provides for forfeiture only for waste in life estate, and an estate for years. Treisch v. Doster, 171 Ga. 525, 156 S.E. 231 (1930).

Forfeiture not applicable to landlord-tenant relation. — Common-law action of waste for forfeiture and damages, when there is no estate for life nor for years, but merely the relation of landlord and tenant, cannot be maintained. Warlick v. Great Atl. & Pac. Tea Co., 170 Ga. 538, 153 S.E. 420 (1930).

Executor not required to give bond if life tenant possesses entire estate free from debts. — In a proceeding to require an executor to give bond under former Code 1933, § 113-1216 (see O.C.G.A. § 53-7-32), if it appears that under the terms of the will the entire estate was bequeathed to the widow of the deceased for her life and that she immediately became possessed of the estate (to the exclusion of the executor for the remainder of her life, if no debts), and at her death it was to go to their children, share

and share alike, and since it does not appear that there were debts of the estate, there was no need for the executor to give bond. Pass v. Pass, 56 Ga. App. 59, 192 S.E. 64 (1937).

Cited in Hicks v. Wadsworth, 57 Ga. App. 529, 196 S.E. 251 (1938); Trust Co. v. Kenny, 188 Ga. 243, 3 S.E.2d 553 (1939); Coleman v. Durden, 193 Ga. 76, 17 S.E.2d 176 (1941); Roberts v. Wilson, 198 Ga. 428, 31 S.E.2d 707 (1944); Smith v. Thomas, 199 Ga. 396, 34 S.E.2d 278 (1945); Raines v. Shipley, 200 Ga. 180, 36 S.E.2d 150 (1945); Dorsey v. Clements, 202 Ga. 820, 44 S.E.2d 783 (1947); Rigdon v. Cooper, 203 Ga. 547, 47 S.E.2d 633 (1948); Smith v. Minich, 125 Ga. 386, 110 S.E.2d 649 (1959); Stevens v. Citizens & S. Nat'l Bank, 233 Ga. 612, 212 S.E.2d 792 (1975); Raulerson v. Smithwick, 263 Ga. 805, 440 S.E.2d 164 (1994).

Rights and Duties of Life Tenant

1. In General

Tenant for life is entitled to the full use and enjoyment of property. In this respect, there is no difference between realty and personalty. Thomas v. Owens, 131 Ga. 248, 62 S.E. 218 (1908).

Life tenant who possessed farmland pursuant to a will was entitled to cut trees on the farmland, to sell the trees, and to retain the proceeds as part of the tenant's full use and enjoyment of the land, over the objection of the remainder beneficiary who wanted the proceeds placed in a trust with the principal to remain in place for the beneficiary while the interest went to the life tenant. Robinson v. Hunter, 254 Ga. App. 290, 562 S.E.2d 189 (2002).

Trial court abused the court's discretion in holding a mother in civil and criminal contempt for protecting the mother's rights as a life tenant, pursuant to O.C.G.A. § 44-6-83, in real property that had been part of a consent order between herself and the son, as the consent order indicated that the son could operate a salvage business on a portion of the property, but it did not allow the son to expand the business to the full area of the property; the mother should not have been sanctioned and threatened with future sanctions for filing suit to protect the mother's interests in the property against the son's interfering actions as the mother had a right to the full use and enjoyment of the property. Carden v. Carden, 276 Ga. App. 43, 622 S.E.2d 389 (2005).

Life estate subject to remainderman's right to have property in state of security. — Tenant for life in property is entitled to the possession of the ''corpus'' of the property for the tenant's own use, subject to a right in the remainderman to have the property in a state of security, to be forthcoming to the remainderman, on the termination of the life estate. Crisp County Lumber Co. v. Bridges, 187 Ga. 484, 200 S.E. 777 (1939).

Life tenant's duty to protect and preserve property. — Life tenant owes to remainderman duty of ordinary care to protect and preserve the property, and to commit no act tending to the permanent injury of the person entitled to the remainder interest. Butler Naval Stores Co. v. Glass, 187 Ga. 317, 200 S.E. 286 (1938).

Life tenant is bound to make necessary repairs to maintain the property. Citizens & S. Nat'l Bank v. Martin, 246 Ga. 284, 271 S.E.2d 192 (1980).

Relation of life tenant to remainderman quasi trusteeship. — Because of the duty to preserve and protect the estate in remainder, the relation of the life tenant to the remainderman has been held to be, to a certain extent, a fiduciary one, and termed an implied or quasi trusteeship. Crisp County Lumber Co. v. Bridges, 187 Ga. 484, 200 S.E. 777 (1939).

Will construed to mean that life tenant's estate was charged with support to remainderman so long as the life tenant lived. Raines v. Shipley, 199 Ga. 316, 34 S.E.2d 281 (1945).

Life tenant and remainderman not in privity. — While a life tenant owes to a remainderman the duty of ordinary care to protect and preserve the property, they are not in privity with each other, since they hold different estates in the same property, and the former is not a trustee for the latter. Lazenby v. Ware, 178 Ga. 463, 173 S.E. 86 (1934).

Life tenant acts in the tenant's individual capacity and is liable for any tax on the sale of growing timber; the tenant is not liable in a fiduciary capacity under the Internal Revenue Code. West v. United States, 310 F. Supp. 1289 (N.D. Ga. 1970).

Owner of life estate may maintain ejectment against one who wrongfully holds pos-

Rights and Duties of Life Tenant (Cont'd)
1. In General (Cont'd)

session of premises. Smallpiece v. Johnson, 210 Ga. 310, 80 S.E.2d 296 (1954).

Ejectment will lie in favor of a tenant in common against a cotenant when the latter attempts to oust him or sets up an adverse possession to the realty so jointly owned. Smallpiece v. Johnson, 210 Ga. 310, 80 S.E.2d 296 (1954).

No injunctive relief when failure to show interference with estate. — When the plaintiff had no more than a life estate in timber on the tract, and the plaintiff did not allege that in order to properly preserve and protect the property it was necessary to cut the timber, plaintiff's petition failed to show a right to cut the timber and failed to state a cause of action for injunctive relief against the defendant from interfering with the plaintiff's cutting of the timber or for damages therefore. McClure v. Chastain, 218 Ga. 510, 128 S.E.2d 721 (1962).

Tenant may convey property when given absolute power of disposal. — When the language of a will creates a life estate, but clearly and unmistakably gives the life tenant an absolute power of disposal, the life tenant may convey the property devised by deed of sale or gift. Williams v. Bullock, 231 Ga. 179, 200 S.E.2d 753 (1973).

2. Waste

Voluntary and permissive waste distinguished. — When a life tenant who, by the exercise of ordinary care, could keep the premises from falling into decay, and who has the ability to do so both from the rents and profits of the estate and otherwise, from some motive unfriendly to the remainderman willfully refuses to keep the premises in reasonable repair, such act is just as much voluntary and willful waste as any affirmative act which would tend to destroy the value of the improvements to the remaindermen. Of course, if the life tenant, from poverty or inability to keep the premises from falling into decay, allowed them to get in such a condition, such conduct would be merely permissive, and would not be voluntary. Grimm v. Grimm, 153 Ga. 655, 113 S.E. 91 (1922).

In order for an action to constitute waste, it must appear that the act amounts to a willful injury to the freehold and does not come within the ordinary and legitimate use of the premises by the one holding the antecedent estate. Wright v. Conner, 200 Ga. 413, 37 S.E.2d 353 (1946).

In determining what amounts to waste, regard must be had to the condition of the premises, and the inquiry should be, did good husbandry, considered with reference to the custom of the country, require the felling of the trees, and were the acts such as a judicious, prudent owner of the inheritance would have committed. Woodward v. Gates, 38 Ga. 205 (1868).

Tenant for life is entitled to the full use and enjoyment of the property, so that, in such use, the tenant exercises the ordinary care of a prudent man for the property's preservation and protection, and commits no acts tending to the permanent injury of the person entitled in remainder or reversion. In determining what amounts to waste, regard must be had to the condition of the premises, and the inquiry should be, did good husbandry, considered with reference to the custom of the country, require the felling of the trees, and were the acts such as a judicious, prudent owner of the inheritance would have committed. Graham v. Bryant, 211 Ga. 856, 89 S.E.2d 640 (1955), commented on in 19 Ga. B.J. 362 (1957).

Life tenant liable for waste. — Statute does not distinctly declare that a tenant for life is liable for actual waste, or will be enjoined from committing threatened waste, but it has been held that such is the law. Smith v. Smith, 105 Ga. 106, 31 S.E. 135 (1898); Kollock v. Webb, 113 Ga. 762, 39 S.E. 339 (1901); Belt v. Simkins, 113 Ga. 894, 39 S.E. 430 (1901); Roby v. Newton, 121 Ga. 679, 49 S.E. 694, 68 L.R.A. 601 (1905). See also Gleaton v. Aultman, 150 Ga. 768, 105 S.E. 445 (1920) (see O.C.G.A. § 44-6-83).

Tenant in dower is liable for waste committed. Brown v. Martin, 137 Ga. 338, 73 S.E. 495 (1912).

Liability for actual damages imposed. — Liability both for permissive and voluntary waste is imposed upon the tenant for life, and all such tenants are liable to the reversioner or remainderman for actual damages resulting from waste of either character. Roby v. Newton, 121 Ga. 679, 49 S.E. 694, 68 L.R.A. 601 (1905).

Tenant may be restrained from committing future waste. — Tenant for life who

holds the estate without impeachment for waste is not liable at law to a remainderman for waste committed, though the tenant may be restrained by a court of equity at the instance of a remainderman from committing further acts of waste in the future which are destructive of the inheritance, or are of a wanton and malicious nature. Belt v. Simkins, 113 Ga. 894, 39 S.E. 430 (1901). See also Gleaton v. Aultman, 150 Ga. 768, 105 S.E. 445 (1920).

Estate of life tenant is not impeachable by a destructive trespass of a stranger, which the life tenant neither licenses nor negligently suffers to be done. Kehr v. Floyd & Co., 132 Ga. 626, 64 S.E. 673 (1909).

Clearing land was waste in England, but is not waste in Georgia, provided the land cleared still leaves the proportion of cleared land to uncleared land such as an ordinarily prudent person would maintain upon one's own property. Brogdon v. McMillan, 116 Ga. App. 34, 156 S.E.2d 828 (1967).

Life tenant's control over growing timber is almost absolute and it is almost impossible to prove any waste by normal cutting. West v. United States, 310 F. Supp. 1289 (N.D. Ga. 1970).

Tenant empowered to cut and sell timber. — Irrespective of the powers of sale granted in the subject will, life tenants are empowered to cut and sell timber in order to preserve and protect the value of the land. Grant v. Bell, 246 Ga. 371, 271 S.E.2d 467 (1980).

No waste from cutting timber unless willful injury. — Cutting and thinning of pine timber in accordance with good forestry practices is not waste, unless willful injury to the remainder is shown by acts not essential to the legitimate use of the life estate. Durrence v. Durrence, 239 Ga. 705, 238 S.E.2d 377 (1977).

Waste question of fact for jury. — If a widow works land for turpentine purposes, which had not previously been so worked by the testator, it would be a question for the jury whether working the trees was such a permanent injury to the trees as was beyond the rights of the widow during the existence of her term. Lee & Bradshaw v. Rogers, 151 Ga. 838, 108 S.E. 371 (1921).

While cutting timber and clearing land do not always constitute waste, such a question is generally for the jury. Wright v. Conner, 200 Ga. 413, 37 S.E.2d 353 (1946).

Property can be used for same purposes as was used when life estate was created. Durrence v. Durrence, 239 Ga. 705, 238 S.E.2d 377 (1977).

Working trees for turpentine. — Tenant holding under a devise of land "during widowhood" has the right to use the land and pine trees growing thereon, by hacking and otherwise working the trees for turpentine purposes, as against a person entitled in reversion, since prior to the testator's death the testator used the land and trees for such purposes, without being liable for waste. Lee & Bradshaw v. Rogers, 151 Ga. 838, 108 S.E. 371 (1921).

Turpentining also authorized if only income tenant can derive. — If the defendant conveyed land to the defendant's granddaughter at a time when the land was woodland and not in cultivation, reserving to defendant a life estate, and the only income the life tenant could derive from the property was from turpentining the pines and from properly thinning the pine timber and selling that cut for pulpwood, the defendant was authorized to do so. Sutton v. Bennett, 215 Ga. 379, 110 S.E.2d 650 (1959).

Tenant cannot sell timber to injury of freehold. — While a widow who has taken a homestead in the land of her deceased husband is entitled to a reasonable and proper use thereof and of the timber thereon for the benefit of herself and the other beneficiaries of the homestead, she cannot make a sale of the standing timber on the land, when it appears that the sale will injure the value of the freehold and is not essential to a legitimate use of the property for homestead purposes. Smith v. Smith, 105 Ga. 106, 31 S.E. 135 (1898).

No right to sell timber when right reserved by grantor. — Clear purpose of the grantor in reserving the right to sell timber was to reserve to the grantor greater rights than those which inhere in a life tenant as to the timber on the lands from which such estate is carved, and to escape the perils of forfeiture of the grantor's life estate by a sale of the timber. Simpson v. Powell & Co., 158 Ga. 516, 123 S.E. 741 (1924).

Life tenant may not sell all the timber on the land. As to partial cutting of timber, the fact situation must control. The question to be decided in each case is whether the value

Rights and Duties of Life Tenant (Cont'd)
2. Waste (Cont'd)

of the freehold will be injured. Brogdon v. McMillan, 116 Ga. App. 34, 156 S.E.2d 828 (1967).

Tenant may not permit destruction by beetles. — In the context of a life tenant's duty to protect and preserve the estate for the remaindermen, permitting the destruction of timber by pine beetles could constitute waste. Aurelio v. Williams, 246 Ga. 428, 271 S.E.2d 825 (1980).

Sale of timber permitted to preserve estates against act of God. — If timber is subject to hazards from an act of God, equity will permit and authorize a sale to protect and preserve the estates. Aurelio v. Williams, 246 Ga. 428, 271 S.E.2d 825 (1980).

For a list of common-law wastes, see Dickinson v. Jones, 36 Ga. 97 (1867).

Insurance proceeds used to rebuild, or held for remainderman. — When a life tenant insures the property, and it is subsequently destroyed, the proceeds should be used in the rebuilding of the structure on the property, or be held for the benefit of the remainderman. Citizens & S. Nat'l Bank v. Martin, 246 Ga. 284, 271 S.E.2d 192 (1980).

Interest on insurance proceeds held for remainderman. — When a lumber company purchases the interest of a life tenant and takes out storm insurance in the company's own name on a building on the premises, the owner of the life interest paying the premium with its individual funds, and upon the destruction of the building by storm collects the insurance, the proceeds of the insurance stand in the place of the property destroyed, and should be used in rebuilding the dwelling, or should be held by the owner of the life interest for the benefit of the remainderman upon the life tenant's death, in which case the owner of the life interest would be entitled to the interest on the fund during this period. Crisp County Lumber Co. v. Bridges, 187 Ga. 484, 200 S.E. 777 (1939).

Continued possession after acts of waste cures defect. — Since a life tenant holds under a written muniment of title, even though the title might become subject to forfeiture on account of acts of waste, continued possession thereafter under such title for seven years would as a general rule cure any such defect in the life tenant's title, and constitutes what would be, in effect, the period of limitation. Wright v. Conner, 200 Ga. 413, 37 S.E.2d 353 (1946).

Forfeiture not authorized. — Fact that the life tenant has sold and thus removed several million board feet of timber from the premises, and through neglect and failure to make any repairs has permitted damage to structures on the premises, and through neglect has permitted cultivated land to lay out and grow up in pine trees, so that it can no longer be cultivated, does not reasonably indicate such a wanton disregard of the rights of the remaindermen so as to authorize forfeiture of the life estate. Wright v. Conner, 200 Ga. 413, 37 S.E.2d 353 (1946).

Failure of a life tenant to pay ad valorem taxes as required by a warranty deed and to exercise ordinary care for the preservation of the property resulted in the forfeiture of a life estate as a matter of law. McIntyre v. Scarbrough, 266 Ga. 824, 471 S.E.2d 199 (1996).

3. Taxes and Expenses

Holder of a life estate is responsible for ad valorem taxes. Henderson v. Tax Assessors, 156 Ga. App. 590, 275 S.E.2d 78 (1980).

Tenant is chargeable with taxes which accrued while tenant lived and was entitled to income from the property. McCook v. Harp, 81 Ga. 229, 7 S.E. 174 (1888).

Failure to pay burdens imposed by law would tend to divest title. — Neglect to pay the burdens imposed by law upon the property during the term would be a want of such ordinary care as a prudent person should exercise for the person's protection and preservation, and would tend to divest the title to the fee by exposing it, or a portion of it, to sale, to raise the taxes levied on it. The life tenant has not the right to expect the remainderman to pay part of taxes. Austell v. Swann, 74 Ga. 278 (1884).

Tenant not liable for taxes if exempted by devisor. — While the will may create a life estate in the widow and unmarried children of the testator, the use of the words, ''his wife and unmarried children be permitted to occupy the same, free of rent or other charges, during her widowhood; at the death or marriage of his wife,'' etc., shows that the testator intended to create a quasi tenancy at

sufferance or will, and she is not liable for the taxes. Griffin v. Fleming, 72 Ga. 697 (1884).

When estate ends during tax year, owner required to pay only proportion of tax. — When a life estate, consisting of city property from which there could be no emblements, ends during the year for which an annual tax is assessed, the owner of the life estate, or the owner's personal representative, is required to pay that proportion of the tax as the part of the year elapsed up to the ending of the life estate bears to the whole of such tax year. Campbell v. Barnard, 74 Ga. App. 272, 39 S.E.2d 420 (1946).

Burial or last-illness expenses not necessarily chargeable against estate. — Burial expenses of a life tenant or the expenses of the tenant's last illness are not, as a matter of law, chargeable against the life estate; if the life tenancy is created by will, such expenses are not chargeable against the corpus when the will does not expressly or by clear implication so provide. Reece v. McCrary, 51 Ga. App. 746, 181 S.E. 697 (1935).

Rights and Duties of Remainderman

Remainderman can only require that "corpus" of property be kept in preservation. — In a life estate the tenant is entitled to have the possession of the property for the tenant's own enjoyment, and all that the remainderman can require is that the ''corpus'' of the property shall be kept in preservation, to be delivered to the remainderman on the termination of the life estate. Thomas v. Owens, 131 Ga. 248, 62 S.E. 218 (1908); Campbell v. Barnard, 74 Ga. App. 272, 39 S.E.2d 420 (1946).

Remaindermen have no right to recover the premises until the expiration of the life estate. McCook v. Harp, 81 Ga. 229, 7 S.E. 174 (1888); Fleming & Co. v. Ray, 86 Ga. 533, 12 S.E. 944 (1891).

When waste committed, remainderman can sue in tort or maintain forfeiture action. — When waste has been committed by a life tenant, the person entitled to the remainder estate has the right to elect either to sue in tort for damages, or to maintain an action to forfeit the life estate, and under this latter election the suit does not sound in tort, but partakes of the nature of an action for title to land. Wright v. Conner, 200 Ga. 413, 37 S.E.2d 353 (1946).

Contingent remainderman cannot sue for forfeiture. — While remaindermen, whether the remainder is vested or contingent, may enjoin for waste, the holder of a contingent remainder may not sue for forfeiture of the life estate since the remainder interest of a remainderman holding a contingent interest is uncertain and it cannot be foretold whether the remaindermen will ever be entitled to take at all. Wright v. Conner, 200 Ga. 413, 37 S.E.2d 353 (1946).

When life tenant causes permanent injury, remainderman may sue immediately for damages. — When the owner of a life tenancy in real estate commits a waste by selling the timber thereon and causing the timber to be removed, to the permanent injury of the estate, such conduct amounts to a tort for which the remainderman may sue immediately to recover damages. In such a case, the life tenant does not hold the proceeds under an implied or resulting trust in favor of the remainderman, but is liable as a tortfeasor. Lazenby v. Ware, 178 Ga. 463, 173 S.E. 86 (1934); West v. United States, 310 F. Supp. 1289 (N.D. Ga. 1970).

No action against tenant for life without impeachment. — No matter what may be the character of the waste committed, no one interested in the property has a right to call a tenant for life without impeachment into a court of law on account of the tenant's conduct. Lee & Bradshaw v. Rogers, 151 Ga. 838, 108 S.E. 371 (1921).

No specific period of limitation set up for forfeiture action. — Phrase ''For the want of such care … [or] the willful commission of such acts, … [he shall elect] to claim immediate possession'' does not operate to set up a specific period of limitation amounting to immediate action since the language has manifest reference to the right of remaindermen to claim immediate possession rather than await the expiration of the antecedent estate. Wright v. Conner, 200 Ga. 413, 37 S.E.2d 353 (1946).

Life tenant necessary party in forfeiture suit. — In a suit by the remaindermen to forfeit the estate of the life tenant for waste, the life tenant is a necessary party. Kehr v. Floyd & Co., 132 Ga. 626, 64 S.E. 673 (1909).

Venue lies in county in which land located. — An action by a remainderman against a life tenant to have the estate of the latter declared forfeited and the remainderman

Rights and Duties of Remainderman (Cont'd)

put in possession because of waste committed by the tenant is a suit "respecting titles to land," and the venue thereof is the county in which the land involved is located. Brown v. Martin, 137 Ga. 338, 73 S.E. 495 (1912).

In forfeiture action, plaintiff must show that corpus unnecessarily wasted. — In an action for the forfeiture of a life estate, based in part on allegations of acts of voluntary waste consisting of cutting and selling timber, it is incumbent on the plaintiff to show not only that such encroachment has been made on the corpus of the estate, but also that it was not necessary to make the life tenant comfortable. Wright v. Conner, 200 Ga. 413, 37 S.E.2d 353 (1946).

Remainderman not estopped from bringing subsequent damage action following forfeiture action. — An action by the remaindermen against the life tenant for the forfeiture of a life estate because of waste was not inconsistent with a subsequent action by the remaindermen against the life tenant for damages based on the same facts so as to estop the remaindermen from bringing a subsequent action. Conner v. Bowdoin, 80 Ga. App. 807, 57 S.E.2d 344 (1950).

RESEARCH REFERENCES

Am. Jur. 2d. — 28 Am. Jur. 2d, Estates, § 113. 51 Am. Jur. 2d, Life Tenants and Remaindermen, §§ 3, 4, 28, 29, 32, 33, 157 et seq., 175 et seq.

Am. Jur. Pleading and Practice Forms. — 16B Am. Jur. Pleading and Practice Forms, Life Tenants and Remaindermen, § 6.

C.J.S. — 31 C.J.S., Estates, §§ 40, 41, 44 et seq., 53 et seq., 73, 78, 80, 161, 163, 173 et seq. 96 C.J.S., Wills, § 1287 et seq.

ALR. — Rights and duties of life tenant with power to anticipate or enjoy principal, 2 ALR 1243; 27 ALR 1381; 69 ALR 825; 114 ALR 946.

Conveyance by life tenant and remaindermen in esse as cutting off interest of unborn persons under devise for life with remainder to a class, 25 ALR 770.

Right of one who furnishes support to another entitled to life support from property, as against such property or the owner of present or future estates therein, 31 ALR 658.

Rights of life tenant and remainderman inter se as to oil and gas, 43 ALR 811.

Right of estate of life beneficiary to income under a trust which confides to discretion of trustee the part of the income principal to be paid to him, 61 ALR 677.

Life tenant's liability for waste as affected by assignment or transfer of his interest, 71 ALR 1187.

Sale or exchange of property which is subject to life estate and remainder, where it is unproductive, or income is insufficient to pay taxes and upkeep, 76 ALR 540.

Right as between life tenant and remainderman in respect of property, estates, or securities of a wasting, consumable, or perishable nature, 77 ALR 753; 170 ALR 133.

Right to mechanics' lien against fee for work or material furnished under contract with, or consent of, life tenant, 97 ALR 870.

Requiring security from life tenant for protection of remainderman, 101 ALR 271; 138 ALR 440.

Duty of life tenant in respect of repairs as affected by amount of income, 101 ALR 681.

Adverse possession as against remainderman during life estate as affected by fact that conveyance by life tenant purported to cover fee, 112 ALR 1042.

Propriety during life estate on unproductive property of authorizing mortgage binding upon remaindermen to raise fund to taxes, repairs, or other charges against property, and powers of trustees in that respect, 116 ALR 1420.

Rights of life tenant (legal or equitable) and remaindermen in respect of amount paid by lessee in consideration of release, 121 ALR 900.

Duty of life tenant or life beneficiary to pay taxes, and resulting rights and liabilities, 126 ALR 862.

Rights and duties of life tenant and remainderman (income and corpus) with respect to repairs and improvements, 128 ALR 199; 175 ALR 1434.

Relative rights of tenant for years or life and remainderman as to return on bonds or other obligations for the payment of money bought at a premium or discount, 131 ALR 1426.

Life tenant in possession as implied or quasi trustee, 137 ALR 1054.

Right of estate of life beneficiary to income of trust for distribution, but not actually distributed, by trustee at time of life beneficiary's death, 141 ALR 1466.

Right of life tenant under a grant or reservation of a life interest in oil and gas (as distinguished from the land) in res of oil and gas developed after the commencement of his interest; 150 ALR 695.

Uniform Principal and Income Act as applicable to estates under administration, 166 ALR 428.

Invasion of principal in behalf of income beneficiary, absent or contrary to provision of trust instrument in that regard, 1 ALR2d 1328.

Propriety of payment of funeral expenses of life beneficiary or life tenant out of corpus or estate under instrument providing for invasion of corpus or estate for support of such person, 18 ALR2d 1236.

Right as between life beneficiaries and remaindermen, or successive life beneficiaries, in corporate dividends or distributions, 44 ALR2d 1277.

Life tenant's right of action for injury or damage to property, 49 ALR2d 1117.

Timber rights of life tenant, 51 ALR2d 1374.

Nature of remainder created by inter vivos trust giving settlor, trustee, or life beneficiary power to exhaust trust fund or otherwise terminate trust, 61 ALR2d 477.

Measure of damages in landlord's action for waste against tenant, 82 ALR2d 1106.

Forfeiture of life estate for waste, 16 ALR3d 1344.

Implication of right of life tenant to entrench upon or dispose of corpus from language contemplating possible diminution or elimination of gift over, 31 ALR3d 6.

What constitutes reasonably necessary use of the surface of the leasehold by a mineral owner, lessee, or driller under an oil and gas lease or drilling contract, 53 ALR3d 16.

Right of contingent remainderman to maintain action for damages for waste, 56 ALR3d 677.

Duty as between life tenant and remainderman with respect to cost of improvements or repairs made under compulsion of governmental authority, 43 ALR4th 1012.

44-6-84. Ownership of increase of property.

The natural increase of the property shall belong to the tenant for life. Any extraordinary accumulation of the corpus, such as an issue of new stock upon the share of a corporation, shall attach to the corpus and go with it to the remainderman. (Orig. Code 1863, § 2236; Code 1868, § 2230; Code 1873, § 2256; Code 1882, § 2256; Civil Code 1895, § 3091; Civil Code 1910, § 3667; Code 1933, § 85-605.)

Law reviews. — For note, ''Determining Principal and Income Allocation in Georgia Trusts,'' see 8 Ga. St. B.J. 564 (1972).

JUDICIAL DECISIONS

Section taken from Massachusetts rule. — When this statute was codified, in view of the older English cases and of such decisions as had then been made in America, one line of authority had to be selected as containing the correct rule. The codifiers in substance selected the Massachusetts rule. McHenry v. McHenry, 152 Ga. 105, 108 S.E. 522 (1921) (see O.C.G.A. § 44-6-84).

Specific devise of lands carries with it to devisee income, profit, or increase of legacy, from the date of the testator's death. Cheshire v. Keaton, 184 Ga. 29, 190 S.E. 579 (1937).

Extraordinary accumulation, including enhancement in value, goes to the remainderman. National Audubon Soc'y, Inc. v. Marshall, 424 F.2d 717 (5th Cir. 1970).

"Natural increase" and "extraordinary accumulation" construed. — Words ''natural

increase'' are used in antithesis to the subsequent words ''extraordinary accumulation,'' and the words mean the ordinary accumulation of the property; that is, in case of stock, the ordinary increase of the stock's value by larger dividends declared, whereby it may be worth much more in the income of the holder from it, goes to the life tenant, but any extraordinary increase or accumulated outside property will go to the remaindermen. Millen v. Guerrard, 67 Ga. 284, 44 Am. St. R. 720 (1881).

Natural increase of stock includes dividends. — Dividends, whether in cash, or bonds, or certificates of indebtedness, are the natural increase of stock, and not an accumulation of the corpus, nor is this affected by the fact that no dividends are declared on the stock for some time, and when dividends are declared the amount is unusually large. Therefore, such dividends belong to the life tenant, and not to the remaindermen. Millen v. Guerrard, 67 Ga. 284, 44 Am. St. R. 720 (1881).

As applied to corporate stock, ''the natural increase'' means dividends. Clearly it cannot mean the appreciation in the value of the corpus of the property. Jackson v. Maddox, 136 Ga. 31, 70 S.E. 865, 1912B Ann. Cas. 1216 (1911).

Extraordinary accumulation includes issue of new stock. — Words, ''such as issue of new stock upon the share of an incorporated or joint stock company'' are a mere illustration of extraordinary accumulations. Millen v. Guerrard, 67 Ga. 284, 44 Am. St. R. 720 (1881).

If the issue of new stock is not an ordinary increase, it is not a natural increase. Millen v. Guerrard, 67 Ga. 284, 44 Am. St. R. 720 (1881); Jackson v. Maddox, 136 Ga. 31, 70 S.E. 865, 1912B Ann. Cas. 1216 (1911).

What is meant by an extraordinary accumulation of the corpus is illustrated by the words ''such as an issue of new stock upon the shares of an incorporated or joint stock company.'' Thus, the codifiers distinctly selected the rule that the issue of new stock upon shares of a corporation constituted an extraordinary accumulation, and stated such an issue as being a typical case to illustrate the meaning of the words, ''extraordinary accumulation,'' as used by the codifiers. Jackson v. Maddox, 136 Ga. 31, 70 S.E. 865, 1912B Ann. Cas. 1216 (1911).

Stock dividends. — When this rule obtains, regardless of the time the profits out of which they are made accumulate or were earned, all stock dividends are to be considered as capital belonging to the remainderman, and all cash dividends are to be regarded as income belonging to the holder of the life term. Armstrong v. Merts, 202 Ga. 483, 43 S.E.2d 512 (1947).

Enhancement in value of sold and reinvested property. — When a testator devised and bequeathed to one for life ''the use, income, and profits'' of certain real and personal property, with remainder over to others, with power in the executors to sell and reinvest in ''income producing property or securities,'' subject to the same uses, and the property devised was sold and reinvested in property which enhanced in value, such enhancement in value became a part of the corpus of the estate and inured to the benefit of the remaindermen, and could not be collected by and for the use of the life tenant. Wood v. Davis, 168 Ga. 504, 148 S.E. 330 (1929).

Increase of animals. — Under this statute, the natural increase of animals belonged to the life tenant, without any condition that when a life tenant takes the increase of animals of animals, there is a corresponding obligation to keep up the stock to its original number. Leonard v. Owen, 93 Ga. 678, 20 S.E. 65 (1894) (see O.C.G.A. § 44-6-84).

Executor cannot take natural increase. — Executor has no right to sell the natural increase of the cattle and hogs, but they belonged absolutely to the widow, and passed, at her death, to her representatives. Leonard v. Owen, 93 Ga. 678, 20 S.E. 65 (1894).

Cited in White v. Rose, 73 F.2d 236 (5th Cir. 1934); Citizens & Southern Nat'l Bank v. Fleming, 181 Ga. 116, 181 S.E. 768 (1935); First Nat'l Bank v. Allen, 86 F. Supp. 918 (M.D. Ga. 1949); Hirsch v. Hirsch, 216 Ga. 379, 116 S.E.2d 611 (1960).

RESEARCH REFERENCES

Am. Jur. 2d. — 51 Am. Jur. 2d, Life Tenants and Remaindermen, §§ 104-120, 162-170, 201-232.

C.J.S. — 18 C.J.S, Corporations, § 242 et seq. 31 C.J.S., Estates, §§ 41 et seq., 50 et seq., 161.

ALR. — Rights and duties of life tenant with power to anticipate or enjoy principal, 2 ALR 1243; 27 ALR 1381; 69 ALR 825; 114 ALR 946.

Rights of life tenant and remainderman respectively as to discount at which securities are purchased, 48 ALR 684; 101 ALR 7; 131 ALR 1426.

Right of estate of life beneficiary to income under a trust which confides to discretion of trustee the part of the income principal to be paid to him, 61 ALR 677.

Duty of life tenant in respect of repairs as affected by amount of income, 101 ALR 681.

Rights and duties of life tenant and remainderman (income and corpus) with respect to repairs and improvements, 128 ALR 199; 175 ALR 1434.

Right of estate of life beneficiary to income of trust for distribution, but not actually distributed, by trustee at time of life beneficiary's death, 141 ALR 1466.

Right of life tenant under a grant or reservation of a life interest in oil and gas (as distinguished from the land) in res of oil and gas developed after the commencement of his interest, 150 ALR 695.

Nontrust life estate expressly given for support and maintenance, as limited thereto, 26 ALR2d 1207.

Right as between life beneficiaries and remaindermen, or successive life beneficiaries, in corporate dividends or distributions, 44 ALR2d 1277.

Rights of life tenant and remaindermen inter se respecting increase, gains, and enhanced values of the estate, 76 ALR2d 162.

44-6-85. When life tenant entitled to emblements.

If a life estate is terminated by the act of someone other than the tenant for life, the tenant and his legal representative shall be entitled to emblements, which are the profits of the crop sowed by him during life, whether the plants are annual or perennial. (Orig. Code 1863, § 2237; Code 1868, § 2231; Code 1873, § 2257; Code 1882, § 2257; Civil Code 1895, § 3092; Civil Code 1910, § 3668; Code 1933, § 85-606.)

JUDICIAL DECISIONS

Section is merely declaratory of the common law. Story v. Butt, 2 Ga. App. 119, 58 S.E. 388 (1907), later appeal, 5 Ga. App. 540, 63 S.E. 658 (1909) (see O.C.G.A. § 44-6-85).

Life tenant entitled to emblements. — Upon the principle that one that sows in peace shall reap in peace, the tenant for life is always entitled to emblements, because it was not known when the tenant sowed that the life would end before the tenant reaped. Chappell v. Boud, 56 Ga. 578 (1876).

If the life estate is terminated, not by the act of the tenant, the tenant and the tenant's legal representatives shall be entitled to emblements, which are the profits of the crop sowed by the tenant during life, whether the plants are annual or perennial. Bristol Sav. Bank v. Nixon, 169 Ga. 282, 150 S.E. 148 (1929).

Cited in Trust Co. v. Kenny, 188 Ga. 243, 3 S.E.2d 553 (1939); Eslinger v. Keith, 218 Ga. App. 742, 463 S.E.2d 501 (1995).

RESEARCH REFERENCES

Am. Jur. 2d. — 21 Am. Jur. 2d, Crops, §§ 20, 22, 23, 25.

C.J.S. — 31 C.J.S., Estates, §§ 40, 48, 49.

ALR. — Duty as to chattels or harvested crops left on land by predecessor in possession, 27 ALR 68.

Rights and duties of life tenant and remainderman (income and corpus) with respect to repairs and improvements, 175 ALR 1434.

Rights in growing, unmatured annual crops as between personal representatives of decedent's estate and heirs or devisees, 92 ALR2d 1373.

Rights in respect of crops as between estate of life tenant and remainderman, 47 ALR3d 784.

44-6-86. Rights of lessee upon termination of life estate.

If the tenant for life rents the land by the year and the life estate is terminated during the year by his death or otherwise, the lessee, upon complying with his contract with the tenant for life, shall be entitled to the land for the balance of the year. (Orig. Code 1863, § 2238; Code 1868, § 2232; Code 1873, § 2258; Code 1882, § 2258; Civil Code 1895, § 3093; Civil Code 1910, § 3669; Code 1933, § 85-607.)

JUDICIAL DECISIONS

Statute is adaptation of British statute. — This statute is not of common-law origin, but is manifestly an adaptation, made by the compilers of the Code, of 14 and 15 Vict., ch. 25. Story v. Butt, 2 Ga. App. 119, 58 S.E. 388 (1907) (see O.C.G.A. § 44-6-86).

Life tenant may lease estate for reasonable duration. — One who by will is made the devisee of a life estate in the lands of the testator and given full power of disposition to the end that an income may be derived for the support of oneself and children may lawfully execute a lease of reasonable duration upon the lands of the estate, and such a lease will not expire upon one's death, even though it occurs before the last year of the lease. Hines v. McCombs, 2 Ga. App. 675, 58 S.E. 1124 (1907).

Contract binding to end of year in which tenant dies. — Power is conferred upon the tenant for life to represent the whole estate to the extent of making a rent contract binding to the end of the year in which the death of such tenant for life may occur. Story v. Butt, 2 Ga. App. 119, 58 S.E. 388 (1907).

Undertenant obligated to comply with contract. — Correlative duty of the undertenant is to comply with one's contract with the life tenant, and if the undertenant does so, the undertenant is not accountable to the remainderman for any portion of the year's rent, though the life tenant dies before the crops are sown. Story v. Butt, 2 Ga. App. 119, 58 S.E. 388 (1907).

If undertenant pays rent to life tenant, payment is good against claim of remainderman. — If the life tenant takes a negotiable promissory note for the year's rent and transfers the note for value to a third person, this is legally equivalent to payment, so far as the rights between the undertenant and the remainderman are concerned. Story v. Butt, 2 Ga. App. 119, 58 S.E. 388 (1907).

Transferee of undertenant's negotiable promissory note may collect full amount of rent. — When a life tenant rents land for the year, taking for the rent a negotiable promissory note, and transfers the note for value to a third person, and dies during the year, and none of the rent has accrued to the life tenant and none has been collected by the life tenant, the transferee of the rent note would ordinarily have the right to collect the full amount of the rent note from the undertenant. Mitchell v. Rutherford, 9 Ga. App. 722, 72 S.E. 302 (1911).

If life tenant dies without collecting rent, undertenant accountable to remainderman for rent. — If the life tenant rents out the land for the year and dies without collecting the rent, and without doing anything to which the law would give the effect of a collection of the rent, the undertenant is entitled to possess the premises to the end of the year, but the undertenant is accountable to the remainderman for such a proportion of the rent agreed to be paid as the period between the death of the life tenant and the end of the year bears to the whole year. Butt v. Story, 5 Ga. App. 540, 63 S.E. 658 (1909).

Nonnegotiable note not equivalent to collection of rent. — Taking of a nonnegotiable note by the life tenant, though it is assigned, is not equivalent to a collection of the rent. Butt v. Story, 5 Ga. App. 540, 63 S.E. 658 (1909).

Cited in Bristol Sav. Bank v. Nixon, 169 Ga. 282, 150 S.E. 148 (1929); Trust Co. v. Kenny, 188 Ga. 243, 3 S.E.2d 553 (1939).

RESEARCH REFERENCES

Am. Jur. 2d. — 51 Am. Jur. 2d, Life Tenants and Remaindermen, §§ 65, 109 et seq.

C.J.S. — 31 C.J.S., Estates, §§ 48 et seq., 67. 51C C.J.S., Landlord and Tenant, §§ 93, 253.

ALR. — Death of life tenant as affecting rights under lease executed by him, 6 ALR 1506; 171 ALR 489.

Life tenant's death as affecting rights under lease given by him, 14 ALR4th 1054.

44-6-87. Effect of purported sale of estate by life tenant.

No forfeiture shall result when a tenant for life purports to sell the entire estate in lands. In such a case, the purchaser shall acquire only the interest of the life tenant. (Orig. Code 1863, § 2242; Code 1868, § 2234; Code 1873, § 2260; Code 1882, § 2260; Civil Code 1895, § 3095; Civil Code 1910, § 3671; Code 1933, § 85-609.)

Law reviews. — For comment on Eller v. Wages, 220 Ga. 58, 136 S.E.2d 730 (1964), see 1 Ga. St. B.J. 557 (1965).

JUDICIAL DECISIONS

Statute is but a legislative declaration of what was already the law. It is true that at common law a life tenant might, by feoffment, fine, or common recovery, forfeit the life tenant's estate to the tenant in remainder, but a conveyance by lease and release, or bargain and sale, the principal mode of conveyance in America, does not work a forfeiture. Doe v. Roe, 36 Ga. 199 (1867).

Trustee for life tenant cannot sell greater interest than life estate. — Trustee for a life tenant named in the will could not, even under a court order, sell and convey any greater interest in the property which passed under such a devise than the estate of the life tenant therein. Fleming v. Hughes, 99 Ga. 444, 27 S.E. 791 (1896).

If the life tenant conveys greater estate than that possessed, it would not work a forfeiture as at common law. Sanford v. Sanford, 55 Ga. 527 (1875).

An attempt to convey a greater estate than that possessed does not work a forfeiture of the life estate as there can be no entry and ouster against grantee until death of life tenant. Howard v. Henderson, 142 Ga. 1, 82 S.E. 292 (1914).

Superior title not passed to purchaser. — When an original owner executed a voluntary deed to a life tenant and remainderman, and the life tenant executed a deed in fee simple to a bona fide purchaser without notice, this statute would not pass a superior title or create a superior equity in favor of such a purchaser from the life tenant. Mathis v. Solomon, 188 Ga. 311, 4 S.E.2d 24 (1939) (see O.C.G.A. § 44-6-87).

Purchaser acquires only life estate. — Deed of L, which purports to convey a fee simple estate to the petitioner, passes only the title which L had under the terms of the will. A purchaser of the entire estate from the life tenant acquires only the interest of the life tenant. Satterfield v. Tate, 132 Ga. 256, 64 S.E. 60 (1909).

If the agreement between the grantor and

a first grantee is treated as creating or leaving in the grantor a life estate, the grantor's second deed might have conveyed that only, although it may have purported to be a conveyance of the fee. Burtchael v. Byrd, 143 Ga. 31, 84 S.E. 55 (1915).

Should the holder of a life estate undertake to convey the entire estate in lands, no forfeiture would result; one would simply convey one's estate for life. McDaniel v. Bagby, 204 Ga. 750, 51 S.E.2d 805 (1949).

Life estate passes upon general tax execution. — When property is sold for taxes as the property of a tenant for life, no more than the interest of the tenant for life passes, unless the sale is for the taxes on that specific property only. This is so when the sale is by virtue alone of the tax execution. Clower v. Fleming, 81 Ga. 247, 7 S.E. 278 (1888).

When a general tax execution against a life tenant is levied upon land in which the tenant has a life estate, the life estate only, and not the fee, is the property under the levy. Dooley v. Bohannon, 191 Ga. 7, 11 S.E.2d 188 (1940).

Remaindermen cannot enter until life tenant's death. — Tenant for life did not forfeit the tenant's estate in the land by selling and conveying the whole fee. The remainders were not affected, and the remaindermen could not enter upon the purchaser until the death of the tenant for life. Sanford v. Sanford, 55 Ga. 527 (1875).

Remainderman has no right of possession until life tenant's death. — Heirs having consented to and acquiesced in the entry and occupation by the widow, raising no question as to the mode of legality of the assigning and laying off her dower, had no right to possession until after her death, inasmuch as, under this statute, no forfeiture resulted by reason of her conveying the fee to another. Wells v. Dillard, 93 Ga. 682, 20 S.E. 263 (1894) (see O.C.G.A. § 44-6-87).

No right of action accrues to remainderman. — Sale by the trustee and consent by the life tenant was not such an act by the tenant for life as, at common law, amounted to a forfeiture, and it was error in the court to hold that, on the making of such a deed, a right of action, based on the forfeiture, accrued to the remainderman, and that the statute of limitations commenced to run. Bazemore v. Davis, 48 Ga. 339 (1873).

Remainderman had no cause of action against any purchaser until the remainderman acquired a right of entry and possession by the death of the life tenant. Biggers v. Gladin, 204 Ga. 481, 50 S.E.2d 585 (1948).

Remainderman cannot interfere with sheriff's sale. — When the sheriff, in attempting to sell the life estate of M under execution, is selling the fee, the remainderman cannot interfere, because the life tenant makes no forfeiture under this statute, and the purchaser buys no more than a life estate. Stone v. Franklin, 89 Ga. 195, 15 S.E. 47 (1892) (see O.C.G.A. § 44-6-87).

Cited in Latham v. Fowler, 192 Ga. 686, 16 S.E.2d 591 (1941); Mid-State Homes, Inc. v. Johnson, 218 Ga. 397, 128 S.E.2d 197 (1962).

RESEARCH REFERENCES

Am. Jur. 2d. — 28 Am. Jur. 2d, Estates, § 111. 51 Am. Jur. 2d, Life Tenants and Remainderman, § 84.

C.J.S. — 26A C.J.S., Deeds, § 257. 31 C.J.S., Estates, §§ 64 et seq., 164.

44-6-88. Demand for bond by purchaser of life estate in personalty; effect of failure to give bond.

Upon the demand of anyone interested in the remainder or his agent or attorney, which demand shall be accompanied by a statement under oath of his interest, it shall be the duty of the officer making the sale of a life estate in personalty under process of law to require the purchaser to give bond in double the value of the property, with good security, for the delivery of the property to the remainderman. The bond shall be filed in the office of the

clerk of the superior court of the county in which the sale is made and shall be subject to an action on the bond by any person who is interested in the remainder. On the failure of the purchaser to give such bond, the property shall be resold at his risk, provided that notice of the demand for such bond was given before he made the purchase. (Laws 1830, Cobb's 1851 Digest, p. 513; Code 1863, § 2244; Code 1868, § 2236; Code 1873, § 2262; Code 1882, § 2262; Civil Code 1895, § 3097; Civil Code 1910, § 3673; Code 1933, § 85-1709; Ga. L. 1982, p. 3, § 44.)

JUDICIAL DECISIONS

For a history of this Code section, see George v. Clary, 180 Ga. 279, 178 S.E. 920 (1935).

RESEARCH REFERENCES

Am. Jur. 2d. — 12 Am. Jur. 2d, Bonds, § 6.
C.J.S. — 11 C.J.S., Bonds, § 53. 31 C.J.S., Estates, § 63 et seq.

44-6-89. Removal of personalty beyond state by life tenant; forfeiture; restraint.

The tenant for life in personalty shall not remove such personalty outside this state without the consent of the remainderman. If the tenant for life fraudulently attempts to remove the personalty, he shall forfeit his interest therein; if he attempts to do so without fraud, the remainderman or reversioner shall be entitled to the writ of ne exeat to restrain him. (Laws 1830, Cobb's 1851 Digest, p. 527; Code 1863, § 2243; Code 1868, § 2235; Code 1873, § 2261; Code 1882, § 2261; Civil Code 1895, § 3096; Civil Code 1910, § 3672; Code 1933, § 85-1708.)

JUDICIAL DECISIONS

Section strictly construed. — This statute is for the protection of the rights of remaindermen and reversioners in personal property and should be strictly construed, and the statute's provisions fully complied with. Wallace v. Duncan, 13 Ga. 41 (1853) (see O.C.G.A. § 44-6-89).

Bond lies for delivery of property when removed from state. — When a life tenant and the tenant's purchaser removed slaves from the state, a bill will lie to make them give bond for the delivery of the property with increase to the remaindermen. Riddle v. Kellum, 8 Ga. 374 (1850).

Ne exeat will be dissolved when there is other relief more appropriate to the case. Hawthorn v. Kelly, 30 Ga. 965 (1860).

RESEARCH REFERENCES

Am. Jur. 2d. — 57 Am. Jur. 2d, Ne Exeat, §§ 6, 7.
C.J.S. — 31 C.J.S., Estates, § 73.

ALR. — Relative rights of life beneficiary and remainderman as to return on bonds or other obligations for the payment of money,

bought at a premium or at a discount, 101 ALR 7; 131 ALR 1426.

Right of life tenant under a grant or reservation of a life interest in oil and gas (as distinguished from the land) in res of oil and gas developed after the commencement of his interest, 150 ALR 695.

Rights and duties of life tenant and remainderman (income and corpus) with respect to repairs and improvements, 175 ALR 1434.

44-6-90. Jurisdiction of judge of superior court as to life estates and contingent remainders.

(a) The judge of the superior court shall have jurisdiction to hear any case that:

(1) Involves a tenant for life in real property or the proceeds of real property;

(2) Involves a contingent remainder interest of a class subject to open through the subsequent event of a birth or an adoption; and

(3) Does not involve the creation of a perpetuity.

(b) In such cases, the judge may receive evidence on the likelihood of the expansion of the class of such remaindermen through the subsequent event of the birth or the adoption of another member of such class. The judge shall be authorized to make such findings of fact and law as to declare such class to be closed. Upon such findings, the judge shall require the life tenant to give bond in an amount sufficient to protect against any actual subsequent expansion of such class by the life tenant through birth or adoption. An order of the judge in such case shall contain a determination of the free marketability of any concerned property.

(c) An action on the bond provided for in subsection (b) of this Code section shall be the sole recourse of any person who is interested in the remainder. (Code 1981, § 44-6-90, enacted by Ga. L. 1984, p. 792, § 1.)

ARTICLE 6

ESTATES FOR YEARS

Law reviews. — For article surveying Georgia cases in the area of real property from June 1977 through May 1978, see 30 Mercer L. Rev. 167 (1978).

JUDICIAL DECISIONS

Cited in City of Jefferson v. Trustees of Martin Inst., 199 Ga. 71, 33 S.E.2d 354 (1945); Warehouses, Inc. v. Wetherbee, 203 Ga. 483, 46 S.E.2d 894 (1948); Southland Inv. Corp. v. McIntosh, 137 Ga. App. 216, 223 S.E.2d 257 (1976).

OPINIONS OF THE ATTORNEY GENERAL

Department of Human Resources may not lease state property to private citizen. — Department of Human Resources has, at present, no general authority or power to lease (grant an estate for years) to a private citizen for one's private purposes real property owned by the state and within the custody and management of the department. 1974 Op. Att'y Gen. No. 74-40.

RESEARCH REFERENCES

ALR. — Validity of oil or gas lease as affected by surrender clause, 3 ALR 378.

Commission of waste as ground for forfeiture of lease, 3 ALR 672.

Lease of property as ademption or revocation of devise, 8 ALR 1638.

Construction of provision for free gas in oil and gas lease, 9 ALR 89.

Time for drilling additional wells in productive territory under oil and gas lease, 14 ALR 967.

What amounts to an option to renew or extend a lease, 26 ALR 1413.

Commencement of development within fixed term as extending term of oil and gas lease, 67 ALR 526.

Rights in respect of rents or royalties earned under an oil and gas lease or other grant of mineral rights in which owners of different tracts join as lessors, 116 ALR 1267.

Easements or privileges of tenant of part of building as to other parts not included in lease, 24 ALR2d 123.

Sublessee's obligation to sublessor to perform latter's covenants in original lease, 24 ALR2d 707.

Lease of realty for term of years as subject of chattel mortgage, 33 ALR2d 1277.

Duty of lessee or assignee of oil or gas lease as regards marketing or delivery for marketing of oil and gas discovered, 71 ALR2d 1219.

Liability of lessee who assigns lease for rent accruing subsequently to extension or renewal of term, 10 ALR3d 818.

Landlord's duty, on tenant's failure to occupy, or abandonment of, premises, to mitigate damages by accepting or procuring another tenant, 21 ALR3d 534.

Implied covenant or obligation to provide lessees with actual possession, 96 ALR3d 1155.

Implied duty of oil and gas lessee to protect against drainage, 18 ALR4th 14.

Remedy for breach of implied duty of oil and gas lessee to protect against drainage, 18 ALR4th 147.

44-6-100. "Estate for years" defined; estate for years in lands passes as realty.

(a) An estate for years is one which is limited in its duration to a period which is fixed or which may be made fixed and certain. Such an estate may be for any number of years, provided the limitation is within the rule against perpetuities.

(b) An estate for years in lands passes as realty. (Orig. Code 1863, § 2255; Code 1868, § 2247; Code 1873, § 2273; Code 1882, § 2273; Civil Code 1895, § 3109; Civil Code 1910, § 3685; Code 1933, § 85-801.)

Law reviews. — For article analyzing legal aspects of time shared (multiple, revolving) ownership of property, see 12 Ga. St. B.J. 75 (1975). For article surveying recent legislative and judicial developments in Georgia's real property laws, see 31 Mercer L. Rev. 187 (1979). For article discussing ad valorem taxation and interest in real property in Georgia, prior to the enactment of provisions in the public revenue statute, T. 48, see 31 Mercer L. Rev. 293 (1979). For article, "The Rule Against Perpetuities as Applied to

Georgia Wills and Trusts,'' see 16 Ga. L. Rev. 235 (1982). For article, ''Usufructs and Estates for Years Distinguished,'' see 18 Ga. St. B.J. 116 (1982).

For note discussing assignment and subletting, see 2 Mercer L. Rev. 412 (1951).

For comment regarding distinction between estate for years and landlord-tenant relationship, in light of State v. Davison, 198 Ga. 27, 31 S.E.2d 255 (1944), see 7 Ga. B.J. 233 (1944).

JUDICIAL DECISIONS

Analysis

General Consideration
Creation
Characteristics
Usufruct Distinguished
Illustrative Cases

General Consideration

Cited in Consolidated Whse. Co. v. Smith, 55 Ga. App. 216, 189 S.E. 724 (1937); Aven v. Steiner Cancer Hosp., 189 Ga. 126, 5 S.E.2d 356 (1939); Murphy v. Johnston, 190 Ga. 23, 8 S.E.2d 23 (1940); Boykin v. Bradley, 192 Ga. 212, 14 S.E.2d 734 (1941); Gilbert Hotel, Inc., No. 4 v. Jones, 157 F.2d 717 (5th Cir. 1946); Evans Theatre Corp. v. De Give Inv. Co., 79 Ga. App. 62, 52 S.E.2d 655 (1949); Superior Pine Prods. Co. v. Williams, 214 Ga. 485, 106 S.E.2d 6 (1958); Union Camp Corp. v. Dyal, 460 F.2d 678 (5th Cir. 1972); Smith v. Top Dollar Stores, Inc., 129 Ga. App. 60, 198 S.E.2d 690 (1973); Tenstate Distribution Co. v. Averett, 397 F. Supp. 1227 (N.D. Ga. 1975); LeBlanc v. Easterwood, 242 Ga. 99, 249 S.E.2d 567 (1978); Killingsworth v. French & Whitten Realtors, 148 Ga. App. 29, 251 S.E.2d 40 (1978); Clayton County Bd. of Tax Assessors v. City of Atlanta, 164 Ga. App. 864, 298 S.E.2d 544 (1982); Eastern Air Lines v. Joint City-County Bd. of Tax Assessors, 253 Ga. 18, 315 S.E.2d 890 (1984).

Creation

Presumption that five-year lease conveys estate for years. — All leases for five years do not necessarily create an estate for years, but there is a presumption that a lease for five years does convey an estate for years. Ginsberg v. Wade, 95 Ga. App. 475, 97 S.E.2d 915 (1957).

Agreement must be searched for parties' intention. — When the grant is for a period of over five years, the presumption arises that an estate for years is intended to be created. In each instance, the agreement involved must be carefully searched for the intention of the parties. Henderson v. Tax Assessors, 156 Ga. App. 590, 275 S.E.2d 78 (1980).

Lease for a period of five years or more is an estate for years under the provisions of this statute. Ward v. McGuire, 213 Ga. 563, 100 S.E.2d 276 (1957) (see O.C.G.A. § 44-6-100).

Characteristics

Estate for years in land passes as realty. Wright v. Central of Ga. Ry., 146 Ga. 406, 91 S.E. 471 (1917), rev'd on other grounds, 248 U.S. 525, 39 S. Ct. 181, 63 L. Ed. 401; 250 U.S. 519, 40 S. Ct. 1, 63 L. Ed. 1123 (1919).

Plaintiff had a written lease from the owner of the premises in question for a term of five years. This created an estate in realty in the lessee as an estate for years which, if it be in lands, passed as realty in this state. Anderson v. Kokomo Rubber Co., 161 Ga. 842, 132 S.E. 76 (1926).

Lease of lands for five years or more creates an estate for years and passes as realty in this state. Shell Petro. Corp. v. Jackson, 47 Ga. App. 667, 171 S.E. 171 (1933).

Estate for years may be bought and sold as any other estate. Clark v. Herring & Mock, 43 Ga. 226 (1871); James G. Wilson Mfg. Co. v. Chamberlin-Johnson-DuBose Co., 140 Ga. 593, 79 S.E. 465 (1913).

Lease of land for five years or more which creates an estate for years may be bought and sold as any other estate, subject to the terms and conditions of the lease. Shell Petro. Corp. v. Jackson, 47 Ga. App. 667, 171 S.E. 171 (1933).

An estate for years may be the subject matter of a sale. Murrah v. First Nat'l Bank, 225 Ga. 613, 170 S.E.2d 399 (1969).

Ordinarily, words "sale of property" signify that sale of fee simple title is contemplated, and not the sale of a limited estate in the property. Murrah v. First Nat'l Bank, 225 Ga. 613, 170 S.E.2d 399 (1969).

Lease of estate for years same as sale of estate. — Sale of lands by a guardian for reinvestment may be made at public or private sale under the direction of the judge of the superior court, and the lease of an estate for years of lands is in effect the sale of an estate for years therein. Shell Petro. Corp. v. Jackson, 47 Ga. App. 667, 171 S.E. 171 (1933).

Holder of estate may maintain damage action against tenant wrongfully holding over. — When the owner of land conveys the land for such a term of years as to convey an estate for years in the land, the holder of the estate may, if entitled to possession under the conveyance, maintain an action for damages against a tenant for wrongful holding over and beyond the tenant's term. Baxley v. Davenport, 75 Ga. App. 659, 44 S.E.2d 388 (1947).

Usufruct Distinguished

When lease term less than five years, presumption that usufruct created. — When the term of the lease is less than five years, a rebuttable presumption arises that only a usufruct is created by the instrument, but when the term of the lease is for more than five years, there is a presumption that an estate for years is created by the agreement of the parties. Camp v. Delta Air Lines, 232 Ga. 37, 205 S.E.2d 194 (1974).

Contract not reduced to usufruct as result of certain limitations upon use. — Contract which ordinarily would be construed to create an estate for years is not reduced to a mere usufruct because certain limitations are put upon its use. The interest so passing may be encumbered or somewhat limited without necessarily changing the character of the estate. Camp v. Delta Air Lines, 232 Ga. 37, 205 S.E.2d 194 (1974).

Usufruct not taxable estate. — Estate for years is a taxable estate, while a mere usufruct, sometimes referred to as a license to use, is not a taxable estate. Camp v. Delta Air Lines, 232 Ga. 37, 205 S.E.2d 194 (1974).

Lessees given usufruct look to owner to place them lawfully in possession. — When the owner of lands does not convey the title or an estate therein but gives the lessees only the usufruct, the lessees may not maintain an action for damages or one to recover possession from a tenant of the owner who is alleged to be holding over and beyond the term for which one rented the premises, but the lessees must look to the owner to place them in possession of the premises, and may maintain an action for damages against one for a refusal or failure to do so. Baxley v. Davenport, 75 Ga. App. 659, 44 S.E.2d 388 (1947).

Illustrative Cases

Estate for years in standing timber is realty. Newton v. Allen, 220 Ga. 681, 141 S.E.2d 417 (1965).

Lease of lands for five years or more creates estate for years and passes as realty in this state. Such an estate may be bought and sold as any other estate, subject to the terms and conditions of the lease. Paces Partnership v. Grant, 212 Ga. App. 621, 442 S.E.2d 826 (1994).

Estate for years held created. — Conveyance of a room for a stipulated sum to be kept as a first-class bar room is an estate for years in the property — a purchase of an interest in the estate for a limited period. Under this statute, it passes an estate as realty. Clark v. Herring & Mock, 43 Ga. 226 (1871) (see O.C.G.A. § 44-6-100).

When husband and wife rent a hotel together for a term of five years or more, an estate in realty is acquired, and the relation of tenants in common exists. Schofield v. Jones, 85 Ga. 816, 11 S.E. 1032 (1890).

Contract in which the Board of Regents of the University System of Georgia leased a tract of land to a fraternity for a term of 99 years, for a rent of $1.00 per year, and which allowed the fraternity to erect a building on the premises, transfer, sell, or convey the property to another fraternity, and following which the fraternity executed a mortgage to secure a loan made by the mortgagee-regents and which was recorded, despite certain restrictions and covenants preventing the lessee from exercising absolute control over the property, granted the fraternity an estate for years, and not a mere leasehold; such an interest could be levied

Illustrative Cases (Cont'd)

upon for the failure to pay taxes. State v. Davison, 198 Ga. 27, 31 S.E.2d 225 (1944), commented on in 7 Ga. B.J. 233 (1944).

Lease which ran for 25 years and had a renewal provision for two additional ten year periods created an estate for more than 20 years made under seal. Brackett v. Cartwright, 231 Ga. App. 536, 499 S.E.2d 905 (1998).

When most sections of a lease either granted rights to or imposed obligations upon the lessee consistent with the conveyance of an estate for years, or set forth restrictions designed to preserve a hotel on the property as a historic structure and protect the lessor's reversionary interest, and the remaining restrictions did not quantitatively or qualitatively outweigh the incidents of ownership vested in the lessee to convert the interest conveyed from the intended leasehold estate to a usufruct, it was proper to require the lessee to pay ad valorem taxes on its interest in the hotel. Jekyll Dev. Assocs., L.P. v. Glynn County Bd. of Tax Assessors, 240 Ga. App. 273, 523 S.E.2d 370 (1999).

Contract action between two non-debtor parties over rights pertaining to leasehold, an estate of years which passed as real property under O.C.G.A. § 44-6-100 and of which debtor was an interest holder, was not related to the debtor's bankruptcy so as to establish jurisdiction under 28 U.S.C. § 1334 because the lease was deemed rejected by the trustee under operation of law pursuant to 11 U.S.C. § 365 and was thus not a part of the bankruptcy estate under 11 U.S.C. § 541. Southeast LandCo, LLC v. 150 Beachview Holdings, LLC, No. CV206-177, 2006 U.S. Dist. LEXIS 73098 (S.D. Ga. Sept. 20, 2006).

Effect of performance on parol contract for rent of land. — When a tenant, after making a parol contract for the rent of land for three years, had sufficiently performed, the tenancy, though ordinarily void under the statute of frauds, could not be treated as a tenancy at will. Petty v. Kennon, 49 Ga. 468 (1873).

Estate for years not created. — No estate for years and no interest in land were created by agreement between property owner and oil company when the latter had no right to use the land and no interest was conveyed by simply promising to sell oil company's products and by allowing the company to make improvements on the land. Copelan v. Acree Oil Co., 249 Ga. 276, 290 S.E.2d 94 (1982).

OPINIONS OF THE ATTORNEY GENERAL

Five-year lease presumed to convey estate for years. — Lease of land for five years or longer which does not by the lease's own terms purport an intention to convey a lesser interest will be presumed to convey an estate for years and as such passes as realty. 1969 Op. Att'y Gen. No. 69-352.

RESEARCH REFERENCES

Am. Jur. 2d. — 28 Am. Jur. 2d, Estates, § 146. 49 Am. Jur. 2d, Landlord and Tenant, §§ 60, 62. 61 Am. Jur. 2d, Perpetuities and Restraints on Alienation, § 37.

C.J.S. — 31 C.J.S., Estates, §§ 13, 67, 160. 51C C.J.S., Landlord and Tenant, §§ 2, 26 et seq., 202. 96 C.J.S., Wills, § 1298.

ALR. — Merger of estate for years in fee or lesser estate, 143 ALR 93.

Liability of lessee who assigns lease for rent accruing subsequently to extension or renewal of term, 10 ALR3d 818.

44-6-101. Estate for years distinguished from contract of hiring and from landlord and tenant relationship.

As applied to personalty, an estate for years differs from a contract of hiring, which is a bailment conveying no interest in the property to the

bailee but merely the right of use. As applied to realty, an estate for years does not involve the relationship of landlord and tenant, in which relationship the tenant has no estate but merely has a right of use which is very similar to the right of a hirer of personalty. (Orig. Code 1863, § 2256; Code 1868, § 2248; Code 1873, § 2274; Code 1882, § 2274; Civil Code 1895, § 3110; Civil Code 1910, § 3686; Code 1933, § 85-802.)

Cross references. — Creation of landlord and tenant relationship generally, § 44-7-1.

Law reviews. — For article analyzing legal aspects of time shared (multiple, revolving) ownership of property, see 12 Ga. St. B.J. 75 (1975).

For comment regarding distinction between estate for years and landlord-tenant relationship, in light of State v. Davison, 198 Ga. 27, 31 S.E.2d 225 (1944), see 7 Ga. B.J. 233 (1944). For comment discussing the legal effect of concurrent leases under both common law and statutory law in Georgia, see 6 Ga. St. B.J. 320 (1970).

JUDICIAL DECISIONS

"Lease" and "bailment" distinguished. — Both ''lease'' and ''bailment'' are indicative of a contractual relationship, and the terms are not necessarily mutually exclusive. A lease may refer to a contract involving realty or personalty, or both, whereas a bailment involves the custody of personalty. Buena Vista Loan & Sav. Bank v. Bickerstaff, 121 Ga. App. 470, 174 S.E.2d 219 (1970).

Estate for years, when applied to realty, differs from the relation of landlord and tenant, in that in the latter the tenant has no estate, but a mere right of use very similar to the right of a hirer of personalty. Midtown Chain Hotels Co. v. Bender, 77 Ga. App. 723, 49 S.E.2d 779 (1948).

Creation of estate for years not conclusively shown by five-year lease. — Although there may be a presumption that a lease for five years or more conveys an estate for years, this fact alone does not conclusively show that an estate for years was created in the lessee, and that the relation of landlord and tenant did not exist between the parties. Midtown Chain Hotels Co. v. Bender, 77 Ga. App. 723, 49 S.E.2d 779 (1948).

Usufruct is lesser interest in real estate than is an estate for years, which does not involve the landlord-tenant relationship. Richmond County Bd. of Tax Assessors v. Richmond Bonded Whse. Corp., 173 Ga. App. 278, 325 S.E.2d 891 (1985); Searcy v. Peach County Bd. of Tax Assessors, 180 Ga. App. 531, 349 S.E.2d 515 (1986).

Holder of estate may maintain damage action against tenant wrongfully holding over. — When the owner of land conveys the land for such a term of years as to convey an estate for years, the holder of the estate may, if entitled to possession under the conveyance, maintain an action for damages against a tenant for wrongful holding over and beyond the tenant's term. Baxley v. Davenport, 75 Ga. App. 659, 44 S.E.2d 388 (1947).

In landlord-tenant relationship, duty of making repairs and improvements upon landlord. — When the lease requires the conclusion that the relation between the parties thereto was that of landlord and tenant, the duty of making the structural changes and improvements in the leased premises, whether they be regarded as ''repairs'' or as ''substantial improvements,'' is upon the landlord and not upon the tenant. Midtown Chain Hotels Co. v. Bender, 77 Ga. App. 723, 49 S.E.2d 779 (1948).

Lessees look to owner to place the lessees lawfully in possession. — When the owner of lands does not convey the title or an estate therein but gives the lessees only the usufruct, the lessees may not maintain an action for damages or one to recover possession from a tenant of the owner who is alleged to be holding over and beyond the term for which the tenant rented the premises, but the lessees must look to the owner to place the lessees in possession of the premises, and may maintain an action for damages against the owner for a refusal or failure to do so. Baxley v. Davenport, 75 Ga. App. 659, 44 S.E.2d 388 (1947).

Estate for years found created. — Contract in which the Board of Regents of the

University System of Georgia leased a tract of land to a fraternity for a term of 99 years, for a rent of $1.00 per year, and which allowed the fraternity to erect a building on the premises, transfer, sell, or convey the property to another fraternity, and following which the fraternity executed a mortgage to secure a loan made by the mortgagee-regents and which was recorded, despite certain restrictions and covenants preventing the lessee from exercising absolute control over the property, granted the fraternity an estate for years, and not a mere leasehold; such an interest could be levied upon for the failure to pay taxes. State v. Davison, 198 Ga. 27, 31 S.E.2d 225 (1944), commented on in 7 Ga. B.J. 233 (1944).

When most sections of a lease either granted rights to or imposed obligations upon the lessee consistent with the conveyance of an estate for years, or set forth restrictions designed to preserve a hotel on the property as a historic structure and protect the lessor's reversionary interest, and the remaining restrictions did not quantitatively or qualitatively outweigh the incidents of ownership vested in the lessee to convert the interest conveyed from the intended leasehold estate to a usufruct, it was proper to require the lessee to pay ad valorem taxes on its interest in the hotel. Jekyll Dev. Assocs., L.P. v. Glynn County Bd. of Tax Assessors, 240 Ga. App. 273, 523 S.E.2d 370 (1999).

Agreement held to create usufruct. — Agreement created a usufruct, rather than an estate for years, despite provision that "it is the intent of the parties to create a leasehold estate … and not a mere usufruct" when the initial term was for seven months, but provided for automatic renewals for ten consecutive one-year periods, provided the program was funded by the General Assembly, and the lessor was responsible for all insurance, taxes, and upkeep of the premises, including maintenance and repairs. Huntingdon II, Ltd. v. Chatham County Bd. of Tax Assessors, 207 Ga. App. 466, 428 S.E.2d 605 (1993).

Easement by necessity not created by usufruct granted to tenant. — Because the evidence presented at trial made it clear that a lessor conveyed no ownership interest to a tenant, leaving that tenant with only a right to possess and use the leased property, and more specifically, a usufruct, the tenant did not own an interest in the property, and thus could not pursue an easement by necessity under O.C.G.A. § 44-9-40; hence, summary judgment in the lessor's favor as to this issue was upheld on appeal. Read v. Ga. Power Co., 283 Ga. App. 451, 641 S.E.2d 680 (2007).

Cited in Eastern Air Lines v. Joint City-County Bd. of Tax Assessors, 253 Ga. 18, 315 S.E.2d 890 (1984); Thompson v. Crownover, 259 Ga. 126, 381 S.E.2d 283 (1989).

RESEARCH REFERENCES

Am. Jur. 2d. — 49 Am. Jur. 2d, Landlord and Tenant, §§ 7, 8, 60 et seq.

C.J.S. — 8 C.J.S., Bailments, § 7. 51C C.J.S., Landlord and Tenant, §§ 2, 26.

ALR. — Assignment of lease as breach of covenant against subletting, 7 ALR 249; 79 ALR 1379.

Duty to disclose to sublessee ownership of property, 37 ALR 1455.

Right of lessee to equitable relief against forfeiture for breach of conditions as affected by lessor's giving a lease to entering into other contractual obligations with a third person; 166 ALR 807.

Implied covenant or obligation to provide lessee with actual possession, 96 ALR3d 1155.

44-6-102. "Lease" defined; extent of interest; when mining interest passes.

The grant by one person to another of an estate for years out of his own estate, with reversion to himself, is usually termed a lease. Such a lease may be confined to a particular interest in lands, such as the right to mine or farm the same, in which case no other interest shall pass. If no subject of the lease is stated, the right to mine the land in question shall not pass unless

the circumstances justify the implication that the parties intended the mining interest to pass. (Orig. Code 1863, § 2260; Code 1868, § 2252; Code 1873, § 2278; Code 1882, § 2278; Civil Code 1895, § 3114; Civil Code 1910, § 3690; Code 1933, § 85-806.)

Cross references. — Provision that owner of property owns upward and downward indefinitely, §§ 44-1-2, 51-9-9. Obtaining of title to mineral rights through adverse possession, § 44-5-168. Landlord and tenant relationship generally, Ch. 7 of this title.

Law reviews. — For article analyzing legal aspects of time shared (multiple, revolving) ownership of property, see 12 Ga. St. B.J. 75 (1975).

For comment discussing the legal effect of concurrent leases under both common law and statutory law in Georgia, see 6 Ga. St. B.J. 320 (1970).

JUDICIAL DECISIONS

"Lease" defined. — Under a ''lease'' one grants to another an estate for years out of one's own estate, reversion to oneself. Hooper, Hough & Force v. Dwinnell, 48 Ga. 442 (1873).

Lease proper is an estate for years. Harms v. Entelman, 21 Ga. App. 295, 94 S.E. 276 (1917).

"Lessee" defined. — Technically, the word ''lessee'' denotes the holder of a contract for the possession and profits of lands and tenements for a fixed term, for life, or at will. Lang v. Hitt, 149 Ga. 667, 101 S.E. 795 (1920).

"Subletting" is a leasing by lessee of a whole or a part of the premises during a portion of the unexpired balance of the lessee's term. Georgia Power Co. v. Fletcher, 113 Ga. App. 559, 148 S.E.2d 915 (1966).

"Lease" and "bailment" compared. — Both lease and bailment indicate contractual relationship, and the terms are not necessarily mutually exclusive. A lease may refer to a contract involving realty or personalty, or both, whereas a bailment involves the custody of personalty. Buena Vista Loan & Sav. Bank v. Bickerstaff, 121 Ga. App. 470, 174 S.E.2d 219 (1970).

Leasing conveys to lessee right to possess and enjoy estate. — Leasing, even for less than a year, conveys to the lessee the right to possess and enjoy the real estate, though it passes no estate out of the lessor. It gives to the lessee the usufruct for the specified term. Georgia Power Co. v. Fletcher, 113 Ga. App. 559, 148 S.E.2d 915 (1966).

Extension of lease not waiver of right to damages for lessor's breach of contract. — When the lessor of timber rights breaches the agreement by allowing a third party to enter and cut timber, and thereafter acknowledges the breach and enters into negotiations with the lessee for the purpose of reaching a settlement as to the amount of damages sustained, an extension of the lease agreement thereafter made, not as a satisfaction of the damages, but as a matter of mutual agreement to allow additional time in which a settlement can be reached, does not constitute a waiver of the rights of the lessee thereafter to insist upon damages resulting from the breach of contract. Gamble v. Hogan, 88 Ga. App. 430, 76 S.E.2d 658 (1953).

Lease of lands for five years or more creates an estate for years and passes as realty in this state. Shell Petro. Corp. v. Jackson, 47 Ga. App. 667, 171 S.E. 171 (1933).

Estate for years may be bought and sold. — Lease of land for five years or more which creates an estate for years may be bought and sold as any other estate, subject to the terms and conditions of the lease. Shell Petro. Corp. v. Jackson, 47 Ga. App. 667, 171 S.E. 171 (1933); Paces Partnership v. Grant, 212 Ga. App. 621, 442 S.E.2d 826 (1994).

Lease of estate for years is in effect the sale of estate for years therein. Shell Petro. Corp. v. Jackson, 47 Ga. App. 667, 171 S.E. 171 (1933).

Contract granting party right to take clay from land for definite term constitutes lease. — Contract which grants to one of the parties thereto the use and occupation of the premises for a definite term with the right to take brick clay from certain land of the other party and manufacture the same

into merchantable brick, for a valuable consideration moving from the other party thereto, during a specified term of years, is a lease. Palmer Brick Co. v. Woodward, 138 Ga. 289, 75 S.E. 480 (1912).

Conveyance of room for stipulated sum is estate for years. — Conveyance of a room for a stipulated sum to be kept as a first-class bar room can hardly be called a lease, since it wants one of the marked ingredients of a lease, the agreement to pay rent. Clark v. Herring & Mock, 43 Ga. 226 (1871).

Under the crop adjustment program, the federal government acquires no right to possession, no usufruct. The government simply acquires the right to say to the farmer that the farmer shall use the farmer's lands in a fashion determined to promote soil building and soil conservation. The government neither "reaps nor sows." It does nothing in the way of taking over, or of taking possession. Whatever is done or to be done to the land must be done by the farmer personally. The farmer retains full possession. The farmer has the usufruct, but must use it for the betterment of the soil. Georgia Power Co. v. Fletcher, 113 Ga. App. 559, 148 S.E.2d 915 (1966).

Minerals in place part of real estate. — While this statute refers to the grant of a mining interest in land as a "lease," the authorities uniformly hold that minerals in place are a part of the real estate with all the attributes and incidents peculiar to the ownership of land. Rockefeller v. First Nat'l Bank, 213 Ga. 493, 100 S.E.2d 279 (1957) (see O.C.G.A. § 44-6-102).

Cited in Hutcheson v. Hodnett, 115 Ga. 990, 42 S.E. 422 (1902); Consolidated Whse. Co. v. Smith, 55 Ga. App. 216, 189 S.E. 724 (1937); Warehouses, Inc. v. Wetherbee, 203 Ga. 483, 46 S.E.2d 894 (1948); Superior Pine Prods. Co. v. Williams, 214 Ga. 485, 106 S.E.2d 6 (1958); Henson v. Airways Serv., Inc., 220 Ga. 44, 136 S.E.2d 747 (1964); Stone Mt. Game Ranch, Inc. v. Hunt, 746 F.2d 761 (11th Cir. 1984).

RESEARCH REFERENCES

Am. Jur. 2d. — 49 Am. Jur. 2d, Landlord and Tenant, §§ 1, 2, 5, 7, 8, 24.

C.J.S. — 31 C.J.S., Estates, § 67. 51C C.J.S., Landlord and Tenant, § 202.

ALR. — Construction of provision for free gas in oil and gas lease, 9 ALR 89.

What amounts to an option to renew or extend a lease, 26 ALR 1413.

Right to partition as affected by severance of estate in mineral from estate in surface by one or more of cotenants, 39 ALR 741.

Oil or gas or other mineral rights in land as affected by language in conveyance specifying purpose for which the property is to be used, 39 ALR 1340.

Duty of lessee or purchaser of mineral rights other than oil or gas as to development and operation, 60 ALR 901; 76 ALR2d 721.

Duty of lessee under oil or gas lease to drill "protection" wells, 60 ALR 950.

Rights and remedies of parties where landlord fails to exercise option to renew lease at end of term or pay lessee for improvements, 63 ALR 1158.

Special assessments as within provisions of a lease requiring lessee to pay "taxes," "taxes and assessments," as variations, 63 ALR 1391.

Right to incidental gas or oil under mining lease, 64 ALR 734.

Contract for the sale of gas or oil produced from wells on leased premises as creating an interest or equity affecting a subsequent assignee or lessee, 64 ALR 1244.

Covenant in mining lease to develop property as affected by provisions for delay rental, 67 ALR 221.

Commencement of development within fixed term as extending term of oil and gas lease, 67 ALR 526.

Effect of acquisition by assignee or sublessee of lessee in mining lease of rights inconsistent with those reserved by less, 69 ALR 936.

Construction and effect of provisions of lease as to rights or remedies in event of tenant's failure to vacate, 71 ALR 1448.

Sublease as breach of covenant against assignment, 74 ALR 1018.

Provision in oil, gas, or mining lease fixing a minimum obligation on lessee as the maximum measure of his right, 76 ALR 836.

Acceptance of rents or royalties under oil and gas lease as waiver of forfeiture for breach of covenant or condition regard drilling of wells, 80 ALR 461.

Construction and effect of condition of provision of lease for option of renewal, that lease shall have been satisfactory, 81 ALR 1058.

Development of land and payment of royalties under oil and gas lease as affected by assignment of lease or sublease as to portion of the land, 82 ALR 1273.

Rights under gas or oil lease or grant, or operating agreement, in respect of wet or casing-head gas or gasoline recovered therefrom, 82 ALR 1304.

Right to maintain action for damages as for breach of contract upon lease defectively executed, 82 ALR 1318.

What are ''minerals'' within deed, lease, or license, 86 ALR 983.

Liability of lessee's assignee to lessor for rent accruing after assignment by him, in the absence of assumption of covenant of lease, 89 ALR 433; 148 ALR 196.

Rule of estoppel of tenant to deny landlord's title as applicable where landlord affirmatively asserts a title or interest beyond that essential to his right to create the tenancy, 89 ALR 1295.

Agreement by lessee with third person permitting use of the property as violation of covenant in lease against assigning or subletting, 89 ALR 1325.

Breach of covenant in lease for payment of taxes as ground for cancelation, rescission, or termination of lease, 93 ALR 1243.

Transfer by lessee of part of demised premises for remainder of term of lease as an assignment pro tanto of the original lea or as a sublease, 99 ALR 220.

Consideration for assumption of obligation of lease by assignee thereof, 100 ALR 1232.

Provision of lease authorizing its termination by lessor in event of insolvency, bankruptcy, or receivership of lessee, 115 ALR 1189; 168 ALR 504.

Leasehold interest as within statutes relating to community real estate, 122 ALR 652.

Validity and effect of covenant by lessee, as regards his activities after expiration of lease, 122 ALR 1031.

Part performance to take oral contract of lease out of statute of frauds predicated upon acts or conduct of one in possession of the property under another contract or right, 125 ALR 1468.

Validity of lease or other contract which contemplates or provides for acts by a party that at the time of the contract w be contrary to zoning regulations, 128 ALR 87.

Validity and effect of acceleration clause in lease or bailment, 128 ALR 750.

Storage contract as a bailment of chattels, or lease of place where chattels are stored, 138 ALR 1137.

Deed or mortgage of real estate as affecting right to oil and gas or royalty interest under existing lease, 140 ALR 1280.

Water as within term ''minerals'' in deed, lease, or license, 148 ALR 780.

Construction of deed of undivided interest in land, as to fractional interest in oil, gas, or other minerals, or in royal reserved or excepted, 163 ALR 1132.

Construction and application of provision in lease under which landlord is to receive percentage of lessee's profits or receipts, 170 ALR 1113; 38 ALR2d 1113.

Conveyance or reservation of minerals as including minerals recoverable only by open pit mining, 1 ALR2d 787.

What constitutes oil or gas ''royalty,'' or ''royalties,'' within language of conveyance, exception, reservation, devise, or assignment, 4 ALR2d 492.

Joining in instrument as ratification of or estoppel as to prior ineffective instrument affecting real property, 7 ALR2d 294.

Abandonment of oil or gas lease by parol declaration, 13 ALR2d 951.

What constitutes a ''sale'' of real property within purview of clause in lease making renewal clause inoperative in event of such contingency, 15 ALR2d 1040.

Law governing validity and construction of, and rights and obligations arising under, a lease of real property, 15 ALR2d 1199.

Rights of tenant for life or for years and remaindermen inter se in royalties or rents under oil, gas, coal, or other mineral lease, 18 ALR2d 98.

Right of mineral lessee to deposit topsoil, waste materials, and the like upon lessor's additional land not being mined, 26 ALR2d 1453.

Construction and effect of provision in mineral lease excusing payment of minimum rent or royalty, 28 ALR2d 1013.

Liability of mine operator for damage to surface structure by removal of support, 32 ALR2d 1309.

Breach of covenant for quiet enjoyment in lease, 41 ALR2d 1414.

Subletting or renting part of premises as violation of lease provision as to subletting, 56 ALR2d 1002.

Expenses and taxes deductible by lessee in computing lessor's oil and gas royalty or other return, 73 ALR2d 1056.

Implied obligation of purchaser or lessee to conduct search for, or to develop or work premises for, minerals other than oil and gas, 76 ALR2d 721.

Duty of lessee or assignee of mineral lease other than lease for oil and gas, as regards marketing or delivery for marketing of mineral products, 77 ALR2d 1058.

Measure of damages for lessor's breach of contract to lease or to put lessee in possession, 88 ALR2d 1024.

Clay, sand, or gravel as ''minerals'' within deed, lease, or license, 95 ALR2d 843.

What amounts to development or operation for oil or gas within terms of habendum clause extending primary term while the premises are being ''developed or operated,'' 96 ALR2d 322.

''Shut-in royalty'' payment provisions in oil and gas leases, 96 ALR2d 345.

Liability of lessee who assigns lease for rent accruing subsequently to extension or renewal of term, 10 ALR3d 818.

Construction of oil and gas lease as to the lessee's right and duty of geophysical or seismograph exploration or survey, 28 ALR3d 1426.

Statements in promotional or explanatory literature issued by lessor to lessee as ground for relief from lease contract, 43 ALR3d 1386.

Validity, construction, and application of entirety clause in oil or gas lease, 48 ALR3d 706.

Grant, lease, exception, or reservation of ''oil, gas, and other minerals,'' or the like, as including coal or metallic ores, 59 ALR3d 1146.

Grant, lease, exception, or reservation of oil and/or gas rights as including oil shale, 61 ALR3d 1109.

Liability of lessee who refuses to take possession under executed lease or executory agreement to lease, 85 ALR3d 514.

Liability for interference with lease, 96 ALR3d 862.

Validity and construction of statutes providing for reversion of mineral estates for abandonment or nonuse, 16 ALR4th 1029.

Implied duty of oil and gas lessee to protect against drainage, 18 ALR4th 14.

Remedy for breach of implied duty of oil and gas lessee to protect against drainage, 18 ALR4th 147.

44-6-103. Tenant's rights and duties; grounds of forfeiture.

An estate for years carries with it the right to use the property in as absolute a manner as may be done with a greater estate, provided that the property or the person who is entitled to the remainder or reversion interest is not injured by such use. The acts of omission and commission prescribed as grounds of forfeiture of an estate for life shall operate to the same effect as against a tenant for years. (Orig. Code 1863, § 2257; Code 1868, § 2249; Code 1873, § 2275; Code 1882, § 2275; Civil Code 1895, § 3111; Civil Code 1910, § 3687; Code 1933, § 85-803.)

Cross references. — Landlord and tenant relationship generally, Ch. 7 of this title.

Law reviews. — For article, ''Usufructs and Estates for Years Distinguished,'' see 18 Ga. St. B.J. 116 (1982). For article, ''The Rule Against Perpetuities as Applied to Georgia Wills and Trusts,'' see 16 Ga. L. Rev. 235 (1982).

For comment discussing the legal effect of concurrent leases under both common law and statutory law in Georgia, see 6 Ga. St. B.J. 320 (1970).

JUDICIAL DECISIONS

Owner has as absolute a right to use property as if owner had greater estate, not injuring the revenue. Clark v. Herring & Mock, 43 Ga. 226 (1871).

Restriction on right to possession inconsistent with estate. — Restriction on the right to the possession of a site solely for the purpose of performing one's obligations under a contract, i.e., to finance improvements to be constructed thereon, is antithetical to the nature of an estate for years. United States v. DeKalb County, 729 F.2d 738 (11th Cir. 1984).

Pervasive restrictions inconsistent with estate. — Certain restrictions imposed upon the use of the premises under a lease can be so pervasive as to be fundamentally inconsistent with the concept of an estate for years. Allright Parking of Ga., Inc. v. Joint City-County Bd. of Tax Assessors, 244 Ga. 378, 260 S.E.2d 315 (1979).

Estate for years is subject to levy and sale as any other estate. Harms v. Entelman, 21 Ga. App. 295, 94 S.E. 276 (1917).

Estate for years is subject to ad valorem taxation. Richmond County Bd. of Tax Assessors v. Richmond Bonded Whse. Corp., 173 Ga. App. 278, 325 S.E.2d 891 (1985).

Estate not necessarily reduced to usufruct by limitations on use. — Although this statute grants the holder of an estate for years the right to use in an absolute a manner as a greater estate, placing certain limitations on the use of the estate does not reduce it to a mere usufruct, since the interest may be encumbered or somewhat limited without necessarily changing the character of the estate. State v. Davison, 198 Ga. 27, 31 S.E.2d 225 (1944) (see O.C.G.A. § 44-6-103).

Valid lease, the term of which is to begin in the future, may be made. Southern Airways Co. v. De Kalb County, 216 Ga. 358, 116 S.E.2d 602 (1960).

Code only provides for forfeiture for waste in two instances: in life estate and an estate for years. Treisch v. Doster, 171 Ga. 525, 156 S.E. 231 (1930).

Forfeiture not maintainable in landlord-tenant relation. — Common-law action of waste for forfeiture and damages, when there is no estate for life nor for years, but merely the relation of landlord and tenant, cannot be maintained. Warlick v. Great Atl. & Pac. Tea Co., 170 Ga. 538, 153 S.E. 420 (1930).

Only remedy of seller of estate for years for unpaid purchase money is common-law action, and not distress and, in that event, the relation of landlord and tenant could not exist. In re O'Dowd, 18 F. Cas. 593 (S.D. Ga. 1873) (No. 10,439).

Estate for years found created. — Contract in which the Board of Regents of the University System of Georgia leased a tract of land to a fraternity for a term of 99 years, for a rent of $1.00 per year, and which allowed the fraternity to erect a building on the premises, transfer, sell, or convey the property to another fraternity, and following which the fraternity executed a mortgage to secure a loan made by the mortgagee-regents, which was recorded, despite certain restrictions and covenants preventing the lessee from exercising absolute control over the property, granted the fraternity an estate for years, and not a mere leasehold; such an interest could be levied upon for failure to pay taxes. State v. Davison, 198 Ga. 27, 31 S.E.2d 225 (1944).

When most sections of a lease either granted rights to or imposed obligations upon the lessee consistent with the conveyance of an estate for years, or set forth restrictions designed to preserve a hotel on the property as a historic structure and protect the lessor's reversionary interest, and the remaining restrictions did not quantitatively or qualitatively outweigh the incidents of ownership vested in the lessee to convert the interest conveyed from the intended leasehold estate to a usufruct, it was proper to require the lessee to pay ad valorem taxes on its interest in the hotel. Jekyll Dev. Assocs., L.P. v. Glynn County Bd. of Tax Assessors, 240 Ga. App. 273, 523 S.E.2d 370 (1999).

Estate for years found not created. — When trees are conveyed for a period of four years, ''for using said timber for turpentine purposes,'' the contract is a mere license and does not convey an estate for years. A breach of the contract will not authorize the forfeiture of the lease contract; however, further breach of contract may be enjoined by a court. Treisch v. Doster, 171 Ga. 525, 156 S.E. 231 (1930).

Intent of the parties was that the airline simply contracted with the county to manage and operate the county's airport, as its agent, for public and governmental purposes, and whether the contract between the parties be called a lease, a license, a franchise, or a contract of agency or management, it was the intention of the parties that the airline would not obtain any interest in the real estate described in the contract, but only a circumscribed and limited use of the airport facilities. The reserved rights of the lessor as to the control, improvement, inspection, and supervision of the premises, with the right of others to use the facilities, negate any contention that the lessee would have the exclusive possession and control of the premises. Southern Airways Co. v. De Kalb County, 216 Ga. 358, 116 S.E.2d 602 (1960).

No estate for years and no interest in land were created by agreement between property owner and oil company since the latter had no right to use the land, and no interest was conveyed by simply promising to sell the oil company's products and by allowing the company to make improvements on the land. Copelan v. Acree Oil Co., 249 Ga. 276, 290 S.E.2d 94 (1982).

Agreement created a usufruct, rather than an estate for years, despite provision that "it is the intent of the parties to create a leasehold estate … and not a mere usufruct" when the initial term was for seven months, but provided for automatic renewals for ten consecutive one-year periods, provided the program was funded by the General Assembly, and the lessor was responsible for all insurance, taxes, and upkeep of the premises, including maintenance and repairs. Huntingdon II, Ltd. v. Chatham County Bd. of Tax Assessors, 207 Ga. App. 466, 428 S.E.2d 605 (1993).

Cited in Dorsey v. Clements, 202 Ga. 820, 44 S.E.2d 783 (1947); Camp v. Delta Air Lines, 232 Ga. 37, 205 S.E.2d 194 (1974); Eastern Air Lines v. Joint City-County Bd. of Tax Assessors, 253 Ga. 18, 315 S.E.2d 890 (1984); Macon-Bibb County Bd. of Tax Assessors v. Atlantic S.E. Airlines, 262 Ga. 119, 414 S.E.2d 635 (1992); Diversified Golf, LLC v. Hart County Bd. of Tax Assessors, 267 Ga. App. 8, 598 S.E.2d 791 (2004).

OPINIONS OF THE ATTORNEY GENERAL

Tenant, as incident to clearing land for cultivation, can sell timber derived from the clearing, although a tenant cannot cut timber merely to sell or dispose of the timber for profit. 1958-59 Op. Att'y Gen. p. 279.

RESEARCH REFERENCES

Am. Jur. 2d. — 49 Am. Jur. 2d, Landlord and Tenant, §§ 60 et seq., 202, 214 et seq., 773, 776 et seq., 862 et seq.

Am. Jur. Pleading and Practice Forms. — 24B Am. Jur. Pleading and Practice Forms, Waste, § 16.

C.J.S. — 31 C.J.S., Estates, § 67. 51C C.J.S., Landlord and Tenant, §§ 26, 31, 342, 345. 96 C.J.S., Wills, §§ 1298, 1299.

ALR. — Commission of waste as ground for forfeiture of lease, 3 ALR 672.

Construction and effect of statutory provision for double or treble damages against tenant committing waste, 45 ALR 771.

Commencement of development within fixed term as extending term of oil and gas lease, 67 ALR 526.

Provision in oil, gas, or mining lease fixing a minimum obligation on lessee as the maximum measure of his right, 76 ALR 836.

Relative rights of tenant for years or life and remainderman as to return on bonds or other obligations for the payment of money brought at a premium or discount, 131 ALR 1426.

Right of lessee to equitable relief against forfeiture for breach of conditions as affected by lessor's giving a lease to entering into other contractual obligations with a third person, 166 ALR 807.

Rights of tenant for life or for years and remaindermen inter se in royalties or rents under oil, gas, coal, or other mineral lease, 18 ALR2d 98.

Right of lessor arbitrarily to refuse or withhold consent to subletting or assignment which is barred without such consent, 31 ALR2d 831; 54 ALR3d 679; 21 ALR4th 188.

Rights of lessee to minerals extracted dur-

ing the lease but remaining on the premises after its termination, 51 ALR2d 1121.

Maintainability, by lessee, of action to quiet title to leasehold, 51 ALR2d 1227.

Subletting or renting part of premises as violation of lease provision as to subletting, 56 ALR2d 1002.

What constitutes reasonably necessary use of the surface of the leasehold by a mineral owner, lessee, or driller under an oil and gas lease or drilling contract, 53 ALR3d 16.

Right of contingent remainderman to maintain action for damages for waste, 56 ALR3d 677.

Union security arrangements in state public employment, 95 ALR3d 1102.

44-6-104. Right of tenant for years to emblements.

A tenant for years is not entitled to emblements unless, before the end of the period which had been fixed for the termination of the estate for years, the happening of some contingency as provided in the creation of the estate terminates the estate without fault on the part of the tenant. (Orig. Code 1863, § 2258; Code 1868, § 2250; Code 1873, § 2276; Code 1882, § 2276; Civil Code 1895, § 3112; Civil Code 1910, § 3688; Code 1933, § 85-804; Ga. L. 1982, p. 3, § 44.)

Cross references. — Landlord and tenant relationship generally, Ch. 7 of this title.

Law reviews. — For article, ''Usufructs and Estates for Years Distinguished,'' see 18 Ga. St. B.J. 116 (1982).

JUDICIAL DECISIONS

General custom cannot deprive contracting party of right secured by law. — General custom governing a trade or business cannot be proved for the purpose of depriving one of the contracting parties of an absolute right explicitly secured to that party by the law of the state. Fleming & Bowles v. King, 100 Ga. 449, 28 S.E. 239 (1897).

Custom does not give tenant right to emblements. — If the provisions of this statute have reference to landlords and tenants when the term of the tenancy extends for less than five years and the estate is created, then, under the rule just stated, no proof or mere custom would operate to give to the tenant the right to emblements thus specifically denied. Carter v. Booth, 25 Ga. App. 796, 104 S.E. 910 (1920) (see O.C.G.A. § 44-6-104).

Cited in Bristol Sav. Bank v. Nixon, 169 Ga. 282, 150 S.E. 148 (1929).

RESEARCH REFERENCES

Am. Jur. 2d. — 21A Am. Jur. 2d, Crops, §§ 20, 22, 23. 49 Am. Jur. 2d, Landlord and Tenant, § 65.

C.J.S. — 51C C.J.S., Landlord and Tenant, §§ 342, 349.

ALR. — Rights of lessee to minerals extracted during the lease but remaining on the premises after its termination, 51 ALR2d 1121.

44-6-105. Liability of tenant for years for repairs and expenses.

A tenant for years is liable for all repairs or other expenses which are necessary for the preservation and protection of the property. (Orig. Code 1863, § 2259; Code 1868, § 2251; Code 1873, § 2277; Code 1882, § 2277; Civil Code 1895, § 3113; Civil Code 1910, § 3689; Code 1933, § 85-805.)

Cross references. — Landlord and tenant relationship generally, Ch. 7 of this title.

Law reviews. — For article, ''Usufructs and Estates for Years Distinguished,'' see 18 Ga. St. B.J. 116 (1982).

JUDICIAL DECISIONS

Tenant bound for all repairs and necessary expenses. — When an estate for years is created, this statute, following the common law, makes the tenant bound for all repairs or other expenses necessary for the preservation and protection of the property. Mayer & Crine v. Morehead, 106 Ga. 434, 32 S.E. 349 (1899) (see O.C.G.A. § 44-6-105).

Contract provisions determine intent of parties. — Unless there is express provision in lease contract, statute's general principle of law is applicable as between the parties. However, the lease contract in its entirety and in view of the facts and circumstances concerning the situation will be looked to in determining the intention of the parties to the contract. Shippen v. Georgia Better Foods, Inc., 79 Ga. App. 813, 54 S.E.2d 704 (1949) (see O.C.G.A. § 44-6-105).

Section applies when contract insufficient. — Section sets presumptive standard when agreement fails to spell out respective obligations of the parties. Sadler v. Winn-Dixie Stores, Inc., 152 Ga. App. 763, 264 S.E.2d 291 (1979) (see O.C.G.A. § 44-6-105).

Section does not obligate the lessee beyond ordinary wear and tear, and does not require the holder of an estate for years to restore premises injured by fire or extraordinary catastrophes or calamities. Alwood v. Commercial Union Assurance Co., 107 Ga. App. 797, 131 S.E.2d 594 (1963).

Improvements and repairs necessary to preserve buildings and prevent destruction should be made. — In an estate for years, when the owner of the estate is to all intents and purposes the owner with unqualified possession, such improvements and repairs necessary to preserve the buildings on the premises comprising the estate and prevent their decadence, as well as to prevent their condemnation and destruction as fire hazards and unsafe buildings, and as a nuisance, should be made by the lessee or the owner of the estate for years. Evans Theatre Corp. v. De Give Inv. Co., 79 Ga. App. 62, 52 S.E.2d 655 (1949).

Whole rent recoverable notwithstanding total destruction of house on premises. — When farming lands were rented for a term of years and the tenants agreed ''to keep up all repairs at their own expense, fire and providential causes excepted,'' the whole rent could be recovered, notwithstanding the total destruction by accidental fire of a house situated on the rented premises. Mayer & Crine v. Morehead, 106 Ga. 434, 32 S.E. 349 (1899).

Cited in Kanes v. Koutras, 203 Ga. 570, 47 S.E.2d 558 (1948); Ginsberg v. Wade, 95 Ga. App. 475, 97 S.E.2d 915 (1957); Buoy v. Chatham County Bd. of Tax Assessors, 142 Ga. App. 172, 235 S.E.2d 556 (1977); International Indus., Inc. v. Dantone, 147 Ga. App. 247, 248 S.E.2d 530 (1978).

RESEARCH REFERENCES

Am. Jur. 2d. — 49 Am. Jur. 2d, Landlord and Tenant, §§ 772, 793 et seq.

C.J.S. — 51C C.J.S., Landlord and Tenant, § 366 et seq.

44-6-106. Dependent and independent covenants or conditions.

In light of the entire instrument, the dependence or independence of covenants or conditions must be determined from the intention of the parties. If the conditions are dependent, the failure of the person first required to act shall be an excuse to the other party for failing to comply; if the conditions are independent, no such excuse shall avail. The law favors conditions to be independent. (Orig. Code 1863, § 2279; Code 1868,

§ 2272; Code 1873, § 2298; Code 1882, § 2298; Civil Code 1895, § 3140; Civil Code 1910, § 3720; Code 1933, § 85-905.)

JUDICIAL DECISIONS

Whether covenants dependent determined by consideration and parties' intent. — Promises which are mutual to the extent that each affords the sole consideration to the other will not be construed as independent, but will, in the absence of clear indications to the contrary, be taken as dependent one upon the other and, while ordinarily dependent covenants are such as mutually afford to the other the whole consideration, the stipulations and circumstances of the contract may be such as to render covenants mutual and dependent even though one of them affords to the other only a part of its consideration. In such a case, the question as to whether covenants shall be taken as mutually dependent is to be determined by reference to the rational meaning and intent of the parties as disclosed by the entire instrument, read in the light of the surrounding circumstances and the purposes for which the contract as a whole was made. Schmidt v. Mitchell, 117 Ga. 6, 43 S.E. 371 (1903); Brenard Mfg. Co. v. Kingston Supply Co., 22 Ga. App. 280, 95 S.E. 1028 (1918).

Covenants construed as independent. — Landlord leased certain stores to tenants at a stipulated price, payable monthly. The landlord agreed to keep the building in good repair and to pay the tenants any damage the tenants might sustain by the landlord's neglect to do so. The covenant to pay rent and that to repair were independent covenants, and a failure to repair did not work a forfeiture of the rent, but gave a right of action or of recoupment to the tenant. Lewis & Co. v. Chisolm, 68 Ga. 40 (1881).

Covenants in a contract whereby A agreed to convey to B all the timber on certain lands for turpentine purposes, and whereby B agreed to convey to A all the timber on certain other lands for sawmill purposes, were independent covenants. Howell & Rawls v. James Lumber Co., 102 Ga. 595, 27 S.E. 699 (1897).

Cited in McRae v. Sewell, 47 Ga. App. 290, 170 S.E. 315 (1933); Fulford v. Fulford, 225 Ga. 9, 165 S.E.2d 848 (1969).

RESEARCH REFERENCES

Am. Jur. 2d. — 20 Am. Jur. 2d, Covenants, Conditions, and Restrictions, § 10 et seq. 28 Am. Jur. 2d, Estates, § 144 et seq.

C.J.S. — 26A C.J.S., Deeds, §§ 273, 304 et seq., 315, 316, 319, 322, 326, 345 et seq. 31 C.J.S., Estates, § 21 et seq. 96 C.J.S., Wills, § 1408 et seq.

ALR. — Restraint upon voluntary alienation of legal life estate, 160 ALR 639.

ARTICLE 7

TENANCY IN COMMON

Cross references. — Right of tenant in common to bring action separately for his own interest, and effect of judgment in such action, § 9-2-23.

Law reviews. — For article discussing provisions pertaining to the regulation of time shared interests in property ownership, see 12 Ga. St. B.J. 75 (1975).

PART 1

IN GENERAL

Law reviews. — For article analyzing legal aspects of time shared (multiple, revolving) ownership of property, see 12 Ga. St. B.J. 75 (1975). For article surveying Georgia cases in the area of real property from June 1977 through May 1978, see 30 Mercer L. Rev. 167 (1978).

JUDICIAL DECISIONS

Tenant in common cannot bring complaint to oust cotenant. — Complaint having for the complaint's object the ousting of a tenant in common from that tenant's interest in property is not maintainable by a cotenant. Ison v. Geiger, 179 Ga. 798, 177 S.E. 596 (1934).

RESEARCH REFERENCES

ALR. — Adjustment on partition of improvements made by tenant in common, 1 ALR 1189; 122 ALR 234.

Right of judgment creditor of cotenant to maintain partition, 25 ALR 105.

Rights of cotenants inter se as to oil and gas, 40 ALR 1400; 91 ALR 205.

Gift or trust by deposit of funds belonging to the depositor in a bank account in the name of himself and another, 48 ALR 189; 127 ALR 602; 169 ALR 207.

Contribution or allowance as between cotenants in remainder as affected by fact that one or more of them owns, or did own, the life estate or an interest therein, 98 ALR 859.

Validity of provision in deed or other instrument creating a cotenancy that neither tenant shall encumber or dispose of his interest without consent of the other, 124 ALR 222.

Character of conveyance or conveyances necessary to create an estate by entirety, 132 ALR 630; 173 ALR 1216; 44 ALR2d 595.

Married Women's Act as abolishing estates by entireties, 141 ALR 179.

Right of spouse of cotenant to acquire and hold title adversely to other cotenants, 153 ALR 678.

Contract to sell land not signed by all of co-owners as operative to cover interests of the signers, 154 ALR 767.

Mental incompetency of one spouse as affecting transfer or encumbrance of community property, homestead property, or estate by the entireties, 155 ALR 306.

Right of survivor of parties to bank account in their joint names as affected by provision excluding his right of withdrawal during the lifetime of the other party, 155 ALR 1084.

Purchase of cotenant's interest at judicial sale as making purchaser cotenant, 159 ALR 395.

Estate created by conveyance to husband and wife as affected by language used in deed, 161 ALR 457.

Interest of spouse in estate by entireties as subject to satisfaction of his or her individual debt, 166 ALR 969; 75 ALR2d 1172.

Privity between cotenants for purposes of doctrine of res judicata, 169 ALR 179.

Basis of computation of cotenant's accountability for minerals and timber removed from the property, 5 ALR2d 1368.

Rights of one entitled to contribution to recover interest, 27 ALR2d 1268.

Rights and incidents where title to real property purchased with wife's funds is taken in spouses' joint names, 43 ALR2d 917.

Contribution, subrogation, and similar rights, as between cotenants, where one pays the other's share of sum owing on mortgage or other lien, 48 ALR2d 1305.

Enforcement of, or waiver of, or estoppel to assert, forfeiture clause of lease made or held by cotenants as lessors, 50 ALR2d 1365.

What acts by one or more of joint tenants will sever or terminate the tenancy, 64 ALR2d 918; 39 ALR4th 1068.

Real estate mortgage executed by one of

joint tenants as enforceable after his death, 67 ALR2d 999.

Right of surviving spouse to contribution, exoneration, or other reimbursement out of decedent's estate respecting liens on estate by entirety or joint tenancy, 76 ALR2d 1004.

Grant of part of cotenancy land, taken from less than all cotenants, as subject of protection through partition, 77 ALR2d 1376.

Rights in proceeds of insurance on property held jointly with right of survivorship, where one of joint owners dies pending payment of proceeds, 4 ALR3d 427.

Valuation of wearing apparel or household goods kept by owner for personal use, in action for loss or conversion of, or injury to, such property, 34 ALR3d 816.

Guardian's position as joint tenant of or successor to property in ward's estate as raising conflict of interest, 69 ALR3d 1198.

Contract of sale or granting of option to purchase, to third party, by both or all of joint tenants or tenants by entirety as severing or terminating tenancy, 39 ALR4th 1068.

44-6-120. "Tenancy in common" defined; presumption of equality of shares; effect of inequality of shares on right of possession.

Unless otherwise specifically provided by statute and unless the document or instrument provides otherwise, a tenancy in common is created wherever from any cause two or more persons are entitled to the simultaneous possession of any property. Tenants in common may have unequal shares, but they will be held to be equal unless the contrary appears. The fact of inequality shall not give the person holding the greater interest any privileges as to possession which are superior to those of the person owning a lesser interest so long as the tenancy continues. (Orig. Code 1863, § 2282; Code 1868, § 2275; Code 1873, § 2301; Code 1882, § 2301; Civil Code 1895, § 3143; Civil Code 1910, § 3723; Code 1933, § 85-1001; Ga. L. 1976, p. 1388, § 9; Ga. L. 1976, p. 1438, § 1; Ga. L. 1980, p. 753, § 1.)

Cross references. — Creation of tenancy in common upon termination of condominium, § 44-3-98.

Law reviews. — For article discussing joint ownership of assets and severance of such ownership, see 14 Ga. St. B.J. 14 (1977). For annual survey article on real property law, see 52 Mercer L. Rev. 383 (2000).

For comment on Eppes v. Locklin, 222 Ga. 86, 149 S.E.2d 148 (1966), appearing below, see 1 Ga. L. Rev. 331 (1967).

JUDICIAL DECISIONS

Title of tenants in common is technically several rather than joint. Hasty v. Wilson, 223 Ga. 739, 158 S.E.2d 915 (1967).

In the event of a foreclosure on the deed to secure debt the defendant and his wife would become tenants in common of the house and property. As tenants in common, the interest of the defendant and his wife is several and not joint. The interest of a husband may be separated from that of his wife, and he holds that interest in his own name and in his own right. Straughair v. Palmieri, 31 Bankr. 111 (Bankr. N.D. Ga. 1983).

Confidential relationship between tenants. — Under Georgia law, tenants in common are in a confidential relationship with each other as to the common estate. However, no Georgia case extends this relationship 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).

Tenancy in common in personalty permis-

sible. — While the technical expression, ''tenants in common,'' applies to owners of realty, still when several own personalty in common, the character of the ownership is the same; and while there is unity of possession they hold under distinct and several titles. Deal v. State, 14 Ga. App. 121, 80 S.E. 537 (1914).

Tenancy in common may be created in a bank check. English v. Poole, 31 Ga. App. 581, 121 S.E. 589 (1924).

Tenancy in common is a type of ownership which may exist in personal as well as real property. Morden v. Mullins, 115 Ga. App. 92, 153 S.E.2d 629 (1967).

Equality of shares. — When deed conveyed the premises in dispute to the plaintiff and the defendant jointly, they were tenants in common and, nothing else appearing, held equal shares in the property. Mills v. Williams, 208 Ga. 425, 67 S.E.2d 212 (1951). See Shiels v. Stark, 14 Ga. 429 (1854); Baker v. Shepherd, 37 Ga. 12 (1867).

Unequal shares must be shown by clear and convincing evidence. — Because of the presumption that tenants in common hold equal shares in property jointly held between them, in order for plaintiff to show that plaintiff and plaintiff's co-tenant held unequal shares in the property, plaintiff was required to bring forth proof of such that was clear and convincing. Burt v. Skrzyniarz, 272 Ga. 35, 526 S.E.2d 848 (2000).

Creation of tenancy in common. — Tenancy in common is created wherever two or more persons, from any cause, are entitled to the possession simultaneously of any property in this state. Although it is true that tenants in common may have unequal shares of the property, yet each one must have a share thereof. Anderson v. Lucky, 18 Ga. App. 479, 89 S.E. 631 (1916).

''And/or'' in a deed passes a tenancy in common. Straughair v. Palmieri, 31 Bankr. 111 (Bankr. N.D. Ga. 1983).

An undivided interest in real property may be created into as many fractional shares of the whole property as the grantor desires, because it is a fractional ownership interest in the whole and not a division of the land into discrete parts. Glover v. Ware, 236 Ga. App. 40, 510 S.E.2d 895 (1999).

An undivided interest in a tenancy in common was just such ownership interest as would result from sale of the defendant's interest in property bought prior to divorce because any purchaser would acquire only defendant's undivided one-half interest in a tenancy in common and would stand in defendant's shoes. Glover v. Ware, 236 Ga. App. 40, 510 S.E.2d 895 (1999).

Devisees take as tenants in common. — When a deed conveyed an immediate estate, with present enjoyment, to a woman and her children, the title vested in the woman and such children as she had in life, as tenants in common, and children thereafter born to her took no interest under such deed. Plant v. Plant, 122 Ga. 763, 50 S.E. 961 (1905); Powell v. James, 141 Ga. 793, 82 S.E. 232 (1914).

Will giving property to testator's daughter and to her children to the exclusion of all other persons whatever vested title in her and such children as were living at the death of the testator as tenants in common. Whitfield v. Means, 140 Ga. 430, 78 S.E. 1067 (1913).

Deed conveyed the property to the wife and her children as tenants in common for her life with remainder to children. Hammock v. Martin, 147 Ga. 828, 95 S.E. 679 (1918).

Tenancy created in livestock. — When a landlord furnishes livestock to a cropper, the increase of which is to be raised by the latter on shares and to be divided equally between the parties, their relation with reference thereto is that of owners or tenants in common, and not that of landlord and cropper. Ellis, McKinnon & Brown v. Hopps, 30 Ga. App. 453, 118 S.E. 583 (1923).

Trustee and cestui que trust as tenants in common. — If a trustee acquires title to specific realty for the trustee's individual use and also for the use of the trustee's cestui que trust, the entire estate will be an estate in common, and the trustee and the cestui que trust will be tenants in common. Carmichael v. Citizens & S. Bank, 162 Ga. 735, 134 S.E. 771 (1926).

Possession of land as notice of right and title. — Former Code 1933, § 85-1001 (see O.C.G.A. § 44-6-120) must be construed in connection with former Code 1933, § 85-408 (see O.C.G.A. § 44-5-169), relating to possession of land as notice of right and title. Wren v. Wren, 199 Ga. 851, 36 S.E.2d 77 (1945).

Because the parties were co-tenants under

O.C.G.A. § 44-6-120, and one of the co-tenants was on notice as to the other co-tenant's heirs' adverse possession under O.C.G.A. § 44-6-123, which included conveying the timber on the land to a company, but failed to assert rights to the property in the prescribed time, the heirs established prescriptive title in the land. Williams v. Screven Wood Co., 279 Ga. 609, 619 S.E.2d 641 (2005).

Compensation for fire loss. — In action to recover on insurance policy for fire loss on house, if insured as a tenant in common with his ex-wife had right to full use and possession of the entire property, his ex-wife's surrender of her similar right to full use and possession did not give him any greater right to use and possession than he already had; therefore, insured was not entitled to any compensation for his ex-wife's right to use and possession. Allstate Ins. Co. v. Ammons, 163 Ga. App. 385, 294 S.E.2d 610 (1982).

Cited in Deal v. State, 14 Ga. App. 121, 80 S.E. 537 (1914); Pullen v. Johnson, 173 Ga. 581, 160 S.E. 785 (1931); Wallis v. Watson, 184 Ga. 38, 190 S.E. 360 (1937); Lee v. State, 62 Ga. App. 556, 8 S.E.2d 706 (1940); Zeagler v. Zeagler, 190 Ga. 220, 9 S.E.2d 263 (1940); Lewis v. Patterson, 191 Ga. 348, 12 S.E.2d 593 (1940); Lee v. State, 64 Ga. App. 290, 13 S.E.2d 79 (1941); Fountain v. Davis, 71 Ga. App. 1, 29 S.E.2d 798 (1944); Locklin v. Locklin, 207 Ga. 134, 60 S.E.2d 362 (1950); Varellas v. Varellas, 221 Ga. 474, 145 S.E.2d 514 (1965); Eppes v. Locklin, 222 Ga. 86, 149 S.E.2d 148 (1966); United States v. Lowe, 268 F. Supp. 190 (N.D. Ga. 1966); White v. Howell, 117 Ga. App. 778, 161 S.E.2d 892 (1968); Savannah Bank & Trust Co. v. Keane, 126 Ga. App. 53, 189 S.E.2d 702 (1972); Ray v. Ray, 73 Bankr. 544 (Bankr. M.D. Ga. 1987); Effingham County Bd. of Tax Assessors v. Samwilka, Inc., 278 Ga. App. 521, 629 S.E.2d 501 (2006).

OPINIONS OF THE ATTORNEY GENERAL

"And/or" in deed passes tenancy in common. — Clause ''and/or her daughter'' in a deed would be interpreted to pass a free title to the taxpayer and the taxpayer's daughter as equal tenants in common. 1965-66 Op. Att'y Gen. No. 66-148.

RESEARCH REFERENCES

Am. Jur. 2d. — 20 Am. Jur. 2d, Cotenancy and Joint Ownership, § 1 et seq. 28 Am. Jur. 2d, Estates, § 2.

C.J.S. — 26A C.J.S., Deeds, §§ 262, 267, 277. 41 C.J.S., Husband and Wife, § 39, 40. 48A C.J.S., Joint Tenancy, §§ 2 et seq., 39. 86 C.J.S., Tenancy in Common, §§ 1 et seq., 22, 51.

ALR. — Effect on joint estate, community estate, or estate by entireties, of death of both tenants in same disaster, 18 ALR 105.

Lease to two or more as creating a tenancy in common or a joint tenancy, 113 ALR 573.

Presumption and proof as to shares of respective grantees or transferees in conveyance or transfer to two or more persons as tenants in common, silent in that regard, 156 ALR 515.

Rights and remedies as between cotenants of cemetery lots respecting burials therein, 10 ALR2d 219.

Maintenance of replevin or similar possessory remedy by cotenant, or security transaction creditor thereof, against other cotenants, 93 ALR2d 358.

Larceny: cotenant taking cotenancy property, 17 ALR3d 1394.

44-6-121. Rights and liabilities of cotenants; accounting.

(a) Every tenant in common shall have the right to possess the joint property. As long as a tenant in common occupies no greater portion of the joint property than his own share would be on partition and does not withdraw from the joint property any of its essential value, such as mineral deposits, he shall not be liable to account for rent to his cotenant.

(b) A tenant in common shall be liable to account to his cotenant if he:

(1) Receives any rent or other profit from the joint property;

(2) Commits any waste;

(3) Deprives his cotenant of the use of his fair proportion of the joint property;

(4) Appropriates the joint property to his exclusive use; or

(5) Uses the joint property in a manner which must necessarily be exclusive. (Orig. Code 1863, § 2283; Code 1868, § 2276; Code 1873, § 2302; Code 1882, § 2302; Civil Code 1895, § 3144; Civil Code 1910, § 3724; Code 1933, § 85-1003.)

JUDICIAL DECISIONS

Right to possess joint property. — Every tenant in common has the right to possess joint property; if each tenant does not receive more than that tenant's share of the rents and profits thereof, that tenant is not liable to the other's cotenant. Pugh v. Moore, 207 Ga. 453, 62 S.E.2d 153 (1950).

By affidavit, heirs showed that a cotenant did not meet the requirements of O.C.G.A. § 44-6-123 by averring that the cotenant took no action to oust the heirs from the property in question, to demand and retain exclusive possession, or to give actual notice of adverse possession; the burden shifted to the cotenant to point to a conflict on this issue, but in an affidavit, the cotenant only showed that the cotenant paid the property taxes and that the heirs did not use the property or question the cotenant's right to be on the property, which did not establish an ouster or to satisfy an ''express notice'' or a ''hostile claim'' criterion, and summary judgment in favor of the heirs was proper in their claim for, inter alia, an accounting relating to the property. Ward v. Morgan, 280 Ga. 569, 629 S.E.2d 230 (2006).

Possession of more than proportionate share not ouster. — That one cotenant may occupy more than one's proportionate share of the property, or even that one may be in possession of all of the property, does not necessarily imply an ouster, the presumption being that one's possession is not adverse, but is in common with the others, or for the common benefit, unless and until the contrary appears. Hardin v. Council, 200 Ga. 822, 38 S.E.2d 549 (1946).

Rent payment may be required. — Occupancy by one cotenant of the joint property, by the consent of the other, does not necessarily relieve that cotenant from the payment of the rent. Shiels v. Stark, 14 Ga. 429 (1854).

When a tenant in common appropriates all of the premises to the tenant's exclusive use, the tenant would be liable to the cotenant for rent. Jackson v. Lipham, 158 Ga. 557, 123 S.E. 887 (1924).

Remedy for possession of more than proportionate share. — When there has been no actual ouster of the plaintiffs, no exclusive possession by the defendant after demand, and no express notice by defendant of a claim of adverse possession, no action can be brought by the tenant in common to recover possession from one of their number. The remedy given to them, if defendant is in possession of more than defendant's share of the premises, or if defendant has received more than defendant's share of the income and profits, is an application for an accounting, or for partition. Daniel v. Daniel, 102 Ga. 181, 28 S.E. 167 (1897).

Right of spouse to rents during and after divorce. — When spouses retained tenancies in common in the marital abode through and after their divorce, the wife was entitled to receive from her former husband her share of the rents from and after the time the condominium was leased to third parties, she was not entitled to rents from her former husband during his occupancy of the premises and she was not liable for contribution toward the expenses of maintaining the condominium for the period during

which the husband was not liable for rent. White v. Lee, 250 Ga. 688, 300 S.E.2d 517 (1983).

Tenants in common may sue severally to recover their interest, but their recovery is limited to their share. Dozier v. Wallace, 169 Ga. App. 126, 311 S.E.2d 839 (1983).

Tenant cannot bind nonconsenting cotenants in disposition of property. — General rule is that one tenant in common cannot bind one's nonconsenting cotenants in any disposition of their undivided interest in the common property. Booth v. Watson, 153 Ga. App. 672, 266 S.E.2d 326 (1980).

Right to share in profits. — Cotenants have the right to share in the profits of the common property, according to their respective interests. Slade v. Rudman Resources, Inc., 237 Ga. 848, 230 S.E.2d 284 (1976).

Limitation on damages recoverable. — When, in an action by one of two owners in common of personalty against the other to recover one half of the rents and profits of the common property, there was no evidence of actual ouster, exclusive possession by the latter after demand by the former, or of express notice by the latter to the former of adverse possession, there was no error in the charge of the court which limited the plaintiff's recovery to one half of whatever rents the defendant actually received. Smith v. Smith, 141 Ga. 629, 81 S.E. 895 (1914); Hunt v. Harris, 149 Ga. 225, 99 S.E. 884 (1919); Houseworth v. Crews, 29 Ga. App. 579, 116 S.E. 217 (1923).

In an action brought former Code 1933, §§ 85-1003 and 85-1004 (see O.C.G.A. §§ 44-6-121 and 44-6-122) by tenants in common to recover the tenants' share of the rents and profits from the defendants who were in possession of the land owned in common, a recovery therefor can be had only up to the time the suit was commenced, and a former action between the same parties for the rents and profits on the same property, which was still pending, did not abate so much of the present suit as seeks recovery of the plaintiffs' share of the rents and profits accruing since the filing of the former action. Lankford v. Dockery, 85 Ga. App. 86, 67 S.E.2d 800 (1951).

In an action by a tenant in common for that tenant's share of rents, the tenant may recover damages only up to the time of bringing the suit, the reason being that the failure to share rents may or may not be continued after the suit is commenced, and if continued, a new cause of action arises therefor. Lankford v. Dockery, 85 Ga. App. 86, 67 S.E.2d 800 (1951).

Right to extract minerals. — This statute, by negative implication, appears to recognize the right of a cotenant to extract minerals from the common estate so long as an accounting is given. Slade v. Rudman Resources, Inc., 237 Ga. 848, 230 S.E.2d 284 (1976) (see O.C.G.A. § 44-6-121).

Without consent of cotenants. — Cotenant has the right to go on the land and mine the minerals the cotenant finds without the consent of all cotenants. Slade v. Rudman Resources, Inc., 237 Ga. 848, 230 S.E.2d 284 (1976).

Right to minerals may be conveyed. — Because a cotenant has the right to enter and mine the common property without the consent of one's cotenants, but subject to one's accounting to the other cotenants for their respective shares, this right is conveyed, by necessary implication, when such a cotenant conveys one's undivided interest in the minerals on or under the common property. Slade v. Rudman Resources, Inc., 237 Ga. 848, 230 S.E.2d 284 (1976).

Cultivation of portion of property. — Tenant in common may cultivate a portion of the property without payment of rent, unless such occupied portion constitutes a greater part of the premises than the tenant would have been entitled to on a proper division of the property. Thompson v. Thompson, 31 Ga. App. 340, 121 S.E. 586 (1923).

Action in trover. — While as a general rule one joint tenant cannot maintain trover against a cotenant, for the reason that the possession of one is the possession of both, yet the tenant may do so when the tenant in possession sets up an adverse claim to the whole property to the exclusion of the cotenant. Yeager v. Weeks, 74 Ga. App. 84, 39 S.E.2d 84 (1946).

One cotenant may sue another cotenant in trover when the property has been destroyed or sold, and may maintain it against a stranger when one cotenant sells the whole to the stranger. Mar-Vel, Inc. v. Counts, 127 Ga. App. 634, 194 S.E.2d 503 (1972).

Liability of cotenant for improvements. — If a tenant in common improves the property while in possession and claiming to be

sole owner, and with no permission or request from the cotenant, the latter is not chargeable with the value of such improvements, beyond the cotenant's share of the rents chargeable to the former. Bazemore v. Davis, 55 Ga. 504 (1875).

Possession of land as notice of right and title. — Former Code 1933, § 85-1003 (see O.C.G.A. § 44-6-121) must be construed in connection with former Code 1933, § 85-408 (see O.C.G.A. § 44-5-169), relating to possession of land as notice of right and title. Wren v. Wren, 199 Ga. 851, 36 S.E.2d 77 (1945).

Cited in Thompson v. Sanders, 113 Ga. 1024, 39 S.E. 419 (1901); Daniel v. Daniel, 22 Ga. App. 95, 95 S.E. 323 (1918); Cook v. McArthur, 31 Ga. App. 248, 120 S.E. 551 (1923); Horn v. Towson, 163 Ga. 37, 135 S.E. 487 (1926); Wallis v. Watson, 184 Ga. 38, 190 S.E. 360 (1937); Zeagler v. Zeagler, 190 Ga. 220, 9 S.E.2d 263 (1940); Lewis v. Patterson, 191 Ga. 348, 12 S.E.2d 593 (1940); Harris v. Rowe, 200 Ga. 265, 36 S.E.2d 787 (1946); Erwin v. Miller, 203 Ga. 58, 45 S.E.2d 192 (1947); Ballenger v. Houston, 207 Ga. 438, 62 S.E.2d 189 (1950); Mills v. Williams, 208 Ga. 425, 67 S.E.2d 212 (1951); Lankford v. Dockery, 87 Ga. App. 813, 75 S.E.2d 340 (1953); Brown v. Granite Holding Corp., 221 Ga. 560, 146 S.E.2d 289 (1965); White v. Howell, 117 Ga. App. 778, 161 S.E.2d 892 (1968); Baker v. Daniels, 244 Ga. 105, 259 S.E.2d 54 (1979); Brewer v. Brewer, 156 Ga. App. 268, 274 S.E.2d 671 (1980).

RESEARCH REFERENCES

Am. Jur. 2d. — 20 Am. Jur. 2d, Cotenancy and Joint Ownership, § 33 et seq.

Am. Jur. Pleading and Practice Forms. — 24B Am. Jur. Pleading and Practice Forms, Waste, § 16.

C.J.S. — 41 C.J.S., Husband and Wife, §§ 39, 40. 86 C.J.S., Tenancy in Common, §§ 8 et seq., 21 et seq., 51 et seq., 76 et seq., 115 et seq.

ALR. — Rights of cotenants inter se as to timber, 2 ALR 993; 41 ALR 582.

Rights of cotenants inter se as to oil and gas, 40 ALR 1400; 91 ALR 205.

Construction and effect of statutory provision for double or treble damages against tenant committing waste, 45 ALR 771.

Rights and remedies of tenant in common who pays his cotenant's share of taxes or assessments, 48 ALR 586.

Lump-sum assessment for taxes or public improvement against property owned by cotenants in undivided shares, 80 ALR 862.

Right of cotenant to acquire and assert adverse title or interest as against other cotenant, 85 ALR 1535.

Contribution or allowance as between cotenants in remainder as affected by fact that one or more of them owns, or did own, life estate or an interest therein, 98 ALR 859.

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 ALR 1022.

Provision in fire insurance policy against other insurance as applied to property owned jointly or by cotenants, 143 ALR 425.

Right of colessor in community oil or gas lease to lessen production and royalties thereunder by operations on land released from or not covered by the lease, 167 ALR 1225.

Cotenancy as factor in determining representation of property owners in petition for or remonstrance against public improvement, 3 ALR2d 127.

Basis of computation of cotenant's accountability for minerals and timber removed from the property, 5 ALR2d 1368.

Capacity of cotenant to maintain suit to set aside conveyance of interest of another cotenant because of fraud, undue influence, or incompetency, 7 ALR2d 1317.

Rights and remedies as between cotenants of cemetery lots respecting burials therein, 10 ALR2d 219.

Survivor's rights to contents of safe-deposit box leased or used jointly with another, 14 ALR2d 948.

Effect of lease given by part only of cotenants, 49 ALR2d 797.

Accountability of cotenants for rents and profits or use and occupation, 51 ALR2d 388.

Grant of part of cotenancy land, taken from less than all cotenants, as subject of protection through partition, 77 ALR2d 1376.

Effect of cotenant's attempt to devise or bequeath specific portion of property held in common, 97 ALR2d 739.

Larceny: cotenant taking cotenancy property, 17 ALR3d 1394.

Felonious killing of one cotenant or tenant by the entireties by the other as affecting the latter's right in the property, 42 ALR3d 1116.

44-6-122. Accounting between cotenants for unequal share of rents or profits; priority of claim over certain liens.

If one tenant in common receives more than his share of the rents and profits, he shall be liable therefor as the agent or bailee of the other cotenant. The claim for such indebtedness shall be superior to liens held by third persons which have been placed on the interest of the cotenant by the tenant in possession who received the unequal share of the rents and profits. (Civil Code 1895, § 3147; Civil Code 1910, § 3727; Code 1933, § 85-1004.)

History of Code section. — This Code section is derived from the decisions in Shiels v. Stark, 14 Ga. 429 (1853); Huff v. McDonald, 22 Ga. 131 (1856) and Hill v. Reeves, 57 Ga. 32 (1876).

Law reviews. — For article discussing several aspects of joint tenancy with right of survivorship, see 16 Ga. St. B.J. 54 (1979).

JUDICIAL DECISIONS

Claim against cotenant takes precedence over mortgage executed by mortgagee and over materialman's lien. — Claim against a cotenant for rents and profits arising from the exclusive use of the estate will take precedence of a mortgage executed by the mortgagee. Foreclosure of a mortgage creates a lien. Foreclosure of a materialman's lien does nothing more. Thus, the claim of the cotenant takes precedence over the materialman's lien foreclosure. New Winder Lumber Co. v. Guest, 182 Ga. 859, 187 S.E. 63 (1936).

Title of grantee without notice of claim superior to claim by cotenant. — Claim of one against a cotenant on account of the cotenant having received more than the cotenant's share of the rents and profits does not take precedence over the title of a grantee of such cotenant who took without notice of such claim. Sawyer v. Powell, 230 Ga. 309, 196 S.E.2d 882 (1973).

Claim by cotenant not superior to security deed. — Statute does not make the claim for indebtedness superior to a security deed made by the tenant in common individually, purporting to convey that tenant's undivided interest in the realty to a third person as security for that tenant's personal obligation. Carmichael v. Citizens & S. Bank, 162 Ga. 735, 134 S.E. 771 (1926) (see O.C.G.A. § 44-6-122).

Lien recognized by this statute is superior to a materialman's lien, and to a mortgage; but it is inferior to a security deed. Bank of Tupelo v. Collier, 191 Ga. 852, 14 S.E.2d 59 (1941) (see O.C.G.A. § 44-6-122).

Section protects tenant who pays taxes for joint property. — Provisions of this statute are applicable in favor of a tenant in common who has expended money for the protection of the joint property by the payment of taxes. Collier v. Bank of Tupelo, 190 Ga. 598, 10 S.E.2d 62 (1940); Bank of Tupelo v. Collier, 191 Ga. 852, 14 S.E.2d 59 (1941) (see O.C.G.A. § 44-6-122).

How "tenant in possession" may place lien. — A ''tenant in possession,'' as those words are used in this statute, may place a lien by any deliberate act which renders the joint property subject to seizure, such as a purchase of materials for improvements without the knowledge and consent of a cotenant. If one held out that one owned the entire interest in the property to be improved, the tenant in possession was the

cause which placed the lien on the property. New Winder Lumber Co. v. Guest, 182 Ga. 859, 187 S.E. 63 (1936) (see O.C.G.A. § 44-6-122).

Jurisdiction in equity. — When a tenant in common is receiving more than the tenant's share of the rents and profits, equity will take jurisdiction of the matter and adjust the accounts between the tenants. Tate v. Goff, 89 Ga. 184, 15 S.E. 30 (1892); Daniel v. Daniel, 102 Ga. 181, 28 S.E. 167 (1897); Thompson v. Sanders, 113 Ga. 1024, 39 S.E. 419 (1901).

Claims may be set up in equity. Mills v. Williams, 208 Ga. 425, 67 S.E.2d 212 (1951).

Having properly assumed jurisdiction for the partition of property of cotenants by its sale and distribution of the proceeds, a court of equity has jurisdiction to adjust the accounts or claims of the cotenants. Taylor v. Sharpe, 221 Ga. 282, 144 S.E.2d 390 (1965).

Suit against executor of deceased cotenant. — Cotenants may maintain a suit to recover their share of the common property from the executor of a deceased cotenant, who asserts an adverse claim to the whole. Coppedge v. Coppedge, 144 Ga. 466, 87 S.E. 392 (1915).

Statute of limitations. — If one tenant in common receives more than one's share of the profits, the statute of limitations does not commence to run in one's favor so as to bar an action of account by one's cotenant until such tenant begins to hold such surplus adversely to the cotenant, and knowledge of that fact comes to the cotenant. Ballenger v. Houston, 207 Ga. 438, 62 S.E.2d 189 (1950); Chambers v. Schall, 209 Ga. 18, 70 S.E.2d 463 (1952).

Between cotenants, no bar is shown by mere lapse of time. Chambers v. Schall, 209 Ga. 18, 70 S.E.2d 463 (1952).

Limitation on damages recoverable. — In an action brought under former Code 1933, §§ 85-1003 and 85-1004 (see O.C.G.A. §§ 44-6-121 and 44-6-122) by tenants in common to recover the tenants' share of the rents and profits from the defendants who were in possession of the land owned in common, a recovery therefor can be had only up to the time the suit was commenced, and a former action between the same parties for the rents and profits on the same property, which was still pending, did not abate so much of the present suit as seeks recovery of the plaintiffs' share of the rents and profits accruing since the filing of the former action. Lankford v. Dockery, 85 Ga. App. 86, 67 S.E.2d 800 (1951).

An action by a tenant in common for one's share of rents may recover damages only up to the time of bringing the suit, the reason being that the failure to share rents may or may not be continued after the suit is commenced and, if continued, a new cause of action arises therefor. Lankford v. Dockery, 85 Ga. App. 86, 67 S.E.2d 800 (1951).

No liability if tenant receives permissible share. — Every tenant in common has the right to possess the joint property; if one does not receive more than one's share of the rents and profits thereof, one is not liable to a cotenant. Pugh v. Moore, 207 Ga. 453, 62 S.E.2d 153 (1950).

Admissibility of tax receipts. — In an action for 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 are admissible. Head v. Lee, 203 Ga. 191, 45 S.E.2d 666 (1947).

Subsequent recording of lien not authorized. — Statute does not authorize the subsequent recording of a lien upon the title register for rents accruing prior to the registration of title. Lankford v. Milhollin, 204 Ga. 193, 48 S.E.2d 729 (1948) (see O.C.G.A. § 44-6-122).

Cited in McArthur v. Jordan, 139 Ga. 304, 77 S.E. 150 (1913); Bank of Eton v. Owens, 146 Ga. 464, 91 S.E. 476 (1917); Wallis v. Watson, 184 Ga. 38, 190 S.E. 360 (1937); Zeagler v. Zeagler, 190 Ga. 220, 9 S.E.2d 263 (1940); Veal v. Veal, 192 Ga. 503, 15 S.E.2d 725 (1941); Lankford v. Dockery, 87 Ga. App. 813, 75 S.E.2d 340 (1953); Brown v. Granite Holding Corp., 221 Ga. 560, 146 S.E.2d 289 (1965); Evans v. Little, 246 Ga. 219, 271 S.E.2d 138 (1980); Brewer v. Brewer, 156 Ga. App. 268, 274 S.E.2d 671 (1980); Jones v. Alexander, 163 Ga. App. 278, 293 S.E.2d 537 (1982); Therrell v. Georgia Marble Holdings Corp., 960 F.2d 1555 (11th Cir. 1992).

RESEARCH REFERENCES

Am. Jur. 2d. — 20 Am. Jur. 2d, Cotenancy and Joint Ownership, §§ 40 et seq., 49 et seq., 76 et seq.

C.J.S. — 86 C.J.S., Tenancy in Common, §§ 22, 55 et seq., 83 et seq.

ALR. — Rights and remedies of tenant in common who pays his cotenant's share of taxes or assessments, 48 ALR 586.

Contribution or allowance as between cotenants in remainder as affected by fact that one or more of them owns, or did own, life estate or an interest therein, 98 ALR 859.

Basis of computation of cotenant's accountability for minerals and timber removed from the property, 5 ALR2d 1368.

44-6-123. Adverse possession against cotenant; action to recover possession.

There may be no adverse possession against a cotenant until the adverse possessor effects an actual ouster, retains exclusive possession after demand, or gives his cotenant express notice of adverse possession. In such event, the cotenant may bring an action to recover possession. (Orig. Code 1863, § 2284; Code 1868, § 2277; Code 1873, § 2303; Code 1882, § 2303; Civil Code 1895, § 3145; Civil Code 1910, § 3725; Code 1933, § 85-1005.)

Cross references. — Adverse possession generally, § 44-5-160 et seq.

JUDICIAL DECISIONS

Analysis

General Consideration
What Constitutes Ouster

General Consideration

Possession of land as notice of right and title. — Former Code 1933, § 85-1005 (see O.C.G.A. § 44-6-123) must be construed in connection with former Code 1933, § 85-408 (see O.C.G.A. § 44-5-169), relating to possession of land as notice of right and title. Wren v. Wren, 199 Ga. 851, 36 S.E.2d 77 (1945).

Adverse possession found. — Trial court properly granted summary judgment to the grantor's grandchildren as the grandchildren held the disputed parcel of property under color of title, via a deed to the grantor's child, albeit the fact that it was not effective as a deed conveying a present interest, for the prescription period of seven years, and the grantor's heirs at law did not contest it until suit was filed. Matthews v. Crowder, 281 Ga. 842, 642 S.E.2d 852 (2007).

Applicability when alleged cotenant claims as sole grantee. — Section inapplicable when alleged cotenant in possession never expressly or impliedly recognized such a relation, but claimed title and held possession under a deed made to that cotenant as the sole grantee. Stephens v. Walker, 193 Ga. 330, 18 S.E.2d 537 (1942); Stallings v. Britt, 204 Ga. 250, 49 S.E.2d 517 (1948) (see O.C.G.A. § 44-6-123).

When a person claiming prescriptive title does not enter possession as a cotenant but as owner of the entire estate under color of title, such possession is adverse to those who might be otherwise treated as cotenants, and the party in possession is not subject to the conditions of O.C.G.A. § 44-6-123. Mattison v. Barbano, 249 Ga. 271, 290 S.E.2d 41 (1982).

When the copossessors were never cotenants, O.C.G.A. § 44-6-123 has no application. Carter v. Becton, 250 Ga. 617, 300 S.E.2d 152 (1983).

Mineral owner and landowners are not

General Consideration (Cont'd)

tenants in common in the usual sense since the landowners own the fee subject to the rights of the mineral owner in one-half of the mineral interests. Hayes v. Howell, 251 Ga. 580, 308 S.E.2d 170 (1983).

Tenants in common occupy a fiduciary relationship to each other, with respect to their interest in the common property and the common title under which the tenants hold, that it would be inequitable to permit one of the tenants, without the consent of the others, to buy an outstanding adversary's claim to the common estate and assert it for one's exclusive benefit, to the injury or prejudice of one's cotenants; and if one cotenant does actually acquire such a claim, the cotenant is, unless the contrary appears, to be regarded as holding it in trust for the benefit of the cotenants in proportion to their respective interests. Hardin v. Council, 200 Ga. 822, 38 S.E.2d 549 (1946); Fuller v. McBurrows, 229 Ga. 422, 192 S.E.2d 144 (1972).

Elements of adverse possession against cotenant. — In order for one cotenant to prescribe against another, O.C.G.A. § 44-6-123 requires actual ouster, exclusive possession after demand, or express notice of adverse possession, in addition to the usual elements of adverse possession. Carter v. Becton, 250 Ga. 617, 300 S.E.2d 152 (1983).

Party who asserts a claim of title by adverse possession against a cotenant has the burden of proving not only the usual elements of prescription, but also at least one of the elements of O.C.G.A. § 44-6-123. Wright v. Wright, 270 Ga. 530, 512 S.E.2d 618 (1999).

Seven years possession required to get title. — Purchaser must maintain actual adverse possession for seven years under color of title to get title. Doe v. Roe, 46 Ga. 9 (1872); Morgan v. Mitchell, 104 Ga. 596, 30 S.E. 792 (1898).

Exclusive possession by a cotenant alone will be presumed not an adverse holding, but simply one in support of the common title. Hardin v. Council, 200 Ga. 822, 38 S.E.2d 549 (1946); Erwin v. Miller, 203 Ga. 58, 45 S.E.2d 192 (1947); Lankford v. Dockery, 85 Ga. App. 86, 67 S.E.2d 800 (1951).

Silent and peaceable possession of one tenant, with no act which can amount to an ouster of one's cotenants, is not adverse. Hardin v. Council, 200 Ga. 822, 38 S.E.2d 549 (1946); Erwin v. Miller, 203 Ga. 58, 45 S.E.2d 192 (1947); Fuller v. McBurrows, 229 Ga. 422, 192 S.E.2d 144 (1972).

Demand required. — Plaintiffs could not contend that the defendant was ''in exclusive possession after demand,'' because the evidence showed no demand by the plaintiff upon the defendant for the possession of their interest in the land. Bowman v. Owens, 133 Ga. 49, 65 S.E. 156 (1909).

Exclusive possession after demand required. — Correct statement of the law is that the cotenant must show exclusive possession after demand, and not that the cotenant demanded such exclusive right. Tietjen v. Meldrim, 169 Ga. 678, 151 S.E. 349 (1930).

Notice of ouster held insufficient. — Sale of one tenant's interest at judicial sale, without actual possession being taken, is insufficient notice of ouster to the cotenant as to start statute to running. Harriss v. Howard, 126 Ga. 325, 55 S.E. 59 (1906).

Party who alleges title by prescription has burden of proving title, and when it is contended that a former tenant in common acquired prescriptive title as against one's former cotenants, the party asserting such contention has the burden of proving not only the usual elements of prescription but also at least one of the conditions stated in this statute as to cotenants. Harris v. Mandeville, 195 Ga. 251, 24 S.E.2d 23 (1943); Hardin v. Council, 200 Ga. 822, 38 S.E.2d 549 (1946); Erwin v. Miller, 203 Ga. 58, 45 S.E.2d 192 (1947); Fuller v. McBurrows, 229 Ga. 422, 192 S.E.2d 144 (1972); Jordan v. Robinson, 229 Ga. 761, 194 S.E.2d 452 (1972); Barfield v. Hilton, 235 Ga. 407, 219 S.E.2d 719 (1975) (see O.C.G.A. § 44-6-123).

Person claiming prescriptive title against cotenant has burden of showing not only the usual elements of prescription under O.C.G.A. § 44-5-161 but in addition thereto at least one of the conditions stated in O.C.G.A. § 44-6-123. Lindsey v. Lindsey, 249 Ga. 832, 294 S.E.2d 512 (1982).

Knowledge of adverse claim is question for jury. Gann v. Runyan, 134 Ga. 49, 67 S.E. 435 (1910).

Substitution of "actual notice" for "express notice" in jury charge is not error.

David v. Tucker, 140 Ga. 240, 78 S.E. 909 (1913).

Exception to statute inapplicable. — When the mother and children obtained possession of the decedent's property by falsely informing the probate court that they were the only heirs at law when the son was also an heir at law, the trial court improperly applied the exception to O.C.G.A. § 44-6-123, as questions of fact remained as to whether the wife and children took possession of the subject property with implied knowledge that there was a tenancy in common with the son as a joint heir. Ponder v. Ponder, 275 Ga. 616, 571 S.E.2d 343 (2002).

Cited in Coppedge v. Coppedge, 144 Ga. 466, 87 S.E. 392 (1915); Cowart v. Strickland, 170 Ga. 530, 153 S.E. 415 (1930); Pullen v. Johnson, 173 Ga. 581, 160 S.E. 785 (1931); Bagley v. Forrester, 53 F.2d 831 (5th Cir. 1931); McIntosh v. Williams, 45 Ga. App. 801, 165 S.E. 854 (1932); Veal v. Veal, 192 Ga. 503, 15 S.E.2d 725 (1941); Nixon v. Nixon, 192 Ga. 629, 15 S.E.2d 883 (1941); Yeager v. Weeks, 74 Ga. App. 84, 39 S.E.2d 84 (1946); King v. King, 203 Ga. 811, 48 S.E.2d 465 (1948); Ballenger v. Houston, 207 Ga. 438, 62 S.E.2d 189 (1950); Andrews v. Walden, 208 Ga. 340, 66 S.E.2d 801 (1951); Lankford v. Dockery, 85 Ga. App. 86, 67 S.E.2d 800 (1951); Brown v. Brown, 209 Ga. 620, 75 S.E.2d 13 (1953); Lankford v. Dockery, 87 Ga. App. 813, 75 S.E.2d 340 (1953); Varellas v. Varellas, 218 Ga. 125, 126 S.E.2d 680 (1962); Crosby v. Crosby, 224 Ga. 109, 160 S.E.2d 362 (1968); United States v. Williams, 441 F.2d 637 (5th Cir. 1971); Thomas v. Hooks, 231 Ga. 409, 202 S.E.2d 92 (1973); Lovin v. Poss, 240 Ga. 848, 242 S.E.2d 609 (1978); Bailey v. Johnson, 245 Ga. 823, 268 S.E.2d 147 (1980); Love v. Love, 259 Ga. 423, 383 S.E.2d 329 (1989).

What Constitutes Ouster

To constitute disseizin of a tenant in common by one's cotenants, there must be outward acts of exclusive ownership of an unequivocal character, overt and notorious, and of such a nature as by their own import to impart information and give notice to the cotenants that an adverse possession and an actual disseizin are intended to be asserted against them. Nor will the making of ordinary improvements by a tenant in possession constitute an ouster of other cotenants. Hardin v. Council, 200 Ga. 822, 38 S.E.2d 549 (1946).

Void deed will operate as color of title. Davis v. Harnesberger, 211 Ga. 625, 87 S.E.2d 841 (1955).

Identification of premises necessary for color of title. — Color of title cannot arise or serve to give right of possession when it is not possible to identify the premises. Newsome v. Moore, 166 Ga. 301, 143 S.E. 400 (1928).

Deed pursuant to court order. — When a deed specifically stated that the property was ''conveyed pursuant to the order'' granting the year's support, grantee was only conveyed such interest as was set aside to the widow under the year's support order, which was an undivided interest equal to that of each of the widow's minor children; therefore, grantee could prescribe against the grantee's cotenants (the children) only by showing ouster, exclusive possession after demand, or express notice of adverse possession. Mattison v. Barbano, 249 Ga. 271, 290 S.E.2d 41 (1982).

Possession of more than proportionate share. — That one cotenant may occupy more than one's proportionate share of the property, or even that one may be in possession of all of the property, does not necessarily imply an ouster, the presumption being that one's possession is not adverse, but is in common with the others, or for the common benefit, unless and until the contrary appears. Chambers v. Schall, 209 Ga. 18, 70 S.E.2d 463 (1952).

Party who asserts a claim of title by adverse possession against a cotenant has the burden of proving not only the usual elements of prescription, O.C.G.A. § 44-5-161, but also at least one of the elements of O.C.G.A. § 44-6-123. But, when a person claiming prescriptive title does not enter possession as a cotenant but as the owner of the entire estate under color of title, such possession is adverse to those who might be otherwise treated as cotenants, and the party in possession is not subject to the conditions of O.C.G.A. § 44-6-123. Gigger v. White, 277 Ga. 68, 586 S.E.2d 242 (2003).

Conveyance to third party is ouster. — Statute means that when two persons hold as cotenants, one cannot prescribe against the other, except under those circumstances. But if one cotenant makes a deed to the

What Constitutes Ouster (Cont'd)

whole property and the grantee takes possession and holds adversely, not as a cotenant, but as sole owner, this is such an ouster as that prescription will run. See Doe v. Roe, 46 Ga. 9 (1872); Doe v. Roe, 46 Ga. 593 (1872); Cain v. Furlow, 47 Ga. 674 (1873); Norris v. Dunn, 70 Ga. 796 (1883); McDowell v. Sutlive, 78 Ga. 142, 2 S.E. 937 (1886); Street v. Collier, 118 Ga. 470, 45 S.E. 294 (1903) (see O.C.G.A. § 44-6-123).

If the administrator of a deceased cotenant sells and makes to the purchaser a deed to the entire property, and one claiming under such purchaser holds possession thereof under a duly recorded deed conveying the entire property, not as a cotenant but as sole owner of the entire property, there is an actual ouster of the other cotenants, and the latter have the right to sue for the possession of their interest. Bowman v. Owens, 133 Ga. 49, 65 S.E. 156 (1909).

When a tenant in common conveys the whole lot to a third person, and the grantee takes possession, claiming the entire lot as the grantee's own, this action constitutes a disseizin and ouster of the other tenants in common, and they are barred from asserting their right to such property after the expiration of seven years. Broadwater v. Parker, 209 Ga. 801, 76 S.E.2d 402 (1953); Davis v. Harnesberger, 211 Ga. 625, 87 S.E.2d 841 (1955).

When the evidence shows that there was an actual ouster or express knowledge of adverse possession, a deed executed by a cotenant to the whole of the property is good as color of title as against the other cotenants. Jordan v. Robinson, 229 Ga. 761, 194 S.E.2d 452 (1972).

Because the parties were cotenants under O.C.G.A. § 44-6-120, and one of the cotenants was on notice as to the other cotenant's heirs' adverse possession under O.C.G.A. § 44-6-123, which included conveying the timber on the land to a company, but failed to assert rights to the property in the prescribed time, the heirs established prescriptive title in the land. Williams v. Screven Wood Co., 279 Ga. 609, 619 S.E.2d 641 (2005).

Erecting fence to divide common property. — Entering into possession of a portion of a cemetery lot, which is enclosed by a fence, by one claiming to be the owner of such portion, and erecting a substantial iron fence so as to divide the part so claimed from the remaining part of the lot, is, as to that peculiar character of property, an act showing adverse possession of a public nature, totally irreconcilable with cotenancy, and amounts to an actual ouster of others claiming to be tenants in common with the possessor. Roumillot v. Gardner, 113 Ga. 60, 38 S.E. 362, 53 L.R.A. 729 (1901).

Possession under order of year's support for widow. — When a landowner's estate was set apart as a year's support for his widow and three children by her, without mentioning two children of the decedent by a former marriage, and the persons to whom the year's support was so set apart took exclusive possession of the property under claim of title, this constituted a severance from the other children, and a prescriptive title began to run. Norris v. Dunn, 70 Ga. 796 (1883).

Merely recording deed from one tenant in common to a third person does not constitute actual ouster of other cotenants. Lindsey v. Lindsey, 249 Ga. 832, 294 S.E.2d 512 (1982).

Possession of property by party who stands in position of tenant of cotenant does not constitute actual ouster of other tenants in common. Lindsey v. Lindsey, 249 Ga. 832, 294 S.E.2d 512 (1982).

Possession under conveyance from third person. — There is a material difference between the effect of a deed or transfer by a tenant or tenants in common purporting to convey the whole estate to a stranger, and a transaction in which such a deed or transfer is made by an outsider to a tenant in common. In the former case, possession by the grantee may amount to an ouster or disseizin, while in the latter case a different rule applies. Hardin v. Council, 200 Ga. 822, 38 S.E.2d 549 (1946).

Requirement of ouster. — Trial court properly granted summary judgment to defendant pursuant to O.C.G.A. § 9-11-56 on plaintiff's claim for adverse possession of land; O.C.G.A. § 44-6-123 required an adverse-possessor cotenant to effect an actual ouster against the other cotenant, and in this case, it was undisputed that plaintiff took no action to effect an actual ouster of defendant. Vaughn v. Stoenner, 276 Ga. 660, 581 S.E.2d 543 (2003).

Evidence insufficient to support ouster. — Only evidence of an adverse holding is the bare fact that the vendors of the defendant were in the exclusive possession by their tenants or agents, and that what rents were collected from the land were paid to them, their agent testifying that he knew of no other owner or claimant of the premises. This is not sufficient to make out a case of adverse holding by one cotenant against another. Morgan v. Mitchell, 104 Ga. 596, 30 S.E. 792 (1898).

When land was owned by two persons as tenants in common, and one of them took a deed from a third person purporting to convey to himself the whole of the common property, and had such deed recorded, and when the conveyance amounted to nothing more as between the cotenants than the removal of an encumbrance for which they were both liable, possession of the land by the grantee, under such deed, would not (assuming good faith) constitute such an ouster of the other cotenant as would lay a foundation for the commencement of adverse possession against him, unless it was accompanied by a hostile claim of which he had actual notice. Hardin v. Council, 200 Ga. 822, 38 S.E.2d 549 (1946).

Possession of heir of deceased grantee in certain deeds was that of the other heirs standing in the same relationship as cotenants, and in the absence of actual ouster, exclusive possession after demand or express notice of the adverse possession, the devisee did not acquire prescriptive title as against cotenants by such possession. Erwin v. Miller, 203 Ga. 58, 45 S.E.2d 192 (1947).

By affidavit, heirs showed that a cotenant did not meet the requirements of O.C.G.A. § 44-6-123 by averring that the cotenant took no action to oust the heirs from the property in question, to demand and retain exclusive possession, or to give actual notice of adverse possession; the burden shifted to the cotenant to point to a conflict on this issue, but in an affidavit, the cotenant only showed that the cotenant paid the property taxes and that the heirs did not use the property or question the cotenant's right to be on the property, which did not establish an ouster or to satisfy an ''express notice'' or a ''hostile claim'' criterion, and summary judgment in favor of the heirs was proper. Ward v. Morgan, 280 Ga. 569, 629 S.E.2d 230 (2006).

RESEARCH REFERENCES

Am. Jur. 2d. — 3 Am. Jur. 2d, Adverse Possession, §§ 145, 212 et seq.

C.J.S. — 86 C.J.S., Tenancy in Common, §§ 15, 19, 20, 30 et seq.

ALR. — Right of cotenant to acquire and assert adverse title or interest as against other cotenants, 54 ALR 874; 85 ALR 1535.

Possession by stranger claiming under conveyance by cotenant as adverse to other cotenants, 32 ALR2d 1214.

Adverse possession between cotenants, 82 ALR2d 5.

PART 2

PARTITION

Law reviews. — For article surveying Georgia cases in the area of real property from June 1977 through May 1978, see 30 Mercer L. Rev. 167 (1978).

JUDICIAL DECISIONS

When remedy at law is required for partition. — Unless, due to reasons stated in former Code 1933, § 85-1501 (see O.C.G.A. § 44-6-140) equitable jurisdiction was applied, the parties seeking a partition of lands were required to resort to the remedy at law. Werner v. Werner, 196 Ga. 1, 25 S.E.2d 676 (1943).

Petition for partition and accounting presents case in equity. — Petition which not only embraces a statutory application for partition but also prays for an accounting

from cotenants for rents and profits presents a case in equity. Werner v. Werner, 196 Ga. 1, 25 S.E.2d 676 (1943).

Writ of mandamus cannot compel commissioner appointed by the court to partition lands to discharge duty. The duties of a commissioner appointed by the court to partition lands are purely administrative, and to issue a mandamus to require one of the commissioners to act would be the equivalent of the court ordering itself to act. Failure to act might be grounds for contempt proceedings but not mandamus. Lankford v. Kirkland, 207 Ga. 504, 62 S.E.2d 836 (1950).

Attorney's fees in partition proceeding. — When there is only a statutory proceeding for partition of lands, attorney's fee for the moving party cannot be deducted from the proceeds of sale by the partitioners as a part of the expense contemplated by that statute. Werner v. Werner, 196 Ga. 1, 25 S.E.2d 676 (1943).

When petition for partition constitutes election to sell interest. — When a written agreement between tenants in common provides that either party may sell that party's interest in the property, the filing of a petition for partition by one of the tenants in common constitutes an election to sell one's interest in the property. Bowers v. Bowers, 208 Ga. 85, 65 S.E.2d 153 (1951).

Cited in McIntosh v. Williams, 45 Ga. App. 801, 165 S.E. 854 (1932); Nixon v. Nixon, 197 Ga. 426, 29 S.E.2d 613 (1944); Johnson v. Flanders, 92 Ga. App. 697, 89 S.E.2d 829 (1955); Lowe v. Loftus, 314 F. Supp. 620 (S.D. Ga. 1970).

RESEARCH REFERENCES

ALR. — Partition: division of building, 28 ALR 727.

Right to partition as affected by severance of estate in mineral from estate in surface by one or more of cotenants, 39 ALR 741.

Interference by court with decision of commissioners in partition suit, 46 ALR 348.

Respective rights of owners of different parcels into which land subject to an oil and gas lease has been subdivided, 46 ALR 634; 106 ALR 906.

Right of executor or administrator to bring proceedings for partition of real property, 57 ALR 573.

Power to decree pecuniary sum as equality in order to equalize shares of parties in partition, 65 ALR 352.

Testamentary provisions operating to prohibit or postpone partition, 85 ALR 1321.

Partition as affecting pre-existing mortgage or other lien on undivided interest, 93 ALR 1267.

Power of court in partition proceedings to direct sale of property without aid of or contrary to recommendation of commissioner or referee, 95 ALR 1330.

Partition suit or partition deed as affecting character of estate as ancestral estate or estate of purchase for purposes of statute of descent and distribution, 103 ALR 231.

Parol partition or division of real property as between undivided interests held by same person in different capacities, 116 ALR 626.

Cotenant's right to allowance in partition in respect of amount paid to discharge mortgage or other lien upon premises as affected by statute of limitations or laches, 117 ALR 1442.

Right of party to voluntary partition, or of his successor, as against other parties thereto, or their successors, where title fails as to parcel, or part of parcel, conveyed to him, 123 ALR 489.

Holder of mortgage or other lien upon an undivided interest in real property as a necessary or proper party to a suit for partition, 126 ALR 414.

Parol partition and the statute of frauds, 133 ALR 476.

Right to, and effect of, partition of undivided interests held respectively in fee and in life estate with remainder, 134 ALR 661.

Homestead right of cotenant as affecting partition, 140 ALR 1170.

Right to partition in kind of mineral or oil and gas land, 143 ALR 1092.

Dower and homestead rights as affecting partition proceedings, 159 ALR 1129.

Partition: construction and application of provision for assignment, to one of co-owners, of real estate not readily divisible, 169 ALR 862.

Partition of undivided interests in minerals in place, 173 ALR 854.

Burden of proof in partition suit as regards alleged prior voluntary partition of property, 1 ALR2d 473.

Timber rights as subject to partition, 21 ALR2d 618.

Applicability of rules of accretion and reliction so as to confer upon owner of island or bar in navigable stream title to additions, 54 ALR2d 643.

Maintainability of partition action where United States or state owns an undivided interest in property, 59 ALR2d 937.

Contractual provisions as affecting right to judicial partition, 37 ALR3d 962.

Right to partition of overriding royalty interest in oil and gas leasehold, 58 ALR3d 1052.

Lack of final settlement of intestate's estate as affecting heir's right to partition of realty, 92 ALR3d 473.

What constitutes unity of title or ownership sufficient for creation of an easement by implication or way of necessity, 94 ALR3d 502.

Subpart 1

Equitable Partition

44-6-140. When equitable partition authorized.

Equity has jurisdiction in cases of partition whenever the remedy at law is insufficient or peculiar circumstances render the proceeding in equity more suitable and just. (Orig. Code 1863, § 3115; Code 1868, § 3127; Code 1873, § 3183; Code 1882, § 3183; Civil Code 1895, § 4783; Civil Code 1910, § 5355; Code 1933, § 85-1501.)

JUDICIAL DECISIONS

Analysis

General Consideration
Distinction Between Equity and Law
Circumstances Supporting Partition
1. General
2. Specific
Procedure
Relief Granted
Illustrative Cases

General Consideration

Enjoining partition. — It is error to enjoin tenants in common from filing proceedings for partition. Ellis v. Jenkins, 250 Ga. 29, 295 S.E.2d 736 (1982).

Cited in Mayer v. Hover, 81 Ga. 308, 7 S.E. 562 (1888); Wallis v. Watson, 184 Ga. 38, 190 S.E. 360 (1937); Joel v. Joel, 201 Ga. 520, 40 S.E.2d 541 (1946); Johnson v. Wilson, 212 Ga. 264, 91 S.E.2d 758 (1956); McCreary v. Wright, 132 Ga. App. 500, 208 S.E.2d 373 (1974); Sikes v. Sikes, 233 Ga. 97, 209 S.E.2d 641 (1974); Givens v. Dunn Labs., Inc., 138 Ga. App. 26, 225 S.E.2d 480 (1976).

Distinction Between Equity and Law

Distinction between equitable and statutory partitions has not been eliminated. Burnham v. Lynn, 235 Ga. 207, 219 S.E.2d 111 (1975).

Former Civil Code 1910, § 5355 (see O.C.G.A. § 44-6-140) was an alternative to the statutory method of petition provided in former Civil Code 1910, § 5358 (see O.C.G.A. § 44-6-160). Cock v. Callaway, 141 Ga. 774, 82 S.E. 286 (1914).

Tenant in common or co-owner of land is entitled to either statutory or equitable partition. Billings v. Billings, 242 Ga. 632, 250 S.E.2d 480 (1978).

Distinction Between Equity and Law (Cont'd)

Equity may adjust complicated and unascertainable interests. — When the title to land is in tenants in common, and their several interests have become complicated and cannot be definitely ascertained and set apart at law, equity will entertain jurisdiction to adjust by one decree the rights of all. Fountain v. Davis, 71 Ga. App. 1, 29 S.E.2d 798 (1944); Waycross Military Ass'n v. Hiers, 209 Ga. 812, 76 S.E.2d 486 (1953).

Plaintiff must prove necessity for equitable relief. — Unless equitable jurisdiction is applied, parties seeking partition are required to resort to legal remedy. Werner v. Werner, 196 Ga. 1, 25 S.E.2d 676 (1943).

While a petition will not be dismissed if the petition states a claim for either legal or equitable partition, the plaintiff must prove the necessity for equitable relief in order to justify the equitable decree. Burnham v. Lynn, 235 Ga. 207, 219 S.E.2d 111 (1975).

Plaintiff in an action for equitable partition must show that there is a necessity for equitable relief or that circumstances make equitable relief more just and suitable. Larimer v. Larimer, 249 Ga. 500, 292 S.E.2d 71 (1982).

Need for obstacle to legal remedy, or peculiar circumstances. — Section is inapplicable unless there is obstacle rendering legal remedy less ample and adequate. Greer v. Henderson, 37 Ga. 1 (1867); Rosenberg v. Phelps, 159 Ga. 607, 126 S.E. 788 (1925) (see O.C.G.A. § 44-6-140).

When no peculiar circumstances are shown, equity will not take cognizance of a partition action. Saffold v. Anderson, 162 Ga. 408, 134 S.E. 81 (1926).

An application to partition lands between tenants in common may be instituted at law, or it may be brought in equity whenever the remedy at law was insufficient or peculiar circumstances render the proceeding in equity more suitable and just. Unless for some special reason equitable jurisdiction was applicable, a party seeking the writ of partition was required to resort to the remedy afforded by former Code 1933, § 85-1504 (see O.C.G.A. § 44-6-160). Gifford v. Courson, 224 Ga. 840, 165 S.E.2d 133 (1968).

Petition not made equitable merely by allegations of uncertainty of interests and difficulty of partitioning. — Allegations in a petition that there was some uncertainty about all parties having an interest in the land and praying for the appointment of a guardian ad litem for unnamed parties at interest, and alleging that the property could not be partitioned by metes and bounds, do not make the petition an equitable one for partition. Brinson v. Thornton, 220 Ga. 234, 138 S.E.2d 268 (1964).

Equitable partition considered separately from petition at law. — When a tenant in common alleges grounds for an equitable partition, the petition constitutes a separate case from the petition at law and must be treated accordingly. Frierson v. Dye, 150 Ga. 206, 103 S.E. 162 (1920).

Action properly treated as one in equity for partitioning when defendant claimed title by prescription. — When the title and interests to realty of the parties in dispute over construction of the will had become more complicated by defendant's claim of title by prescription, the trial court did not err in treating the action as one in equity for partitioning. Bailey v. Johnson, 247 Ga. 657, 278 S.E.2d 384 (1981).

Circumstances Supporting Partition

1. General

Petition not defeated because opposing party owns life estate in other undivided interests. — One who holds title to an undivided interest in land may not, in an action to partition the land, be defeated merely because the party against whom the partition is sought may own a life estate in other undivided interests. Johnson v. Wilson, 212 Ga. 264, 91 S.E.2d 758 (1956).

2. Specific

Tenants excluded from possession may maintain action. — When one cotenant is in exclusive possession and denies the title of the others, the tenants so excluded may maintain an action for partition. Hatton v. Johnson, 150 Ga. 218, 103 S.E. 233 (1920).

When there is an agreement between the tenants in common to divide severable property, in pursuance of which the portion of one cotenant is allotted to that cotenant, that cotenant may, upon demand and refusal to deliver the property, maintain an action

for the conversion thereof against the former cotenant, having the property in that tenant's possession, although this portion was never in fact separated from the residue. Hemphill v. Hemphill, 62 Ga. App. 358, 7 S.E.2d 762 (1940).

Section applicable where matters of account involved. — When matters of an account against a cotenant are involved and a sale is necessary to partition, this statute applies. Lowe v. Burke, 79 Ga. 164, 3 S.E. 449 (1887) (see O.C.G.A. § 44-6-140).

When matter of account against an insolvent cotenant for past profits of the land is involved, and where partition of the premises cannot be made without a sale, equity has jurisdiction to decree a partition and account. The element of account and insolvency will give equity jurisdiction. Ballenger v. Houston, 207 Ga. 438, 62 S.E.2d 189 (1950).

While equity jurisdiction ceases when the legislature gives a specific remedy at law, a specific legal remedy for partition is provided, and equity will not ordinarily take cognizance of a partition proceeding unless the remedy at law is insufficient, or peculiar circumstances render the proceeding in equity more suitable and just, an accounting between tenants in common will alone and of itself give a court of equity jurisdiction of a partition proceeding, whether or not there be 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).

Property which is owned jointly may be partitioned in a divorce action by the court as in an equitable proceeding. Hargrett v. Hargrett, 242 Ga. 725, 251 S.E.2d 235 (1978), overruled on other grounds, Stokes v. Stokes, 246 Ga. 765, 273 S.E.2d 169 (1980).

In divorce cases heard without a jury, as equitable proceedings, a trial judge may divide property as equity demands, regardless of which party receives an award. Reaves v. Reaves, 244 Ga. 102, 259 S.E.2d 52 (1979).

Procedure

Superior court which has general equitable powers has jurisdiction to partition property. Gorman v. Gorman, 239 Ga. 312, 236 S.E.2d 652 (1977).

Court may entertain partition proceeding without first trying, or in connection therewith, accounting action concerning the same property held in cotenancy. Lankford v. Milhollin, 200 Ga. 512, 37 S.E.2d 197 (1946).

Owner of water easement as necessary party. — While all parties having an interest in the property sought to be partitioned must be named defendants, since the United States government had an easement or grant of two-thirds of the water flow to the spring located on the land to which all the interests of all the tenants in common were subject, and only the property was sought to be partitioned, it was not necessary for the United States government to be named as a party defendant, even if such might be done with or without its permission and consent. City of Warm Springs v. Bulloch, 213 Ga. 164, 97 S.E.2d 582 (1957).

Effect of agreement on partition action. — Generally, party will not be decreed partition if it would be contrary to the party's agreement. Bowers v. Bowers, 208 Ga. 85, 65 S.E.2d 153 (1951).

Objections to return of appointed commissioners not timely filed. — Since equity has jurisdiction in cases of partition, it is too late to file objections to the return of the appointed commissioners when the return has been entered up as the judgment of the court with the knowledge of both parties to the proceeding. Drew v. Drew, 151 Ga. 11, 105 S.E. 469 (1921).

Appeal in partition action to enforce separation agreement. — Although it had its roots in the parties' divorce action, an action for an equitable partition to enforce the separation agreement which was part of the divorce decree is a new action and not merely a continuation of the divorce action. For this reason, O.C.G.A.§ 5-6-35 does not apply to this situation, and husband's direct appeal from the partition order is proper. Larimer v. Larimer, 249 Ga. 500, 292 S.E.2d 71 (1982).

Relief Granted

Court has power to determine all various matters in dispute. — When a tenant in common applies to the superior court to have certain land so held partitioned, and to have an accounting between the tenants in common, such a proceeding is in the nature of a proceeding in equity, in which the court

Relief Granted (Cont'd)

has all the power and jurisdiction for hearing and determining the various matters in dispute between the parties, including their respective titles to the land, to have an accounting for rents and profits, awarding partition, etc. Borum v. Deese, 196 Ga. 292, 26 S.E.2d 538 (1943).

Court decree transfers title. — Whether the division of a estate was entered into under the provisions as to the distribution of estates in kind, or was made under the provisions as to the partition of estates by agreement of the parties, the division award of the commissioners, which was approved and made the decree of the court, was sufficient to transfer title out of the estate and the heirs to the persons to whom the particular portions of the estate were awarded. Bell v. Cone, 208 Ga. 467, 67 S.E.2d 558 (1951).

Partitionship may be accomplished through receivership. — There is no reason why partitionment in equity may not be fully and effectually accomplished through and by receivership. Waycross Military Ass'n v. Hiers, 209 Ga. 812, 76 S.E.2d 486 (1953).

Court may adjust cotenants' accounts. — Having properly assumed jurisdiction for the partition of the property of the cotenants by its sale and distribution of the proceeds, a court of equity has jurisdiction to adjust the accounts or claims of the cotenants. Taylor v. Sharpe, 221 Ga. 282, 144 S.E.2d 390 (1965).

Court may make necessary and equitable adjustments for improvements and expenditures made and paid for by the respective parties. Borum v. Deese, 196 Ga. 292, 26 S.E.2d 538 (1943).

Compensation allowed for counsel in proper case. — In an equitable partition proceeding, the judge of the superior court before whom the proceeding is pending has the power under general equitable doctrine, in a proper case and where the circumstances justify it, to allow compensation for the plaintiff's counsel as a charge against the fund arising from the sale of the land partitioned. Especially is this true when other equities are involved, such as the settlement of involved accounts between the parties, when deeds are canceled, and when a receiver is appointed to manage and sell properties. Werner v. Werner, 196 Ga. 1, 25 S.E.2d 676 (1943).

In a proceeding at law to partition land, the applicants are not entitled to have fees awarded to their counsel from the common fund, thus requiring their cotenants to contribute to the payment of such fees but, in an equitable proceeding for partitionment and for other relief, an allowance for attorney's fees may be made by the court from the common fund. Cashin v. Markwalter, 208 Ga. 444, 67 S.E.2d 226 (1951), overruled on other grounds, Sikes v. Sikes, 233 Ga. 97, 209 S.E.2d 641 (1974).

In an equitable proceeding for partition and other relief, the court does not err in awarding fees to the attorneys for the plaintiffs to be paid from the common fund derived from the sale of the joint property. Taylor v. Sharpe, 221 Ga. 282, 144 S.E.2d 390 (1965).

Illustrative Cases

Equitable partition found authorized. — When two railway companies erected a station on the land of one of the companies, at the joint and equal expense of both companies, under a contract whereby each of the companies became owners of one-half interest in the building, and when, after the station had been used by both companies jointly and individually for several years, the company that did not own the land became insolvent, and all the company's property, including the company's interest in the station, was duly sold under foreclosure proceedings and purchased by private individuals, and since the railroad of this company was dismantled and its business as a common carrier was abandoned, so that there was no longer any necessity for that company or the purchasers to use the station for railroad purposes, the purchasers are entitled to have the station partitioned in equity, the court having power to protect the interest of all parties by appropriate decree. Henry Talmadge & Co. v. Seaboard Air Line Ry., 170 Ga. 225, 152 S.E. 243 (1930).

When a divorce decree made no provision for alimony, and when the petition of the wife alleges that the defendant is disposing and threatening to dispose of property owned in common, and that he is insolvent, and the wife prays for a money judgment and an injunction, the petition is sufficient to allege reasons for an equitable partition and an accounting, rather than by a parti-

tion at law. Wallack v. Wallack, 211 Ga. 745, 88 S.E.2d 154 (1955).

In a partition action in which the parties disputed the extent of one party's interest in the property, and one party counterclaimed for an equitable division, accounting, and contribution, claiming to have paid all taxes and maintenance costs for over 20 years, the need for an accounting between the tenants in common, alone, gave the trial court equity jurisdiction to decide the matter. Ransom v. Holman, 279 Ga. 63, 608 S.E.2d 600 (2005).

Minority owner's claim of error in the partitioning of a parcel of property was rejected as, while a pending contract with a prospective buyer was taken into consideration, the property was partitioned in the way desired by the minority owner and the surveyor; the minority owner received tracts that were worth more than the owner would have been received if the property had remained intact and had been sold to the buyer and the owner received tracts valued at more than the interest owned before the partitioning. Talmadge v. Elson Props., 279 Ga. 268, 612 S.E.2d 780 (2005).

Agreement to occupy home not partnership. — Agreement between the cotenants of a city lot, on which is located a residence, to occupy the residence jointly as a home, does not constitute a partnership as defined by law, and the fact that such an agreement embraced an additional provision that the co-owners would share not only in the upkeep and maintenance of the property, but also in their personal living expenses in the home, would not have the effect of enlarging their relation of cotenancy into a partnership such as contemplated by law, so as to bar certain of the co-owners from proceeding by equitable partition against other co-owners of the land involved. Borum v. Deese, 196 Ga. 292, 26 S.E.2d 538 (1943).

Equitable accounting found authorized. — When the petitioner in a partitioning proceeding prays for an accounting for water sold from a spring on property to be partitioned by one of the tenants in common, and alleges that a lease agreement, whereby the petitioner's interest in the water rights had been granted to the city, had been declared void by a court decision and that one has not received compensation for vast quantities of water used from the spring, the only accounting available to the petitioner is one in equity, there being no adequate remedy at law for an accounting for the use of the water by another tenant in common. City of Warm Springs v. Bulloch, 213 Ga. 164, 97 S.E.2d 582 (1957).

RESEARCH REFERENCES

Am. Jur. 2d. — 27A Am. Jur. 2d, Equity, § 4.

C.J.S. — 68 C.J.S., Partition, § 72 et seq.

ALR. — Right of judgment creditor of cotenant to maintain partition, 25 ALR 105.

Divorce as affecting estate by entireties, 52 ALR 890; 59 ALR 718.

Right of executor or administrator to bring proceedings for partition of real property, 57 ALR 573.

Partition of partnership real property, 77 ALR 300.

Acquisition by one party pending partition suit of all outstanding joint or common interests as affecting power of court to determine questions of controverted title, remove clouds on title, etc., 162 ALR 227.

Contractual provisions as affecting right to judicial partition, 37 ALR3d 962.

Necessary or proper parties to suit or proceeding to establish private boundary line, 73 ALR3d 948.

44-6-141. Molding of decree; discretion of court.

In every case, the court will mold its decree to meet the general justice and equity of each cotenant and in its discretion may postpone or deny either a partition or a sale if it appears that the present or prospective interest of any cotenant may not be protected thereby. (Orig. Code 1863,

§ 3117; Code 1868, § 3129; Code 1873, § 3185; Code 1882, § 3185; Civil Code 1895, § 4785; Civil Code 1910, § 5357; Code 1933, § 85-1502.)

JUDICIAL DECISIONS

Decree should conform to the verdict. Groover v. King, 55 Ga. 243 (1875).

When parties collaterally interested are brought in as defendants, decree should settle the parties' rights. Gaines v. Little, 56 Ga. 649 (1876).

Claim against a cotenant for profits will take precedence over a mortgage made by the cotenant. Hines v. Munnerlyn, 57 Ga. 32 (1876).

Court may adjust cotenants' accounts. — Having properly assumed jurisdiction for the partition of the property of the cotenants by its sale and distribution of the proceeds, a court of equity has jurisdiction to adjust the accounts or claims of the cotenants. Taylor v. Sharpe, 221 Ga. 282, 144 S.E.2d 390 (1965).

Attorney fees may be awarded. — In an equitable proceeding for partition and other relief, the court does not err in awarding fees to the attorneys for the plaintiffs to be paid from the common fund derived from the sale of the joint property. Taylor v. Sharpe, 221 Ga. 282, 144 S.E.2d 390 (1965).

Court empowered to mold decree to protect absent interested person presumed dead. — When an absentee minor has been missing for several years, the next of kin claiming as heirs at law of the absentee may, by an action in equity instituted against the guardian after a presumption of death arises, compel the administration and distribution of the estate. In such a case, the court of equity has full power to mold the court's decree as to protect the absentee or any person claiming under the absentee, should it afterwards appear that the absentee was not in fact dead, or that the absentee did not die until after the absentee attained majority. Payne v. Home Sav. Bank, 193 Ga. 406, 18 S.E.2d 770 (1942).

Equitable partition found authorized. — When two railway companies erected a station on the land of one of the companies, at the joint and equal expense of both companies, under a contract whereby each of the companies became owners of one-half interest in the building, and when, after the station had been used by both companies jointly and individually for several years, the company that did not own the land became insolvent, and all the company's property, including the company's interest in the station, was duly sold under foreclosure proceedings brought in a court of competent jurisdiction and purchased by private individuals, and since the railroad of the company was dismantled and the company's business as a common carrier was abandoned, so that there was no longer any necessity for that company or the purchasers to use the station for railroad purposes, the purchasers are entitled to have the station partitioned in equity, the court having power to protect the interest of all parties by appropriate decree. Henry Talmadge & Co. v. Seaboard Air Line Ry., 170 Ga. 225, 152 S.E. 243 (1930).

Cited in Greer v. Henderson, 37 Ga. 1 (1867); Brown v. Mooney, 108 Ga. 331, 33 S.E. 942 (1899); Smith v. Smith, 133 Ga. 170, 65 S.E. 414 (1909); Clements v. Seaboard Air-Line Ry., 158 Ga. 764, 124 S.E. 516 (1924); Rosenberg v. Phelps, 159 Ga. 607, 126 S.E. 788 (1925); Joel v. Joel, 201 Ga. 520, 40 S.E.2d 541 (1946); Bell v. Cone, 208 Ga. 467, 67 S.E.2d 558 (1951); McCreary v. Wright, 132 Ga. App. 500, 208 S.E.2d 373 (1974); McClain v. McClain, 241 Ga. 162, 243 S.E.2d 879 (1978); Brannon v. Simpson, 244 Ga. 58, 257 S.E.2d 541 (1979).

RESEARCH REFERENCES

Am. Jur. 2d. — 27A Am. Jur. 2d, Equity, § 1.

C.J.S. — 68 C.J.S., Partition, § 72.

ALR. — Power to decree pecuniary sum as equality in order to equalize shares of parties in partition, 65 ALR 352.

Power of guardian to agree to, or of court to approve, voluntary partition between infant or incompetent and cotenant, 157 ALR 755.

Acquisition by one party pending partition suit of all outstanding joint or common

interests as affecting power of court to determine questions of controverted title, remove clouds on title, etc., 162 ALR 227.

Allowance and apportionment of counsel fee in partition action or suit, 94 ALR2d 575.

44-6-142. Effect of decree on title.

The decree on a proceeding for equitable partition shall pass the title without the execution of any conveyances by the parties. (Orig. Code 1863, § 3116; Code 1868, § 3128; Code 1873, § 3184; Code 1882, § 3184; Civil Code 1895, § 4784; Civil Code 1910, § 5356; Code 1933, § 85-1503.)

JUDICIAL DECISIONS

If a partitioning is in equity, a decree of the court will pass the title, whether or not conveyances are executed by the parties. Barron v. Lovett, 207 Ga. 131, 60 S.E.2d 458 (1950).

Whether a division of the estate was entered into under the provisions as to distribution of estates in kind, or was made under the provisions as to the partition of estates by agreement of the parties, the division award, which was approved and made the decree of the court, was sufficient to transfer title out of the estate and the heirs to the persons to whom particular portions of the estate were awarded. Bell v. Cone, 208 Ga. 467, 67 S.E.2d 558 (1951).

Consent order, unless set aside, cannot be reopened to relitigate cotenants' rights. — Consent order entered in a partitioning case, decreeing certain persons to be cotenants and appointing partitioners to partition the property in question, cannot be subsequently reopened to relitigate the rights of the parties as cotenants, unless the order is reversed or set aside. Johnson v. James, 246 Ga. 680, 272 S.E.2d 692 (1980).

RESEARCH REFERENCES

Am. Jur. 2d. — 59A Am. Jur. 2d, Partition, § 115.

C.J.S. — 68 C.J.S., Partition, § 131.

Subpart 2

Statutory Partition

44-6-160. Grounds for partition; jurisdiction; contents of petition.

When two or more persons are common owners of lands and tenements, whether by descent, purchase, or otherwise, and no provision is made, by will or otherwise, as to how such lands and tenements shall be divided, any one of such common owners may apply by petition to the superior court of the county in which such lands and tenements are located for a writ of partition which shall set forth plainly and distinctly the facts and circumstances of the case, shall describe the premises to be partitioned, and shall define the share and interest of each of the parties therein. When the lands in question constitute a single tract situated in more than one county, the application may be made to the superior court of any of such counties. (Laws 1767, Cobb's 1851 Digest, p. 581; Code 1863, § 3896; Code 1868, § 3920; Code 1873, § 3996; Code 1882, § 3996; Civil Code 1895, § 4786;

Ga. L. 1900, p. 56, § 1; Civil Code 1910, § 5358; Ga. L. 1920, p. 85, § 1; Code 1933, § 85-1504.)

Law reviews. — For annual survey on domestic relations, see 61 Mercer L. Rev. 117 (2009).

JUDICIAL DECISIONS

Analysis

General Consideration
Distinction Between Law and Equity
Circumstances Supporting Partition
Procedure
Relief Granted
Illustrative Cases

General Consideration

Constitutionality. — See Southall v. Carter, 229 Ga. 240, 190 S.E.2d 517 (1972).

Enjoining partition. — It is error to enjoin tenants in common from filing proceedings for partition. Ellis v. Jenkins, 250 Ga. 29, 295 S.E.2d 736 (1982).

Not applicable to joint-tenants with a right of survivorship. — O.C.G.A. § 44-6-160 has long been construed to apply only to tenants in common, not to joint-tenants with a right of survivorship. Wallace v. Wallace, 260 Ga. 400, 396 S.E.2d 208 (1990).

Exclusive possession by one spouse defeats partitioning by other. — Whether the property is held by husband and wife as tenants in common or as joint-tenants, if it is subject to the exclusive possession of one of them, it is not subject to partitioning by the other. Wallace v. Wallace, 260 Ga. 400, 396 S.E.2d 208 (1990).

Right to partition. — When a non-possessing tenant in common has not agreed to give up the right to partition, that right is not extinguished by a judgment imposed upon the tenant. To the extent Blalock v. Blalock, 250 Ga. 862 (1983), and White v. White, 253 Ga. 388 (1984), can be read as finding a relinquishment of the right to partition in a judicial decree not supported by an agreement, those cases are disapproved. Harvey v. Sessoms, 284 Ga. 75, 663 S.E.2d 210 (2008).

Cited in Wilkinson v. Tuggle, 61 Ga. 381 (1878); Lochrane v. Equitable Loan & Sec. Co., 122 Ga. 433, 50 S.E. 372 (1905); Mize v. Bank of Whigham, 138 Ga. 499, 75 S.E. 629 (1912); Knowles v. Knowles, 146 Ga. 507, 91 S.E. 776 (1917); English v. Poole, 31 Ga. App. 581, 121 S.E. 589 (1917); Clements v. Seaboard Air-Line Ry., 158 Ga. 764, 124 S.E.2d 516 (1924); Jennings v. Jennings, 173 Ga. 428, 160 S.E. 405 (1931); Walden v. Walden, 191 Ga. 182, 12 S.E.2d 345 (1940); Wren v. Wren, 199 Ga. 851, 36 S.E.2d 77 (1945); Joel v. Joel, 201 Ga. 520, 40 S.E.2d 541 (1946); Armstrong v. Merts, 76 Ga. App. 465, 46 S.E.2d 529 (1948); Mixon v. Sumner, 205 Ga. 579, 54 S.E.2d 411 (1949); Leggitt v. Allen, 85 Ga. App. 280, 69 S.E.2d 106 (1952); Bufford v. Bufford, 221 Ga. 13, 142 S.E.2d 796 (1965); Goodman v. Georgia R.R. Bank & Trust Co., 221 Ga. 396, 144 S.E.2d 764 (1965); White v. Howell, 224 Ga. 135, 160 S.E.2d 374 (1968); Bodrey v. Bodrey, 122 Ga. App. 23, 176 S.E.2d 234 (1970); Wilkerson v. Wilkerson, 126 Ga. App. 172, 190 S.E.2d 140 (1972); McCreary v. Wright, 132 Ga. App. 500, 208 S.E.2d 373 (1974); Sikes v. Sikes, 233 Ga. 97, 209 S.E.2d 641 (1974); Burnham v. Lynn, 235 Ga. 207, 219 S.E.2d 111 (1975); Seymour v. Presley, 239 Ga. 572, 238 S.E.2d 347 (1977); Crooke v. Gilden, 262 Ga. 122, 414 S.E.2d 645 (1992).

Distinction Between Law and Equity

Tenant in common or co-owner entitled to petition for either statutory or equitable partition. Billings v. Billings, 242 Ga. 632, 250 S.E.2d 480 (1978).

Application to partition certain land is a purely statutory proceeding. Nash v. Williamson, 212 Ga. 804, 96 S.E.2d 251 (1957).

Statutory proceedings partake of the nature of proceedings in equity. Waycross Military Ass'n v. Hiers, 209 Ga. 812, 76 S.E.2d 486 (1953).

Application for partition and accounting is in nature of proceeding in equity. Poole v. Poole, 220 Ga. 3, 136 S.E.2d 745 (1964).

Equitable jurisdiction applicable only when peculiar circumstances or insufficient legal remedy. — Application to partition lands between tenants in common may be instituted at law, or an application may be brought in equity whenever the remedy at law is insufficient or peculiar circumstances render the proceeding in equity more suitable and just. But, unless for some special reason equitable jurisdiction is applicable, a party seeking the writ of partition is required to resort to the remedy afforded by this statute. Gifford v. Courson, 224 Ga. 840, 165 S.E.2d 133 (1968) (see O.C.G.A. § 44-6-160).

Accounting alone gives court of equity jurisdiction of partition proceeding. — While equity jurisdiction ceases when the legislature gives a specific remedy at law, and while a specific legal remedy for partition is provided, and while equity will not ordinarily take cognizance of a partition proceeding unless the remedy at law is insufficient, or peculiar circumstances render the proceeding in equity more suitable and just, an accounting between tenants in common will alone and of itself give a court of equity jurisdiction of a partition proceeding, whether or not there are 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).

Error for court to dismiss equitable proceeding after amended petition sets cause of action. — After an amendment of the petition set out a cause of action for equitable partition, it was error for the court to dismiss the action on the ground that by amendment it had been changed from an equitable to a statutory proceeding for partition, or that it did not set forth a cause of action. Gibson v. Gibson, 180 Ga. 457, 179 S.E. 354 (1935).

Circumstances Supporting Partition

No right of partitioning unless property held in common. — Under the plain wording of this statute, the right to have a partitioning does not exist unless the property sought to be partitioned is held under a joint tenancy or a tenancy in common. Paris v. Clay, 223 Ga. 738, 158 S.E.2d 377 (1967) (see O.C.G.A. § 44-6-160).

Any co-owner may apply for partition writ. — Statute relating to partition of realty expressly provides that, in all cases where two or more persons are common owners of land by descent, any one of such owners may apply for a writ of partition. Evans v. Little, 246 Ga. 219, 271 S.E.2d 138 (1980) (see O.C.G.A. § 44-6-160).

Division under will had without interference from executors. — When a will provides for a division, the remaindermen become tenants in common and the division may be had without any interference from the executors. Watkins v. Gilmore, 121 Ga. 488, 49 S.E. 598 (1904).

Division may be had without an interference from the executors. Miller v. Harris County, 186 Ga. 648, 198 S.E. 673 (1938).

Partition proper despite coexecutors lack of assent. — Son and coexecutor of mother's will, under which he and his brother, also his coexecutor, each received an undivided one half interest in property, had standing to bring a partition action in spite of his brother's refusal to assent, and partition was proper although the estate was still in probate. Clay v. Clay, 268 Ga. 40, 485 S.E.2d 205 (1997).

Heirs are not compelled to get the consent of the administrators before a partition. Hunnicutt v. Rogers, 135 Ga. 595, 69 S.E. 913 (1911).

Existence or nonexistence of administration of estate does not preclude bringing partition action by a tenant in common. Evans v. Little, 246 Ga. 219, 271 S.E.2d 138 (1980).

Executors can join with the surviving cotenant for the partition of land owned jointly by their testatrix and the surviving cotenant since the testatrix makes devises of the land, and since the partition of the land between the estate and the surviving cotenant is necessary for its due administration by the executors. Peck v. Watson, 165 Ga. 853, 142 S.E. 450, 57 A.L.R. 560 (1928).

Voluntary partition by tenants not binding on remaindermen. — When the tenant in fee of a half undivided interest, by voluntary agreement to which the remaindermen were

Circumstances Supporting Partition (Cont'd)

not parties, partitioned land, the partition is binding upon the tenants in fee alone so long as the limited estate of the life tenant continues, even though the remainderman assented to the partition. Teasley v. Hulme, 150 Ga. 495, 104 S.E. 151, 12 A.L.R. 641 (1920).

Defeasible fee under will providing how tenants' interest can be sold cannot be partitioned. — Tenants in common having a defeasible fee in land devised under a will, which provides how their interest can be sold during their joint lives, cannot have the devised property partitioned, either by statutory or equitable proceedings. Trimble v. Fairbanks, 209 Ga. 741, 76 S.E.2d 16 (1953).

Procedure

Superior courts alone have jurisdiction. An application for partition to a city court is a nullity and not amendable. Roberson v. Bennett, 20 Ga. App. 590, 93 S.E. 297 (1917).

Petitioners abandoning statutory proceedings and instituting probate proceedings bound by probate court's judgment. — When parties holding as heirs an undivided interest in lands have abandoned, without formally dismissing, a proceeding instituted in the superior court for partition, and agreed among themselves to institute such a proceeding in the court of ordinary (now probate court) to bring about a partition of the same lands, and this is done by an appropriate proceeding in that court, resulting in a judgment confirming the assignment of the various parcels by the appraisers, no objection being filed or appeal taken, the parties are bound by the judgment. The parties will not subsequently be permitted to disregard such judgment, and seek, by amendment to the original petition in the superior court, another partitioning of the lands. Zeagler v. Zeagler, 192 Ga. 453, 15 S.E.2d 478 (1941).

Sufficiency of application for partition. — Application for partition need only set forth the circumstances of the case, describe the premises to be partitioned, and define the share and interest of each of the parties as provided in statute. Anderson v. Anderson, 27 Ga. App. 513, 108 S.E. 907, cert. denied, 27 Ga. App. 835 (1921) (see O.C.G.A. § 44-6-160).

Under the statutes governing statutory partitioning, the notice of intention to seek partitioning was the only process necessary in order to bring a defendant into court to meet the application for partitioning, and a sale of the property was provided for when a fair and equitable division of the property was not able to have been made by means of metes and bounds; ordering the sale of the property was within the trial court's authority without the need for securing personal jurisdiction over the defendant. Shields v. Gish, 280 Ga. 556, 629 S.E.2d 244 (2006).

It is immaterial whether petition prays for partition by sale or by metes and bounds, since in an application in either form the issues are the same. Anderson v. Anderson, 27 Ga. App. 513, 108 S.E. 907, cert. denied, 27 Ga. App. 835 (1921).

Premises must be described and the interest of each party defined. Childs v. Hayman, 72 Ga. 791 (1884).

Process or prayer for process attached thereto is not required. Griffin v. Griffin, 153 Ga. 547, 113 S.E. 161 (1922).

Applicant must show title in applicant and name each person who may own interest. — In order for a partition proceeding to be maintainable, the applicant must not only show title in the applicant to a specified interest in the property sought to be sold or divided, but must name as a defendant each of the other persons who may own an interest therein, and set forth their respective interests. Hill v. McCandless, 198 Ga. 737, 32 S.E.2d 774 (1945).

Defendant may controvert complainant's title or deny cotenancy. — In a bill for partition, it is not necessary that the complainant's title to the property should be fully set out. However, the defendant may, by plea or answer, controvert the complainant's title to the whole or any part of the property, or deny the cotenancy, in which event, a preliminary trial should be had to settle these issues. Dollar v. Dollar, 214 Ga. 499, 105 S.E.2d 736 (1958).

Respondent in partition proceeding can only set up matters germane to the case as made by the applicant's petition, and cannot recover a personal judgment against the applicant on a separate and independent matter. Starling v. Starling, 214 Ga. 786, 107 S.E.2d 651 (1959).

Not error to allow petitioners' transferee to be made party plaintiff. — When, pending an application for partition of realty, the original petitioners sold their interest to another person, the proceedings were not thereby vacated, and it was not error to allow the other person to be made a party plaintiff in the application, it not appearing that the original petitioners were dismissed. Hamby Mt. Gold Mines v. Calhoun Land & Mining Co., 83 Ga. 311, 9 S.E. 831 (1889).

Venue of statutory proceeding for partition of land is the county where the land lies. Douglas v. Johnson, 130 Ga. 472, 60 S.E. 1041 (1908).

Statutory partition action under this statute, which can bestow title on both parties and divest both parties of title, is a case ''respecting title to land'' and must be brought in the county where the land lies. Schuehler v. Pait, 239 Ga. 520, 238 S.E.2d 65 (1977) (see O.C.G.A. § 44-6-160).

Judgment, until set aside, binding upon all parties with notice. — Judgment rendered in partition proceedings under this statute, until reversed or set aside, is binding upon all who were parties to the proceedings with due notice thereof, whatever may be its effects as to another co-owner, to whom no such notice was given. Chattahoochee Lumber Co. v. Yeates, 137 Ga. 64, 72 S.E. 504 (1911) (see O.C.G.A. § 44-6-160).

Service on the parties, actual or constructive, is necessary to render the judgment conclusive. Childs v. Hayman, 72 Ga. 791 (1884).

Judgment admissible in later suit to establish plaintiff's title. — Judgment is admissible in a suit for an injunction and damages committed upon the property set apart to the plaintiff to establish the plaintiff's title to such a portion. Chattahoochee Lumber Co. v. Yeates, 137 Ga. 64, 72 S.E. 504 (1911).

Appellate jurisdiction over cases involving statutory partition is in the Supreme Court of Georgia. However, when the sole issue in an appeal is the recusal of the trial court such an issue in no way deals with an area where exclusive jurisdiction rests in the Supreme Court. It is the Court of Appeals which has jurisdiction to entertain the appeal since it is not what is in the complaint before the trial court that determines the Supreme Court's jurisdiction, but the issues on appeal. Stevens v. Myers, 190 Ga. App. 61, 378 S.E.2d 334 (1989).

Jurisdiction of appeal from judgment in action involving statutory partitioning proceedings is in Supreme Court, as partition action is one ''respecting title to land.'' Wiley v. Wiley, 233 Ga. 824, 213 S.E.2d 682 (1975).

Appeal not timely until judge appoints commissioners and orders sale. — In a case when a partition is sought by bringing the lands involved to sale, the objecting party may only bring the case to the Supreme Court by a proper bill of exceptions after the judge has appointed commissioners and ordered the commissioners to sell the land. Lanier v. Gay, 195 Ga. 859, 25 S.E.2d 642 (1943).

Relief Granted

Court empowered to determine all various matters in dispute. — Proceedings under this statute are in the nature of proceedings in equity. The court has all the power and jurisdiction for hearing and determining the various matters in dispute between the parties, in respect to their respective titles, as fully and completely as if it were a bill in chancery for that purpose. Griffin v. Griffin, 33 Ga. 107 (1861); Hamby Mt. Gold Mines v. Calhoun Land & Mining Co., 83 Ga. 311, 9 S.E. 831 (1889) (see O.C.G.A. § 44-6-160).

When a tenant in common applies to the superior court to have certain land partitioned, and to have an accounting between the tenants in common, a proceeding is in the nature of a proceeding in equity, in which the court has all the power and jurisdiction for hearing and determining the various matters in dispute between the parties, including their respective titles to the land, to have an accounting for rents and profits, awarding partition, etc. Gibson v. Gibson, 180 Ga. 457, 179 S.E. 354 (1935); Borum v. Deese, 196 Ga. 292, 26 S.E.2d 538 (1943); Liddell v. Johnson, 213 Ga. 752, 101 S.E.2d 755 (1958).

Partition in kind is the rule and should be generally followed, unless it cannot be conveniently made, or the interest of the parties will be promoted by a sale. Anderson v. Anderson, 27 Ga. App. 513, 108 S.E. 907, cert. denied, 27 Ga. App. 835 (1921).

Error to appoint receiver when no necessity proved and defendant solvent. — When,

Relief Granted (Cont'd)

on the trial of an equitable petition for the partition of real estate, accounting, the settlement of accounts between the tenants in common, the settlement of an estate, and the appointment of a receiver, the evidence shows that the defendant against whom the charges of waste, mismanagement, etc., were made is solvent, and no necessity for a receivership is proved, it is error to appoint receivers to take possession of and to hold and manage the property in question pending final disposition of the case. Liddell v. Johnson, 213 Ga. 752, 101 S.E.2d 755 (1958).

Proper to hold funds pending trial of accounting suit. — In the case of a partition by sale, it is proper for the decree to direct that the funds be held in court pending the trial of the action for accounting. Liddell v. Johnson, 213 Ga. 752, 101 S.E.2d 755 (1958).

Court's power extends to an accounting between the tenants in common. Griffin v. Griffin, 153 Ga. 547, 113 S.E. 161 (1922).

In an equitable partitioning proceeding, the court has adequate authority to have the property of the tenants in common partitioned to require any of the tenants in common to account for rents and profits received by any of them from the jointly owned property, and it can adjust the accounts. Liddell v. Johnson, 213 Ga. 752, 101 S.E.2d 755 (1958).

Court may make adjustments for improvements and expenditures. — When, in pursuance of an agreement between several tenants in common, two of them enter upon the land and make expenditures of money in improvements thereon in excess of the amount received in rents, they are entitled, upon a partition of the land, to an accounting from their cotenants, and to be reimbursed the amount properly found to be due them. Turnbull v. Foster, 116 Ga. 765, 43 S.E. 42 (1902).

When the court has jurisdiction, it may, in decreeing partition, make necessary and equitable adjustments for improvements and expenditures made and paid for by the respective parties. Borum v. Deese, 196 Ga. 292, 26 S.E.2d 538 (1943).

Court can question the mesne profits. Hall v. Collier, 146 Ga. 815, 92 S.E. 536 (1917).

Proceedings limited to partitioning. — Proceedings under this statute cannot be had for the purpose of partitioning a large tract of land with certain alleged tenants in common with the applicant, and at the same time of recovering parts of the land held adversely not under the alleged tenants in common, and also of having an accounting for rent. Cock v. Callaway, 141 Ga. 774, 82 S.E. 286 (1914) (see O.C.G.A. § 44-6-160).

Applicants not entitled to have fees awarded to counsel. — In a proceeding at law to partition land, the applicants are not entitled to have fees awarded to their counsel from the common fund, thus requiring their cotenants to contribute to the payment of such fees. Cashin v. Markwalter, 208 Ga. 444, 67 S.E.2d 226 (1951).

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).

Illustrative Cases

Allegation of petition was sufficient to set out an equitable cause of action for partition of land. Byrd v. Byrd, 180 Ga. 548, 179 S.E. 818 (1935).

Equitable partition found authorized. — When two railway companies erected a station on the land of one of the companies, at the joint and equal expense of both companies, under a contract whereby each of the companies became owners of one-half interest in the building, and when, after the station had been used by both companies jointly and individually for several years, the company that did not own the land because insolvent, and all the company's property, including the company's interest in the station, was duly sold under foreclosure proceedings brought in a court of competent jurisdiction and purchased by private individuals, and since the railroad of this company was dismantled and the company's business as a common carrier was abandoned, so that there was no longer any necessity for that company or the purchasers to use the station for railroad purposes, the purchasers are entitled to have the station

partitioned in equity, the court having power to protect the interest of all parties by appropriate decree. Henry Talmadge & Co. v. Seaboard Air Line Ry., 170 Ga. 225, 152 S.E. 243 (1930).

Minority owner's claim of error in the partitioning of a parcel of property was rejected as, while a pending contract with a prospective buyer was taken into consideration, the property was partitioned in the way desired by the minority owner and the minority owner's surveyor; the minority owner received tracts that were worth more than would have been received if the property had remained intact and had been sold to the buyer and the minority owner received tracts valued at more than the interest that was owned before the partitioning. Talmadge v. Elson Props., 279 Ga. 268, 612 S.E.2d 780 (2005).

Agreement between cotenants not a partnership. — An agreement between the cotenants of a city lot, on which is located a residence, to occupy the residence jointly as a home, does not constitute a partnership as defined by law, and the fact that such an agreement embraced an additional provision that the coowners would share not only in the upkeep and maintenance of the property, but also in their personal living expenses in the home, would not have the effect of enlarging their relation of cotenancy into a partnership such as contemplated by law, so as to bar certain of the co-owners from proceeding by equitable partition against other co-owners of the land involved. Borum v. Deese, 196 Ga. 292, 26 S.E.2d 538 (1943).

Right to partition not barred by divorce decree. — In an action for partition brought by a former husband as a tenant in common with the former wife, it was error to grant summary judgment to the former wife on the ground that the divorce decree placed the property in the exclusive possession of the wife. To be barred from seeking partition, the husband had to have contractually relinquished his right to partition. Harvey v. Sessoms, 284 Ga. 75, 663 S.E.2d 210 (2008).

RESEARCH REFERENCES

Am. Jur. 2d. — 59A Am. Jur. 2d, Partition, §§ 1, 71 et seq.

C.J.S. — 68 C.J.S., Partition, § 72 et seq.

ALR. — Divorce as affecting estate by entireties, 52 ALR 890; 59 ALR 718.

Right to partition of different tracts of land in same proceeding, 65 ALR 893.

Venue of suit for partition of land, 128 ALR 1232.

Suit for partition as involving freehold or title to real estate within constitutional or statutory provisions relating to jurisdiction, 135 ALR 1066.

Probate of will as condition precedent to suit for partition by devisees, 141 ALR 1311.

Right to partition in kind of mineral or oil and gas land, 143 ALR 1092.

Power of guardian to agree to, or of court to approve, voluntary partition between infant or incompetent and cotenant, 157 ALR 755.

Necessity and sufficiency of pleading in partition action to authorize incidental relief, 11 ALR2d 1449.

Timber rights as subject to partition, 21 ALR2d 618.

Spouse of living co-owner of interest in property as necessary or proper party to partition action, 57 ALR2d 1166.

Contractual provisions as affecting right to judicial partition, 37 ALR3d 962.

Severance or termination of joint tenancy by conveyance of divided interest directly to self, 7 ALR4th 1268.

44-6-161. Who may apply for partition.

If the party desiring the writ of partition is of full age and free from disability, he may make the application either in person or by his agent or attorney in fact or at law. An application may be made for the benefit of a minor, a mentally ill or retarded person, or the beneficiary of a trust by the guardian of such minor, the guardian of such mentally ill or retarded person, or the trustee of such beneficiary, as the case may be. (Orig. Code

1863, § 3897; Code 1868, § 3921; Code 1873, § 3997; Code 1882, § 3997; Civil Code 1895, § 4787; Civil Code 1910, § 5359; Code 1933, § 85-1505.)

JUDICIAL DECISIONS

No provision for partition when infant has no guardian. — Provision is made to have a partition for an infant when represented by a guardian, but there seems to be none if the infant has no guardian and is represented by the infant's next friend. Lowe v. Burke, 79 Ga. 164, 3 S.E. 449 (1887).

Cited in Perdue v. McKenzie, 194 Ga. 356, 21 S.E.2d 705 (1942); Leggitt v. Allen, 85 Ga. App. 280, 69 S.E.2d 106 (1952).

RESEARCH REFERENCES

Am. Jur. 2d. — 59A Am. Jur. 2d, Partition, § 90 et seq.

C.J.S. — 68 C.J.S., Partition, § 61 et seq.

ALR. — Right of trustee holding legal title to maintain partition suit, 103 ALR 455.

Right of cestui que trust (or one claiming through or under him) to maintain suit for partition, 126 ALR 1009.

Power of guardian to agree to, or of court to approve, voluntary partition between infant or incompetent and cotenant, 157 ALR 755.

44-6-162. Notice of intention to apply for writ of partition.

The party applying for the writ of partition shall give the other parties concerned at least 20 days' notice of his intention to make the application. If any of the other parties is a minor, a mentally ill or retarded person, or a beneficiary of a trust, the 20 days' notice shall be served on the guardian of such minor, the guardian of such mentally ill or retarded person, or the trustee of such beneficiary. If any of the parties reside outside of this state, the court may order service by publication as in its judgment is right in each case. (Laws 1767, Cobb's 1851 Digest, p. 582; Code 1863, § 3898; Code 1868, § 3922; Code 1873, § 3998; Code 1882, § 3998; Civil Code 1895, § 4788; Civil Code 1910, § 5360; Code 1933, § 85-1506; Ga. L. 1991, p. 94, § 44.)

Law reviews. — For article recommending more consistency in age requirements of laws pertaining to the welfare of minors, see 6 Ga. St. B.J. 189 (1969).

JUDICIAL DECISIONS

Section inapplicable when petition prays for sale of lands. — When the petition stated an equitable cause of action for partition and accounting under § 44-6-167, the provisions of former Code 1933, § 85-1506 (see O.C.G.A. § 44-6-162) did not apply. Mills v. Williams, 208 Ga. 425, 67 S.E.2d 212 (1951).

No process is required except the notice under this statute. Anderson v. Anderson, 27 Ga. App. 513, 108 S.E. 907, cert. denied, 27 Ga. App. 835 (1921) (see O.C.G.A. § 44-6-162).

As this is a special statutory proceeding, the notice of intention is the only process necessary in order to bring the defendant into court to meet the application for partition. Bodrey v. Bodrey, 122 Ga. App. 23, 176 S.E.2d 234 (1970).

Petition does not require any process or prayer for process attached to the petition. Griffin v. Griffin, 153 Ga. 547, 113 S.E. 161 (1922).

Notice of application for partition is equivalent of process in the statutory pro-

ceeding for partition, which is not in rem. Leggitt v. Allen, 85 Ga. App. 280, 69 S.E.2d 106 (1952).

Applicant must show title in applicant and name each person who may own interest. — In order for a statutory partition proceeding to be maintainable, the applicant must not only show title in the applicant to a specified interest in the property sought to be sold or divided, but must name as defendant each of the other persons who may own an interest therein, and set forth their respective interests. Hill v. McCandless, 198 Ga. 737, 32 S.E.2d 774 (1945).

Notice to grantee in recorded deed to secure debt required. — When the petition showed that a recorded deed to secure a debt was outstanding against the property sought to be partitioned, and it not appearing that the grantee in the deed had been properly notified of the application for the partition, so as to bring the grantee into the proceeding, the petition should have been dismissed. Leggitt v. Allen, 85 Ga. App. 280, 69 S.E.2d 106 (1952).

Trustee empowered to sell and reinvest premises proper, but not necessary, party. — Trustee who, by the deed of trust, has a power of sale and reinvestment, is a proper, though not a necessary, party in a proceeding to partition the premises amongst the beneficiaries. Welch v. Agar, 84 Ga. 583, 11 S.E. 149, 20 Am. St. R. 380 (1890).

Service upon minor will not enforce appearance of minor after minor has arrived at age. Welch v. Agar, 84 Ga. 583, 11 S.E. 149, 20 Am. St. R. 380 (1890).

Part of former Civil Code 1895, § 4788 (see O.C.G.A. § 44-6-162) relating to service by publication was not repealed by general provisions on the same subject in former Civil Code 1895, §§ 4976 and 4977 (see O.C.G.A. § 9-10-71). Lochrane v. Equitable Loan & Sec. Co., 122 Ga. 433, 50 S.E. 372 (1905).

When no application has been filed, judge has no jurisdiction to order service by publication. Lochrane v. Equitable Loan & Sec. Co., 122 Ga. 433, 50 S.E. 372 (1905).

Defendant failing to appear after receiving notice cannot have partition order revoked. — When the defendant, after receiving the notice provided by this statute, failed to appear, defendant could not thereafter have the order for partition revoked and set aside on the ground that the court did not have jurisdiction to entertain the equitable petition at the time. Gammon v. Holloway-Smith Co., 150 Ga. 253, 103 S.E. 154 (1920).

Cited in Childs v. Hayman, 72 Ga. 791 (1884); Miller v. A.M. Watson & Co., 135 Ga. 408, 69 S.E. 555 (1910); English v. Poole, 31 Ga. App. 581, 121 S.E. 589 (1924); Cates v. Duncan, 178 Ga. 748, 174 S.E. 380 (1934); Armstrong v. Merts, 76 Ga. App. 465, 46 S.E.2d 529 (1948); Starling v. Starling, 214 Ga. 786, 107 S.E.2d 651 (1959); Brinson v. Thornton, 220 Ga. 234, 138 S.E.2d 268 (1964); Evans v. Little, 246 Ga. 219, 271 S.E.2d 138 (1980); Iteld v. Siverboard, 247 Ga. 158, 275 S.E.2d 645 (1981).

RESEARCH REFERENCES

Am. Jur. 2d. — 59A Am. Jur. 2d, Partition, § 98.

C.J.S. — 68 C.J.S., Partition, § 126 et seq.

44-6-163. Issuance of writ of partition; appointment of partitioners.

When the application for partition is made and when due proof is made that the notice required by Code Section 44-6-162 has been given, the court shall examine the petitioner's title and share of the premises to be partitioned and shall thereupon pass an order directing the clerk of the superior court to issue a writ of partition which shall be framed according to the nature of the case and directed to five freeholders of the county in which the lands are located who shall serve as partitioners; and the court shall execute and return the writ as provided in Code Section 44-6-164. (Laws 1767, Cobb's 1851 Digest, p. 582; Laws 1827, Cobb's 1851 Digest, p.

583; Code 1863, § 3899; Code 1868, § 3923; Code 1873, § 3999; Code 1882, § 3999; Civil Code 1895, § 4789; Civil Code 1910, § 5361; Code 1933, § 85-1507.)

JUDICIAL DECISIONS

Judge required to see that apparent interest in applicant exists. — Statute does not require that the judge shall have a trial of the application at once upon its presentation, but that the judge should personally see that some apparent interest in the applicant exists. Cock v. Callaway, 141 Ga. 774, 82 S.E. 286 (1914) (see O.C.G.A. § 44-6-163).

Writ of error will not lie to interlocutory judgment provided for in this statute; the rule is the opposite if it is the judgment of confirmation that is questioned. Berryman v. Haden, 112 Ga. 752, 38 S.E. 53 (1901); Lochrane v. Equitable Loan & Sec. Co., 122 Ga. 433, 50 S.E. 372 (1905) (see O.C.G.A. § 44-6-163).

Cited in Gamble v. Brooks, 170 Ga. 662, 153 S.E. 759 (1930); Cates v. Duncan, 178 Ga. 748, 174 S.E. 380 (1934); Wood v. W.P. Brown & Sons Lumber Co., 199 Ga. 167, 33 S.E.2d 435 (1945); Leggitt v. Allen, 85 Ga. App. 280, 69 S.E.2d 106 (1952); Clay v. Clay, 269 Ga. 902, 506 S.E.2d 866 (1998).

RESEARCH REFERENCES

Am. Jur. 2d. — 59A Am. Jur. 2d, Partition, § 90 et seq.

C.J.S. — 68 C.J.S., Partition, §§ 101, 103.

ALR. — Probate of will as condition precedent to suit for partition by devisees, 141 ALR 1311.

Partition: construction and application of provision for assignment, to one of co-owners, of real estate not readily divisible, 169 ALR 862.

44-6-164. Appointment of surveyor; notice of time of execution of writ; oath of partitioners; principles governing partition; partitioner's return.

The partitioners shall have the power to select a surveyor to aid them in the discharge of their duties. After giving all the parties, if possible, at least eight days' notice of the time of executing the writ and after being sworn to execute the writ duly and impartially before an officer authorized by law to administer such oath, the partitioners or a majority of them shall proceed to make a just and equal partition and division of all the lands and tenements, either in entire tracts or in parcels, as they shall judge, according to the best of their skill, ability, and knowledge, to be in proportion to the shares claimed and to be most beneficial to the several common owners of the lands and tenements. They shall return the writ, with their actings and doings thereon and under their hands and seals, to the superior court within three months after its issuance, which return shall be filed and kept by the clerk until the next term of the court. (Laws 1767, Cobb's 1851 Digest, p. 582; Laws 1827, Cobb's 1851 Digest, p. 583; Code 1863, § 3900; Code 1868, § 3924; Code 1873, § 4000; Code 1882, § 4000; Civil Code 1895, § 4790; Civil Code 1910, § 5362; Code 1933, § 85-1508.)

JUDICIAL DECISIONS

Court authorized to pay surveyor. — Employment of a surveyor contemplates payment, and the court, in the exercise of the court's powers in these equitable proceedings, would be authorized to provide for such. Liddell v. Johnson, 214 Ga. 861, 108 S.E.2d 878 (1959).

Notice required by this statute need not be in writing. Ralph v. Ward, 109 Ga. 363, 34 S.E. 610 (1899) (see O.C.G.A. § 44-6-164).

No provision is made for the return or entry of such notice. English v. Poole, 31 Ga. App. 581, 121 S.E. 589 (1924).

Provision of O.C.G.A. § 44-6-164 requiring partitioners to make their return within three months after issuance of writ is directory rather than mandatory, and a delay will not require dismissal of the return unless it was caused by the applicant or it appears that a substantial right of the respondents has been prejudiced. Williams v. Williams, 159 Ga. App. 351, 283 S.E.2d 344 (1981).

Effect of taking oath after return filed. — When the return of the partitioners appointed to partition land had been made and filed, and an objection was made thereto by the defendant on the ground that the partitioners had not taken the oath required of the partitioners by this statute, and the partitioners were ordered by the court to make and file a new return after having taken the oath required, and when the petitioners made and filed a new return, the latter return was not void and illegal upon the ground that the partitioners had no authority in law to make the return, or were disqualified, and the proceedings were not subject to dismissal upon the ground that, with the making of the petitioners first return, the writ of partition became functus officio. McIntosh v. Williams, 45 Ga. App. 801, 165 S.E. 854 (1932).

Authority to hire timber cruise. — In a statutory partitioning of land, the trial court did not err in granting the partitioners authority to hire a timber cruise to assess the value of timber. Hart v. Hart, 245 Ga. App. 734, 538 S.E.2d 814 (2000).

Division to agreed groups. — Although O.C.G.A. § 44-6-164 provided that a division of property should be in proportion to the shares claimed, the trial court's division of the two tracts of land involved in a partition action to different groups of siblings was not precluded as the record showed that the aggrieved siblings agreed to that grouping at the beginning of the partition proceeding; thus, the siblings could not be heard to complain about a grouping to which the siblings agreed. Williams v. Conerly, 276 Ga. 651, 582 S.E.2d 1 (2003).

Cited in Leggitt v. Allen, 85 Ga. App. 280, 69 S.E.2d 106 (1952); Clay v. Clay, 269 Ga. 902, 506 S.E.2d 866 (1998).

RESEARCH REFERENCES

Am. Jur. 2d. — 59A Am. Jur. 2d, Partition, §§ 58, 62, 63.

C.J.S. — 68 C.J.S., Partition, § 126 et seq.

ALR. — Judicial partition of land by lot or chance, 32 ALR4th 909.

44-6-165. Objections and defenses to right of applicant, writ, or return; jury trial.

At the term of the court when the application is made or at the next term after the partitioners have made their return, any of the persons against whose right or title a judgment is sought may file objections to the right of the applicant and the writ of partition or to the return of the partitioners, as the case may be, and may, by way of defense, show any good and probable matter in bar of the partition asked for or show that the petitioner does not have title to as much as is allowed and awarded to him by the partitioners or to any part of the land; in such event, the issue shall be tried by a jury as in cases of appeals to the superior court. (Laws 1767, Cobb's 1851 Digest, p.

582; Code 1863, § 3901; Code 1868, § 3925; Code 1873, § 4001; Code 1882, § 4001; Civil Code 1895, § 4791; Civil Code 1910, § 5363; Code 1933, § 85-1509.)

JUDICIAL DECISIONS

Former Civil Code 1910, § 5363 (see O.C.G.A. § 44-6-165) had no application to the equitable partition provided for by former Civil Code 1910, § 5355 (see O.C.G.A. § 44-6-140). Drew v. Drew, 151 Ga. 11, 105 S.E. 469 (1921).

This statute provides that in a partition proceeding (at law) when title to the land is at issue, the issue shall be tried by a jury as in appeal cases. It is not applicable to an equitable partition. Gifford v. Courson, 224 Ga. 840, 165 S.E.2d 133 (1968) (see O.C.G.A. § 44-6-165).

Interested party must be given "reasonable time" to file objections. — One at interest must be given a ''reasonable time'' after the filing of the application for partition in which to file objections. Bodrey v. Bodrey, 122 Ga. App. 23, 176 S.E.2d 234 (1970).

Objections cannot be filed later than next court term. — Objections to an application for a partition or to the return of the partitioners may not be filed later than the term next after the partitioners have made their return. Cates v. Duncan, 181 Ga. 686, 183 S.E. 797 (1936).

Objections need not be under oath. Webb v. Till, 134 Ga. 388, 67 S.E. 1034 (1910).

Want of affidavit no cause for rejection. — When an amended answer would have set up a valid defense, a want of an affidavit would be no cause for rejecting the answer. Mize v. Bank of Whigham, 138 Ga. 499, 75 S.E. 629 (1912).

Defendant may deny applicant's title. — When an alleged tenant in common denies that the applicant is a cotenant, it is error for the court to order partition without joining issue. Douglas v. Johnson, 130 Ga. 472, 60 S.E. 1041 (1908).

Defendant may show that another person, not named and served, has interest in property. — Even though an applicant may correctly set forth the applicant's own interest in the property which the applicant seeks to have sold for the purpose of partition, and even though the applicant names as a defendant another person, and correctly sets forth the interest in the property belonging to the applicant, the defendant may appear for the purpose of showing that another and different person, not named as a defendant, and not served, has an interest in the property, and that therefore the applicant is proceeding illegally. Hill v. McCandless, 198 Ga. 737, 32 S.E.2d 774 (1945).

Defense may show that equitable division can be made without sale. — Defendant may caveat the return of the partitioners, and introduce evidence to show that a fair and equitable division of the land can be made by metes and bounds without ordering a sale. McCann v. Brown, 43 Ga. 386 (1871).

Objections on grounds previously adjudicated not authorized. — This statute must be construed in harmony with the rule as to the conclusiveness of judgments, and will not authorize parties to file objections to the return of the partitioners on grounds which were adjudicated upon the hearing of the application for their appointment. Cates v. Duncan, 181 Ga. 686, 183 S.E. 797 (1936) (see O.C.G.A. § 44-6-165).

Judge may pass upon application without jury when sufficient matter in bar not set up. Brown v. Mooney, 108 Ga. 331, 33 S.E. 942 (1899).

Time for trial discretionary. — If the defendant has time, in the judgment of the court, to prepare and file defendant's objections, the trial should be at the term in which application is made; otherwise it should be tried at the next term thereafter. Lochrane v. Equitable Loan & Sec. Co., 122 Ga. 433, 50 S.E. 372 (1905).

When no objections were raised to hearing at time, judgment will not be reversed. Cock v. Callaway, 141 Ga. 774, 82 S.E. 286 (1914).

Evidence showing nondelivery of deeds admissible without special pleading. — Upon the trial of an issue as to title, evidence tending to show nondelivery of certain deeds is admissible without special pleading. Lowry v. Lowry, 150 Ga. 324, 103 S.E. 813 (1920).

Cited in Rodgers v. Price, 105 Ga. 67, 31 S.E. 126 (1898); Brown v. Tomberlin, 137 Ga. 596, 73 S.E. 947 (1912); Culver v. Pierce, 148 Ga. 300, 96 S.E. 497 (1918); Cates v. Duncan, 180 Ga. 289, 179 S.E. 121 (1935); Wren v. Wren, 199 Ga. 851, 36 S.E.2d 77 (1945); Armstrong v. Merts, 76 Ga. App. 465, 46 S.E.2d 529 (1948); Leggitt v. Allen, 85 Ga. App. 280, 69 S.E.2d 106 (1952); Goodman v. Georgia R.R. Bank & Trust Co., 221 Ga. 396, 144 S.E.2d 764 (1965); Shaw v. Davis, 119 Ga. App. 801, 168 S.E.2d 853 (1969); Lowe v. Lowe, 123 Ga. App. 525, 181 S.E.2d 715 (1971); Williams v. Williams, 159 Ga. App. 351, 283 S.E.2d 344 (1981); Clay v. Clay, 269 Ga. 902, 506 S.E.2d 866 (1998); Cheeves v. Lacksen, 273 Ga. 549, 544 S.E.2d 425 (2001).

RESEARCH REFERENCES

Am. Jur. 2d. — 59A Am. Jur. 2d, Partition, §§ 57 et seq., 114.

C.J.S. — 68 C.J.S., Partition, § 259.

44-6-166. Return of partitioners as judgment of court; conclusiveness; when second partition ordered; effect.

If no objection to the return of the partitioners is filed by any of the parties or if, being filed, the jury on the trial finds a verdict against the party setting up such objections, the return of the partitioners shall be made the judgment of the court and shall be final and conclusive as to all the parties concerned who were notified of the application for partition and of the time of executing the writ as required by Code Sections 44-6-162 and 44-6-164, and a writ of possession shall issue accordingly. If objections to the return are filed and are sustained by the jury trying the case or if it appears to the court that there is injustice or inequality in the division made by the partitioners, the court shall award a new partition to be made in the presence of the parties concerned if they will appear, which second partition, when returned, shall be firm, good, and conclusive forever against all parties notified as provided in Code Sections 44-6-162 and 44-6-164. (Laws 1767, Cobb's 1851 Digest, pp. 582, 583; Code 1863, § 3902; Code 1868, § 3926; Code 1873, § 4002; Code 1882, § 4002; Civil Code 1895, § 4792; Civil Code 1910, § 5364; Code 1933, § 85-1510; Ga. L. 1982, p. 3, § 44.)

JUDICIAL DECISIONS

Statute is applicable only to a partition by metes and bounds. Childs v. Hayman, 72 Ga. 791 (1884) (see O.C.G.A. § 44-6-166).

Party entitled to except to second return. — When a return of the partitioners is set aside by the verdict of a jury on objections filed thereto, and a new partition is awarded by order of the court, either party has the right to except to the second return before it is made the judgment of the court, and to have that party's objection passed upon by a jury. Lancaster v. Morgan, 54 Ga. 76 (1875). See also McCann v. Brown, 43 Ga. 386 (1871).

Just and equal recommendation accepted by court. — Trial court did not err in approving the recommendation of the practitioners about partition of the tracts of land at issue and making that recommendation its judgment as the aggrieved siblings did not show that the recommendation was unjust and unequal. Williams v. Conerly, 276 Ga. 651, 582 S.E.2d 1 (2003).

Judgment final and conclusive. — If the

partitioning is statutory, the judgment of the court is final and conclusive as to all parties who were notified of the application for partition. Barron v. Lovett, 207 Ga. 131, 60 S.E.2d 458 (1950).

Cited in Leggitt v. Allen, 85 Ga. App. 280, 69 S.E.2d 106 (1952).

RESEARCH REFERENCES

C.J.S. — 68 C.J.S., Partition, § 259.

ALR. — Adjustment on partition of improvements made by tenant in common, 122 ALR 234.

Judgment in partition as res judicata, 144 ALR 9.

44-6-166.1. Partition when physical division of property is inequitable.

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

(1) ''Party in interest'' means any person, other than a petitioner, having an interest in property.

(2) ''Petitioner'' means any person petitioning for partition of property.

(3) ''Property'' means lands and tenements sought to be partitioned pursuant to this subpart.

(b) Whenever an application is made for the partition of property and any of the parties in interest convinces the court that a fair and equitable division of the property cannot be made by means of metes and bounds because of improvements made thereon, because the premises are valuable for mining purposes or for the erection of mills or other machinery, or because the value of the entire property will be depreciated by the partition applied for, the court shall proceed pursuant to this Code section.

(c) The court shall appoint three qualified persons to make appraisals of the property. The average of the three appraisals shall constitute the appraised price of the property for purposes of this Code section. Notice of the amount of the appraised price shall be served on the petitioners and all parties in interest within five days after the appraised price is established.

(d) Within 15 days after the appraised price is established, upon request to the court and grant thereof, any petitioner may withdraw as petitioner in the partition action and become a party in interest and any party in interest may become a petitioner in the action. Any petitioner remaining as such after the fifteenth day may be paid, pursuant to this Code section, his respective share of the appraised price corresponding to his respective share of the property. This payment shall constitute complete satisfaction of all of that petitioner's claims to and interest in that property. If no petitioner remains in the partition action after that fifteenth day, the proceeding shall be dismissed, and the petitioners who have withdrawn

shall be liable for the costs of the action, including but not limited to the appraisal costs.

(e)(1) No sooner than 16 days and no later than 90 days after the appraised price is established, the parties in interest shall tender to the court sufficient sums to pay to petitioners their shares of the appraised price, as determined by their respective shares in the property, or the property shall be subject to public sale pursuant to Code Section 44-6-167. If the property is subject to such public sale, the petitioner and the parties in interest shall be liable for appraisal costs under this Code section in proportion to their respective interests in the property.

(2) Each party in interest may pay toward the amount required to purchase any petitioners' shares of the appraised price an amount in proportion to that party's share of the total shares of property of all parties in interest, unless one party in interest authorizes another party in interest to pay some or all of his proportionate share of the shares available for sale. The share of each party in interest in the property shall be increased by the share that party pays toward the purchase of petitioners' shares in the property.

(f) Within 95 days after the appraised price is established, unless the property becomes subject to public sale pursuant to paragraph (1) of subsection (e) of this Code section, the petitioners shall execute title to the parties in interest for the property in return for payment to the petitioners, from sums tendered to court under subsection (e) of this Code section, of their respective shares of the appraised price. Petitioners and parties in interest shall be liable for costs of the sale and proceedings relating thereto under this Code section in proportion to their respective shares in the property prior to that sale. (Code 1981, § 44-6-166.1, enacted by Ga. L. 1983, p. 1182, § 1; Ga. L. 1985, p. 149, § 44.)

Law reviews. — For annual survey of real property law, see 41 Mercer L. Rev. 317 (1989).

JUDICIAL DECISIONS

Conditions necessary before statute applicable. — Partition in kind is the rule and this statute constitutes the exceptions. Two concurring conditions are necessary before it will be applied: (1) the partition in kind cannot be made; and (2) the interest of the parties owning the land will be promoted. Anderson v. Anderson, 27 Ga. App. 513, 108 S.E. 907, cert. denied, 27 Ga. App. 835 (1921) (see O.C.G.A. § 44-6-166.1).

Provisions mandatory. — First tenant in common was not entitled to bypass the provisions of O.C.G.A. § 44-6-166.1, which provided the method for partitioning property that could not be physically divided such as the first tenant in common and the second tenant in common's sign, as the provisions of that statute were mandatory and had to be followed. Caudell v. Toccoa Inn, Inc., 261 Ga. App. 209, 582 S.E.2d 180 (2003).

"Court," meaning the judge, shall determine whether partition may be had by metes and bounds. Rodgers v. Price, 105 Ga. 67, 31 S.E. 126 (1898).

When the only question before the court is whether or not a fair and equitable divi-

sion of the land can be made by metes and bounds, the judge has the legal right to determine this question without the intervention of a jury. Jennings v. Jennings, 173 Ga. 428, 160 S.E. 405 (1931).

Requisite that court must look to interest of parties means interest of all parties; the fact that one of the parties to the application might be benefited would not justify the partition. Tucker v. Parks, 70 Ga. 414 (1883).

Petition for partition by metes and bounds sufficient. — Partition of the proceeds of the sale of the lands and tenements is in all essential particulars a partition of the lands and tenements, and it is immaterial whether the applicant prays for a partition by sale or a partition by metes and bounds. In an application in either form and with either prayer, the issues are the same. Anderson v. Anderson, 27 Ga. App. 513, 108 S.E. 907, cert. denied, 27 Ga. App. 835 (1921).

Timberland with varying percentage interests. — Court properly found that a fair and equitable division of the property could not be made by means of metes and bounds since the property consisted of 53 acres of timberland with no road frontage, the parties owned varying percentage interests of the land, the land was most suitable for timberland, and it was not feasible for a timber company to buy the smaller tracts for timber. Cheeves v. Lacksen, 273 Ga. 549, 544 S.E.2d 425 (2001).

Burden of proof is upon party asserting that equitable division of land cannot be made to affirmatively show this fact. When no evidence was introduced on the issue, and the judgment sustained the application for partition of the land in kind, the judgment will not be reversed on the ground that there was no evidence to show that the land was incapable of subdivision. Jennings v. Jennings, 173 Ga. 428, 160 S.E. 405 (1931).

Court order as to payment for property appealable. — An order of the trial court providing that a party may tender the appropriate portion of the appraised price of the property to the court by a date certain or the property will be subject to public sale is a final judgment which may be appealed directly to the Supreme Court. Lassiter Properties, Inc. v. Gresham, 258 Ga. 500, 371 S.E.2d 650 (1988).

Availability of remedy of public sale. — Even if a party in interest does not pursue the remedy under O.C.G.A. § 44-6-166.1, the petitioner may still seek a public sale under O.C.G.A. § 44-6-167 by convincing the court that a fair and equitable division of the property cannot be made by means of metes and bounds because of improvements on the property, because the premises are valuable for mining purposes or for the erection of mills or other machinery, or because the value of the entire property will be depreciated by the partition applied for. Stone v. Benton, 258 Ga. 539, 371 S.E.2d 864 (1988).

Withdrawal of petition for public sale. — Under O.C.G.A. § 44-6-166.1, a public sale of property could only be ordered by the court if the party in interest failed to tender to the court an amount necessary to ''buy out'' the petitioner before 90 days after the appraised price had been established, but that provision did not apply when the partitioning action was dismissed for lack of a petitioner and, thus, the first tenant in common was not entitled to a public sale of the sign the first tenant in common owned with the second tenant in common as the first tenant in common had withdrawn the first tenant in common's petition for a public sale and dismissed the partitioning action. Caudell v. Toccoa Inn, Inc., 261 Ga. App. 209, 582 S.E.2d 180 (2003).

Costs of upkeep, improvements, and repair of the property were not considered ''contributions'' when dividing the proceeds of the sale of the property pursuant to a written agreement between the parties which stated that the property would be divided ''to the extent of each party's contribution.'' Maree v. Phillips, 272 Ga. 52, 525 S.E.2d 94 (2000).

Partition prevented by parties' agreement. — Partition of a property was improper as the parties' agreement constituted an implied waiver of the right of partition, and a right of first refusal alone would not have satisfied the contractual obligations of the corporation seeking partition. The corporation could not seek partition because such an action was in direct contravention of the corporation's contractual obligations to put forth aggressive and professional marketing efforts to protect the investor status of a partnership, and to refrain from ''transferring … or otherwise encumbering'' the property. Mansour Props., L.L.C. v. I-85/Ga.

20 Ventures, Inc., 277 Ga. 632, 592 S.E.2d 836 (2004).

Ordering sale was within court's authority. — Under the statutes governing statutory partitioning, the notice of intention to seek partitioning was the only process necessary in order to bring a defendant into court to meet the application for partitioning, and a sale of the property was provided for when a fair and equitable division of the property was not able to have been made by means of metes and bounds; ordering the sale of the property was within the trial court's authority without the need for securing personal jurisdiction over defendant. Shields v. Gish, 280 Ga. 556, 629 S.E.2d 244 (2006).

Cited in Williams v. Conerly, 276 Ga. 651, 582 S.E.2d 1 (2003).

44-6-167. When sale of lands ordered; procedure; place of sale; notice.

In the event lands and tenements sought to be partitioned are not sold pursuant to Code Section 44-6-166.1, the court shall order a public sale of such lands and tenements. The court shall appoint three discreet persons as commissioners to conduct such sale under such regulations and upon such just and equitable terms as it may prescribe. The sale shall take place on the first Tuesday in the month, shall be at the place of public sales in the county in which the land is located, and shall be advertised in some public newspaper once a week for four weeks. This Code section shall not be construed to change the place of sale in those counties where by law sheriffs' sales are required to take place at the courthouse. (Laws 1837, Cobb's 1851 Digest, p. 584; Code 1863, § 3903; Code 1868, § 3927; Code 1873, § 4003; Code 1882, § 4003; Ga. L. 1887, p. 29, § 1; Civil Code 1895, § 4793; Ga. L. 1903, p. 40, § 1; Civil Code 1910, § 5365; Code 1933, § 85-1511; Ga. L. 1983, p. 1182, § 2.)

Editor's notes. — Provisions which, prior to the 1983 amendment of this section, appeared in the first sentence of this Code section now appear in § 44-6-166.1. Applicable case notes have been transferred to § 44-6-166.1.

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

Availability of remedy. — Even if a party in interest does not pursue the remedy under O.C.G.A. § 44-6-166.1, the petitioner may still seek a public sale under O.C.G.A. § 44-6-167 by convincing the court that a fair and equitable division of the property cannot be made by means of metes and bounds because of improvements on the property because the premises are valuable for mining purposes or for the erection of mills or other machinery, or because the value of the entire property will be depreciated by the partition applied for. Stone v. Benton, 258 Ga. 539, 371 S.E.2d 864 (1988).

When petitioner may pursue remedy of public sale. — First tenant in common was only entitled to pursue the remedy of a public sale under O.C.G.A. § 44-6-167 if the first tenant in common filed a direct action under that statute and argued that a fair and equitable division of the property, the first tenant in common and the second tenant in common's sign, could not be made under O.C.G.A. § 44-6-166.1, but since the first tenant in common did not do that and merely refiled the first tenant in common's action under O.C.G.A. § 44-6-166.1 and asserted the same claims that had been previously rejected, the trial court was entitled to award attorney fees to the second tenant in common. Caudell v. Toccoa Inn, Inc., 261 Ga. App. 209, 582 S.E.2d 180 (2003).

Application to partition certain land is a purely statutory proceeding. Nash v. Williamson, 212 Ga. 804, 96 S.E.2d 251 (1957).

Petition not made equitable merely by allegations of uncertainty of interests and difficulty of partitioning. — Allegations in a petition that there was some uncertainty about all parties having an interest in the land and praying for the appointment of a guardian ad litem for unnamed parties at interest, and alleging that the property could not be partitioned by metes and bounds, do not make the petition an equitable one for partition. Brinson v. Thornton, 220 Ga. 234, 138 S.E.2d 268 (1964).

Prayer for accounting insufficient to render action equitable. — Equity does not have jurisdiction of a purely statutory partition case merely because the application prays for an accounting as to grantors when there was no filing of a suit and summons and process. Bodrey v. Bodrey, 225 Ga. 822, 171 S.E.2d 614 (1969), overruled on other grounds, Wiley v. Wiley, 233 Ga. 824, 213 S.E.2d 682 (1975).

Notice of petition provisions inapplicable when petition prays for sale of lands. — When the petition stated an equitable cause of action for partition and accounting under former Code 1933, § 85-1511 (see O.C.G.A. § 44-6-167), the notice provisions of former Code 1933, § 85-1506 (see O.C.G.A. § 44-6-162) did not apply. Mills v. Williams, 208 Ga. 425, 67 S.E.2d 212 (1951).

Sale notice provision complied with by inserting advertising in each of four preceding calendar weeks. — Term ''once a week for four weeks'' is complied with by the insertion of the advertisement in each of the four calendar weeks preceding that in which the sale is had, although 28 days do not elapse between the date of the first insertion and the date of the sale. Heist v. Dunlap & Co., 193 Ga. 462, 18 S.E.2d 837 (1942).

Sale terms and conditions left to commissioners, subject to court review. — Statute clearly does not require the trial court to prescribe the regulations and terms governing the sale, but is directory only. Discretion as to the terms and conditions of the sale is left to the commissioners, whose actions are subject to review by the trial court in the confirmation proceedings. Wiley v. Wiley, 233 Ga. 824, 213 S.E.2d 682 (1975) (see O.C.G.A. § 44-6-167).

Discretion as to the terms and conditions of the sale is left to the commissioners, whose actions are subject to review by the trial court in the confirmation proceedings. Bernstein v. Bernstein, 235 Ga. 220, 219 S.E.2d 100 (1975).

Sale order failing to prescribe terms not invalid if nobody deceived. — Order of sale is not invalid if the order only failed to prescribe the terms and conditions of the sale; i.e., whether for cash or on terms, as long as nobody was misled or deceived by the manner in which the sale was conducted. Bernstein v. Bernstein, 235 Ga. 220, 219 S.E.2d 100 (1975).

Changes occurring after sale cannot mandate partition in kind. — Changes in conditions occurring after an order of sale which facilitate partition by metes and bounds do not mandate such a division. McClain v. McClain, 241 Ga. 162, 243 S.E.2d 879 (1978).

Costs of upkeep, improvements, and repair of the property were not considered ''contributions'' when dividing the proceeds of the sale of the property pursuant to a written agreement between the parties which stated that the property would be divided ''to the extent of each party's contribution.'' Maree v. Phillips, 272 Ga. 52, 525 S.E.2d 94 (2000).

Parties entitled to have accounts adjusted after sale. — In a suit for equitable partition, sale of the property, and satisfaction of all liens, each party is entitled to have each party's accounts and claims adjusted by the court after the sale and before the distribution of the proceeds. In so doing, the court should consider expenditures of either party for improvements to the property, taxes or other expenses, and income received by either party from the rental of the property. Baker v. Baker, 242 Ga. 525, 250 S.E.2d 436 (1978).

Attorney's fees not authorized. — Former Civil Code 1910, §§ 5365 and 5366 (see O.C.G.A. §§ 44-6-167 and 44-6-168) did not authorize the award from the fund of fees for the attorneys representing the applicants for partition. Neal v. Neal, 140 Ga. 734, 79 S.E. 849 (1913).

Sale is subject to confirmation by the court. Oswald v. Johnson, 140 Ga. 62, 78 S.E. 333, 1914 Am. Ann. Cas. 1 (1913).

Any party in interest may file objections to the confirmation at the term of the court to

which the commissioners conducting the sale make their report, if done before the confirmation. Oswald v. Johnson, 140 Ga. 62, 78 S.E. 333, 1914 Am. Ann. Cas. 1 (1913).

Jurisdiction of appeal from judgment in action involving statutory partitioning proceedings is in Supreme Court. Wiley v. Wiley, 233 Ga. 824, 213 S.E.2d 682 (1975).

Appeal not timely until judge appoints commissioners and orders sale. — In a case where a partition is sought by bringing the lands involved to sale, the objecting party may only bring the case to the Supreme Court by a proper bill of exceptions after the judge has appointed commissioners and ordered the commissioners to sell the land. Lanier v. Gay, 195 Ga. 859, 25 S.E.2d 642 (1943).

Cited in Lankford v. Milhollin, 197 Ga. 227, 28 S.E.2d 752 (1944); Wood v. W.P. Brown & Sons Lumber Co., 199 Ga. 167, 33 S.E.2d 435 (1945); Leggitt v. Allen, 85 Ga. App. 280, 69 S.E.2d 106 (1952); Liddell v. Johnson, 213 Ga. 752, 101 S.E.2d 755 (1958); Bufford v. Bufford, 221 Ga. 13, 142 S.E.2d 796 (1965); Goodman v. Georgia R.R. Bank & Trust Co., 221 Ga. 396, 144 S.E.2d 764 (1965); White v. Howell, 224 Ga. 135, 160 S.E.2d 374 (1968); Shaw v. Davis, 119 Ga. App. 801, 168 S.E.2d 853 (1969); Hames v. Shaver, 229 Ga. 412, 191 S.E.2d 861 (1972); Gray v. Hall, 233 Ga. 244, 210 S.E.2d 766 (1974); Brannon v. Simpson, 244 Ga. 58, 257 S.E.2d 541 (1979); Iteld v. Silverboard, 247 Ga. 158, 275 S.E.2d 645 (1981); Silverboard v. Iteld, 248 Ga. 589, 285 S.E.2d 182 (1981).

RESEARCH REFERENCES

Am. Jur. 2d. — 59A Am. Jur. 2d, Partition, §§ 99, 100, 131 et seq.

C.J.S. — 68 C.J.S., Partition, §§ 230 et seq, 293, 303.

ALR. — Timber rights as subject to partition, 21 ALR2d 618.

Contractual provisions as affecting right to judicial partition, 37 ALR3d 962.

44-6-168. Commissioners' return; distribution of proceeds; liability of commissioners for moneys received; contempt.

After the sale of any lands and tenements provided for in Code Section 44-6-167, the commissioners conducting the sale shall return their proceeds to the same term of the court ordering such sale if such term is still being held, and, if not, to the next term thereof, at which term the court shall order the proceeds of the sale to be divided among the several claimants in proportion to their respective interests after deducting the expenses of the proceedings. The commissioners shall be liable to rule by the superior court as sheriffs are liable for all moneys which they have or may receive for the lands sold by them and which they are required by law to return to the court for distribution; and, in case they shall fail to pay the money into court in obedience to a rule against them, they shall be immediately attached as for a contempt and imprisoned without bail until such payment is made. (Laws 1837, Cobb's 1851 Digest, p. 584; Code 1863, § 3904; Code 1868, § 3928; Code 1873, § 4004; Code 1882, § 4004; Ga. L. 1884-85, p. 54, § 1; Civil Code 1895, § 4794; Civil Code 1910, § 5366; Code 1933, § 85-1512.)

JUDICIAL DECISIONS

Allowance for attorney's fees may be made in equitable proceeding. — In a proceeding at law to partition land, the applicants are not entitled to have fees awarded to their counsel from the common fund, thus requiring their cotenants to contribute to the payment of the fees, but in an equitable proceeding for partitionment and for other

relief, an allowance for attorney's fees may be made by the court from the common fund. Cashin v. Markwalter, 208 Ga. 444, 67 S.E.2d 226 (1951).

No attorney's fees if proceeding instituted for sole benefit of plaintiff. — While the judge of the superior court in an equitable partition proceeding may, in the exercise of sound discretion, and if the circumstances justify it (as when the proceeding is prosecuted for the common benefit of all of the tenants in common), allow compensation for the plaintiff's counsel as a charge against the fund arising from the sale of the land partitioned, nevertheless, when the proceeding is instituted and prosecuted for the sole benefit of the plaintiff, no such attorney fees should be allowed. Mills v. Williams, 208 Ga. 425, 67 S.E.2d 212 (1951).

Cited in Lankford v. Milhollin, 197 Ga. 227, 28 S.E.2d 752 (1943); Leggitt v. Allen, 85 Ga. App. 280, 69 S.E.2d 106 (1952); Shaw v. Davis, 119 Ga. App. 801, 168 S.E.2d 853 (1969); Billings v. Billings, 242 Ga. 632, 250 S.E.2d 480 (1978); Silverboard v. Iteld, 248 Ga. 589, 285 S.E.2d 182 (1981).

RESEARCH REFERENCES

Am. Jur. 2d. — 59A Am. Jur. 2d, Partition, §§ 118 et seq., 148, 149, 173.

C.J.S. — 68 C.J.S., Partition, §§ 277 et seq., 293, 303.

ALR. — Allowance and apportionment of counsel fees in suit for partition, 73 ALR 16; 94 ALR2d 575.

44-6-169. Title to property sold; execution of deed of conveyance by commissioners.

Upon the sale of lands and tenements as provided for in Code Section 44-6-167, the parties in interest shall execute a title to the purchaser; and, if any of them shall fail or refuse to do so, the commissioners or any two of them shall execute a deed of conveyance to such lands and tenements to the purchaser at such sale, which deed shall be as valid and binding as if made by the parties themselves. (Laws 1837, Cobb's 1851 Digest, p. 584; Code 1863, § 3905; Code 1868, § 3929; Code 1873, § 4005; Code 1882, § 4005; Civil Code 1895, § 4795; Civil Code 1910, § 5367; Code 1933, § 85-1513.)

JUDICIAL DECISIONS

Rights of cotenants protected by right to object to sale's confirmation. — If for any reason property sold under this statute does not bring the property's fair market value, the rights of the cotenants are protected by the right to object to the confirmation of the sale. If the sale is unfair or inequitable to the parties, the court will refuse to confirm the sale and will order a resale. Lankford v. Milhollin, 200 Ga. 512, 37 S.E.2d 197 (1946) (see O.C.G.A. § 44-6-169).

Cited in Childs v. Hayman, 72 Ga. 791 (1884); Leggitt v. Allen, 85 Ga. App. 280, 69 S.E.2d 106 (1952).

RESEARCH REFERENCES

Am. Jur. 2d. — 59A Am. Jur. 2d, Partition, § 130.

C.J.S. — 68 C.J.S., Partition, §§ 14, 276.

44-6-170. Treatment of extraordinary cases; denial of sale or partition.

In any extraordinary case not covered by Code Sections 44-6-160 through 44-6-169, the court may frame its proceeding and order so as to meet the exigency of the case without forcing the parties into equity; and the court may deny a sale or partition altogether if it is manifest that the interest of each party will not be fully protected. (Orig. Code 1863, § 3906; Code 1868, § 3930; Code 1873, § 4006; Code 1882, § 4006; Civil Code 1895, § 4796; Civil Code 1910, § 5368; Code 1933, § 85-1514.)

JUDICIAL DECISIONS

It is improper to force party into equity to obtain dissolution of copartnership in property before applying a writ of partition. Jackson v. Deese, 35 Ga. 84 (1866).

That applicant holds deed as security only is patent reason for denying applicant's petition, unless special reason can be shown for the applicant's not using the applicant's appropriate statutory remedy. Welch v. Agar, 84 Ga. 583, 11 S.E. 149, 20 Am. St. R. 380 (1890).

Cashier's check partitionable. — Novelty of the procedure in partitioning a cashier's check payable to the plaintiff and the defendant jointly, and the probable existence of other remedies to determine the title or rights of the parties in the fund, would not defeat the remedy sought, which is given by this statute and others. English v. Poole, 31 Ga. App. 581, 121 S.E. 589 (1924) (see O.C.G.A. § 44-6-170).

Changes occurring after sale cannot mandate partition in kind. — Changes in conditions occurring after an order of sale which facilitate partition by metes and bounds do not mandate such a division. McClain v. McClain, 241 Ga. 162, 243 S.E.2d 879 (1978).

Authority to hire timber cruise. — In a statutory partitioning of land, the trial court did not err in granting the partitioners authority to hire a timber cruise to assess the value of timber. Hart v. Hart, 245 Ga. App. 734, 538 S.E.2d 814 (2000).

Cited in Tucker v. Parks, 70 Ga. 414 (1883); Brown v. Mooney, 108 Ga. 331, 33 S.E. 942 (1899); Smith v. Smith, 133 Ga. 170, 65 S.E. 414 (1909); Leggitt v. Allen, 85 Ga. App. 280, 69 S.E.2d 106 (1952); White v. Howell, 117 Ga. App. 778, 161 S.E.2d 892 (1968); Sanders v. Darnell, 238 Ga. 362, 233 S.E.2d 180 (1977).

RESEARCH REFERENCES

Am. Jur. 2d. — 59A Am. Jur. 2d, Partition, §§ 64, 65.

C.J.S. — 68 C.J.S., Partition, § 24.

ALR. — Right of judgment creditor of cotenant to maintain partition, 25 ALR 105.

Probate of will as condition precedent to suit for partition by devises, 141 ALR 1311.

Power of guardian to agree to, or of court to approve, voluntary partition between infant or incompetent and cotenant, 157 ALR 755.

44-6-171. Setting aside judgment by parties under disability, absent, or not notified; time limitations; conclusiveness of judgment; effect of proceedings on bona fide purchaser.

When proceedings have been instituted and judgment of the partition has been rendered according to the regulations prescribed in this part and if any one of the parties in interest is a minor or a mentally ill or retarded person who has no guardian, or is absent from the state during such

proceeding, or has not been notified thereof, such minor or mentally ill or retarded person may, within 12 months after coming of age, after restoration of mind, or after having a guardian appointed, as the case may be, and such absent or unnotified party may, at any time within 12 months after rendition of the judgment, move the court to set aside the judgment on any of the grounds upon which a party notified and free from disabilities might have resisted the judgment upon the hearing as authorized by Code Section 44-6-165. The issue shall be tried and the subsequent proceedings shall be the same as is provided for in cases of objections filed to the return of the partitioners before judgment. If such motion to set aside the judgment is not made within the time specified in this Code section, such judgment shall be as binding and conclusive upon such minor, mentally ill or retarded person, or absent or unnotified party as if he had been notified, present, or free from disability. In no event shall such subsequent proceedings affect the title of a bona fide purchaser under a sale ordered by the court. (Laws 1767, Cobb's 1851 Digest, p. 582; Code 1863, § 3907; Code 1868, § 3931; Code 1873, § 4007; Code 1882, § 4007; Civil Code 1895, § 4797; Civil Code 1910, § 5369; Code 1933, § 85-1515.)

JUDICIAL DECISIONS

Section provides for case of one who is resident, but is temporarily absent from state. Childs v. Hayman, 72 Ga. 791 (1884) (see O.C.G.A. § 44-6-171).

Applicability to cotenant absent from state. — This statute is not dependent on the absence of service, but the statutory provisions will apply when a party at interest is either absent from the state or has not been notified. Thus, even though a cotenant may be served, yet if the cotenant is absent from the state, the cotenants rights will be presumed so materially affected that a judgment may be set aside at any time within 12 months. Lankford v. Milhollin, 197 Ga. 227, 28 S.E.2d 752 (1944) (see O.C.G.A. § 44-6-171).

Counsel's presence equivalent of party's presence. — Presence of counsel who has full authority to represent a party, and who litigates the issues then for trial, is the equivalent of the party's presence. Lankford v. Milhollin, 201 Ga. 594, 40 S.E.2d 376 (1946).

Unnotified, absent, or disabled parties have 12 months to move to set aside judgment. — When proceedings have been instituted and judgment of partition had thereon, and any one of the parties in interest is absent from the state during the proceeding, or has not been notified, such absent or unnotified party may at any time within 12 months move to set aside the judgment, on any ground on which the party might have resisted the same on the hearing, and the issue shall be tried and the subsequent proceedings shall be the same as pointed out in cases of objections filed to the return of the partitioners before judgment. Lankford v. Milhollin, 197 Ga. 227, 28 S.E.2d 752 (1944).

Parties not notified, or absent from the state, or laboring under any disability recognized by law, have 12 months in which to move to set aside the judgment upon any ground which might have been urged by such parties upon the hearing for partition. Barron v. Lovett, 207 Ga. 131, 60 S.E.2d 458 (1950).

Cited in Leggitt v. Allen, 85 Ga. App. 280, 69 S.E.2d 106 (1952).

RESEARCH REFERENCES

Am. Jur. 2d. — 59A Am. Jur. 2d, Partition, §§ 128, 141 et seq.

C.J.S. — 68 C.J.S., Partition, §§ 24, 130.

ALR. — Right to partition as against infants, 96 ALR 1278.

Power of guardian to agree to, or of court to approve, voluntary partition between infant or incompetent and cotenant, 157 ALR 755.

44-6-172. Partition of realty by life tenants — Effect on other parties; conditions.

In all cases where an undivided interest in real estate has been or may be granted or devised to a person for his lifetime with remainder or reversion to others, such life tenant may compel a partition pursuant to the partition laws of this state which may, upon a proper judgment of the superior court based upon an application therefor, bind all parties interested whether in possession, reversion, or remainder and whether or not those entitled to take are in being, provided the property is capable of fair and equitable partition and such fact is adjudicated by the court in such proceeding. No sale of the property may be made or had under such application for partition, and the terms of the grant or devise shall otherwise remain in full force and effect. (Ga. L. 1959, p. 189, § 1; Ga. L. 1961, p. 228, § 1.)

Law reviews. — For article surveying recent legislative and judicial developments in Georgia's real property laws, see 31 Mercer L. Rev. 187 (1979).

JUDICIAL DECISIONS

Statute relates only to owner of undivided interest in life estate in real property and not to the sole owner of a life estate. Williams v. Colleran, 230 Ga. 56, 195 S.E.2d 413 (1973) (see O.C.G.A. § 44-6-172).

Prior right to sell land unaffected by statute. — If a life tenant had a right to sell the land upon petition prior to the enactment of this statute, it was not taken away by this statute. Williams v. Colleran, 230 Ga. 56, 195 S.E.2d 413 (1973) (see O.C.G.A. § 44-6-172).

Life tenant may not acquire portion in fee. — Although a life tenant, in the proper circumstances, may seek partition, it may not be accomplished by the life tenant acquiring a portion of the land in fee simple. McGhee v. Brown, 244 Ga. 478, 260 S.E.2d 873 (1979).

Cited in Sanders v. Darnell, 238 Ga. 362, 233 S.E.2d 180 (1977); Billings v. Billings, 242 Ga. 632, 250 S.E.2d 480 (1978).

RESEARCH REFERENCES

Am. Jur. 2d. — 59A Am. Jur. 2d, Partition, § 32.

C.J.S. — 68 C.J.S., Partition, § 74.

ALR. — Right to, and effect of, partition of undivided interests held respectively in fee and in life estate, with remainder, 12 ALR 644; 134 ALR 661.

Right to partition of different tracts of land in same proceeding, 65 ALR 893.

Contractual provisions as affecting right to judicial partition, 37 ALR3d 962.

44-6-173. Partition of realty by life tenants — Appointment of guardians ad litem; service of notice of application; time for answer.

(a) Under the partition proceeding provided in Code Section 44-6-172, the court shall appoint a guardian ad litem to act for and represent all unborn remaindermen or reversioners on such terms as may be ordered by the court. When interested minors are not represented by a guardian, the court shall also appoint a guardian ad litem to act for and represent such minors.

(b) The guardian ad litem shall be served with a notice of the application for partition. After the application has been filed in the superior court, all other parties shall also be served with notice of the application for partition. The guardian ad litem and all other parties who have been served with the notice shall answer and plead to the application for partition within 20 days after the service of the notice; provided, however, that the court may authorize the guardian ad litem to acknowledge service and waive the 20 days' notice. (Ga. L. 1961, p. 228, § 2.)

JUDICIAL DECISIONS

Statute relates only to owner of undivided interest in life estate in real property and not to the sole owner of a life estate. Williams v. Colleran, 230 Ga. 56, 195 S.E.2d 413 (1973) (see O.C.G.A. § 44-6-173).

RESEARCH REFERENCES

Am. Jur. 2d. — 59A Am. Jur. 2d, Partition, § 98.

C.J.S. — 68 C.J.S., Partition, §§ 74, 165.

ALR. — Right to partition as against infants, 96 ALR 1278.

44-6-174. Partition of realty by life tenants — Cumulative effect.

The right of partition provided by Code Sections 44-6-172 and 44-6-173 shall be cumulative to existing laws. (Ga. L. 1961, p. 228, § 3.)

JUDICIAL DECISIONS

Statute relates only to owner of undivided interest in life estate in real property and not to the sole owner of a life estate. Williams v. Colleran, 230 Ga. 56, 195 S.E.2d 413 (1973) (see O.C.G.A. § 44-6-174).

Prior right to sell land unaffected by statute. — If a life tenant had a right to sell the land upon petition prior to the enactment of this statute, it was not taken away by this statute. Williams v. Colleran, 230 Ga. 56, 195 S.E.2d 413 (1973) (see O.C.G.A. § 44-6-174).

ARTICLE 8

JOINT TENANCY WITH SURVIVORSHIP

44-6-190. Creating joint tenancy with survivorship; severance; effect of Code section on other laws.

(a) Deeds and other instruments of title, including any instrument in which one person conveys to himself and one or more other persons, any instrument in which two or more persons convey to themselves or to themselves and another or others, and wills, taking effect after January 1, 1977, may create a joint interest with survivorship in two or more persons. Any instrument of title in favor of two or more persons shall be construed to create interests in common without survivorship between or among the owners unless the instrument expressly refers to the takers as ''joint tenants,'' ''joint tenants and not as tenants in common,'' or ''joint tenants with survivorship'' or as taking ''jointly with survivorship.'' Any instrument using one of the forms of expression referred to in the preceding sentence or language essentially the same as one of these forms of expression shall create a joint tenancy estate or interest that may be severed as to the interest of any owner by the recording of an instrument which results in his lifetime transfer of all or a part of his interest; provided, however, that, if all persons owning joint tenant interests in a property join in the same recorded lifetime transfer, no severance shall occur.

(b) Neither this Code section nor Code Section 44-6-120 shall be construed to repeal, modify, or limit in any way either Code Section 14-5-8, relative to joint tenancy of shares and securities of corporations, or Article 8 of Chapter 1 of Title 7, relative to multiple-party accounts in financial institutions, or any other law relative to multiple-party accounts in financial institutions. Neither this Code section nor Code Section 44-6-120 shall apply to any document, transaction, or right to which Code Section 14-5-8 applies or to multiple-party deposit accounts in any financial institution. (Laws 1828, Cobb's 1851 Digest, p. 545; Ga. L. 1853-54, p. 70, § 1; Code 1863, § 2281; Code 1868, § 2274; Code 1873, § 2300; Code 1882, § 2300; Civil Code 1895, § 3142; Civil Code 1910, § 3722; Code 1933, § 85-1002; Ga. L. 1976, p. 1388, § 10; Ga. L. 1976, p. 1438, § 2; Ga. L. 1980, p. 753, § 2; Ga. L. 1984, p. 1335, § 2; Ga. L. 1985, p. 149, § 44.)

Cross references. — Presumption of existence of joint tenancy with right of survivorship when share certificates or other securities are issued or transferred to two or more persons in joint tenancy on books or records of corporation, § 14-5-8.

Law reviews. — For article arguing for reestablishment of the true joint tenancy with survivorship in Georgia prior to the 1976 amendment to this Code section, see 3 Ga. St. B.J. 29 (1966). For article discussing joint tenancy arrangements as a means of avoiding probate, see 6 Ga. L. Rev. 74 (1971). For article discussing joint ownership of assets and severance of such ownership, see 14 Ga. St. B.J. 14 (1977). For article discussing several aspects of joint tenancy with right of survivorship, see 16 Ga. St. B.J. 54 (1979). For article, ''Joint Bank Accounts: A Different Form of Joint Tenancy,'' see 17

Ga. St. B.J. 184 (1981). For annual survey article on real property law, see 50 Mercer L. Rev. 307 (1998). For survey article on real property law, see 60 Mercer L. Rev. 345 (2008).

For note discussing the treatment of joint bank accounts in Georgia, with regard to survivorship and testamentary effect, prior to the enactment of the Financial Institutions Code of Georgia, see 7 Ga. St. B.J. 370 (1971).

For comment on Eppes v. Locklin, 222 Ga. 86, 149 S.E.2d 148 (1966), see 1 Ga. L. Rev. 331 (1967).

JUDICIAL DECISIONS

Common law doctrine abolished by Constitution of 1777. — Common law doctrine of survivorship among joint tenants was abolished by the Constitution of 1777. Lowe v. Brooks, 23 Ga. 325 (1857); Carswell v. Schley, 56 Ga. 101 (1876). See also Bryan v. Averett, 21 Ga. 401, 68 Am. Dec. 464 (1857); Harrison v. Harrison, 105 Ga. 517, 31 S.E. 455, 70 Am. St. R. 60 (1898); Equitable Loan & Sec. Co. v. Waring, 117 Ga. 599, 44 S.E. 320, 97 Am. St. R. 177, 62 L.R.A. 93 (1903).

Purpose of Act of 1828. — When the legislature in 1828 interfered with the doctrine of the common law as to survivorship, the language used by the legislature shows that the legislature did so, not as believing the doctrine to be in force, but out of abundant caution lest it might be in force. Lowe v. Brooks, 23 Ga. 325 (1857).

Purpose of Act of 1853-54. — Act of 1828 confined itself to estates in ''lands.'' In 1854, the legislature extended the Act ''to personal estate held in joint tenancy.'' Lowe v. Brooks, 23 Ga. 325 (1857).

Judicial recognition of joint estates. — Although a joint tenancy with right of survivorship was abolished by statute, the Georgia courts continued to recognize such joint estates if expressly created. In 1976, the General Assembly superseded former Code 1933, § 85-1002 with Ga. L. 1976, p. 1388 (see O.C.G.A. § 44-6-190), which recognizes this fact. Barnes v. Mance, 246 Ga. 314, 271 S.E.2d 359 (1980).

Creation of right of survivorship prior to 1976. — Prior to 1976, although joint tenancy as it existed at common law was abolished, one could clearly intend by the language in one's will to create a right of survivorship, which could not be destroyed by severance. The transferees would hold vested life estates with cross contingent remainders. Williams v. Studstill, 251 Ga. 466, 306 S.E.2d 633 (1983).

Joint survivorship may be created by deed to oneself and another. Barnes v. Mance, 246 Ga. 314, 271 S.E.2d 359 (1980).

Deed entitled ''Warranty Deed with right of survivorship'' expressly created such an estate in father and his son, and therefore the land became the son's at father's death, and was not part of father's estate. Barnes v. Mance, 246 Ga. 314, 271 S.E.2d 359 (1980).

Enforcement of right of survivorship. — When created by contract, the right of survivorship will be enforced. Commercial Banking Co. v. Spurlock, 238 Ga. 123, 231 S.E.2d 748 (1977).

Joint tenancy not terminated by tenant's incapacity. — Joint tenancies in bank and stock investment accounts and in real property did not terminate as a matter of law when one of the joint tenants was declared incapacitated and a guardian was appointed for that tenant's person and property. A guardian, unlike a trustee, has no beneficial title in the ward's estate, but is merely a custodian or manager. Moore v. Self, 222 Ga. App. 71, 473 S.E.2d 507 (1996).

Will transfer does not qualify as lifetime transfer to sever joint tenancy. — A will transfers property interests only when the will has been probated after the testator's death, so a will cannot qualify as an instrument making a lifetime transfer capable of severing a joint tenancy for purposes of O.C.G.A. § 44-6-190(a). Harbin v. Harbin, 261 Ga. App. 244, 582 S.E.2d 131 (2003).

Defendant widow was properly granted summary judgment on plaintiff son's claim to reform certain deeds to two tracts of real property when the son wanted the deeds to reflect the intention of the decedent that the son receive part of the property pursuant to an attempted devise in the decedent's will. The deeds created a joint tenancy with a right of survivorship in the decedent and the widow in compliance with O.C.G.A. § 44-6-190(a), and, since the will did not qualify as a lifetime transfer of the property

so as to sever the joint tenancy and there was no proof of mutual mistake or unilateral mistake combined with fraud or inequitable conduct to justify reforming the deed in equity, the widow became the sole owner of the property when the decedent died, and the property never became part of the decedent's estate upon the decedent's death; the widow's consent to probate the will did not constitute an admission that the devise was valid. Harbin v. Harbin, 261 Ga. App. 244, 582 S.E.2d 131 (2003).

Joint tenancy not severed by execution of deed to secure debt. — Execution of a deed to secure debt by a joint tenant in real property is not such a transfer of all or a part of the grantor's interest in the property as would sever the joint tenancy with right of survivorship. Biggers v. Crook, 283 Ga. 50, 656 S.E.2d 835 (2008).

Deed to secure debt executed by a joint tenant with right of survivorship under O.C.G.A. § 44-6-190 did not sever the joint tenancy. Thus, when a decedent executed a deed to secure debt on property the decedent held jointly with a surviving sibling, and the security agreement encumbered the decedent's interest only, the decedent's death made the sibling the sole owner of the property, and the deed to secure debt was void. Biggers v. Crook, 283 Ga. 50, 656 S.E.2d 835 (2008).

Cited in Lee v. State, 62 Ga. App. 556, 8 S.E.2d 706 (1940); Lewis v. Patterson, 191 Ga. 348, 12 S.E.2d 593 (1940); Lee v. State, 64 Ga. App. 290, 13 S.E.2d 79 (1941), commented on in 1 Ga. L. Rev. 331 (1967); Eppes v. Locklin, 222 Ga. 86, 149 S.E.2d 148 (1966); Sams v. McDonald, 117 Ga. App. 336, 160 S.E.2d 594 (1968); Brown v. Five Points Parking Ctr., 121 Ga. App. 819, 175 S.E.2d 901 (1970); Savannah Bank & Trust Co. v. Keane, 126 Ga. App. 53, 189 S.E.2d 702 (1972); Tri-City Fed. Sav. & Loan Ass'n v. Evans, 132 Ga. App. 735, 209 S.E.2d 20 (1974); Eppes v. Wood, 243 Ga. 835, 257 S.E.2d 259 (1979); State v. Jackson, 197 Ga. App. 619, 399 S.E.2d 88 (1990); Wallace v. Meehan, 162 Bankr. 367 (Bankr. S.D. Ga. 1993); Mathis v. Hammond, 268 Ga. 158, 486 S.E.2d 356 (1997).

RESEARCH REFERENCES

Am. Jur. 2d. — 20 Am. Jur. 2d, Cotenancy and Joint Ownership, § 1 et seq.

C.J.S. — 26A C.J.S., Deeds, §§ 262, 267, 277. 41 C.J.S., Husband and Wife, §§ 39, 40. 86 C.J.S., Tenancy in Common, § 6 et seq.

ALR. — Effect on joint estate, community estate, or estate by entireties, of death of both tenants in same disaster, 18 ALR 105.

Character of interests of husband and wife in purchase-money mortgage on sale of estate by entireties, 30 ALR 905.

Divorce as affecting estate by entireties, 52 ALR 890; 59 ALR 718.

Right of survivorship in respect of bank deposit as affected by statutes abolishing joint tenancy and survivorship, 85 ALR 282.

Rights and remedies of judgment creditor or of purchaser under execution, in respect of estate in real property held in joint tenancy, 111 ALR 171.

Lease to two or more as creating a tenancy in common or a joint tenancy, 113 ALR 573.

Right of creditors of one spouse, either before or after death of other spouse, to attack conveyance or encumbrance of estate by entireties by both spouses as in fraud of creditors, 121 ALR 1028.

Statutory lien on interest of joint tenant as severing joint tenancy, 134 ALR 957.

Statute relating to joint tenancy in personal property as applicable to choses in action, 144 ALR 1465.

Mental incompetency of one spouse as affecting transfer or encumbrance of community property, homestead property, or estate by the entireties, 155 ALR 306.

Right of survivor of parties to bank account in their joint names as affected by provision excluding his right of withdrawal during the lifetime of the other party, 155 ALR 1084.

Use of word ''joint'' or ''jointly'' in provision of deed other than the granting or habendum clause as indicating intent to create a joint tenancy rather than one in common between the grantees, 157 ALR 566.

Interest of spouse in estate by entireties as subject to satisfaction of his or her individual debt, 166 ALR 969; 75 ALR2d 1172.

Gift over to surviving members of a group of share of deceased member as creating absolute interest in last survivor, 166 ALR 1277.

Creation of right of survivorship by instrument ineffective to create estate by entireties or joint tenancy, 1 ALR2d 247.

Survivor's rights to contents of safe-deposit box leased or used jointly with another, 14 ALR2d 948.

Transmutation of community funds or property into property held by spouses in joint tenancy, 30 ALR2d 1241.

Character of tenancy created by owner's conveyance to himself and another, or to another alone, of an undivided interest, 44 ALR2d 595.

What constitutes a devise or bequest in joint tenancy notwithstanding statute raising a presumption against joint tenancy, 46 ALR2d 523.

Estates by entirety in personal property, 64 ALR2d 8; 22 ALR4th 459.

What acts by one or more of joint tenants will sever or terminate the tenancy, 64 ALR2d 918; 39 ALR4th 1068.

Construction of devise to persons as joint tenants and expressly to the survivor of them, or to them ''with the right of survivorship,'' 69 ALR2d 1058.

Estate by entireties as affected by statute declaring nature of tenancy under grant or devise to two or more persons, 32 ALR3d 570.

Proceeds or derivatives of real property held by entirety as themselves held by entirety, 22 ALR4th 459.

Contract of sale or granting of option to purchase, to third party, by both or all of joint tenants or tenants by entirety as severing or terminating tenancy, 39 ALR4th 1068.

Judgment lien or levy of execution on one joint tenant's share or interest as severing joint tenancy, 51 ALR4th 906.

ARTICLE 9

UNIFORM STATUTORY RULE AGAINST PERPETUITIES

Law reviews. — For article, ''Georgia's Proposed Dynasty Trust: Giving the Dead Too Much Control,'' see 35 Ga. L. Rev. 1 (2000).

44-6-200. Short title.

This article shall be known and may be cited as the ''Uniform Statutory Rule Against Perpetuities.'' (Code 1981, § 44-6-200, enacted by Ga. L. 1990, p. 1837, § 2.)

Law reviews. — For article pointing out potential problems with the rule against perpetuities in drafting wills containing conditions based on probate, see 3 Ga. St. B.J. 407 (1967). For article discussing options to purchase realty in Georgia, with respect to the rule against perpetuities, see 8 Ga. St. B.J. 229 (1971). For article surveying legislative and judicial developments in Georgia's will, trusts, and estate laws, see 31 Mercer L. Rev. 281 (1979). For article, ''The Rule Against Perpetuities as Applied to Georgia Wills and Trusts,'' see 16 Ga. L. Rev. 235 (1982). For article, ''Private Trusts for the Provision of Private Goods,'' see 37 Emory L.J. 295 (1988). For article, ''Birth After Death: Perpetuities and the New Reproductive Technology,'' see 38 Ga. L. Rev. 575 (2004).

For note on options appendant exemptions in the Rule of Perpetuities, see 33 Mercer L. Rev. 443 (1981). For note on 1990 enactment of this article, see 7 Ga. St. U.L. Rev. 343 (1990).

For comment on Regents of Univ. Sys. v. Trust Co., 186 Ga. 498, 198 S.E. 345 (1938), see 1 Ga. B.J. 52 (1939). For comment criticizing Williams v. S.M. High Co., 200 Ga. 230, 36 S.E.2d 667 (1946), holding perpetual right of renewal in lease granted to corporation did not violate rule against perpetuities, see 8 Ga. B.J. 420 (1946). For comment on Southern Airways Co. v. DeKalb County, 216 Ga. 358, 116 S.E.2d 602 (1961), see 24 Ga. B.J. 142 (1961). For comment on Lanier v. Lanier, 218 Ga. 137, 126 S.E.2d 776 (1962), executory interests and the rule against perpetuities, see 14 Mercer L. Rev. 275 (1962). For comment on Lanier v. Lanier, 218 Ga. 137, 126 S.E.2d 776

(1962), see 25 Ga. B.J. 422 (1963). For comment on Burton v. Hicks, 220 Ga. 29, 136 S.E.2d 759 (1964), see 1 Ga. St. B.J. 361 (1965). For comment, ''Proposed Legislation for Property's Twilight Zone: Time Sharing in Georgia,'' see 34 Mercer L. Rev. 403 (1982).

JUDICIAL DECISIONS

Analysis

General Consideration
Period of Rule
Application of Rule
1. In General
2. Test Used
3. Subsequent Construction of Document
Charities
Leases and Purchase Options

General Consideration

Editor's notes. — In light of the similarity of the provisions, decisions under former Orig. Code 1863, § 2249, Code 1873, § 2267, Civil Code 1895, § 3102, Civil Code 1910, § 3678, Code 1933, § 85-707, and § 44-6-1 [repealed], are included in the annotations for this Code section.

Legislative intent. — Intention of the legislature was to prevent testators and others from rendering estates unalienable within the limits prescribed by the section. Hollifield v. Stell, 17 Ga. 280 (1855) (decided under former Orig. Code 1863, § 2249).

Rule against perpetuities is an expression of public policy as determined by the Georgia General Assembly. Thomas v. Murrow, 245 Ga. 38, 262 S.E.2d 802 (1980) (decided under former Code 1933, § 85-707).

Section is statement of common law. — Rule against perpetuities, as codified in Georgia, is recognized as a statement of the common-law rule. Burt v. Commercial Bank & Trust Co., 244 Ga. 253, 260 S.E.2d 306 (1979) (decided under former Code 1933, § 85-707).

Rule against perpetuities not mere rule of construction. — Rule against perpetuities is not a rule of construction but a positive mandate of law to be obeyed irrespective of the question of intention, and is to be applied even if the accomplishment of the expressed intent of the testator is made impossible. Thomas v. Citizens & S. Nat'l Bank, 224 Ga. 572, 163 S.E.2d 823 (1968) (decided under former Code 1933, § 85-707).

Rule against perpetuities is a positive mandate of law and is not a mere rule of construction. Lufburrow v. Williams, 152 Ga. App. 674, 263 S.E.2d 535 (1979) (decided under former Code 1933, § 85-707).

Rule against perpetuities is a rule against remoteness of vesting of interests. Walker v. Bogle, 244 Ga. 439, 260 S.E.2d 338 (1979) (decided under former Code 1933, § 85-707).

Rule is for the purpose of preventing the creation of remote future interests in estates. Parker v. Churchill, 104 Ga. 122, 30 S.E. 642 (1898) (decided under former Civil Code 1895, § 3102).

Rule concerns remoteness of vesting. — Rule against perpetuities deals with the vesting of an estate rather than with the postponement of possession, though it may sometimes have been applied to delay possession. Wright v. Hill, 140 Ga. 554, 79 S.E. 546 (1913) (decided under former Civil Code 1910, § 3678).

Rule against perpetuities is a rule against remoteness of vesting, not a rule for invalidating interests which last too long. Burt v. Commercial Bank & Trust Co., 244 Ga. 253, 260 S.E.2d 306 (1979) (decided under former Code 1933, § 85-707).

Effect of rule against perpetuities. — Rule against perpetuities places time limits on the vesting of future interests; the rule also seeks to protect the free alienability of property, although the restraint may be more indirect than a pure restraint on alienation which is against public policy even if confined in time. Shiver v. Benton, 251 Ga. 284, 304 S.E.2d 903 (1983) (decided under former § 44-6-1).

General Consideration (Cont'd)

Rule against perpetuities prevents the tying up of property for an indefinite period and thus destroying the property's salability. An interest vested in a class that is subject to open so as to let in persons born during the existence of the preceding estate, because the estate cannot be sold so as to bar the interests of the unborn members of the class, just as effectively ties up property and prevents the property's being freely sold as if the interests created were contingent. Landrum v. National City Bank, 210 Ga. 316, 80 S.E.2d 300 (1954) (decided under former Code 1933, § 85-707).

Thrust of the rule is to encourage the right of free dealings in real estate interests. St. Regis Paper Co. v. Brown, 247 Ga. 361, 276 S.E.2d 24 (1981) (decided under former Code 1933, § 85-707).

No encumbrance of title. — Rule against perpetuities is one of the most beneficent provisions of the law relative to estates. Nothing could interfere more with commerce in lands than for the title to be encumbered with an indefinite succession. Thomas v. Citizens & S. Nat'l Bank, 224 Ga. 572, 163 S.E.2d 823 (1968) (decided under former Code 1933, § 85-707).

Application of section. — This section should always be applied in construing a will to determine whether it is inconsistent with the law. Sheats v. Johnson, 229 Ga. 150, 189 S.E.2d 856 (1972) (decided under former Code 1933, § 85-707).

Time for application of section. — Devise, bequest, or grant is to be first construed, and then the rule applied. Parker v. Churchill, 104 Ga. 122, 30 S.E. 642 (1898) (decided under former Civil Code 1895, § 3102).

"Wait and see" alternative rejected. — Goals of certainty and early vesting would not be served by adopting the "wait and see" approach, an alternative to the rule against perpetuities which permits a court to consider the actual sequence of events occurring after the creation of the interest. Pound v. Shorter, 259 Ga. 148, 377 S.E.2d 854 (1989) (decided under former § 44-6-1).

Term "his lifetime" in deed construed. — When a deed conveyed land to D, "heirs and assigns, his lifetime, and then to the lawful heirs of his body, then to their heirs and assigns," to have and to hold the same to "said party of the second part, his heirs, executors, administrators, and assigns, in fee simple;" in view of the words "his lifetime," the deed conveyed only a life estate to D, with the remainder in fee simple to D's children. English v. Davis, 195 Ga. 89, 23 S.E.2d 394 (1942) (decided under former Code 1933, § 85-707).

Cited in Robinson v. McDonald, 2 Ga. 116 (1847); Carlton v. Price, 10 Ga. 495 (1851); Dudley v. Porter, 16 Ga. 613 (1855); Gibson v. Hardaway, 68 Ga. 370 (1882); Wright v. Hill, 140 Ga. 554, 79 S.E. 546 (1913); Patterson v. Patterson, 147 Ga. 44, 92 S.E. 882 (1917); Nottingham v. McKelvey, 149 Ga. 463, 100 S.E. 371 (1919); Curles v. Wade & Brimberry, 151 Ga. 142, 106 S.E. 1 (1921); Roberts v. Wadley, 156 Ga. 35, 118 S.E. 664 (1923); Bramblett v. Trust Co., 182 Ga. 87, 185 S.E. 72 (1936); Citizens & S. Nat'l Bank v. Howell, 186 Ga. 47, 196 S.E. 741 (1938); Boykin v. Bradley, 192 Ga. 212, 14 S.E.2d 734 (1941); Folds v. Hartry, 201 Ga. 783, 41 S.E.2d 142 (1947); Bussey v. Bussey, 208 Ga. 760, 69 S.E.2d 569 (1952); Cummings v. Cummings, 89 Ga. App. 529, 80 S.E.2d 204 (1954); Southern Airways Co. v. DeKalb County, 101 Ga. App. 689, 115 S.E.2d 207 (1960); Burton v. Hicks, 220 Ga. 29, 136 S.E.2d 759 (1964); Brown v. McInvale, 118 Ga. App. 375, 163 S.E.2d 854 (1968); Trammell v. Elliott, 230 Ga. 841, 199 S.E.2d 194 (1973); National Bank v. First Nat'l Bank, 234 Ga. 734, 218 S.E.2d 23 (1975); Capers v. Camp, 244 Ga. 7, 257 S.E.2d 517 (1979); Stephens v. Trust for Pub. Land, 475 F. Supp. 2d 1299 (N.D. Ga. 2007).

Period of Rule

All interests must vest within period of rule. — Requirement of the rule against perpetuities is not that all interests be vested at the death of the testatrix, but that all interests become vested within the period of the rule. Burt v. Commercial Bank & Trust Co., 244 Ga. 253, 260 S.E.2d 306 (1979) (decided under former Code 1933, § 85-707).

Contingent estate, too remote, is void. — When there is a possibility that the limitations contained in the will of the deceased would extend through lives not in being when the limitations commenced, or for a longer time than is permitted by the rule against perpetuities, those limitations that

are too remote are illegal and void, and the last legal takers will become entitled to the trust estate in fee simple. Landrum v. National City Bank, 210 Ga. 316, 80 S.E.2d 300 (1954) (decided under former Code 1933, § 85-707).

When a will seeks to set up a trust for the benefit of a number of persons as well as institutions, but the duration of the life of anyone in being constitutes no part of the specified duration of the trust, and it is provided therein that it shall not endure for more than 25 years, it is a clear violation of the rule against perpetuities, and the trust is absolutely void. Fuller v. Fuller, 217 Ga. 316, 122 S.E.2d 234 (1961) (decided under former Code 1933, § 85-707).

When a future estate is contingent and the event upon which the contingency is based may occur beyond the rule against perpetuities, the estate is void for remoteness. Thomas v. Citizens & S. Nat'l Bank, 224 Ga. 572, 163 S.E.2d 823 (1968) (decided under former Code 1933, § 85-707).

When a will establishing a trust provides that the remainder interest vests in those grandchildren in life at the time the youngest has completed his or her education, the provision is inconsistent with subsection (a) of this section. Sheats v. Johnson, 229 Ga. 150, 189 S.E.2d 856 (1972) (decided under former Code 1933, § 85-707).

Common law rule is life in being plus 21 years. — In order to constitute a good and valid executory bequest or devise, the limitation over must be confined to a stated period, to wit, to a life or lives in being, and 21 years afterwards, to which may be added a few months more to reach the case of a posthumous child. Carlton v. Price, 10 Ga. 495 (1851) (decided under prior law).

Common law rule is that no interest is good unless it must vest, if at all, not later than 21 years after some life in being at the creation of the interest. Burt v. Commercial Bank & Trust Co., 244 Ga. 253, 260 S.E.2d 306 (1979) (decided under former Code 1933, § 85-707).

With no life in being, limit is 21 years. — When the vesting of a gift is not limited upon the life of any person, the term cannot be longer than 21 years. Perkins v. Citizens & S. Nat'l Bank, 190 Ga. 29, 8 S.E.2d 28 (1940) (decided under former Code 1933, § 85-707).

When no life in being forms any part of the period of suspension or postponement of the time when the estate or interest is to become vested, the limit of time under the rule against perpetuities is 21 years. Murphy v. Johnston, 190 Ga. 23, 8 S.E.2d 23 (1940); St. Regis Paper Co. v. Brown, 155 Ga. App. 679, 272 S.E.2d 544 (1980), rev'd on other grounds, 247 Ga. 361, 276 S.E.2d 24 (1981) (decided under former Code 1933, § 85-707).

When the future estate created is not tied to any life in being, the interest must become vested within 21 years. St. Regis Paper Co. v. Brown, 247 Ga. 361, 276 S.E.2d 24 (1981) (decided under former Code 1933, § 85-707).

Trust may last beyond period of rule. — Trust does not violate the rule against perpetuities when the interests of the beneficiaries vest within the period of the rule even though the trust remains in effect beyond the period of the rule. Burt v. Commercial Bank & Trust Co., 244 Ga. 253, 260 S.E.2d 306 (1979) (decided under former Code 1933, § 85-707).

Some time limit for the enforcement of a first refusal right is desirable. Shiver v. Benton, 251 Ga. 284, 304 S.E.2d 903 (1983) (decided under former § 44-6-1).

Application of Rule

1. In General

Rule inapplicable to restrictive covenants. — Rule against perpetuities deals with estates in land and the vesting of estates, and does not relate to restrictive covenants. Reeves v. Comfort, 172 Ga. 331, 157 S.E. 629 (1931); McKinnon v. Neugent, 225 Ga. 215, 167 S.E.2d 593 (1969) (decided under former Civil Code 1910, § 3678 and Code 1933, § 85-707).

Rule inapplicable to vested remainders or reversions. — As vested remainders are not subject to the rule against perpetuities, it follows that the rule against perpetuities does not apply to reversions. A grantor or a testator may create a vested estate for any number of years, and such estate will not be destroyed by the rule against perpetuities. Erskine v. Klein, 218 Ga. 112, 126 S.E.2d 755 (1962) (decided under former Code 1933, § 85-707).

Since the rule against perpetuities involves

Application of Rule (Cont'd)
1. In General (Cont'd)

remoteness of vesting, it is not applicable to a vested remainder or to a reversion. Smith v. Francis, 221 Ga. 260, 144 S.E.2d 439 (1965) (decided under former Code 1933, § 85-707).

Rule applies to vesting of remainders. — Remainders are not invalidated by the rule against perpetuities unless the remainders fail to vest within the term provided. Burt v. Commercial Bank & Trust Co., 244 Ga. 253, 260 S.E.2d 306 (1979) (decided under former Code 1933, § 85-707).

Immediate gift with age restriction is vesting of remainder. — Words of immediate gift after which an age restriction is attached have long been construed as vesting the remainder but postponing enjoyment to a later date. Walker v. Bogle, 244 Ga. 439, 260 S.E.2d 338 (1979) (decided under former Code 1933, § 85-707).

Receipt of income with final distribution postponed. — Right to receive income from property with final distribution postponed indicates a vested interest in the property. Walker v. Bogle, 244 Ga. 439, 260 S.E.2d 338 (1979) (decided under former Code 1933, § 85-707).

Stock option agreement. — Following Shewmake v. Robinson, 148 Ga. 287, 96 S.E. 564 (1918), it was assumed that the rule against perpetuities applied to a stock option agreement. Smith v. Stuckey, 233 Ga. App. 79, 503 S.E.2d 284 (1998) (decided under former § 44-6-1).

Rule against perpetuities did not bar a stock option agreement providing that the option was to be exercised "at any time" after a certain date. Smith v. Stuckey, 233 Ga. App. 79, 503 S.E.2d 284 (1998) (decided under former § 44-6-1).

Bequest to class. — Bequest to a class, some of whose members are in being at the time the bequest is to take effect, does not include others subsequently born. Parker v. Churchill, 104 Ga. 122, 30 S.E. 642 (1898) (decided under former Code 1895, § 3102).

Will creating a testamentary trust, with income to be paid in stated installments to three sisters, and at their death the income to be paid to testator's nieces in equal parts with trust to be kept intact as long as any one of them was living plus 21 years, constitutes a gift to a class, the class composed of the nieces of the testator. The nieces of the testator living at the time of the testator's death take a vested interest, subject to open and let in any additional nieces born during the existence of the preceding trust, with the result that, as to the nieces, the limitation was for a longer time than is permitted by the rule against perpetuities. Landrum v. National City Bank, 210 Ga. 316, 80 S.E.2d 300 (1954) (decided under former Code 1933, § 85-707).

Unborn children. — Bequest by a testator, to such child or children as his granddaughter may have at her decease, no such children being then in life; and a provision that "in case any such child or children should die during the life of its mother, leaving issue of their body, such issue shall, in such case, represent the parent" is not a limitation over upon the death of an unborn child, and thus void under this section; rather it is a gift to the children and grandchildren of testator's granddaughter, living upon the termination of a life in being, viz: that of the granddaughter. Robert v. West, 15 Ga. 122 (1854) (decided under prior law).

Limitations over in favor of the brothers and sisters of a niece, should she have a child and it should survive her and die without issue, deals with a child not in being when the will took effect by the death of the testator, and which might never be born or, if born might not die within 21 years, so that the limitation over to the brothers and sisters might not be determinable within the time limited by the rule. Phinizy v. Wallace, 136 Ga. 520, 71 S.E. 896 (1911) (decided under former Civil Code 1910, § 3678).

Limitation of an estate to plaintiff for life, and at plaintiff's death to plaintiff's children born and to be born, does not create a perpetuity. Palmer v. Neely, 162 Ga. 767, 135 S.E. 90 (1926) (decided under former Code 1910, § 3678).

Construction of limitation over to future husband of unmarried woman is valid. — Devise was in trust for L for life, with remainder to her children, if any; and if none, or if those born died before reaching maturity, then over to any man with whom L might intermarry. Any interest conveyed to him necessarily had to vest in possession within 21 years after the death of L. The devise over was therefore not void as an attempt to

create a perpetuity. Jossey v. Brown, 119 Ga. 758, 47 S.E. 350 (1904) (decided under former Code 1895, § 3102).

Limitation over to future wife of married man is too remote. — Limitation over on the death of E, J's wife, to J in trust for any future wife which he may have, which estate was to determine at her death, was a violation of this section, for no man could say, at the time the deed was executed, that J necessarily would marry within 22 years after the death of his wife E, or that the person whom he would marry was in life. Overby v. Scarborough, 145 Ga. 875, 90 S.E. 67 (1916) (decided under former Code 1910, § 3678).

Contingency depending upon future wife void. — It was early held that when property is devised to A for life, remainder to his widow for life, remainder over on the death of the widow, the ultimate remainder on the death of the widow, if contingent until that event, is bad, because A may marry a woman who was not born at the testator's death; and the result is not affected by the fact that A is very old at the testator's death. Overby v. Scarborough, 145 Ga. 875, 90 S.E. 67 (1916) (decided under former Code 1910, § 3678).

Trust giving income for life is equivalent of life estate. — Insofar as the vesting requirement of the rule against perpetuities is concerned, there is no difference between having a life estate in Blackacre and a trust giving the beneficiary the right to receive the income from Blackacre for life. Burt v. Commercial Bank & Trust Co., 244 Ga. 253, 260 S.E.2d 306 (1979) (decided under former Code 1933, § 85-707).

Property vested to prevent violation of rule by contingency with uncertain date. — When it is clear that it was the testator's intent to make a valid will, even if the language of the will may have been read to delay the vesting of the estate in the remainder beneficiaries until certain debts were paid at a future unspecified time, the devise to the remainder beneficiaries did not violate the rule against perpetuities because the remaindermen became vested at the death of the life beneficiary in keeping with the Georgia tradition of vesting property at the earliest possible time. First Nat'l Bank v. Jenkins, 256 Ga. 223, 345 S.E.2d 829 (1986) (decided under former § 44-6-1).

Right of first refusal. — When a first refusal right is not tied to a fixed price method or some method of pricing which may not reflect true market value, but is conditioned upon meeting a sale price which the seller is willing to accept, such an agreement encourages the development of the property to its fullest potential and is not void as a violation of the rule against perpetuities or as a restraint on alienation. Shiver v. Benton, 251 Ga. 284, 304 S.E.2d 903 (1983) (decided under former § 44-6-1).

When the language of a sales contract and warranty deed supported the court's finding that a right of first refusal was personal to the grantee, and did not extend to the grantee's ''successors or assigns,'' the duration of this right was within the lifetime of the grantee and the rule against perpetuities was not violated. In re Wauka, Inc., 39 Bankr. 734 (Bankr. N.D. Ga. 1984) (decided under former § 44-6-1).

Right of first refusal is compatible with the policies of commerce and utilization of land, and thus not void as a violation of the rule against perpetuities since, even though the preemptive right may be unlimited in duration, it requires merely matching the offer of a third party. Hinson v. Roberts, 256 Ga. 396, 349 S.E.2d 454 (1986) (decided under former § 44-6-1).

No intent to violate section if alternative vesting method provided. — Testator did not have overriding intention to violate this section when according to the testator's own clear words the testator expressed a desire not to violate the rule and when the testator set forth a valid alternative method for final vesting and distribution within rule in form of a saving clause. Norton v. Georgia R.R. Bank & Trust, 253 Ga. 596, 322 S.E.2d 870 (1984) (decided under former § 44-6-1).

In terrorem clause in will did not show intent to violate this section since testator left four likely challengers who had little to lose by challenging the will. Norton v. Georgia R.R. Bank & Trust, 253 Ga. 596, 322 S.E.2d 870 (1984) (decided under former § 44-6-1).

Rule was violated in the following case. — Seal v. First Bank & Trust Co., 163 Ga. App. 620, 295 S.E.2d 367 (1982) (provision for acceptance of subdivision lots by City of Marietta) (decided under former Code 1933, § 85-707).

Rule not violated. — This section is not violated when owner of family business, par-

Application of Rule (Cont'd)
1. In General (Cont'd)

ent of ten children aged between 37 and 60 and grandparent of twelve grandchildren aged between 5 and 34, wished to provide life estates for those children the owner selected, and their children and their grandchildren. Norton v. Georgia R.R. Bank & Trust, 253 Ga. 596, 322 S.E.2d 870 (1984) (decided under former § 44-6-1).

2. Test Used

Test under subsection (a) of this section is whether the trust attempted to be created might continue for a period beyond lives in being plus 21 years and the gestation period. Sheats v. Johnson, 229 Ga. 150, 189 S.E.2d 856 (1972) (decided under former Code 1933, § 85-707).

Determination is whether contingency may occur beyond time limitation. — Whether a limitation over is to be regarded as a perpetuity or not depends upon the time within which such limitation must take effect. It is not enough that a contingent event may happen, or even that it will probably happen, within the limits of the rule against perpetuities; if it can possibly happen beyond those limits, an interest conditioned on it is too remote. O'Byrne v. Feeley, 61 Ga. 77 (1878); Overby v. Scarborough, 145 Ga. 875, 90 S.E. 67 (1916) (decided under former Code 1873, § 2267 and Civil Code 1910, § 3678).

Determination is made at death of testator. — Whether an instrument violates the rule against perpetuities is to be determined at the death of the testator when the limitations begin because the crucial determination is not whether the rule is in fact violated but rather whether the rule may be violated. Rogers v. Rooth, 237 Ga. 713, 229 S.E.2d 445 (1976) (decided under former Code 1933, § 85-707).

Choice of measuring life or lives. — First step in determining whether or not the rule is violated is choosing the measuring life or lives. That person or those persons must be lives in being at the creation of the interest, which in the case of a will is the testator's death. Rogers v. Rooth, 237 Ga. 713, 229 S.E.2d 445 (1976) (decided under former Code 1933, § 85-707).

When a divesting condition is too remote, it is void under the rule against perpetuities, but the remainder interest is given effect. Walker v. Bogle, 244 Ga. 439, 260 S.E.2d 338 (1979) (decided under former Code 1933, § 85-707).

Remoteness of condition. — If there is any possibility that a contingent event might happen beyond the limits set out by this section, then the limitation is too remote. Lanier v. Lanier, 218 Ga. 137, 126 S.E.2d 776 (1962) (decided under former Code 1933, § 85-707).

3. Subsequent Construction of Document

Independent provisions of will may be violative of rule without invalidating entire will. — When the various provisions of a will are independent and not for the carrying out of a common or general purpose, those which are contrary to the rule may be rejected and the valid provisions upheld. The test is whether the invalid parts are so interwoven with those which are valid that the former may not be eliminated without interfering with or changing in any essential the main testamentary scheme. Thomas v. Citizens & S. Nat'l Bank, 224 Ga. 572, 163 S.E.2d 823 (1968) (decided under former Code 1933, § 85-707).

Failure of a testamentary trust for violating this section does not render invalid other provisions of the will which are not affected by the trust. Sheats v. Johnson, 229 Ga. 150, 189 S.E.2d 856 (1972) (decided under former Code 1933, § 85-707).

When a remote divesting condition and the executory interests which follow it are invalidated, the remaining provisions of the testamentary trust would not be invalidated under the doctrine of ''infectious invalidity.'' Walker v. Bogle, 244 Ga. 439, 260 S.E.2d 338 (1979) (decided under former Code 1933, § 85-707).

If invalid limitation is essential part of general scheme, whole gift is void. — When only a part of a gift is invalid by reason of the rule against perpetuities and the invalid limitation is an essential part of the general scheme of the will or gift, the several parts of the devise or the grant are treated as inseparable and the whole is adjudged void. Thomas v. Citizens & S. Nat'l Bank, 224 Ga. 572, 163 S.E.2d 823 (1968) (decided under former Code 1933, § 85-707).

If invalid portion cannot be separated from valid portion entire gift void. — When the income from a trust was to be paid to both charitable and noncharitable purposes, the charitable purpose for which the trust was established is not subject to the operation of the rule of this section, but the noncharitable purposes are void if they come within the rule. When there is no method by which the charitable and noncharitable portions of the trust can be separated and the charitable portion preserved, the entire trust has to fail under the rule. Green v. Austin, 222 Ga. 409, 150 S.E.2d 346 (1966) (decided under former Code 1933, § 85-707).

Charities

Rule against perpetuities does not apply to charities. Taylor v. Trustees of Jesse Parker Williams Hosp., 190 Ga. 349, 9 S.E.2d 165 (1940); Pace v. Dukes, 205 Ga. 835, 55 S.E.2d 367 (1949) (decided under former Code 1933, § 85-707).

This section, inhibiting perpetuities, does not apply to charities. Hardage v. Hardage, 211 Ga. 80, 84 S.E.2d 54 (1954) (decided under former Code 1933, § 85-707).

When interest vests within time permitted. — Rule against perpetuities does not apply to charities when the gift is made in such a way that the interest vests in the charity immediately or within the time permitted for the vesting of future interests, and in such cases a public or charitable trust may be perpetual in its duration, and the property may be left to trustees who may be self-perpetuating. Murphy v. Johnston, 190 Ga. 23, 8 S.E.2d 23 (1940) (decided under former Code 1933, § 85-707).

When a gift to charity unconditionally vests for that purpose, either immediately or within the period permitted by the rule against perpetuities, it is not void as violating the rule. Perkins v. Citizens & S. Nat'l Bank, 190 Ga. 29, 8 S.E.2d 28 (1940); Pace v. Dukes, 205 Ga. 835, 55 S.E.2d 367 (1949) (decided under former Code 1933, § 85-707).

Rule applies if vesting postponed beyond permitted time. — If by the terms of a gift for charitable uses its vesting is postponed beyond the period of perpetuity rule, this rule will be applied just as in cases of the creation of other future interests. Murphy v. Johnston, 190 Ga. 23, 8 S.E.2d 23 (1940) (decided under former Code 1933, § 85-707).

A grant or devise for a charitable use, which is conditioned upon its vesting only after the termination of a trust for accumulation, is void for remoteness, if the period of accumulation may possibly exceed that prescribed by the rule. Murphy v. Johnston, 190 Ga. 23, 8 S.E.2d 23 (1940) (decided under former Code 1933, § 85-707).

When a gift is to vest in charity upon a condition precedent which may or may not happen within the period, it is void as violating the rule. It is not sufficient that the estate may by some possibility become vested within the permissible period, or even that it will probably do so; for, if the condition fixed by the donor is such that the gift may by any possibility fail to vest in charity within the lawful time, or if there is any room for uncertainty or doubt upon the question, the gift is void. Perkins v. Citizens & S. Nat'l Bank, 190 Ga. 29, 8 S.E.2d 28 (1940) (decided under former Code 1933, § 85-707).

When devise over is to another charity. — This rule does not have application where a devise to one charity is limited over after a devise to another charity. Murphy v. Johnston, 190 Ga. 23, 8 S.E.2d 23 (1940) (decided under former Code 1933, § 85-707).

To be charity, hospital must perform some gratuitous service. — While the character of a hospital as a charitable institution would not be destroyed by the hospital's receipt of compensation from some patients able to make payment, so as to thus enlarge the hospital's primary object and purpose for the gratuitous relief of human suffering, a legacy for the establishment of a hospital, to be governed and managed under the uncontrolled discretion of trustees, without any requirement that any part of the hospital's work be gratuitously done, violates the rule against perpetuities. This would be especially true if the only provision which could be taken as relating to compensation or gratuitous service is merely a "special request that all charges at said hospital be reasonable." Trust Co. v. Williams, 184 Ga. 706, 192 S.E. 913 (1937) (decided under former Code 1933, § 85-707).

Trust to pay medical and educational expenses of testator's relatives not charity. —

Charities (Cont'd)

Devise for the purpose of defraying medical expenses of blood relatives of a testator, and for educational loans to deserving persons who were dependents of the testator's blood relatives, is not a devise for public charity; and the intended trust is void under this section. Hardage v. Hardage, 211 Ga. 80, 84 S.E.2d 54 (1954) (decided under former Code 1933, § 85-707).

To establish a permanent charity for one family, and thus permit the perpetual holding together of property, which this section was designed to prohibit, is not justified by the slight prospective public good that might come from educating or keeping off of the public charity rolls the poor of one family. Hardage v. Hardage, 211 Ga. 80, 84 S.E.2d 54 (1954) (decided under former Code 1933, § 85-707).

Trust to benefit university system valid. — Devise in trust to the trustees of the University of Georgia for the use and benefit of the Georgia School of Technology is not invalid as a perpetuity. Regents of Univ. Sys. v. Trust Co., 186 Ga. 498, 198 S.E. 345 (1938) (decided under former Code 1933, § 85-707).

Leases and Purchase Options

Perpetual lease, or perpetual right to renew a lease, is not violative of the rule against perpetuities. Smith v. Aggregate Supply Co., 214 Ga. 20, 102 S.E.2d 539 (1958); St. Regis Paper Co. v. Brown, 247 Ga. 361, 276 S.E.2d 24 (1981); Rose v. Chandler, 247 Ga. 382, 276 S.E.2d 28 (1981) (decided under former Code 1933, § 85-707).

Under Georgia law, a perpetual option violates the rule against perpetuities and is void. A perpetual lease or a perpetual right to renew a lease, however, does not violate the rule. Even an option to purchase within a perpetually renewable lease does not violate the rule. Parker v. Reynolds Metals Co., 747 F. Supp. 711 (M.D. Ga. 1990) (decided under former § 44-6-1).

Lease agreement with purchase option. — Lease agreement for a specified term of two years, containing provisions for the purchase of the property, which lease and option agreement were renewed by action of the parties thereto for a like term of two years, would not be violative of the rule against perpetuities. McKown v. Heery, 200 Ga. 819, 38 S.E.2d 425 (1946) (decided under former Code 1933, § 85-707).

Purchase option exercisable within period of lease. — An option to purchase written into a lease and exercisable within the period of the lease does not violate the rule against perpetuities even though the period within which the option may be exercised extends beyond the period specified in the rule. St. Regis Paper Co. v. Brown, 247 Ga. 361, 276 S.E.2d 24 (1981) (decided under former Code 1933, § 85-707).

Effect of lease renewable in perpetuity. — An option within a lease renewable in perpetuity does not violate the rule against perpetuities. Rose v. Chandler, 247 Ga. 382, 279 S.E.2d 423 (1981) (decided under former Code 1933, § 85-707).

Purchase option limited in time to life of grantee. — There is no violation of the rule against perpetuities when the option is limited in time to the life of the grantee and his wife, or at the death of the survivor of the grantees. Floyd v. Hoover, 141 Ga. App. 588, 234 S.E.2d 89 (1977) (decided under former Code 1933, § 85-707).

Purchase option with unlimited time to exercise is violation. — Option to purchase realty or an interest therein which is unlimited as to the time within which the option may be exercised constitutes a perpetuity and is prohibited under the statute. Smith v. Aggregate Supply Co., 214 Ga. 20, 102 S.E.2d 539 (1958); Floyd v. Hoover, 141 Ga. App. 588, 234 S.E.2d 89 (1977) (decided under former Code 1933, § 85-707).

Perpetual option to purchase land is a direct violation of the rule against perpetuities and is void ab initio. Rose v. Chandler, 247 Ga. 382, 279 S.E.2d 423 (1981) (decided under former Code 1933, § 85-707).

Perpetual option to buy goods off land. — Clause in a deed of land reserving a perpetual right to remove sand from land conveyed, for which grantee and grantee's successors are to be paid a fixed fee per car of sand removed, grants a perpetual option to buy sand and is violative of the rule against perpetuities. Brown v. Mathis, 201 Ga. 740, 41 S.E.2d 137 (1947) (decided under former Code 1933, § 85-707).

Repurchase option without time limit is void. — Clause which authorized the grantor to repurchase land at a stated price, without fixing any time limit during which

the property should be used or within which the option should be exercised, is void as violative of the rule against perpetuities. Gearhart v. West Lumber Co., 212 Ga. 25, 90 S.E.2d 10 (1955); Thomas v. Murrow, 245 Ga. 38, 262 S.E.2d 802 (1980) (decided under former Code 1933, § 85-707).

Clause which gives to the living descendants of grantor the right of first refusal to repurchase the land without fixing any time limit within which the option should be exercised is void as violative of the rule against perpetuities. Lufburrow v. Williams, 152 Ga. App. 674, 263 S.E.2d 535 (1979) (decided under former Code 1933, § 85-707).

Deed in which grantor conveys only the agricultural interest and timber rights, while retaining the mineral rights coupled with an option to repurchase, violates the rule against perpetuities, but does not void the deed and/or vest the underlying fee interest in the grantor's successors-in-interest. Milner v. Bivens, 255 Ga. 49, 335 S.E.2d 288 (1985) (decided under former § 44-6-1).

Rule against perpetuities was not violated by a provision that an option to purchase land "shall extend for a period of 90 days beyond the death of the survivor of two life tenants . . . except that, if grantor shall fail to notify grantee of the death of said survivor of said life tenants, then said period shall extend 90 days beyond such time as grantee is notified." A reasonable time for giving notice was to be implied which in no case could exceed 21 years from the death of the last survivor. Young v. Cass, 255 Ga. 508, 340 S.E.2d 185 (1986) (decided under former § 44-6-1).

Agreement which created a lease to mine for a 50-year period and gave an option to continue that had to be exercised by mining within that period, did not violate the rule against perpetuities, even though the lease could be extended indefinitely. Parker v. Reynolds Metals Co., 747 F. Supp. 711 (M.D. Ga. 1990) (decided under former § 44-6-1).

RESEARCH REFERENCES

Am. Jur. 2d. — 61 Am. Jur. 2d, Perpetuities, §§ 5, 22 et seq.

C.J.S. — 70 C.J.S., Perpetuities, §§ 22, 23, 39 et seq., 51. 90 C.J.S., Trusts, § 26. 90A C.J.S., Trusts, § 218.

ALR. — Validity of appointment under power, with reference to the rule against perpetuities, 1 ALR 374; 101 ALR 1282; 104 ALR 1352.

Perpetual lease or covenant to renew lease perpetually as violation of rule against perpetuities or the suspension of the power of alienation, 3 ALR 498; 162 ALR 1147.

Postponing distribution until payment of debts or settlement of estate as violating rule against perpetuities, 13 ALR 1033.

Devise or bequest for upkeep of cemetery lot as violation of rule against perpetuities, 14 ALR 118.

Conveyance by life tenant and remaindermen in esse as cutting off interest of unborn persons under devise for life with remainder to a class, 25 ALR 770.

Prior estate as affected by remainder void for remoteness, 28 ALR 375; 75 ALR 124; 168 ALR 321.

Rule against perpetuities as affecting limitation over to charity after a gift of indefinite duration to another charity, 30 ALR 594.

Provision for application of rent or income from property to discharge of encumbrance as violation of statute against accumulation of income, 65 ALR 1069.

Doctrine as to possibility of issue extinct as affecting property rights or taxation, 67 ALR 538; 98 ALR2d 1285.

Applicability of rule against perpetuities to reverter on breach of condition subsequent, 70 ALR 1196; 133 ALR 1476.

Rule against accumulation of income as applicable to stock dividends, 70 ALR 1336.

Provision for application of rent or income to improvement, restoration, or maintenance of trust property as violation of statute against accumulation of income, 71 ALR 417.

Violation of rule against perpetuities, or unlawful restraint of alienation or suspension of ownership, by postponement of vesting or alienation of ownership until exercise of discretion as to sale or disposal, 89 ALR 1046.

Provision which suspends vesting of estate or interest for a fixed period upon the condition or with the qualification to effect that period shall not be longer than the lifetime of person or persons in being at

death of testator as violation of rule against perpetuities, 91 ALR 771.

Distinction as regards rule against perpetuities between time of vesting of future estates and time fixed for enjoyment of possession, 110 ALR 1450.

Rule against perpetuities as applied to gift to class, conditional upon specified age being attained, 155 ALR 698.

Estoppel to invoke rule or statute against perpetuities, 162 ALR 156.

Gift to charity as affected by conjoined noncharitable gift invalid under rule or statute against perpetuities or rule against accumulations, 170 ALR 760.

Settlor's right to revoke or terminate trust, or to withdraw funds or invade corpus thereof, as affecting operation of rule against perpetuities, 7 ALR2d 1089.

Validity, under rule against perpetuities, of gift in remainder to creator's great-grandchildren, following successive life estates to children and grandchildren, 18 ALR2d 671.

Validity of restraint, ending not later than expiration of a life or lives in being, on alienation of an estate in fee, 42 ALR2d 1243.

Application of rule against perpetuities to limitation over on discontinuance of use for which premises are given or granted, or the commencement of a prohibited use, 45 ALR2d 1154.

Perpetual nonparticipating royalty interest in oil and gas as violating rule against perpetuities, 46 ALR2d 1268.

Gift for maintenance or care of private cemetery or burial lot, or of tomb or of monument, including the erection thereof, as valid trust, 47 ALR2d 596.

Separability, for purposes of rule against perpetuities, of gift to several persons by one description, 56 ALR2d 450.

When is a gift by will or deed of trust one to a class, 61 ALR2d 212; 13 ALR4th 978.

Lease for term of years, or contract therefor, as violating rule against perpetuities, 66 ALR2d 733.

Applicability of doctrine of equitable approximation to cut down to a permissible time period the time of a testamentary gift that violates rule against perpetuities, 95 ALR2d 807.

Rule against perpetuities where estate is limited on alternative contingencies, one within and one beyond the period allowed by the rule, 98 ALR2d 807.

Modern status of presumption against possibility of issue being extinct, 98 ALR2d 1285.

Validity and effect of provision or condition against alienation in gift for charitable trust or to charitable corporation, 100 ALR2d 1208.

Doctrine that gift which might be void under rule against perpetuities will be given effect where contingency actually occurs within period of rule, 20 ALR3d 1094.

Pre-emptive rights to realty as violation of rule against perpetuities or rule concerning restraints on alienation, 40 ALR3d 920.

Construction and application of ''first refusal'' option contained in trust instrument and relating to sale or shares of stock, 51 ALR3d 1327.

Construction and operation of private pension plan provision for distribution of pension funds upon termination of plan, 55 ALR3d 767.

Independent option to purchase real estate as violating rule against perpetuities or restraints or alienation, 66 ALR3d 1294.

Wills: gift to persons individually named but also described in terms of relationship to testator or another as class gift, 13 ALR4th 978.

Sufficiency of provision of lease to effect second or perpetual right of renewal, 29 ALR4th 172.

44-6-201. Validity of nonvested property interest or power of appointment.

(a) A nonvested property interest is invalid unless:

(1) When the interest is created, it is certain either to vest or to terminate within the lifetime of an individual then alive or within 21 years after the death of that individual; or

(2) The interest either vests or terminates within 90 years after its creation.

(b) A general power of appointment not presently exercisable because of a condition precedent is invalid unless:

(1) When the power is created, the condition precedent is certain either to be satisfied or to become impossible to satisfy within the lifetime of an individual then alive or within 21 years after the death of that individual; or

(2) The condition precedent either is satisfied or becomes impossible to satisfy within 90 years after its creation.

(c) A nongeneral power of appointment or a general testamentary power of appointment is invalid unless:

(1) When the power is created, it is certain to be irrevocably exercised or otherwise to terminate within the lifetime of an individual then alive or within 21 years after the death of that individual; or

(2) The power is irrevocably exercised or otherwise terminates within 90 years after its creation.

(d) In determining whether a nonvested property interest or a power of appointment is valid under paragraph (1) of subsection (a), paragraph (1) of subsection (b), or paragraph (1) of subsection (c) of this Code section, the possibility that a child will be born to an individual after the individual's death is disregarded. (Code 1981, § 44-6-201, enacted by Ga. L. 1990, p. 1837, § 2.)

JUDICIAL DECISIONS

Vesting within 90 years. — Executrix failed to obtain a declaratory judgment from a federal district court to the effect that a realty sales agreement between a decedent and a public trust, which contained a right of first offer (RFO), was unenforceable under Georgia law; the contract did not violate the common law rule against perpetuities or, even if it did, did not violate the rule's codification at O.C.G.A. § 44-6-201(a)(2) because the RFO, which expired 20 years from the date of its creation, was reasonable as a matter of law, and it was not clearly impossible for the RFO to vest within 90 years under the statute's "wait and see" provision. Stephens v. Trust for Pub. Land, 475 F. Supp. 2d 1299 (N.D. Ga. 2007).

Cited in Owenby v. Holley, 256 Ga. App. 13, 567 S.E.2d 351 (2002).

44-6-202. Time of creation of nonvested property interest or power of appointment.

(a) Except as provided in subsections (b) and (c) of this Code section and in subsection (a) of Code Section 44-6-205, the time of creation of a nonvested property interest or a power of appointment is determined under general principles of property law.

(b) For purposes of this article, if there is a person who alone can exercise a power created by a governing instrument to become the unqualified beneficial owner of:

(1) A nonvested property interest; or

(2) A property interest subject to a power of appointment described in subsection (b) or (c) of Code Section 44-6-201,

the nonvested property interest or power of appointment is created when the power to become the unqualified beneficial owner terminates.

(c) For purposes of this article, a nonvested property interest or a power of appointment arising from a transfer of property to a previously funded trust or other existing property arrangement is created when the nonvested property interest or power of appointment in the original contribution was created. (Code 1981, § 44-6-202, enacted by Ga. L. 1990, p. 1837, § 2.)

44-6-203. Reform of disposition by court to approximate transferor's plan of distribution.

Upon the petition of an interested person, a court shall reform a disposition in the manner that most closely approximates the transferor's manifested plan of distribution and is within the 90 years allowed by paragraph (2) of subsection (a), paragraph (2) of subsection (b), or paragraph (2) of subsection (c) of Code Section 44-6-201 if:

(1) A nonvested property interest or a power of appointment becomes invalid under Code Section 44-6-201;

(2) A class gift is not but might still become invalid under Code Section 44-6-201 and the time has arrived when the share of any class member is to take effect in possession or enjoyment; or

(3) A nonvested property interest that is not validated by paragraph (1) of subsection (a) of Code Section 44-6-201 can vest, but not within 90 years after its creation. (Code 1981, § 44-6-203, enacted by Ga. L. 1990, p. 1837, § 2.)

44-6-204. Exceptions to applicability of article.

Code Section 44-6-201 shall not apply to:

(1) A nonvested property interest or a power of appointment arising out of a nondonative transfer, except a nonvested property interest or a power of appointment arising out of:

(A) A premarital or postmarital agreement;

(B) A separation or divorce settlement;

(C) A spouse's election;

(D) A similar arrangement arising out of a prospective, existing, or previous marital relationship between the parties;

(E) A contract to make or not to revoke a will or trust;

(F) A contract to exercise or not to exercise a power of appointment;

(G) A transfer in satisfaction of a duty of support; or

(H) A reciprocal transfer;

(2) A fiduciary's power relating to the administration or management of assets, including the power of a fiduciary to sell, lease, or mortgage property, and the power of a fiduciary to determine principal and income;

(3) A power to appoint a fiduciary;

(4) A discretionary power of a trustee to distribute principal before termination of a trust to a beneficiary having an indefeasibly vested interest in the income and principal. Nothing contained in paragraphs (2) and (3) of this Code section and this paragraph shall be construed to permit the fiduciary to continue the administration or management of assets once the nonvested property interest becomes invalid as described in subsection (a) of Code Section 44-6-201;

(5) A nonvested property interest held by a charity, government, or governmental agency or subdivision, if the nonvested property interest is preceded by an interest held by another charity, government, or governmental agency or subdivision;

(6) A nonvested property interest in or a power of appointment with respect to a trust or other property arrangement forming part of a pension, profit-sharing, stock bonus, health, disability, death benefit, income deferral, or other current or deferred benefit plan for one or more employees, independent contractors, or their beneficiaries or spouses, to which contributions are made for the purpose of distributing to or for the benefit of the participants or their beneficiaries or spouses the property, income, or principal in the trust or other property arrangement, except a nonvested property interest or a power of appointment that is created by an election of a participant or a beneficiary or spouse; or

(7) A property interest, power of appointment, or arrangement that was not subject to the common-law rule against perpetuities or is excluded by another statute of this state. (Code 1981, § 44-6-204, enacted by Ga. L. 1990, p. 1837, § 2.)

44-6-205. Applicability of article; court reform of nonvested dispositions created before article became effective.

(a) Except as extended by subsection (b) of this Code section, this article applies to a nonvested property interest or a power of appointment that is

created on or after May 1, 1990. For purposes of this Code section only, a nonvested property interest or a power of appointment created by the exercise of a power of appointment is created when the power is irrevocably exercised or when a revocable exercise becomes irrevocable.

(b) With respect to a nonvested property interest or a power of appointment that was created before May 1, 1990, and that violates this state's rule against perpetuities as that rule existed before May 1, 1990, a court upon the petition of an interested party may exercise its equitable power to reform the disposition in the manner that most closely approximates the transferor's manifested plan of distribution and is within the limits of the rule against perpetuities applicable when the nonvested property interest or power of appointment was created. (Code 1981, § 44-6-205, enacted by Ga. L. 1990, p. 1837, § 2.)

JUDICIAL DECISIONS

In general. — Trial court properly utilized the court's statutory authority under O.C.G.A. § 44-6-205(b) to reform a trust instrument that violated the rule against perpetuities. Scott v. South Trust Asset Mgt. Co., 274 Ga. 523, 555 S.E.2d 732 (2001).

Cited in Stephens v. Trust for Pub. Land, 475 F. Supp. 2d 1299 (N.D. Ga. 2007).

44-6-206. Application and construction of article.

This article shall be applied and construed to effectuate its general purpose to make uniform the law with respect to the subject of this article among states enacting it. (Code 1981, § 44-6-206, enacted by Ga. L. 1990, p. 1837, § 2.)

CHAPTER 7

LANDLORD AND TENANT

Article 1

In General

Sec.
44-7-1. Creation of landlord and tenant relationship; rights of tenant; construction of lease for less than five years.
44-7-2. Parol contract creating landlord and tenant relationship; certain provisions prohibited; effect of provision for attorney's fees.
44-7-3. Disclosure of ownership and agents; effect of failure to comply.
44-7-4. Local ordinances relating to security of premises occupied by tenants; cumulative effect of this Code section.
44-7-5. When implied contract to pay rent arises.
44-7-6. Tenancy at will — Creation when no time period specified.
44-7-7. Tenancy at will — Notice required for termination.
44-7-8. Tenancy at will — Right of tenant to emblements.
44-7-9. Estoppel to dispute landlord's title or attorn to another.
44-7-10. Delivery of possession at end of term; summary remedy.
44-7-11. Specific rights of tenants.
44-7-12. Removal of trade fixtures during term; when abandoned.
44-7-13. Landlord's duties as to repairs and improvements.
44-7-14. Tort liability of landlord.
44-7-14.1. Landlord's duties as to utilities.
44-7-15. Effect of destruction of tenement on obligation to pay rent.
44-7-16. Accrual of interest on rent owed.
44-7-17. Exemption from liens against tenant of crops paid as rent.
44-7-18. Effect of leases for purposes of prostitution or assignation.
44-7-19. Restrictions on rent regulation by local governments.
44-7-20. Notification to prospective tenant of property's propensity toward flooding.
Sec.
44-7-21. Written brokerage agreement as binding obligation; notice of commission rights form.
44-7-22. Termination of a residential rental agreement by a service member.

Article 2

Security Deposits

44-7-30. Definitions.
44-7-31. Placement of security deposit in trust in escrow account; notice to tenant of account location.
44-7-32. Surety bond in lieu of escrow account; withdrawal of surety; fees; liability of clerk of superior court.
44-7-33. Lists of existing defects and of damages during tenancy; right of tenant to inspect and dissent; action to recover security deposit.
44-7-34. Return of security deposit; grounds for retention of part; delivery of statement and sum due to tenant; unclaimed deposit; court determination of disposition of deposit.
44-7-35. Remedies for landlord's noncompliance with article.
44-7-36. Certain rental units exempt from article.
44-7-37. Liability for rent of military personnel receiving change of duty orders.

Article 3

Dispossessory Proceedings

44-7-49. ''Writ of possession'' defined.
44-7-50. Demand for possession; procedure upon a tenant's refusal; concurrent issuance of federal lease termination notice.
44-7-51. Issuance of summons; service; time for answer; defenses and counterclaims.
44-7-52. When tender of payment by tenant serves as complete defense.

Sec.
44-7-53. When writ of possession issued; trial of issues; possession pending trial.
44-7-54. Payment of rent and utility payments into court; issuance of writ upon failure to pay; disposition of funds.
44-7-55. Judgment; writ of possession; landlord's liability for wrongful conduct; distribution of funds paid into court; personal property.
44-7-56. Appeal; possession and payment of rent pending appeal.
44-7-57. Application of article to croppers and servants.
44-7-58. False statements in affidavit or answer; penalty.
44-7-59. Removal of transportable housing from lands subject to writ of possession.

Article 4

Distress Warrants

44-7-70. Power of landlord to distrain for rent.
44-7-71. Application for distress warrant.
44-7-72. Issuance of summons; service on defendant; time for hearing.
44-7-73. When tender of payment by tenant serves as complete defense.
44-7-74. Answer; grant of distress warrant on failure to answer; trial; possession pending final outcome.
44-7-75. Payment of rent into court; transfer and possession of property pending trial; seizure; disposition of funds.
44-7-76. Bond; determination of amount; effect of approval on alienability of property.
44-7-77. Judgment and satisfaction; landlord's liability; distribution of funds; return of property.
44-7-78. Appeal; possession pending appeal.
44-7-79. Execution and levy of distress warrant; sale.
44-7-80. Time for attachment of landlord's lien; priorities.
44-7-81. Claims by third persons; oath and bond; method of trial.
44-7-82. Application of article to tenant's mobile home.

Article 5

Croppers

44-7-100. Nature of relationship between owner and cropper.
44-7-101. Title to crops.
44-7-102. Recovery of crops sold or disposed of without landlord's consent.
44-7-103. Illegal sale by cropper; refusal of landlord to deliver cropper's share; penalties.

Cross references. — Forfeiture of rights of lessees or tenants for unlawful manufacture, sale, etc., of distilled spirits on leased premises, § 3-10-6. Allocating water and waste-water usage among tenants, § 12-5-180.1. Estates for years, § 44-6-100 et seq.

Law reviews. — For article discussing 1976 to 1977 developments in landlord-tenant law, see 29 Mercer L. Rev. 219 (1977). For article surveying recent legislature and judicial developments in Georgia's real property laws, see 31 Mercer L. Rev. 187 (1979). For article, ''Usufructs and Estates for Years Distinguished,'' see 18 Ga. St. B.J. 116 (1982). For article, ''The New Documentary Concerns Associated With Intelligent Buildings,'' see 22 Ga. St. B.J. 16 (1985). For annual survey of law of real property, see 40 Mercer L. Rev. 337 (1988).

For note discussing landlord liability for crime in apartments, see 5 Ga. L. Rev. 349 (1971). For note arguing the necessity for specific state legislation to deal with the mobile home park landlord-tenant relationship, see 9 Ga. L. Rev. 212 (1974). For note outlining the 1976 revisions in Georgia's Landlord and Tenant Law and their potential impact on tenant's rights and remedies, see 28 Mercer L. Rev. 351 (1976).

JUDICIAL DECISIONS

Cited in Warehouses, Inc. v. Wetherbee, 203 Ga. 483, 46 S.E.2d 894 (1948).

RESEARCH REFERENCES

Am. Jur. Proof of Facts. — Value of Growing Crop, 20 POF2d 115.

Proof of Tenant's Abandonment of Real Property Lease, 70 POF3d 1.

Proof of Landlord's Liability for Injury Inflicted by Tenant's Dog, 85 POF3d 1.

ALR. — Changes of physical conditions on property of landlord other than that leased, as affecting rights and liabilities of landlord and tenant, 44 ALR 59.

Liability of lessee's guarantor or surety beyond the original period fixed by lease, 10 ALR3d 582.

When lessor may withhold consent under unqualified provision in lease prohibiting assignment or subletting of leased premises without lessor's consent, 21 ALR4th 188.

Validity and construction of law regulating conversion of rental housing to condominiums, 21 ALR4th 1083.

Landlord's tort liability to tenant for personal injury or property damage resulting from criminal conduct of employee, 38 ALR4th 240.

Commercial leases: application of rule that lease may be canceled only for ''material'' breach, 54 ALR4th 595.

Specificity of description of premises as affecting enforceability of lease, 73 ALR4th 236.

Landlord's liability to third person for injury resulting from attack off leased premises by dangerous or vicious animal kept by tenant, 89 ALR4th 374.

Coverage of leases under state consumer protection statutes, 89 ALR4th 854.

ARTICLE 1

IN GENERAL

Law reviews. — For article discussing 1976 statutory changes in landlord-tenant law, see 13 Ga. St. B.J. 43 (1976).

For comment discussing Robinson v. Diamond Housing Corp., 463 F.2d 853 (D.C. Cir. 1972), as to retaliatory eviction following tenant's successful assertion of rights, see 6 Ga. L. Rev. 805 (1972).

JUDICIAL DECISIONS

Cited in Griffin v. Loman, 206 Ga. 116, 56 S.E.2d 263 (1949).

RESEARCH REFERENCES

Am. Jur. Trials. — Retaliatory Eviction Claims, 99 Am. Jur. Trials 289.

ALR. — Perpetual lease or covenant to renew lease perpetually as violation of rule against perpetuities or the suspension of the power of alienation, 3 ALR 498; 162 ALR 1147.

Commission of waste as ground for forfeiture of lease, 3 ALR 672.

Change in time for assessment or payment of taxes as affecting provision for payment of taxes during term of lease, 3 ALR 1159; 20 ALR 1502.

Knowledge of owner of improvements or repairs, intended or in process under orders of lessee or vendee, as ''consent,'' which will subject his interest to mechanics' liens, 4 ALR 685.

Effect of nonhabitability of leased dwelling or apartment, 4 ALR 1453; 13 ALR 818; 29 ALR 52; 34 ALR 711.

Covenant to pay taxes as including income

taxes, 9 ALR 1566; 30 ALR 991; 45 ALR 756; 124 ALR 1020; 140 ALR 517.

Liability of landlord for injury to person or property of tenant, or his privies, from defects in heating or lighting plant or plumbing, 13 ALR 837; 26 ALR 1253; 52 ALR 864.

Right to receive rent as between mortgagor and mortgagee of leased premises, 14 ALR 640; 105 ALR 744.

Effect of foreclosure of mortgage as terminating lease, 14 ALR 664.

Statute prescribing damages for forcibly ejecting or excluding one from possession of real property as applying to possession held by one as servant or employee, 14 ALR 808.

What are ''minerals'' within deed, lease, or license, 17 ALR 156; 86 ALR 983.

Taking partner or assigning to cotenant as breach of provision in lease against assignment or subletting, 17 ALR 183.

Implied covenants of title or possession on assignment of lease, 19 ALR 608.

Advertising rights on leased premises, 22 ALR 800; 20 ALR2d 940.

Liability of landlord for damage to tenant because of infection from contagious or infectious disease, 26 ALR 1265.

Reentry by lessor as terminating lessee's option to renew or purchase, 29 ALR 1040; 115 ALR 376.

Validity and enforceability of provision for renewal of lease at rental not determined, 30 ALR 572; 68 ALR 157; 166 ALR 1237.

Right to recover exaction by lessor as condition of consent to assignment or sublease, 40 ALR 553.

Waiver by lessor of failure to comply with conditions of lease as to manner or terms of assignment by lessee, 42 ALR 1108.

Construction and effect of provision of sublease or assignment making it subject to, or assuming, the provisions of the lease, 42 ALR 1173.

Condemnation of premises or part thereof as affecting rights of landlord and tenant inter se, 43 ALR 1176; 163 ALR 679.

Extent of lessee's obligation under express covenant as to repairs, 20 ALR 782; 45 ALR 12.

Acts of other tenants as chargeable to landlord, 45 ALR 1126.

Duty of tenant in absence of express provision, to occupy the premises, or to use them for the particular purpose indicated by words in the lease descriptive of their character, 46 ALR 1134.

Surrender of lease as affecting liability on covenants other than for rent, 51 ALR 1061.

Crop failure as affecting liability for rent, 51 ALR 1291.

Agreement to take lease as raising corresponding agreement to give one, 53 ALR 288.

Acts of other tenants as chargeable to landlord, 58 ALR 1049.

Tenant's liability for rent subsequent to appointment of receiver in suit or proceeding by landlord or by parties in privity with landlord, 61 ALR 372.

When landlord's reletting or efforts to relet, after tenant's abandonment or refusal to enter, deemed to be acceptance of surrender, 61 ALR 773; 110 ALR 368.

Right of sublessee to take lease from lessor after expiration of lease to sublessor, 75 ALR 847.

Assignment of lease as breach of covenant against subletting, 79 ALR 1379.

Rights and remedies of parties in respect to lease of filling station, 83 ALR 1416; 126 ALR 1375.

Parol evidence rule as applied to lease, 88 ALR 1380; 151 ALR 279.

Receiver of insolvent lessee, who elects to take over the lease, as holding under privity of estate within rule allowing termination of assignee's liability by reassignment of lease, 95 ALR 379.

Validity, construction, and effect of provision in mortgage or deed of trust regarding status of mortgagor or his grantee in possession after sale under foreclosure or otherwise, 103 ALR 981.

Measure of damages for breach by lessor of contract to lease or to lessee into possession, 104 ALR 132; 88 ALR2d 1024.

Relation and rights inter se of purchaser under foreclosure of mortgage and tenant under lease subsequent to mortgage, 109 ALR 447.

Landlord's acceptance of rent as waiver of right to forfeit because of tenant's past or future violation of terms of lease, 109 ALR 1267.

Transaction between lessor and sublessee or assignee after forfeiture or cause of forfeiture by lessee as waiver of forfeiture, 118 ALR 124.

Language of lease as creating conditional

limitation as distinguished from a condition subsequent, or vice versa, 118 ALR 283.

Apportionment of income where right to income commences or ends during accrual period, 126 ALR 12.

Time when rent payable in absence of provision of lease fixing time applicable to all payments, 126 ALR 565.

What amounts to a leasehold interest within insurance policy, 130 ALR 818.

Option of one party to terminate lease upon condition which does not entitle other party to similar option, 137 ALR 362.

Provision of lease or statute as to forfeiture where premises used for unlawful purpose, as contemplating a single use or a continuous use, 145 ALR 1063.

Liability of lessee's assignee to lessor for rent accruing after assignment by him, in the absence of assumption of covenant of the lease, 148 ALR 196.

What agreement or conduct subsequent to assignment of lease amounts to assumption by assignee of covenants of lease, or estoppel to deny such assumption, 148 ALR 393.

Provision in lease as to purpose for which premises are to be used, as excluding use for other purpose, 148 ALR 583.

Validity and effect, as between assignor and assignee or claimants under them, of assignment by purchaser under land contract, or by tenant under lease, as affected by provision of contract or lease restricting or prohibiting assignment, 148 ALR 1361.

Constitutionality and construction of Emergency Price Control Act as relating to rent, 155 ALR 1461; 156 ALR 1459; 157 ALR 1457; 158 ALR 1464.

Provision of lease for protection of lessee in event of specified collateral contingency as affected by his failure to avoid the contingency, 156 ALR 302.

Restrictions in lessor's record title as to use of premises as affecting rights between lessor and lessee, 165 ALR 1178.

Provision of lease authorizing its termination by lessor in event of insolvency, bankruptcy, or receivership of lessee, 168 ALR 504.

What is nuisance within meaning of rent control act or regulation governing eviction of tenant, 174 ALR 989.

Right of owner of housing development or apartment houses to restrict canvassing, peddling, solicitation of contributions, etc., 3 ALR2d 1431.

Granting to lessee of "first" privilege or right to re-lease or to renewal or extension of tenancy period as conditioned upon lessor's willingness to re-lease, 6 ALR2d 820.

Conditions accompanying or following dissolution of lessee corporation, as breach of covenant against assignment or sublease, 12 ALR2d 179.

Remedy of tenant against stranger wrongfully interfering with his possession, 12 ALR2d 1192.

Implied covenant in lease for business purposes, that lessor will not compete in business activity for conducting of which lessee leased the premises, 22 ALR2d 1466.

Sublessee's obligation to sublessor to perform latter's covenants in original lease, 24 ALR2d 707.

Relative rights and liabilities of landlord, tenant, assignee, or sublessee where act is done increasing insurance rates, 30 ALR2d 489.

Misrepresentation by lessor, in negotiations for lease, as to offers of rental received from third persons, as actionable fraud, 30 ALR2d 923.

Breach of covenant for quiet enjoyment in lease, 41 ALR2d 1414.

Enforcement of, or waiver of or estoppel to assert, forfeiture clause of lease made or held by cotenants as lessors, 50 ALR2d 1365.

Measure of evicted tenant's recovery for improvements made by him on premises for lease uses, 71 ALR2d 1104.

Liability of mortgagee or lienholder of a lease with respect to rents or covenants therein, 73 ALR2d 1118.

Estoppel of lessee, because of occupancy of, or other activities in connection with, premises, to assert invalidity of lease because of irregularities in description or defects in execution, 84 ALR2d 920.

Liability as between lessor and lessee, where lease does not specify, for taxes and assessments, 86 ALR2d 670.

Validity, construction, and effect of lessor's covenant against use of his other property in competition with the lessee-covenantee, 97 ALR2d 4.

Liability of lessee who assigns lease for rent accruing subsequently to extension or renewal of term, 10 ALR3d 818.

Tenant's rights under unexercised option

to purchase as affected by landlord's breach of lease or lease agreement, 12 ALR3d 1128.

Landlord's duty, on tenant's failure to occupy, or abandonment of, premises, to mitigate damages by accepting or procuring another tenant, 21 ALR3d 534.

Infestation of leased dwelling or apartment with vermin as entitling tenant to abandon premises or as constructive eviction by landlord, in absence of express covenant of habitability, 27 ALR3d 924.

Landlord and tenant: constructive eviction based on flooding, dampness, or the like, 33 ALR3d 1356.

Landlord and tenant: what amounts to "sale" of property for purposes of provision giving tenant right of first refusal if landlord desires to sell, 70 ALR3d 203.

Landlord supplying electricity, gas, water, or similar facility to tenant as subject to utility regulation, 75 ALR3d 1204.

Requirements as to certainty and completeness of terms of lease in agreement to lease, 85 ALR3d 414.

Lease provisions providing for rent adjustment based on event or formula outside control of parties, 87 ALR3d 986.

Use of property for multiple dwellings as violating restrictive covenant permitting property to be used for residential purposes only, 99 ALR3d 985.

Landlord and tenant: constructive eviction by another tenant's conduct, 1 ALR4th 849.

Shopping center lease restrictions on type of business conducted by tenant, 1 ALR4th 942.

Measure of damages for landlord's breach of implied warranty of habitability, 1 ALR4th 1182.

Option to purchase real property as affected by optionor's receipt of offer for, or sale of, larger tract which includes the optioned parcel, 34 ALR4th 1217.

Sublessee's rights with respect to primary lessee's option to renew lease, 39 ALR4th 824.

Landlord's fraud, deceptive trade practices, and the like, in connection with mobile home owner's lease or rental of landsite, 39 ALR4th 859.

Merger or consolidation of corporate lessee as breach of clause in lease prohibiting, conditioning, or restricting assignment or sublease, 39 ALR4th 879.

Death of lessee as terminating lease, 42 ALR4th 963.

Landlord's liability for failure to protect tenant from criminal activities of third person, 43 ALR5th 207.

Validity, construction, and application of mobile home eviction statutes, 43 ALR5th 705.

Measure and elements of damages for lessee's breach of covenant as to repairs, 45 ALR5th 251.

44-7-1. Creation of landlord and tenant relationship; rights of tenant; construction of lease for less than five years.

(a) The relationship of landlord and tenant is created when the owner of real estate grants to another person, who accepts such grant, the right simply to possess and enjoy the use of such real estate either for a fixed time or at the will of the grantor. In such a case, no estate passes out of the landlord and the tenant has only a usufruct which may not be conveyed except by the landlord's consent and which is not subject to levy and sale.

(b) All renting or leasing of real estate for a period of time less than five years shall be held to convey only the right to possess and enjoy such real estate, to pass no estate out of the landlord, and to give only the usufruct unless the contrary is agreed upon by the parties to the contract and is so stated in the contract. (Orig. Code 1863, § 2261; Code 1868, § 2253; Code 1873, § 2279; Ga. L. 1876, p. 35, § 1; Code 1882, § 2279; Civil Code 1895, § 3115; Civil Code 1910, § 3691; Code 1933, § 61-101.)

Cross references. — Rights and obligations of tenants of premises being converted to condominiums, § 44-3-87. Distinction between estate for years and landlord and tenant relationship, § 44-6-101.

Law reviews. — For article, ''Some Rescission Problems in Truth-in-Lending, as Viewed from Georgia,'' see 7 Ga. St. B.J. 315 (1971). For article discussing options to purchase realty in Georgia, with respect to renewable leases, see 8 Ga. St. B.J. 229 (1971). For article discussing ad valorem taxation and interest in real property in Georgia, prior to the enactment of the Georgia Public Revenue Code, T. 48, see 31 Mercer L. Rev. 293 (1979). For article, ''Usufructs and Estates for Years Distinguished,'' see 18 Ga. St. B.J. 116 (1982). For article, ''Commercial Tenant Defaults: Fact Issues to Anticipate,'' see 27 Ga. St. B.J. 181 (1991). For survey article on real property law, see 59 Mercer L. Rev. 371 (2007).

For note discussing assignment and subletting, see 2 Mercer L. Rev. 412 (1951).

For comment on Garbutt & Donovan v. Barksdale Pruitt Junk Co., 37 Ga. App. 210, 139 S.E. 357 (1927), see 1 Ga. L. Rev. No. 2, p. 46 (1927). For comment regarding distinction between estate for years and landlord-tenant relationship, in light of State v. Davison, 198 Ga. 27, 31 S.E.2d 225 (1944), see 7 Ga. B.J. 233 (1944). For comment discussing the legal effect of concurrent leases under both common law and statutory law in Georgia, see 6 Ga. St. B.J. 320 (1970).

JUDICIAL DECISIONS

Analysis

General Consideration
Existence of Relationship
Creation of Relationship
Characteristics of Relationship
Subletting and Assignment
Rights of Tenant
Status of Third Parties

General Consideration

Cited in A.F. Burnett & Bro. v. William Rich & Co., 45 Ga. 211 (1872); Brown v. Persons, 48 Ga. 60 (1873); Hutcheson v. Hodnett, 115 Ga. 990, 42 S.E. 422 (1902); Hearn v. Huff, 6 Ga. App. 56, 64 S.E. 298 (1909); Motor Aid, Inc. v. Ray, 53 Ga. 772, 187 S.E. 120 (1936); Johnson v. First Nat'l Bank, 53 Ga. App. 643, 187 S.E. 300 (1936); Chastain v. Gardner, 187 Ga. 462, 200 S.E. 786 (1939); Stephens v. Pickering, 192 Ga. 199, 15 S.E.2d 202 (1941); State v. Davison, 198 Ga. 27, 31 S.E.2d 225 (1944); Flynt v. Barrett, 73 Ga. App. 396, 36 S.E.2d 868 (1946); Jones v. E.I. Rooks & Son, 78 Ga. App. 790, 52 S.E.2d 580 (1949); Nunnally v. Shockley, 91 Ga. App. 767, 87 S.E.2d 115 (1955); Ray v. Ashburn Bank, 212 Ga. 37, 89 S.E.2d 889 (1955); Stephens v. Stephens, 220 Ga. 22, 136 S.E.2d 726 (1964); Henson v. Airways Serv., Inc., 220 Ga. 44, 136 S.E.2d 747 (1964); Sewell Dairy Supply Co. v. Taylor, 113 Ga. App. 729, 149 S.E.2d 540 (1966); Scarbor v. Scarbor, 226 Ga. 323, 175 S.E.2d 6 (1970); Brown v. Wood, 124 Ga. App. 500, 184 S.E.2d 661 (1971); Smith v. Top Dollar Stores, Inc., 129 Ga. App. 60, 198 S.E.2d 690 (1973); Tenstate Distribution Co. v. Averett, 397 F. Supp. 1227 (N.D. Ga. 1975); Southland Inv. Corp. v. McIntosh, 137 Ga. App. 216, 223 S.E.2d 257 (1976); Rains Inv. Co. v. George Roe & Assocs., 140 Ga. App. 566, 231 S.E.2d 460 (1976); Martin v. Heard, 239 Ga. 816, 238 S.E.2d 899 (1977); Overlin v. Boyd, 598 F.2d 423 (5th Cir. 1979); Ansley Park Plumbing & Heating Co. v. Mikart, Inc., 9 Bankr. 144 (Bankr. N.D. Ga. 1981); Clayton County Bd. of Tax Assessors v. City of Atlanta, 164 Ga. App. 864, 298 S.E.2d 544 (1982); Parrott v. Wilson, 707 F.2d 1262 (11th Cir. 1983); Eastern Air Lines v. Joint City-County Bd. of Tax Assessors, 253 Ga. 18, 315 S.E.2d 890 (1984); Henderson v. Easters, 178 Ga. App. 867, 345 S.E.2d 42 (1986); Glen Oak, Inc. v. Henderson, 258 Ga. 455, 369 S.E.2d 736 (1988); Thompson v. Crownover, 259 Ga. 126, 381 S.E.2d 283 (1989); Hallisy v. Snyder, 219 Ga. App. 128, 464 S.E.2d 219 (1995); Outdoor Sys., Inc. v. Wood, 247 Ga. App. 287, 543 S.E.2d 414

General Consideration (Cont'd)

(2000); Williams v. State, 261 Ga. App. 511, 583 S.E.2d 172 (2003).

Existence of Relationship

Usufruct defined. — Usufructs are rights or privileges usually arising out of landlord and tenant relationships with privileges granted to tenants holding less interest in real estate than estate for years. Roe v. Doe, 246 Ga. 138, 268 S.E.2d 901 (1980).

Usufruct is a lesser interest in real estate than is an estate for years which does not involve the landlord-tenant relationship. Searcy v. Peach County Bd. of Tax Assessors, 180 Ga. App. 531, 349 S.E.2d 515 (1986).

Tenant defined. — Tenant is generally defined as one who occupies the lands or premises of another in subordination to that other's title, and with the other's assent, express or implied. Sharpe v. Mathews, 123 Ga. 794, 51 S.E. 706 (1905).

Tenancy at will. — Tenant at will is in possession by right, evidenced by the will of the landlord and that of the tenant, which will is expressed by the express or implied consent of the landlord to the occupancy of the premises, concurrent with the will of the tenant to occupy the premises; the payment of rent is not essential to the creation of a tenancy at will. Carruth v. Carruth, 77 Ga. App. 131, 48 S.E.2d 387 (1948).

When the plaintiff purchased a mobile home, never signed a lease with defendants or the company which then owned the lot, and presented no evidence to support plaintiff's assertion that the property owner ever contracted for or consented to the establishment of a life estate in the property, that the prior tenant had possessed a life interest, or that plaintiff assumed a lease or a life estate when plaintiff purchased the mobile home, there was no error in finding as a matter of law that plaintiff had a tenancy at will. Gentry v. Chateau Properties, 236 Ga. App. 371, 511 S.E.2d 892 (1999).

Familial relationship between parties. — In a wrongful death suit wherein a visiting youth of a tenant was shot and killed by a gun left loaded in the leased premises, a lease was found to have existed between the parties, who were all related to each other, despite no written lease agreement existing and the payment of rent was not regularly made. McCullough v. Reyes, 287 Ga. App. 483, 651 S.E.2d 810 (2007), cert. denied, 2008 Ga. LEXIS 178 (Ga. 2008).

Effect of lease for less than five years. — Lease of real estate for less than five years passes no estate out of the landlord; the tenant has only a usufruct, and the tenant can neither sublet the premises, convey the tenant's usufructuary interest, nor assign the tenant's lease, without the landlord's consent. Hudson v. Stewart, 110 Ga. 37, 35 S.E. 178 (1900); DeFoor v. Stephens & Lastinger, 133 Ga. 617, 66 S.E. 786 (1909).

When a lease carries a term of less than five years and does not clearly indicate by its express terms that it passes an estate for years, the lease conveys a mere usufruct and is not assignable absent the express consent of the landlord. Splish Splash Waterslides, Inc. v. Cherokee Ins. Co., 167 Ga. App. 589, 307 S.E.2d 107 (1983).

Estate for years. — When the term of a lease is greater than five years, a rebuttable presumption arises that an estate for years is created. In re Emory Properties, Ltd., 106 Bankr. 318 (Bankr. N.D. Ga. 1989).

Effect of lease for over five years. — Lease of real estate for a period of five years passes such an estate from the landlord to the tenant as the landlord may convey or contract to convey to another with all the incident rights and duties of the tenancy. Robinson v. Perry, 21 Ga. 183, 68 Am. Dec. 455 (1857); Perry v. Paschal, 103 Ga. 134, 29 S.E. 703 (1897); Jones v. Fuller, 27 Ga. App. 84, 107 S.E. 544 (1921); Shell Petro. Corp. v. Jackson, 47 Ga. App. 667, 171 S.E. 171 (1933); Shell Petro. Corp. v. Stallings, 51 Ga. App. 351, 180 S.E. 654 (1935).

Circumscribed and limited use of premises are characteristic of a usufruct. Allright Parking of Ga., Inc. v. Joint City-County Bd. of Tax Assessors, 244 Ga. 378, 260 S.E.2d 315 (1979).

Estate for years and tenancy distinguished. — Estate for years, when applied to realty, differs from the relation of landlord and tenant in that in the latter the tenant has no estate, but a mere right of use very similar to the right of a hirer of personalty. Midtown Chain Hotels Co. v. Bender, 77 Ga. App. 723, 49 S.E.2d 779 (1948).

Tenancies at sufferance and at will distinguished. — Tenancy at sufferance differs from a tenancy at will in this: the tenant at

sufferance enters lawfully and holds over wrongfully without the landlord's assent or dissent; the tenant at will holds by the landlord's permission. It takes little to convert a tenancy at sufferance into a tenancy at will; anything that indicates the permission of the landlord for the tenant to remain in possession will have this effect. Carruth v. Carruth, 77 Ga. App. 131, 48 S.E.2d 387 (1948).

Timber conveyance distinguished from lease. — Conveyances of timber to be removed within a certain time are distinguishable from leases because those conveyances are assignable without the consent of the grantor. Baxter v. Mattox, 106 Ga. 344, 32 S.E. 94 (1898); McRae v. Stillwell, Millen & Co., 111 Ga. 65, 36 S.E. 604, 55 L.R.A. 513 (1900); McLendon Bros. v. Finch, 2 Ga. App. 421, 58 S.E. 690 (1907).

Sale of timber on land. — Relation between the parties to a conveyance whereby the one sells to the other the timber on land is that of vendor and vendee, and not that of landlord and tenant; and the conveyance is a deed, not a lease, although the time within which the timber is to be cut and removed is limited to less than five years. Coody v. Gress Lumber Co., 82 Ga. 793, 10 S.E. 218 (1889); Morgan v. Perkins, 94 Ga. 353, 21 S.E. 574 (1894); Baxter v. Mattox, 106 Ga. 344, 32 S.E. 94 (1898); McRae v. Stillwell, Millen & Co., 111 Ga. 65, 36 S.E. 604, 55 L.R.A. 513 (1900).

Distinction between cropper and renter. — When an owner of land furnishes the land with supplies and other like necessaries, keeping general supervision over the farm, and agrees to pay a certain portion of the crop to the laborer for the laborer's work, the laborer is a cropper, and judgments or liens cannot sell the laborer's part of the crop until the landlord is fully paid; but if there is a renting, and the relation of landlord and tenant exists, an older judgment will subject the renter's crop, although the landlord may have a parol contract with the tenant by which it is stipulated that the crop is to be the landlord's until the debt for supplies is paid. Almand v. Scott, 80 Ga. 95, 4 S.E. 892, 12 Am. St. R. 241 (1887).

When a tenant retained control and direction of the farm, and croppers worked the farm under this direction and were to receive a part of the crop as wages for their labor, the relation between them and the tenant was not that of landlord and tenant, but of master and servant; but if the tenant made an additional and separate contract with one of the croppers, by which it was agreed that the cropper was to pay $60.00 for a crop which had been begun and abandoned by another, work it and give the tenant half, the remaining half to be bound for the $60.00, this cropper became a renter of the land occupied by that crop, and the title to the crop raised on it was in the cropper. Bryant v. Pugh, 86 Ga. 525, 12 S.E. 927 (1891).

Unsigned lease. — When a two-year lease is not signed by the lessor, even though signed by the lessee in possession, it is inoperative as such. Lewis v. Floyd, 126 Ga. App. 520, 191 S.E.2d 291 (1972).

Lease to begin in future. — Fact that the beginning of the term of the lease was postponed until the time the United States government ceased to use the airport would not render the agreement invalid; a valid lease, the term of which is to begin in the future, may be made. Southern Airways Co. v. De Kalb County, 216 Ga. 358, 116 S.E.2d 602 (1960).

Limitations not creating usufruct. — Contract which ordinarily would be construed to create an estate for years is not reduced to a mere usufruct because certain limitations are put upon the contract's use; the interest so passing may be encumbered or somewhat limited without necessarily changing the character of the estate. Camp v. Delta Air Lines, 232 Ga. 37, 205 S.E.2d 194 (1974).

Parties intended by restrictions to create a usufruct when the agreement completely restricted assignment of the lease without lessor's written consent; the agreement limited the lessees' rights in the property to cultivation matters, specifically excluding lessees from exercising mineral rights and ''other rights of every kind and nature;'' and the agreement required lessees to maintain the property in the ''usual high standard of care, cultivation and fertilization'' practiced by lessees on their own land and required lessees to clear the land and leave it in good cultivatable condition suitable for grain or row-crop cultivation upon termination of the lease. Therefore, lessors, not lessees, was subject to ad valorem taxation on the property. Searcy v. Peach County Bd. of Tax Assessors, 180 Ga. App. 531, 349 S.E.2d 515 (1986).

Existence of Relationship (Cont'd)

Effect of restrictions upon lease. — Certain restrictions imposed upon use of the premises under a lease can be so pervasive as to be fundamentally inconsistent with the concept of an estate for years. Allright Parking of Ga., Inc. v. Joint City-County Bd. of Tax Assessors, 244 Ga. 378, 260 S.E.2d 315 (1979).

Contract of purchase. — When the owner of land puts another in possession thereof under a parol contract to allow the latter to purchase the land at a given price and pay for the land in annual installments, but on condition that if the other was not able to pay for the land the other should pay as rent for the same each year the other occupied the land 10 percent of the price agreed upon and the taxes on the land, and the occupant of the land failed for two years to make any payment to the owner, either as purchase money or as rent, the relation of landlord and tenant existed between the parties as to the second year's occupation. Reddick & Webster v. Hutchinson, 94 Ga. 675, 21 S.E. 712 (1894).

Crop adjustment program. — Under the crop adjustment program, the federal government acquires no right to possession, no usufruct; it simply acquires the right to say to the farmer that the farmer shall use the farmer's lands in a fashion determined to promote soil building and soil conservation. Georgia Power Co. v. Fletcher, 113 Ga. App. 559, 148 S.E.2d 915 (1966).

Contract to manage property. — Intent of the parties was that Southern Airways simply contracted with the county to manage and operate the county's airport, as its agent, for public and governmental purposes, and whether the contract between the parties be called a lease, a license, a franchise or a contract of agency or management, it was the intention of the parties that Southern Airways would not obtain any interest in the real estate described in the contract, but only a circumscribed and limited use of the airport facilities. The reserved rights of the lessor as to the control, improvement, inspection, and supervision of the premises with the right of others to use the facilities, negate any contention that the lessee would have the exclusive possession and control of the premises. Southern Airways Co. v. De Kalb County, 216 Ga. 358, 116 S.E.2d 602 (1960).

Assignees who rented a portion of an airplane hangar from a lessee of the premises were trespassers who were not entitled to notice to vacate since there was no evidence indicating a consent or election on the part of the landlords to accept the assignees as tenants. Block v. Brown, 199 Ga. App. 127, 404 S.E.2d 288, cert. denied, 199 Ga. App. 905, 404 S.E.2d 288 (1991).

Conveyance of room for stipulated sum. — Conveyance of a room for a stipulated sum to be kept as a first class bar room is clearly not a mere contract of writing, so as to give the tenant only an usufruct, which cannot be conveyed to another without consent of the landlord. Such a conveyance creates an estate for years. Clark v. Herring & Mock, 43 Ga. 226 (1871).

Furnished room on week-to-week term. — Fact that bedroom and bath were rented furnished in a building containing other rooms and the term was on a week-to-week basis does not affirmatively show that landlord-tenant relationship alleged by plaintiff did not exist so as to change the duty owed by the defendant to the plaintiff from that of landlord to tenant to innkeeper and guest. Garner v. La Marr, 88 Ga. App. 364, 76 S.E.2d 721 (1953).

Lease of transportation privileges. — When complainants ''rented and farmed out'' all the transportation privileges of the defendant for 99 years, complainants did not take an estate for years, but came within the provisions of this statute, and became tenants having the mere right of possession and use with no interest in the property which was taxable, all estate therein subject to taxation remaining in the lessor. Louisville & N.R.R. v. Wright, 199 F. 454 (N.D. Ga. 1912), aff'd, 201 F. 1023 (5th Cir. 1913), modified, 236 U.S. 687, 35 S. Ct. 475, 59 L. Ed. 788 (1915).

Lessor's inherent right to terminate lease. — When the lessee's failure to maintain the farm in a reasonable manner was found by the jury to amount to such a breach of the lease in a matter so substantial and fundamental as to defeat the object of the lease, the lessor retains the inherent right to rescind or terminate the lease even in the absence of an express provision in the lease. Nunn v. Taylor, 177 Ga. App. 44, 338 S.E.2d 453 (1985).

Creation of Relationship

Use of land. — When there is a sale or contract of sale of title, the relation of landlord and tenant does not exist, but it exists only when the use of the land either for a specified time or at will, is granted. Allread v. Harris, 75 Ga. 687 (1885).

Possession and enjoyment. — When the owner of the land granted to the defendant the right to possess and enjoy the use of such land, and the grant was accepted, the relation of landlord and tenant arose between them. Taylor v. Coney, Lovejoy & Co., 101 Ga. 655, 28 S.E. 974 (1897).

Specified time and price. — When the owner of land rent is to one person for the year at a specified price, the relation of landlord and tenant exists between them by contract. Willingham v. Faircloth, 52 Ga. 126 (1874).

Agreement to pay rent. — Agreement to pay rent creates the relation of landlord and tenant. In re O'Dowd, 18 F. Cas. 593 (S.D. Ga. 1873) (No. 10, 439).

Payment of rent is not essential to the creation of a tenancy at will. May v. May, 165 Ga. App. 461, 300 S.E.2d 215 (1983).

Contract for land for stipulated rent for five years created the relation of landlord and tenant. Napier v. Varner, 149 Ga. 586, 101 S.E. 580 (1919).

Acceptance by tenant of terms of contract. — Before the relation of landlord and tenant exists, the tenant must accept the grant or enter the premises under the terms of the contract, and not in some other relationship or capacity. Edwards v. Gulf Oil Corp., 71 Ga. App. 649, 31 S.E.2d 677 (1944).

Taking possession not necessary. — Fact that the tenant did not at any time occupy the premises has no effect on the landlord-tenant relationship. Hudson v. Stewart, 110 Ga. 37, 35 S.E. 178 (1900).

Relationship created by parol. — When the defendant, under the parol contract, took possession of the rented premises, the relation of landlord and tenant was established between the plaintiffs and the defendant. Nicholes v. Swift, 118 Ga. 922, 45 S.E. 708 (1903).

Joint possession and use. — When a railroad company, by contract express or implied, admits another company into the possession, use and occupation, jointly with itself, of the railroad's depot, yards, yardtracks, and other terminal facilities, the relation of landlord and tenant is established between the two companies and continues, if no term be fixed by contract, so long as such joint possession, use, and occupation may last. Rome R.R. v. Chattanooga, R. & C.R.R., 94 Ga. 422, 21 S.E. 69 (1894).

Terms creating usufruct. — When the terms of the lease stated: ''This contract shall create the relationship of landlord and tenant between lessor and lessee, and no estate shall pass out of the lessor; the said lease is not subject to levy and sale and not assignable by lessee except by lessor's consent,'' only a usufruct was granted to the original lessee. Stevenson v. Allen, 94 Ga. App. 123, 93 S.E.2d 794 (1956).

Lease between port authority and warehouse company of warehouse property created a usufruct, rather than an estate for years, since the authority retained dominion or control over the leased property, and the warehouse company was required to keep and maintain the premises, and was prohibited from assigning or permitting any part of the subject property to be used by others without the authority's written consent. Richmond County Bd. of Tax Assessors v. Richmond Bonded Whse. Corp., 173 Ga. App. 278, 325 S.E.2d 891 (1985).

Landlord need not be owner. — It is not essential to the establishment of the relationship of landlord and tenant that the landlord be the owner of the premises. Pugh v. Middlebrooks, 47 Ga. App. 528, 171 S.E. 160 (1933), cert. dismissed, 179 Ga. 64, 175 S.E. 16 (1934).

Characteristics of Relationship

Contract of tenancy may "concern" lands without conveying an interest therein. Neely v. Sheppard, 185 Ga. 771, 196 S.E. 452 (1938).

No premises liability. — Trial court properly granted summary judgment pursuant to O.C.G.A. § 9-11-56(c) to a grandmother of an adult grandson who shot and killed his girlfriend as there was no showing that the grandmother had any duty to supervise the grandson, nor did the grandmother own the premises where the shooting occurred, such that a claim of premises liability could not stand under O.C.G.A. § 44-7-1(a); summary judgment to the mother of the adult son was also proper on the negligent supervision

Characteristics of Relationship (Cont'd)

claim as the mother only had a duty to supervise the son, who was out on bond, during the mother's non-working hours, and the son committed the killing during the mother's work hours. Spivey v. Hembree, 268 Ga. App. 485, 602 S.E.2d 246 (2004).

Relationship of landlord and tenant may be for any length of time fixed by agreement. Garner v. La Marr, 88 Ga. App. 364, 76 S.E.2d 721 (1953).

There is a rebuttable presumption that a lease for five years or more is a taxable estate for years, but, whether an estate in the land passes to the tenant, or the tenant obtains merely the usufruct, depends upon the intention of the parties, and this is true without regard to the length of the term. A company's 50-year lease from a city recreational authority was a usufruct since the provisions of the parties' lease showed that the authority retained dominion and control over the property and that the company took only a circumscribed and limited use of the premises. Diversified Golf, LLC v. Hart County Bd. of Tax Assessors, 267 Ga. App. 8, 598 S.E.2d 791 (2004).

Whether an estate in the land passes to the tenant, or the tenant merely obtains a usufruct depends upon the intention of the parties; and this is true without regard to the length of the term. Macon-Bibb County Bd. of Tax Assessors v. Atlantic S.E. Airlines, 262 Ga. 119, 414 S.E.2d 635 (1992).

Lease as sale. — Lease of an estate for years of lands is in effect the sale of an estate for years therein. Shell Petro. Corp. v. Jackson, 47 Ga. App. 667, 171 S.E. 171 (1933).

Usufruct not taxable estate. — Usufruct is not considered to be a taxable estate because the fee estate in the property remains with the lessor and is undisturbed by the agreement for the lessee to use the property. Camp v. Delta Air Lines, 232 Ga. 37, 205 S.E.2d 194 (1974); Allright Parking of Ga., Inc. v. Joint City-County Bd. of Tax Assessors, 244 Ga. 378, 260 S.E.2d 315 (1979).

Usufruct not subject to levy and sale. — Usufruct is not subject to levy and sale. Boone v. Sirrine, 38 Ga. 121 (1868); Harms v. Entelman, 21 Ga. App. 295, 94 S.E. 276 (1917).

Lease of lands for five years or more creates estate for years and passes as realty in this state. Such an estate may be bought and sold as any other estate, subject to the terms and conditions of the lease. Paces Partnership v. Grant, 212 Ga. App. 621, 442 S.E.2d 826 (1994).

Estate for years may be sold. — Lease of land for five years or more which creates an estate for years may be bought and sold as any other estate, subject to the terms and conditions of the lease. Shell Petro. Corp. v. Jackson, 47 Ga. App. 667, 171 S.E. 171 (1933).

Each partner liable to landlord. — When the relationship exists between landlord and copartners as tenants, the owner of the land would have been entitled to look to each of the parties for the preservation of the party's property and payment of the rents. Boone v. Sirrine, 38 Ga. 121 (1868); Kraft v. Hendry, 150 Ga. 155, 103 S.E. 169 (1920).

Promise of payment is consideration. — Payment or promise of payment of stipulated rentals alone constitutes a valid consideration for a lease, without the necessity for any other consideration from the lessee. Shell Petro. Corp. v. Stallings, 51 Ga. App. 351, 180 S.E. 654 (1935).

Agent is not landlord. — While one may be a landlord without being the owner of the premises, yet the agent of the landlord to collect rents and who agrees and assumes the duty of making repairs does not become the landlord of the tenant, and no recovery can be had against such agent as landlord. Sanders v. A.T. Holt Co., 76 Ga. App. 279, 45 S.E.2d 480 (1947).

Effect of holding over. — When after the expiration of a lease for 20 years, the tenants held over another year without objection on the part of the landlord, the holding over did not entitle the tenants to another 20 years tenancy but constituted them tenants at sufferance. Sutton v. Hiram Lodge, 83 Ga. 770, 10 S.E. 585, 6 L.R.A. 703 (1889).

Damages for wrongful holding over. — When the owner of land conveys the land for such term of years as to convey an estate for years in that land, the holder of such estate may, if entitled to possession under such conveyance, maintain an action for damages against a tenant for wrongful holding over and beyond the tenant's term. Baxley v. Davenport, 75 Ga. App. 659, 44 S.E.2d 388 (1947).

Presumptions as to usufruct or estate for years. — When the term of the lease is less

than five years, a rebuttable presumption arises that only a usufruct is created by the instrument, but when the term of the lease is for more than five years, there is a presumption that an estate for years is created by the agreement of the parties. Camp v. Delta Air Lines, 232 Ga. 37, 205 S.E.2d 194 (1974); Allright Parking of Ga., Inc. v. Joint City-County Bd. of Tax Assessors, 244 Ga. 378, 260 S.E.2d 315 (1979).

Presumption of estate for years not conclusive. — Although there may be a presumption that a lease for five years or more conveys an estate for years, this fact alone does not conclusively show that an estate for years was created in the lessee and that the relation of landlord and tenant did not exist between the parties. Midtown Chain Hotels Co. v. Bender, 77 Ga. App. 723, 49 S.E.2d 779 (1948).

Presumption of continued possession under lease. — If it is proved that one alleged to be a tenant entered the premises originally under the lease, in the absence of any other evidence to the contrary, there is a presumption that one's continued possession was under the lease, since such possession is consistent with the terms of the lease. Edwards v. Gulf Oil Corp., 71 Ga. App. 649, 31 S.E.2d 677 (1944).

Description of property conveyed. — Description will not be declared void for uncertainty if the description furnishes the key to identification of the property conveyed. Roe v. Doe, 246 Ga. 138, 268 S.E.2d 901 (1980).

Agreement held to create usufruct. — Agreement created a usufruct, rather than an estate for years, despite provision that ''it is the intent of the parties to create a leasehold estate … and not a mere usufruct'' since the initial term was for seven months, but provided for automatic renewals for ten consecutive one-year periods, provided the program was funded by the General Assembly, and the lessor was responsible for all insurance, taxes, and upkeep of the premises, including maintenance and repairs. Huntingdon II, Ltd. v. Chatham County Bd. of Tax Assessors, 207 Ga. App. 466, 428 S.E.2d 605 (1993).

Subletting and Assignment

Subletting defined. — ''Subletting'' is a leasing by the lessee of a whole or a part of the premises during a portion of the unexpired balance of one's term. Georgia Power Co. v. Fletcher, 113 Ga. App. 559, 148 S.E.2d 915 (1966).

At common law, a tenant had the right to assign the tenant's his lease, but the tenant could not substitute another paymaster in the tenant's stead, without the consent and acceptance of the landlord. Garner v. Byard, 23 Ga. 289, 68 Am. Dec. 527 (1857).

Modification of common law. — Statute changed the common law power of the tenant to sublet for at common law the tenant could assign the tenant's interests. Garner v. Byard, 23 Ga. 289, 68 Am. Dec. 527 (1857) (see O.C.G.A. § 44-7-1).

Subletting prohibited. — When the landlord rents land and tenements to another for a fixed time, or at the will of the landlord, the tenant has only a usufruct in the premises, which the tenant cannot convey to another, except by the landlord's consent. Sealy v. Kuttner, 41 Ga. 594 (1871); Hooper, Hough & Force v. Dwinnell, 48 Ga. 442 (1873); McLendon Bros. v. Finch, 2 Ga. App. 421, 58 S.E. 690 (1907); Butts Bros. v. Ennis, 148 Ga. 153, 96 S.E. 131 (1918).

Assignment of lease for years. — When, in consideration of the grant of a leasehold estate in realty, the lessee agrees for the lessee and assigns to pay a stipulated yearly rental to the lessor, and thereafter conveys and assigns the lessee's entire unexpired leasehold to a third person, the effect of the instrument is to establish a privity of estate between the assignee and the original lessor, and to authorize the latter to hold the former liable upon covenants running with the land, such as the payment of the yearly rental while the leasehold estate remains vested in the assignee, but the rule is to the contrary when property is leased for a period of less than five years, so as not to constitute a leasehold estate. Dunlap v. George, 48 Ga. App. 341, 172 S.E. 657 (1934).

Consent of lessor to assignment not necessary. — Even though a lessee cannot by an assignment of a lease of five years or more, or by a sublease thereunder, free oneself from the obligations of the lease without the consent of the lessor, such consent is not necessary to the validity of the sublease. Shell Petro. Corp. v. Stallings, 51 Ga. App. 351, 180 S.E. 654 (1935).

Effect of attempted transfer. — Lessee cannot, without the consent of the landlord,

Subletting and Assignment (Cont'd)

transfer the lessee's lease; the transferee in such a case would be a mere intruder and subject to be summarily ousted by the landlord. Bass v. West, 110 Ga. 698, 36 S.E. 244 (1900).

Landlord's permission constitutes right to sublet. — Tenant can sublet only with the landlord's consent, and the terms and conditions of the subtenant's right to possess and enjoy the use of the demised property must be found in the landlord's permission. Dodd v. Ozburn, 128 Ga. 380, 57 S.E. 701 (1907).

Refusal to consent as rescission. — Refusal on the part of the landlord to consent to tenant's subletting the premises does not constitute a rescission of the lease agreement between the tenant and the landlord if no provision is made for subletting by the tenant. Jenkins v. Smith, 92 Ga. App. 296, 88 S.E.2d 533 (1955).

Landlord's reasonableness in considering sublet implied. — Even if a lease does not contain a clause requiring reasonableness on the part of a landlord in the denial of a sublease, such a provision will be implied. Stern's Gallery of Gifts, Inc. v. Corporate Property Investors, Inc., 176 Ga. App. 586, 337 S.E.2d 29 (1985).

Landlord's acceptance of subtenant. — If a tenant, without consent, undertakes to assign or transfer such lease to another person, the landlord may, by affirmative action, elect to treat such unauthorized transferee as one's own tenant, and thereby establish between them the relation of landlord and tenant according to the terms of the original lease. McBurney v. McIntyre, 38 Ga. 261 (1868); McConnell v. East Point Land Co., 100 Ga. 129, 28 S.E. 80 (1897); Lawson v. Haygood, 202 Ga. 501, 43 S.E.2d 649 (1947); Estralita Lamps, Inc. v. Marietta Indus. Ass'n, 80 Ga. App. 196, 55 S.E.2d 822 (1949).

In the event of an unauthorized transfer or assignment of a lease, the landlord may by affirmative action elect to substitute the transferee or assignee for the original tenant. The landlord's election to recognize an unauthorized subtenant as the landlord's tenant may be effected by an expressed recognition, or the election may be implied from such affirmative acts and conduct as will clearly indicate an intention on the part of the landlord to effect such a substitution. Splish Splash Waterslides, Inc. v. Cherokee Ins. Co., 167 Ga. App. 589, 307 S.E.2d 107 (1983).

Affirmative act by landlord. — In order for the relation of landlord and tenant to exist between the owner of the property and a subtenant, some affirmative action must be had by the landlord showing that the landlord elected to treat the subtenant as the landlord's tenant. Hudson v. Stewart, 110 Ga. 37, 35 S.E. 178 (1900), later appeal, Liberty Loan Corp. v. Leftwich, 115 Ga. App. 113, 153 S.E.2d 596 (1967); 116 Ga. App. 799, 159 S.E.2d 142 (1967); 118 Ga. App. 383, 163 S.E.2d 837 (1968); Ihlanfeldt v. Courtney, 132 Ga. App. 155, 207 S.E.2d 653 (1974).

Relationship of subtenant to landlord. — Subtenant becomes the tenant of the landlord, if the landlord elects to recognize the subtenant as such, and the landlord may proceed against the subtenant for holding over; or the landlord may refuse to recognize the tenancy and proceed to expel the person placed upon the premises by the tenant as an intruder, in any manner prescribed by law for the expulsion of trespassers or intruders. McBurney v. McIntyre, 38 Ga. 261 (1868).

Landlord's mere failure to object and the landlord's acceptance of payment of the rent from the subtenant, without more, are not together sufficient to constitute an election by the landlord to accept the subtenant as the landlord's immediate tenant. Liberty Loan Corp. v. Leftwich, 115 Ga. App. 113, 153 S.E.2d 596 (1967); 116 Ga. App. 799, 159 S.E.2d 142 (1967), later appeal, 118 Ga. App. 383, 163 S.E.2d 837 (1968).

Question for jury. — Since a 20-year lease stipulated that the tenant received only a usufruct and expressly prohibited the assignment of the interest or the subletting of the premises without the landlord's prior written consent, but a subtenant was in possession with the landlord's knowledge for approximately seven months before the landlord entered into an agreement with the tenant to terminate the lease, these facts, while not alone sufficient to find that the landlord accepted the subtenant as the landlord's tenant, and could not terminate the underlying lease with the subtenant's consent,

raised a jury question. Step Ahead, Inc. v. Lehndorff Greenbriar, Ltd., 171 Ga. App. 805, 321 S.E.2d 115 (1984).

Rights of Tenant

Tenant may protect interests in property. — Tenant, although the tenant has no estate in the land, is the owner of the land's use for the term of the tenant's rent contract, and can recover damages for any injury to such use occasioned by a public nuisance. Bentley v. City of Atlanta, 92 Ga. 623, 18 S.E. 1013 (1893).

Due process right of lessee. — Holder of a valid rent contract for realty, though it be for a period of less than five years, has a property right in the leased premises which is protected by the constitutional provision declaring that private property cannot be taken or damaged, for a public use, without first paying just and adequate compensation for the property. Waters v. DeKalb County, 208 Ga. 741, 69 S.E.2d 274 (1952).

Tenancy not part of tenant's assets. — When the tenancy of the storehouse occupied by the assignors was by the year, they had no estate in it, and therefore it could not have been a part of their assets. Stultz & Blair v. Fleming & Bussey, 83 Ga. 14, 9 S.E. 1067 (1889).

Lessee's right to possess and enjoy. — Leasing, even for less than a year, conveys to the lessee the ''right to possess and enjoy the real estate,'' though it passes no estate out of the lessor. Georgia Power Co. v. Fletcher, 113 Ga. App. 559, 148 S.E.2d 915 (1966).

Lessee's right to possession. — When the owner of lands does not convey the title or an estate therein but gives the lessees only the usufruct, such lessees may not maintain an action for damages or one to recover possession from a tenant of the owner who is alleged to be holding over and beyond the term for which the tenant rented the premises, but the lessees must look to the owner to place the lessees in possession of the premises and may maintain an action for damages against the owner for a refusal or failure to do so. Baxley v. Davenport, 75 Ga. App. 659, 44 S.E.2d 388 (1947).

Because the evidence presented at trial made it clear that a lessor conveyed no ownership interest to a tenant, leaving that tenant with only a right to possess and use the leased property, and more specifically, a usufruct, the tenant did not own an interest in the property, and thus could not pursue an easement by necessity under O.C.G.A. § 44-9-40; hence, summary judgment in the lessor's favor as to this issue was upheld on appeal. Read v. Ga. Power Co., 283 Ga. App. 451, 641 S.E.2d 680 (2007).

Landlord's failure to repair latent defect. — Responsibility of a landlord for failure to repair a latent defect in the premises before leasing the premises is predicable only on the landlord's knowledge of the defect and the consequent necessity for repairs; this knowledge may be constructive as well as actual. Accordingly, if by the exercise of ordinary care in the performance of one's obligation to keep the premises in repair, one ought to have known of a latent defect therein, one is answerable in damages to the tenant, or to one entering under the authority of the tenant, for personal injuries sustained by reason of such defect. Elijah A. Brown Co. v. Wilson, 191 Ga. 750, 13 S.E.2d 779 (1941).

Tenant severing trees. — Tenant of farm lands has no right to sever trees thereon for the purpose of sale, and when the tenant does so, animus furandi, the tenant is guilty of larceny and not larceny after trust. Higgins v. State, 58 Ga. App. 480, 199 S.E. 158 (1938).

Liability of subtenant to tenant. — One who rents land and sublets the land to a third person stands in the relation of landlord to the subtenant and may have a distress warrant for the rent. Harrison v. Guill, 46 Ga. 427 (1872).

Existing condition as constructive eviction. — Tenant was precluded by lease from claiming that the tenant was constructively evicted by a condition that existed at the time the tenant signed the lease. Snipes v. Halpern Enters., Inc., 160 Ga. App. 207, 286 S.E.2d 511 (1981).

Defense based on fraud prohibited if lease contains stipulation regarding entire agreement. — Tenants who sign a lease containing a stipulation regarding the ''entire agreement,'' when sued for the rent thereunder, cannot defend on the grounds of fraudulent representations as to the condition of the premises. Snipes v. Halpern Enters., Inc., 160 Ga. App. 207, 286 S.E.2d 511 (1981).

Status of Third Parties

Lienor. — When the owner of property encumbered the property with a security deed and a contractor's lien, and thereafter leased a portion of the property to a third person for a term of years, the lessee had a right to enjoy the property for the term of the lease, and the holders of the liens will be compelled to sell such property in such a manner as not capriciously, unnecessarily, and unjustly to interfere with such leasehold interest. Western Union Tel. Co. v. Brown & Randolph Co., 154 Ga. 229, 114 S.E. 36 (1922).

Transferee. — If one has a leasehold estate and a right to assign it, and makes to another a lease covering one's whole term, it will be treated as an assignment relative to the landlord so as to establish a privity between the transferee and the landlord, and to authorize the latter to hold the former upon covenants running with the land. But, as between the original lessee and the sublessee, even though the former demise one's whole term, if the parties intend a lease, the relation of landlord and tenant, at least as to all but strictly reversionary rights, will arise. Potts-Thompson Liquor Co. v. Potts, 135 Ga. 451, 69 S.E. 734 (1910).

Trustee in bankruptcy. — Trustee in bankruptcy of a lessee has only the same rights and interest that the tenant has under the contract of lease, and cannot enforce a different contract. The lessee could not assign the lease without the consent of the lessee's landlord, and neither could the trustee in bankruptcy. Cox v. Howell, 37 Ga. App. 596, 141 S.E. 82, cert. denied, 37 Ga. App. 833 (1928).

Effect of transfer to trustee in bankruptcy. — When a lease to a bankrupt for five years, though containing a covenant against assignment and subletting, did not expressly prohibit such transfer nor provide for termination on the transfer of the lessee's interest by bankruptcy proceedings, such a transfer to the lessee's trustee in bankruptcy was an act of the law and did not terminate the lease, especially under this statute inferentially providing that a lease for five years confers a legal estate on the lessee. Nelson v. Denmark (In re Gutman), 197 F. 472 (S.D. Ga. 1912) (see O.C.G.A. § 44-7-1).

Partner. — Lessee's association of a third person with the lessee as a partner is not an assignment of the lease. The incoming partner may not have a legal interest in the lease, because it was not formally assigned to that partner by the tenant with the landlord's consent; but as the partner was on the premises engaged in the business with the landlord's tenant, with the landlord's knowledge and consent, the partner was not a trespasser. The partner was at least a licensee whose rights as such the landlord was bound to respect. DeFoor v. Stephens & Lastinger, 133 Ga. 617, 66 S.E. 786 (1909).

Effect of covenant to renew on purchaser. — As against a purchaser from the landlord, with notice, the covenant on the part of the lessor to renew is a covenant real, the burden of which rests with the reversion, and may therefore be enforced against the grantee of the reversion. Parker v. Gortatowsky, 127 Ga. 560, 56 S.E. 846 (1907).

OPINIONS OF THE ATTORNEY GENERAL

Lease of land for five years or longer which does not by the lease's own terms purport an intention to convey a lesser interest will be presumed to convey an estate for years and as such passes as realty. 1969 Op. Att'y Gen. No. 69-352.

Oral lease. — One may make a valid oral lease agreement for a period of one year or less and be bound by the agreed terms thereof just as in a written contract although one may be somewhat handicapped in presenting evidence as to the terms of the agreement. 1967 Op. Att'y Gen. No. 67-59.

Lease subject to ad valorem taxation. — Lease of real property conveying an interest therein is subject to ad valorem taxation. 1969 Op. Att'y Gen. No. 69-482.

City holding usufruct is not owner. — When city holds a mere usufruct, terminable on six months' notice, which cannot be levied upon or sold, city has only the limited rights of possession and use, and no estate has passed to the city; therefore, the property is not publicly owned and is not subject to the provisions of § 4 (f) of the Department of Transportation Act of 1966. 1976 Op. Att'y Gen. No. 76-49.

RESEARCH REFERENCES

Am. Jur. 2d. — 49 Am. Jur. 2d, Landlord and Tenant, § 1.

Am. Jur. Pleading and Practice Forms. — 16A Am. Jur. Pleading and Practice Forms, Landlord and Tenant, § 4.

C.J.S. — 51C C.J.S., Landlord and Tenant, § 4.

ALR. — Fraud, misrepresentation, or mistake as affecting estoppel of tenant to deny landlord's title, 2 ALR 359.

Right of tenant to treat interference with his possession as an eviction and recover damages for loss of unexpired term, 7 ALR 1103.

Rights and remedies of tenant who remains in possession of all or part of the premises against landlord for interfering with his possession or enjoyment, 20 ALR 1369; 28 ALR 1333; 64 ALR 900.

Parol-evidence rule as applied to lease, 25 ALR 787; 88 ALR 1380; 151 ALR 279.

Effect of nonhabitability of leased dwelling or apartment, 29 ALR 52; 34 ALR 711.

Acts of insurance company or public authorities to protect property after fire as constructive eviction of tenant, 29 ALR 1361.

Landlord's consent to one assignment or sublease as obviating necessity of consent to subsequent assignment or sublease, 31 ALR 153; 32 ALR 1080.

Status and rights of one renting room in club, 32 ALR 1016.

Rights of lessee who relets for entire term as against sublessee or person claiming under latter, 32 ALR 1429.

Construction of provision for termination of lease in event of sale of property, 35 ALR 518; 116 ALR 931; 163 ALR 1019.

Nature of occupancy of person occupying premises of employer as part of compensation, 39 ALR 1145.

Forfeiture of lease by act of subtenant, 49 ALR 830.

Surrender and acceptance of term as affecting right to recover rent or on obligation given for rent, 58 ALR 906.

What is objectionable purpose within provision of lease against assigning or subletting for objectionable purpose, 61 ALR 708.

Special assessments as within provisions of a lease requiring lessee to pay ''taxes,'' ''taxes and assessments,'' as variations, 63 ALR 1391.

Rights and remedies of assignee or sublessee as against assignor or sublessor who misrepresents facts regarding lessor's consent, 78 ALR 356.

Landlord's acceptance of chattel mortgage, or conditional sales contract, as waiver of landlord's lien or reservation of title, 96 ALR 568.

Rights as between the landlord and conditional seller of property to tenant, 98 ALR 628.

Status as licensee or lessee of one in occupation of land in anticipation of the making or execution of a lease, 123 ALR 700.

Validity and effect of acceleration clause in lease or bailment, 128 ALR 750.

Lease or tenancy agreement as creating partnership relationship between lessor and lessee, 131 ALR 508.

Construction and application of provisions as to assignment by ''tenant-owner'' in ''co-operative'' apartment house plan, 141 ALR 1162.

Condemnation of premises or part thereof as affecting rights of landlord and tenant inter se, 163 ALR 679.

Sublease or assignment of tenancy at will, 167 ALR 1040.

Character and duration of tenancy created by entry under invalid or unenforceable lease, 6 ALR2d 685.

Enforceability of option to purchase, consideration for which is payment of rentals exceeding rent control law maximum, 28 ALR2d 1204.

Covenant in lease to arbitrate, or to submit to appraisal, as running with the leasehold so as to bind assignee, 81 ALR2d 804.

Construction and effect of provision in lease that consent to subletting or assignment will not be arbitrarily or unreasonably withheld, 54 ALR3d 679.

Grazing or pasturage agreement as violative of covenant in lease or provision of statute against assigning or subletting without lessor's consent, 71 ALR3d 780.

Recovery of expected profits lost by lessor's breach of lease preventing or delaying operation of new business, 92 ALR3d 1286.

Farmland cultivation arrangement as creating status of landlord-tenant or landowner-cropper, 95 ALR3d 1013.

Implied covenant or obligation to provide lessee with actual possession, 96 ALR3d 1155.

Right to exercise option to renew or extend lease as affected by tenant's breach of other covenants or condition, 23 ALR4th 908.

Children's day-care use as violation of restrictive covenant, 29 ALR4th 730.

Sufficiency as to method of giving oral or written notice exercising option to renew or extend lease, 29 ALR4th 903.

What constitutes timely notice of exercise of option to renew or extend lease, 29 ALR4th 956.

Waiver or estoppel as to notice requirement for exercising option to renew or extend lease, 32 ALR4th 452.

Sufficiency as to parties giving or receiving notice of exercise of option to renew or extend lease, 34 ALR4th 857.

Express or implied restriction on lessee's use of residential property for business purposes, 46 ALR4th 496.

Implied warranty of fitness or suitability in commercial leases — modern status, 76 ALR4th 928.

What constitutes abandonment of residential or commercial lease — modern cases, 84 ALR4th 183.

Landlord's permitting third party to occupy premises rent-free as acceptance of tenant's surrender of premises, 18 ALR5th 437.

Effect, as between landlord and tenant, of lease clause restricting the keeping of pets, 114 ALR5th 443.

44-7-2. Parol contract creating landlord and tenant relationship; certain provisions prohibited; effect of provision for attorney's fees.

(a) Contracts creating the relationship of landlord and tenant for any time not exceeding one year may be by parol.

(b) In any contract, lease, license agreement, or similar agreement, oral or written, for the use or rental of real property as a dwelling place, a landlord or a tenant may not waive, assign, transfer, or otherwise avoid any of the rights, duties, or remedies contained in the following provisions of law:

(1) Code Section 44-7-13, relating to the duties of a landlord as to repairs and improvements;

(2) Code Section 44-7-14, relating to the liability of a landlord for failure to repair;

(3) Ordinances adopted pursuant to Code Section 36-61-11;

(4) Article 3 of this chapter, relating to proceedings against tenants holding over;

(5) Article 4 of this chapter, relating to distress warrants;

(6) Article 2 of this chapter, relating to security deposits; and

(7) Any applicable provision of Chapter 11 of Title 9 which has not been superseded by this chapter.

(c) A provision for the payment by the tenant of the attorney's fees of the landlord upon the breach of a rental agreement by the tenant, which

provision is contained in a contract, lease, license agreement, or similar agreement, oral or written, for the use or rental of real property as a dwelling place shall be void unless the provision also provides for the payment by the landlord of the attorney's fees of the tenant upon the breach of the rental agreement by the landlord. (Orig. Code 1863, § 2262; Code 1868, § 2254; Code 1873, § 2280; Code 1882, § 2280; Civil Code 1895, § 3117; Civil Code 1910, § 3693; Code 1933, § 61-102; Ga. L. 1976, p. 1372, § 1; Ga. L. 1982, p. 3, § 44.)

Cross references. — Statute of frauds, § 13-5-30 et seq.

Law reviews. — For article surveying developments in Georgia contracts law from mid-1980 through mid-1981, see 33 Mercer L. Rev. 67 (1981). For article surveying developments in Georgia real property law from mid-1980 through mid-1981, see 33 Mercer L. Rev. 219 (1981).

For note concerning the availability of an implied warrant or habitability and an illegal contract defense under subsection (b) of this Code section, see 28 Mercer L. Rev. 351 (1976). For note discussing exculpatory clauses in leases in light of Country Club Apts. v. Scott, 246 Ga. 443, 271 S.E.2d 841 (1980), see 32 Mercer L. Rev. 419 (1980).

JUDICIAL DECISIONS

Analysis

General Consideration
Exculpatory Clauses
Decisions Under Prior Law

General Consideration

Public policy. — General Assembly has consistently expressed the public policy of this state as one in favor of imposing upon the landlord liability for damages to others from defective construction and failure to keep the landlord's premises in repair. The expressed public policy in favor of landlord liability is matched by an equally strong and important public policy in favor of preventing unsafe residential housing. Thompson v. Crownover, 259 Ga. 126, 381 S.E.2d 283 (1989).

Subsection (b) of O.C.G.A. § 44-7-2 forbids landowners from avoiding the duty to make repairs and improvements or the duties created by housing codes. Gresham v. Atlanta Gas Light Co., 193 Ga. App. 841, 389 S.E.2d 502 (1989), rev'd on other grounds, 260 Ga. 391, 394 S.E.2d 345 (1990).

Certainty and definiteness. — Parol contract sought to be enforced as within some exception to the statute of frauds must be certain and definite in all essential particulars. Norris v. Downtown LaGrange Dev. Auth., 151 Ga. App. 343, 259 S.E.2d 729 (1979).

Executory contract may be parol. — Contract establishing the relation of landlord and tenant for one year, though made before the year begins, may be in parol. Steininger v. Williams, 63 Ga. 475 (1879); Gay v. Peak, 5 Ga. App. 583, 63 S.E. 650 (1909); Ridgway v. Bryant, 8 Ga. App. 564, 70 S.E. 28 (1911); Render v. Harris, 25 Ga. App. 302, 103 S.E. 179 (1920), later appeal, 26 Ga. App. 741, 107 S.E. 283 (1921); Butler v. Godley, 51 Ga. App. 784, 181 S.E. 494 (1935); Roland v. Floyd, 53 Ga. App. 282, 185 S.E. 580 (1936).

Unsigned lease ineffective. — When a two-year lease is not signed by the lessor, even though signed by the lessee in possession, the lease is inoperative as such. Lewis v. Floyd, 126 Ga. App. 520, 191 S.E.2d 291 (1972).

Liability for statutory defect. — Tenant correctly asserted that although defect was obvious when the tenant took possession of the apartment, recovery was not necessarily barred when the defect was in violation of duty created by applicable statute or administrative regulation stipulated in O.C.G.A. § 44-7-2(b)(3), such that the trial court

General Consideration (Cont'd)

erred in granting landlord's motion for summary judgment. Bastien v. Metropolitan Park Lake Assocs., 209 Ga. App. 881, 434 S.E.2d 736 (1993).

Storage contract, requiring the lessee to provide all insurance on stored possessions, was not a contract for ''the use or rental of real property as a dwelling place,'' within the meaning of subsection (b) of O.C.G.A. § 44-7-2. Whipper v. McLendon Movers, Inc., 188 Ga. App. 249, 372 S.E.2d 820 (1988).

Part performance. — Parol contract for the rent of lands for a period of five years is invalid and will not have the effect of creating a tenacy for longer than one year in absence of such part performance of the contract as will take the contract out of the statute of frauds. Carl v. Hansbury, 67 Ga. App. 830, 21 S.E.2d 302 (1942).

Part performance insufficient. — Reliance upon the statements and representations of a landlord, prompting a tenant to purchase business coupled with the tenant's possession of the premises and payment of rent, does not constitute sufficient part performance to remove a parol lease agreement from the strictures of this statute. Norris v. Downtown LaGrange Dev. Auth., 151 Ga. App. 343, 259 S.E.2d 729 (1979) (see O.C.G.A. § 44-7-2).

Authority of agent. — Contracts creating the relation of landlord and tenant for any time exceeding one year must be in writing, and when executed by an agent, the authority of the agent to execute the contract must likewise be in writing. Butler v. Godley, 51 Ga. App. 784, 181 S.E. 494 (1935).

Renewal of lease for more than one year. — Lease for more than a year cannot be renewed except in writing. Hooks v. Lease, 68 Ga. App. 850, 24 S.E.2d 601 (1943).

Purported lease renewal was void and inoperative since there was no writing as required by the statute of frauds to authorize the exercise of an option to renew the lease for another three-year term. Brookhill Mgt. Corp. v. Shah, 197 Ga. App. 305, 398 S.E.2d 290 (1990).

Parol renewal for one year valid. — Evidence authorized a finding that after the expiration of the original written lease between the parties a new parol contract was entered into by the parties for the rent of the property for another year which was valid. King v. Patillo, 19 Ga. App. 59, 90 S.E. 1033 (1916).

Automatic renewal. — Fact that a lease provides that the lease would be automatically renewed from year to year in the event the tenant did not give the notice required to the contrary does not necessarily make it a lease for longer than one year. Butler v. Godley, 51 Ga. App. 784, 181 S.E. 494 (1935).

Disaffirming executory parol contract. — Valid executory parol contract for the rent of land for the ensuing year for an agreed price cannot be disaffirmed by the landlord before the time the contract is to take effect on the ground that no part of the contract has been performed and that neither party has acted to the party's prejudice because of it, without subjecting oneself to an action for damages. Roland v. Floyd, 53 Ga. App. 282, 185 S.E. 580 (1936).

Instructions. — In a negligence action by a tenant against the tenant's landlord for compensation for injuries resulting from a rat bite, the trial court erred in instructing the jury that the landlord could not avoid the landlord's duty to repair the property absent evidence of the landlord's negligence. Valdosta Hous. Auth. v. Finnessee, 160 Ga. App. 552, 287 S.E.2d 569 (1981).

Recovery of damages. — In order to recover, a tenant is required to show not only that the landlord breached the landlord's statutory duty to keep the premises in repair, but that such breach was the proximate cause of the tenant's injury. Brown v. RFC Mgt., Inc., 189 Ga. App. 603, 376 S.E.2d 691 (1988).

Cited in Springfield Fire & Marine Ins. Co. v. Price, 132 Ga. 687, 64 S.E. 1074 (1909); Tatum v. Padrosa, 24 Ga. App. 259, 100 S.E. 653 (1919); Candler v. Smyth, 168 Ga. 276, 147 S.E. 552 (1929); Killian v. Cherokee County, 169 Ga. 313, 150 S.E. 158 (1929); Heaton v. Fulton Nat'l Bank, 46 Ga. App. 773, 169 S.E. 216 (1933); Blanchard & Calhoun Realty Co. v. Comer, 185 Ga. 448, 195 S.E. 420 (1938); Neely v. Sheppard, 185 Ga. 771, 196 S.E. 452 (1938); Lamons v. Good Foods, Inc., 195 Ga. 475, 24 S.E.2d 678 (1943); Meeks v. Adams La. Co., 49 F. Supp. 489 (S.D. Ga. 1943); Citizens Oil Co. v. Head, 201 Ga. 542, 40 S.E.2d 559 (1946);

Deriso v. Castleberry, 202 Ga. 174, 42 S.E.2d 356 (1947); Carruth v. Carruth, 77 Ga. App. 131, 48 S.E.2d 387 (1948); Cooper v. Vaughan, 81 Ga. App. 330, 58 S.E.2d 453 (1950); Moon v. Stone Mt. Mem. Ass'n, 223 Ga. 696, 157 S.E.2d 461 (1967); Smith v. Top Dollar Stores, Inc., 129 Ga. App. 60, 198 S.E.2d 690 (1973); Blease v. Blease, 238 Ga. 651, 235 S.E.2d 21 (1977); Hill v. Hill, 143 Ga. App. 549, 239 S.E.2d 154 (1977); Opportunities Industrialization Ctr. of Atlanta, Inc. v. Whiteway Neon Ad, Inc., 146 Ga. App. 871, 247 S.E.2d 494 (1978); General Hosps. of Humana v. Jenkins, 188 Ga. App. 825, 374 S.E.2d 739 (1988); Evans v. Richardson, 189 Ga. App. 751, 377 S.E.2d 521 (1989); Thompson v. Crownover, 259 Ga. 126, 381 S.E.2d 283 (1989); Roth v. Wu, 199 Ga. App. 665, 405 S.E.2d 741 (1991); Gaffney v. EQK Realty Investors, 213 Ga. App. 653, 445 S.E.2d 771 (1994); Fields v. Lanier, 294 Ga. App. 355, 670 S.E.2d 145 (2008).

Exculpatory Clauses

Property not to be used as dwelling place. — While a landlord may not avoid in any lease of real property as a dwelling place any of the requirements set forth in Arts. 3 and 4 of this chapter, a landlord may contract to avoid these statutory requirements when renting property which is not to be used as a dwelling place. Colonial Self Storage of S.E., Inc. v. Concord Properties, Inc., 147 Ga. App. 493, 249 S.E.2d 310 (1978).

Landlord was entitled to rely on default provisions of lease of residence for commercial purposes in refusing tender of past due rent and in taking action to dispossess appellant, and appellant was not entitled to defenses of O.C.G.A. § 44-7-50 et seq., having waived those provisions in the lease. Eason Publications, Inc. v. Monson, 163 Ga. App. 370, 294 S.E.2d 585 (1982).

Warranty of good repair. — Landlord's implied warranty that the rented premises were in good repair at the time the premises were rented cannot be defeated by an exculpatory provision in the lease. Country Club Apts., Inc. v. Scott, 246 Ga. 443, 271 S.E.2d 841 (1980).

Houseboat not alleged to be dwelling place. — When no contention was made in a houseboat lessee's action that the slips or spaces in the marina, or even the houseboats docked there, were to be used as dwelling places, the landlord may contract to avoid the statutory requirements of former Code 1933, Ch. 61-3 or 61-4 (see O.C.G.A. Art. 3 or 4, Ch. 7, T. 44). Wilkerson v. Chattahoochee Parks, 244 Ga. 472, 260 S.E.2d 867 (1979).

Exculpatory clause void as against public policy. — Exculpatory and indemnity provision in commercial lease providing that "lessee hereby releases lessor from any and all damages to both person and property and will hold the lessor harmless from such damages during the terms of this lease" was void as against public policy. Barnes v. Pearman, 163 Ga. App. 790, 294 S.E.2d 619 (1982), aff'd, 250 Ga. 628, 301 S.E.2d 647 (1983).

Liability for wrongful death. — Exculpatory clauses in residential lease would not relieve landlord of liability for wrongful death of tenant. Cain v. Vontz, 703 F.2d 1279 (11th Cir. 1983).

Insurance requirement. — Provision in a lease agreement that imposed upon a tenant a condition that the tenant purchase insurance to protect oneself against the tenant's landlord's negligence, and another provision that purported to bar the tenant's recovery in a negligence case because of the tenant's failure to purchase such insurance, were both void as against public policy as the provisions clearly avoided the "rights, duties, or remedies" contained in O.C.G.A. §§ 44-7-13 and 44-7-14. Schuster v. Plaza Pac. Equities, Inc., 588 F. Supp. 61 (N.D. Ga. 1984).

Decisions Under Prior Law

Editor's notes. — Georgia Laws 1976, p. 1372, deleted from present subsection (a), "and if made for a greater time shall have the effect of a tenancy at will."

In general. — When an oral lease agreement for a definite term exceeds one year, the agreement creates a tenancy at will. Cody v. Quarterman, 12 Ga. 386 (1852); Hooper, Hough & Force v. Dwinnell, 48 Ga. 442 (1873); Abbott v. Padrosa, 136 Ga. 278, 71 S.E. 419 (1911); Beveridge v. Simmerville, 26 Ga. App. 373, 106 S.E. 212 (1921); Sikes v. Carter, 30 Ga. App. 539, 118 S.E. 430 (1923); City Council v. Henry, 92 Ga. App. 408, 88 S.E.2d 576 (1955); Norris v. Downtown LaGrange Dev. Auth., 151 Ga. App. 343, 259 S.E.2d 729 (1979).

Decisions Under Prior Law (Cont'd)

Creation of tenancy at will. — Tenancies at will in Georgia may be created by express contract, by force of statute, when a contract creating the relationship of landlord and tenant is made in parol for a greater time than one year, and the tenancy is to be treated as one at will, or by implication when there was no original express contract for a definite term. Stepp v. Richman, 75 Ga. App. 169, 42 S.E.2d 773 (1947).

Section inapplicable to written lease. — Statute is not applicable when there was a written lease under which the defendant held and the lease does not create a tenancy at will. King & Prince Surf Hotel, Inc. v. McLendon, 74 Ga. App. 805, 41 S.E.2d 556 (1947) (see O.C.G.A. § 44-7-2).

Part performance under void lease. — Although a parol lease may be void under the statute of frauds, a tenancy at will is nevertheless created when the tenant goes into possession or pays rent. Western Union Tel. Co. v. Fain & Parrott, 52 Ga. 18 (1874); Weed v. Lindsay & Morgan, 88 Ga. 686, 15 S.E. 836, 20 L.R.A. 33 (1892); Hayes v. City of Atlanta, 1 Ga. App. 25, 57 S.E. 1087 (1907); Mendel v. C.L. Barrett & Son, 32 Ga. App. 581, 124 S.E. 107 (1924); Merry v. Georgia Big Boy Mtg., Inc., 135 Ga. App. 707, 218 S.E.2d 694 (1975).

Part performance under tenancy at will. — When an oral agreement creates a tenancy at will, part performance does not render the agreement valid and enforceable as a lease for years. Nicholes v. Swift, 118 Ga. 922, 45 S.E. 708 (1903); Norris v. Downtown LaGrange Dev. Auth., 151 Ga. App. 343, 259 S.E.2d 729 (1979).

Term depending upon contingency. — When the term of the lease was indefinite, depending upon a contingency, and could not extend beyond a year, the plaintiff was a tenant at will. Anthony Shoals Power Co. v. Fortson, 138 Ga. 460, 75 S.E. 606 (1912).

Unsigned lease. — When the tenant was to rent land for a term of five years but the landlord failed to sign the lease as modified by the tenant, but the tenant entered and paid notes for rent and did the same the following year, only a tenancy at will was created. Beasley v. Lee, 155 Ga. 634, 117 S.E. 743 (1923).

That the tenant is in possession under a written lease for more than one year, signed only by the landlord, is immaterial when the landlord sells the property to a third party who seeks to evict the tenant on the ground that the lease is void, and that the tenant is a tenant at will. Blanton v. Moseley, 133 Ga. App. 144, 210 S.E.2d 368 (1974).

Agent without authority. — Since an agent's authority to sign a sealed contract must be in writing, the making of a lease for a longer term than one year by the agent is void and hence an entering of the principal under such a contract creates a tenancy at will. Hayes v. City of Atlanta, 1 Ga. App. 25, 57 S.E. 1087 (1907).

RESEARCH REFERENCES

C.J.S. — 51C C.J.S., Landlord and Tenant, § 2.

ALR. — Parol-evidence rule as applied to lease, 25 ALR 787; 88 ALR 1380; 151 ALR 279.

Effect of nonhabitability of leased dwelling or apartment, 29 ALR 52; 34 ALR 711.

Rights of lessee who relets for entire term as against sublessee or person claiming under latter, 32 ALR 1429.

Nature of occupancy of person occupying premises of employer as part of compensation, 39 ALR 1145.

Right to recover exaction by lessor as condition of consent to assignment or sublease, 40 ALR 553.

Landlord's responsibility to third persons for conditions created during tenancy as affected by renewal of the lease, or a new lease subject to the original lease, 49 ALR 1418.

Period covered by lessee's, sublessee's or assignee's covenant to pay taxes or assessments, 97 ALR 931.

When landlord's reletting, or efforts to relet, after tenant's abandonment or refusal to enter, deemed to be acceptance of surrender, 110 ALR 368.

When lease deemed to show intention that an assignment thereof shall relieve the lessee from further liability, contrary to the general rule in that regard, 110 ALR 591.

Rights and remedies of tenant who takes possession of land under agreement in violation of statute of frauds, 119 ALR 1225.

Status as licensee or lessee of one in occupation of land in anticipation of the making or execution of a lease, 123 ALR 700.

Option for renewal of lease or for purchase as conditional upon optionor's purpose to lease or sell property, 127 ALR 894.

Option in lease for renewal or purchase as affecting rights and obligations in respect of sublease, 127 ALR 948.

Validity, construction, and enforceability of provision of lease creating or reserving option or election for future enlargement, reduction, or other variation as regards the premises to be occupied by tenant, 129 ALR 772.

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 ALR 807.

Right of owner of housing development or apartment houses to restrict canvassing, peddling, solicitation of contributions, etc., 3 ALR2d 1431.

Construction and application of provision in lease under which landlord is to receive percentage of lessee's profits or receipts, 38 ALR2d 1113; 58 ALR3d 384.

Doctrine of part performance with respect to renewal option in lease not complying with statute of frauds, 80 ALR2d 425.

Effect, on nonsigner, of provision of lease exempting landlord from liability on account of condition of property, 12 ALR3d 958.

Liability of lessee who refuses to take possession under executed lease or executory agreement to lease, 85 ALR3d 514.

Recovery of expected profits lost by lessor's breach of lease preventing or delaying operation of new business, 92 ALR3d 1286.

Tenant's agreement to indemnify landlord against all claims as including losses resulting from landlord's negligence, 4 ALR4th 798.

Sufficiency of provision of lease to effect second or perpetual right of renewal, 29 ALR4th 172.

Children's day-care use as violation of restrictive covenant, 29 ALR4th 730.

Applicability of exculpatory clause in lease to lessee's damages resulting from defective original design or construction, 30 ALR4th 971.

Provision in lease as to purpose for which premises are to be used as excluding other uses, 86 ALR4th 259.

What constitutes tenant's holding over leased premises, 13 ALR5th 169.

44-7-3. Disclosure of ownership and agents; effect of failure to comply.

(a) At or before the commencement of a tenancy, the landlord or an agent or other person authorized to enter into a rental agreement on behalf of the landlord shall disclose to the tenant in writing the names and addresses of the following persons:

(1) The owner of record of the premises or a person authorized to act for and on behalf of the owner for the purposes of serving of process and receiving and receipting for demands and notice; and

(2) The person authorized to manage the premises.

In the event of a change in any of the names and addresses required to be contained in such statement, the landlord shall advise each tenant of the change within 30 days after the change either in writing or by posting a notice of the change in a conspicuous place.

(b) A person who enters into a rental agreement on behalf of an owner or a landlord or both and who fails to comply with the disclosure requirements in paragraphs (1) and (2) of subsection (a) of this Code

section becomes an agent of the owner or the landlord or both for serving of process and receiving and receipting for notices and demands; for performing the obligations of the landlord under this chapter; and for expending or making available, for the purpose of fulfilling such obligations, all rent collected from the premises. (Code 1933, § 61-102.1, enacted by Ga. L. 1976, p. 1372, § 2; Ga. L. 1982, p. 3, § 44.)

RESEARCH REFERENCES

Am. Jur. 2d. — 49 Am. Jur. 2d, Landlord and Tenant, § 3.

C.J.S. — 51C C.J.S., Landlord and Tenant, § 1 et seq.

ALR. — Fraud, misrepresentation, or mistake as affecting estoppel of tenant to deny landlord's title, 2 ALR 359.

Continued possession of tenant as constructive notice to third person of unrecorded transfer of title of original lessor, 1 ALR2d 322.

44-7-4. Local ordinances relating to security of premises occupied by tenants; cumulative effect of this Code section.

(a) Municipalities and counties may establish by local ordinance minimum security standards not in conflict with applicable fire codes to prevent the unauthorized entry of premises occupied by a tenant as a dwelling place and may require landlords to comply with such standards.

(b) This Code section shall be cumulative to and shall not prohibit the enactment of other general and local laws, rules and regulations of state or local agencies, and local ordinances on this subject. (Code 1933, § 61-102.2, enacted by Ga. L. 1976, p. 1372, § 3.)

RESEARCH REFERENCES

C.J.S. — 62 C.J.S., Municipal Corporations, § 104 et seq.

ALR. — Landlord's liability for failure to protect tenant from criminal activities of third person, 43 ALR5th 207.

44-7-5. When implied contract to pay rent arises.

When, in an action for rent, title is shown in the plaintiff and occupation by the defendant is proved, an obligation to pay rent is generally implied. However, if the entry of the defendant on the premises was not under the plaintiff or if the possession of the defendant is adverse to the plaintiff, no such implication arises. (Civil Code 1895, § 3116; Civil Code 1910, § 3692; Code 1933, § 61-103.)

History of Code section. — This Code section is derived from the decision in Lathrop v. Standard Oil Co., 83 Ga. 307, 9 S.E. 1041 (1889).

JUDICIAL DECISIONS

Derivation of section. — See Lenney v. Finley, 118 Ga. 718, 45 S.E. 593 (1903) (see O.C.G.A. § 44-7-5).

Statute is a rule of evidence as to what proof will authorize the implication of the relation of landlord and tenant and a consequent implied obligation to pay rent. Lathrop v. Standard Oil Co., 83 Ga. 307, 9 S.E. 1041 (1889); Lenney v. Finley, 118 Ga. 718, 45 S.E. 593 (1903) (see O.C.G.A. § 44-7-5).

Nature of relationship required. — Distress for rent will lie only if the relation of landlord and tenant exists between the parties. Cohen v. Broughton, 54 Ga. 296 (1875); Lathrop v. Standard Oil Co., 83 Ga. 307, 9 S.E. 1041 (1889); Cleveland v. Watson, 51 Ga. App. 37, 179 S.E. 586 (1935).

Statute is inapplicable if entry was not under the plaintiff or if the possession is adverse to the plaintiff. Atlanta, K. & N. Ry. v. McHan, 110 Ga. 543, 35 S.E. 634 (1900); Lenney v. Finley, 118 Ga. 718, 45 S.E. 593 (1903); New v. Quinn, 31 Ga. App. 102, 119 S.E. 457 (1923) (see O.C.G.A. § 44-7-5).

Possession adverse to landlord. — When the entry is under one holding adversely to another, the latter is not the landlord of the tenant. Sims v. Price, 123 Ga. 97, 50 S.E. 961 (1905).

Obligation to pay reasonable rent implied. — When one enters into possession of the premises of another under the relation of a tenant, and no amount of compensation is agreed upon, the law will imply an undertaking to pay such as will be fair and reasonable. Rome R.R. v. Chattanooga, R. & C.R.R., 94 Ga. 422, 21 S.E. 69 (1894); Taylor v. Coney, Lovejoy & Co., 101 Ga. 655, 28 S.E. 974 (1897).

Termination of gratuitous tenancy at will. — When a property owner gave notice to the tenant that the gratuitous tenancy at will was terminated, and there was evidence of the reasonable rental value, the owner was entitled to rental payments beginning 60 days after the demand for possession. Auburn Maranatha Inst., Inc. v. Georgia Korean Church, 232 Ga. App. 415, 501 S.E.2d 846 (1998).

Vendor remaining in possession. — When one party conveys land to another, and it is agreed between the parties that the vendor shall remain in possession until a fixed time when the vendor shall surrender possession to the vendee, the relation of landlord and tenant exists between the two by implication under this statute, the vendor being tenant. Prichard v. Tabor, 104 Ga. 64, 30 S.E. 415 (1898); Hand v. Matthews, 153 Ga. 75, 111 S.E. 408 (1922); Chason v. O'Neal, 158 Ga. 725, 124 S.E. 519 (1924) (see O.C.G.A. § 44-7-5).

Security deed given but possession retained. — One who makes to a creditor for the purpose of securing a debt a deed to land, but retains possession of the land, does not thereby become the tenant either of such creditor or of the creditor's vendee. Finn v. Reese, 36 Ga. App. 591, 137 S.E. 574 (1927). See also Ray v. Boyd, 96 Ga. 808, 22 S.E. 916 (1895).

Tenant's disclaimer of owner's title. — If A owns land that is the occupancy of B, the law will imply a liability on the part of B to pay rent for the lands unless B expressly disclaims holding possession under A. Jacks & Bros. v. Mowry, 30 Ga. 143 (1860).

When tenant's possession not interfered with. — Even if title is not shown, a landlord is still entitled to collect rent from one who enters into possession as the landlord's tenant, when the tenant's possession is not interfered with by superior title. Goodman v. Friedman, 117 Ga. App. 475, 161 S.E.2d 71, cert. dismissed, 224 Ga. 497, 162 S.E.2d 295 (1968).

Lease in third party excludes presumption of relationship. — When it appears that a third party has the right, under an express lease contract with the plaintiff, to the use and occupancy of the premises during the time for which rent is claimed against the defendant, there is no room for the implication that the relation of landlord and tenant exists between the plaintiff and the defendant. Lenney v. Finley, 118 Ga. 718, 45 S.E. 593 (1903).

Rental contract with third party as landlord. — When there was no proof to establish the relation of landlord and tenant between the parties, and the evidence showed that the defendant held the premises under a contract of rental with a person other than the plaintiff administrator or plaintiff's intestate, no obligation for rent

existed. Kaufman v. Treadaway, 40 Ga. App. 274, 149 S.E. 325 (1929).

Vague contract of sale resulting in tenancy at will. — In a dispossessory action, the trial court correctly found a contract for sale of land to be too vague, indefinite, and uncertain to be enforceable. There being no valid contract for the sale of the property, the trial court's ruling that defendants were tenants at will was not error. Burns v. Pugmire, 194 Ga. App. 898, 392 S.E.2d 62 (1990).

Lessor and third party. — Lessor of real property has no right of action against a third party for the use and occupation of a portion of the leased premises during the period of the lease and at a time when the lessee was entitled to the possession of the property. Since there is no injury to the freehold, the right of action, if any, is in the lessee. Southern Ry. v. State, 116 Ga. 276, 42 S.E. 508 (1902); Lenney v. Finley, 118 Ga. 718, 45 S.E. 593 (1903).

If, relative to the plaintiff and to the receiver, the defendant was nothing but a trespasser, the relation of landlord and tenant could not have existed between plaintiff and the defendant, or between the defendant and the receiver, by the express terms of this statute. Hearn v. Huff, 6 Ga. App. 56, 64 S.E. 298 (1909) (see O.C.G.A. § 44-7-5).

Purchaser from trustee in bankruptcy. — When the purchaser of a stock of goods from trustee in bankruptcy continued in possession, no such contract is implied. Stevens v. McCurdy, 124 Ga. 456, 52 S.E. 762 (1905).

Successor of tenant at will. — Action for use and occupation of land will not lie against successor to tenant at will for entry was not under plaintiff. Atlanta, K. & N. Ry. v. McHan, 110 Ga. 543, 35 S.E. 634 (1900).

Expiration of cropper's contract. — When contract of cropper had expired, and the defendant had ceased to occupy the premises as a cropper but occupied the premises under a different relationship, the defendant was presumably a tenant. Malone v. Floyd, 50 Ga. App. 701, 179 S.E. 176 (1935).

Effect of reliance on express contract. — Having elected to rely on an express contract, a party is not entitled to rely on an implied contract. Willis v. Kemp, 130 Ga. App. 758, 204 S.E.2d 486 (1974).

Cited in Sharpe v. Mathews, 123 Ga. 794, 51 S.E. 706 (1905); Roberts v. Roberts, 39 Ga. App. 810, 148 S.E. 606 (1929); Anderson v. Watkins, 42 Ga. App. 319, 156 S.E. 43 (1930); Daniel v. Radford, 47 Ga. App. 282, 170 S.E. 302 (1933); Young v. Wilson, 183 Ga. 59, 187 S.E. 44 (1936); Price v. Bloodworth, 55 Ga. App. 268, 189 S.E. 925 (1937); Stephens v. Pickering, 192 Ga. 199, 15 S.E.2d 202 (1941); Faircloth v. State, 69 Ga. App. 441, 26 S.E.2d 118 (1943); Chamblee-Camp Gordon Water, Light & Power Co. v. Flowers, 70 Ga. App. 45, 27 S.E.2d 234 (1943); Cooper v. Vaughan, 81 Ga. App. 330, 58 S.E.2d 453 (1950); Smith v. Abercrombie, 89 Ga. App. 129, 78 S.E.2d 826 (1953); Bank Bldg. & Equip. Corp. v. Georgia State Bank, 132 Ga. App. 762, 209 S.E.2d 82 (1974).

RESEARCH REFERENCES

Am. Jur. 2d. — 49 Am. Jur. 2d, Landlord and Tenant, § 408.

C.J.S. — 52A C.J.S., Landlord and Tenant, § 988.

ALR. — Surrender and acceptance of term as affecting right to recover rent or an obligation given for rent, 18 ALR 957; 58 ALR 906.

Where rent payable, 23 ALR 883.

Effect of nonhabitability of leased dwelling or apartment, 29 ALR 52; 34 ALR 711.

Validity and enforceability of provision for renewal of lease at rental not determined, 30 ALR 572; 68 ALR 157; 166 ALR 1237.

Right to compensation for board furnished to relatives of wife, 36 ALR 677.

Lease of property for sale of liquor in violation of law as affecting right to rent, 42 ALR 1036.

Crop failure as affecting liability for rent, 51 ALR 1291.

Surrender and acceptance of term as affecting right to recover rent or on obligation given for rent, 58 ALR 906.

Tenant's liability for rent subsequent to appointment of receiver in suit or proceeding by landlord or by parties in privity with landlord, 61 ALR 372.

Liability of lessee's assignee to lessor for rent where he abandons possession, 70 ALR 1102.

Claim of lessor or privy against receiver of

lessee in respect of leasehold which latter elects not to take over, 84 ALR 892; 111 ALR 556.

Status as licensee or lessee of one in occupation of land in anticipation of the making or execution of a lease, 123 ALR 700.

Validity, construction, and application of statute or ordinance which precludes recovery of rent in case of occupancy of building which does not conform to building and health regulations, or where certificate of conformity has not been issued, 144 ALR 259.

Seller's, bailor's, lessor's, or lender's knowledge of the other party's intention to put the property or money to an illegal use as defense to action for purchase price, rent, or loan, 166 ALR 1353.

Factors and elements considered in fixing rental for extended or renewal term where removal or extension clause leaves amount of rental for future determination, 6 ALR2d 448.

Vendee's liability for use and occupancy of premises, where vendor disaffirms an unenforceable land contract, 49 ALR2d 1169.

Right of tenant to recover rentals previously paid to one mistakenly believed to be owner of property, 57 ALR2d 350.

Landlord and tenant: constructive eviction based on flooding, dampness, or the like, 33 ALR3d 1356.

44-7-6. Tenancy at will — Creation when no time period specified.

Where no time is specified for the termination of a tenancy, the law construes it to be a tenancy at will. (Orig. Code 1863, § 2271; Code 1868, § 2264; Code 1873, § 2290; Code 1882, § 2290; Civil Code 1895, § 3132; Civil Code 1910, § 3708; Code 1933, § 61-104; Ga. L. 1952, p. 201, § 1.)

Law reviews. — For comment on Metzer v. Connally Realty Co., 75 Ga. App. 274, 43 S.E.2d 169 (1947), see 10 Ga. B.J. 229 (1947).

JUDICIAL DECISIONS

Creation of tenancy at will. — Tenancies at will in Georgia may be created by express contract, by force of statute, when a contract creating the relationship of landlord and tenant is made in parol for a greater time than one year, or by implication, as for example, if there was no original express contract for a definite term. Stepp v. Richman, 75 Ga. App. 169, 42 S.E.2d 773 (1947).

Term in dispute. — Statute is not applicable merely because there is a disagreement over the term of the tenancy. Harris v. Cleghorn, 121 Ga. 314, 48 S.E. 959 (1904); Buice v. McCarty-Johnstone Co., 28 Ga. App. 192, 110 S.E. 503 (1922) (see O.C.G.A. § 44-7-6).

Tenant holding over. — Provision in a written lease contract conferring upon lessee privilege of renewal of lease for five years at same rental is a covenant to grant an estate, and not a present demise; consequently, upon expiration of original lease, the execution of a new lease is necessary, and the lessee holding over after the expiration of the original lease becomes a tenant at will. Walker v. Brooks Simmons Co., 44 Ga. App. 470, 161 S.E. 659 (1931).

Right of first refusal to re-lease in expired written leases. — Right of first refusal to re-lease given to a corporation under written leases for nursing home facilities was not a general term or condition of the leases; even assuming there was an extension of the written leases, it terminated, and any lease beyond that time was, at best, an oral agreement for an indefinite period of time, hence unenforceable; because the leases limited the time for the right of first refusal to ''during the lease term'' and because the corporation was a tenant-at-will after the expiration of the written leases, the corporation could not enforce the right of first refusal contained in the expired leases. Mariner Healthcare, Inc. v. Foster, 280 Ga. App. 406, 634 S.E.2d 162 (2006).

Tenancy at will not created. — Although the tenant in a dispossessory action argued

that the tenant was a tenant at will and entitled to 60 days notice of the termination of the tenant's tenancy under O.C.G.A. § 44-7-7, the tenant admitted that the tenant entered into a 10-year lease and thus was not a tenant at will; in any event, there was no requirement that the lease or the tenancy be terminated before filing a dispossessory action for nonpayment of rent. Siratu v. Diane Inv. Group, 298 Ga. App. 127, 679 S.E.2d 359 (2009).

Term dependent on contingency. — When the plaintiff agreed orally with the defendant that the plaintiff could occupy a house of the defendant until certain other property was sold by the plaintiff and the duration of the tenancy by its express terms depended upon the happening of the contingency, such an agreement, not naming any term, cannot properly be considered as a lease for years, but created a tenancy at will. Heaton v. Fulton Nat'l Bank, 46 Ga. App. 773, 169 S.E. 216 (1933).

Oral agreement to rent real property that did not specify a date for termination was a tenancy at will and the trial court's judgment ordering two tenants to vacate the property after the landlord gave them 60 days' notice that the landlord was terminating the tenancy was upheld. Gu v. Liu, 262 Ga. App. 443, 585 S.E.2d 740 (2003).

Cited in Smith v. Hightower, 80 Ga. App. 293, 55 S.E.2d 872 (1949); Cooper v. Vaughan, 81 Ga. App. 330, 58 S.E.2d 453 (1950); City Council v. Henry, 92 Ga. App. 408, 88 S.E.2d 576 (1955); Roberts v. Graham, 98 Ga. App. 309, 105 S.E.2d 801 (1958); Pitman v. Griffeth, 131 Ga. App. 489, 206 S.E.2d 115 (1974); Thomas v. Clark, 178 Ga. App. 823, 344 S.E.2d 754 (1986); Williams v. State, 261 Ga. App. 511, 583 S.E.2d 172 (2003).

OPINIONS OF THE ATTORNEY GENERAL

Rule stated. — Parties may agree orally or in writing to any manner of termination the parties desire, which manner shall be binding upon the parties; however, if no time is specified for the termination of the lease, the law construes the lease to be a tenancy at will. 1967 Op. Att'y Gen. No. 67-59.

RESEARCH REFERENCES

Am. Jur. 2d. — 49 Am. Jur. 2d, Landlord and Tenant, § 69 et seq.

C.J.S. — 51C C.J.S., Landlord and Tenant, § 157.

ALR. — Deed or lease of real property as affecting rights and remedies available against tenant at will or by sufferance, 151 ALR 369.

Indefiniteness as to term in option for extension or renewal of lease, 172 ALR 421.

Waiver or estoppel as to notice requirement for exercising option to renew or extend lease, 32 ALR4th 452.

What constitutes tenant's holding over leased premises, 13 ALR5th 169.

44-7-7. Tenancy at will — Notice required for termination.

Sixty days' notice from the landlord or 30 days' notice from the tenant is necessary to terminate a tenancy at will. (Orig. Code 1863, § 2272; Code 1868, § 2265; Code 1873, § 2291; Code 1882, § 2291; Civil Code 1895, § 3133; Civil Code 1910, § 3709; Code 1933, § 61-105; Ga. L. 1962, p. 463, § 1.)

Law reviews. — For article surveying real property law, see 34 Mercer L. Rev. 255 (1982).

JUDICIAL DECISIONS

Applicability to tenant at sufferance. — Tenant at sufferance is not entitled to notice to quit. Willis v. Harrell, 118 Ga. 906, 45 S.E. 794 (1903); Carruth v. Carruth, 77 Ga. App. 131, 48 S.E.2d 387 (1948); Wilson v. Lee, 129 Ga. App. 647, 200 S.E.2d 480 (1973).

Not applicable to failure to pay rent. — Statute is applicable to the refusal of the tenant to vacate after the tenant had been given the two months' notice to quit, required by this statute, and not upon the failure to pay rent when due. Morris v. Battey, 28 Ga. App. 90, 110 S.E. 342 (1922); Craig v. Day, 92 Ga. App. 339, 88 S.E.2d 451 (1955) (see O.C.G.A. § 44-7-7).

Although the tenant in a dispossessory action argued that the tenant was a tenant at will and entitled to 60 days notice of the termination of the tenant's tenancy under O.C.G.A. § 44-7-7, the tenant admitted that the tenant entered into a 10-year lease and thus was not a tenant at will; in any event, there was no requirement that the lease or the tenancy be terminated before filing a dispossessory action for nonpayment of rent. Siratu v. Diane Inv. Group, 298 Ga. App. 127, 679 S.E.2d 359 (2009).

Notice is not demand for possession. — Two months' notice required by this statute is not such a demand for possession of the premises as will warrant the issuance by the landlord of a summary proceeding to dispossess the tenant. Ginn v. Johnson, 74 Ga. App. 35, 38 S.E.2d 753 (1946); Goff v. Cooper, 110 Ga. App. 339, 138 S.E.2d 449 (1964); Trumpet v. Brown, 215 Ga. App. 299, 450 S.E.2d 316 (1994) (see O.C.G.A. § 44-7-7).

Condition precedent for eviction. — Notice to quit is a condition precedent for an action to evict a tenant at will. Carruth v. Carruth, 77 Ga. App. 131, 48 S.E.2d 387 (1948).

Defense to dispossessory warrant. — Failure by the landlord to give the statutory notice of two months would be a good defense to a dispossessory warrant. Imperial Hotel Co. v. Martin, 199 Ga. 801, 35 S.E.2d 502 (1945).

Actual receipt of notice. — Though notice to quit was not served upon the proper agent of the tenant, if the tenant got the notice it is sufficient. Godfrey v. Walker, 42 Ga. 562 (1871).

When the landlord, more than 60 days before the expiration of the term of the lease, told the tenants that the landlord would sell the house after the tenants advised the landlord of their inability to buy the house, and placed a For Sale sign in the yard, notice to quit was satisfactorily given. Burns v. Reves, 217 Ga. App. 316, 457 S.E.2d 178 (1995).

Notice to attorney. — When the matter had been referred to the attorneys by both parties, the 60 days' notice to vacate the premises given by the attorney for the landlord to the attorney for the tenant is a sufficient compliance with this statute. Farlow v. Central Oil Co., 74 Ga. App. 349, 39 S.E.2d 561 (1946); Proffitt v. Housing Sys., 154 Ga. App. 114, 267 S.E.2d 650 (1980) (see O.C.G.A. § 44-7-7).

Creation of tenancy by contract or operation of law immaterial. — There is no distinction recognized by our Code between a tenant at will by express agreement and a tenant at will by operation of law so far as the right to terminate the tenancy by either party is concerned by giving the required notice. Western Union Tel. Co. v. Fain & Parrott, 52 Ga. 18 (1874).

Landlord must prove notice. — Burden of proof is on the landlord to show that the required notice was timely given. Harrell v. Souter, 27 Ga. App. 531, 109 S.E. 301 (1921); Howington v. W.H. Ferguson & Sons, 147 Ga. App. 636, 249 S.E.2d 687 (1978).

Emoluments. — Tenant at will is entitled to notice to quit, and to emoluments. Cody v. Quarterman, 12 Ga. 386 (1852); Nicholes v. Swift, 118 Ga. 922, 45 S.E. 708 (1903).

Expiration of term. — Term of a tenant at will does not expire at the instance of the landlord until two months after notice from the landlord to terminate the tenancy. Byrne v. Bearden, 27 Ga. App. 149, 107 S.E. 782 (1921); Harrell v. Souter, 27 Ga. App. 531, 109 S.E. 301 (1921).

Purchaser may terminate tenancy. — Purchaser of realty from a landlord during the term of a tenant at will is entitled, upon notice as prescribed by law, to terminate the tenancy, and thereafter to dispossess the tenant. Willis v. Harrell, 118 Ga. 906, 45 S.E. 794 (1903); Tatum v. Padrosa, 24 Ga. App. 259, 100 S.E. 653 (1919).

Contract for sale does not terminate tenancy. — When neither party to the purchase and sale of a home attempted to terminate the tenancy of the purchaser, the agreement did not terminate the tenancy or the obligation of the purchaser to pay rent. Dismuke v. Abbott, 233 Ga. App. 844, 505 S.E.2d 58 (1998).

Parol agreement with indefinite term. — When the term of the parol agreement was indefinite, the defendant was a tenant at will of the plaintiff, and the plaintiff could terminate the tenancy by giving the defendant two months' notice. Heaton v. Fulton Nat'l Bank, 46 Ga. App. 773, 169 S.E. 216 (1933).

Acceptance of rent from tenant holding over. — If a landlord seeks to regain possession of the landlord's premises on the ground that the tenant is holding over beyond the term, the landlord's acceptance of rent which has accrued subsequent to the time the dispossessory proceedings are initiated and up to the time of trial is not inconsistent with the landlord's demand for possession of the property and does not require a finding that a new tenancy at will has been created. Since there was no suggestion in the record that the landlord accepted a rent payment before instituting the dispossessory proceedings, the evidence did not support a finding that the original notice of termination and demand for possession were waived. Williams v. Clayton Park Mobile Home Court, 166 Ga. App. 359, 304 S.E.2d 483 (1983).

When a lessor terminated a lease for reasons other than nonpayment of rent, and the lessee held over, acceptance of rent from the lessee did not convert the tenancy at sufferance to one of tenancy at will. Solon Automated Servs., Inc. v. Corporation of Mercer Univ., 221 Ga. App. 856, 473 S.E.2d 544 (1996).

Notice found adequate. — Oral agreement to rent real property that did not specify a date for termination was a tenancy at will, and the trial court's judgment ordering two tenants to vacate the property after the landlord gave them 60 days' notice that the landlord was terminating the tenancy was upheld. Gu v. Liu, 262 Ga. App. 443, 585 S.E.2d 740 (2003).

Cited in Weed v. Lindsay & Morgan, 88 Ga. 686, 15 S.E. 836, 20 L.R.A. 33 (1892); Roberson v. Simons, 109 Ga. 360, 34 S.E. 603 (1899); Nicholes v. Swift, 118 Ga. 922, 45 S.E. 708 (1903); Parham v. Kennedy, 60 Ga. App. 52, 2 S.E.2d 765 (1939); Mattox v. Chapman, 67 Ga. App. 465, 20 S.E.2d 859 (1942); Lamons v. Good Foods, Inc., 195 Ga. 475, 24 S.E.2d 678 (1943); In re Freeman, 49 F. Supp. 163 (S.D. Ga. 1943); Minor v. Sutton, 73 Ga. App. 253, 36 S.E.2d 158 (1945); Kenney v. Pitts, 73 Ga. App. 450, 36 S.E.2d 820 (1946); Simpson v. Blanchard, 73 Ga. App. 843, 38 S.E.2d 634 (1946); Jackson v. Hardin, 74 Ga. App. 39, 38 S.E.2d 695 (1946); Pace v. Radcliff Mem. Presbyterian Church, 76 Ga. App. 840, 47 S.E.2d 588 (1948); Smith v. Hightower, 80 Ga. App. 293, 55 S.E.2d 872 (1949); City Council v. Henry, 92 Ga. App. 408, 88 S.E.2d 576 (1955); Stevenson v. Allen, 94 Ga. App. 123, 93 S.E.2d 794 (1956); Ammons v. Central of Ga. Ry., 215 Ga. 758, 113 S.E.2d 438 (1960); Moon v. Stone Mt. Mem. Ass'n, 223 Ga. 696, 157 S.E.2d 461 (1967); Merry v. Georgia Big Boy Mgt., Inc., 135 Ga. App. 707, 218 S.E.2d 694 (1975); Harkins v. Harkins, 153 Ga. App. 104, 264 S.E.2d 572 (1980); Knighton v. Gary, 163 Ga. App. 394, 295 S.E.2d 138 (1982); Cheeves v. Horne, 167 Ga. App. 786, 307 S.E.2d 687 (1983); D. Jack Davis Corp. v. Karp, 175 Ga. App. 482, 333 S.E.2d 685 (1985); Craft's Ocean Court, Inc. v. Coast House Ltd., 255 Ga. 336, 338 S.E.2d 277 (1986); DeKalb County v. Glaze, 189 Ga. App. 1, 375 S.E.2d 66 (1988); Alexander v. Steining, 197 Ga. App. 328, 398 S.E.2d 390 (1990); Diner One, Inc. v. Bank South, 219 Ga. App. 702, 466 S.E.2d 234 (1995); Williams v. State, 261 Ga. App. 511, 583 S.E.2d 172 (2003).

RESEARCH REFERENCES

Am. Jur. 2d. — 49 Am. Jur. 2d, Landlord and Tenant, §§ 73, 825.

C.J.S. — 51C C.J.S., Landlord and Tenant, § 173.

ALR. — Construction of provision for termination of lease in event of sale of property, 35 ALR 518; 116 ALR 931; 163 ALR 1019.

Computation and requisites of period of notice given to terminate tenancy, 86 ALR 1346.

Waiver or revocation by landlord of notice given by him to terminate tenancy, 120 ALR 557.

Conveyance or lease by landlord as termination of existing tenancy at will, 120 ALR 1006.

Deed or lease of real property as affecting rights and remedies available against tenant at will or by sufferance, 151 ALR 369.

Right of landlord legally entitled to possession to dispossess tenant without legal process, 6 ALR3d 177.

44-7-8. Tenancy at will — Right of tenant to emblements.

The tenant at will is entitled to his emblements if the crop is sowed or planted before the landlord gives him notice of termination of the tenancy, if the tenancy is terminated by the judicial sale of the estate by the landlord or by death of the landlord or tenant, or if for any other cause the tenancy is suddenly terminated. (Orig. Code 1863, § 2273; Code 1868, § 2266; Code 1873, § 2292; Code 1882, § 2292; Civil Code 1895, § 3134; Civil Code 1910, § 3710; Code 1933, § 61-106.)

JUDICIAL DECISIONS

In general. — Tenant is entitled to the tenant's emblements, if any, as provided by this statute. Western Union Tel. Co. v. Fain & Parrott, 52 Ga. 18 (1874); Chappell v. Boyd, 56 Ga. 578 (1876) (see O.C.G.A. § 44-7-8).

Applicable regardless of how terminated. — Tenant at will or tenant's legal representative are entitled to the emblements, whether tenancy is terminated by notice or by death of tenant. Morgan v. Morgan, 65 Ga. 493 (1880).

Doctrine of emblements does not arise when tenancy is not one at will, but is instead for a definite period. Knighton v. Gary, 163 Ga. App. 394, 295 S.E.2d 138 (1982).

Rights where land sold under execution. — Purchaser at an execution sale acquires the title of the owner, and when it is rented to a tenant, though the rental contract was made subsequent to the judgment, the purchaser acquires only the interests of the owner. If the purchaser converts matured crop to the purchaser's own use, the tenant may recover the value in trover. Blitch v. Lee, 115 Ga. 112, 41 S.E. 275 (1902); Garrison v. Parker, 117 Ga. 537, 43 S.E. 849 (1903).

Failure to assert counterclaim in dispossessor action. — Trial court correctly disallowed evidence of emblements or emoluments in a dispossessory action after the defendant failed to assert any such claim in the defendant's answer or as a counterclaim, to proffer evidence of details of the alleged specific improvements that might be the basis for such a claim, or to proffer evidence as to an agreement between the parties for reimbursement of the cost of any improvements. Gentry v. Chateau Properties, 236 Ga. App. 371, 511 S.E.2d 892 (1999).

Cited in Bristol Sav. Bank v. Nixon, 169 Ga. 282, 150 S.E. 148 (1929).

RESEARCH REFERENCES

Am. Jur. 2d. — 49 Am. Jur. 2d, Landlord and Tenant, § 69 et seq.

C.J.S. — 51C C.J.S., Landlord and Tenant, § 156.

ALR. — Duty and liability of farm tenant in respect to livestock leased with farm, 32 ALR 857.

Rights, as between landlord and tenant, in respect of crops unharvested at expiration of tenancy (doctrine of emblements), 141 ALR 1240.

Deed or lease of real property as affecting rights and remedies available against tenant at will or by sufferance, 151 ALR 369.

Rights of lessee to minerals extracted during the lease but remaining on the premises after its termination, 51 ALR2d 1121.

44-7-9. Estoppel to dispute landlord's title or attorn to another.

The tenant may not dispute his landlord's title or attorn to another claimant while he is in actual physical occupation, while he is performing any active or passive act or taking any position whereby he expressly or impliedly recognizes his landlord's title, or while he is taking any position that is inconsistent with the position that the landlord's title is defective. (Orig. Code 1863, § 2265; Code 1868, § 2257; Code 1873, § 2283; Code 1882, § 2283; Civil Code 1895, § 3122; Civil Code 1910, § 3698; Code 1933, § 61-107; Ga. L. 1967, p. 774, § 1.)

JUDICIAL DECISIONS

In general. — Tenant may not dispute the title of the tenant's landlord without first surrendering possession. Doe v. Roe & Beckom, 33 Ga. 163 (1862); Richardson v. Harvey, 37 Ga. 224 (1867); Gleaton v. Gleaton, 37 Ga. 650 (1868); Grizzle v. Gaddis, 75 Ga. 350 (1885); Beckham v. Maples, 95 Ga. 773, 22 S.E. 894 (1895); Sparks v. Conrad, 99 Ga. 643, 27 S.E. 764 (1896); Grizzard v. Roberts, 110 Ga. 41, 35 S.E. 291 (1900); Veazey v. Sinclair Ref. Co., 66 Ga. App. 730, 19 S.E.2d 53 (1942); Salter v. Salter, 81 Ga. App. 864, 60 S.E.2d 424 (1950).

Exception to rule. — If the landlord parts with the title to the disputed premises or if the premises be lawfully sold under execution against the landlord, the tenant may in good faith attorn to the purchaser. Roe v. Doe, 48 Ga. 165, 15 Am. R. 656 (1873); Raines v. Hindman, 136 Ga. 450, 71 S.E. 738, 38 L.R.A. (n.s.) 863, 16 Am. Ann. Cas. 347 (1911); Hines v. Lavant, 158 Ga. 336, 123 S.E. 611 (1924); Salter v. Salter, 81 Ga. App. 864, 60 S.E.2d 424 (1950).

Rationale for rule. — Reason for the rule is that one who goes into possession under another shall not be permitted to deny the character in which that one went in. A.F. Burnett & Bro. v. William Rich & Co., 45 Ga. 211 (1872).

Extension of rule. — As a general rule, a tenant shall never be permitted to controvert the landlord's title, or set up against the landlord a title acquired by the tenant during the tenancy which is hostile in its character to that which the tenant acknowledged in accepting the demise, and this rule extends to a tenant holding over as well as to an undertenant, assignee, or other person claiming under the lessee. Veazey v. Sinclair Ref. Co., 66 Ga. App. 730, 19 S.E.2d 53 (1942).

Change of character of holding. — Tenant cannot change the character of the tenant's holding without the consent of the landlord, even after the expiration of the original rent period, until the tenant surrenders the premises. This is true notwithstanding the person putting the tenant in possession may not have owned the land. Morgan v. Morgan, 65 Ga. 493 (1880); Grizzle v. Gaddis, 75 Ga. 350 (1885); Grizzard v. Roberts, 110 Ga. 41, 35 S.E. 291 (1900); Johnson v. Thrower, 117 Ga. 1007, 44 S.E. 846 (1903); Hodges v. Waters, 124 Ga. 229, 52 S.E. 161, 110 Am. St. R. 166, 1 L.R.A. (n.s.) 1181 (1905); Bullard v. Hudson, 125 Ga. 393, 54 S.E. 132 (1906); Watters v. Hertz, 135 Ga. 804, 70 S.E. 338 (1911); New v. Quinn, 31 Ga. App. 102, 119 S.E. 457 (1923).

Trustee as landlord. — Trustee is bound to perform the duty, enjoined by this statute upon all landlords of keeping the premises in repair, and especially so when the landlord expressly undertook by agreement with the tenant so to do. Miller v. Smythe, 92 Ga. 154, 18 S.E. 46 (1893) (see O.C.G.A. § 44-7-9).

Action by tenant against subtenant. — In dispossessory warrant proceeding, brought by tenant against subtenant for nonpayment

of rent, subtenant could not set up a superior title in the owner of the premises when the owner had not elected to treat the subtenant as the owner's tenant. Veazey v. Sinclair Ref. Co., 66 Ga. App. 730, 19 S.E.2d 53 (1942).

Attornment to vendee. — When the landlord parts with the landlord's title pending the lease, the tenant in the absence of any reservation to the contrary becomes the tenant of the purchaser. Grizzle v. Gaddis, 75 Ga. 350 (1885); Stewart Bros. v. Cook, 24 Ga. App. 509, 101 S.E. 304 (1919).

Landlord's successor in title. — In a summary proceeding by a landlord to dispossess a tenant as one holding over beyond the expiration of one's term, it is no defense that the landlord's title to the premises expired before the institution of the dispossessory proceeding, and that the tenant is now holding under the landlord's successor in title, since it does not appear that after the creation of the tenancy the landlord parted with title, or that the alleged successor to the landlord's title is in privity with it. Lee v. Lacy, 26 Ga. App. 126, 105 S.E. 619, cert. denied, 26 Ga. App. 801 (1921).

Attacking title of former landlord. — Rule estops the tenant from disputing the landlord's title so long as the tenant is in possession. The rule does not prevent the tenant from attacking the title of the former landlord, but requires as a prerequisite to such attack that the tenant surrender possession. Barnett v. Lewis, 194 Ga. 203, 20 S.E.2d 912 (1942).

Vendee purchasing apparent title from tenant. — Vendee of a tenant who has an apparent legal title and from whom the purchase was made, with or without notice of the tenancy, cannot dispute the title of the landlord, in an action of complaint for land, until the vendee has restored the possession to the tenant. Vada Naval Stores Co. v. Sapp, 148 Ga. 677, 98 S.E. 79 (1919).

Lessee-landlord's term expired. — Lessee whose terms under an unsigned lease for five years has expired cannot evict subtenant who has not attorned to owner of land. Beasley v. Lee, 155 Ga. 634, 117 S.E. 743 (1923).

Tenant in possession claiming title when term begins. — Rule that a tenant cannot set up a title to the rented premises in opposition to that claimed by the landlord is applicable, although at the time the contract of rent was made the tenant was in possession, claiming title to the premises. Johnson v. Thrower, 117 Ga. 1007, 44 S.E. 846 (1903); Willis v. Harrell, 118 Ga. 906, 45 S.E. 794 (1903); Wills v. Purcell, 198 Ga. 666, 32 S.E.2d 392 (1944).

Tenant returning to premises. — When a landlord enters into a valid agreement with a tenant by the terms of which the landlord agrees to accept symbolical delivery of the premises on the last day of the term, the vacation of the premises on the date stipulated is a complete surrender of the premises, and a tenant who thereafter moves back on the premises under a claim of title is not the tenant of the former landlord and is not estopped to dispute title to the premises. Lasseter v. Fenn, 66 Ga. App. 173, 17 S.E.2d 303 (1941).

Tenant of husband and wife as to homestead property. — When the head of a family rented land set apart as an exemption under former Civil Code 1910, § 3425 (see O.C.G.A. § 44-13-100), after having abandoned his wife and moved away from the exempted land, the principle that a tenant cannot attorn to another claimant is not applicable, as the tenant in such circumstances will be treated as the tenant of the wife when she is the sole beneficiary of the homestead exemption. Wood v. Wood, 171 Ga. 389, 155 S.E. 678 (1930).

Tenant's heirs cannot dispute the landlord's title. Lewis v. Adams, 61 Ga. 559 (1878).

Tenant claiming life estate. — When a tenant alleged that the landlord had orally granted the tenant a life estate in a portion of property the tenant had farmed under a series of crop leases, by executing a lease covering all of the property, the tenant was estopped from taking the inconsistent position of claiming a life estate in a portion thereof. Eslinger v. Keith, 218 Ga. App. 742, 463 S.E.2d 501 (1995).

Since plaintiff never signed a lease on a lot, but paid rent on a month-to-month basis, plaintiff was estopped from asserting a life estate ownership interest in the property and thereby disputing the landlord's title to the property during a dispossessory hearing. Gentry v. Chateau Properties, 236 Ga. App. 371, 511 S.E.2d 892 (1999).

Specific performance to sell land. — Tenant in possession of land is not estopped

from seeking specific performance by administrator of deceased landlord's estate of landlord's agreement to devise land to tenant since such an agreement does not involve a dispute of the landlord's title, but necessarily amounts to an admission by the tenant that the landlord had title. Bowles v. White, 206 Ga. 433, 57 S.E.2d 547 (1950).

Void judicial sale. — If after a judicial sale of land, which was void, the defendant in fi. fa. treats the sale as valid and enters into a contract with the purchaser whereby the defendant becomes the tenant of the purchaser and remains in possession of the land under the new relation of the parties as landlord and tenant, the defendant will be estopped by so remaining in possession from disputing the title of the landlord. Bryant v. Towns, 177 Ga. 571, 170 S.E. 669 (1933).

Fraudulent title. — Even if title is fraudulent, the tenant has no right to dispute the title. Gleaton v. Gleaton, 37 Ga. 650 (1868); Tufts v. DuBignon, 61 Ga. 322 (1878).

Misrepresentations of lessor. — Estoppel is not operative when lessees' recognition of the lessors' title has been induced by misrepresentations of the latter. Goodman v. Friedman, 117 Ga. App. 475, 161 S.E.2d 71, cert. dismissed, 224 Ga. 497, 162 S.E.2d 295 (1968).

Recovery upon admission of title. — When it is established that the relation of landlord and tenant exists, the landlord may recover upon the admission of title which grows out of that relation. City of Jefferson v. Trustees of Martin Inst., 199 Ga. 71, 33 S.E.2d 354 (1945).

Testimony showing tenancy. — Provisions of this statute are applicable when, although no plea of estoppel was filed by the defendant who claims to be the landlord and it does not appear in the petition, the testimony of the petitioner, admitted without objection, shows the petitioner to be the tenant of such defendant. Consolidated Realty Invs., Inc. v. Gasque, 203 Ga. 790, 48 S.E.2d 510 (1948) (see O.C.G.A. § 44-7-9).

Landlord need not prove title. — By virtue of O.C.G.A. § 44-11-1, a landlord is authorized to file a complaint for the ejectment of a tenant alleging, not that the landlord has a presently enforceable legal title to the land, but that the landlord has a presently enforceable lease contract with the tenant and that the tenant has breached that contract so as to entitle the landlord to possession. Ingold, Inc. v. Adair, 247 Ga. 155, 274 S.E.2d 560 (1981).

Defense of dispossessory action. — Tenant could not defend a dispossessory action by challenging the existence of a landlord-tenant relationship based on an attack on the validity of the original landlord's title to the land and transfer of the property to a city. Bridges v. City of Moultrie, 210 Ga. App. 697, 437 S.E.2d 368 (1993).

When a tenant's defense to a dispossessory action was that the landlord had lost title to the property prior to the filing of the action, the tenant was entitled to a trial on the issue of whether a landlord-tenant relationship still existed between the parties, and the trial court's grant of a writ of possession was reversed. Holy Fellowship Church of God in Christ v. Greater Travelers Rest Baptist Church, 236 Ga. App. 177, 511 S.E.2d 280 (1999).

Cited in McDowell v. Sutlive, 78 Ga. 142, 2 S.E. 937 (1886); Dennard v. Lewis, 142 Ga. 171, 82 S.E. 558 (1914); Hardeman v. Ellis, 162 Ga. 664, 135 S.E. 195 (1926); English v. Little, 164 Ga. 805, 139 S.E. 678 (1927); Dunlop Tire & Rubber Co. v. White, 45 Ga. App. 268, 164 S.E. 414 (1932); Sterchi Bros. Stores, Inc. v. Mitchell, 49 Ga. App. 826, 176 S.E. 537 (1934); West v. Flynn Realty Co., 53 Ga. App. 594, 186 S.E. 753 (1936); Jones v. Home Owners Loan Corp., 188 Ga. 466, 4 S.E.2d 146 (1939); Brinkley v. Newell, 188 Ga. 678, 4 S.E.2d 827 (1939); Smith v. Aldridge, 192 Ga. 376, 15 S.E.2d 430 (1941); Cliett v. Metropolitan Life Ins. Co., 195 Ga. 257, 24 S.E.2d 59 (1943); Darling Stores Corp. v. William Beatus, Inc., 68 Ga. App. 869, 24 S.E.2d 805 (1943); Holliday v. Guill, 196 Ga. 723, 27 S.E.2d 398 (1943); Partain v. King, 206 Ga. 530, 57 S.E.2d 617 (1950); Seay v. Malone, 219 Ga. 149, 132 S.E.2d 261 (1963); Friedman v. Goodman, 222 Ga. 613, 151 S.E.2d 455 (1966); Moorman v. Brumby, 223 Ga. 39, 153 S.E.2d 444 (1967); Scarbor v. Scarbor, 226 Ga. 323, 175 S.E.2d 6 (1970); Leslie, Inc. v. Solomon, 141 Ga. App. 673, 234 S.E.2d 104 (1977); Lamas v. Citizens & S. Nat'l Bank, 241 Ga. 349, 245 S.E.2d 301 (1978); Ferguson v. Bank of S., 164 Ga. App. 443, 296 S.E.2d 756 (1982); Myers v. North Ga. Title & Tax Free Exch., LLC, 241 Ga. App. 379, 527 S.E.2d 212 (1999).

RESEARCH REFERENCES

Am. Jur. 2d. — 49 Am. Jur. 2d, Landlord and Tenant, § 98 et seq.

C.J.S. — 51C C.J.S., Landlord and Tenant, § 266 et seq.

ALR. — Fraud, misrepresentation, or mistake as affecting estoppel of tenant to deny landlord's title, 2 ALR 359.

Estoppel of assignee or sublessee to dispute lessor's title where assignment or sublease is conditioned upon validity of the title, 36 ALR 1287.

Estoppel to dispute landlord's title where tenant never was in possession under the lease, 98 ALR 545.

Tenant's adverse possession or use of third person's land not within the description in the lease as inuring to landlord's benefit so as to support latter's title or right by adverse possession or prescription, 105 ALR 1187.

Right of tenant, as against landlord, to acquire or assert title based on foreclosure of lien or sale for tax or special assessment, 172 ALR 1181.

Estoppel by lease: effect of lessor's after-acquired title or interest during lease term, 51 ALR2d 1238.

44-7-10. Delivery of possession at end of term; summary remedy.

The tenant shall deliver possession to the landlord at the expiration of his term; and, if he fails or refuses to do so, a summary remedy pursuant to Article 3 of this chapter is given to the landlord. (Orig. Code 1863, § 2264; Code 1868, § 2256; Code 1873, § 2282; Code 1882, § 2282; Civil Code 1895, § 3121; Civil Code 1910, § 3697; Code 1933, § 61-108.)

Law reviews. — For article, ''Usufructs and Estates for Years Distinguished,'' see 18 Ga. St. B.J. 116 (1982).

JUDICIAL DECISIONS

Existence of relationship. — In order to maintain a summary eviction proceeding, the relation of landlord and tenant must exist. Carruth v. Carruth, 77 Ga. App. 131, 48 S.E.2d 387 (1948).

At the termination of the lease, the lessee shall surrender the premises in the same condition as at the commencement of the term, natural wear and tear excepted. Pharr v. Burnette, 158 Ga. App. 473, 280 S.E.2d 881 (1981).

Lessor is not usually entitled to replacement of an old structure without deduction for depreciation. Pharr v. Burnette, 158 Ga. App. 473, 280 S.E.2d 881 (1981).

Holding over. — Mere holding over by a tenant beyond the term covered by the contract of tenancy does not make the tenant a tenant at will so as to entitle the tenant to a two-months' notice to quit. U.S. Fid. & Guar. Co. v. Garber, 72 Ga. App. 888, 35 S.E.2d 371 (1945).

Possession under agent's unratified contract of purchase. — One who makes a contract for the purchase of land with a person assuming to act as agent of the owner, and subject to the approval and ratification of this latter, and who goes into possession under the contract, which is never ratified by the owner, is a tenant at sufferance, and is subject to be dispossessed by the statutory process against a tenant holding over, after possession has been demanded and refused. Smith v. Singleton, Hunt & Co., 71 Ga. 68 (1883).

Cited in Wright v. Harris, 221 F. 736 (S.D. Ga. 1915); Stone Mt. Game Ranch, Inc. v. Hunt, 746 F.2d 761 (11th Cir. 1984); Gully v. Glover, 190 Ga. App. 238, 378 S.E.2d 411 (1989); Walters v. Betts, 174 Bankr. 636 (Bankr. N.D. Ga. 1994).

RESEARCH REFERENCES

C.J.S. — 51C C.J.S., Landlord and Tenant, § 316.

ALR. — Rent period as criterion of term implied by holding over after expiration of lease for a fixed term, 108 ALR 1464.

Tenant's liability in damages for holding over after expiration of term as affected by reason or excuse for so doing, 122 ALR 280.

Implied duty of lessee to remove his property, debris, buildings, improvements, and the like, from leased premises at expiration of lease, 23 ALR2d 655.

Validity and construction of lease provision requiring lessee to pay liquidated sum for failure to vacate premises or surrender possession at expiration of lease, 23 ALR2d 1318.

Measure of damages for tenant's failure to surrender possession of rented premises, 32 ALR2d 582.

Time for exercise of lessee's option to terminate lease, 37 ALR2d 1173.

Right of landlord legally entitled to possession to dispossess tenant without legal process, 6 ALR3d 177.

Holding over under lease, or renewal or extension thereof, as extending time for exercise of option to purchase contained therein, 15 ALR3d 470.

44-7-11. Specific rights of tenants.

The tenant has no rights beyond the use of the land and tenements rented to him and such privileges as are necessary for the enjoyment of his use. He may not cut or destroy growing trees, remove permanent fixtures, or otherwise injure the property. He may use dead or fallen timber for firewood and the pasturage for his cattle. (Orig. Code 1863, § 2263; Code 1868, § 2255; Code 1873, § 2281; Code 1882, § 2281; Civil Code 1895, § 3119; Civil Code 1910, § 3695; Code 1933, § 61-109.)

JUDICIAL DECISIONS

Tenant's duty of care. — Tenant is under a duty to exercise ordinary care and diligence to prevent damage to the rented premises, and such duty is by implication a part of the lease contract. Martin v. Medlin, 81 Ga. App. 602, 59 S.E.2d 519 (1950).

Implied covenant. — In a rental contract between a landlord and tenant, a covenant is raised, by implication of law in the absence of express covenants in reference thereto, that the tenant will so use the rented property that no unnecessary or substantial injury shall be done to the property. Martin v. Medlin, 81 Ga. App. 602, 59 S.E.2d 519 (1950).

Reasonable use by tenant. — Independently of covenant, a tenant is required to return the premises at the end of the term in substantially the same condition as when received, subject to reasonable use. Martin v. Medlin, 81 Ga. App. 602, 59 S.E.2d 519 (1950).

Distinction between permanent and movable fixtures. — Chattels real are considered as personal property in every respect, if not so annexed and necessarily attached to the freehold as to go along with the freehold in the same path of alienation. In order to make a thing part of the realty by merely annexing, it is necessary that both the thing and the soil to which it is attached should belong to the same owner. McCall v. Walter, 71 Ga. 287 (1883).

Trade fixtures. — In the absence of a contract giving the tenant the right so to do, the tenant cannot lawfully remove fixtures annexed to the freehold, which the tenant has placed on leased land. The exception to this rule existed only in the case of trade fixtures under former Civil Code 1895, § 3120 (see O.C.G.A. § 44-7-11). Wright v. DuBignon, 114 Ga. 765, 40 S.E. 747, 57 L.R.A. 669 (1902).

While two owners of an aircraft hangar had no formal agreement with the city entitling the owners to extend their stay on city property, and the city could therefore elect

to remove the owners at any time as tenants at will, the owners were obligated to remove any trade fixtures from the landlord's property, specifically, the hangar, despite the hangar's size, and at their own expense, upon notification by the city of the expiration of the lease term; moreover, the hangar was such that although the hangar was bolted to the ground, the hangar was done so in such a way that it could be disassembled and rebuilt elsewhere. S.S. Air, Inc. v. City of Vidalia, 278 Ga. App. 149, 628 S.E.2d 117 (2006).

Removal of fixtures as "necessary repairs". — Tenants had no right under the general license to make ''necessary repairs'' to have removed permanent fixtures. Center & Treadwell v. Davis, 39 Ga. 210 (1869).

Intention of tenant immaterial. — Servant's room, metallic gutters attached to the roof of a house, waterpipes laid under the ground by a tenant on leased premises, become, when constructed and attached, a part of the freehold, and cannot be lawfully severed from the land by the tenant against the will of the landlord, even though at the time of their erection the tenant intended to remove them at the expiration of the tenant's term. Wright v. DuBignon, 114 Ga. 765, 40 S.E. 747, 57 L.R.A. 669 (1902).

Agreement by predecessor in title. — Trover suit for possession of buildings will not lie against the purchaser of the land, although such purchaser took with notice of a specific agreement between the plaintiff and the defendant's predecessor in title that the buildings were to remain personal property and fixtures and be removable. Adams v. Chamberlin, 54 Ga. App. 459, 188 S.E. 550 (1936).

Counters and drawers in store permanent. — Counters and drawers in a drug store placed there by the landlord, and rented in their place with the store, are fixtures, which the tenant has no right to remove. Pope v. Gerrard, 39 Ga. 471 (1869).

Pavement. — Fixture permanently attached to the land, such as a pavement, is not removable under the right to remove trade fixtures. Mayor of Savannah v. Standard Fuel Supply Co., 151 Ga. 145, 106 S.E. 178 (1921).

Section houses erected by railroad company on premises over which railroad had easement for tracks to assist the railroad in carrying on the railroad's business could not be removed, after an abandonment of the railroad by the company and the railroad's insolvency, by a purchaser of all the railroad property, without the franchise, from the receiver having custody of the property. Jackson v. Crutchfield, 184 Ga. 412, 191 S.E. 468 (1937).

Trespass by landlord. — When a landlord, without the tenant's consent and before the expiration of the term, enters upon the rented premises without authority of law and forcibly evicts the tenant and rents the premises to another, and in so doing takes possession of the tenant's effects, and in moving effects damages the effects, the landlord thereby commits an inexcusable trespass against the tenant; the jury is authorized to find a sum in punitive damages or damages for compensation for the wounded feelings of the tenant. Real Estate Loan Co. v. Pugh, 47 Ga. App. 443, 170 S.E. 698 (1933).

Illegal use of property by sign company unauthorized by landlord. — Under O.C.G.A. § 44-7-11, a tenant such as a sign company has no right beyond the use of the land actually conveyed or rented. Furthermore, under O.C.G.A. § 44-7-14, the landlord and neighbor of plaintiffs was not responsible for the tenant's, the sign company's, illegal use of the neighbor's property or airspace. Powell v. Norman Elec. Galaxy, Inc., 255 Ga. App. 407, 565 S.E.2d 591 (2002).

Cited in Henderson v. Easters, 178 Ga. App. 867, 345 S.E.2d 42 (1986).

OPINIONS OF THE ATTORNEY GENERAL

Condemnation of fixtures. — In a condemnation proceeding in which there exists a landlord-tenant relationship, those fixtures which are physically or constructively made a part of the realty, even those which were placed there by the tenant, are to be considered as a part of the realty and property of the landowner; the tenant would not be allowed compensation for such fixtures unless the tenant had, by previous agreement, entered into a written agreement with the landlord that these fixtures were to be con-

sidered as personalty of the tenant. The only exception to this rule would be in those cases in which the tenant was engaged in some trade or business and the fixtures in question were used as part of the tenant's business or trade and could be considered as trade fixtures. 1969 Op. Att'y Gen. No. 69-122.

Condemnation of trade fixtures. — Trade fixtures are considered as property of the tenant; in any condemnation proceeding, the tenant is eligible for relocation moving expenses for trade fixtures. 1969 Op. Att'y Gen. No. 69-122.

RESEARCH REFERENCES

Am. Jur. 2d. — 49 Am. Jur. 2d, Landlord and Tenant, §§ 211, 228.

C.J.S. — 51C C.J.S., Landlord and Tenant, § 348 et seq.

ALR. — Gas range as fixture, 7 ALR 1578.

Right of tenant to make alterations in structures on leased premises, 9 ALR 445; 13 ALR 824.

Status of one employed by landlord to perform work on premises who enters or remains without consent or against protest of tenant, 10 ALR 715.

Change of physical conditions on property of landlord, other than that leased, as affecting the rights and liabilities of landlord and tenant, 12 ALR 160; 38 ALR 1090; 44 ALR 59.

Division of the premises by the lessor, or the creation of undivided interests therein, as affecting the enforcement of the lessee's covenants, 12 ALR 826.

Pavement, flooring, platform, walks, and the like as fixtures, 13 ALR 1454.

Rights and remedies of tenant who remains in possession of all or part of the premises against landlord for interfering with his possession or enjoyment, 20 ALR 1369; 28 ALR 1333; 64 ALR 900.

Duty and liability of farm tenant in respect to live stock leased with farm, 32 ALR 857.

Liability for injury to trespassing stock from poisonous substances or other conditions on the premises, 33 ALR 448.

Oil or gas or other mineral rights in land as affected by language in conveyance specifying purpose for which the property is to be used, 39 ALR 1340.

Rights of cotenants inter se as to timber, 41 ALR 582.

Liability of owner of office building or tenement house for loss of or damage to property of tenant due to dishonesty or negligence of owner's employee, 42 ALR 1335.

Right of third person to enter premises against objection of landlord, 43 ALR 206.

Storage tank or other apparatus of gasoline station as fixture, 52 ALR 798; 99 ALR 69.

Right of mortgagor or owner of equity of redemption to cut timber, 57 ALR 451.

Liability of landlord for interfering with tenants of lessee, 70 ALR 1477.

Waste, as between landlord and tenant, as including loss or damages due to act or negligence of third person, 84 ALR 393.

Buildings erected by a tenant as "trade fixtures," 107 ALR 1153.

Right to remove fixtures or improvements placed upon property by one holding under lease as affected by renewal or new lease made to him or his successor without reservation of the right to remove, 110 ALR 480.

Common-law duty of landlord as regards installation and maintenance of fire equipment, 122 ALR 167.

Bowling alleys as fixtures, 123 ALR 690.

Refrigerator or refrigerating plant as fixture, 169 ALR 478.

Recovery by tenant of damages for physical injury or mental anguish occasioned by wrongful eviction, 17 ALR2d 936.

Relative rights and liabilities as between landlord and tenant with respect to keeping of dogs, birds, or other pets, 18 ALR2d 880.

Advertising rights on leased premises, 20 ALR2d 940.

Landlord's duty under express covenant to repair, rebuild, or restore, where property is damaged or destroyed by fire, 38 ALR2d 682.

Breach of covenant for quite enjoyment in lease, 41 ALR2d 1414.

Effect, as between lessor and lessee, of provision in mineral lease purporting to except or reserve a previously granted right of way or other easement through, over, or upon the premises, 49 ALR2d 1191.

Timber rights of life tenant, 51 ALR2d 1374.

What constitutes alterations or changes in premises within lease provision permitting making thereof by lessee, 57 ALR2d 963.

Implied covenant or obligation of lessor to furnish water or water supply for business needs of the lessee, 65 ALR2d 1313.

Measure of damages in landlord's action for waste against tenant, 82 ALR2d 1106.

Liability of landlord for personal injury or death due to inadequacy or lack of lighting on portion of premises used in common by tenants, 66 ALR3d 202.

Landlord's liability for personal injury or death due to defects in appliances supplied for use of different tenants, 66 ALR3d 374.

Grazing or pasturage agreement as violative of covenant in lease or provision of statute against assigning or subletting without lessor's consent, 71 ALR3d 780.

Implied covenant or obligation to provide lessee with actual possession, 96 ALR3d 1155.

Modern status of rule as to tenant's rent liability after injury to or destruction of demised premises, 99 ALR3d 738.

Production on one tract as extending term on other tract, where one mineral deed conveys oil or gas in separate tracts for as long as oil or gas is produced, 9 ALR4th 1121.

Right to exercise option to renew or extend lease as affected by tenant's breach of other covenants or condition, 23 ALR4th 908.

Landlord and tenant: respective rights in excess rent when landlord relets at higher rent during lessee's term, 50 ALR4th 403.

Validity, construction, and effect of statute or lease provision expressly governing rights and compensation of lessee upon condemnation of leased property, 22 ALR5th 327.

Time within which tenant's right to remove trade fixtures must be exercised, 109 ALR5th 421.

Effect, as between landlord and tenant, of lease clause restricting the keeping of pets, 114 ALR5th 443.

44-7-12. Removal of trade fixtures during term; when abandoned.

During the term of his tenancy or any continuation thereof or while he is in possession under the landlord, a tenant may remove trade fixtures erected by him. After the term and his possession are ended, any trade fixtures remaining will be regarded as abandoned for the use of the landlord and will become the landlord's property. (Civil Code 1895, § 3120; Civil Code 1910, § 3696; Code 1933, § 61-110.)

History of Code section. — This Code section is derived from the decisions in Youngblood & Harris v. Eubank, 68 Ga. 630 (1881), and Wright v. DuBignon, 114 Ga. 765, 40 S.E. 747, 57 L.R.A. 669 (1902).

Law reviews. — For article discussing lawful removal of fixtures by tenant, see 4 Ga. B.J. 16 (1942). For article on the law governing the removal of trade fixtures from property in Georgia, see 19 Ga. B.J. 35 (1956). For article discussing U.C.C. provisions establishing a security interest in fixtures as a means of protecting sellers, see 16 Mercer L. Rev. 404 (1965). For article discussing origin and construction of Georgia provision concerning tenant's rights to fixtures constructed by him, see 14 Ga. L. Rev. 239 (1980). For article, "Usufructs and Estates for Years Distinguished," see 18 Ga. St. B.J. 116 (1982).

JUDICIAL DECISIONS

Section is exception to general rule. — Tenant cannot remove fixtures annexed to the freehold, which the tenant has placed on the land, and the exception to this rule exists only in the case of trade fixtures. Armour & Co. v. Block, 147 Ga. 639, 95 S.E. 228 (1918).

Section applicable only to trade fixtures. — Statute is to be construed to refer only to trade fixtures. Wright v. DuBignon, 114 Ga.

765, 40 S.E. 747, 57 L.R.A. 669 (1902); Raymond v. Strickland, 124 Ga. 504, 52 S.E. 619, 3 L.R.A. (n.s.) 69 (1905) (see O.C.G.A. § 44-7-12).

Definition of trade fixture. — See Wright v. DuBignon, 114 Ga. 765, 40 S.E. 747, 57 L.R.A. 669 (1902); Raymond v. Strickland, 124 Ga. 504, 52 S.E. 619, 3 L.R.A. (n.s.) 69 (1905); Currin v. Milhollin, 53 Ga. App. 270, 185 S.E. 380 (1936); Chouinard v. Leah Enters., Inc., 205 Ga. App. 206, 422 S.E.2d 204 (1992).

Applicability to purchaser of land. — Trover suit for possession of buildings will not lie against the purchaser of the land, although such purchaser took with notice of a specific agreement between the plaintiff and the defendant's predecessor in title that the buildings were to remain personal property and fixtures and be removable. Adams v. Chamberlin, 54 Ga. App. 459, 188 S.E. 550 (1936).

Applicability to mere chattel. — When a lease of land for use as a filling station provided that the lessee shall have the right to erect on the land ''such buildings, pumps, underground tanks and other improvements as may be necessary and incident to the conduct of a filling station for the dispensing of petroleum products, tires and automobile accessories,'' that ''all improvements erected on said land by the lessee shall revert and be the property of the lessor,'' and that the lessor agrees to pay ''all taxes on the land and improvements,'' the stipulation that the improvements shall become the property of the lessor refers only to improvements in the realty itself and does not apply to a mere chattel used by the lessee in connection with the lessee's business. Irvin v. Smith, 185 Ga. 386, 194 S.E. 906 (1938).

Fixtures attached to realty. — In a suit in trover to recover certain shelving supplied by the tenant for use in the rented property, the lease having expired, it could not be recovered, even as trade fixtures, if attached to the realty. Powell v. Griffith, 38 Ga. App. 40, 142 S.E. 466 (1928).

While two owners of an aircraft hangar had no formal agreement with the city entitling the owners to extend their stay on city property, and the city could therefore elect to remove the owners at any time as tenants at will, the owners were obligated to remove any trade fixtures from the landlord's property, specifically, the hangar, despite the hangar's size, and at the owners own expense, upon notification by the city of the expiration of the lease term; moreover, the hangar was such that although the hangar was bolted to the ground, it was done so in such a way that the hangar could be disassembled and rebuilt elsewhere. S.S. Air, Inc. v. City of Vidalia, 278 Ga. App. 149, 628 S.E.2d 117 (2006).

Brick and roofing material remaining after a fire which were a part of a kiln and lumber sheds erected and used by the tenant in carrying on a lumberyard business are trade fixtures. Ory v. Tate, 211 Ga. 256, 85 S.E.2d 36 (1954).

Depot building. — Depot building, erected by a railroad, not for the purpose of improving the inheritance, but to aid and assist the company in carrying on the company's business, is a trade fixture, and a tenant may remove such fixtures before the expiration of the tenant's term; but after having forfeited the tenant's estate in the land, and having abandoned the tenant's possession, the railroad could not remove such fixtures. Carr v. Georgia R.R., 74 Ga. 73 (1884).

Meat smokehouse. — When by an agreement the landlord erected a smokehouse for the tenant upon the tenant paying $4,000.00, the smokehouse became ''a trade fixture'' which could be removed by the tenant. Armour & Co. v. Block, 147 Ga. 639, 95 S.E. 228 (1918).

An air compressor used to furnish free air at a filling station is a trade fixture. Rucker v. Hunt, 44 Ga. App. 836, 163 S.E. 612 (1932).

Removal of domestic and ornamental fixtures. — Domestic or ornamental fixtures which a tenant has attached to a dwellinghouse or the grounds on which the dwellinghouse is located, to promote the tenant's domestic comfort, and which may be easily severed and made equally useful to the tenant in another house, may be removed by the tenant's during the tenant's term. Wright v. DuBignon, 114 Ga. 765, 40 S.E. 747, 57 L.R.A. 669 (1902).

Tenant must be in possession. — Tenant may remove domestic and ornamental fixtures during the tenant's term, but cannot remove the fixtures after the term's expiration without the landlord's consent unless

the tenant remains in possession of the premises under right to still be considered the landlord's tenant. Youngblood & Harris v. Eubanks, 68 Ga. 630 (1882); Raymond v. Strickland, 124 Ga. 504, 52 S.E. 619 (1905).

Landlord's acceptance of rent during pendency of dispossessory proceedings pursuant to consent agreement with tenant did not amount to acquiescence by landlord of tenant's possession and tenant had no right to remove trade fixtures once the tenant's rightful possession of the premises ended. Chouinard v. Leah Enters., Inc., 205 Ga. App. 206, 422 S.E.2d 204, cert. denied, 205 Ga. App. 899, 422 S.E.2d 204 (1992).

Interference by landlord. — Any wrongful act or refusal on the part of the landlord with respect to the removal of the tenant's fixtures amounts to a conversion for which an action will lie. Wright v. DuBignon, 114 Ga. 765, 40 S.E. 747, 57 L.R.A. 669 (1902); Richards v. Gilbert, 116 Ga. 382, 42 S.E. 715 (1902).

Personalty which has not become a fixture remains the property of the tenant; although the personalty may be left in the building, it is not by the fact alone to be treated as abandoned to the landlord. Cozart v. Johnson, 181 Ga. 337, 182 S.E. 502 (1935).

Definition and illustrations of domestic and ornamental fixtures. — See Wright v. DuBignon, 114 Ga. 765, 40 S.E. 747, 57 L.R.A. 669 (1902); Raymond v. Strickland, 124 Ga. 504, 52 S.E. 619, 3 L.R.A. (n.s.) 69 (1905).

Cited in Stokes v. First Ga. Bank, 500 F.2d 393 (5th Cir. 1974); Turner Communications Corp. v. Hickcox, 161 Ga. App. 79, 289 S.E.2d 260 (1982); Benton v. Georgia Marble Co., 258 Ga. 58, 365 S.E.2d 413 (1988).

OPINIONS OF THE ATTORNEY GENERAL

Compensation for condemned fixtures. — In a condemnation proceeding in which there exists a landlord-tenant relationship, those fixtures which are physically or constructively made a part of the realty, even those which were placed there by the tenant, are to be considered as a part of the realty and property of the landowner; the tenant would not be allowed compensation for such fixtures unless the tenant had, by previous agreement, entered into a written agreement with the landlord that these fixtures were to be considered as personalty of the tenant; the only exception to this rule would be in those cases in which the tenant was engaged in some trade or business and the fixtures in question were used as part of the tenant's business or trade and could be considered as trade fixtures. 1969 Op. Att'y Gen. No. 69-122.

Condemnation of fixtures. — State Highway Department (now Department of Transportation), being a condemning authority, stands in the position of a grantee and the principle of law applicable to trade fixtures has no bearing on the rights of the condemnor; if fixtures exist on property which is being condemned at the time of the condemnation and the condemnation describes the property condemned sufficient to include the fixtures, upon a judgment of condemnation the fixtures become property of the State of Georgia; it is insignificant and immaterial in this event that the fixtures may have been trade fixtures. 1967 Op. Att'y Gen. No. 67-127.

Tenant's relocation expenses in condemnation. — Trade fixtures are considered as property of the tenant; in any condemnation proceeding, the tenant is eligible for relocation moving expenses for trade fixtures. 1969 Op. Att'y Gen. No. 69-122.

RESEARCH REFERENCES

Am. Jur. 2d. — 49 Am. Jur. 2d, Landlord and Tenant, § 856 et seq.

C.J.S. — 51C C.J.S., Landlord and Tenant, § 288.

ALR. — Right of tenant to make alterations in structures on leased premises, 9 ALR 445; 13 ALR 824.

Pavement, flooring, platform, walks, and the like as fixtures, 13 ALR 1454.

Eviction before expiration of term as af-

fecting right to remove trade fixtures, 39 ALR 1099.

Storage tank or other apparatus of gasoline station as fixture, 52 ALR 798; 99 ALR 69.

Refrigerator or refrigerating plant as fixture, 64 ALR 1222; 169 ALR 478.

Cotton gin as fixture, 70 ALR 1128.

Buildings erected by a tenant as ''trade fixtures,'' 107 ALR 1153.

Right to remove fixtures or improvements placed upon property by one holding under lease as affected by renewal or new lease made to him or his successor without reservation of the right to remove, 110 ALR 480.

Bowling alleys as fixtures, 123 ALR 690.

Time within which tenant's right to remove trade fixtures must be exercised, 6 ALR2d 322.

Rights of lessee to minerals extracted during the lease but remaining on the premises after its termination, 51 ALR2d 1121.

Electric range as fixture, 57 ALR2d 1103.

What constitutes improvements, alterations, or additions within provisions of lease permitting or prohibiting tenant's removal thereof at termination of lease, 30 ALR3d 998.

Air-conditioning appliance, equipment, or apparatus as fixture, 69 ALR4th 359.

Time within which tenant's right to remove trade fixtures must be exercised, 109 ALR5th 421.

44-7-13. Landlord's duties as to repairs and improvements.

The landlord must keep the premises in repair. He shall be liable for all substantial improvements placed upon the premises by his consent. (Orig. Code 1863, § 2266; Code 1868, § 2258; Code 1873, § 2284; Code 1882, § 2284; Civil Code 1895, § 3123; Civil Code 1910, § 3699; Code 1933, § 61-111.)

Cross references. — Prohibition against waiving landlord's duties by contractual agreement, § 44-7-2(b)(1).

Law reviews. — For article, ''Exculpatory Clauses in Leases,'' see 15 Ga. B.J. 389 (1953). For article, ''Usufructs and Estates for Years Distinguished,'' see 18 Ga. St. B.J. 116 (1982).

For note advocating reasonable man standard for tort liability of landlord, see 23 Emory L.J. 1051 (1974).

For comment on Midtown Chain Hotels Co. v. Bender, 77 Ga. App. 723, 49 S.E.2d 779 (1948), see 11 Ga. B.J. 352 (1949).

JUDICIAL DECISIONS

Analysis

General Consideration
Duties of Landlord
Notice
Rights and Duties of Tenant

General Consideration

Origin of section. — Statute introduced a new rule on the subject of keeping rented premises in repair, devolving the burden on the landlord instead of upon the tenant, since it rested by the rule of the common law. Vason v. City of Augusta, 38 Ga. 542 (1868); Center & Treadwell v. Davis, 39 Ga. 210 (1869); Whittle v. Webster, 55 Ga. 180 (1875); Driver v. Maxwell, 56 Ga. 11 (1876); Roach v. LeGree, 18 Ga. App. 250, 89 S.E. 167 (1916); Finley v. Williams, 45 Ga. App. 863, 166 S.E. 265 (1932); Wallace v. Adams, 47 Ga. App. 144, 169 S.E. 852 (1933) (see O.C.G.A. § 44-7-13).

Public policy. — General Assembly has consistently expressed the public policy of this state as one in favor of imposing upon the landlord liability for damages to others from defective construction and failure to keep one's premises in repair. The expressed

public policy in favor of landlord liability is matched by an equally strong and important public policy in favor of preventing unsafe residential housing. Thompson v. Crownover, 259 Ga. 126, 381 S.E.2d 283 (1989).

Section does not impose tort liability on landlord. — Clear import of O.C.G.A. § 44-7-13 is that the landlord is liable for the payment of costs for repairs or improvements made to the property by the tenant. It thus imposes contractual, but not tort, liability on a landlord. Colquitt v. Rowland, 265 Ga. 905, 463 S.E.2d 491 (1995).

O.C.G.A. § 44-7-13 provided remedy to member of military and spouse, who lived in military base housing, and recovery was not barred under the ''activity incident to service'' doctrine. Elliott ex rel. Elliott v. United States, 877 F. Supp. 1569 (M.D. Ga. 1992), aff'd, 13 F.3d 1555 (11th Cir. 1995).

Proximate cause of injury. — In order to recover, a tenant is required to show not only that the landlord breached the landlord's statutory duty to keep the premises in repair, but that such breach was the proximate cause of the tenant's injury. Brown v. RFC Mgt., Inc., 189 Ga. App. 603, 376 S.E.2d 691 (1988); Jones v. Campbell, 198 Ga. App. 83, 400 S.E.2d 364 (1990).

Section applies when no estate for years. — Statute expresses the general rule as to the obligation of a landlord when there is no tenancy for years. Shippen v. Georgia Better Foods, Inc., 79 Ga. App. 813, 54 S.E.2d 704 (1949) (see O.C.G.A. § 44-7-13).

Word "repair" contemplates an existing structure or thing which has become imperfect, and means to supply in the original existing structure that which is lost or destroyed, and thereby restore it to the condition in which it originally existed, as near as may be. Childers v. Speer, 63 Ga. App. 848, 12 S.E.2d 439 (1940).

Any upkeep necessary to preserve premises as to tenantability is a repair. — Any upkeep, including, if necessary, an entire replacement of a component part of a building upon the rented premises — as, for instance, a furnace — which is necessary to the preservation of the premises in their entirety in the same condition as to tenantability as they were at the time of the execution of the lease, is a repair. Pharr v. Burnette, 158 Ga. App. 473, 280 S.E.2d 881 (1981).

O.C.G.A. § 25-2-40 controlled over O.C.G.A. § 44-7-13. — Summary judgment was properly entered for a landlord and a property manager (appellees) in a negligence suit filed by an injured party as appellees complied with state law as to the installation of smoke detectors contained in O.C.G.A. § 25-2-40(a)(2), and as evidence of any failure to maintain the detectors was inadmissible under § 25-2-40(g); as § 25-2-40(a)(2) was more specific, it governed over any conflicting statutory or common law duty of care, such as those contained in O.C.G.A. §§ 44-7-13 and 51-3-1, and as O.C.G.A. § 25-2-40(g) was enacted more recently than the older statutes, it controlled. Hill v. Tschannen, 264 Ga. App. 288, 590 S.E.2d 133 (2003).

Implied covenant of suitability. — Except as provided by this statute there is no implied covenant that the premises are suitable for the purpose for which the premises are leased, or for the particular use for which the premises are intended by the tenant. Cox v. Walter M. Lowney Co., 35 Ga. App. 51, 132 S.E. 257 (1926); Childers v. Speer, 63 Ga. App. 848, 12 S.E.2d 439 (1940); Point Apts., Inc. v. Bryant, 99 Ga. App. 110, 107 S.E.2d 684 (1959) (see O.C.G.A. § 44-7-13).

Suitability for intended use. — From former Code 1933, §§ 61-111 and 61-112 (see O.C.G.A. §§ 44-7-13 and 44-7-14) has been derived the principle that suitability for the use ''intended by the lessee and known to the lessor'' was assured. Thus, a jury question existed as to the suitability of a lock to prevent burglaries. Warner v. Arnold, 133 Ga. App. 174, 210 S.E.2d 350 (1974).

Remedy of tenant when landlord fails to keep premises in repair. — When a landlord covenants to keep premises in repair, the landlord's failure to do so, whereby the use of the premises by the tenant is impaired, will not work a forfeiture of the rent, unless the premises become untenantable and a constructive eviction results; the remedy of the tenant is, after reasonable opportunity to the landlord, and failure by the landlord to repair, to make the repairs personally 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. Swim Dixie Pool Corp. v. Kraemer, 157 Ga. App. 748, 278 S.E.2d 448 (1981).

General Consideration (Cont'd)

Evidence sufficient to preclude summary judgment. — When evidence shows injured defendant took care to inspect work area for possible hazards before starting to remove a roof, asked workers for the property owner to stay away from the area defendant was working in and generally tried to keep the area safe, defendant's personal injury suit should survive summary judgment. Greenforest Baptist Church, Inc. v. Shropshire, 221 Ga. App. 465, 471 S.E.2d 547 (1996).

Constructive eviction. — Rented building becomes untenantable and the tenant is constructively evicted therefrom and thereafter relieved of one's obligation to pay rent, when the landlord whose duty it is to keep it in a proper state of repair allows it to deteriorate to such an extent that it is an unfit place for the tenant to carry on the business for which it was rented, and when it cannot be restored to such condition by ordinary repairs which can be made without unreasonable interruption of the tenant's business. Overstreet v. Rhodes, 213 Ga. 181, 97 S.E.2d 561 (1957).

To establish an affirmative defense of constructive eviction from the rented premises it is necessary for the defendant to prove: (1) that the landlord in consequence of the landlord's failure to keep the rented building repaired allowed the building to deteriorate to such an extent that the building had become an unfit place for the defendant to carry on the business for which the building was rented; and (2) that the building could not be restored to a fit condition by ordinary repairs which could be made without unreasonable interruption of the tenant's business. Swim Dixie Pool Corp. v. Kraemer, 157 Ga. App. 748, 278 S.E.2d 448 (1981).

Express contract concerning repairs. — Any statutory requirement as to the landlord-tenant relationship is not applicable or controlling in a case when the landlord and the tenant have expressly contracted as to this obligation with reference to repairs. Sewell v. Royal, 147 Ga. App. 88, 248 S.E.2d 165 (1978).

Contractual modification. — Landlord may by express contract relieve oneself from liability for concealed defects in the premises, known to the landlord, but unknown to the tenant. Jadronja v. Bricker, 49 Ga. App. 37, 174 S.E. 251 (1934).

Owner of property not used as a ''dwelling place'' can contract to avoid the duties to repair and improve the property. Groutas v. McCoy, 219 Ga. App. 252, 464 S.E.2d 657 (1995).

Consideration for promise to repair. — When by the terms of the lease the landlord has not the obligation of repairing the premises, a promise made by the landlord during the term to make repairs, or lay out money in having repairs made, must be supported by some new consideration to be valid. Jadronja v. Bricker, 49 Ga. App. 37, 174 S.E. 251 (1934).

Liability of subsequent purchaser. — Subsequent purchaser is not personally liable for the breach to pay for repairs where the breach occurred prior to the purchase; the liability is personal to the landlord at the time of breach. Mead Corp. v. Abeles, 530 F.2d 38 (5th Cir. 1976).

Liability of vendee for improvements. — When one rents premises under a contract to purchase and during the tenancy places repairs upon the premises, one cannot hold the vendee of one's landlord liable for the improvements because the landlord or vendee did not consent. Grizzle v. Gaddis, 75 Ga. 350 (1885).

No recovery against landlord's agent. — While one may be a landlord without being the owner of the premises, yet the agent of the landlord to collect rents and who agrees and assumes the duty of making repairs does not become the landlord of the tenant, and no recovery can be had against such agent as landlord. Sanders v. A.T. Holt Co., 76 Ga. App. 279, 45 S.E.2d 480 (1947).

Nonowner as landlord. — An action by a tenant, against one from whom the tenant rented certain premises, for damages on account of the negligence of the latter in making repairs to the premises is not subject to demurrer because it does not appear that the defendant is the owner of the premises; a person may be a landlord without being an owner. Hill v. Liebman, Inc., 53 Ga. App. 462, 186 S.E. 431 (1936).

Lapse of reasonable time in making repairs. — In a suit for damages caused by a failure to repair a roof destroyed by fire, it should appear that the damage was done

after the time when the landlord by proper diligence could have covered the building. Driver v. Maxwell, 56 Ga. 11 (1876); J.B. White & Co. v. Montgomery, 58 Ga. 204 (1877); Lewis & Co. v. Chisolm, 68 Ga. 40 (1881); Miller v. Smythe, 95 Ga. 288, 22 S.E. 532 (1895); Johnson v. Collins, 98 Ga. 271, 26 S.E. 744 (1896); Stack v. Harris, 111 Ga. 149, 36 S.E. 615 (1900); Gavan v. Norcross, 117 Ga. 356, 43 S.E. 771 (1903).

Landlord not insurer of tenant's safety. — Even though the landlord is under a duty to keep the premises in repair pursuant to O.C.G.A. §§ 44-7-13 and 44-7-14, the landlord is not an insurer of the tenant's safety. Ethridge v. Davis, 243 Ga. App. 11, 530 S.E.2d 477 (2000).

Husband's knowledge of defective condition not imputed to wife. — Since the plaintiff had no notice or knowledge of the defective condition of the steps, which was a latent defect, she would not be precluded from recovering for injuries arising therefrom merely because her husband, who was the tenant, knew of the condition of the steps. Wall Realty Co. v. Leslie, 54 Ga. App. 560, 188 S.E. 600 (1936).

Relevancy of Housing Code violations in determining damages. — Failure of the landlord to keep rented premises in repair as required by statute and to comply with provisions of the housing code would be relevant on the issue of ordinary damages to the property of the tenant, but would not per se authorize the imposition of punitive damages. Kaplan v. Sanders, 237 Ga. 132, 227 S.E.2d 38 (1976).

Questions for jury. — Whether landlord who was aware of a defective gas heater failed to exercise reasonable care to repair the heater, and whether the condition of the heater constituted a violation of the housing code, were questions for the jury. Thompson v. Crownover, 259 Ga. 126, 381 S.E.2d 283 (1989).

Whether landlord approved substantial improvements made by the tenant to the property was a jury question. Roberts v. Roberts, 205 Ga. App. 371, 422 S.E.2d 253 (1992).

In a negligence action brought by a tenant who slipped and fell on the steps of the tenant's rented home, when both tenant and landlord were aware of a problem with the steps, the question was, given the tenant's equal or superior knowledge, whether the tenant could have avoided the accident, either by avoiding the problematic area, or by using the area more cautiously. Phillips v. King, 214 Ga. App. 712, 448 S.E.2d 780 (1994).

Whether a landlord provided an adequate fire detection and alarm system in a rented house was an issue of fact for the jury. Denise v. Cannon, 219 Ga. App. 765, 466 S.E.2d 885 (1995).

After learning that its back-up generator was irreparable, determining whether the landlord acted negligently, breached the statutory duties as landlord, or violated local ordinances or housing codes were questions for the jury. McCullough v. Briarcliff Summit, 237 Ga. App. 630, 516 S.E.2d 353 (1999).

Cited in Oakland Motor Car Co. v. Rippey Motor Co., 41 Ga. App. 784, 154 S.E. 823 (1930); Gledhill v. Harvey, 55 Ga. App. 322, 190 S.E. 61 (1937); Bixby v. Sinclair Ref. Co., 74 Ga. App. 626, 40 S.E.2d 677 (1946); Kanes v. Koutras, 203 Ga. 570, 47 S.E.2d 558 (1948); Ginsberg v. Wade, 95 Ga. App. 475, 97 S.E.2d 915 (1957); Golf Club Co. v. Rothstein, 97 Ga. App. 128, 102 S.E.2d 654 (1958); Big Apple Super Mkts. of Peachtree, Inc. v. W.J. Milner & Co., 111 Ga. App. 282, 141 S.E.2d 567 (1965); Howell Gas of Athens, Inc. v. Coile, 112 Ga. App. 732, 146 S.E.2d 145 (1965); Townsend & Ghegan Enters. v. W.R. Bean & Son, 117 Ga. App. 109, 159 S.E.2d 776 (1968); Scarboro Enters., Inc. v. Hirsh, 119 Ga. App. 866, 169 S.E.2d 182 (1969); Zeeman Mfg. Co. v. L.R. Sams Co., 123 Ga. App. 99, 179 S.E.2d 552 (1970); Kaplan v. Sanders, 136 Ga. App. 902, 222 S.E.2d 630 (1975); Porter v. Moschella, 152 Ga. App. 678, 263 S.E.2d 538 (1979); Bradley v. Godwin, 152 Ga. App. 782, 264 S.E.2d 262 (1979); Jacobi v. Timmers Chevrolet, Inc., 164 Ga. App. 198, 296 S.E.2d 777 (1982); Vizzini v. Blonder, 165 Ga. App. 840, 303 S.E.2d 38 (1983); Schuster v. Plaza Pac. Equities, Inc., 588 F. Supp. 61 (N.D. Ga. 1984); Bettis v. Ryle, 176 Ga. App. 88, 335 S.E.2d 399 (1985); Dyches Constr. Co. v. Strauss, 192 Ga. App. 454, 385 S.E.2d 316 (1989); Watts v. Jaffs, 216 Ga. App. 565, 455 S.E.2d 328 (1995); Culberson v. Lanier, 216 Ga. App. 686, 455 S.E.2d 385 (1995); Doe v. Prudential-Bache/A.G. Spanos Realty Partners, 222 Ga. App. 169, 474 S.E.2d 31

General Consideration (Cont'd)

(1996); Doe v. Briargate Apts., Inc., 227 Ga. App. 408, 489 S.E.2d 170 (1997); Standard Mgt. Co. v. Scott, 229 Ga. App. 36, 493 S.E.2d 216 (1997).

Duties of Landlord

Liability for injury from defective condition. — Landlord is not an insurer, but the landlord is under a legal duty to keep the rented premises in repair, and is liable in damages to a person who receives injury while lawfully upon the premises and who is in the exercise of due care, if the injury arises because of the defective construction of a building erected on the premises by the landlord, or because of the landlord's failure to repair defects of which the landlord knows, or in the exercise of reasonable diligence ought to know. Oglesby v. Rutledge, 67 Ga. App. 656, 21 S.E.2d 497 (1942); Ween v. Saul, 88 Ga. App. 299, 76 S.E.2d 525 (1953).

Even if the lack of a smoke detector rendered a leased mobile home defective, the owner of the real property on which the mobile home was located did not violate a duty to supply a smoke detector since a third party owned the mobile home and rented the mobile home to the tenants. Crowder v. Larson, 236 Ga. App. 858, 513 S.E.2d 771 (1999).

Liability for dangerous condition. — When a portion of leased premises is dangerously out of repair and such condition is known to tenant who continues to use that area, tenant cannot recover from the landlord for damages resulting from the condition; but the severity of the doctrine of assumption of risk has been ameliorated in cases where its application would make the tenant "a captive" in the tenant's own home. Carey v. Bradford, 218 Ga. App. 325, 461 S.E.2d 290 (1995).

When a dangerous area is tenant's only access or only safe or reasonable access to the home, tenant's equal knowledge of the danger does not excuse the landlord of damages caused by a failure to keep the premises in repair. Carey v. Bradford, 218 Ga. App. 325, 461 S.E.2d 290 (1995).

Landlord is bound to keep in repair the premises which landlord has leased, unless the contract of lease contains a stipulation to the contrary. Pharr v. Burnette, 158 Ga. App. 473, 280 S.E.2d 881 (1981).

Landlord has a duty to keep premises in repair, and when defects render premises unsafe or uninhabitable, a landlord may not avoid duties created by statutes or by housing codes even though the defect is patent. Roth v. Wu, 199 Ga. App. 665, 405 S.E.2d 741 (1991).

Plaintiff as tenant cannot place liability for improvements on defendants as landlords, absent consent to improvements or an agreement between the parties to the contrary. May v. May, 165 Ga. App. 461, 300 S.E.2d 215 (1983).

Absence of contractual stipulation. — Landlord, in the absence of a stipulation to the contrary, is bound to keep the premises in repair. Mathis v. Gazan, 51 Ga. App. 805, 181 S.E. 503 (1935); Paulk v. Ellis St. Realty Corp., 79 Ga. App. 36, 52 S.E.2d 625 (1949); Kersh v. Manis Whsle. Co., 135 Ga. App. 943, 219 S.E.2d 604 (1975).

Exculpatory provision void. — Landlord's implied warranty concerning latent defects existing at the inception of the lease is sufficiently analogous to a contract for maintenance or repair that an exculpatory provision purporting to nullify the effect of the implied warranty is void and unenforceable; the landlord's warranty exists by operation of law in the interest of public safety. Porubiansky v. Emory Univ., 156 Ga. App. 602, 275 S.E.2d 163 (1980), aff'd, 248 Ga. 391, 282 S.E.2d 903 (1981).

Duty to repair arising from contract. — When duty to repair or rebuild arises from a contract, it must be by an express agreement to that effect; it will not be inferred even from a reservation of the right to enter for that purpose. Gavan v. Norcross, 117 Ga. 356, 43 S.E. 771 (1903).

Suitability of rental property. — It is the duty of the landlord to make rental property suitable for the purpose for which it is rented, unless the tenant knows as much about the property's condition as the landlord does; the landlord must, upon notice of any defect, keep it in such condition as to be suitable for such use. Whittle v. Webster, 55 Ga. 180 (1875); Driver v. Maxwell, 56 Ga. 11 (1876); J.B. White & Co. v. Montgomery, 58 Ga. 204 (1877); Lewis & Co. v. Chisolm, 68 Ga. 40 (1881); Miller v. Smythe, 95 Ga. 288, 22 S.E. 532 (1895); Johnson v. Collins, 98 Ga.

271, 26 S.E. 744 (1896); Stack v. Harris, 111 Ga. 149, 36 S.E. 615 (1900); Thompson v. Walker, 6 Ga. App. 80, 64 S.E. 336 (1909); Clements v. Blanchard, 141 Ga. 311, 80 S.E. 1004, 17 L.R.A. 993 (1914); Florence v. Northcutt, 145 Ga. 265, 88 S.E. 933 (1916); King v. Investors' Mtg. & Loan Co., 51 Ga. App. 235, 179 S.E. 910 (1935); Point Apts., Inc. v. Bryant, 99 Ga. App. 110, 107 S.E.2d 684 (1959).

Duty to inspect. — When the landlord is notified that the premises are out of repair, it becomes the landlord's duty to inspect and investigate in order that the landlord may make such repairs as the safety of the tenant requires; therefore, when, after such notice, the landlord fails, within a reasonable time, to make the repairs, the landlord is chargeable with notice of all defects that a proper inspection would have disclosed. Mathis v. Gazan, 51 Ga. App. 805, 181 S.E. 503 (1935); Ball v. Murray, 91 Ga. App. 686, 86 S.E.2d 706 (1955); Dempsey v. Smith, 108 Ga. App. 88, 132 S.E.2d 233 (1963), overruled on other grounds, Frist v. U.S. 5 & 10¢ Stores, Inc., 110 Ga. App. 237, 138 S.E.2d 186 (1964).

No duty to inspect without request. — When the tenant is in the exclusive possession and control of the rented premises, the landlord is under no duty to inspect the premises to ascertain whether or not repairs are needed, unless requested so to do. Ocean S.S. Co. v. Hamilton, 112 Ga. 901, 38 S.E. 204 (1901); Ross v. Jackson, 123 Ga. 657, 51 S.E. 578 (1905); Sutton v. Murray, 49 Ga. App. 130, 174 S.E. 174 (1934); Cone v. Lawhon, 61 Ga. App. 797, 7 S.E.2d 597 (1940); Elijah A. Brown Co. v. Wilson, 191 Ga. 750, 13 S.E.2d 779 (1941); Ramey v. Pritchett, 90 Ga. App. 745, 84 S.E.2d 305 (1954); Tribble v. Somers, 115 Ga. App. 847, 156 S.E.2d 130 (1967).

Duty to rebuild. — Words, ''keep … in repair,'' as used in this statute are not technical words, but are used in their ordinary sense. The usual meaning of ''to repair'' is to mend, to restore to a sound state what has been partially destroyed, to make good an existing thing; not to make a new thing, such as erecting a new building to take the place of one destroyed. The law requiring the landlord to keep the rented premises in repair does not mean that the landlord shall rebuild buildings wholly destroyed by casualty not caused by the landlord. Mayer & Crine v. Morehead, 106 Ga. 434, 32 S.E. 349 (1899); Sewell v. Royal, 147 Ga. App. 88, 248 S.E.2d 165 (1978) (see O.C.G.A. § 44-7-13).

Tenant's implied duty to rebuild. — When the lessee has agreed ''to repair'' or ''to keep in repair'' generally the building or property rented and qualifies these words with other words, to-wit: to deliver the possession of the same property in the same condition at the expiration of the lease as at the time of the execution of the lease, natural wear and tear excepted (or words to like effect), the obligation is subject to the implied condition that the building or property shall be in existence at the end of the term and if before that time the property is destroyed by fire, the lessee will not be required, under the terms of the contract, to rebuild or be liable therefor. Otherwise when the covenant is to repair, or keep in repair generally, without the qualifying words, the tenant must rebuild. Williams v. Bernath, 61 Ga. App. 350, 6 S.E.2d 184 (1939).

Covenant to repair ordinarily does not bind the landlord to rebuild, though there are cases in which the word ''repair,'' aided by the context, has been held to mean ''rebuild.'' When the contract requires the tenant to keep the premises in repair, and return the premises in the same condition as when received, or other language is employed showing an intention to make either party rebuild, such duty will be imposed, even though the word ''rebuild'' is not used. Shippen v. Georgia Better Foods, Inc., 79 Ga. App. 813, 54 S.E.2d 704 (1949).

Rebuilding in case of destruction. — Provision of this statute making landlords liable for repairs does not require landlords to rebuild in case of the destruction of the tenement. Mayer & Crine v. Morehead, 106 Ga. 434, 32 S.E. 349 (1899) (see O.C.G.A. § 44-7-13).

Negligent repair. — When the landlord is notified of defective premises and undertakes to repair, landlord must do so properly; landlord will be liable if landlord negligently repairs the premises. Dempsey v. Hertsfield, 30 Ga. 866 (1860); Adams v. Klasing, 20 Ga. App. 203, 92 S.E. 960 (1917); Marr v. Dieter, 27 Ga. App. 711, 109 S.E. 532 (1921); Jadronja v. Bricker, 49 Ga. App. 37, 174 S.E. 251 (1934); Hill v. Liebman, Inc., 53 Ga. App. 462, 186 S.E. 431 (1936); Thomson v.

Duties of Landlord (Cont'd)

Avery, 67 Ga. App. 671, 21 S.E.2d 331 (1942); Oglesby v. Rutledge, 67 Ga. App. 656, 21 S.E.2d 497 (1942).

Landlord is liable for damages when the repairs the landlord has a duty to make are completed negligently so that a defect in the premises remains despite the attempted repair. However, when the worker hired is an independent contractor, the landlord is not liable for the negligent acts of the worker during the course of the repairs. Mason v. Gracey, 189 Ga. App. 150, 375 S.E.2d 283 (1988).

Trial court erred in granting an apartment owner and a manager summary judgment in a tenant's action to recover damages for the personal injuries the tenant sustained from carbon-monoxide poisoning because the owner and manager could be liable for the actions of a construction company's workers even if the company, which was orally hired to assist in the clean up of the owner's apartments, was an independent contractor; the evidence showed that a temporary tarp repair the workers performed was completed so negligently that a defect in the premises was created, and some evidence showed that the company and its workers were not independent contractors. In placing a temporary tarp on the roof of the tenant's apartment, the company was performing the duty of the owner and manager to repair the premises by stopping a leak until a more permanent repair could be effected. Atkins v. MRP Park Lake, L. P., 301 Ga. App. 275, 687 S.E.2d 215 (2009).

Trial court erred in granting an apartment owner and a manager summary judgment in a tenant's action to recover damages for the personal injuries the tenant sustained from carbon-monoxide poisoning on the ground that the tenant had equal knowledge with the owner and manager that the vents of the apartment were covered because some evidence showed that other agents of the owner and manager had superior knowledge of the defect, and the evidence was disputed as to whether the tenant had equal knowledge; an employee of the owner and manager supervised the emergency repairs of the apartment and was constantly walking the property to check on those repairs, and should have seen the vent pipe problem. Atkins v. MRP Park Lake, L. P., 301 Ga. App. 275, 687 S.E.2d 215 (2009).

Liability for defects in construction. — Landlord will not be liable for an injury to a tenant on account of defective construction of rented premises which the landlord has not constructed or caused to be constructed. However, when a building was defectively constructed by a predecessor in title of the landlord, and the landlord knew, or in the exercise of reasonable diligence could have known, of the building's improper construction before the tenancy was created, the landlord would be answerable to the plaintiff for injuries sustained by reason of a negligent failure to put the premises in a safe condition if the tenant could not have avoided the injury by the exercise of ordinary care. Thomson v. Avery, 67 Ga. App. 671, 21 S.E.2d 331 (1942).

Duty to prevent condemnation. — When the relation between parties is purely landlord and tenant, the duty is on the landlord to make such improvements and repairs necessary to preserve the buildings on the premises and prevent their decadence as well as to prevent their condemnation and destruction as fire hazards and unsafe buildings, and as nuisances. Evans Theatre Corp. v. De Give Inv. Co., 79 Ga. App. 62, 52 S.E.2d 655 (1949).

Landlord's duty to subtenant. — It is the duty of the landlord to keep the premises in repair, whether the premises be occupied by a tenant or a subtenant. Hooks v. Bailey, 5 Ga. App. 211, 62 S.E. 1054 (1908).

No continuing obligation to repair. — When a lease provided that the lessee would make all necessary repairs, and require no repairs be made by the lessor, the mere fact that the landlord has made repairs at the request of the tenant does not impose upon the landlord any obligation to continue to make repairs. Jadronja v. Bricker, 49 Ga. App. 37, 174 S.E. 251 (1934).

Landlord not insurer. — Landlord is not an insurer of the tenant's safety, but the landlord is certainly no bystander. Warner v. Arnold, 133 Ga. App. 174, 210 S.E.2d 350 (1974).

Notice

Landlord not liable absent notice or actual knowledge of defect. — Landlord is not liable to a tenant for injuries resulting from

defects unless the landlord has had actual knowledge of the defects, or has been notified of such defects and has failed to make repairs within a reasonable time and the tenant could not have avoided the injuries resulting therefrom by the exercise of ordinary care on the tenant's own part. Stack v. Harris, 111 Ga. 149, 36 S.E. 615 (1900); McGee v. Hardacre, 27 Ga. App. 106, 107 S.E. 563 (1921); Kleinberg v. Lyons, 39 Ga. App. 774, 148 S.E. 535 (1929); Wallace v. Adams, 47 Ga. App. 144, 169 S.E. 852 (1933); Mathis v. Gazan, 51 Ga. App. 805, 181 S.E. 503 (1935).

Landlord, in the absence of a stipulation to the contrary, is bound to keep the premises in repair. Landlord is, however, entitled to notice from the tenant that the premises are out of repair, and if, after such notice has been given, the tenant suffers damage on account of the failure of the landlord to make the necessary repairs, the landlord is liable for the damage thus sustained, provided the conduct of the tenant was not such as to preclude the tenant from recovering. Harris v. Edge, 92 Ga. App. 827, 90 S.E.2d 47 (1955); Point Apts., Inc. v. Bryant, 99 Ga. App. 110, 107 S.E.2d 684 (1959).

When the premises were destroyed by a fire originating from a furnace, the landlord, who had no actual knowledge of any furnace problem, could not be charged with notice that the removal of exterior asbestos shingles may have created a hazard with the furnace. Harris v. Sloan, 199 Ga. App. 340, 405 S.E.2d 68, cert. denied, 199 Ga. App. 906, 405 S.E.2d 68 (1991).

No duty without notice. — Landlord has no duty to repair until the landlord has notice of, or otherwise acquires knowledge of, the necessity for repair. Upchurch v. Coggins, 70 Ga. App. 205, 27 S.E.2d 869 (1943); Holloway v. Feinberg, 100 Ga. App. 160, 110 S.E.2d 413 (1959); Davis v. General Gas Corp., 106 Ga. App. 317, 126 S.E.2d 820 (1962).

Effect of notice. — Notice of a defect given by the tenant to the landlord charges the landlord with notice of such other defects as might reasonably be discovered by a compliance with such request for repairs. Stack v. Harris, 111 Ga. 149, 36 S.E. 615 (1900); Roach v. LeGree, 18 Ga. App. 250, 89 S.E. 167 (1916); Cone v. Lawhon, 61 Ga. App. 797, 7 S.E.2d 597 (1940); Home Owners Loan Corp. v. Brazzeal, 62 Ga. App. 683, 9 S.E.2d 773 (1940); Shattles v. Blanchard, 87 Ga. App. 15, 73 S.E.2d 112 (1952); Ball v. Murray, 91 Ga. App. 686, 86 S.E.2d 706 (1955).

Effect of notice of patent defect. — Notice of a separate and independent patent defect, in no way connected with the latent defect which is alleged to have occasioned the injury, cannot be taken as constructive notice of the latter, or as devolving upon the landlord any duty of inspection. Hendrick v. Muse, 48 Ga. App. 295, 172 S.E. 661 (1934); Cone v. Lawhon, 61 Ga. App. 797, 7 S.E.2d 597 (1940); Tribble v. Somers, 115 Ga. App. 847, 156 S.E.2d 130 (1967).

Liability after notice or knowledge. — When the landlord, after knowledge or notice that the premises are out of repair, neglects to repair the premises within a reasonable time the landlord may be liable to the tenant in a proper case for damage sustained by reason of the failure to make such repairs. Whittle v. Webster, 55 Ga. 180 (1875); Stack v. Harris, 111 Ga. 149, 36 S.E. 615 (1900); Ross v. Jackson, 123 Ga. 657, 51 S.E. 578 (1905); Wall Realty Co. v. Leslie, 54 Ga. App. 560, 188 S.E. 600 (1936); Oglesby v. Rutledge, 67 Ga. App. 656, 21 S.E.2d 497 (1942); Midtown Chain Hotels Co. v. Bender, 77 Ga. App. 723, 49 S.E.2d 779 (1948).

No actual or constructive knowledge. — Landlord is not liable for injuries to a tenant on account of latent defects existing at the time of the lease, which the landlord might have discovered by an inspection not required of the landlord by law, unless the landlord actually knew, or by the exercise of ordinary care might otherwise have known, of their existence. Tribble v. Somers, 115 Ga. App. 847, 156 S.E.2d 130 (1967).

Landlord without actual notice of defect. — Owner may be held liable for injuries arising from failure to maintain building in proper repair, even without actual notice of the defect, if, in the exercise of ordinary care, the owner should have known of the defect. Home Owners Loan Corp. v. Brazzeal, 62 Ga. App. 683, 9 S.E.2d 773 (1940).

Property company was not liable for negligence after an apartment fire because, even assuming that the alleged defect existed and

Notice (Cont'd)

caused the fire, the company lacked notice of the condition. There was no evidence that the stove lacked drip pans when the victim moved into the apartment and the company was never told of a problem with the stove. Haynes v. Kingstown Props., Inc., 260 Ga. App. 102, 578 S.E.2d 898 (2003).

Actual knowledge derived from inspection. — Whether or not owner was under the duty to inspect for latent defects, having actually made such inspection the owner was under the duty to make such repairs as may have been called for by the knowledge so obtained. Home Owners Loan Corp. v. Brazzeal, 62 Ga. App. 683, 9 S.E.2d 773 (1940).

Landlord not in possession. — When landlord has surrendered complete possession to tenant landlord must have knowledge of defect, or have been notified to repair, before landlord becomes liable. Finley v. Williams, 45 Ga. App. 863, 166 S.E. 265 (1932); Home Owners Loan Corp. v. Brazzeal, 62 Ga. App. 683, 9 S.E.2d 773 (1940); Shattles v. Blanchard, 87 Ga. App. 15, 73 S.E.2d 112 (1952); Ball v. Murray, 91 Ga. App. 686, 86 S.E.2d 706 (1955).

Notice not required when landlord retains qualified possession. — When a landlord retains a qualified possession of and a general supervision over the rented premises, by placing an agent in charge thereof, no notice from the tenant is required. Guthman v. Castleberry, 49 Ga. 272 (1873); J.B. White & Co. v. Montgomery, 58 Ga. 204 (1877); Monahan v. National Realty Co., 4 Ga. App. 680, 62 S.E. 127 (1908); Florence v. Northcutt, 145 Ga. 265, 88 S.E. 933 (1916); Davis v. Hall, 21 Ga. App. 265, 94 S.E. 274 (1917).

Landlord occupying premises. — When a landlord occupies a room in the rented premises the landlord is presumed to have knowledge of the defective and leaky condition of the roof, and notice by the tenant to repair is not necessary. Turner v. Long, 61 Ga. App. 785, 7 S.E.2d 595 (1940).

Landlord must be charged with knowledge of the physical construction of the landlord's own premises. Shattles v. Blanchard, 87 Ga. App. 15, 73 S.E.2d 112 (1952).

When structure is built by predecessor in title of a landlord, or by some other person not acting under the supervision of the landlord, before the landlord can be held liable for injuries caused by the defective structure, it must appear that the landlord actually knew, or by the exercise of ordinary diligence could and should have known, of the improper construction before the tenancy was created; or that the landlord had been notified thereof by the tenant, and had failed, after a reasonable time, to repair and render the defective structure safe; or that the landlord had acquired such knowledge, and had failed, after a reasonable time, to render the structure safe. Upchurch v. Coggins, 70 Ga. App. 205, 27 S.E.2d 869 (1943).

Patent defects known at lease. — If there are patent defects known to both parties at the time of executing the lease, and the lessee takes the premises as the premises are, the lessee cannot thereafter demand that the landlord remedy the defect. Driver v. Maxwell, 56 Ga. 11 (1876); Aikin v. Perry, 119 Ga. 263, 46 S.E. 93 (1903); Lumpkin v. Provident Loan Soc'y, Inc., 15 Ga. App. 816, 84 S.E. 216 (1915); Desverges v. Marchant, 18 Ga. App. 248, 89 S.E. 221 (1916).

Notice to agent. — Notice of the defective condition of the property when given to the agent with whom the tenant dealt under instructions of the landlord, and to whom the rents were paid, is notice to the landlord. Wall Realty Co. v. Leslie, 54 Ga. App. 560, 188 S.E. 600 (1936).

Burden of proof of notice. — In order to sustain a cause of action against a landlord for failure to keep the premises in repair, the tenant must allege and prove that the tenant has given the landlord notice of the defective condition of the premises. Roach v. LeGree, 18 Ga. App. 250, 89 S.E. 167 (1916).

Knowledge of owner as jury question. — Fact that landing floor broke through, when used in the ordinary manner by the plaintiff, together with the fact of the floor's condition as shown by the exhibits and openness of the inspection, made it a jury question as to whether or not the floor's defective condition could have been known to the owner by the exercise of ordinary care. Home Owners Loan Corp. v. Brazzeal, 62 Ga. App. 683, 9 S.E.2d 773 (1940).

Reasonable notice as jury question. — Question of what is a reasonable time for the performance of an act required to be per-

formed upon ''reasonable notice'' is determined by the character of the act contemplated, considered with its purposes and the attendant facts and circumstances, and accordingly, when, the only means of ingress and egress from an apartment rented by the landlord is a set of outside steps, whether two days' notice of a defect in the steps is such reasonable notice as would raise a duty on the part of the landlord to repair the steps within such period of time is a jury question. Shattles v. Blanchard, 87 Ga. App. 15, 73 S.E.2d 112 (1952).

Rights and Duties of Tenant

Duty of tenant to give notice. — When rented premises become out of repair, it is the duty of the tenant to notify the landlord of this fact, and also to abstain from using any part of the premises, the use of which would be attended with danger. J.B. White & Co. v. Montgomery, 58 Ga. 204 (1877); Ocean S.S. Co. v. Hamilton, 112 Ga. 901, 38 S.E. 204 (1901); Clements v. Blanchard, 141 Ga. 311, 80 S.E. 204, 1917A L.R.A. 993 (1914); Roach v. LeGree, 18 Ga. App. 250, 89 S.E. 167 (1916); Alexander v. Owen, 18 Ga. App. 326, 89 S.E. 437 (1916); Davis v. Hall, 21 Ga. App. 265, 94 S.E. 274 (1917).

Acceptance of premises. — When lessees accepted the premises in the condition in which the premises were at the time of the lease, as suitable for the purpose intended, and further relieved the landlord of any obligation to repair except after written notice, these provisions in the contract constituted a ''stipulation to the contrary'' relieving the lessor of any duty to repair the premises except after notice to it by the tenants. Point Apts., Inc. v. Bryant, 99 Ga. App. 110, 107 S.E.2d 684 (1959).

Effect of tenant's covenant to repair. — Tenant will not be required to make repairs in addition to or beyond those expressly covenanted in the contract. Midtown Chain Hotels Co. v. Bender, 77 Ga. App. 723, 49 S.E.2d 779 (1948).

Tenant's covenant to keep the rented premises in repair absolves the landlord from the landlord's statutory duty to make repairs. Browning v. F.E. Fortenberry & Sons, 131 Ga. App. 498, 206 S.E.2d 101 (1974); Kersh v. Manis Whsle. Co., 135 Ga. App. 943, 219 S.E.2d 604 (1975).

Election by tenant. — Tenant may repair and charge the landlord or the tenant may notify the landlord that the repairs are needed. Vason v. City of Augusta, 38 Ga. 542 (1868); Driver v. Maxwell, 56 Ga. 11 (1876).

Landlord must keep the premises in repair; and if on notice the landlord fails to do so, the tenant has a right of action, or the tenant may recoup against the rent. Lewis & Co. v. Chisolm, 68 Ga. 40 (1881); Mayer & Crine v. Morehead, 106 Ga. 434, 32 S.E. 349 (1899).

Tenant has as tenant's option to make the repairs and recover from the landlord the reasonable expense incurred, the tenant can set off the expense against the rent, or the tenant may omit to make the repairs personally and may seek compensation by an action for the damages. Dougherty v. Taylor & Norton Co., 5 Ga. App. 773, 63 S.E. 928 (1909).

Recoupment against distress warrant. — When the landlord fails to repair the roof of the storehouse, after notice of the roof's leaky condition, and the tenant's goods are damaged thereby, the tenant is entitled to recoup the amount of such damages as against a distress warrant for the rent. Williamson v. May, 44 Ga. App. 532, 162 S.E. 162 (1932).

Use of defective premises as negligence. — When rented premises become defective and unsafe, it is the duty of the tenant to refrain from using that part of the premises the use of which would be attended with danger; it is the tenant's duty to exercise ordinary care for the tenant's own safety; and when the tenant is injured as a result of the tenant's failure to exercise such care, the tenant cannot recover damages from the tenant's landlord. Guthman v. Castleberry, 48 Ga. 172 (1873); Driver v. Maxwell, 56 Ga. 11 (1876); Stack v. Harris, 111 Ga. 149, 36 S.E. 615 (1900); Henley v. Brockman, 124 Ga. 1059, 53 S.E. 672 (1906); Donehoe v. Crane, 141 Ga. 224, 80 S.E. 712 (1914); Roach v. LeGree, 18 Ga. App. 250, 89 S.E. 167 (1916); Mathis v. Gazan, 51 Ga. App. 805, 181 S.E. 503 (1935); Turner v. Long, 61 Ga. App. 785, 7 S.E.2d 595 (1940); Brooks v. Arnold, 89 Ga. App. 782, 81 S.E.2d 289 (1954); Holloway v. Feinberg, 100 Ga. App. 160, 110 S.E.2d 413 (1959).

Even after notice to the defendant, the tenants had a perfect right to use that part of

Rights and Duties of Tenant (Cont'd)

the premises which was apparently in good and sound condition, unless there was something to call their attention to a defect in that part. Clements v. Blanchard, 141 Ga. 311, 80 S.E. 1004, 17 L.R.A. 993 (1914); Roach v. LeGree, 18 Ga. App. 250, 89 S.E. 167 (1916); Mathis v. Gazan, 51 Ga. App. 805, 181 S.E. 503 (1935).

By electing to use a stairway at night, when the lighting was out, a tenant assumed the risk of injury as a matter of law and was thus barred from recovery. Wells v. Citizens & S. Trust Co., 199 Ga. App. 31, 403 S.E.2d 826, cert. denied, 199 Ga. App. 907, 403 S.E.2d 826 (1991).

Quality of repairs by tenant. — In making the necessary repairs the tenant is not bound to use precisely the same materials as were originally used. If the tenant employs capable workmen, uses suitable materials, and the work is reasonable and properly done, the tenant is entitled to be reimbursed for the money expended by the tenant in making the repairs. Dougherty v. Taylor & Norton Co., 5 Ga. App. 773, 63 S.E. 928 (1909).

Liability where tenant supervised work. — When a tenant had been occupying a certain store, and at the tenant's instance and under the tenant's immediate supervision the landlord caused repairs to be made in the flooring, and thereupon the tenant rented for a term, agreeing that no repairs should be required to the landlord, if the floor subsequently gave way by reason of putting a heavy load upon the floor, there could be no setoff from the rent on account of damages resulting from such accident. Bosworth v. Thomas, 67 Ga. 640 (1881).

Persons present with tenant's permission. — Members of a tenant's family, the tenant's guests, servants, employees, and others present at the tenant's express or implied invitation, stand in the tenant's shoes, and are controlled by the rules governing the tenant as to the right of recovery for injuries arising from failure to keep the premises in repair. Wallace v. Adams, 47 Ga. App. 144, 169 S.E. 852 (1933); Oglesby v. Rutledge, 67 Ga. App. 656, 21 S.E.2d 497 (1942).

Negligence not imputed to child. — Child of three years of age is conclusively presumed to be incapable of contributory negligence, and any negligence of the tenant in failing to prevent the tenant's child from using the alleged defective portion of the premises would not be imputable to the child in an action maintained in the child's own behalf. Oglesby v. Rutledge, 67 Ga. App. 656, 21 S.E.2d 497 (1942).

RESEARCH REFERENCES

Am. Jur. 2d. — 49 Am. Jur. 2d, Landlord and Tenant, § 618 et seq.

C.J.S. — 51C C.J.S., Landlord and Tenant, §§ 366 et seq., 387 et seq.

ALR. — Breach of lessor's agreement as ground of liability for personal injury to tenant or one in privity with latter, 8 ALR 765; 78 ALR2d 1238.

Status of one employed by landlord to perform work on premises who enters or remains without consent or against protest of tenant, 10 ALR 715.

Effect of noninhabitability of leased dwelling or apartment, 13 ALR 818; 29 ALR 52; 34 ALR 711.

Rights and remedies of tenant upon landlord's breach of covenant to repair, 28 ALR 1448; 28 ALR2d 446.

Necessity of notice to landlord as condition of asserting breach of express covenant to repair, 28 ALR 1525.

Measure of damages for breach of landlord's covenant to heat, or furnish hot water for, premises leased for business or manufacturing purposes, 28 ALR 1550.

Transfer or devolution of reversion as carrying lessee's covenants to repair, or to yield up in repair, 34 ALR 782.

Liability of landlord for personal injuries due to defective halls, stairways, and the like, for use of different tenants, 39 ALR 294; 58 ALR 1411; 75 ALR 154; 97 ALR 220.

Extent of lessee's obligation under express covenant as to repairs, 45 ALR 12; 20 ALR 782.

Landlord's responsibility to third persons for conditions created during tenancy as affected by renewal of the lease, or a new lease subject to the original lease, 49 ALR 1418.

Liability of landlord for injury to person or property of tenant or his privies, from

defects in heating or lighting plant or plumbing, 52 ALR 864.

Conclusiveness of appraisal of buildings or other improvements under provision of lease for compensation to tenant on termination of lease, 53 ALR 697.

Rights and remedies of parties where landlord fails to exercise option to renew lease at end of term or pay lessee for improvements, 63 ALR 1158.

Breach of covenant to furnish heat for building or room other than dwelling or apartment as an eviction, 69 ALR 1093.

Constructive notice by record of true title or interest as affecting right to compensation for improvements, 82 ALR 921.

Equitable lien on real property in favor of one who makes advances or expenditures to improve the same, 89 ALR 1455.

Rights as between surviving spouse and holder of leasehold interest under a lease from deceased spouse in respect of improvements made pursuant to provisions of lease, 92 ALR 1382.

Common-law duty of landlord as regards installation and maintenance of fire equipment, 122 ALR 167.

Lessor as subject to income tax in respect of improvements or additions by lessee, 138 ALR 238.

Validity, construction, and application of statute or ordinance which precludes recovery of rent in case of occupancy of building which does not conform to building and health regulations, or where certificate of conformity has not been issued, 144 ALR 259.

Landlord's liability for injury to person or damage to property as affected by his making of repairs in absence of obligation to do so, 150 ALR 1373.

Covenant respecting condition of premises as requiring indemnity for amount paid or liability incurred on account of injury to third person or his property, 157 ALR 623.

Lease of premises as affecting owner's liability for injury arising out of condition in highway connected with use of property, 160 ALR 825.

Breach of lessor's agreement to repair as ground of liability for personal injury to tenant or one in privity with latter, 163 ALR 300; 78 ALR2d 1238.

Statute requiring property to be kept in good repair as affecting landlord's liability for personal injury to tenant or his privies, 17 ALR2d 704.

Extent of lessee's obligation under express covenant as to repairs, 20 ALR2d 1331.

Tenant's right to lien, in absence of agreement therefor, for improvements made on leased premises, 25 ALR2d 885.

Landlord's liability for injury to tenant's person or property caused by water overflowing from defective appliances in other premises of landlord, 26 ALR2d 1044.

Liability of landlord to tenant or member of tenant's family, for injury by animal or insect, 67 ALR2d 1005.

Clause of lease providing for payment of taxes by lessor as applicable to increase in real estate taxes occasioned by lessee's improvements, 68 ALR2d 1289.

Landlord's liability for personal injury or death of tenant or his privies from heating system or equipment, 86 ALR2d 791.

Landlord's liability for personal injury or death of tenant or privies from electrical system or equipment, 86 ALR2d 838.

Improvements and betterments insurance, 97 ALR2d 1243.

Effect, on nonsigner, of provision of lease exempting landlord from liability on account of condition of property, 12 ALR3d 958.

Premises liability: proceeding in the dark as contributory negligence, 22 ALR3d 286.

Who, as between landlord and tenant, must make, or bear expense of, alterations, improvements, or repairs ordered by public authorities, 22 ALR3d 521.

Landlord's liability for damage to tenant's property caused by water, 35 ALR3d 143.

Modern status of the rule absolving a possessor of land of liability to those coming thereon for harm caused by dangerous physical conditions in which the injured party knew and realized the risk, 35 ALR3d 230.

Modern status of rules as to existence of implied warranty of habitability or fitness for use of leased premises, 40 ALR3d 646.

Landlord's failure to repair as aggravated negligence or similar fault, 40 ALR3d 795.

Tenant's right, where landlord fails to make repairs, to have them made and set off cost against rent, 40 ALR3d 1369.

Liability of owner or operator of park for mobile homes or trailers for injuries caused by appliances or other instruments on premises, 41 ALR3d 324.

Landlord's liability for injury or death due to defects in areas of building (other than stairways) used in common by tenants, 65 ALR3d 14.

Liability of landlord for personal injury or death due to inadequacy or lack of lighting on portion of premises used in common by tenants, 66 ALR3d 202.

Landlord's liability for personal injury or death due to defects in appliances supplied for use of different tenants, 66 ALR3d 374.

Landlord's liability for injury or death due to defects in outside walks, drives, or grounds used in common by tenants, 68 ALR3d 382.

Landlord's liability to tenant's child for personal injuries resulting from defects in premises, as affected by tenant's negligence with respect to supervision of child, 82 ALR3d 1079.

Failure of landlord to make, or permit tenant to make, repairs or alterations required by public authority as constructive eviction, 86 ALR3d 352.

Liability for injuries in connection with ice or snow on nonresidential premises, 95 ALR3d 15.

Landlord and tenant: violation of statute or ordinance requiring landlord to furnish specified facilities or services as ground of liability for injury resulting from tenant's attempt to deal with deficiency, 63 ALR4th 883.

Landlord's liability to third party for repairs authorized by tenant, 46 ALR5th 1.

Comparative negligence, contributory negligence and assumption of risk in action against owner of store, office, or similar place of business by invitee falling on tracked-in water or snow, 83 ALR5th 589.

44-7-14. Tort liability of landlord.

Having fully parted with possession and the right of possession, the landlord is not responsible to third persons for damages resulting from the negligence or illegal use of the premises by the tenant; provided, however, the landlord is responsible for damages arising from defective construction or for damages arising from the failure to keep the premises in repair. (Civil Code 1895, § 3118; Civil Code 1910, § 3694; Code 1933, § 61-112; Ga. L. 1982, p. 3, § 44.)

History of Code section. — This Code section is derived from the decisions in J.B. White & Co. v. Montgomery, 58 Ga. 204 (1877), and Freidenburg & Co. v. Jones, 63 Ga. 612 (1879).

Cross references. — Liability of owners and occupiers of land, § 51-3-1 et seq.

Law reviews. — For article surveying torts law, see 34 Mercer L. Rev. 271 (1982). For survey article on tort law for the period from June 1, 2002 to May 31, 2003, see 55 Mercer L. Rev. 425 (2003).

For note advocating reasonable man standard for tort liability of landlord, see 23 Emory L.J. 1051 (1974).

For comment on Martin v. Medlin, 81 Ga. App. 602, 59 S.E.2d 519 (1950), see 13 Ga. B.J. 240 (1950).

JUDICIAL DECISIONS

Analysis

General Consideration
Duties of Landlord
1. In General
2. Knowledge or Notice
3. Inspection
4. Miscellaneous Consideration
Rights and Duties of Tenant

General Consideration

Origin of section. — Under this statute, which is a mere codification of the principles laid down in J.B. White & Co. v. Montgomery, 58 Ga. 204 (1877), and Freidenburg & Co. v. Jones, 63 Ga. 612 (1879), a landlord is responsible to third persons both for damage arising from defective construction and for damage arising from failure to keep the premises in repair. As to positive misfeasance in construction, landlord is subject to the same rule which is announced in Mayor of Brunswick v. Braxton, 70 Ga. 193 (1833). Monahan v. National Realty Co., 4 Ga. App. 680, 62 S.E. 127 (1908) (see O.C.G.A. § 44-7-14).

Public policy. — General Assembly has consistently expressed the public policy of this state as one in favor of imposing upon the landlord liability for damages to others from defective construction and failure to keep one's premises in repair. The expressed public policy in favor of landlord liability is matched by an equally strong and important public policy in favor of preventing unsafe residential housing. Thompson v. Crownover, 259 Ga. 126, 381 S.E.2d 283 (1989).

O.C.G.A. § 44-7-14 provided remedy to member of military and spouse, who lived in military base housing, and recovery was not barred under the ''activity incident to service'' doctrine. Elliott ex rel. Elliott v. United States, 877 F. Supp. 1569 (M.D. Ga. 1992), aff'd, 13 F.3d 1555 (11th Cir. 1995).

Construction of section. — Properly construed, this statute does not make a landlord responsible as an insurer, but liable only in the event the landlord fails to comply with the landlord's statutory duty of keeping the premises in repair. Birdsey v. Greene, 176 Ga. 688, 168 S.E. 564 (1933) (see O.C.G.A. § 44-7-14).

O.C.G.A. § 44-7-14 makes it clear that a landlord who relinquishes possession of the premises cannot be liable to third parties for damages arising from the negligence of the tenant. Colquitt v. Rowland, 265 Ga. 905, 463 S.E.2d 491 (1995); Johnson v. Loy, 231 Ga. App. 431, 499 S.E.2d 140 (1998).

Landlord not insurer of tenant's safety. — Even though the landlord is under a duty to keep the premises in repair pursuant to O.C.G.A. §§ 44-7-13 and 44-7-14, the landlord is not an insurer of the tenant's safety. Ethridge v. Davis, 243 Ga. App. 11, 530 S.E.2d 477 (2000).

Purpose of section. — Statute was designed simply to embody a rule of law which was well settled and well understood at the time of the law's codification, and not to enlarge the duty devolving upon landlords with respect to the making of repairs nor to impose upon the landlord a harsher rule of responsibility than that to which the landlord were already subject. Ocean S.S. Co. v. Hamilton, 112 Ga. 901, 38 S.E. 204 (1901); Birdsey v. Greene, 176 Ga. 688, 168 S.E. 564 (1933); Howell Gas of Athens, Inc. v. Coile, 112 Ga. App. 732, 146 S.E.2d 145 (1965) (see O.C.G.A. § 44-7-14).

Modification of common law. — Statute changed the rule which had been applied under the common law for under the common law the burden of repairing was upon the tenant. Roach v. LeGree, 18 Ga. App. 250, 89 S.E. 167 (1916); Wallace v. Adams, 47 Ga. App. 144, 169 S.E. 852 (1933) (see O.C.G.A. § 44-7-14).

Relationship of landlord and tenant required. — When a party enters upon land under a contract of purchase, prior to the consummation of the sales transaction, a landlord and tenant relationship does not come into existence, and, absent this relationship, the provisions of this statute concerning the liability of a landlord to third persons cannot apply. MacKenna v. Jordan, 123 Ga. App. 801, 182 S.E.2d 550 (1971) (see O.C.G.A. § 44-7-14).

Liability of out-of-possession owner limited. — When a plaintiff, injured when the plaintiff fell from an amusement ride, has presented no evidence to contradict a defendant's showing that it was out of possession of the amusement park, the defendant's tort liability is limited by O.C.G.A. § 44-7-14, which states that a landlord is not liable for the negligence of a tenant toward third persons; as the alleged negligence in this action was the tenant's, the landlord's motion for summary judgment would be granted. Fraley ex rel. Fraley v. Lake Winnepesaukah, Inc., 631 F. Supp. 160 (N.D. Ga. 1986).

After a minor child was bitten by another tenant's dog, an action by the mother of the child against the owner of the apartment complex and the apartment's leasing agent resulted in summary judgment against the

General Consideration (Cont'd)

mother, as the out-of-possession landlord's only liability to third persons was that of O.C.G.A. § 44-7-14, which was inapplicable; there was no showing that either the owner or agent had any type of knowledge of the dog's propensities or viciousness, and the agent was therefore not shown to be liable on any claim arising under O.C.G.A. § 51-3-1. Griffiths v. Rowe Props., 271 Ga. App. 344, 609 S.E.2d 690 (2005).

Suitability for intended use. — There is in this state, as at common law (the statute not having changed this rule), no implied covenant that the premises are suitable for the purpose for which they are leased, or for the particular use for which they are intended by the tenant; the only modification of this rule in Georgia is as to the duty of the landlord to "keep the premises in repair." Childers v. Speer, 63 Ga. App. 848, 12 S.E.2d 439 (1940).

Implied covenant of suitability for the intended use has crept into the law only to the extent that this statute places upon such landlord a duty to keep the premises in repair, which must necessarily imply that state of repair which is reasonably necessary to make the premises fit for the use intended by the lessee and known to the lessor. Point Apts., Inc. v. Bryant, 99 Ga. App. 110, 107 S.E.2d 684 (1959) (see O.C.G.A. § 44-7-14).

From former Code 1933, §§ 61-111 and 61-112 (see O.C.G.A. §§ 47-7-13 and 47-7-14) has been derived the principle that suitability for the use "intended by the lessee and known to the lessor" was assured. Thus, a jury question existed as to the suitability of a lock to prevent burglaries. Warner v. Arnold, 133 Ga. App. 174, 210 S.E.2d 350 (1974).

Persons present by invitation of tenant. — Tenant's family, tenant's guests, servants, employees, or others present by the tenant's express or implied invitation, stand in his shoes and are controlled by the rules governing the right to recover for injuries arising from a landlord's failure to keep the premises in repair. Archer v. Blalock, 97 Ga. 719, 25 S.E. 391 (1896); Williams v. Mayes, 46 Ga. App. 142, 166 S.E. 876 (1932); Wallace v. Adams, 47 Ga. App. 144, 169 S.E. 852 (1933); Chamberlain v. Nash, 54 Ga. App. 508, 188 S.E. 276 (1936); Dobbs v. Noble, 55 Ga. App. 201, 189 S.E. 694 (1937); Rogers v. Columbus Bank & Trust Co., 111 Ga. App. 792, 143 S.E.2d 438 (1965); Yates v. Crumbley, 116 Ga. App. 366, 157 S.E.2d 295 (1967); Black v. New Holland Baptist Church, 122 Ga. App. 606, 178 S.E.2d 571 (1970).

Actions by invitees. — While actions by invitees of tenants against landlords for failure to repair premises are based on this statute, the rationale of the basis for the actions is the same as if the duty had been a general common-law duty. University Apts., Inc. v. Uhler, 84 Ga. App. 720, 67 S.E.2d 201 (1951) (see O.C.G.A. § 44-7-14).

Liability for nuisance. — If the nuisance existed upon the premises when the lease was made, the landlord is liable, but if the tenant continues the nuisance after the tenant obtains exclusive possession and control, the tenant alone is liable for the nuisance's continuance. Robertson v. Liggett Drug Co., 81 Ga. App. 850, 60 S.E.2d 268 (1950); Howell Gas of Athens, Inc. v. Coile, 112 Ga. App. 732, 146 S.E.2d 145 (1965).

Contractual stipulations. — When lessees accepted the premises in the condition in which the premises were at the time of the lease, as suitable for the purpose intended, and further relieved the landlord of any obligation to repair except after written notice, these provisions in the contract constituted a "stipulation to the contrary" relieving the lessor of any duty to repair the premises except after notice to the lessor by the tenants. Point Apts., Inc. v. Bryant, 99 Ga. App. 110, 107 S.E.2d 684 (1959).

Owner of property not used as a "dwelling place" can contract to avoid the duties to repair and improve the property. Groutas v. McCoy, 219 Ga. App. 252, 464 S.E.2d 657 (1995).

Proximate cause of injury. — In order to recover, a tenant is required to show not only that the landlord breached the landlord's statutory duty to keep the premises in repair, but that such breach was the proximate cause of the tenant's injury. Brown v. RFC Mgt., Inc., 189 Ga. App. 603, 376 S.E.2d 691 (1988); Jones v. Campbell, 198 Ga. App. 83, 400 S.E.2d 364 (1990).

Defective construction defined. — Construction which is not strong enough to stand the strain of ordinary use is defective construction. Monahan v. National Realty Co., 4 Ga. App. 680, 62 S.E. 127 (1908).

Neither the mere juxtaposition of a toilet and elevator nor the absence of lights in the passageway to the toilet at night constitutes defective construction. Smith v. Inman, 32 Ga. App. 24, 122 S.E. 632 (1924).

Repair defined. — Word repair contemplates an existing structure or thing which has become imperfect, and means to supply in the original existing structure that which is lost or destroyed, and thereby restore it to the condition in which it originally existed. Childers v. Speer, 63 Ga. App. 848, 12 S.E.2d 439 (1940).

Responsibility not waived. — As between landlord and tenant, responsibility for damages may be waived, but no such waiver results from a provision which merely refers to a defective condition amounting to an affirmative act of the landlord committed during the term of the tenancy and resulting in the creation of a defect which would not otherwise have existed. Kulman v. Sulcer, 99 Ga. App. 28, 107 S.E.2d 674 (1959).

Pleading. — Allegation that the defendant knew or ought to have known of the defective condition of the premises is an allegation, when construed most strongly against the pleader, that the defendant had no knowledge and was negligent in failing to know or discover the alleged defective condition. Echols v. Patterson, 60 Ga. App. 372, 4 S.E.2d 81 (1939).

Failure to state cause of action. — Petition alleging that the owner had fully parted with possession and the right of possession but failing to allege that the damages were from injuries due to defective construction or to a failure to keep the premises in repair did not state a case against the owner. Reddien v. C.M.S. Realty Co., 75 Ga. App. 848, 44 S.E.2d 825 (1947).

Tenant's knowledge of condition requiring dismissal of petition. — When it appears from the allegations of a petition, brought by a tenant against a landlord for personal injuries alleged to have been caused by the landlord's failure to repair, that the tenant had knowledge of the defective and unsafe condition of the premises, having discussed the unsafe and defective condition thereof with a carpenter sent by the landlord to repair other portions of the rented premises, a motion to dismiss the petition was properly sustained although the petition contained allegations that the tenant was without fault, in that the tenant did not know of the defective and unsafe condition of the steps, and in the exercise of ordinary care could not have discovered the unsafe condition of the steps. Upchurch v. Coggins, 70 Ga. App. 205, 27 S.E.2d 869 (1943).

Question for trier of fact as to what are common areas. — Question of whether a particular area of an apartment building—i.e., a patio deck behind an apartment, from which a tenant fell after the railing gave way—was a common area over which the landlord retained a qualified right of possession, rendering the landlord liable for failure to exercise ordinary care in keeping the premises safe, or was an area which was in the exclusive possession of the tenant, rendering the landlord liable for failure to repair in the face of a notice of defect, was a matter for determination by the trier of fact, thus the court properly instructed the jury as to both legal theories. Andres v. Roswell-Windsor Village Apts., 777 F.2d 670 (11th Cir. 1985).

Setting aside verdict. — In an action for damages for injuries to a tenant alleged to have been caused by defective premises, a verdict for the plaintiff will not be set aside on the ground that the landlord could not have discovered the defect allegedly causing the injury in the repairing of another defect of which notice was given to the landlord, when the evidence is sufficient to authorize the finding that the defect allegedly causing the injury was in existence at the time the premises were leased to the tenant, and that the landlord could have discovered the defect by the exercise of ordinary care, as in such a case the landlord's duty to discover the defect arose from the landlord's duty under the law not to lease premises having a latent defect discoverable by the exercise of ordinary care, and the landlord was thus charged regardless of notice. Dodge v. Huggins, 62 Ga. App. 724, 9 S.E.2d 844 (1940).

Owner had relinquished control. — Trial court properly granted summary judgment to warehouse owner who leased premises to tenant who installed skateboard ramp from which invitee fell and was injured as the record was devoid of evidence that the warehouse owner had not fully relinquished possession of the premises to the tenant; thus, the invitee could not show that the ware-

General Consideration (Cont'd)

house owner had a duty it owed to the invitee. Ray v. Smith, 259 Ga. App. 749, 577 S.E.2d 807 (2003).

Cited in Augusta-Aiken Ry. & Elec. Corp. v. Hafer, 21 Ga. App. 246, 94 S.E. 252 (1917); Gledhill v. Harvey, 55 Ga. App. 322, 190 S.E. 61 (1937); McCrory Stores Corp. v. Ahern, 65 Ga. App. 334, 15 S.E.2d 797 (1941); Townsend & Ghegan Enters. v. W.R. Bean & Son, 117 Ga. App. 109, 159 S.E.2d 776 (1968); Scarboro Enters., Inc. v. Hirsh, 119 Ga. App. 866, 169 S.E.2d 182 (1969); Ragland v. Rooker, 124 Ga. App. 361, 183 S.E.2d 579 (1971); Espy v. Miller Bros. Co., 126 Ga. App. 98, 189 S.E.2d 911 (1972); Moody v. Southland Inv. Corp., 126 Ga. App. 225, 190 S.E.2d 578 (1972); Kaplan v. Sanders, 136 Ga. App. 902, 222 S.E.2d 630 (1975); Thompson-Weinman & Co. v. Brock, 144 Ga. App. 346, 241 S.E.2d 279 (1977); Daniel v. Georgia Power Co., 146 Ga. App. 596, 247 S.E.2d 139 (1978); Porter v. Moschella, 152 Ga. App. 678, 263 S.E.2d 538 (1979); Bradley v. Godwin, 152 Ga. App. 782, 264 S.E.2d 262 (1979); Wilner's, Inc. v. Fine, 153 Ga. App. 591, 266 S.E.2d 278 (1980); Mills v. Bonanza Int'l Corp., 160 Ga. App. 104, 286 S.E.2d 337 (1981); Vizzini v. Blonder, 165 Ga. App. 840, 303 S.E.2d 38 (1983); Atkins v. Tri-Cities Steel, Inc., 166 Ga. App. 349, 304 S.E.2d 409 (1983); Davis v. Smith, 169 Ga. App. 635, 314 S.E.2d 471 (1984); Schuster v. Plaza Pac. Equities, Inc., 588 F. Supp. 61 (N.D. Ga. 1984); Bettis v. Ryle, 176 Ga. App. 88, 335 S.E.2d 399 (1985); Shepherd v. Holmes, 184 Ga. App. 648, 362 S.E.2d 396 (1987); Whipper v. McLendon Movers, Inc., 188 Ga. App. 249, 372 S.E.2d 820 (1988); Barlow v. Brant, 206 Ga. App. 313, 425 S.E.2d 309 (1992); Stephens v. Ernie's Steakhouse of Stone Mt., Inc., 215 Ga. App. 166, 450 S.E.2d 275 (1994); Culberson v. Lanier, 216 Ga. App. 686, 455 S.E.2d 385 (1995); Walker v. Sturbridge Partners, Ltd., 221 Ga. App. 36, 470 S.E.2d 738 (1996); Doe v. Prudential-Bache/A.G. Spanos Realty Partners, 222 Ga. App. 169, 474 S.E.2d 31 (1996); Doe v. Briargate Apts., Inc., 227 Ga. App. 408, 489 S.E.2d 170 (1997); Standard Mgt. Co. v. Scott, 229 Ga. App. 36, 493 S.E.2d 216 (1997); Asbell v. BP Exploration & Oil, Inc., 230 Ga. App. 700, 497 S.E.2d 260 (1998); Myers v. Harris, 257 Ga. App. 286, 570 S.E.2d 600 (2002); Norman v. Jones Lang LaSalle Ams., Inc., 277 Ga. App. 621, 627 S.E.2d 382 (2006).

Duties of Landlord

1. In General

Construed with § 51-3-1. — Word ''owner,'' as used in former Civil Code 1910, § 4420 (see O.C.G.A. § 51-3-1), was not synonymous with ''landlord,'' as the latter word was used in former Civil Code 1910, § 3694 (see O.C.G.A. § 44-7-14), and since the owner of land has fully parted with both possession and right of possession by any lawful contract of rental, the landlord's liabilities are those prescribed by former Civil Code 1910, § 3694. Augusta-Aiken Ry. & Elec. Corp. v. Hafer, 21 Ga. App. 246, 94 S.E. 252 (1917); Dobbs v. Noble, 55 Ga. App. 201, 189 S.E. 694 (1937); Edwards v. Lassiter, 67 Ga. App. 368, 20 S.E.2d 451 (1942); Goettee v. Carlyle, 68 Ga. App. 288, 22 S.E.2d 854 (1942); Rothberg v. Bradley, 85 Ga. App. 477, 69 S.E.2d 293 (1952); Maloof v. Blackmon, 105 Ga. App. 207, 124 S.E.2d 441 (1962); Howell Gas of Athens, Inc. v. Coile, 112 Ga. App. 732, 146 S.E.2d 145 (1965); Powell v. United Oil Corp., 160 Ga. App. 810, 287 S.E.2d 667 (1982); Cooperwood v. Auld, 175 Ga. App. 694, 334 S.E.2d 22 (1985).

Retention of the right to enter the leased premises in emergencies and during business hours for landlord related purposes did not evidence such dominion and control of the premises so as to vitiate appellee's limited liability under O.C.G.A. § 44-7-14 and replace it with liability imposed by O.C.G.A. § 51-3-1. Godwin v. Olshan, 161 Ga. App. 35, 288 S.E.2d 850 (1982).

Landlord was not liable for injuries to a tenant suffered as the result of the independent criminal conduct of a third party which occurred within the premises over which the tenant had complete control; the owner's duty to the tenant was limited to that imposed under O.C.G.A. § 44-7-14, i.e., a duty to ensure that the leased premises were properly constructed and maintained, and it was not the duty owed under O.C.G.A. § 51-3-1, pertaining to the landlord's duty to exercise ordinary care in keeping common areas safe. Plott v. Cloer, 219 Ga. App. 130, 464 S.E.2d 39 (1995).

Retention of right to approve tenant insurance policies did not evidence such dominion and control of the premises so as to vitiate appellee's limited liability under O.C.G.A. § 44-7-14 and replace it with the liability imposed by O.C.G.A. § 51-3-1, which pertains to the duty of an owner or occupier of land to invitees. Godwin v. Olshan, 161 Ga. App. 35, 288 S.E.2d 850 (1982).

Liability generally. — If, after notice of the defective condition of the premises and after the lapse of a reasonable time in which to make the needed repairs, the repairs are not made, the landlord will be liable to the tenant or a member of the tenant's family for damages occasioned by the disrepair of the premises, if the injured party's own negligence did not bring about the injury. Veal v. Hanlon, 123 Ga. 642, 51 S.E. 579 (1905).

O.C.G.A. § 44-7-14 imposes liability upon a landlord for damages that arise from defective construction or the landlord's failure to keep the premises in repair. Flores v. Strickland, 259 Ga. App. 335, 577 S.E.2d 41 (2003).

Duty and liability for repair. — Landlord is not an insurer, but the landlord is under a legal duty to keep the rented premises in repair, and is liable in damages to a person who receives injury while lawfully upon the premises and who is in the exercise of due care, if the injury arises because of the defective construction of a building erected on the premises by the landlord, or because of the landlord's failure to repair defects of which the landlord knows or in the exercise of reasonable diligence ought to know. Stack v. Harris, 111 Ga. 149, 36 S.E. 615 (1900); Ocean S.S. Co. v. Hamilton, 112 Ga. 901, 38 S.E. 204 (1901); Monahan v. National Realty Co., 4 Ga. App. 680, 62 S.E. 127 (1908); Crook v. Foster, 142 Ga. 715, 83 S.E. 670 (1914); Marr v. Dieter, 27 Ga. App. 711, 109 S.E. 532 (1921); Birdsey v. Greene, 176 Ga. 688, 168 S.E. 564 (1933); Oglesby v. Rutledge, 67 Ga. App. 656, 21 S.E.2d 497 (1942).

Trial court erred in granting an apartment owner and a manager summary judgment in a tenant's action to recover damages for the personal injuries the tenant sustained from carbon-monoxide poisoning because the owner and manager could be liable for the actions of a construction company's workers even if the company, which was orally hired to assist in the clean up of the owner's apartments, was an independent contractor; the evidence showed that a temporary tarp repair the workers performed was completed so negligently that a defect in the premises was created, and some evidence showed that the company and its workers were not independent contractors. In placing a temporary tarp on the roof of the tenant's apartment, the company was performing the duty of the owner and manager to repair the premises by stopping a leak until a more permanent repair could be effected. Atkins v. MRP Park Lake, L. P., 301 Ga. App. 275, 687 S.E.2d 215 (2009).

Trial court erred in granting an apartment owner and a manager summary judgment in a tenant's action to recover damages for the personal injuries the tenant sustained from carbon-monoxide poisoning on the ground that the tenant had equal knowledge with the owner and manager that the vents of the apartment were covered because some evidence showed that other agents of the owner and manager had superior knowledge of the defect, and the evidence was disputed as to whether the tenant had equal knowledge; an employee of the owner and manager supervised the emergency repairs of the apartment and was constantly walking the property to check on those repairs, and should have seen the vent pipe problem. Atkins v. MRP Park Lake, L. P., 301 Ga. App. 275, 687 S.E.2d 215 (2009).

Degree of diligence required in keeping the premises safe does not consist in either slight diligence or of extraordinary diligence, but rather consists of ordinary care, such as a prudent householder might reasonably be expected to exercise. Cuthbert v. Schofield, 35 Ga. App. 443, 133 S.E. 303 (1926); Black v. New Holland Baptist Church, 122 Ga. App. 606, 178 S.E.2d 571 (1970).

Due care required in making repairs. — Landlord making repairs on the rented premises, either voluntarily or in compliance with the landlord's statutory obligation, is required to use due care to leave the repaired portion free from defects. McGee v. Hardacre, 27 Ga. App. 106, 107 S.E. 563 (1921); later appeal, 33 Ga. App. 43, 125 S.E. 383 (1924); Marr v. Dieter, 27 Ga. App. 711, 109 S.E. 532 (1921); Hill v. Liebman, Inc., 53

Duties of Landlord (Cont'd)
1. In General (Cont'd)

Ga. App. 462, 186 S.E. 431 (1936); Oglesby v. Rutledge, 67 Ga. App. 656, 21 S.E.2d 497 (1942).

Liability for latent defects. — Landlord is liable for injuries to the tenant arising from latent defects unknown to the tenant, existing at the time of the lease, provided the landlord actually knew, or in the exercise of ordinary care on the landlord's part might have known, of their existence. Oglesby v. Rutledge, 67 Ga. App. 656, 21 S.E.2d 497 (1942).

When rented premises become out of repair, it is the duty of the landlord to repair the same on notice by the tenant, and where, after such notice and before repairs are made, a tenant is injured by some latent defect which the repairs might have disclosed, but which in the exercise of ordinary care the tenant is not put on notice of, and which is in apparently sound condition, the plaintiff is not thereby precluded from recovery. Harris v. Edge, 92 Ga. App. 827, 90 S.E.2d 47 (1955).

Landlord was not liable for any faulty construction of a premises since an alleged defect, the uneven steps and small landing, was simply a latent defect in existence at the time the landlord purchased the property which the landlord did not build. Rainey v. 1600 Peachtree L.L.C., 255 Ga. App. 299, 565 S.E.2d 517 (2002).

Liability for patent defects. — In the absence of an express contract to do so, a landlord is under no duty to repair a patent defect in the rented premises since the defect's existence was known to the tenant at the time the rent contract was entered into; and subsequent notice by a tenant of the existence of such a defect would not place upon the landlord any duty of inspection or repair. Chamberlain v. Nash, 54 Ga. App. 508, 188 S.E. 276 (1936); Barnes v. Thomas, 72 Ga. App. 827, 35 S.E.2d 364 (1945).

Landlord is liable for damages when the repairs the landlord has a duty to make are completed negligently so that a defect in the premises remains despite the attempted repair. However, when the worker hired is an independent contractor, the landlord is not liable for the negligent acts of the worker during the course of the repairs. Mason v. Gracey, 189 Ga. App. 150, 375 S.E.2d 283 (1988).

Landlord has a duty to keep premises in repair, and if defects render premises unsafe or uninhabitable, a landlord may not avoid duties created by statutes or by housing codes even though the defect is patent. Roth v. Wu, 199 Ga. App. 665, 405 S.E.2d 741 (1991).

Common area defect. — When the allegedly defective condition on an owner's property involved the common area of a parking lot and not the residential living area over which tenant had dominion, and there was no assertion that the landowner violated any applicable statute or housing code, liability was properly predicated upon O.C.G.A. § 51-3-1 and not O.C.G.A. § 44-7-14. Commerce Properties, Inc. v. Linthicum, 209 Ga. App. 853, 434 S.E.2d 769 (1993).

Liability for dangerous condition. — When a portion of leased premises is dangerously out of repair and such condition is known to a tenant who continues to use that area, a tenant cannot recover from the landlord for damages resulting from the condition; but the severity of the doctrine of assumption of risk has been ameliorated in cases when the doctrine's application would make the tenant ''a captive'' in the tenant's own home. Carey v. Bradford, 218 Ga. App. 325, 461 S.E.2d 290 (1995).

When a dangerous area is tenant's only access or only safe or reasonable access to the home, tenant's equal knowledge of the danger does not excuse the landlord of damages caused by a failure to keep the premises in repair. Carey v. Bradford, 218 Ga. App. 325, 461 S.E.2d 290 (1995).

Questions for jury. — Whether landlord who was aware of a defective gas heater failed to exercise reasonable care to repair the heater, and whether the condition of the heater constituted a violation of the housing code, were questions for the jury. Thompson v. Crownover, 259 Ga. 126, 381 S.E.2d 283 (1989).

After learning that its back-up generator was irreparable, determining whether the landlord acted negligently, breached the statutory duties as landlord, or violated local ordinances or housing codes were questions for the jury. McCullough v. Briarcliff Summit, 237 Ga. App. 630, 516 S.E.2d 353 (1999).

Landlord is not an insurer of the tenant's safety. Black v. New Holland Baptist Church, 122 Ga. App. 606, 178 S.E.2d 571 (1970); Warner v. Arnold, 133 Ga. App. 174, 210 S.E.2d 350 (1974).

Liability to invitee of tenant. — Landlord is liable to one lawfully present on the rented premises, by invitation of the tenant, for injuries arising from defective construction, or from failure to keep the premises in repair, since the defect is known to the landlord or in the exercise of reasonable diligence could have been known, and the injured person was personally in the exercise of due care. Ross v. Jackson, 123 Ga. 657, 51 S.E. 578 (1905); Crossgrove v. Atlantic Coast Line R.R., 30 Ga. App. 462, 118 S.E. 694 (1923); See § 4420. Mattox v. Lambright, 31 Ga. App. 441, 120 S.E. 685 (1923); Ramey v. Pritchett, 90 Ga. App. 745, 84 S.E.2d 305 (1954); Spence v. Citizens & S. Nat'l Bank, 195 Ga. App. 294, 393 S.E.2d 1 (1990).

An out-of-possession landlord's tort liability to third persons is determined under the bases set forth in O.C.G.A. § 44-7-14 and it was error to assess liability based upon principles of common law negligence. Martin v. Johnson-Lemon, 271 Ga. 120, 516 S.E.2d 66 (1999), reversing Lemon v. Martin, 232 Ga. App. 579, 502 S.E.2d 273 (1998).

In a personal injury action arising from a fall suffered by a lessee's visitor from a pull-down staircase, because no questions of fact remained as to an out-of-possession landlord's liability for failure to repair, defective construction, or failure to warn, the landlord was properly granted summary judgment as to those issues. Gainey v. Smacky's Invs., Inc., 287 Ga. App. 529, 652 S.E.2d 167 (2007).

Liability for unforeseen and extraordinary causes. — Landlord is not liable to the tenant for damages to the tenant's goods resulting from unforeseen and extraordinary causes unless so stipulated in the contract at the time of renting. Guthman v. Castleberry, 49 Ga. 272 (1873); Lumpkin v. Provident Loan Soc'y, Inc., 15 Ga. App. 816, 84 S.E. 216 (1915).

Contractual modification of landlord's liability. — Liability of a landlord arising from failure to keep the premises in repair may be limited as between the parties by a lease containing contrary stipulations. Tribble v. Somers, 115 Ga. App. 847, 156 S.E.2d 130 (1967).

No exemption from responsibility. — Knowledge required for liability may be constructive as well as actual for a landlord or the landlord's agent charged with the duty to repair cannot exempt oneself from responsibility merely by remaining ignorant of the facts out of which one's duty arises. Bazemore v. Burnet, 117 Ga. App. 849, 161 S.E.2d 924 (1968).

Suspension of liability until tenant gives notice. — When a tenant has exclusive possession of the property and there is no covenant to repair or right of entry to inspect or repair, the law suspends the liability of the lessor as to injuries from defects existing at the time of the lease which the lessor could not have discovered by the exercise of ordinary care, those known to the tenant at the time, or patent and discoverable by the exercise of ordinary care, and those arising after the tenancy began until notice by the tenant. City of Dalton v. Anderson, 72 Ga. App. 109, 33 S.E.2d 115 (1945).

Landlord with qualified possession. — When the landlord retains qualified possession of the rented premises for the purpose of supervising the building, collecting the rents, and making repairs, the landlord is liable for an injury resulting from a defective condition of the building, if the landlord has actual notice of such defective condition, or if, in the exercise of ordinary and reasonable care and diligence, the landlord ought to have known of the defect. Monahan v. National Realty Co., 4 Ga. App. 680, 62 S.E. 127 (1908); Davis v. Hall, 21 Ga. App. 265, 94 S.E. 274 (1917); Marr v. Dieter, 27 Ga. App. 711, 109 S.E. 532 (1921); White v. Thacker, 89 Ga. App. 656, 80 S.E.2d 699 (1954).

Reservation of limited right to enter. — Mere presence of a lease clause reserving the right to enter for repairs and inspection cannot impose a general duty to exercise ordinary care in making reasonable inspections of those areas of the building over which the landlord retained neither a right to control nor the duty to repair. Ladson Invs. v. Bagent, 151 Ga. App. 24, 258 S.E.2d 718 (1979).

Person may be landlord without being owner. Hill v. Liebman, Inc., 53 Ga. App. 462, 186 S.E. 431 (1936).

Tenant must be free from negligence. — It is presumed that the premises leased are in a condition suitable for the purposes for

Duties of Landlord (Cont'd)
1. In General (Cont'd)

which they were rented, and if such is not the case, and damage results therefrom to the tenant, the landlord is liable, provided the landlord has had notice of the defective condition of the premises and has failed after a reasonable time to make the necessary repairs, and provided also that the tenant has not been guilty of such negligence as to bar a recovery of the tenant. Black v. New Holland Baptist Church, 122 Ga. App. 606, 178 S.E.2d 571 (1970).

Monitoring lessee's compliance with covenant to repair. — Fact that lessee was obligated under terms of lease to maintain premises in safe condition cannot be held to have placed any duty upon lessor to monitor lessee's compliance. Ragsdale v. Harris, 162 Ga. App. 888, 293 S.E.2d 475 (1982).

Lessor's liability when trademark signs displayed at gas stations. — Distinctive colors and trademark signs are displayed at gasoline stations by independent dealers of petroleum products suppliers, and represent no more than notice to the motorists that a given company's products are being marketed at the station, and do not render lessor company liable for lessee's failure to maintain premises in safe condition. Ragsdale v. Harris, 162 Ga. App. 888, 293 S.E.2d 475 (1982).

Illegal use of property by sign company unauthorized by landlord. — Under O.C.G.A. § 44-7-11, a tenant such as a sign company has no right beyond the use of the land actually conveyed or rented. Furthermore, under O.C.G.A. § 44-7-14, the landlord and neighbor of plaintiffs was not responsible for the tenant's, the sign company's, illegal use of the neighbor's property or airspace. Powell v. Norman Elec. Galaxy, Inc., 255 Ga. App. 407, 565 S.E.2d 591 (2002).

2. Knowledge or Notice

Liability predicated upon knowledge. — Landlord's liability is predicated upon actual or constructive knowledge of the defective condition. Stack v. Harris, 111 Ga. 149, 36 S.E. 615 (1900); Ocean S.S. Co. v. Hamilton, 112 Ga. 901, 38 S.E. 204 (1901); Monahan v. National Realty Co., 4 Ga. App. 680, 62 S.E. 127 (1908); Wall Realty Co. v. Leslie, 54 Ga. App. 560, 188 S.E. 600 (1936); Dobbs v. Noble, 55 Ga. App. 201, 189 S.E. 694 (1937); Echols v. Patterson, 60 Ga. App. 372, 4 S.E.2d 81 (1939); Turner v. Long, 61 Ga. App. 785, 7 S.E.2d 595 (1940); Home Owners Loan Corp. v. Brazzeal, 62 Ga. App. 683, 9 S.E.2d 773 (1940); Upchurch v. Coggins, 70 Ga. App. 205, 27 S.E.2d 869 (1943); Ball v. Murray, 91 Ga. App. 686, 86 S.E.2d 706 (1955); National Distrib. Co. v. Georgia Indus. Realty Co., 106 Ga. App. 475, 127 S.E.2d 303 (1962); Fincher v. Fox, 107 Ga. App. 695, 131 S.E.2d 651 (1963); Howell Gas of Athens, Inc. v. Coile, 122 Ga. App. 732, 146 S.E.2d 145 (1965); Tribble v. Somers, 115 Ga. App. 847, 156 S.E.2d 130 (1967); Bazemore v. Burnet, 117 Ga. App. 849, 161 S.E.2d 924 (1968).

In a personal injury action, because an injured party failed to show that the landlords could not have had constructive notice of the deteriorated condition of the steps upon which that party fell and was injured, the landlords were not liable for their failure to keep the premises in repair. Thus, the landlords were properly granted summary judgment as to the issue of liability for the party's injuries. Stelter v. Simpson, 288 Ga. App. 402, 655 S.E.2d 237 (2007).

Effect of notice. — Notice of a defect given by the tenant to the landlord charges the landlord with notice of such other defects as might reasonably be discovered upon an inspection to repair the defect of which notice was given. Cone v. Lawhon, 61 Ga. App. 797, 7 S.E.2d 597 (1940); Home Owners Loan Corp. v. Brazzeal, 62 Ga. App. 683, 9 S.E.2d 773 (1940); Dempsey v. Smith, 108 Ga. App. 88, 132 S.E.2d 233 (1963); Tribble v. Somers, 115 Ga. App. 847, 156 S.E.2d 130 (1967).

Duration of notice. — Notice may be actual or constructive but, if the latter, it must be shown to have existed for such a length of time, or under such circumstances, as to put the owner of the building on notice before the owner will be liable for resulting injuries. Fincher v. Fox, 107 Ga. App. 695, 131 S.E.2d 651 (1963).

Liability without actual notice. — Owner may be held liable for injuries arising from failure to maintain building in proper repair, even without actual notice of the defect if, in the exercise of ordinary care, the landlord should have known of the defect. Home

Owners Loan Corp. v. Brazzeal, 62 Ga. App. 683, 9 S.E.2d 773 (1940).

Defective construction by landlord. — If a defective structure is built by the landlord or under the landlord's direction, the landlord's knowledge of the defective condition will be conclusively presumed. Fuller v. Louis Steyerman & Sons, 46 Ga. App. 830, 169 S.E. 508 (1933); Dobbs v. Noble, 55 Ga. App. 201, 189 S.E. 694 (1937); Robertson v. Liggett Drug Co., 81 Ga. App. 850, 60 S.E.2d 268 (1950).

When the tenant erected a swimming pool after the landlord had relinquished possession and control over the property, the landlord was not liable for injuries sustained by a guest of the tenant even though the landlord was aware of the construction of the pool. Colquitt v. Rowland, 265 Ga. 905, 463 S.E.2d 491 (1995).

Defective construction by predecessor. — If a defective structure has been built by a predecessor in title of the landlord or some other person not acting under the landlord's supervision or direction, before the landlord can be held responsible, it must appear that the landlord actually knew or by the exercise of ordinary diligence could have and should have known of the improper construction before the tenancy was created. Ross v. Jackson, 123 Ga. 657, 51 S.E. 578 (1905); Dobbs v. Noble, 55 Ga. App. 201, 189 S.E. 694 (1937); Upchurch v. Coggins, 70 Ga. App. 205, 27 S.E.2d 869 (1943); Barnes v. Thomas, 72 Ga. App. 827, 35 S.E.2d 364 (1945); National Distrib. Co. v. Georgia Indus. Realty Co., 106 Ga. App. 475, 127 S.E.2d 303 (1962).

If a building was defectively constructed by a predecessor in title, and the landlord knew or by the exercise of reasonable diligence could have known of the building's improper construction before the tenancy was created, the landlord would be answerable to the tenant, or to any one lawfully on the premises by invitation of the tenant, for injuries sustained by reason of the landlord's failure to put the premises in a safe condition, if the person sustaining the injuries could not have avoided the injuries by the exercise of ordinary care. Savage v. Flagler Co., 258 Ga. 335, 368 S.E.2d 504 (1988).

Landlord's knowledge at time of leasing. — If it appears that the landlord had actual knowledge of a latent defect at the time of leasing, the duty to repair has already arisen. Howell Gas of Athens, Inc. v. Coile, 112 Ga. App. 732, 146 S.E.2d 145 (1965).

Landlords had no superior knowledge of gun in tenant's leased premises. — In a wrongful death suit, because the record was devoid of any evidence that the landlords knew that a tenant, a nephew, had left a gun accessible and loaded on the day a visiting youth was shot, or any other occasion, a trial court erred in denying summary judgment for the landlords; since the landlords knew or should have known that the nephew would have friends occasionally come to visit at the leased premises, the landlords, as possessors of the land, would have been subject to liability for the youth's fatal injury by the loaded shotgun if, but only if, the landlords knew or had reason to know of the hazard in the nephew's loft room and then failed to exercise reasonable care to make the condition safe or to warn visitors, which such superior knowledge of the hazard on the part of the landlords was not shown. McCullough v. Reyes, 287 Ga. App. 483, 651 S.E.2d 810 (2007), cert. denied, 2008 Ga. LEXIS 178 (Ga. 2008).

Knowledge of tenant irrelevant to liability to third persons. — As respects third persons lawfully upon the premises, the landlord is liable notwithstanding the tenant knew of the defective condition causing the injury. Greene v. Birdsey, 47 Ga. App. 424, 170 S.E. 681 (1933).

Equal means of knowledge of patent defect. — When a condition amounted to a patent defect, recovery would be precluded, since a landlord is not liable for injuries to a tenant resulting from a defect existing at the inception of the lease, if the tenant had means of knowledge equal to those of the landlord. Bazemore v. Burnet, 117 Ga. App. 849, 161 S.E.2d 924 (1968).

Notice to landlord's agent. — Notice of the defective condition of the property when given to the agent with whom the tenant dealt under the instructions of the landlord, and to whom the rents were paid, is notice to the landlord. Wall Realty Co. v. Leslie, 54 Ga. App. 560, 188 S.E. 600 (1936).

Jury question of city's possession of premises. — When a plaintiff slipped and fell on a recently waxed floor and was injured, and suit was brought against the city as landlord, the tenant, and the cleaning ser-

Duties of Landlord (Cont'd)
2. Knowledge or Notice (Cont'd)

vice that waxed the floor, the evidence presented to the trial court was sufficient to raise questions of fact requiring jury resolution as to whether the city had parted with possession of the premises and whether the city had any knowledge (actual or constructive) of the alleged defect. City of Swainsboro v. Riner, 195 Ga. App. 390, 393 S.E.2d 519 (1990).

Landlord not charged with notice of furnace hazard. — When the premises were destroyed by a fire originating from a furnace, the landlord, who had no actual knowledge of any furnace problem, could not be charged with notice that the removal of exterior asbestos shingles may have created a hazard with the furnace. Harris v. Sloan, 199 Ga. App. 340, 405 S.E.2d 68, cert. denied, 199 Ga. App. 906, 405 S.E.2d 68 (1991).

Property company without notice of alleged defect not liable. — Property company was not liable for negligence after an apartment fire because, even assuming that the alleged defect existed and caused the fire, the company lacked notice of the condition. There was no evidence that the stove lacked drip pans when the victim moved into the apartment and the company was never told of a problem with the stove. Haynes v. Kingstown Props., Inc., 260 Ga. App. 102, 578 S.E.2d 898 (2003).

Landlord had no actual or constructive knowledge of defect. — In a social guest's suit for personal injuries brought against the tenants of certain real property as well as the property owner and the owner's property management company, the trial court properly granted summary judgment to the property owner as there was no evidence that the property owner had actual or constructive knowledge of any problem with the condition of or construction of the deck that fell while the guest was standing upon the deck. Silman v. Assocs. Bellemeade, 294 Ga. App. 764, 669 S.E.2d 663 (2008), aff'd, 286 Ga. 27, 685 S.E.2d 277 (2009).

3. Inspection

No duty to inspect. — After tenant had moved into the house, landlord was under no duty to inspect the premises for the purpose of making repairs. Dobbs v. Noble, 55 Ga. App. 201, 189 S.E. 694 (1937); Cone v. Lawhon, 61 Ga. App. 797, 7 S.E.2d 597 (1940); City of Dalton v. Anderson, 72 Ga. App. 109, 33 S.E.2d 115 (1945); Davis v. City of Atlanta, 84 Ga. App. 572, 66 S.E.2d 188 (1951); Ramey v. Pritchett, 90 Ga. App. 745, 84 S.E.2d 305 (1954); Howell Gas of Athens, Inc. v. Coile, 112 Ga. App. 732, 146 S.E.2d 145 (1965); Tribble v. Somers, 115 Ga. App. 847, 156 S.E.2d 130 (1967); Black v. New Holland Baptist Church, 122 Ga. App. 606, 178 S.E.2d 571 (1970).

Liability not dependent upon inspection. — When the landlord has fully parted with the possession of the premises, the landlord owes no duty to inspect the premises and make repairs until the landlord has notice of the defective condition but the landlord is responsible to others for damages arising from defective construction, or for damages for failure to keep the premises in repair. Fuller v. Louis Steyerman & Sons, 46 Ga. App. 830, 169 S.E. 508 (1933).

When duty to inspect arises. — When the landlord is notified that the premises are out of repair, it becomes the landlord's duty to inspect and investigate in order that the landlord may make such repairs as the safety of the tenant requires. Garner v. La Marr, 88 Ga. App. 364, 76 S.E.2d 721 (1953).

Duty created by inspection. — Whether or not owner was under the duty to inspect for latent defects, having actually made such inspection, the owner was under the duty to make such repairs as may have been called for by the knowledge so obtained. Home Owners Loan Corp. v. Brazzeal, 62 Ga. App. 683, 9 S.E.2d 773 (1940).

4. Miscellaneous Consideration

Liability for acts of tenant. — When the landlord has by lease parted fully with possession and right of possession of the leased premises, although the landlord retains therein the right to enter, examine and repair the premises, the landlord is not liable to third persons for injuries received as a result of the tenants' negligent or illegal use thereof. Leonard v. Fulton Nat'l Bank, 86 Ga. App. 635, 72 S.E.2d 93 (1952); Howell Gas of Athens, Inc. v. Coile, 112 Ga. App. 732, 146 S.E.2d 145 (1965).

Liability for tenant's nuisance. — Landlord who has leased premises to a tenant is not liable for a nuisance maintained upon

the premises by the tenant. Howell Gas of Athens, Inc. v. Coile, 112 Ga. App. 732, 146 S.E.2d 145 (1965).

Lease contract provision relieving landlord of obligation to keep premises in repair is not effective as against third persons lawfully on the premises, even if the tenant knew of the defective condition. Flagler Co. v. Savage, 258 Ga. 335, 368 S.E.2d 504 (1988).

When tenant makes repairs. — Owner of property is liable for injuries caused by defective repairs made by the tenant in possession since the law imposes upon the owner the duty of making such repairs, or when the tenant is authorized by the owner to make the repairs. Byne v. Mayor of Americus, 6 Ga. App. 48, 64 S.E. 285 (1909).

Out-of-possession landlord not responsible for injury to tenant's employee. — When the employee fell from a ladder while working for a restaurant located in a mall, the mall owner was entitled to summary judgment on the employee's tort claim, as the mall owner was an out-of-possession landlord, and merely retained the right to approve the restaurant's construction of an improvement to the premises without having in any way supervised or directed construction. Cowart v. Crown Am. Props., 258 Ga. App. 21, 572 S.E.2d 706 (2002).

Liability of landlord for acts of a cotenant. — In respect to each other cotenants are strangers; if damage to one tenant be caused, not by any act or negligence to repair of the landlord, but by the fault exclusively of the cotenant, such cotenant, and not the landlord, would be liable. J.B. White & Co. v. Montgomery, 58 Ga. 204 (1877); Adair v. Allen, 18 Ga. App. 636, 89 S.E. 1099 (1916).

Liability for toxic fumes from tenant's business. — Because defendants, the owner and manager of a shopping center, had parted with possession of premises used by a tenant as a manicurist business, the defendants were not liable to plaintiff for injuries caused by toxic fumes escaping from the business. Diffley v. Marshall's at E. Lake, 227 Ga. App. 343, 489 S.E.2d 123 (1997).

Liability of landlord for dog bite. — Landlord was not liable for injuries sustained by the plaintiff when a tenant's dog bit the plaintiff since the landlord had relinquished possession of the property to the tenant. Webb v. Danforth, 234 Ga. App. 211, 505 S.E.2d 860 (1998).

Out-of-possession landlord could not be held liable for severe injuries that the tenant's pit bulls inflicted on a next door neighbor, who also rented a house owned by the landlord, because under O.C.G.A. § 44-7-14, the landlord's only duty to third persons was for defective construction of the premises or the landlord's failure to keep the premises in repair. Ranwez v. Roberts, 268 Ga. App. 80, 601 S.E.2d 449 (2004).

Liability of agent. — Agent who undertakes the sole and complete control and management of the principal's premises is liable to third persons, to whom a duty is owing on the part of the owner, for injuries resulting from the agent's negligence in failing to make or keep the premises in a safe condition. Ramey v. Pritchett, 90 Ga. App. 745, 84 S.E.2d 305 (1954).

Liability of executor. — Executor, who by will is given authority to manage and rent a building for the benefit of the executor and other legatees, may be held liable as such executor for injuries resulting from a defective condition of the rented premises, under the legal rules which control individuals; but unless some duty or right of control over the property is vested in the executor beyond the executor's mere representative power, the executor is not personally liable. Dobbs v. Noble, 55 Ga. App. 201, 189 S.E. 694 (1937).

Liability for rape of tenant. — Because the record contained some evidence that the duties of the landlord's employee included looking out for the safety of the apartment premises and the residents, there remained questions as to whether the landlord had assumed a duty to provide security for the apartment complex and whether that duty had been performed in a nonnegligent manner, and the granting of summary judgment in favor of the landlord, in an action by the victim for damages for injuries, was inappropriate. Cooperwood v. Auld, 175 Ga. App. 694, 334 S.E.2d 22 (1985).

Child of tenant. — When a child was killed by a defect of which the landlord had notice, in a porch of a mill of which the child's stepfather was tenant, the child being lawfully upon the porch, the landlord was liable. Crook v. Foster, 142 Ga. 715, 83 S.E. 670 (1914).

Duties of Landlord (Cont'd)
4. Miscellaneous Consideration (Cont'd)

Landlord owning adjacent premises. — Statute applies when the tenant sues the landlord for negligence arising out of legal duties claimed to be owed plaintiff by reason of defendant's ownership of the adjacent premises and not based upon the landlord-tenant relationship as to the leased unit. Stamsen v. Barrett, 135 Ga. App. 156, 217 S.E.2d 320 (1975) (see O.C.G.A. § 44-7-14).

Lights in common areas. — In the absence of a contract or statutory obligation to do so, a landlord is not under a duty to maintain lights in the corridor or upon the stairway. Chamberlain v. Nash, 54 Ga. App. 508, 188 S.E. 276 (1936).

Rats. — Nuisance of rats and their bringing food into an office is not such a defect as the landlord is liable for. Lumpkin v. Provident Loan Soc'y, Inc., 15 Ga. App. 816, 84 S.E. 216 (1915).

Toilet. — It is the duty of the landlord to keep the premises free from the consequences arising ordinarily from the use of a toilet, which becomes a private nuisance when not properly used and attended to; and if the landlord fails, and from such cause damage ensues, the landlord is liable. Marshall v. Cohen, 44 Ga. 489, 9 Am. R. 170 (1871).

Failure to repair locks. — Genuine issue of material fact existed, precluding summary judgment, as to whether an apartment landlord was negligent in not changing the locking mechanism screws on doors after a neighborhood watch meeting since door safety was discussed in the presence of apartment managers. Demarest v. Moore, 201 Ga. App. 90, 410 S.E.2d 191 (1991).

Lack of smoke detector. — Even if the lack of a smoke detector rendered a leased mobile home defective, the owner of the real property on which the mobile home was located did not violate a duty to supply a smoke detector since a third party owned the mobile home and rented the mobile home to the tenants. Crowder v. Larson, 236 Ga. App. 858, 513 S.E.2d 771 (1999).

Since the jury was not required to believe testimony that a property owner had installed smoke detectors in the owner's rental property, and other testimony authorized the jury's finding that the owner breached the duty under O.C.G.A. § 25-2-40 to install smoke detectors, O.C.G.A. § 44-7-14 did not insulate the owner from liability for the wrongful death of tenants in a fire. Gordon v. Fleeman, 298 Ga. App. 662, 680 S.E.2d 684 (2009).

Stairways. — Summary judgment for a landlord in a negligence action arising out of a tenant's fall on the outside stairs was affirmed since the tenant had equal knowledge of the accumulation of leaves on the stairs, had used the stairs several times that day without incident, and had not reported the condition to the landlord; the necessity rule was inapplicable as the tenant, the tenant's wife, and the tenants' son had used the exterior stairs many times without incident, including several times earlier that same day, no evidence indicated that the steps were inherently unsafe or otherwise in a state of disrepair, and the tenant's own evidence indicated that the alleged danger did not constitute a known hazard. Flores v. Strickland, 259 Ga. App. 335, 577 S.E.2d 41 (2003).

Rights and Duties of Tenant

Tenant's duty of care. — Only duty of care resting on the tenant is to refrain from using those portions of the premises which are patently defective or dangerous. Krapf v. Sternberg, 48 Ga. App. 130, 172 S.E. 69 (1933); Turner v. Long, 61 Ga. App. 785, 7 S.E.2d 595 (1940); Bixby v. Sinclair Ref. Co., 74 Ga. App. 626, 40 S.E.2d 677 (1946); Ween v. Saul, 88 Ga. App. 299, 76 S.E.2d 525 (1953).

Tenant must plead and prove notice. — In order to sustain a cause of action against a landlord for failure to keep the premises in repair, the tenant must allege and prove that the tenant has given the landlord notice of the defective condition of the premises. Guthman v. Castleberry, 48 Ga. 172 (1873); Stack v. Harris, 111 Ga. 149, 36 S.E. 615 (1900); Roach v. LeGree, 18 Ga. App. 250, 89 S.E. 167 (1916); Wallace v. Adams, 47 Ga. App. 144, 169 S.E. 852 (1933).

No duty to examine property. — While the tenant must avoid obvious dangers, the law does not impose upon the tenant the duty of making a thorough examination of the landlord's property in order to ascertain hidden

dangers. Dessau v. Achord, 50 Ga. App. 426, 178 S.E. 396 (1935).

Negligence of tenant. — Tenant by remaining in the untenantable premises is guilty of such negligence as barred a recovery. Veal v. Hanlon, 123 Ga. 642, 51 S.E. 579 (1905); Clements v. Blanchard, 141 Ga. 311, 80 S.E. 1004, 17 L.R.A. 993 (1914).

Assumption of risk. — By electing to use a stairway at night, when the lighting was out, a tenant assumed the risk of injury as a matter of law and was thus barred from recovery. Wells v. Citizens & S. Trust Co., 199 Ga. App. 31, 403 S.E.2d 826, cert. denied, 199 Ga. App. 907, 403 S.E.2d 826 (1991).

Tenant's liability for nuisance. — If the nuisance grew out of the failure of the landlord to make the repairs, this could not relieve the tenant for the nuisance as the tenant might have made the repairs and charged them to the landlord, and the tenant might set off their reasonable value against the rent due the landlord unless the tenant was bound by contract with the landlord, to make the repairs. Vason v. City of Augusta, 38 Ga. 542 (1868); Gardner v. Rhodes, 114 Ga. 929, 41 S.E. 63, 57 L.R.A. 749 (1902).

Nuisance maintained by tenant. — When a nuisance is maintained by a tenant, the landlord is not responsible for the nuisance, unless license is given by the landlord to the tenant. The tenant maintaining the nuisance would be liable to one injured as a result thereof. Robertson v. Liggett Drug Co., 81 Ga. App. 850, 60 S.E.2d 268 (1950).

Damages recoverable. — Damages proximately resulting from a breach of a landlord's covenant to make repairs are recoverable by the tenant. Atlanta Baggage & Cab Co. v. Loftin, 88 Ga. App. 98, 76 S.E.2d 92 (1953).

Damages not recoverable. — Humiliation, mortification, and a shock are not such injuries as may be redressed because of the landlord's failure to repair. Davis v. Hall, 21 Ga. App. 265, 94 S.E. 274 (1917).

Knowledge of husband not imputed to wife. — When the plaintiff had no notice or knowledge of the defective condition of the steps, which was a latent defect, the plaintiff would not be precluded from recovering for injuries arising therefrom merely because the plaintiff's spouse, who was the tenant, knew of the condition of the steps. Wall Realty Co. v. Leslie, 54 Ga. App. 560, 188 S.E. 600 (1936).

Negligence not imputable to child. — Child of three years of age is conclusively presumed to be incapable of contributory negligence, and any negligence of the tenant in failing to prevent the tenant's child from using the alleged defective portion of the premises would not be imputable to the child in an action maintained in the child's own behalf. Oglesby v. Rutledge, 67 Ga. App. 656, 21 S.E.2d 497 (1942).

Questions for jury. — Tenant may continue in premises with knowledge of a defect therein, unless the defect is plainly dangerous, and whether the tenant's knowledge of the defect is sufficient to charge the tenant with knowledge of the danger is a question to be determined by the jury. Krapf v. Sternberg, 48 Ga. App. 130, 172 S.E. 69 (1933); Dessau v. Achord, 50 Ga. App. 426, 178 S.E. 396 (1935).

Fact that landing floor broke through, when used in the ordinary manner by the plaintiff, together with the fact of the floor's condition as shown by the exhibits and openness of the inspection, made it a jury question as to whether or not the floor's defective condition could have been known to the owner by the exercise of ordinary care. Home Owners Loan Corp. v. Brazzeal, 62 Ga. App. 683, 9 S.E.2d 773 (1940).

Invitee of theatre house. — One who is in the control of a building which one uses as a show house, to which the public are invited for one's profit, and who assumes the construction of the plastering therein, is liable to an invitee injured by the falling of the plastering because of defects in its construction, of which one had knowledge or of which one ought to have known in the exercise of ordinary care. Bonita Theatre v. Bridges, 31 Ga. App. 798, 122 S.E. 255 (1924).

RESEARCH REFERENCES

Am. Jur. 2d. — 49 Am. Jur. 2d, Landlord and Tenant, § 624 et seq.

Am. Jur. Proof of Facts. — Liability of an Owner or Operator of a Self-Service Filling

Station for Injury or Death of a Business Invitee on the Premises, 46 POF3d 161.

Am. Jur. Trials. — Landlord Liability for Criminal Attack on Tenant, 35 Am. Jur. Trials 1.

C.J.S. — 52A C.J.S., Landlord and Tenant, §§ 893 et seq., 917 et seq.

ALR. — Proximate cause as determining landlord's liability, where injury results to a third person from a nuisance that becomes such only upon tenant's using the premises, 4 ALR 740.

Breach of lessor's covenant to repair as ground of liability for damages for personal injuries to tenant, or one in privity with latter, 8 ALR 765; 78 ALR2d 1238.

Liability of owner to licensee or invitee for conditions on premises recently vacated by tenant, 10 ALR 244.

Effect of noninhabitability of leased dwelling or apartment, 13 ALR 818; 29 ALR 52; 34 ALR 711.

Rights and remedies of tenant who remains in possession of all or part of the premises against landlord for interfering with his possession or enjoyment, 20 ALR 1369; 28 ALR 1333; 64 ALR 900.

What is unavoidable or inevitable casualty or accident within provision of lease, 24 ALR 1461.

Liability of landlord for personal injuries due to defective halls, stairways, and the like, for use of different tenants, 25 ALR 1237.

Liability of landlord for injury to person or property of tenant, or his privies, from defects in heating or lighting plant or plumbing, 26 ALR 1253; 52 ALR 864.

Rights and remedies of tenant upon landlord's breach of covenant to repair, 28 ALR 1448; 28 ALR2d 446.

Necessity of notice to landlord as condition of asserting breach of express covenant to repair, 28 ALR 1525.

Measure of damages for breach of landlord's covenant to heat, or furnish hot water for, premises leased for business or manufacturing purposes, 28 ALR 1550.

Tenancy as relieving landlord from liability for injury to third person in street due to snow or ice, 29 ALR 181.

Landlord's liability to one injured while using, for a purpose for which it was not intended, property remaining in the former's control, 30 ALR 1390; 49 ALR 564; 12 ALR2d 217.

Transfer or devolution of reversion as carrying lessee's covenants to repair, or to yield up in repair, 34 ALR 782.

Liability of landlord for personal injuries due to defective halls, stairways, and the like, for use of different tenants, 39 ALR 294; 58 ALR 1411; 75 ALR 154; 97 ALR 220.

Liability of the landlord for damage to the property of a tenant due to defective condition of foundation, walls, or roof of building intended for use of different tenants, 43 ALR 1292.

Landlord's responsibility for injury to stranger due to tenant's negligence as to doors, guards, etc., provided by former, but in tenant's possession and control, 47 ALR 846.

Landlord's responsibility to third persons for conditions created during tenancy as affected by renewal of the lease, or a new lease subject to the original lease, 49 ALR 1418.

Landlord's liability for damage to property of third person by operations of tenant, 53 ALR 327.

Acts of other tenants as chargeable to landlord, 58 ALR 1049.

Contributory negligence of plaintiff as defense to action for personal injuries on account of defective condition of part of the premises within the landlord's control, 58 ALR 1428.

Permissive character of use as affecting landlord's liability to a tenant, or one in privity with him, for personal injuries received in part of premises remaining in landlord's control, 58 ALR 1433.

Liability of landlord for personal injuries due to defective accessories to the leased premises which had passed into the possession of the tenant, 58 ALR 1453.

Liability of owner or occupant for condition of covering over opening or vault in sidewalk, 62 ALR 1067; 31 ALR2d 1334.

Lease of property as affecting owner's liability for failure to provide fire escapes as required by law, 77 ALR 1273.

Validity, construction, application and effect of provision of lease exempting landlord from liability on account of condition of property, 84 ALR 654.

Landlord's liability for injuries to strangers outside premises as affected by covenant to repair or reservation of right to enter to make repairs, 89 ALR 480.

Employment of independent contractor as affecting landlord's liability for personal injury to tenant or to one in like case with tenant, 90 ALR 50; 162 ALR 1111.

Statute requiring property to be kept in good repair as affecting landlord's liability for personal injury to tenant or his privies, 93 ALR 778; 17 ALR2d 704.

Liability of one exercising the rights of an owner of realty for injuries due to its condition, as affected by want of legal title, 96 ALR 1068; 130 ALR 1525.

Duty of landlord to instruct tenant as to use of appliances furnished with premises, 97 ALR 216.

Who is a stranger or third person within the rule regarding landlord's liability to stranger or third person where premises are in a ruinous condition or condition amounting to a nuisance when leased, 110 ALR 756.

Duty to guard against operation of elevator by unauthorized person, 117 ALR 989.

Lease by municipality of property intended for use and benefit of public as affecting its duty and responsibility in respect of the manner and conditions of operation and maintenance of the property by the lessee, 129 ALR 1163.

Lessor's liability for personal injuries to tenant or occupant where premises are let furnished, 139 ALR 261.

Res ipsa loquitur as applicable in action against landlord for injury to person or property due to condition of premises, 145 ALR 870.

Landlord's liability for injury to person or damage to property as affected by his making of repairs in absence of obligation to do so, 150 ALR 1373.

Covenant respecting condition of premises as requiring indemnity for amount paid or liability incurred on account of injury to third person or his property, 157 ALR 623.

Lease of premises as affecting owner's liability for injury arising out of condition in highway connected with use of property, 160 ALR 825.

Breach of lessor's agreement to repair as ground of liability for personal injury to tenant or one in privity with latter, 163 ALR 300; 78 ALR2d 1238.

Liability of a lessor or his property for damages resulting from lessee's sale of intoxicating liquor, 169 ALR 1203.

Liability of landlord to one using fire escape for other than intended purpose, 12 ALR2d 217.

Liability of landlord for injury to or death of employee of tenant, occasioned by negligent construction, maintenance, or operation of elevator, 19 ALR2d 272.

Liability of tenant occupying abutting premises for injury from ice formed on sidewalk by discharge of rain or melted snow thereon because of condition existing on premises, 22 ALR2d 738.

Landlord's liability for injury or death due to defects in exterior stairs, passageways, areas, or structures used in common by tenants, 26 ALR2d 468; 67 ALR3d 490; 65 ALR3d 14; 68 ALR3d 382.

Landlord's liability for injury to tenant's person or property caused by water overflowing from defective appliances in other premises of landlord, 26 ALR2d 1044.

Liability for injuries occasioned by falling of awning or the like, 34 ALR2d 486.

Landlord's duty under express covenant to repair, rebuild, or restore, where property is damaged or destroyed by fire, 38 ALR2d 682.

Liability of landlord for injury or death of third person on street or highway by nuisance created by tenant for month to month, year to year, or the like, 39 ALR2d 973.

Tenant's capacity to sue independent contractor, as third-party beneficiary, for breach of contract between landlord and such contractor for repair or remodeling work, 46 ALR2d 1210.

Liability of landowner for injury or death of child caused by cut or puncture from broken glass or other sharp object, 47 ALR2d 1048.

Lessor of building as invitee of lessee, with respect to latter's duty and liability to former for personal injuries occasioned by condition of premises, 47 ALR2d 1439.

Liability of landlord to tenant or member of tenant's family, for injury by animal or insect, 67 ALR2d 1005.

Liability for injury or damage from escaping refrigerant, 74 ALR2d 894.

Liability for injury to person in street by glass falling from window, door, or wall, 81 ALR2d 897.

Landlord's liability for personal injury or death of tenant or his privies from plumbing system or equipment, 84 ALR2d 1143.

Landlord's liability for personal injury or death of tenant or privies from water heater, 84 ALR2d 1190.

Landlord's liability for personal injury or death of tenant or his privies from heating system or equipment, 86 ALR2d 791.

Landlord's liability for personal injury or death of tenant or privies from electrical system or equipment, 86 ALR2d 838.

Modern status of rule requiring actual knowledge of latent defect in leased premises as prerequisite to landlord's liability to tenant injured thereby, 88 ALR2d 586.

Liability of owner or operator of shopping center to patrons for injuries from defects or conditions in sidewalks, walks, or pedestrian passageways, 95 ALR2d 1341.

Liability of owner or occupant of building for personal injury or death of person in street resulting from objects falling or thrown from building interior, 97 ALR2d 1431.

Effect, on nonsigner, of provision of lease exempting landlord from liability on account of condition of property, 12 ALR3d 958.

Validity, construction, and effect of provision of lease exempting landlord or tenant from liability on account of fire, 15 ALR3d 786.

Landlord's liability to tenant's business patron injured as a result of defective condition of premises, 17 ALR3d 422.

What constitutes ''public'' use affecting landlord's liability to tenant's invitees for defects in leased premises, 17 ALR3d 873.

Premises liability: proceeding in the dark as contributory negligence, 22 ALR3d 286.

Landlord's liability for damage to tenant's property caused by water, 35 ALR3d 143.

Liability of landlord for injury or death occasioned by swimming pool maintained for tenants, 39 ALR3d 824.

Modern status of rules as to existence of implied warranty of habitability or fitness for use of leased premises, 40 ALR3d 646.

Landlord's failure to repair as aggravated negligence or similar fault, 40 ALR3d 795.

Tenant's right, where landlord fails to make repairs, to have them made and set off cost against rent, 40 ALR3d 1369.

Liability of owner or operator of park for mobile homes or trailers for injuries caused by appliances or other instruments on premises, 41 ALR3d 324.

Liability of owner or operator of trailer camp or park for injury or death from condition of premises, 41 ALR3d 546.

Tenant's obligation under lease as basis of tort liability to third persons, 44 ALR3d 943.

Validity of exculpatory clause in lease exempting lessor from liability, 49 ALR3d 321.

Landlord's liability to tenant or tenant's invitees for injury or death due to ice or snow in areas or passageways used in common by tenants, 49 ALR3d 387.

Liability of owner or operator for injury caused by door of automatic passenger elevator, 63 ALR3d 893.

Modern status of landlord's tort liability for injury or death of tenant or third person caused by dangerous condition of premises, 64 ALR3d 339.

Liability of owner or operator for injury caused by failure of automatic elevator to level at floor, 64 ALR3d 1020.

Landlord's liability for injury or death due to defects in areas of building (other than stairways) used in common by tenants, 65 ALR3d 14.

Liability of landlord for personal injury or death due to inadequacy or lack of lighting on portion of premises used in common by tenants, 66 ALR3d 202.

Landlord's liability for personal injury or death due to defects in appliances supplied for use of different tenants, 66 ALR3d 374.

Landlord's liability for injury or death due to defects in exterior steps or stairs used in common by tenants, 67 ALR3d 490.

Landlord's liability for injury or death due to defects in interior steps or stairs used in common by tenants, 67 ALR3d 587.

Landlord's liability for injury or death due to defects in outside walks, drives, or grounds used in common by tenants, 68 ALR3d 382.

Landlord's liability to tenant's child for personal injuries resulting from defects in premises, as affected by tenant's negligence with respect to supervision of child, 82 ALR3d 1079.

Failure of landlord to make, or permit tenant to make, repairs or alterations required by public authority as constructive eviction, 86 ALR3d 352.

Res ipsa loquitur as applicable in actions for damage to property by the overflow or escape of water, 91 ALR3d 186.

Liability for injuries in connection with ice

or snow on nonresidential premises, 95 ALR3d 15.

Tenant's agreement to indemnify landlord against all claims as including losses resulting from landlord's negligence, 4 ALR4th 798.

Liability of owner of store, office, or similar place of business to invitee falling on tracked-in water or snow, 20 ALR4th 438.

Applicability of exculpatory clause in lease to lessee's damages resulting from defective original design or construction, 30 ALR4th 971.

Landlord's tort liability to tenant for personal injury or property damage resulting from criminal conduct of employee, 38 ALR4th 240.

Strict liability of landlord for injury or death of tenant or third person caused by defect in premises leased for residential use, 48 ALR4th 638.

Legal aspects of speed bumps, 60 ALR4th 1249.

Landlord and tenant: violation of statute or ordinance requiring landlord to furnish specified facilities or services as ground of liability for injury resulting from tenant's attempt to deal with deficiency, 63 ALR4th 883.

Landlord's liability to third person for injury resulting from attack on leased premises by dangerous or vicious animal kept by tenant, 87 ALR4th 1004.

Landlord's liability for injury or death of tenant's child from lead paint poisoning, 19 ALR5th 405.

Liability of owner or operator of shopping center, or business housed therein, for injury to patron on premises from criminal attack by third party, 31 ALR5th 550.

Landlord's liability for failure to protect tenant from criminal acts of third person, 43 ALR5th 207.

Apportionment of liability between landowners and assailants for injuries to crime victims, 54 ALR5th 379.

Liability of owner, operator, or other parties, for personal injuries allegedly resulting from snow or ice on premises of parking lot, 74 ALR5th 49.

44-7-14.1. Landlord's duties as to utilities.

(a) As used in this Code section, the term ''utilities'' means heat, light, and water service.

(b) It shall be unlawful for any landlord knowingly and willfully to suspend the furnishing of utilities to a tenant until after the final disposition of any dispossessory proceeding by the landlord against such tenant.

(c) Any person who violates subsection (b) of this Code section shall, upon conviction, be assessed a fine not to exceed $500.00. (Code 1981, § 44-7-14.1, enacted by Ga. L. 1988, p. 923, § 1.)

RESEARCH REFERENCES

ALR. — Landlord and tenant: violation of statute or ordinance requiring landlord to furnish specified facilities or services as ground of liability for injury resulting from tenant's attempt to deal with deficiency, 63 ALR4th 883.

44-7-15. Effect of destruction of tenement on obligation to pay rent.

The destruction of a tenement by fire or the loss of possession by any casualty not caused by the landlord or from a defect of his title shall not abate the rent contracted to be paid. (Orig. Code 1863, § 2274; Code 1868, § 2267; Code 1873, § 2293; Code 1882, § 2293; Civil Code 1895, § 3135; Civil Code 1910, § 3711; Code 1933, § 61-113.)

JUDICIAL DECISIONS

Rule stated. — Tenant of a rented house is liable for the stipulated rent to the end of the tenant's term although the house, before the expiration of such term, be destroyed by fire, unless the landlord does some act which in law amounts to an eviction of the tenant. Pope v. Gerrard, 39 Ga. 471 (1869); Fleming & Bowles v. King, 100 Ga. 449, 28 S.E. 239 (1897).

Reason for rule is that the loss of the rent must fall somewhere, and there is no more equity that the landlord should bear it than the tenant, when the tenant has expressly agreed to pay the rent, and when the landlord must bear the loss of the property destroyed. Equity considers the calamity mutual and will not interfere to relieve against the express contract of the tenant. White v. Molyneux, 2 Ga. 124 (1847).

Common law. — Statute is a codification of a common-law principle. Mayer & Crine v. Morehead, 106 Ga. 434, 32 S.E. 349 (1899) (see O.C.G.A. § 44-7-15).

Casualty defined. — Casualty has been defined as ''unforeseen circumstances not to be guarded against by human agency, and in which man takes no part,'' as ''an unforeseen accident; a misfortune,'' as an ''event not to be foreseen or guarded against.'' Oakland Motor Car Co. v. Rippey Motor Co., 41 Ga. App. 784, 154 S.E. 823 (1930).

Violent windstorm of unusual nature, such as might not reasonably be foreseen or guarded against, resulting in damage, should be deemed a casualty. Oakland Motor Car Co. v. Rippey Motor Co., 41 Ga. App. 784, 154 S.E. 823 (1930).

What amounts to eviction. — Entering on premises to clean brick is not eviction when tenant did not object, nor was building wall around premises and pulling down remains of building under order of city. Fleming & Bowles v. King, 100 Ga. 449, 28 S.E. 239 (1897).

To constitute an eviction which will operate as a suspension of rent, there must be either an actual expulsion of the tenant, or some act of a grave and permanent character done by the landlord with the intention of depriving the tenant of the enjoyment of the demised premises. The granting of an order restraining the tenant from removing the tenant's goods beyond the state, and the appointment of a receiver who took possession for several weeks did not amount to an eviction of the tenant. Potts-Thompson Liquor Co. v. Capital City Tobacco Co., 137 Ga. 648, 74 S.E. 279 (1912).

When a landlord enters upon the rented premises for the ostensible purpose of making repairs, irrespective of whether it is in conformity with the legal obligation due to a tenant or for the purpose of protecting the landlord's own property, if the landlord's conduct consists of negligent acts of such grave and permanent character as would render the premises unfit for tenancy, and is such as would legally import the intent to deprive the tenants of their enjoyment, it amounts in law to an eviction of the tenant, and the landlord cannot thereafter recover subsequently accruing rent. Feinberg v. Sutker, 35 Ga. App. 505, 134 S.E. 173 (1926).

Acts by stranger disturbing tenant. — Implied covenant in a lease contract for the quiet enjoyment of the premises by the tenant obligates the landlord to protect the tenant only against the landlord's own acts, and not against the acts of strangers which disturb the tenant in the tenant's quiet enjoyment and possession of the rented premises. Adair v. Allen, 18 Ga. App. 636, 89 S.E. 1099 (1916); Parker v. Munn Sign & Adv. Co., 29 Ga. App. 420, 115 S.E. 926 (1923).

Exception in lease. — If the tenant would guard against loss by fire and tempest, the tenant must introduce into the tenant's lease an exception to that effect. Lennard v. Boynton, 11 Ga. 109 (1852); Pope v. Gerrard, 39 Ga. 471 (1869). See also, Guthman v. Castleberry, 49 Ga. 272 (1873); Fleming & Bowles v. King, 100 Ga. 449, 28 S.E. 239 (1897).

Right to possession after destruction. — When there is nothing to indicate an intention to limit the possession to buildings, and city premises are described by street numbers, the lessee takes an interest in the yard, garden, subjacent land, and appurtenances, and retains the right to the possession of such land after the buildings thereon have been destroyed, being in turn bound to pay rent for the balance of the term. P.H. Snook & Austin Furn. Co. v. Steiner & Emery, 117 Ga. 363, 43 S.E. 775 (1903).

When the lease is only of a storeroom, the

destruction of the building containing the apartment terminates the tenant's interest in the land, and the tenant has no right to damages on account of the landlord's refusal to permit the tenant to occupy a similar apartment in a new structure erected on the same land. Gavan v. Norcross, 117 Ga. 356, 43 S.E. 771 (1903).

Landlord's obligation to rebuild. — If a storm completely destroys a dwelling, the landlord is not required to replace the dwelling, nor does the rent abate. Mayer & Crine v. Morehead, 106 Ga. 434, 32 S.E. 349 (1899).

Tenant's obligation to rebuild. — Statute imposes upon the tenant no obligation to replace a building or any portion thereof destroyed by fire, unless the tenant has contracted to do so. Oakland Motor Car Co. v. Rippey Motor Co., 41 Ga. App. 784, 154 S.E. 823 (1930) (see O.C.G.A. § 44-7-15).

Setoff of building rebuilt by tenant. — Lessee cannot set off against the rent the value of a building which the lessee voluntarily erected on the rented premises to take the place of one destroyed by fire. Hicks & Son v. Mozley & Co., 12 Ga. App. 661, 78 S.E. 133 (1913).

When landlord parts with title. — While it is true that the destruction of a tenement by fire, or the loss thereof by a casualty not caused by the landlord, will not release the tenant from a rent contract already in existence, still, if the landlord makes an admission in judicio that the landlord has parted with full title to the property, thus rendering the landlord unable to specifically perform the contract as to such property, equity will not decree specific performance as to the adverse party. Ledbetter v. Goodroe, 179 Ga. 69, 175 S.E. 250 (1934).

Continuation of rent when law prohibits business. — Lessee of hotel with barroom can have no reduction of rent on account of law prohibiting sale of liquors, without express stipulation. Lawrence v. White, 131 Ga. 840, 63 S.E. 631, 12 L.R.A. (n.s.) 966, 15 Am. Ann. Cas. 1097 (1909).

Cited in Kanes v. Koutras, 203 Ga. 570, 47 S.E.2d 558 (1948); Sewell v. Royal, 147 Ga. App. 88, 248 S.E.2d 165 (1978).

RESEARCH REFERENCES

Am. Jur. 2d. — 49 Am. Jur. 2d, Landlord and Tenant, §§ 456, 475.

C.J.S. — 52A C.J.S., Landlord and Tenant, § 1010.

ALR. — What is unavoidable or inevitable casualty or accident within provision of lease, 20 ALR 1101; 24 ALR 1461.

Acts of insurance company or public authorities to protect property after fire as constructive eviction of tenant, 29 ALR 1361.

Landlord's liability for damage to tenant's property by fire, 66 ALR 1393.

Condition of premises within contemplation of provision of lease or statute for cessation of rent or termination of lease in event of destruction of or damage to property as result of fire, 118 ALR 106; 61 ALR2d 1445.

Validity, construction, and application of statute or ordinance which precludes recovery of rent in case of occupancy of building which does not conform to building and health regulations, or where certificate of conformity has not been issued, 144 ALR 259.

Condemnation of premises or part thereof as affecting rights of landlord and tenant inter se, 163 ALR 679.

Duty of lessee to remove his equipment, machinery, debris, or other property from leased premises after a fire or casualty, 46 ALR2d 839.

Condition of premises within contemplation of provision of lease or statute for cessation of rent or termination of lease in event of destruction of or damage to property as result of fire, calamity, the elements, act of God, or the like, 61 ALR2d 1445.

Validity, construction, and effect of provision of lease exempting landlord or tenant from liability on account of fire, 15 ALR3d 786.

Landlord's liability for damage to tenant's property caused by water, 35 ALR3d 143.

Modern status of rule as to tenant's rent liability after injury to or destruction of demised premises, 99 ALR3d 738.

44-7-16. Accrual of interest on rent owed.

All contracts for rent shall bear interest from the time the rent is due. (Laws 1811, Cobb's 1851 Digest, p. 901; Code 1863, § 2269; Code 1868, § 2262; Code 1873, § 2288; Code 1882, § 2288; Civil Code 1895, § 3128; Civil Code 1910, § 3704; Code 1933, § 61-114; Ga. L. 1946, p. 761, § 1.)

JUDICIAL DECISIONS

Cited in Simpson v. Earle, 87 Ga. 215, 13 S.E. 446 (1891); W.W. Kimball Co. v. Rogers, 17 Ga. App. 562, 87 S.E. 848 (1916); City Prods. Corp. v. Napier & Byers, 107 Ga. App. 733, 131 S.E.2d 597 (1963); Krupp Realty Co. v. Joel, 168 Ga. App. 480, 309 S.E.2d 641 (1983).

RESEARCH REFERENCES

Am. Jur. 2d. — 49 Am. Jur. 2d, Landlord and Tenant, § 416.

C.J.S. — 52A C.J.S., Landlord and Tenant, §§ 1101, 1161 et seq., 1274.

ALR. — Application of usury laws to transactions characterized as "leases," 94 ALR3d 640.

44-7-17. Exemption from liens against tenant of crops paid as rent.

When it is agreed that the tenant shall pay to the landlord as rent a part of the crop produced on the lands rented from the landlord and the tenant, in good faith, delivers the part of the crop agreed on in discharge of his rent, such part of the crop so delivered shall be discharged from the lien of any judgment, decree, or other process whatsoever against the tenant. (Ga. L. 1884-85, p. 91, § 1; Civil Code 1895, § 3127; Civil Code 1910, § 3703; Code 1933, § 61-115; Ga. L. 1982, p. 3, § 44.)

JUDICIAL DECISIONS

Rent to be paid in money. — When the rent was to be paid in money and the tenant turned over a part of the crop in payment, it was not exempt from a judgment against the tenant. Toler v. Seabrook, 39 Ga. 14 (1869); Almand v. Scott, 80 Ga. 95, 4 S.E. 892, 12 Am. St. R. 241 (1887); Duncan v. Clark, 96 Ga. 263, 22 S.E. 927 (1895).

RESEARCH REFERENCES

Am. Jur. 2d. — 49 Am. Jur. 2d, Landlord and Tenant, § 565.

C.J.S. — 52A C.J.S., Landlord and Tenant, § 1235 et seq.

ALR. — Priority as between landlord's lien on chattels and chattel mortgage, 52 ALR 935.

Subject-matter covered by landlord's statutory lien for rent, 96 ALR 249.

44-7-18. Effect of leases for purposes of prostitution or assignation.

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

(1) ''Assignation'' means the making of any appointment or engagement for prostitution or any act in furtherance of such appointment or engagement.

(2) ''Prostitution'' means the offering or giving of the body for sexual intercourse, sex perversion, obscenity, or lewdness for hire.

(3) ''Tourist camp'' means any temporary or permanent buildings, tents, cabins or structures, or trailers or other vehicles which are maintained, offered, or used for dwelling or sleeping quarters for pay.

(b) All leases and agreements letting, subletting, or renting any house, place, building, tourist camp, or other structure for the purpose of prostitution or assignation shall be void. (Ga. L. 1943, p. 568, § 3.)

Cross references. — Penalty for prostitution and keeping place of prostitution, §§ 16-6-9, 16-6-10. Abatement of houses of prostitution, Ch. 3, T. 41.

JUDICIAL DECISIONS

Cited in Price v. State, 76 Ga. App. 108, 45 S.E.2d 84 (1947); Pippin v. State, 205 Ga. 316, 53 S.E.2d 482 (1949).

RESEARCH REFERENCES

Am. Jur. 2d. — 49 Am. Jur. 2d, Landlord and Tenants, § 39 et seq.

C.J.S. — 51C C.J.S., Landlord and Tenant, § 226.

ALR. — Seller's, bailor's, lessor's, or lender's knowledge of the other party's intention to put the property or money to an illegal use as defense to action for purchase price, rent, or loan, 166 ALR 1353.

Construction and application of statute authorizing forfeiture or termination of lease because of tenant's illegal use of premises, 100 ALR2d 465.

Lease provisions allowing termination or forfeiture for violation of law, 92 ALR3d 967.

44-7-19. Restrictions on rent regulation by local governments.

No county or municipal corporation may enact, maintain, or enforce any ordinance or resolution which would regulate in any way the amount of rent to be charged for privately owned, single-family or multiple-unit residential rental property. This Code section shall not be construed as prohibiting any county or municipal corporation, or any authority created by a county or municipal corporation for that purpose, from regulating in any way property belonging to such county, such municipal corporation, or such authority from entering into any agreements with private persons, which agreements regulate the amount of rent to be charged for such rental properties. (Code 1981, § 44-7-19, enacted by Ga. L. 1984, p. 1079, § 1.)

44-7-20. Notification to prospective tenant of property's propensity toward flooding.

When the owner of real property, either directly or through an agent, seeks to lease or rent that property for residential occupancy, prior to entering a written agreement for the leasehold of that property, the owner shall, either directly or through an agent, notify the prospective tenant in writing of the property's propensity of flooding if flooding has damaged any portion of the living space covered by the lease or attachments thereto to which the tenant or the tenant's resident relative has sole and exclusive use under the written agreement at least three times during the five-year period immediately preceding the date of the lease. An owner failing to give such notice shall be liable in tort to the tenant and the tenant's family residing on the leased premises for damages to the personal property of the lessee or a resident relative of the lessee which is proximately caused by flooding which occurs during the term of the lease. For purposes of this Code section, flooding is defined as the inundation of a portion of the living space covered by the lease which was caused by an increased water level in an established water source such as a river, stream, or drainage ditch or as a ponding of water at or near the point where heavy or excessive rain fell. This Code section shall apply only to leaseholds entered into on or after July 1, 1995. (Code 1981, § 44-7-20, enacted by Ga. L. 1995, p. 266, § 1.)

Code Commission notes. — Pursuant to Code Section 28-9-5, in 1995, ''inundation'' was substituted for ''innundation'' in the third sentence.

Law reviews. — For note on the 1995 enactment of this Code section, see 12 Ga. St. U.L. Rev. 310 (1995).

44-7-21. Written brokerage agreement as binding obligation; notice of commission rights form.

(a) Where a landlord or tenant has entered into a written brokerage commission agreement for the payment of compensation or promise of payment to a real estate broker in consideration of brokerage services rendered in connection with the consummation of a lease, then, notwithstanding any rule or construction of law under which such written brokerage commission agreement might otherwise be considered the personal obligation of the original landlord or tenant specifically named in the lease, such written brokerage commission agreement shall, pursuant to the terms of this Code section, constitute a binding contractual obligation of such landlord or tenant, as the case may be, and of their respective grantees, successors, and assigns. Upon any sale, transfer, assignment, or other disposition, including, without limitation, by reason of the enforcement of any mortgage, lien, deed to secure debt, or other security instrument, of a landlord's interest in real property or upon any sale, assignment, transfer, or other disposition of a tenant's leasehold interest, the succeeding party shall be bound for all obligations occurring after the

sale, transfer, assignment, or other disposition with the same effect as if such succeeding party had expressly assumed the landlord's or tenant's obligations relating to the written brokerage commission agreement if:

(1) A written brokerage commission agreement is incorporated into the lease;

(2) The real estate broker has complied with subsection (b) of this Code section;

(3) The succeeding party assumes the benefits of the tenancy, rental amount, and term of the lease; and

(4) The written brokerage commission agreement has not been waived in writing by the broker.

The conveyance or transfer of the real property coupled with the continuing assumption of the tenancy, rental amount, and term of said lease shall constitute conclusive evidence of the succeeding landlord's or tenant's agreement to pay such periodic commission payments under the written brokerage commission agreement.

(b) A real estate broker shall be entitled to the protections afforded by this Code section only upon the broker's recording a notice of commission rights in the deed records in the office of the clerk of the superior court in the county in which the real property or leasehold interest is located within 30 days of the execution of the lease incorporating the written brokerage commission agreement. Said notice of commission rights must be filed before conveyance of the real property, must be signed by the broker or by a person expressly authorized to sign on behalf of the broker, and must follow substantially the following form:

''NOTICE OF COMMISSION RIGHTS

The undersigned licensed Georgia real estate broker does hereby publish this NOTICE OF COMMISSION RIGHTS pursuant to Code Section 44-7-21 of the Official Code of Georgia Annotated to establish that the lease set forth below contains a written brokerage commission agreement providing for the payment or promise of payment of compensation for brokerage services.

_____

Owner

_____

Landlord

_____

Tenant

_____

Lease date Lease term

_____

Project name or building

Legal Description: All that tract or parcel of land lying and being in the State of Georgia, County of _____, being more particularly described on Exhibit 'A' attached hereto and made a part hereof. (A full and complete legal description is required for this form to be valid.)

Given under hand and seal this _____ day of _____, _____.

Signed, sealed, and delivered in the presence of:	Broker:
_____	_____ (Seal)
Unofficial Witness	Name:_____
_____	_____
Notary Public (Notary Seal Attached)	Georgia Real Estate License No. _____''

(c) The real estate broker must file a release of commission rights within 30 days of receipt of the final payment of commissions due under the written brokerage commission agreement.

(d) This Code section shall only apply to leaseholds of all or a portion of commercial real estate as that term is defined in Code Section 44-14-601 which are entered into on or after July 1, 1997.

(e) Notwithstanding any provision of this Code section to the contrary, this Code section does not create an interest in the real property which is the subject of the lease. (Code 1981, § 44-7-21, enacted by Ga. L. 1997, p. 825, § 1; Ga. L. 1999, p. 81, § 44.)

Law reviews. — For article commenting on the enactment of this Code section, see 14 Georgia St. U. L. Rev. 244 (1997).

44-7-22. Termination of a residential rental agreement by a service member.

(a) As used in this Code section, the term ''service member'' means an active duty member of the regular or reserve component of the United States armed forces, the United States Coast Guard, the Georgia National Guard, or the Georgia Air National Guard on ordered federal duty for a period of 90 days or longer.

(b) Any service member may terminate his or her residential rental or lease agreement by providing the landlord with a written notice of termination to be effective on the date stated in the notice that is at least 30 days after the landlord's receipt of the notice if any of the following criteria are met:

(1) The service member is required, pursuant to a permanent change of station orders, to move 35 miles or more from the location of the rental premises;

(2) The service member is released from active duty or state active duty after having leased the rental premises while on active duty status and the rental premises is 35 miles or more from the service member's home of record prior to entering active duty;

(3) After entering into a rental agreement, the service member receives military orders requiring him or her to move into government quarters;

(4) After entering into a rental agreement, the service member becomes eligible to live in government quarters and the failure to move into government quarters will result in a forfeiture of the service member's basic allowance for housing;

(5) The service member receives temporary duty orders, temporary change of station orders, or state active duty orders to an area 35 miles or more from the location of the rental premises, provided such orders are for a period exceeding 60 days; or

(6) The service member has leased the property but prior to taking possession of the rental premises receives a change of orders to an area that is 35 miles or more from the location of the rental premises.

(c) The notice to the landlord pursuant to subsection (b) of this Code section shall be accompanied by either a copy of the official military orders or a written verification signed by the service member's commanding officer.

(d) In the event a service member dies during active duty, an adult member of his or her immediate family may terminate the service member's residential rental or lease agreement by providing the landlord with a written notice of termination to be effective on the date stated in the notice that is at least 30 days after the landlord's receipt of the notice. The notice to the landlord must be accompanied by either a copy of the official military orders showing the service member was on active duty or a written verification signed by the service member's commanding officer and a copy of the service member's death certificate.

(e) Upon termination of a rental agreement under this Code section, the service member is liable for the rent due under the rental agreement prorated to the effective date of the termination payable at such time as would have otherwise been required by the terms of the rental agreement. The service member is not liable for any other rent or damages due to the early termination of the tenancy as provided for in this Code section. Notwithstanding any provision of law to the contrary, if a service member terminates the rental agreement pursuant to this Code section 14 or more

days prior to occupancy, no damages or penalties of any kind will be assessable.

(f) The provisions of this Code section shall apply to all residential rental or lease agreements entered into on or after July 1, 2005, and to any renewals, modifications, or extensions of such agreements in effect on such date. The provisions of this Code section may not be waived or modified by the agreement of the parties under any circumstances. (Code 1981, § 44-7-22, enacted by Ga. L. 2005, p. 213, § 7/SB 258; Ga. L. 2006, p. 72, § 44/SB 465.)

ARTICLE 2

SECURITY DEPOSITS

Law reviews. — For article discussing 1976 statutory changes in landlord-tenant law, see 13 Ga. St. B.J. 43 (1976).

JUDICIAL DECISIONS

Intent of article. — Intent of provisions on security deposits is only to prevent the wrongful withholding of security deposits from tenants by landlords. It does not in any way alter the statutory or contractual liability of tenants for rent. Kimber v. Towne Hills Dev. Co., 156 Ga. App. 401, 274 S.E.2d 620 (1980).

Cited in Whipper v. Kirk, 156 Ga. App. 218, 274 S.E.2d 662 (1980).

RESEARCH REFERENCES

ALR. — Bankruptcy: lessor's right, upon bankruptcy of lessee, to enforce lien or retain security for future rentals, 22 ALR 1307; 45 ALR 717.

Provision in lease for pecuniary forfeiture where lease is prematurely terminated as one for liquidated damages, 106 ALR 292.

Right of lessor to retain advance rental payments made under lease terms upon lessee's default in rent, 27 ALR2d 656.

Landlord-tenant security deposit legislation, 63 ALR4th 901.

44-7-30. Definitions.

As used in this article, the term:

(1) ''Nonrefundable fee'' means any money or other consideration paid or given by a tenant to a landlord under the terms of a residential rental agreement which the parties agreed would not be refunded.

(2) ''Residential rental agreement'' means a contract, lease, or license agreement for the rental or use of real property as a dwelling place.

(3) ''Security deposit'' means money or any other form of security given after July 1, 1976, by a tenant to a landlord which shall be held by the landlord on behalf of a tenant by virtue of a residential rental agreement and shall include, but not be limited to, damage deposits,

advance rent deposits, and pet deposits. Such term shall not include nonrefundable fees, or money or other consideration which are not to be returned to the tenant under the terms of the residential rental agreement or which were to be applied toward the payment of rent or reimbursement of services or utilities provided to the tenant. (Code 1933, § 61-601, enacted by Ga. L. 1976, p. 1372, § 6; Ga. L. 1982, p. 3, § 44; Ga. L. 2007, p. 498, § 3/SB 94.)

Administrative rules and regulations. — Immediate Transfer of Residents, Official Compilation of the Rules and Regulations of the State of Georgia, Department of Community Health, Personal Care Homes, Rule 111-8-62-.29.

Discharge or Transfer of Residents, Official Compilation of the Rules and Regulations of the State of Georgia, Department of Community Health, Personal Care Homes, Rule 111-8-62-.30.

JUDICIAL DECISIONS

Refundability of a "security deposit" is implicit, and the absence of any express agreement as to the refundability of such a deposit is immaterial. Race, Inc. v. Wade Leasing, Inc., 201 Ga. App. 340, 411 S.E.2d 56 (1991).

Cited in Kimber v. Towne Hills Dev. Co., 156 Ga. App. 401, 274 S.E.2d 620 (1980).

RESEARCH REFERENCES

Am. Jur. 2d. — 49 Am. Jur. 2d, Landlord and Tenant, § 522.

C.J.S. — 52A C.J.S., Landlord and Tenant, § 989 et seq.

ALR. — Validity and construction of provision of lease or condition of bond protecting lessor from loss in consequence of violation of the liquor law, 62 ALR 431.

44-7-31. Placement of security deposit in trust in escrow account; notice to tenant of account location.

Except as provided in Code Section 44-7-32, whenever a security deposit is held by a landlord or such landlord's agent on behalf of a tenant, such security deposit shall be deposited in an escrow account established only for that purpose in any bank or lending institution subject to regulation by this state or any agency of the United States government. The security deposit shall be held in trust for the tenant by the landlord or such landlord's agent except as provided in Code Section 44-7-34. Tenants shall be informed in writing of the location of the escrow account required by this Code section. (Code 1933, § 61-602, enacted by Ga. L. 1976, p. 1372, § 6; Ga. L. 2006, p. 656, § 1/HB 1273.)

JUDICIAL DECISIONS

Action to recover rent not barred by landlord's failure to comply with section. — Even though a landlord did not comply with the provisions of the security deposit statute, this did not bar the landlord from bringing an action to recover unpaid rent due on a lease contract or for withholding the security deposit for nonpayment of rent. Zakaria v. McElwaney, 174 Ga. App. 149, 329 S.E.2d 310 (1985).

Unverified affidavit. — Failure to verify an affidavit as provided by law is an amendable defect. Cobb v. McCrary, 152 Ga. App. 212, 262 S.E.2d 538 (1979).

Security deposit not part of the estate in bankruptcy. — Security deposits received from tenants and placed in accounts seized by the trustee in bankruptcy were held in trust for the benefit of the tenants. Any property held in trust for the benefit of a third party does not become part of the estate in bankruptcy, accordingly, the trustee could not claim and control the funds from the security deposits as property of the estate. Empire Fin. Servs. v. Gingold (In re Real Estate W. Ventures), 170 Bankr. 736 (Bankr. N.D. Ga. 1993).

RESEARCH REFERENCES

Am. Jur. 2d. — 49 Am. Jur. 2d, Landlord and Tenant, § 60.

C.J.S. — 52A C.J.S., Landlord and Tenant, § 990.

ALR. — Validity and construction of provision of lease or condition of bond protecting lessor from loss in consequence of violation of the liquor law, 62 ALR 431.

44-7-32. Surety bond in lieu of escrow account; withdrawal of surety; fees; liability of clerk of superior court.

(a) As an alternative to the requirement that security deposits be placed in escrow as provided in Code Section 44-7-31, the landlord may post and maintain an effective surety bond with the clerk of the superior court in the county in which the dwelling unit is located. The amount of the bond shall be the total amount of the security deposits which the landlord holds on behalf of the tenants or $50,000.00, whichever is less. The bond shall be executed by the landlord as principal and a surety company authorized and licensed to do business in this state as surety. The bond shall be conditioned upon the faithful compliance of the landlord with Code Section 44-7-34 and the return of the security deposits in the event of the bankruptcy of the landlord or foreclosure of the premises and shall run to the benefit of any tenant injured by the landlord's violation of Code Section 44-7-34.

(b) The surety may withdraw from the bond by giving 30 days' written notice by registered or certified mail or statutory overnight delivery to the clerk of the superior court in the county in which the principal's dwelling unit is located, provided that such withdrawal shall not release the surety from any liability existing under the bond at the time of the effective date of the withdrawal.

(c) The clerk of the superior court shall receive a fee of $5.00 for filing and recording the surety bond and shall also receive a fee of $5.00 for canceling the surety bond. The clerk of the superior court shall not be held personally liable should the surety bond prove to be invalid. (Code 1933, § 61-603, enacted by Ga. L. 1976, p. 1372, § 6; Ga. L. 2000, p. 1589, § 3.)

OPINIONS OF THE ATTORNEY GENERAL

Section 43-40-20 controls as to brokers' escrow accounts. — Requirement of former Code 1933, § 84-1419 (see O.C.G.A. § 43-40-20) that brokers maintain security

deposits only in an escrow account, since it dealt with a more specific class than Ga. L. 1976, p. 1372, § 6 (see O.C.G.A. § 44-7-32), and predated Ga. L. 1976, p. 1372, § 6, was controlling as to that class or in other words, brokers. 1976 Op. Att'y Gen. No. 76-101.

Partners may not purchase surety bond in lieu of escrow accounts. — General partner, who is a licensed broker in a limited partnership may not purchase a surety bond in lieu of placing security deposits in the broker's designated trust account, and, similarly, a partner in a partnership, who is also a licensed real estate broker, may not purchase a surety bond in lieu of placing deposits in a designated trust account. 1984 Op. Att'y Gen. No. 84-80.

RESEARCH REFERENCES

Am. Jur. 2d. — 49 Am. Jur. 2d, Landlord and Tenant, § 523.

C.J.S. — 52A C.J.S., Landlord and Tenant, § 989 et seq.

ALR. — Construction and effect of provision of lease or bond saving liability of tenant or sureties in case of forfeiture of lease or re-entry by landlord, 99 ALR 42.

44-7-33. Lists of existing defects and of damages during tenancy; right of tenant to inspect and dissent; action to recover security deposit.

(a) Prior to tendering a security deposit, the tenant shall be presented with a comprehensive list of any existing damage to the premises, which list shall be for the tenant's permanent retention. The tenant shall have the right to inspect the premises to ascertain the accuracy of the list prior to taking occupancy. The landlord and the tenant shall sign the list and this shall be conclusive evidence of the accuracy of the list but shall not be conclusive as to latent defects. If the tenant refuses to sign the list, the tenant shall state specifically in writing the items on the list to which he dissents and shall sign such statement of dissent.

(b) Within three business days after the date of the termination of occupancy, the landlord or his agent shall inspect the premises and compile a comprehensive list of any damage done to the premises which is the basis for any charge against the security deposit and the estimated dollar value of such damage. The tenant shall have the right to inspect the premises within five business days after the termination of the occupancy in order to ascertain the accuracy of the list. The landlord and the tenant shall sign the list, and this shall be conclusive evidence of the accuracy of the list. If the tenant refuses to sign the list, he shall state specifically in writing the items on the list to which he dissents and shall sign such statement of dissent. If the tenant terminates occupancy without notifying the landlord, the landlord may make a final inspection within a reasonable time after discovering the termination of occupancy.

(c) A tenant who disputes the accuracy of the final damage list given pursuant to subsection (b) of this Code section may bring an action in any court of competent jurisdiction in this state to recover the portion of the security deposit which the tenant believes to be wrongfully withheld for damages to the premises. The tenant's claims shall be limited to those items to which the tenant specifically dissented in accordance with this Code

section. If the tenant fails to sign a list or to dissent specifically in accordance with this Code section, the tenant shall not be entitled to recover the security deposit or any other damages under Code Section 44-7-35, provided that the lists required under this Code section contain written notice of the tenant's duty to sign or to dissent to the list. (Code 1933, § 61-604, enacted by Ga. L. 1976, p. 1372, § 6.)

Law reviews. — For survey article on real property law for the period from June 1, 2002 to May 31, 2003, see 55 Mercer L. Rev. 397 (2003).

JUDICIAL DECISIONS

Withholding security deposit not barred by noncompliance with security deposit provisions. — Even though a landlord did not comply with the provisions of the security deposit statute, this did not bar the landlord from bringing an action to recover unpaid rent due on a lease contract or for withholding the security deposit for nonpayment of rent. Zakaria v. McElwaney, 174 Ga. App. 149, 329 S.E.2d 310 (1985).

Retention prerequisite for written statements. — When the plaintiffs did not retain the defendant's security deposit to cover damages caused by a fire, they were never obligated to provide her with any of the written statements listed in the statute. Travelers Ins. Co. v. Linn, 235 Ga. App. 641, 510 S.E.2d 139 (1998).

No forfeiture when written statements not required. — When a landlord does not retain a security deposit and is therefore not required to provide written statements under O.C.G.A. §§ 44-7-33 and 44-7-34, the landlord's failure to do so cannot work a forfeiture of the right to sue the tenant for damages to the property under O.C.G.A. § 44-7-35(b). Travelers Ins. Co. v. Linn, 235 Ga. App. 641, 510 S.E.2d 139 (1998).

Inspection upon surrender. — Landlord was entitled to retain tenant's security deposit for damages that were not normal wear and tear in the apartment the tenant rented from the landlord pursuant to a lease agreement as the landlord fulfilled the obligation of inspecting the apartment within three days of the date the tenant surrendered the apartment and thereafter notified the tenant of the balance due to repair damage that was not part of normal wear and tear. Cannon v. Wesley Plantation Apts., 256 Ga. App. 244, 568 S.E.2d 137 (2002).

Cited in Kimber v. Towne Hills Dev. Co., 156 Ga. App. 401, 274 S.E.2d 620 (1980).

RESEARCH REFERENCES

Am. Jur. 2d. — 49 Am. Jur. 2d, Landlord and Tenant, § 523.

C.J.S. — 52A C.J.S., Landlord and Tenant, § 989 et seq.

44-7-34. Return of security deposit; grounds for retention of part; delivery of statement and sum due to tenant; unclaimed deposit; court determination of disposition of deposit.

(a) Except as otherwise provided in this article, within one month after the termination of the residential lease or the surrender and acceptance of the premises, whichever occurs last, a landlord shall return to the tenant the full security deposit which was deposited with the landlord by the tenant. No security deposit shall be retained to cover ordinary wear and tear which occurred as a result of the use of the premises for the purposes for which the premises were intended, provided that there was no negligence,

carelessness, accident, or abuse of the premises by the tenant or members of his household or their invitees or guests. In the event that actual cause exists for retaining any portion of the security deposit, the landlord shall provide the tenant with a written statement listing the exact reasons for the retention thereof. If the reason for retention is based on damages to the premises, such damages shall be listed as provided in Code Section 44-7-33. When the statement is delivered, it shall be accompanied by a payment of the difference between any sum deposited and the amount retained. The landlord shall be deemed to have complied with this Code section by mailing the statement and any payment required to the last known address of the tenant via first class mail. If the letter containing the payment is returned to the landlord undelivered and if the landlord is unable to locate the tenant after reasonable effort, the payment shall become the property of the landlord 90 days after the date the payment was mailed. Nothing in this Code section shall preclude the landlord from retaining the security deposit for nonpayment of rent or of fees for late payment, for abandonment of the premises, for nonpayment of utility charges, for repair work or cleaning contracted for by the tenant with third parties, for unpaid pet fees, or for actual damages caused by the tenant's breach, provided the landlord attempts to mitigate the actual damages.

(b) In any court action in which there is a determination that neither the landlord nor the tenant is entitled to all or a portion of a security deposit under this article, the judge or the jury, as the case may be, shall determine what would be an equitable disposition of the security deposit; and the judge shall order the security deposit paid in accordance with such disposition. (Code 1933, § 61-605, enacted by Ga. L. 1976, p. 1372, § 6; Ga. L. 1982, p. 3, § 44.)

JUDICIAL DECISIONS

Applicability. — While Ga. L. 1976, p. 1372, § 6 (see O.C.G.A. § 44-7-35(b)) clearly bars a landlord from withholding a security deposit to cover damages to the premises or from bringing action against the tenant for damages to the premises if the landlord does not provide the specific written statements, it does not bar the landlord from bringing an action to recover unpaid rent due on the lease contract or from withholding the security deposit for nonpayment of rent as provided in Ga. L. 1976, p. 1372, § 6. Kimber v. Towne Hills Dev. Co., 156 Ga. App. 401, 274 S.E.2d 620 (1980).

When there was no retention of the defendant's security deposit, plaintiffs had no obligation to provide, and could not have provided, a statement giving the reasons for retention. Travelers Ins. Co. v. Linn, 235 Ga. App. 641, 510 S.E.2d 139 (1998).

No forfeiture when written statements not required. — When a landlord does not retain a security deposit and is therefore not required to provide written statements under O.C.G.A. § 44-7-33 and 44-7-34, the landlord's failure to do so cannot work a forfeiture of the right to sue the tenant for damages to the property under O.C.G.A. § 44-7-35(b). Travelers Ins. Co. v. Linn, 235 Ga. App. 641, 510 S.E.2d 139 (1998).

Landlord's written notification of the landlord's intent to retain the tenant's security deposit timely mailed to the tenant at the tenant's last known address was sufficient to comply with the requirement that the landlord notify the tenant within one month of

the date the apartment was surrendered that the landlord would be retaining the security deposit; the tenant's claim of never receiving such written notification was without merit as the applicable statute did not require that the notice actually be received in order to allow the landlord to retain the deposit. Cannon v. Wesley Plantation Apts., 256 Ga. App. 244, 568 S.E.2d 137 (2002).

Cited in Chrietzberg v. Kristopher Woods, Ltd., 162 Ga. App. 517, 292 S.E.2d 100 (1982).

RESEARCH REFERENCES

Am. Jur. 2d. — 49 Am. Jur. 2d, Landlord and Tenant, § 525.

C.J.S. — 52A C.J.S., Landlord and Tenant, § 991 et seq.

44-7-35. Remedies for landlord's noncompliance with article.

(a) A landlord shall not be entitled to retain any portion of a security deposit if the security deposit was not deposited in an escrow account in accordance with Code Section 44-7-31 or a surety bond was not posted in accordance with Code Section 44-7-32 and if the initial and final damage lists required by Code Section 44-7-33 are not made and provided to the tenant.

(b) The failure of a landlord to provide each of the written statements within the time periods specified in Code Sections 44-7-33 and 44-7-34 shall work a forfeiture of all his rights to withhold any portion of the security deposit or to bring an action against the tenant for damages to the premises.

(c) Any landlord who fails to return any part of a security deposit which is required to be returned to a tenant pursuant to this article shall be liable to the tenant in the amount of three times the sum improperly withheld plus reasonable attorney's fees; provided, however, that the landlord shall be liable only for the sum erroneously withheld if the landlord shows by the preponderance of the evidence that the withholding was not intentional and resulted from a bona fide error which occurred in spite of the existence of procedures reasonably designed to avoid such errors. (Code 1933, § 61-606, enacted by Ga. L. 1976, p. 1372, § 6.)

JUDICIAL DECISIONS

Applicability. — While Ga. L. 1976, p. 1372, § 6 (see O.C.G.A. § 44-7-35(b)) clearly bars a landlord from withholding a security deposit to recover damages to the premises or from bringing action against the tenant for damages to the premises if the landlord does not provide the specific written statements, it does not bar the landlord from bringing an action to recover unpaid rent due on the lease contract or from withholding the security deposit for nonpayment of rent. Kimber v. Towne Hills Dev. Co., 156 Ga. App. 401, 274 S.E.2d 620 (1980).

When a landlord does not retain a security deposit and is therefore not required to provide written statements under O.C.G.A. §§ 44-7-33 and 44-7-34, the landlord's failure to do so cannot work a forfeiture of the right to sue the tenant for damages to the property under subsection (b) O.C.G.A. § 44-7-35. Travelers Ins. Co. v. Linn, 235 Ga. App. 641, 510 S.E.2d 139 (1998).

Failure to provide defect list works forfei-

ture. — In an insurer's subrogation action against a tenant who had negligently caused damage to a home, the landlord's failure to provide the tenant with a list of existing defects and damages to the home as required by O.C.G.A. § 44-7-33 worked a forfeiture of the insurer's right to recover damages. State Farm Fire & Cas. Co. v. Bajalia, 216 Ga. App. 707, 456 S.E.2d 77 (1995).

Landlord's liability for triple damages. — Since the landlord was not required to return the security deposit lawfully withheld for nonpayment of rent, the landlord was not liable under subsection (c) of Ga. L. 1976, p. 1372, § 6 (see O.C.G.A. § 44-7-35) or three times the amount of the security deposit, as that is a sanction imposed if security deposits are not returned when there are no damages to the premises, unpaid rent, or other charges for which the deposit may be lawfully retained. Kimber v. Towne Hills Dev. Co., 156 Ga. App. 401, 274 S.E.2d 620 (1980).

Trial court properly awarded treble damages and attorney fees since the court apparently determined that landlords improperly withheld $305 of tenant's $450 security deposit and the court apparently allowed the landlords to retain $145 of the tenant's security deposit as rent owing to the landlords. Pleasant v. Luther, 195 Ga. App. 889, 395 S.E.2d 79 (1990).

Tenant's retention of an uncashed security deposit check from the landlord for a period of approximately two weeks pending a scheduled trial date did not manifest an acceptance of it in satisfaction of the tenant's claim for treble damages since the tenant did not acknowledge receipt and retention of the check and had promptly indicated the tenant's rejection of the settlement offer by filing an objection to proposed dismissal of the case. Mehavier v. Tahamtan, 198 Ga. App. 807, 403 S.E.2d 92 (1991).

Evidence as to reasonable attorney's fees required. — By filing a motion requesting the court to award attorney fees under O.C.G.A. § 44-7-35, defendant waived defendant's right to a jury trial on this issue; but since it was clear from the trial court's order that the court failed to hear any evidence on this issue, the court was directed to hear evidence as to reasonable attorney fees. Jackson v. Patton, 157 Ga. App. 410, 277 S.E.2d 769 (1981).

Attorney's fees denied if proof was inadequate. — Denial of attorney fees in the case of an award of damages due to a landlord's failure to return a tenant's security deposit was appropriate since the evidence was inadequate to show what portion of the fees was allocable to the damages award. Augusta Tennis Club, Inc. v. Leger, 186 Ga. App. 440, 367 S.E.2d 263 (1988).

Attorney's fees properly awarded. — In a suit for return of a security deposit, the jury's award of treble damages to the tenant made clear the jury's finding of intentional withholding and, thus, the trial court could not deny the tenant an award of attorney's fees. Preece v. Turman Realty Co., 228 Ga. App. 609, 492 S.E.2d 342 (1997).

Cited in Chrietzberg v. Kristopher Woods, Ltd., 162 Ga. App. 517, 292 S.E.2d 100 (1982); McKay v. Nally, 173 Ga. App. 372, 326 S.E.2d 560 (1985).

RESEARCH REFERENCES

Am. Jur. 2d. — 49 Am. Jur. 2d, Landlord and Tenant, § 522.

C.J.S. — 52A C.J.S., Landlord and Tenant, § 996.

44-7-36. Certain rental units exempt from article.

Code Sections 44-7-31, 44-7-32, 44-7-33, and 44-7-35 shall not apply to rental units which are owned by a natural person if such natural person, his or her spouse, and his or her minor children collectively own ten or fewer rental units; provided, however, that this exemption does not apply to units for which management, including rent collection, is performed by third persons, natural or otherwise, for a fee. (Code 1933, § 61-607, enacted by Ga. L. 1976, p. 1372, § 6.)

JUDICIAL DECISIONS

Cited in McKay v. Nally, 173 Ga. App. 372, 326 S.E.2d 560 (1985).

44-7-37. Liability for rent of military personnel receiving change of duty orders.

Notwithstanding any other provision of this chapter, if a person is on active duty with the United States military and enters into a residential lease of property for occupancy by that person or that person's immediate family and subsequently receives permanent change of station orders or temporary duty orders for a period in excess of three months, any liability of the person for rent under the lease may not exceed:

(1) Thirty days' rent after written notice and proof of the assignment are given to the landlord; and

(2) The cost of repairing damage to the premises caused by an act or omission of the tenant. (Code 1981, § 44-7-37, enacted by Ga. L. 1990, p. 1829, § 1; Ga. L. 1991, p. 94, § 44; Ga. L. 1991, p. 360, § 1.)

Editor's notes. — Ga. L. 1990, p. 1829, § 2 provides that this Code section shall become effective upon its approval by the Governor or upon its becoming law without such approval and shall apply to all leases of residential property entered into on or after the effective date of this Code section. This Code section became effective April 16, 1990.

ARTICLE 3

DISPOSSESSORY PROCEEDINGS

Law reviews. — For note on the 1994 amendments of Code Sections 44-7-53, 44-7-55 to 44-7-56 of this article, see 11 Ga. St. U.L. Rev. 246 (1994).

JUDICIAL DECISIONS

Legislative intent. — A close reading of O.C.G.A. Art. 3, Ch. 7, T. 44 indicates that intent of legislature was to provide landlord with means to regain possession of premises from tenant who fails to make timely payment of rent. Perimeter Mall v. Retail Sense, Inc., 162 Ga. App. 465, 291 S.E.2d 392 (1982).

Exclusivity of remedy. — Summary proceedings here provided are the only lawful manner by which a tenant may be summarily and forcibly evicted. Ralls v. E.R. Taylor Auto Co., 202 Ga. 107, 42 S.E.2d 446 (1947).

Applicability of this article. — Former Code 1933, § 61-301 et seq. (see O.C.G.A. Art. 3, Ch. 7, T. 44) did not apply when the tenant had already relinquished control of the property. Spitzer v. Selig Enters., Inc., 140 Ga. App. 156, 230 S.E.2d 121 (1976).

Amendment of counterclaim by tenant. — Tenant's claim in a dispossessory proceeding that a leased building was in gross disrepair and that part of the terms of the tenancy had been that no rent would be due until the landlord made repairs does not constitute a counterclaim that may be amended. Trust Co. Bank v. Shaw, 186 Ga. App. 347, 367 S.E.2d 82 (1988).

Tenant refusing to relinquish possession. — Former Code 1933, § 61-301 et seq. (see O.C.G.A. Art. 3, Ch. 7, T. 44) obviously concerns itself with those tenants who refuse

to relinquish possession of property after their right of possession has expired either by termination of lease or by failure to pay rental. Spitzer v. Selig Enters., Inc., 140 Ga. App. 156, 230 S.E.2d 121 (1976).

Issue is tenancy or no tenancy. — In a dispossessory proceeding, the issue is tenancy or no tenancy. Miron Motel, Inc. v. Smith, 211 Ga. 864, 89 S.E.2d 643 (1955).

Relationship of landlord and tenant required. — Statutory proceeding authorized by dispossessory proceedings cannot be maintained against a person in possession of premises unless the relation of landlord and tenant exists between the parties. Atlantic Life Ins. Co. v. Ryals, 48 Ga. App. 793, 173 S.E. 875 (1934); Hightower v. Phillips, 184 Ga. 532, 192 S.E. 26 (1937); Fountain v. Davis, 71 Ga. App. 1, 29 S.E.2d 798 (1944); Crain v. Daniel, 79 Ga. App. 647, 54 S.E.2d 487 (1949).

When the parties are in agreement that the document between the parties relating to a mobile home was a sales contract, not a lease, since the absence of a landlord-tenant relationship between the parties is uncontroverted, no question of fact exists that defendant's use of the dispossessory statute was wrongful since the relationship of landlord and tenant must exist before dispossessory proceedings can be held. Sanders v. Hughes, 183 Ga. App. 601, 359 S.E.2d 396, cert. denied, 183 Ga. App. 907, 359 S.E.2d 396 (1987).

Plaintiff may not assert noncompliance with statute in attacking an eviction proceeding, since under Georgia law, it is clear that the person in possession was not a tenant. Parrott v. Wilson, 707 F.2d 1262 (11th Cir.), cert. denied, 464 U.S. 936, 104 S. Ct. 344, 78 L. Ed. 2d 311 (1983) (failure to give formerly required three-day notice prior to eviction).

All related claims to be determined, including rent due. — Law intends for all related claims between the landlord and the tenant to be determinable in the dispossessory proceeding; and the law intends specifically to enable the landlord to collect the rent due the landlord, but the landlord must ask for the rent. Leverette v. Moran, 153 Ga. App. 825, 266 S.E.2d 574 (1980).

Jurisdiction of contested action. — When a default is properly opened and the dispossessory action becomes contested, a justice of the peace loses jurisdiction over the action and is required to transfer the case to a court of record. Lamb v. Housing Auth., 146 Ga. App. 786, 247 S.E.2d 597 (1978).

Demand for possession required. — Proper demand for possession is a condition precedent to the right of a landlord to dispossess. Whipper v. Kirk, 156 Ga. App. 218, 274 S.E.2d 662 (1980).

When demand for possession made. — Demand for possession should be made upon or after the termination of the lease contract. Whipper v. Kirk, 156 Ga. App. 218, 274 S.E.2d 662 (1980).

Application of declaratory judgment statute. — Declaratory judgment statute does not purport to reach back and nullify the rights, remedies, and penalties in favor of landlords which have already accrued provided by statutory provisions, relating to dispossessory warrants when the tenant is already in default; this is true because a court will not take jurisdiction to render a declaratory judgment where another statutory remedy has been especially provided for the character of case presented, if the effect would be to interfere with the right of the parties to appeal to the court given jurisdiction in that particular matter by the statute. Shippen v. Folsom, 200 Ga. 58, 35 S.E.2d 915 (1945).

Contracting to avoid statutory requirements. — Landlord may not avoid in any lease "for the use or rental of real property as a dwelling place" any of the requirements set forth in former Code 1933, § 61-301 et seq. (see O.C.G.A. Art. 3, Ch. 7, T. 44); however, the landlord may contract to avoid these statutory requirements when renting property which was not to be used as a dwelling place. Colonial Self Storage of S.E., Inc. v. Concord Properties, Inc., 147 Ga. App. 493, 249 S.E.2d 310 (1978); Wilkerson v. Chattahoochee Parks, 244 Ga. 472, 260 S.E.2d 867 (1979); Guthrie v. Pilgrim Realty Co., 155 Ga. App. 692, 275 S.E.2d 686 (1980).

Purchaser of land from a landlord during the term of a tenant has the same right to dispossess the tenant for the failure to pay the rent as required by the terms of the lease that the original landlord had. Haynie v. Murray, 74 Ga. App. 253, 39 S.E.2d 567 (1946).

Grantor remaining in possession. — When a security deed provides that, in case of a sale under the power contained in the deed, the grantor or any person in possession under the grantor "shall then become and be tenants holding over and shall forthwith deliver possession to the purchaser at such sale or be summarily dispossessed in accordance with the provisions of law applicable to the tenants holding over," the purchaser at such sale may bring proceedings against the grantor. Redwine v. Frizzell, 184 Ga. 230, 190 S.E. 789 (1937).

Cited in Jones Mercantile Co. v. Smith, 44 F.2d 168 (5th Cir. 1930); Reardon v. Bland, 206 Ga. 633, 58 S.E.2d 377 (1950); Reeves v. Reeves, 217 Ga. 348, 122 S.E.2d 229 (1961); McBride v. Distinctive Food & Entertainment Corp., 133 Ga. App. 424, 211 S.E.2d 28 (1974); Hill v. Hill, 143 Ga. App. 549, 239 S.E.2d 154 (1977); Mathews v. Fidelcor Mtg. Corp., 144 Ga. App. 140, 240 S.E.2d 758 (1977); American Key Corp. v. Metropolitan Atlanta Rapid Transit Auth., 150 Ga. App. 21, 256 S.E.2d 618 (1979); Bradley v. Godwin, 152 Ga. App. 782, 264 S.E.2d 262 (1979); Walters v. Chevron U.S.A., Inc., 154 Ga. App. 636, 269 S.E.2d 495 (1980); Jeffries v. Georgia Residential Fin. Auth., 503 F. Supp. 610 (N.D. Ga. 1980); Omni Int'l, Ltd. v. Mimi's of Atlanta, Inc., 5 Bankr. 623 (N.D. Ga. 1980); Williams-East, Inc. v. Weeks, 156 Ga. App. 861, 275 S.E.2d 801 (1981); Barkley-Cupit Enters., Inc. v. Equitable Life Assurance Soc'y, 157 Ga. App. 138, 276 S.E.2d 650 (1981).

OPINIONS OF THE ATTORNEY GENERAL

Dispossessory proceeding is not a civil action but is merely a summary process setting forth the procedure for the disposition of the property pending trial of any contested issues. 1979 Op. Att'y Gen. No. U79-7.

RESEARCH REFERENCES

ALR. — Judgment for rent for particular period as bar to action for rent for subsequent period, 42 ALR 128.

Construction and effect of provisions of lease as to rights or remedies in event of tenant's failure to vacate, 71 ALR 1448.

Rights of tenant who holds over after expiration of term with consent of the then owner as against mortgagee or lienor pending the original term, or their successors in interest, 98 ALR 216.

Notice by landlord of change in rent or other modification of tenancy as affecting rights and liabilities incident to tenant's holding over after expiration of term or rent period or time fixed by notice, 109 ALR 197.

Tenant's or subtenant's right to damages for claimed constructive eviction or breach of covenant based upon notice to tenant to vacate or other termination notice, 14 ALR2d 1450.

Landlord's consent to extension or renewal of lease as shown by acceptance of rent from tenant holding over, 45 ALR2d 827.

Binding effect on tenant holding over of covenants in expired lease, 49 ALR2d 480.

Estoppel of lessee, because of occupancy of, or other activities in connection with, premises, to assert invalidity of lease because of irregularities in description or defects in execution, 84 ALR2d 920.

Time within which tenant must yield or abandon premises after claimed constructive eviction, 91 ALR2d 638.

Infestation of leased dwelling or apartment with vermin as entitling tenant to abandon premises or as constructive eviction by landlord, in absence of express covenant of habitability, 27 ALR3d 924.

Lessor's retention of past-due rental payments as precluding termination of lease and dispossession of lessee for nonpayment of rent, 39 ALR4th 1204.

What constitutes tenant's holding over leased premises, 13 ALR5th 169.

Excessiveness or inadequacy of punitive damages in cases not involving personal injury or death, 14 ALR5th 242.

44-7-49. "Writ of possession" defined.

As used in this article, the term ''writ of possession'' means a writ issued to recover the possession of land or other property and such writ shall not contain restrictions, responsibilities, or conditions upon the landlord in order to be placed in full possession of the land or other property. (Code 1981, § 44-7-49, enacted by Ga. L. 2007, p. 498, § 1/SB 94.)

JUDICIAL DECISIONS

Challenge to dispossession following foreclosure sale. — In a dispossessory action by the buyer at a foreclosure sale against the occupant of the foreclosed-upon property, a challenge to the validity of the foreclosure failed because the occupant could not attack dispossession without first setting aside the foreclosure and deed. Even if the occupant's defenses were available in a dispossessory proceeding, the court could not review those defenses because the occupant failed to include a trial transcript in the record. Owens v. Green Tree Servicing LLC, 300 Ga. App. 22, 684 S.E.2d 99 (2009).

Invalidity of foreclosure not defense. — In a dispossessory action brought by the buyer at a foreclosure sale against the occupant of the property that had been foreclosed upon, the occupant could not assert the alleged invalidity of the foreclosure sale as a defense. Moreover, the occupant failed to include a trial transcript in the record on appeal. Jackman v. Lasalle Bank, N.A., 299 Ga. App. 894, 683 S.E.2d 925 (2009).

44-7-50. Demand for possession; procedure upon a tenant's refusal; concurrent issuance of federal lease termination notice.

(a) In all cases where a tenant holds possession of lands or tenements over and beyond the term for which they were rented or leased to the tenant or fails to pay the rent when it becomes due and in all cases where lands or tenements are held and occupied by any tenant at will or sufferance, whether under contract of rent or not, when the owner of the lands or tenements desires possession of the lands or tenements, the owner may, individually or by an agent, attorney in fact, or attorney at law, demand the possession of the property so rented, leased, held, or occupied. If the tenant refuses or fails to deliver possession when so demanded, the owner or the agent, attorney at law, or attorney in fact of the owner may immediately go before the judge of the superior court, the judge of the state court, or the clerk or deputy clerk of either court, or the judge or the clerk or deputy clerk of any other court with jurisdiction over the subject matter, or a magistrate in the district where the land lies and make an affidavit under oath to the facts. The affidavit may likewise be made before a notary public, subject to the same requirements for judicial approval specified in Code Section 18-4-61, relating to garnishment affidavits.

(b) If issued by a public housing authority, the demand for possession required by subsection (a) of this Code section may be provided concurrently with the federally required notice of lease termination in a separate writing. (Laws 1827, Cobb's 1851 Digest, p. 901; Ga. L. 1853-54, p. 52, § 4; Ga. L. 1853-54, p. 55, § 1; Ga. L. 1855-56, p. 268, § 1; Code 1863, § 3983;

Ga. L. 1865-66, p. 34, § 1; Code 1868, § 4005; Code 1873, § 4077; Code 1882, § 4077; Civil Code 1895, § 4813; Civil Code 1910, § 5385; Code 1933, § 61-301; Ga. L. 1982, p. 1228, § 1; Ga. L. 1983, p. 884, § 4-1; Ga. L. 1984, p. 892, § 1; Ga. L. 1986, p. 1446, § 9; Ga. L. 1995, p. 577, § 1; Ga. L. 2006, p. 656, § 1.1/HB 1273.)

Law reviews. — For article, ''Distress and Dispossessory Warrants in Georgia,'' see 12 Ga. B.J. 266 (1950). For article surveying real property law, see 34 Mercer L. Rev. 255 (1982). For annual survey article on real property law, see 50 Mercer L. Rev. 307 (1998).

For comment on Wilensky v. Agoos, 74 Ga. App. 815, 41 S.E.2d 565 (1947), see 10 Ga. B.J. 109 (1947).

JUDICIAL DECISIONS

Analysis

General Consideration
When Remedy Available
Demand for Possession
Affidavit
1. Contents
2. Before Whom Made
3. By Whom Made
Defenses
Tort Liability of Landlord
Procedural Matters
Miscellaneous Considerations

General Consideration

For history and general consideration of this statute, see Huff v. Markham, 70 Ga. 284 (1883); Hicks v. Beacham, 136 Ga. 89, 62 S.E. 45 (1908); Carter v. Sutton, 147 Ga. 496, 94 S.E. 760 (1917); Shehane v. Eberhart, 30 Ga. App. 265, 117 S.E. 675 (1923), rev'd, 158 Ga. 743, 124 S.E. 527, answer conformed to, 33 Ga. App. 23, 125 S.E. 506 (1924) (see O.C.G.A. § 44-7-50).

Constitutionality. — Since this statute merely provides for the making of an affidavit before the justice of the peace in dispossessory proceedings, and any contested issue is transferred to a court of record for trial, there can be no conflict between this statute and the Constitution. Lopez v. Dlearo, 232 Ga. 339, 206 S.E.2d 454 (1974) (see O.C.G.A. § 44-7-50).

Strict construction. — Dispossessory proceeding is statutory and must be strictly construed and observed. Young v. Cowles, 128 Ga. App. 770, 197 S.E.2d 864 (1973).

Scope. — Statute does not provide for the trial of title to land. Its sole purpose is the determination of the right of possession between a person claiming to be a landlord and one whom the landlord claims to be the landlord's tenant. Jordan v. Jordan, 103 Ga. 482, 30 S.E. 265 (1898); Willis v. Harrell, 118 Ga. 906, 45 S.E. 794 (1903); Bullard v. Hudson, 125 Ga. 393, 54 S.E. 132 (1906); Boatright v. Eason, 24 Ga. App. 364, 100 S.E. 764 (1919). See also Cassidy v. Clark, 62 Ga. 412 (1879); Hicks v. Beacham, 136 Ga. 89, 62 S.E. 45 (1908); Tatum v. Padrosa, 24 Ga. App. 259, 100 S.E. 653 (1919); Griffeth v. Wilmore, 46 Ga. App. 96, 166 S.E. 673 (1932); Jones v. Windham, 176 Ga. 619, 168 S.E. 6 (1933); Fitzgerald Trust Co. v. Shepard, 60 Ga. App. 674, 4 S.E.2d 689 (1939) (see O.C.G.A. § 44-7-50).

An attack on plaintiff's title to the premises is not permissible in a proceeding for possession under the dispossessory statutes. Roberts v. Collins, 199 Ga. App. 614, 405 S.E.2d 508 (1991).

Purpose of proceeding. — Dispossessory proceeding is one primarily for the recovery of the possession of land. Roland v. Floyd, 53 Ga. App. 282, 185 S.E. 580 (1936).

Purpose not to collect rent. — Dispossessory warrant is a summary statutory

proceeding by a landlord to obtain possession of premises from the landlord's tenant, and the landlord's purpose is not to collect rent claimed to be due but to determine the right of possession to the premises between landlord and tenant. Healey Real Estate & Imp. Co. v. Wilson, 74 Ga. App. 63, 38 S.E.2d 747 (1946); Wilson v. Healey Real Estate & Imp. Co., 203 Ga. 52, 45 S.E.2d 656 (1947). But see Leverette v. Moran, 153 Ga. App. 825, 266 S.E.2d 574 (1980).

Former Code 1933, § 61-301 (see O.C.G.A. § 44-7-50) did not impose a requirement that the landlord terminate the lease before instituting dispossessory proceedings if the landlord did so solely on the basis of nonpayment of rent; rather, a close reading of former Code 1933, § 61-301 et seq. (see O.C.G.A. Art. 3, Ch. 7, T. 44) indicated that the intent of the legislature was to provide a landlord with a means to regain possession of premises from a tenant who fails to make timely payment of rent. Failure to pay rent is a separate ground from that of holding over beyond the term, and it may exist during the term. Metro Mgt. Co. v. Parker, 247 Ga. 625, 278 S.E.2d 643 (1981).

Discretion of landlord to implement statutory procedure. — O.C.G.A. § 44-7-50 provides an additional right or benefit to landlords as a class, and whether or not a landlord wishes to implement the statutorily provided procedure or waive the benefit of the statute is a matter purely within the landlord's discretion. Price v. Age, Ltd., 194 Ga. App. 141, 390 S.E.2d 242 (1990).

Landlord is not required to activate the termination provisions in a lease in order to institute dispossessory proceedings against a tenant on the basis of nonpayment of rent, and the statutory remedy may be exercised at any time the landlord sees fit to use the remedy. Price v. Age, Ltd., 194 Ga. App. 141, 390 S.E.2d 242 (1990).

Waiver of remedy. — Statute is one providing an additional right or benefit to landlords as a class, and whether or not the landlord wishes to waive this benefit is a matter purely within the landlord's discretion. Once the landlord has done so, the landlord cannot thereafter complain that the landlord is being deprived of a right conferred on the landlord by statute. Holden v. Royal Mfg. Co., 79 Ga. App. 767, 54 S.E.2d 317 (1949) (see O.C.G.A. § 44-7-50).

No issue of title involved. — Issue made under this statute is tenancy or no tenancy, and the question of the plaintiff's title is not involved. Patrick v. Cobb, 122 Ga. 80, 49 S.E. 806 (1905); Downs v. Weaver, 184 Ga. 856, 193 S.E. 858 (1937); Fitzgerald Trust Co. v. Shepard, 60 Ga. App. 674, 4 S.E.2d 689 (1939) (see O.C.G.A. § 44-7-50).

Tenancy at sufferance defined. — Tenancy at sufferance exists when a wrongdoer is in possession without the consent of the landlord, but as a result of the landlord's laches or neglect. Thrift v. Schurr, 52 Ga. App. 314, 183 S.E. 195 (1935); Price v. Bloodworth, 55 Ga. App. 268, 189 S.E. 925 (1937).

An estate at sufferance exists when one comes into possession of land by lawful title but keeps the landlord afterward without any title at all. Williams v. Durham, 77 Ga. App. 840, 50 S.E.2d 373 (1948); Hunter v. Ranitz, 88 Ga. App. 182, 76 S.E.2d 542 (1953); Kenner v. Kenner, 92 Ga. App. 851, 90 S.E.2d 33 (1955).

Tenancy at will is based on the consent of the landlord, either express or implied. Thrift v. Schurr, 52 Ga. App. 314, 183 S.E. 195 (1935); Price v. Bloodworth, 55 Ga. App. 268, 189 S.E. 925 (1937).

Tenants at will and sufferance distinguished. — Tenant at will is in possession by right with the consent of the landlord, either express or implied; a tenant at sufferance is a wrongdoer and is in possession without the consent of the landlord, but as a result of the landlord's laches or neglect. Willis v. Harrell, 118 Ga. 906, 45 S.E. 794 (1903). See also Godfrey v. Walker, 42 Ga. 562 (1871); Weed v. Lindsay & Morgan, 88 Ga. 686, 15 S.E. 836, 20 L.R.A. 33 (1892); Henry v. Perry, 110 Ga. 630, 36 S.E. 87 (1900); Salas v. Davis, 120 Ga. 95, 47 S.E. 644 (1904); Purtell v. Farris, 137 Ga. 318, 73 S.E. 634 (1912); Stanley v. Stembridge, 140 Ga. 750, 79 S.E. 842 (1913).

Dispossessory and ejection warrants distinguished. — Dispossessory warrants used in dispossessing tenants holding over, and warrants for the ejection of intruders, are different only insofar as their specific purposes are concerned, such difference depending on the relationship between the parties. Their natures and the ultimate ends the warrants accomplish are the same, the dispossession of one in favor of another who is legally entitled to the possession. Dantley

General Consideration (Cont'd)

v. Burge, 88 Ga. App. 478, 77 S.E.2d 107 (1953).

Distress warrants unaffected. — Statute does not affect the law as to the issuance of distress warrants. Beall v. Hill, 42 Ga. 172 (1871) (see O.C.G.A. § 44-7-50).

Jurisdiction. — State courts are explicitly conferred with subject matter jurisdiction over dispossessory actions. Tauber v. Community Ctrs. Two, 235 Ga. App. 705, 509 S.E.2d 662 (1998).

Trial court had jurisdiction over actions for nonpayment of rent and for holding over; however, it was not necessary to determine whether the trial court exceeded the court's jurisdiction in the landlord's dispossessory action against the tenant in possession of the land, as the trial court erred as a matter of law in denying the landlord's motion for a new trial. SBP Mgmt., LLC v. Price, 277 Ga. App. 130, 625 S.E.2d 523 (2006).

Magistrate court had jurisdiction over dispossessory proceedings involving a property owner who, by remaining in possession of the premises after a lawful foreclosure of the owner's deed to secure debt, became a tenant at sufferance and subject to summary dispossession by the purchaser at the foreclosure sale. California Fed. Sav. & Loan Ass'n v. Day, 193 Ga. App. 690, 388 S.E.2d 727 (1989).

Verdict for rent unauthorized when admitted paid. — In a dispossessory proceeding by the landlord to recover land from the tenant, as one holding over, if the jury should find that the tenant was rightfully in possession of the property under a parol contract, the jury must find a verdict for the defendant, and the jury would not be authorized to find for the plaintiff for rent admitted by the defendant to be paid under the contract. Roland v. Floyd, 53 Ga. App. 282, 185 S.E. 580 (1936).

Tender of payment is equivalent to payment. Arnold v. Selman, 83 Ga. App. 145, 62 S.E.2d 915 (1951).

Constructive eviction. — Landlord who seeks forcibly to evict a tenant by extralegal means may be liable to the tenant in damages, notwithstanding that the tenant is behind in rental payments; whether a tenant was constructively evicted when landlord turned off water was a jury question. Roberts v. Roberts, 205 Ga. App. 371, 422 S.E.2d 253 (1992).

Landlord was entitled to rely upon the default provisions in the commercial lease agreement, which gave the landlord the right to reenter and take possession without notice or resort to legal proceedings, and the landlord acted pursuant to the terms of the lease in reentering and taking possession of the premises for rerental upon default by the tenants for nonpayment of rent; accordingly, the trial court properly granted summary judgment in favor of the landlord on the tenant's claim for trespass, breach of the implied covenant of quiet enjoyment of the premises, and breach of the terms of the lease agreement. Rucker v. Wynn, 212 Ga. App. 69, 441 S.E.2d 417 (1994).

Cited in Culpepper v. Cunningham, 142 Ga. 164, 82 S.E. 549 (1914); Williams v. Federal Land Bank, 44 Ga. App. 606, 162 S.E. 408 (1932); Heaton v. Fulton Nat'l Bank, 46 Ga. App. 773, 169 S.E. 216 (1933); Whitson v. City of Atlanta, 177 Ga. 666, 170 S.E. 888 (1933); Lovell v. Federal Land Bank, 178 Ga. 578, 173 S.E. 390 (1934); Justice v. Warner, 178 Ga. 579, 173 S.E. 703 (1934); Burt v. Crawford, 180 Ga. 331, 179 S.E. 82 (1935); Ford v. Eskridge, 53 Ga. App. 466, 186 S.E. 204 (1936); Sinclair Ref. Co. v. Giddens, 54 Ga. App. 69, 187 S.E. 201 (1936); West v. Flynn Realty Co., 54 Ga. App. 523, 188 S.E. 468 (1936); Johnson v. Reed, 56 Ga. App. 658, 193 S.E. 472 (1937); Neely v. Sheppard, 185 Ga. 771, 196 S.E. 452 (1938); Frazier v. Beasley, 186 Ga. 861, 199 S.E. 194 (1938); Morgan v. Fidelity Trust Co., 65 Ga. App. 873, 16 S.E.2d 522 (1941); Akers v. Kinney, 73 Ga. App. 456, 36 S.E.2d 844 (1946); Cartey v. Swain, 76 Ga. App. 320, 45 S.E.2d 822 (1947); Smith v. R.F. Brodegaard & Co., 77 Ga. App. 661, 49 S.E.2d 500 (1948); Arnold v. Selman, 83 Ga. App. 145, 62 S.E.2d 915 (1951); Estridge v. Janko, 96 Ga. App. 246, 99 S.E.2d 682 (1957); Goff v. Cooper, 110 Ga. App. 339, 138 S.E.2d 449 (1964); Smith v. Allen, 115 Ga. App. 80, 153 S.E.2d 648 (1967); Williams v. Housing Auth., 223 Ga. 407, 155 S.E.2d 923 (1967); Sanks v. Georgia, 401 U.S. 144, 91 S. Ct. 593, 27 L. Ed. 2d 741 (1971); Wilson v. Lee, 129 Ga. App. 647, 200 S.E.2d 480 (1973); Browning v. F.E. Fortenberry & Sons, 131 Ga. App. 498, 206 S.E.2d 101 (1974); First Fed. Sav. &

Loan Ass'n v. Shepherd, 131 Ga. App. 692, 206 S.E.2d 571 (1974); Van Schallern v. Stanco, 132 Ga. App. 794, 209 S.E.2d 243 (1974); Lunsford Co. v. Klingenberg, 138 Ga. App. 791, 227 S.E.2d 507 (1976); Evans v. Equico Lessors, 140 Ga. App. 583, 231 S.E.2d 534 (1976); Jordan v. Ford Motor Credit Co., 141 Ga. App. 280, 233 S.E.2d 256 (1977); Lipshutz v. Shantha, 144 Ga. App. 196, 240 S.E.2d 738 (1977); Burger King Corp. v. Garrick, 149 Ga. App. 186, 253 S.E.2d 852 (1979); Bates v. Chevron U.S.A., Inc., 151 Ga. App. 544, 260 S.E.2d 367 (1979); Lamb v. Sims, 153 Ga. App. 556, 265 S.E.2d 879 (1980); Proffitt v. Housing Sys., 154 Ga. App. 114, 267 S.E.2d 650 (1980); Peter E. Blum & Co. v. First Bank Bldg. Corp., 156 Ga. App. 680, 275 S.E.2d 751 (1980); Jeffries v. Georgia Residential Fin. Auth., 503 F. Supp. 610 (N.D. Ga. 1980); Remy v. Citicorp Person-to-Person Fin. Ctr., Inc., 159 Ga. App. 726, 285 S.E.2d 76 (1981); Stephens v. Housing Auth., 163 Ga. App. 97, 293 S.E.2d 53 (1982); C & A Land Co. v. Rudolf Inv. Corp., 163 Ga. App. 832, 296 S.E.2d 149 (1982); Housing Auth. v. Sterlin, 250 Ga. 95, 296 S.E.2d 564 (1982); Housing Auth. v. Hudson, 250 Ga. 109, 296 S.E.2d 558 (1982); McKinnon v. Shoemaker, 166 Ga. App. 231, 303 S.E.2d 770 (1983); Virginia Highland Assocs. v. Allen, 174 Ga. App. 706, 330 S.E.2d 892 (1985); Skelton v. Hill Aircraft & Leasing Corp., 175 Ga. App. 152, 333 S.E.2d 15 (1985); Ranger v. First Family Mtg. Corp., 176 Ga. App. 715, 337 S.E.2d 388 (1985); Bentley-Kessinger, Inc. v. Jones, 186 Ga. App. 466, 367 S.E.2d 317 (1988); Dykes v. Federal Land Bank, 189 Ga. App. 771, 377 S.E.2d 537 (1989); Dodson v. Farm & Home Sav. Assoc., 208 Ga. App. 568, 430 S.E.2d 880 (1993); Walters v. Betts, 174 Bankr. 636 (Bankr. N.D. Ga. 1994); Solomon v. Norwest Mtg. Corp., 245 Ga. App. 875, 538 S.E.2d 783 (2000); Wilbanks v. Arthur, 257 Ga. App. 226, 570 S.E.2d 664 (2002); GMC Group, Inc. v. Harsco Corp., 293 Ga. App. 707, 667 S.E.2d 916 (2008).

When Remedy Available

In general. — Tenancy such as will authorize the remedy may exist either where the tenant fails to pay rent when due under an express agreement with the landlord, when the tenant holds possession beyond the terms of the tenant's lease, or when the tenant holds possession as a tenant at will or sufferance, whether under contract of rent or not. Thrift v. Schurr, 52 Ga. App. 314, 183 S.E. 195 (1935); Price v. Bloodworth, 55 Ga. App. 268, 189 S.E. 925 (1937); Cunningham v. Moore, 60 Ga. App. 850, 5 S.E.2d 71 (1939).

Right exists apart from rights under lease. — Landlord's right of dispossession for nonpayment of rent exists apart from any right the landlord may have under the lease to terminate the lease for nonpayment of rent. Perimeter Mall v. Retail Sense, Inc., 162 Ga. App. 465, 291 S.E.2d 392 (1982).

When a valid lease exists which does not expressly waive right to dispossess tenant for nonpayment of rent, the landlord may, when rent is due and unpaid, seek dispossession by filing sworn statement of these facts in proper court. Perimeter Mall v. Retail Sense, Inc., 162 Ga. App. 465, 291 S.E.2d 392 (1982).

When a landlord chose to pursue the legislatively-provided dispossessory remedy rather than the contract-provided termination remedy, a notice provision in the lease did not have to be fulfilled because the lease did not expressly waive the statutory right. May v. Poole, 174 Ga. App. 224, 329 S.E.2d 561 (1985).

Motive of the landlord in seeking possession of the landlord's property is immaterial. Williams v. Housing Auth., 158 Ga. App. 734, 282 S.E.2d 141 (1981).

Relation of landlord and tenant required. — Dispossessory warrant will lie only if the relation of landlord and tenant exists. If the defendant holds possession otherwise than as tenant, such as purchaser, donee, or equitable owner, this remedy is not applicable. Brown v. Persons, 48 Ga. 60 (1873); Cassidy v. Clark, 62 Ga. 412 (1879); Allread v. Harris, 75 Ga. 687 (1885); Watson v. Toliver, 103 Ga. 123, 29 S.E. 614 (1897); Williams v. Seale, 103 Ga. 801, 30 S.E. 644 (1898); Henry v. Perry, 110 Ga. 630, 36 S.E. 87 (1900); Sharpe v. Mathews, 123 Ga. 794, 51 S.E. 706 (1905); Bacon v. Howard, 19 Ga. App. 660, 91 S.E. 1066 (1917); Napier v. Varner, 149 Ga. 586, 101 S.E. 580 (1919); Edwards v. Blackshear, 24 Ga. App. 622, 101 S.E. 585 (1919); Spooner v. Shelfer, 152 Ga. 190, 108 S.E. 773 (1921); Allen v. Allen, 154 Ga. 581, 115 S.E. 17 (1922); Sloan v. Sheffield, 31 Ga. App. 437, 120 S.E. 795 (1923); Radcliffe v. Jones,

When Remedy Available (Cont'd)

46 Ga. App. 33, 166 S.E. 450 (1932); Stephenson v. Kellett, 46 Ga. App. 27, 166 S.E. 457 (1932); Griffeth v. Wilmore, 46 Ga. App. 96, 166 S.E. 673 (1932); Thrift v. Schurr, 52 Ga. App. 314, 183 S.E. 195 (1935); Price v. Bloodworth, 55 Ga. App. 268, 189 S.E. 925 (1937); Patterson v. Baugh, 56 Ga. App. 660, 193 S.E. 364 (1937); Downs v. Weaver, 58 Ga. App. 259, 198 S.E. 292 (1938); Williams v. Stark, 75 Ga. App. 668, 44 S.E.2d 300 (1947); Carruth v. Carruth, 77 Ga. App. 131, 48 S.E.2d 387 (1948); Hunter v. Ranitz, 88 Ga. App. 182, 76 S.E.2d 542 (1953); Fountain v. Grant, 210 Ga. 78, 77 S.E.2d 721 (1953); Roberts v. Graham, 98 Ga. App. 309, 105 S.E.2d 801 (1958); Harold v. Modern Homes Constr. Co., 104 Ga. App. 415, 121 S.E.2d 809 (1961); Branch v. Wesav Fin. Corp., 198 Ga. App. 347, 401 S.E.2d 569 (1991).

Relationship of legal title holder and tenant at sufferance satisfies section. — Although the relationship of landlord and tenant must exist before a dispossessory hearing can be held under O.C.G.A. § 44-7-50 et seq., the provisions of § 44-7-50 are clearly satisfied when the relationship between the parties is that of legal title holder and tenant at sufferance. Stevens v. Way, 167 Ga. App. 688, 307 S.E.2d 507 (1983); Browning v. Federal Home Loan Mtg. Corp., 210 Ga. App. 115, 435 S.E.2d 450 (1993); Good Ol' Days Commissary, Inc. v. Longcrier Family Ltd. Partnership I, 240 Ga. App. 111, 522 S.E.2d 249 (1999).

Trial court did not err in granting the creditor a writ of possession regarding the subject property because the debtors' legal right to possession of the property ended when the creditor became the legal title holder of the property as the purchaser at a foreclosure sale, and the debtors, as tenants at sufferance, were subject to being summarily dispossessed as a result. Bradley v. JPMorgan Chase Bank, 289 Ga. App. 704, 658 S.E.2d 240 (2008).

Action for possession supported by landlord-tenant relationship. — When defendant contended that no landlord-tenant relationship was shown to exist between the parties, and that the action consequently should have been for ejectment pursuant to O.C.G.A. § 44-11-1, rather than for possession, pursuant to O.C.G.A. § 44-7-50, but defendant conceded that it had been defendant's intention to include the house in the property conveyed by security deed and the trial court was authorized to conclude from the evidence that the house was so included, it was held that when the defendant defaulted on the debt and the security deed was foreclosed upon, the relationship between the parties became that of landlord and tenant at sufferance. West v. VA, 182 Ga. App. 767, 357 S.E.2d 121 (1987).

Execution of deed to secure debt establishes landlord-tenant relationship. — When proof of execution of a deed to secure a debt upon which landlord claimed ownership was necessary to establish a landlord-tenant relationship between parties in order to provide jurisdiction of a court in a dispossessory action, such proof of execution was properly before the court to preclude contrary assertions concerning execution by a homeowner in a subsequent action. Rutledge v. Colonial Fin. Servs., Inc., 173 Ga. App. 662, 327 S.E.2d 791 (1985).

Time of remedy. — This remedy may be exercised at any time the landlord sees fit to use it. So long as the relation of landlord and tenant exists, the remedy is available; but if the relation be once destroyed, the remedy is no longer available. Willis v. Harrell, 118 Ga. 906, 45 S.E. 794 (1903). See also Godfrey v. Walker, 42 Ga. 562 (1871); Taylor v. West, 142 Ga. 193, 82 S.E. 518 (1914); Colvin v. Colvin, 24 Ga. App. 630, 101 S.E. 586 (1919).

Who may use remedy. — Agents, attorneys-in-fact, or attorneys-at-law may proceed for and in behalf of landlords against tenants to collect rent past due or to recover possession of the premises. Jackson v. Oliphant, 88 Ga. App. 313, 76 S.E.2d 625 (1953).

Remedy for failure to pay rent. — In all cases when a tenant holding possession of land shall fail to pay the rent when the rent becomes due, the landlord is afforded a summary remedy for the tenant's eviction. Veal v. Jenkins, 58 Ga. App. 4, 197 S.E. 328 (1938).

Tenant in arrears for rent. — When the tenant is in arrears for rent, it is only necessary for the landlord to make affidavit of that fact and of a demand and refusal to deliver, whereupon the warrant issues. Bussell v. Swift, 50 Ga. App. 148, 177 S.E. 277 (1934);

Craig v. Day, 92 Ga. App. 339, 88 S.E.2d 451 (1955).

Rent must be past due. — To dispossess a tenant for nonpayment of rent, proceedings must be begun by the landlord at a time when such rent is past due and unpaid. Yates v. Farmer, 102 Ga. App. 570, 117 S.E.2d 211 (1960).

Refusal to accept past due rent. — Party to a legal contract has the right to insist upon the contract's terms, and in refusing to accept the past due rent the landlord here was clearly within the landlord's rights, and the rent remained unpaid. In these circumstances the tenants were holding over, and the landlord had the right of immediate reentry and dispossession. Cunningham v. Moore, 60 Ga. App. 850, 5 S.E.2d 71 (1939).

Remedy proper for tenant at sufferance. — If the defendant was a tenant at sufferance, the dispossessory warrant was a proper remedy. Williams v. Durham, 77 Ga. App. 840, 50 S.E.2d 373 (1948).

Cropper. — When, after the expiration and termination of a contract by which a person has occupied premises as a cropper and not as a tenant, the person continues in possession of the premises, but not as a cropper, the person occupies the premises as a tenant by sufferance, and can be summarily dispossessed. Malone v. Floyd, 50 Ga. App. 701, 179 S.E. 176 (1935).

Seller remaining in possession. — When title has been divested by a sale made pursuant to a power of sale given by the owner in a deed to the land to secure a debt, and the tenant thereafter remains in possession, the tenant is a tenant at sufferance of the purchaser, and may be summarily dispossessed. Anderson v. Watkins, 42 Ga. App. 319, 156 S.E. 43 (1930); Lowther v. Patton, 45 Ga. App. 543, 165 S.E. 487 (1932); Radcliffe v. Jones, 46 Ga. App. 33, 166 S.E. 450 (1932); Atlantic Life Ins. Co. v. Ryals, 48 Ga. App. 793, 173 S.E. 875 (1934); Price v. Bloodworth, 55 Ga. App. 268, 189 S.E. 925 (1937); Ray v. Holden, 62 Ga. App. 554, 8 S.E.2d 703 (1940); Hunter v. Ranitz, 88 Ga. App. 182, 76 S.E.2d 542 (1953); Harold v. Modern Homes Constr. Co., 104 Ga. App. 415, 121 S.E.2d 809 (1961).

Effect of oral notification of election to extend lease. — When lease did not provide any particular method for notification of the election to extend the lease, tenant who gave oral notification of the tenant's election prior to expiration of the original three-year term was in possession under the original written lease and was not a tenant at will who could be subject to disposition. Ask Enters., Inc. v. Johnson Model Bedding, Inc., 155 Ga. App. 294, 270 S.E.2d 709 (1980).

Possession under option to purchase. — One who obtains possession of the premises from the owner under an option to purchase is not a tenant upon one's failure to exercise the option, and a dispossessory proceeding will not lie to evict one therefrom. Griffeth v. Wilmore, 46 Ga. App. 96, 166 S.E. 673 (1932).

Heir of tenant at sufferance. — When a father, who has possession of and title to certain realty, sells the legal title to his son, but remains in possession with his wife and daughter with no agreement or understanding with the son concerning the payment of rent on the premises, the father becomes the tenant at sufferance of the son; and, where, upon the death of the father, his wife and daughter remain in possession with no agreement or understanding with the son concerning their payment of rent, they succeed to the position of the father as tenants at sufferance of the son, and he may evict them by the summary proceeding for which provision is made in this statute. Kenner v. Kenner, 92 Ga. App. 851, 90 S.E.2d 33 (1955) (see O.C.G.A. § 44-7-50).

Trustees of unincorporated religious society, holding title in themselves to the society's real property, may bring a dispossessory proceeding through their secretary and agent against a tenant in possession of the property who is holding over and beyond the tenant's term and who refuses to pay rent. Godfrey v. Walker, 42 Ga. 562 (1871); Jackson v. Oliphant, 88 Ga. App. 313, 76 S.E.2d 625 (1953).

Purchaser of land from a landlord during the term of the tenant has the same right to dispossess the tenant that the landlord had. Morrow v. Sawyer, 82 Ga. 226, 8 S.E. 51 (1888); Hindman v. Raper, 143 Ga. 643, 85 S.E. 843 (1915); May v. McDaniel, 145 Ga. 160, 88 S.E. 934 (1916); Carlton v. Hibernia Sav., Bldg. & Loan Ass'n, 185 Ga. 425, 195 S.E. 764 (1938); Veal v. Jenkins, 58 Ga. App. 4, 197 S.E. 328 (1938); McKinney v. South Boston Sav. Bank, 156 Ga. App. 114, 274 S.E.2d 34 (1980).

When Remedy Available (Cont'd)

Plaintiff need not be owner. — Lessee is not precluded from prosecuting a dispossessory warrant simply because the lessee is not the true owner of the premises. Empire Shoe Co. v. Regal Shoe Shops, 123 Ga. App. 796, 182 S.E.2d 796 (1971).

Tenants in common. — When the parties at the time the demand for the possession is made are tenants in common, one having title and the other the right to occupy a part of the premises, neither of the tenants in common can legally obtain a dispossessory warrant for the removal of the other. Roberts v. Graham, 98 Ga. App. 309, 105 S.E.2d 801 (1958).

Motive of landlord immaterial. — When a landlord shows oneself to be entitled under the statute to the summary remedy of a dispossessory warrant one's motive in desiring possession is immaterial, and the fact that in the present case it was made to appear that the landlord had a prospect of leasing the premises to better advantage cannot alter or diminish one's statutory rights. Cunningham v. Moore, 60 Ga. App. 850, 5 S.E.2d 71 (1939).

Violation of covenant not to sublet. — Remedy does not lie for a tenant's violation of a covenant not to sublet. Rakestraw v. Lubbock, 26 Ga. App. 330, 106 S.E. 190 (1921).

Demand for Possession

Necessity of demand for possession. — Demand upon a tenant to deliver possession to the tenant's landlord is a condition precedent to the right of the landlord to dispossess the tenant summarily. Broadwell v. Maxwell, 30 Ga. App. 738, 119 S.E. 344 (1923). See also Willis v. Harrell, 118 Ga. 906, 45 S.E. 794 (1903); Talley v. Mitchell, 138 Ga. 392, 75 S.E. 465 (1912); Levens v. Arp, 23 Ga. App. 198, 97 S.E. 893 (1919); Beveridge v. Simmerville, 26 Ga. App. 373, 106 S.E. 212 (1921); Bussell v. Swift, 50 Ga. App. 148, 177 S.E. 277 (1934); Gilbert Hotel No. 22, Inc. v. Black, 67 Ga. App. 221, 19 S.E.2d 796 (1942); Jackson v. Hardin, 74 Ga. App. 39, 38 S.E.2d 695 (1946); Ginn v. Johnson, 74 Ga. App. 35, 38 S.E.2d 753 (1946); Oastler v. Wright, 201 Ga. App. 649, 40 S.E.2d 531 (1946); Wilensky v. Agoos, 74 Ga. App. 815, 41 S.E.2d 565 (1947); Jett v. Wolfe, 75 Ga. App. 155, 42 S.E.2d 505 (1947); Arnold v. Selman, 83 Ga. App. 145, 62 S.E.2d 915 (1950); Goolsby v. McNair, 97 Ga. App. 491, 103 S.E.2d 440 (1958); Terrell v. Griffith, 129 Ga. App. 675, 200 S.E.2d 485 (1973); Harkins v. Boyd, 136 Ga. App. 365, 221 S.E.2d 207 (1975); Wig Fashions, Inc. v. A-T-O Properties, Inc., 145 Ga. App. 325, 243 S.E.2d 526 (1978); Housing Auth. v. Berryhill, 146 Ga. App. 374, 246 S.E.2d 406 (1978); Metro Mgt. Co. v. Parker, 156 Ga. App. 686, 275 S.E.2d 827 (1980); Metro Mgt. Co. v. Parker, 247 Ga. 625, 278 S.E.2d 643 (1981); Booker v. Trizec Properties, Inc., 184 Ga. App. 782, 363 S.E.2d 13 (1987), cert. denied, 184 Ga. App. 909, 363 S.E.2d 13 (1988); Trumpet v. Brown, 215 Ga. App. 299, 450 S.E.2d 316 (1994) (see O.C.G.A. § 44-7-50).

Prima-facie proof of demand not required. — While demand for possession is a condition precedent to the institution of dispossessory proceedings, and although proof should be made, the dispossessory Code sections do not require prima-facie proof of demand for possession by the plaintiff as a statutory procedure. Able-Craft, Inc. v. Bradshaw, 167 Ga. App. 725, 307 S.E.2d 671 (1983).

Proof of demand. — When a tenant had filed for bankruptcy and agreed in a bankruptcy consent order to vacate the premises by a specific date and to lift the automatic stay against any future dispossessory action by the landlord, the trial court could reasonably infer that the landlord had already made a demand for possession of the premises. Green Room, Inc. v. Confederation Life Ins. Co., 215 Ga. App. 221, 450 S.E.2d 290 (1994).

Well-pleaded complaint rule. — In a case in which a landlord sought a dispossessory writ pursuant to O.C.G.A. § 44-7-50 in state court and the tenant removed the case to federal court, the landlord's motion to remand was granted because the complaint relied exclusively on state law, and thus did not satisfy the well-pleaded complaint rule, and the tenant failed to demonstrate grounds for the application of any exception to the well-pleaded complaint rule. Chase Manhattan Mortg. Corp. v. Gresham, No. 1:05-cv-1944-WSD, 2005 U.S. Dist. LEXIS 29994 (N.D. Ga. Nov. 17, 2005).

Sufficiency of demand. — Two month's notice to a tenant at will to quit is an

insufficient demand to comply with the requirements of this statute, nor will an agreement by the tenant with the landlord to vacate by a certain date operate in lieu of the demand required by the statute. Beveridge v. Simmerville, 26 Ga. App. 373, 106 S.E. 212 (1921); Ginn v. Johnson, 74 Ga. App. 35, 38 S.E.2d 753 (1946); Wilensky v. Agoos, 74 Ga. App. 815, 41 S.E.2d 565 (1947); Jett v. Wolfe, 75 Ga. App. 155, 42 S.E.2d 505 (1947) (see O.C.G.A. § 44-7-50).

Demand is sufficient notice to the tenant when the ground for the action is the nonpayment of rent due. Morris v. Battey, 28 Ga. App. 90, 110 S.E. 342 (1922).

Timely demand for possession is a condition precedent to the institution of dispossessory proceedings under O.C.G.A. § 44-7-50; a demand for payment of rent or a debt is not timely unless made after the rent or debt becomes due, and a demand for possession based on nonpayment of rent would not be timely under § 44-7-50 unless the rent had fallen due and the tenant had failed to make payment. Metro Mgt. Co. v. Parker, 247 Ga. 625, 278 S.E.2d 643 (1981).

Landlord's letter terminating the lease and instructing tenant ''to vacate your premises as of the receipt of this letter,'' constituted a sufficient demand for possession, and was not rendered ineffective by also giving notice in the same document of demand for payment of notes given for back rent and attorney's fees and notice that attorney's fees would be demanded if not paid within ten days. Twin Tower Joint Venture v. American Mktg. & Communications Corp., 166 Ga. App. 364, 304 S.E.2d 493 (1983).

Certified letter of notice that tenant must surrender possession and quit the premises if rent due and owing is not paid within three days of the date of notice is a sufficient notice of demand for possession. Sandifer v. Long Investors, Inc., 211 Ga. App. 757, 440 S.E.2d 479 (1994).

Time for demand. — Demand for possession should have been made upon or after the termination of the lease contract. Edmondson v. White, 19 Ga. 534 (1856); Wilensky v. Agoos, 74 Ga. App. 815, 41 S.E.2d 565 (1947); Wig Fashions, Inc. v. A-T-O Properties, Inc., 145 Ga. App. 325, 243 S.E.2d 526 (1978).

Demand by agent sufficient. — Demand by one alleging to be the agent of the landlord, where there is no contention that such person is not such agent of the landlord, is sufficient to meet the requirements of this statute. Bussell v. Swift, 50 Ga. App. 148, 177 S.E. 277 (1934) (see O.C.G.A. § 44-7-50).

When demand unnecessary. — It is not necessary to prove a demand for the possession of the premises since it appears that the demand, if made, would have been refused. Craig v. Day, 92 Ga. App. 339, 88 S.E.2d 451 (1955); Kenner v. Kenner, 92 Ga. App. 851, 90 S.E.2d 33 (1955).

Demand for possession is a condition precedent to the right of the landlord to dispossess the tenant. It is not necessary, however, to prove a demand since it appears that if the demand is made it would be refused. Hyman v. Leathers, 168 Ga. App. 112, 308 S.E.2d 388 (1983); Henderson v. Colony W., Ltd., 175 Ga. App. 676, 332 S.E.2d 331 (1985).

Rebuttable presumption of demand. — While the defendant did not deny in the defendant's counteraffidavit that a demand for possession had been made upon the defendant by the plaintiff prior to the issuance of the dispossessory warrant, and the defendant's failure to do so raised a presumption of law that such a demand was made, still such presumption must give way to the direct and positive testimony of the defendant on the trial that no demand was made upon the defendant for possession by anyone prior to the issuance of the dispossessory warrant. Ginn v. Johnson, 74 Ga. App. 35, 38 S.E.2d 753 (1946).

No demand made. — When the testimony of defendant's agent established without any evidence to the contrary that the only demand for possession of the premises had been made on the previous tenant, not on defendant, the presumption raised by the allegation in the affidavit that demand was made was rebutted by direct and positive evidence, and the trial court erred by denying defendant's motion for directed verdict. Jet Air, Inc. v. Management/USA, Inc., 180 Ga. App. 648, 350 S.E.2d 40 (1986).

Notice of termination of lease by public housing authority could not also serve as a demand for possession under O.C.G.A. § 44-7-50, not because in every instance of nonpayment of rent the landlord must terminate the lease before making a demand for possession, but because under the fed-

Demand for Possession (Cont'd)

eral regulations the landlord does not have the right to possession of the premises during the 14 day grace period; furthermore, the landlord is prohibited from taking any legal action against the tenant during this time, including making a demand for possession. Metro Mgt. Co. v. Parker, 247 Ga. 625, 278 S.E.2d 643 (1981).

If the ground for dispossession is nonpayment of rent, O.C.G.A. § 44-7-50 provides that a landlord may make a demand for possession when the tenant fails to pay the rent when due; this right exists apart from any right the landlord may have under a lease to terminate the lease for nonpayment of rent. Metro Mgt. Co. v. Parker, 247 Ga. 625, 278 S.E.2d 643 (1981).

If the ground for dispossession is that the tenant is a holdover, there is a requirement for termination of the lease simply to place the tenant in the status of a holdover; since this requirement for termination exists, it must occur prior to the demand for possession. Metro Mgt. Co. v. Parker, 247 Ga. 625, 278 S.E.2d 643 (1981).

Once the lease has been terminated, a tenant who refuses to vacate becomes a tenant holding over, and a demand for possession may properly be made on the tenant under O.C.G.A. § 44-7-50. Metro Mgt. Co. v. Parker, 247 Ga. 625, 278 S.E.2d 643 (1981).

When the landlord gave a notice to quit, the tenants were in a hold-over status when the landlord demanded possession of the property by letter, and the demand was timely made under O.C.G.A. § 44-7-50. Burns v. Reves, 217 Ga. App. 316, 457 S.E.2d 178 (1995).

Affidavit

1. Contents

Sufficiency of affidavit. — Sufficiency of an affidavit seeking a dispossessory warrant must be measured by the same strict rules applicable prior to the Civil Practice Act since the Act does not apply if in conflict with special statutory proceedings. Brinson v. Ingram, 120 Ga. App. 271, 170 S.E.2d 39 (1969).

Affidavit has to be sufficiently definite and certain in the description of the land to enable the sheriff to identify the premises. Brinson v. Ingram, 120 Ga. App. 271, 170 S.E.2d 39 (1969).

Alternative grounds insufficient. — When an affidavit under this statute alleging one ground for dispossessing a tenant is followed by the words ''or/and'' and then another ground, it is not a positive allegation of either ground, and is subject to an oral motion to dismiss. Ralls v. E.R. Taylor Auto Co., 75 Ga. App. 136, 42 S.E.2d 656 (1947); Saylor v. Williams, 93 Ga. App. 643, 92 S.E.2d 565 (1956); Brinson v. Ingram, 120 Ga. App. 271, 170 S.E.2d 39 (1969); Rinconcito Latino, Inc. v. Eriksson, 145 Ga. App. 340, 243 S.E.2d 721 (1978) (see O.C.G.A. § 44-7-50).

Demand for rent unnecessary. — Affidavit need not allege demand for rent. Colclough & Co. v. Mathis, 79 Ga. 394, 4 S.E. 762 (1887); Almand v. Scott & Co., 83 Ga. 402, 11 S.E. 653 (1889).

Amount of unpaid rent irrelevant. — Affidavit need not specify the amount of the rent unpaid. Lamar v. Sheppard, 84 Ga. 561, 10 S.E. 1084 (1890).

Amendable defect in landlord's name. — Affidavit is amendable for such errors as the insertion of the tenant's name at a place where obviously the name of the landlord is intended. Lanier v. Kelly, 6 Ga. App. 738, 65 S.E. 692 (1909).

Affidavit held sufficient. — Affidavit of the plaintiff, upon which the dispossessory warrant proceeding was founded, alleging as a basis for the issuing of such warrant, ''that said tenant is holding said offices and premises over and beyond the term for which the same were rented or leased to him,'' fully complied with this statute and such affidavit was not subject to demurrer on the grounds that it did not allege the nature or character of the tenancy, whether it was a tenancy at will or a tenancy for a definite term, when the tenancy began or when the tenancy terminated, nor when or how demand for possession was made so as to enable the defendant to properly prepare for trial. Wilson v. Healey Real Estate & Imp. Co., 203 Ga. 52, 45 S.E.2d 656 (1947) (see O.C.G.A. § 44-7-50).

Error to dismiss affidavit. — When an affidavit is in strict accordance with this statute and there are no patent defects in the affidavit, its dismissal on the ground of patent defects apparent in the face of the

paper is error. Hitch v. Frasier, 75 Ga. 880 (1885) (see O.C.G.A. § 44-7-50).

2. Before Whom Made

Any justice of peace may administer oath, not only the one of the district wherein the land lies. DuBignon v. Tufts, 66 Ga. 59 (1880); Fletcher v. Collins, 111 Ga. 253, 36 S.E. 646 (1900); Sistrunk v. State, 18 Ga. App. 42, 88 S.E. 796 (1916).

Affidavit before notary public insufficient. — Notaries public do not have authority to administer the oath required for an affidavit on which a dispossessory warrant is issued. Young v. Cowles, 128 Ga. App. 770, 197 S.E.2d 864 (1973).

Affidavit before clerks of court. — Oath required for the affidavit on which the dispossessory warrant is issued may be given only by a justice of the peace or a superior court judge, or such other judicial officer as may be authorized by law. The latter includes clerks and deputy clerks of the civil court of Fulton County. Young v. Cowles, 128 Ga. App. 770, 197 S.E.2d 864 (1973).

Affidavit before civil court judge. — Judges of the civil court of Fulton County are on a par with superior court judges or justices of the peace as to the issuance of dispossessory warrants, but the requirement that the affidavit be taken before the judge issuing the warrant must still be met. Young v. Cowles, 128 Ga. App. 770, 197 S.E.2d 864 (1973).

Affidavit before state court judge. — Affidavit which under this statute is to be made ''before the judge of the superior court or any justice of the peace,'' includes such other judicial officers as may be authorized by law, including judges of the state courts of each county. Howington v. W.H. Ferguson & Sons, 147 Ga. App. 636, 249 S.E.2d 687 (1978) (see O.C.G.A. § 44-7-50).

Amendable defect in verification. — When the subject affidavit was sworn to and subscribed before a notary public, rather than before the judge of the superior court or any justice of the peace, and a summons was issued, there is an amendable defect in verification or lack thereof, waived by failure timely to object. Crump v. Jordan, 154 Ga. App. 503, 268 S.E.2d 787 (1980).

3. By Whom Made

Affidavit by agent. — Affidavit may be made by an agent of the landlord. Johnson v. Thrower, 117 Ga. 1007, 44 S.E. 846 (1903).

Affidavit by administrator. — Affidavit may be made by the administrator of a deceased landlord. Moody v. Ronaldson, 38 Ga. 652 (1869). See also Clark v. Smith, 142 Ga. 200, 82 S.E. 563 (1914).

Affidavit by attorney prohibited. — Affidavit may not be made by the landlord's attorney in the landlord's name, but may be made in the name of the maker as agent or attorney. Clark v. Smith, 142 Ga. 200, 82 S.E. 563 (1914).

Affidavit by attorney. — When an affidavit to obtain a dispossessory warrant is made by an attorney at law or an attorney in fact for the owner, the affidavit shall contain a recital of the employment and be signed by the attorney in the attorney's individual name, and the word ''Atty.'' following a person's name is merely descriptio personae and, consequently, not sufficient. Heath v. Costello, 76 Ga. App. 94, 44 S.E.2d 919 (1947).

No need to disclose which permissible affiant signed. — Dispossessory warrant was not fatally flawed as O.C.G.A. § 44-7-50(a) did not require the warrant to state which of the permissible affiants had signed it and the mortgagee's attorney had validly signed the warrant. Mackey v. Fed. Nat'l Mortg., 294 Ga. App. 495, 669 S.E.2d 397 (2008).

Defenses

Answer asserting tenant's title. — Counteraffidavit to a dispossessory proceeding under this statute which sets up title in the alleged tenant is good. Griffeth v. Wilmore, 46 Ga. App. 96, 166 S.E. 673 (1932) (see O.C.G.A. § 44-7-50).

Evidence of superior title inadmissible. — In dispossessory warrant proceeding, brought by tenant against subtenant for nonpayment of rent, subtenant could not set up a superior title in the owner of the premises, who had leased the premises to the subtenant's lessor, since the owner had not elected to treat the subtenant as the owner's tenant, or to release the original tenant, the subtenant's lessor. Veazey v. Sinclair Ref. Co., 66 Ga. App. 730, 19 S.E.2d 53 (1942).

Defects in landlord's title cannot be raised as defense to proceeding for possession. McKinney v. South Boston Sav. Bank, 156 Ga. App. 114, 274 S.E.2d 34 (1980).

Claimed defects in the landlord's title to

Defenses (Cont'd)

premises cannot be raised as a defense to a proceeding for possession. The defendants' claim that the defendants owned the premises was relevant only to the extent that it challenged the allegations that the plaintiff owned the premises and that the defendants were tenants at sufferance, i.e., that the plaintiff was a landlord with right of immediate possession. Thomas v. Wells Fargo Credit Corp., 200 Ga. App. 592, 409 S.E.2d 71 (1991), cert. denied, 200 Ga. App. 897, 409 S.E.2d 71 (1991); Hague v. Kennedy, 205 Ga. App. 586, 423 S.E.2d 283, cert. denied, 205 Ga. App. 900, 423 S.E.2d 283 (1992).

Although the defense of lack of a landlord-tenant relationship is a proper defense to a dispossessory action, claimed defects in the landlord's title to the premises cannot be raised as a defense to a proceeding for possession. Bridges v. City of Moultrie, 210 Ga. App. 697, 437 S.E.2d 368 (1993).

A tenant's allegation of a defect in the landlord's title to the leased premises could not be raised as a defense to a proceeding for possession under O.C.G.A. § 44-7-50 et seq., although the tenant could raise the claimed defect in a separate proceeding. Sanders v. Daniel, 302 Ga. App. 350, 691 S.E.2d 244 (2010).

Void sale no defense. — Defense that sale of premises under power of sale in loan deed in favor of plaintiff was void on account of its improper exercise or because loan was not mature, could not be set up as a defense to a dispossessory proceeding. Ryals v. Atlantic Life Ins. Co., 53 Ga. App. 469, 186 S.E. 197 (1936).

Because two borrowers' allegation of wrongful foreclosure of their home was not a valid defense to a dispossessory action brought by the purchaser of their home at a nonjudicial foreclosure sale, pursuant to O.C.G.A. §§ 44-7-50 and 44-7-53, the trial court's order issuing a writ of dispossession was affirmed. Vines v. LaSalle Bank Nat'l Ass'n, 302 Ga. App. 353, 691 S.E.2d 242 (2010).

Extraneous contract inadmissible. — In proceeding by dispossessory warrant brought by a purchaser of land from the original landlord, a contention by the tenants that plaintiff's vendor had violated an oral option given the tenants to purchase the land before selling the land to any other purchaser did not present a valid defense, and evidence tending to show such a contract should have been excluded on the timely motion of the plaintiff. Minor v. Sutton, 73 Ga. App. 253, 36 S.E.2d 158 (1945).

In a dispossessory action by purchasers at a foreclosure sale, answer by former owners that the purchase was void because the foreclosure was not authorized was not germane to the proceeding because the purchasers were owners of the property unless and until the foreclosure was set aside. Womack v. Columbus Rentals, Inc., 223 Ga. App. 501, 478 S.E.2d 611 (1996).

Purchaser at foreclosure sale can lawfully institute dispossessory proceedings against the defaulting mortgagor, who may not assert that the advertisement of the property was invalid, because such an assertion is an attack on the purchaser's title to the premises. Partin v. Southern Disct. Co., 167 Ga. App. 798, 307 S.E.2d 697 (1983).

Tort Liability of Landlord

Liability for non-compliance with this section. — Landlord who forcibly ejects a tenant without complying with the provisions of this statute is liable to the tenant in trespass, though the latter be at the time holding over beyond the tenant's term, in arrears for rent, and in receipt of due notice to quit. Clifford v. Gressiner, 96 Ga. 789, 22 S.E. 399 (1895); Entelman v. Hagood, 95 Ga. 390, 22 S.E. 545 (1895); Ray v. Boyd, 96 Ga. 808, 22 S.E. 916 (1895); Broxton v. Ennis, 96 Ga. 792, 22 S.E. 945 (1895); Rape v. Gunn, 96 Ga. 791, 22 S.E. 962 (1895); Blitch & Newton v. Edwards, 96 Ga. 606, 24 S.E. 147 (1895); Lanier v. Kelly, 6 Ga. App. 738, 65 S.E. 692 (1909); Collins v. Baker, 51 Ga. App. 669, 181 S.E. 425 (1935); Teston v. Teston, 135 Ga. App. 321, 217 S.E.2d 498 (1975) (see O.C.G.A. § 44-7-50).

Liability of landlord for trespass in absence of breach by tenant. — When a tenant has not breached the contract of rental, but is entitled to possession of the rented premises, and this is known to the landlord, the act of the landlord in maliciously causing a warrant to issue to dispossess the tenant constitutes a trespass by the landlord against the tenant's right of possession for which the

tenant has a cause of action in tort against the landlord. Yopp v. Johnson, 51 Ga. App. 925, 181 S.E. 596 (1935).

Liability of landlord to evicted tenant for trespass. — Summary judgment under O.C.G.A. § 9-11-56 for an owner, a manager, and a lessor of an apartment was properly entered in a tenant's action for trespass arising out of the tenant's eviction; the entry of the writ of possession was proper, on the writ's face, under O.C.G.A. § 44-7-50. Vickers v. Merry Land & Inv. Co., 263 Ga. App. 316, 587 S.E.2d 816 (2003).

Owner did not owe duty to an intruder to follow summary disposition proceedings. — A buyer who purchased a homeowner's home at a foreclosure sale was not required to obtain a writ of possession prior to changing the locks on the upstairs unit of the home because the homeowner, who allegedly moved from the downstairs unit to the upstairs unit of the home after the sale, was not a tenant at sufferance but an intruder. Steed v. Fed. Nat'l Mortg. Corp., 301 Ga. App. 801, 689 S.E.2d 843 (2009).

Malicious use of process by landlord. — Use of the dispossessory warrant procedure provided by statute by a landlord to obtain possession of the landlord's premises is not such a perversion or unintended use of the process as amounts to a malicious abuse of legal process, but the proceeding may amount to a malicious use of legal process if the facts so warrant. McSwain v. Edge, 6 Ga. App. 9, 64 S.E. 116 (1909); Crawford v. Theo, 112 Ga. App. 83, 143 S.E.2d 750 (1965) (see O.C.G.A. § 44-7-50).

When the evidence showed that a landlord harassed the landlord's tenant and that the tenant was intimidated by the landlord, a jury could find that the tenant reasonably believed that the tenant had been evicted when the landlord ordered the tenant off the premises and later locked the doors against the tenant, that this action was an attempt to convert the tenant's personal property which remained inside, and that suing the tenant for unpaid rent which accrued after the tenant was locked out was malicious. Swift Loan & Fin. Co. v. Duncan, 195 Ga. App. 556, 394 S.E.2d 356 (1990).

Liability of landlord for illegal warrant. — In dispossessing under an illegal warrant, the officers are nothing more than mere agents of the defendant and the defendant would be liable for any damage proximately flowing from the original wrong of prosecuting the dispossessory warrant. Tapley v. Youmans, 95 Ga. App. 161, 97 S.E.2d 365 (1957).

Liability not avoided by use of independent contractor. — While a landlord may accomplish the duties required by O.C.G.A. § 44-7-50 for dispossession of a tenant through an agent or attorney, the landlord cannot avoid liability for a wrongful eviction by delegating these duties to an independent contractor. Owens v. Barclays American/Mortgage Corp., 218 Ga. App. 160, 460 S.E.2d 835 (1995).

Procedural Matters

Filing in justice court. — If the landlord chooses to file a dispossessory action in the justice court, the landlord does so with the risk that the tenant will answer, causing the justice court to lose jurisdiction. Rucker v. Fuller, 247 Ga. 423, 276 S.E.2d 600 (1981).

What constitutes an "answer" in a dispossessory action is to be liberally construed. Rucker v. Fuller, 247 Ga. 423, 276 S.E.2d 600 (1981).

Tenant's answer to a dispossessory complaint need not be verified. Henry v. Wild Pines Apts., 177 Ga. App. 576, 340 S.E.2d 233 (1986).

Effect of filing counteraffidavit. — Filing of the counteraffidavit by the tenant to the proceedings to dispossess, regardless of the ground therefor, converts the case into one of law, with all the rights the parties would have if the suit were on open account or contract. Shehane v. Eberhart, 30 Ga. App. 265, 117 S.E. 675 (1923), rev'd on other grounds, 158 Ga. 743, 124 S.E. 527, answer conformed to, 33 Ga. App. 23, 125 S.E. 506 (1924).

Transfer to court of record. — When a tenant answers a dispossessory affidavit either orally or in writing within the time prescribed by law or within the time during which the tenant may open a default as of right, the justice of the peace loses jurisdiction over the dispossessory matter. The tenant having answered, the case must be transmitted to the clerk of the superior court along with any fees required by law for filing in superior court. Rucker v. Fuller, 247 Ga. 423, 276 S.E.2d 600 (1981).

Procedural Matters (Cont'd)

How transfer effected. — Transfer of the case from the justice court to the superior court is not initiated by the tenant; rather, the transfer takes place by operation of the law. The tenant has merely answered the complaint and formed issues which must be tried in another court. Rucker v. Fuller, 247 Ga. 423, 276 S.E.2d 600 (1981).

Removal to superior court was proper. — Superior court's order vacating justice of peace's order in contested dispossessory action for lack of jurisdiction and removing case to superior court for a proceeding on merits was proper. Young v. Hinton, 163 Ga. App. 692, 295 S.E.2d 150 (1982).

Costs on transfer. — When a dispossessory case is transmitted to the superior court unaccompanied by required advance costs or a proper pauper's affidavit, the clerk shall not be required to docket such case. The payment of advance costs and fees required by law shall be the responsibility of the plaintiff in the dispossessory action. In the event that the case is not docketed because of failure to pay costs or present a pauper's affidavit, the case must be dismissed for want of prosecution. Rucker v. Fuller, 247 Ga. 423, 276 S.E.2d 600 (1981).

Proper parties. — Only proper parties to an issue arising under a warrant sued out to dispossess a tenant holding over are the alleged landlord and the tenant, and it is error to allow other persons, under whom the tenant claimed possession, to be made parties defendant to the proceeding. Fitzgerald Trust Co. v. Shepard, 60 Ga. App. 674, 4 S.E.2d 689 (1939).

Undenied allegations deemed admitted. — Allegations of fact as the basis for the issuance of a warrant to dispossess a tenant, contained in the landlord's affidavit upon which the warrant issued, which were not denied by the tenant in the tenant's counteraffidavit, are treated as admitted; since the landlord's affidavit contained an allegation that the landlord demanded possession of the premises, and the tenant's counteraffidavit denied only that the rent was due and did not deny that demand was made for possession of the premises, such demand would be treated as an admitted fact. Carson v. Adair, 76 Ga. App. 418, 46 S.E.2d 166 (1948); Battles v. Anchor Rome Mills, Inc., 80 Ga. App. 47, 55 S.E.2d 156 (1949).

No equitable relief. — Absent special circumstances, such as, insolvency of the landlord, or inadequacy of any legal defense which could be interposed thereto, equity will not interfere with a dispossessory proceeding to enjoin the same, since whatever defenses the tenant may have to such proceeding may be interposed in the dispossessory proceeding as readily as in a court of equity. Imperial Hotel Co. v. Martin, 199 Ga. 801, 35 S.E.2d 502 (1945); Shippen v. Folsom, 200 Ga. 58, 35 S.E.2d 915 (1945); Dumas v. Burleigh, 209 Ga. 241, 71 S.E.2d 545 (1952); Lee v. Peck, 228 Ga. 448, 186 S.E.2d 94 (1971).

Evidence failing to show tenancy. — When dispossessory warrant was based on the sole ground that the defendant had ''rented'' the premises and failed to ''pay the rent as per agreement,'' and the defendant contended that under the evidence the defendant was in possession as a purchaser, and not as a tenant under the alleged agreement to pay rent, or as a tenant at will or sufferance, and the evidence wholly failed to show any meeting of the minds of the parties upon such an agreement, a verdict for the defendant on the only expressed ground for the issuance of the dispossessory warrant was demanded. Thrift v. Schurr, 52 Ga. App. 314, 183 S.E. 195 (1935).

Pending proceeding under § 9-10-30. — Proceeding instituted under former Civil Code 1895, § 4813 (see O.C.G.A. § 44-7-50) was until disposed of a pending proceeding within the meaning of former Civil Code 1895, § 4950 (see O.C.G.A. § 9-10-30). Townsend v. Brinson, 117 Ga. 375, 43 S.E. 748 (1903); Ellis v. Stewart, 123 Ga. 242, 51 S.E. 321 (1905); Bedgood v. Carlton, 145 Ga. 54, 88 S.E. 568 (1916).

Directed verdict for landlord improper. — Since there was insufficient evidence to require a finding that a demand upon a tenant to deliver possession to the landlord was made prior to the commencement of the dispossession action, a directed verdict in favor of the plaintiff was not proper. Terrell v. Griffith, 129 Ga. App. 675, 200 S.E.2d 485 (1973).

Instruction. — It is also error to fail to limit the jury's inquiry, leaving the jury to find what the jury may from the evidence.

Jones v. Blackwelder, 146 Ga. 238, 91 S.E. 45 (1916).

In a case under this statute involving a tenancy at will or sufferance, it is error for the court to fail to explain fully these terms to the jury, notwithstanding a quotation of this statute is made. Salios v. Swift, 25 Ga. App. 96, 102 S.E. 869 (1920) (see O.C.G.A. § 44-7-50).

Res judicata. — One dispossessory proceeding alone is sufficient to determine whether the lessors are entitled to possession of the premises, since lessees and sublessees of the same premises may be made parties defendant in such a single proceeding. Lee v. Peck, 228 Ga. 448, 186 S.E.2d 94 (1971).

Jurisdiction on appeal. — When the statutory affidavit provided for in this statute seeking to evict one alleged to be tenant holding over beyond the tenant's term is resisted by the filing of a counteraffidavit denying tenancy and asserting ownership as a defense, the issue presented is not a case respecting title to land, so as to come within the jurisdiction of the Supreme Court, as defined by the Constitution. Arnold v. Water Power & Mining Co., 147 Ga. 91, 92 S.E. 889 (1917); Anderson v. Watkins, 170 Ga. 483, 153 S.E. 8 (1930) (see O.C.G.A. § 44-7-50).

Appeal from civil court. — An action filed in the Civil Court of Fulton County in which the only relief sought is possession of real estate by the owner thereof is not subject to direct appeal to the Court of Appeals; an appeal to the appellate division of the civil court must first be filed. Courtney v. Ihlanfeldt, 130 Ga. App. 637, 204 S.E.2d 312 (1974).

Miscellaneous Considerations

Derivation of title. — One who seeks to dispossess a person as tenant of premises, on the ground that the relation of landlord and tenant arose by virtue of title to the property acquired by the plaintiff at a sale of the property had under a power of sale in a deed to secure debt, made by the defendant or one under whom the defendant claims right of possession, must show title derived from the grantor in the security deed. Harold v. Modern Homes Constr. Co., 104 Ga. App. 415, 121 S.E.2d 809 (1961).

Notice to tenant at will. — When a tenancy at will had been created, the defendant was entitled to two month's notice as a tenant at will before the tenancy could be terminated so as to support an action under the provisions of this statute. Carruth v. Carruth, 77 Ga. App. 131, 48 S.E.2d 387 (1948) (see O.C.G.A. § 44-7-50).

Waiver by prior conduct. — Landlord is not entitled to a dispossessory warrant for failure to pay rent on the day named since a strict adherence to the terms of the lease contract have been waived by the landlord by prior conduct of the parties, and no demand has been made for the rent on the day named, or at any other time, and the rent is tendered to the landlord before the commencement of a dispossessory warrant proceeding. Arnold v. Selman, 83 Ga. App. 145, 62 S.E.2d 915 (1951).

Lessor holding rent. — When lessor received the rent check covering the payment for the month and held the check for five days before notifying the lessee that the lessor considered the lease terminated for nonpayment of rent and continued to so hold such check without ever presenting the check for payment at the bank, and since the record showed that all subsequent rent payments due between such time and the time of the trial were tendered in accordance with the lease agreement, the evidence demanded a verdict for the lessees. Yates v. Farmer, 102 Ga. App. 570, 117 S.E.2d 211 (1960).

Rent paid into court. — Lessee was not in default in the payment of rent after the lessee paid the rent into court under a garnishment summons. Deaton v. Johnson, 72 Ga. App. 573, 34 S.E.2d 560 (1945).

Mother as tenant. — When demand for possession of the premises was given, defendant mother had ceased to be a tenant in common with her children, fee simple owners, and occupied the relationship to them of landlord and tenant. Roberts v. Graham, 98 Ga. App. 309, 105 S.E.2d 801 (1958).

Fixtures attached to realty. — Although two owners of an aircraft hangar had no formal agreement with the city entitling the owners to extend their stay on city property, and the city could therefore elect to remove the owners at any time as tenants at will, the owners were obligated to remove any trade fixtures from the landlord's property, specifically, the hangar, despite the hangar's size, and at the owners' own expense, upon notification by the city of the expiration of the

Miscellaneous Considerations (Cont'd)

lease term; moreover, the hangar was such that although the hangar was bolted to the ground, it was done so in such a way that the hangar could be disassembled and rebuilt elsewhere. S.S. Air, Inc. v. City of Vidalia, 278 Ga. App. 149, 628 S.E.2d 117 (2006).

OPINIONS OF THE ATTORNEY GENERAL

Magistrate court has jurisdiction to try cases and issue writs and judgments in dispossessory and distress warrant proceedings when the amount in controversy exceeds $3,000.00. 1988 Op. Att'y Gen. No. U88-18.

Location of property irrelevant. — Landlord may institute dispossessory proceedings against a tenant by filing an affidavit with a judge of superior court or any justice of the peace demanding possession of the landlord's land and setting forth the facts which entitle the landlord thereto. This affidavit can be given before any justice of the peace regardless of the location of the property which is the subject of the affidavit. 1979 Op. Att'y Gen. No. U79-7.

Financial burden of physically removing a tenant's property may be properly cast upon the landlord. 1985 Op. Att'y Gen. No. U85-36.

RESEARCH REFERENCES

Am. Jur. Pleading and Practice Forms. — 16A Am. Jur. Pleading and Practice Forms, Landlord and Tenant, § 105.

C.J.S. — 52A C.J.S., Landlord and Tenant, § 1373 et seq.

ALR. — Right of tenant holding over after termination of definite term of notice to quit, 19 ALR 1405; 156 ALR 1310.

Landlord's consent to holding over by tenant as essential to tenancy from year to year, 55 ALR 286.

When landlord deemed to have assented to renewal by holding over, 64 ALR 309.

Liability for rent accruing after landlord's institution of action or proceedings against tenant to recover possession, 93 ALR 1474.

Dispossession without legal process by one entitled to possession of real property as ground of action, other than for recovery of possession or damage to his person, by person dispossessed, 101 ALR 476.

Rent period as criterion of term implied by holding over after expiration of lease for a fixed term, 108 ALR 1464.

Tenant's liability in damages for holding over after expiration of term as affected by reason or excuse for so doing, 122 ALR 280.

Doctrine of breach by anticipatory repudiation of contract as applicable to lease, 137 ALR 432.

Constitutionality, construction, and application of statutes as to the effect of holding over by lessee, or as to automatic renewal clauses in leases, 152 ALR 1395.

Requisites and sufficiency of notice to quit as condition of summary proceeding to evict tenant, 169 ALR 913.

Effect of tender of past-due rent after period prescribed by statutory provision for termination of lease for default in payment, 170 ALR 1156.

Demand of rent due as prerequisite of enforcement of forfeiture or termination of lease providing for termination for nonpayment, 28 ALR2d 803; 31 ALR4th 1254.

Relief against forfeiture of lease for nonpayment of rent, 31 ALR2d 321.

Right of landlord legally entitled to possession to dispossess tenant without legal process, 6 ALR3d 177.

Waiver of statutory demand-for-rent due or of notice-to-quit prerequisite of summary eviction of lessee for nonpayment of rent — modern cases, 31 ALR4th 1254.

Retaliatory eviction of tenant for reporting landlord's violation of law, 23 ALR5th 140.

44-7-51. Issuance of summons; service; time for answer; defenses and counterclaims.

(a) When the affidavit provided for in Code Section 44-7-50 is made, the judge of the superior court, the state court, or any other court with jurisdiction over the subject matter or the judge, clerk, or deputy clerk of the magistrate court shall grant and issue a summons to the sheriff or his deputy or to any lawful constable of the county where the land is located. A copy of the summons and a copy of the affidavit shall be personally served upon the defendant. If the sheriff is unable to serve the defendant personally, service may be had by delivering the summons and the affidavit to any person who is sui juris residing on the premises or, if after reasonable effort no such person is found residing on the premises, by posting a copy of the summons and the affidavit on the door of the premises and, on the same day of such posting, by enclosing, directing, stamping, and mailing by first-class mail a copy of the summons and the affidavit to the defendant at his last known address, if any, and making an entry of this action on the affidavit filed in the case.

(b) The summons served on the defendant pursuant to subsection (a) of this Code section shall command and require the tenant to answer either orally or in writing within seven days from the date of the actual service unless the seventh day is a Saturday, a Sunday, or a legal holiday, in which case the answer may be made on the next day which is not a Saturday, a Sunday, or a legal holiday. If the answer is oral, the substance thereof shall be endorsed on the dispossessory affidavit. The answer may contain any legal or equitable defense or counterclaim. The landlord need not appear on the date of the tenant's response. The last possible date to answer shall be stated on the summons.

(c) If service is by posting a copy of the summons and the affidavit on the door of the premises and mailing a copy of the summons and the affidavit to the defendant, as provided in subsection (a) of this Code section, the court shall have jurisdiction to enter a default judgment for possession of the premises in the absence of an answer being filed, but in such instance a default judgment for money owed may not be entered unless the defendant files an answer or otherwise makes an appearance in the case. (Laws 1827, Cobb's 1851 Digest, p. 902; Code 1863, § 3984; Ga. L. 1865-66, p. 34, § 1; Ga. L. 1866, p. 25, § 1; Code 1868, § 4006; Code 1873, § 4078; Code 1882, § 4078; Civil Code 1895, § 4814; Civil Code 1910, § 5386; Code 1933, § 61-302; Ga. L. 1970, p. 968, § 1; Ga. L. 1971, p. 536, § 1; Ga. L. 1976, p. 1372, § 4; Ga. L. 1978, p. 938, § 1; Ga. L. 1982, p. 1228, § 2; Ga. L. 1983, p. 884, § 4-1; Ga. L. 1991, p. 94, § 44; Ga. L. 1991, p. 968, § 1; Ga. L. 2006, p. 656, § 1.2/HB 1273.)

Law reviews. — For survey of Georgia cases in the area of trial practice and procedure from June 1977 through May 1978, see 30 Mercer L. Rev. 239 (1978). For annual

survey of law of real property, see 38 Mercer L. Rev. 319 (1986).

JUDICIAL DECISIONS

Analysis

General Consideration
Service of Process
Answer

General Consideration

Constitutionality. — See Pelletier v. Northbrook Garden Apts., 233 Ga. 208, 210 S.E.2d 722 (1974).

Legislative intent. — Purpose of subsection (b) of former Code 1933, §§ 61-302 and 61-303 (see O.C.G.A. §§ 44-7-51 and 44-7-53) was to give tenants who were unrepresented by counsel and who were unschooled in the law an opportunity to state their defenses orally to the court as best they can and to have the substance of their defenses endorsed on the dispossessory warrant, thereby making a record upon which the case may proceed in the trial and appellate courts. Hill v. Hill, 241 Ga. 218, 244 S.E.2d 862 (1978); Brown v. Wilson Chevrolet-Olds, Inc., 150 Ga. App. 525, 258 S.E.2d 139 (1979); Denson v. Housing Auth., 150 Ga. App. 493, 258 S.E.2d 183 (1979).

Purpose of section. — It is the purpose of this statute to afford the parties a speedy trial on the merits. Queen v. Harrell, 126 Ga. App. 122, 190 S.E.2d 160 (1972) (see O.C.G.A. § 44-7-51).

Strict construction. — Dispossessory proceeding is statutory and must be strictly construed and observed. Young v. Cowles, 128 Ga. App. 770, 197 S.E.2d 864 (1973).

Transfer to court of record. — When a tenant answers a dispossessory affidavit either orally or in writing within the time prescribed by law or within the time during which the tenant may open a default as of right, the justice of the peace loses jurisdiction over the dispossessory matter. The tenant having answered, the case must be transmitted to the clerk of the superior court along with any fees required by law for filing in superior court. Rucker v. Fuller, 247 Ga. 423, 276 S.E.2d 600 (1981).

How transfer effected. — Transfer of the case from the justice court to the superior court is not initiated by the tenant; rather, the transfer takes place by operation of law. The tenant has merely answered the complaint and formed issues which, according to O.C.G.A. Art. 3, Ch. 7, T. 44, must be tried in another court. Rucker v. Fuller, 247 Ga. 423, 276 S.E.2d 600 (1981).

Payment of costs on transfer. — When a dispossessory case is transmitted to the superior court unaccompanied by required advance costs or a proper pauper's affidavit, the clerk shall not be required to docket such case. The payment of advance costs and fees required by law shall be the responsibility of the plaintiff in the dispossessory action. In the event that the case is not docketed because of failure to pay costs or present a pauper's affidavit, the case must be dismissed for want of prosecution. Rucker v. Fuller, 247 Ga. 423, 276 S.E.2d 600 (1981).

Transfer denied. — Because the commercial tenants did not assert a counterclaim in a landowner's dispossessory action, as the tenants were permitted to do under O.C.G.A. § 44-7-51(b), and the relief the tenants sought under O.C.G.A. § 44-7-53(b), to enjoin the landowner from pursuing the dispossessory action in the state court, was within the court's inherent jurisdiction to simply deny relief in the dispossessory action, there was no cause to grant the tenants' motion to transfer the matter to a superior court. Davita, Inc. v. Othman, 270 Ga. App. 93, 606 S.E.2d 112 (2004).

Dispossessory warrant as abuse of process. — Use of a dispossessory warrant not to obtain possession of the premises for a failure to pay the rent allowed by law, but to compel the tenant to give up in money $6.00 per month in excess of the maximum amount which was allowed by law under an administrative order for freezing rents in the area in question, and to prevent the tenant from making a just demand for reimbursement for repairs, is an abuse of legal process.

Defnall v. Schoen, 73 Ga. App. 25, 35 S.E.2d 564 (1945).

When demand for possession unnecessary. — Demand for possession is not necessary when it would be futile to make the demand and the demand would be refused. RCH Corp. v. Southland Inv. Corp., 122 Ga. App. 815, 178 S.E.2d 766 (1970).

Right to file defense or counterclaim. — Trial court properly awarded a mortgage company a writ of possession in an action against a debtor; the debtor was not deprived of the debtor's right to file a defense pursuant to O.C.G.A. § 44-7-51(b) as a bankruptcy court lifted a bankruptcy stay to allow this action to proceed. Agber v. DLJ Mortg. Capital, Inc., 263 Ga. App. 53, 587 S.E.2d 210 (2003).

Effect of failure to answer. — When the record showed that the defendants accepted service of a dispossessory action and did not answer within the requisite time, the defendants waived the right to challenge their liability or assert other defenses. Tauber v. Community Ctrs. Two, 235 Ga. App. 705, 509 S.E.2d 662 (1998).

Failure to assert counterclaim in dispossessor action. — Trial court correctly disallowed evidence of emblements or emoluments in a dispossessory action after the defendant failed to assert any such claim in the defendant's answer or as a counterclaim, to proffer evidence of details of the alleged specific improvements that might be the basis for such a claim, or to proffer evidence as to an agreement between the parties for reimbursement of the cost of any improvements. Gentry v. Chateau Properties, 236 Ga. App. 371, 511 S.E.2d 892 (1999).

Jurisdiction to enter money judgment. — If the defendant answers in a proceeding brought under former Code 1933, § 61-301 et seq. (see O.C.G.A. § 44-7-51), notice was not an issue, and the trial court had jurisdiction over the defendant's person as to both the dispossessory proceeding and to enter a money judgment against the defendant. Housing Auth. v. Sterlin, 250 Ga. 95, 296 S.E.2d 564 (1982); Housing Auth. v. Hudson, 250 Ga. 109, 296 S.E.2d 558 (1982).

When the defendant is served by ''nail and mail'' in a dispossessory proceeding and does not answer, the trial court has jurisdiction over defendant's person for the purposes of the dispossessory proceeding but may not enter a judgment for rent due upon default. Housing Auth. v. Sterlin, 250 Ga. 95, 296 S.E.2d 564 (1982); Housing Auth. v. Hudson, 250 Ga. 109, 296 S.E.2d 558 (1982).

In a dispossessory proceeding, a judgment for rent allegedly due cannot be rendered upon default if service was by nail and mail. Housing Auth. v. Hudson, 250 Ga. 109, 296 S.E.2d 558 (1982).

Fixtures attached to realty. — Although two owners of an aircraft hangar had no formal agreement with the city entitling the owners to extend their stay on city property, and the city could therefore elect to remove the owners at any time as tenants at will, the owners were obligated to remove any trade fixtures from the landlord's property, specifically, the hangar, despite the hangar's size, and at the owners' own expense, upon notification by the city of the expiration of the lease term; moreover, the hangar was such that although the hangar was bolted to the ground, it was done so in such a way that the hangar could be disassembled and rebuilt elsewhere. S.S. Air, Inc. v. City of Vidalia, 278 Ga. App. 149, 628 S.E.2d 117 (2006).

Cited in Crawford v. Crawford, 139 Ga. 394, 77 S.E. 557 (1913); Hall v. John Hancock Mut. Life Ins. Co., 50 Ga. App. 625, 179 S.E. 183 (1935); Ford v. Eskridge, 53 Ga. App. 466, 186 S.E. 204 (1936); Sinclair Ref. Co. v. Giddens, 54 Ga. App. 69, 187 S.E. 201 (1936); Ward v. Walker, 222 Ga. 451, 151 S.E.2d 228 (1966); RCH Corp. v. Southland Inv. Corp., 122 Ga. App. 815, 178 S.E.2d 766 (1970); Stephens v. Cogdell, 227 Ga. 121, 179 S.E.2d 45 (1971); Sanks v. Georgia, 401 U.S. 144, 91 S. Ct. 593, 27 L. Ed. 2d 741 (1971); Terrell v. Griffith, 129 Ga. App. 675, 200 S.E.2d 485 (1973); Daniel v. Federal Nat'l Mtg. Ass'n, 231 Ga. 385, 202 S.E.2d 388 (1973); Browning v. F.E. Fortenberry & Sons, 131 Ga. App. 498, 206 S.E.2d 101 (1974); Lopez v. Dlearo, 232 Ga. 339, 206 S.E.2d 454 (1974); Vlahos v. DeLong, 132 Ga. App. 722, 209 S.E.2d 12 (1974); Warrick v. Mid-State Homes, Inc., 139 Ga. App. 301, 228 S.E.2d 234 (1976); Jordan v. Ford Motor Credit Co., 141 Ga. App. 280, 233 S.E.2d 256 (1977); Perimeter Billjohn, Inc. v. Perimeter Mall, Inc., 141 Ga. App. 343, 233 S.E.2d 470 (1977); Hill v. Hill, 143 Ga. App. 549, 239 S.E.2d 154 (1977); Lipshutz v. Shantha, 144 Ga. App. 196, 240 S.E.2d 738 (1977); King v. Ellis, 146 Ga. App. 157, 246 S.E.2d 1 (1978);

General Consideration (Cont'd)

Davis v. State, 147 Ga. App. 107, 248 S.E.2d 181 (1978); Adams v. Wright, 242 Ga. 330, 249 S.E.2d 15 (1978); Howington v. W.H. Ferguson & Sons, 147 Ga. App. 636, 249 S.E.2d 687 (1978); Lamb v. Sims, 153 Ga. App. 556, 265 S.E.2d 879 (1980); Proffitt v. Housing Sys., 154 Ga. App. 114, 267 S.E.2d 650 (1980); Crump v. Jordan, 154 Ga. App. 503, 268 S.E.2d 787 (1980); C & A Land Co. v. Rudolf Inv. Corp., 163 Ga. App. 832, 296 S.E.2d 149 (1982); Jones v. Cooke, 169 Ga. App. 516, 313 S.E.2d 773 (1984); A.G. Spanos Dev., Inc. v. Caras, 170 Ga. App. 243, 316 S.E.2d 793 (1984); Moran v. Mid-State Homes, Inc., 171 Ga. App. 618, 320 S.E.2d 625 (1984); Solomon v. Norwest Mtg. Corp., 245 Ga. App. 875, 538 S.E.2d 783 (2000).

Service of Process

Applicability of Civil Practice Act. — Since former Code 1933, § 61-302 (see O.C.G.A. § 44-7-51) did not expressly prescribe that the cumulative service provisions of Ga. L. 1972, p. 689, §§ 1-3 (see O.C.G.A. § 9-11-4 (i)) were unavailable, Ga. L. 1968, p. 1104, § 12 (see O.C.G.A. § 9-11-81), providing for exceptions to the applicability of the Civil Practice Act, was inoperable. Navaho Corp. v. Stuckey, 141 Ga. App. 271, 233 S.E.2d 217 (1977).

Service calculated to give notice. — Statute does not allow any service which is not reasonably calculated, under the circumstances, to afford notice. Davis v. Hybrid Indus., Inc., 142 Ga. App. 722, 236 S.E.2d 854 (1977) (see O.C.G.A. § 44-7-51).

Tacking not sufficient if tenants not in residence. — Service by tacking affidavit and summons in a dispossessory action was not service reasonably calculated, under the circumstances, to afford notice since the tenants did not reside at the premises. Davis v. Hybrid Indus., Inc., 142 Ga. App. 722, 236 S.E.2d 854 (1977).

Tacking where personal service possible. — Court cannot construe this statute to allow tacking when personal service is possible. Davis v. Hybrid Indus., Inc., 142 Ga. App. 722, 236 S.E.2d 854 (1977) (see O.C.G.A. § 44-7-51).

Tacking permitted. — To nail the process to the very door of the disputed premises where the tenant claims to be living is reasonably calculated, under all the circumstances, to apprise interested parties of the pendency of the action and afford the parties an opportunity to present their objections. Pelletier v. Northbrook Garden Apts., 233 Ga. 208, 210 S.E.2d 722 (1974).

Right to notice and hearing violated. — When return of service only reasonably informed defendant that after the lapse of seven days the marshal would execute the warrant by evicting the defendant; since there was no command to appear at a hearing on a day certain, and since the defendant was given no notice of a hearing on the issue of past due rent which was required by the statute, the defendant's right to notice and a hearing have been violated. Van Schallern v. Stanco, 132 Ga. App. 794, 209 S.E.2d 243 (1974).

Return of service sufficient. — When a hold-over tenant failed to answer a summons issued under former Code 1933, § 61-302 (see O.C.G.A. § 44-7-51) and a default judgment was rendered against the tenant, the marshal's return of service reciting that "default may be opened not later than 8-17-78" which was given to the tenant was sufficient under former Code 1933, § 61-303 (see O.C.G.A. § 44-7-53). Bannister v. Airport Assocs., 149 Ga. App. 501, 254 S.E.2d 742 (1979).

"Nail and mail" method of service in dispossessory proceeding conferred upon trial court jurisdiction over person of defendant as to both the dispossessory proceeding and to enter a money judgment against the defendant for past-due rent after defendant filed a timely answer. Housing Auth. v. Sterlin, 250 Ga. 95, 296 S.E.2d 564 (1982); Housing Auth. v. Hudson, 250 Ga. 109, 296 S.E.2d 558 (1982).

Posting a copy of the summons and dispossessory warrant on the door of the tenant's residence, the leased apartment, and mailing a copy of the documents to the same address was adequate service. Sandifer v. Long Investors, Inc., 211 Ga. App. 757, 440 S.E.2d 479 (1994).

Because a dispossessory court never ruled upon or resolved a landlord's claims for past due rent and other damages, and because the dispossessory court lacked jurisdiction over the defaulting tenants, who were served by "nail and mail" service under O.C.G.A. § 44-7-51(a), the landlord's claims were not

barred by the doctrine of res judicata under O.C.G.A. § 9-12-40 or subject to a plea of abatement under O.C.G.A. §§ 9-2-5(a) and 9-2-44(a). Bhindi Bros. v. Patel, 275 Ga. App. 143, 619 S.E.2d 814 (2005).

Actual knowledge by defendant of pending proceeding irrelevant. — When the requirement of mailing a copy of the summons and affidavit to the defendant's last known address is not satisfied because the plaintiff had instead mailed defendant the service copy of an action against another tenant, the fact that the defendant may have had actual knowledge of the pendency of the proceeding is irrelevant. Spring Branch Apts. v. Epps, 160 Ga. App. 142, 286 S.E.2d 490 (1981).

Amended summons. — Amendment to a summons in a dispossessory action which changed the time for the defendant's answer was required to be served with the same formalities required for the original summons. Tampa Pipeline Corp. v. City Mills Co., 216 Ga. App. 783, 456 S.E.2d 270 (1995).

Answer

What constitutes "answer" in a dispossessory action is to be liberally construed. Rucker v. Fuller, 247 Ga. 423, 276 S.E.2d 600 (1981).

Formalities not required. — Tenant's attempt to contest a dispossessory proceeding is not to be ignored or dismissed because of a failure to meet the formalities required for other judicial proceedings but not expressly required for a dispossessory proceeding. Lamb v. Housing Auth., 146 Ga. App. 786, 247 S.E.2d 597 (1978).

Unsigned answer is sufficient. — Written but unsigned answer is sufficient to create a contested dispossessory proceeding and thus to open a default to a dispossessory summary. Lamb v. Housing Auth., 146 Ga. App. 786, 247 S.E.2d 597 (1978).

Tenant's answer to a dispossessory complaint need not be verified. Henry v. Wild Pines Apts., 177 Ga. App. 576, 340 S.E.2d 233 (1986).

Personal appearance not answer. — Personal appearance before the court was not an ''answer'' within the meaning of former Code 1933, § 61-302 (see O.C.G.A. § 44-7-51), nor did the appearance waive the right to open the default in accordance with former Code 1933, § 61-303 (see O.C.G.A. § 44-7-53). Denson v. Housing Auth., 150 Ga. App. 493, 258 S.E.2d 183 (1979).

Opening default. — Former Code 1933, § 61-303 (see O.C.G.A. § 44-7-53), in conjunction with subsection (b) of former Code 1933, § 61-302 (see O.C.G.A. § 44-7-51), provided that if the tenant failed to answer within seven days from the date of service, the tenant may open the default as a matter of right by making an answer within seven days after the date of the default. Burnett v. Pace, 151 Ga. App. 111, 258 S.E.2d 916 (1979).

Court unauthorized to open default when no answer within statutorily prescribed time. — When appellee-tenant failed to answer dispossessory action within the statutorily prescribed time, the trial court was without authority to grant appellee's motion to open default, and appellants were entitled to an immediate writ of possession and to other items sought in the complaint. Avery v. Warrick, 172 Ga. App. 674, 324 S.E.2d 532 (1984).

Tenant failed to show the type of defect in the dispossession action filed against the tenant that would afford the tenant a basis for a collateral attack as the tenant failed to answer the dispossession writ within seven days as required by O.C.G.A. § 44-7-51(b) since the sheriff delivering the summons knocked before resorting to the tack and mail approach, and a demand for payment was properly made. Vickers v. Merry Land & Inv. Co., 263 Ga. App. 316, 587 S.E.2d 816 (2003).

OPINIONS OF THE ATTORNEY GENERAL

Sufficiency of oral answer. — An oral answer by the tenant is sufficient to prevent issuance of a writ of possession. 1983 Op. Att'y Gen. No. U83-69.

RESEARCH REFERENCES

C.J.S. — 52A C.J.S., Landlord and Tenant, § 1373 et seq.

ALR. — Dispossession without legal process by one entitled to possession of real property as ground of action, other than for recovery of possession or damage to his person, by person dispossessed, 101 ALR 476.

44-7-52. When tender of payment by tenant serves as complete defense.

(a) Except as provided in subsection (c) of this Code section, in an action for nonpayment of rent, the tenant shall be allowed to tender to the landlord, within seven days of the day the tenant was served with the summons pursuant to Code Section 44-7-51, all rents allegedly owed plus the cost of the dispossessory warrant. Such a tender shall be a complete defense to the action; provided, however, that a landlord is required to accept such a tender from any individual tenant after the issuance of a dispossessory summons only once in any 12 month period.

(b) If the court finds that the tenant is entitled to prevail on the defense provided in subsection (a) of this Code section and the landlord refused the tender as provided under subsection (a) of this Code section, the court shall issue an order requiring the tenant to pay to the landlord all rents which are owed by the tenant and the costs of the dispossessory warrant within three days of said order. Upon failure of the tenant to pay such sum, a writ of possession shall issue. Such payment shall not count as a tender pursuant to subsection (a) of this Code section.

(c) For a tenant who is not a tenant under a residential rental agreement as defined in Code Section 44-7-30, tender and acceptance of less than all rents allegedly owed plus the cost of the dispossessory warrant shall not be a bar nor a defense to an action brought under Code Section 44-7-50 but shall, upon proof of same, be considered by the trial court when awarding damages. (Code 1933, § 61-309, enacted by Ga. L. 1970, p. 968, § 6; Ga. L. 1998, p. 1380, § 1.)

JUDICIAL DECISIONS

Rent means money. — General Assembly in giving tenants the right to remain in possession during the pendency of a dispossessory proceeding by tendering the payment of rent into court intended "rent" to mean "money." Lipshutz v. Shantha, 144 Ga. App. 196, 240 S.E.2d 738 (1977).

Failure to tender costs. — Although the defendant tenant tendered all rent due within seven days after service, but failed to tender the amount of the cost of the dispossessory warrant, the defendant did not have a complete defense so as to bar the action. Terrell v. Griffith, 129 Ga. App. 675, 200 S.E.2d 485 (1973).

Second tender in 12-month period no defense. — Housing authority was not required to accept a tenant's tender of rent and the cost of dispossessory warrant made in response to the authority's second dispossessory warrant issued within a 12-month period. Housing Auth. v. Jackson, 216 Ga. App. 51, 453 S.E.2d 60 (1994).

Acceptance of late rent not estoppel. — Fact that the tenant had been delinquent in rental payments during two prior months,

which failures to pay had generated termination notices not followed through by the landlord, who accepted late rental payments on those occasions, did not constitute an estoppel which would require the landlord to accept late rent after termination notices on subsequent occasions. Baker v. Housing Auth., 152 Ga. App. 64, 262 S.E.2d 183 (1979).

Reliance on terms of agreement. — Termination notice obviously indicates an intention to rely on the exact terms of the agreement. Baker v. Housing Auth., 152 Ga. App. 644, 262 S.E.2d 183 (1979).

Waiver of defenses when lease concerns commercial property. — Landlord was entitled to rely on default provisions of lease of residence for commercial purposes in refusing tender of past due rent and in taking action to dispossess appellant, and appellant was not entitled to defenses of O.C.G.A. § 44-7-50 et seq., having waived those provisions in the lease. Eason Publications, Inc. v. Monson, 163 Ga. App. 370, 294 S.E.2d 585 (1982).

New trial on grounds of payment of rent not available remedy. — Fact that the appellant had made out an affirmative defense as to payment of rent, and that the evidence showed the rent was paid, avails the appellant nothing when the issue was not raised at trial as a defense and no disposition, verdict, or judgment was sought on its account. A motion for a new trial on the grounds of payment of rent is not an available remedy to a dispossessory action since the plea of ''complete defense'' as a matter of law goes to the judgment only and not the verdict. Able-Craft, Inc. v. Bradshaw, 167 Ga. App. 725, 307 S.E.2d 671 (1983).

Cited in West Court Square v. Assayag, 131 Ga. App. 690, 206 S.E.2d 579 (1974); Minit Chek Food Stores, Inc. v. Plaza Capital, Inc., 135 Ga. App. 110, 217 S.E.2d 415 (1975); C & A Land Co. v. Rudolf Inv. Corp., 163 Ga. App. 832, 296 S.E.2d 149 (1982); Greenhill v. Allen, 181 Ga. App. 532, 352 S.E.2d 845 (1987).

RESEARCH REFERENCES

Am. Jur. 2d. — 49 Am. Jur. 2d, Landlord and Tenant, § 950.

C.J.S. — 52A C.J.S., Landlord and Tenant, § 1376 et seq.

ALR. — Power of equity to relieve against forfeiture of lease for nonpayment of rent, 16 ALR 437.

Demand of rent due as prerequisite of enforcement of forfeiture or termination of lease providing for termination for nonpayment, 28 ALR2d 803; 31 ALR4th 1254.

Relief against forfeiture of lease for nonpayment of rent, 31 ALR2d 321.

44-7-53. When writ of possession issued; trial of issues; possession pending trial.

(a) If the tenant fails to answer as provided in subsection (b) of Code Section 44-7-51, the court shall issue a writ of possession instanter notwithstanding Code Section 9-11-55 or Code Section 9-11-62. The court, without the intervention of a jury, shall not require any further evidence nor hold any hearings and the plaintiff shall be entitled to a verdict and judgment by default for all rents due as if every item and paragraph of the affidavit provided for in Code Section 44-7-50 were supported by proper evidence.

(b) If the tenant answers, a trial of the issues shall be had in accordance with the procedure prescribed for civil actions in courts of record except that if the action is tried in the magistrate court the trial shall be had in accordance with the procedures prescribed for that court. Every effort should be made by the trial court to expedite a trial of the issues. The defendant shall be allowed to remain in possession of the premises pending

the final outcome of the litigation; provided, however, that, at the time of his answer, the tenant must pay rent into the registry of the court pursuant to Code Section 44-7-54. (Laws 1827, Cobb's 1851 Digest, p. 902; Code 1863, § 3985; Ga. L. 1866, p. 25, § 1; Code 1868, § 4007; Code 1873, § 4079; Code 1882, § 4079; Civil Code 1895, § 4815; Civil Code 1910, § 5387; Code 1933, § 61-303; Ga. L. 1970, p. 968, § 2; Ga. L. 1971, p. 536, § 2; Ga. L. 1976, p. 1372, § 5; Ga. L. 1982, p. 3, § 44; Ga. L. 1982, p. 1134, § 1; Ga. L. 1983, p. 3, § 33; Ga. L. 1983, p. 884, § 3-28.1; Ga. L. 1994, p. 1150, § 1; Ga. L. 2007, p. 498, § 2/SB 94.)

Cross references. — Trial calendar, Uniform State Court Rules, Rule 8.3.

Law reviews. — For article, ''The Endangered Right of Jury Trials in Dispossessories,'' see 24 Ga. St. B.J. 126 (1988).

JUDICIAL DECISIONS

Analysis

General Consideration
Transfer to Court of Record
Answer

General Consideration

Constitutionality. — See Rush v. Southern Property Mgt., Inc., 121 Ga. App. 360, 173 S.E.2d 744 (1970).

Purpose of section. — It is the purpose of this statute to afford the parties a speedy trial on the merits. Queen v. Harrell, 126 Ga. App. 122, 190 S.E.2d 160 (1972) (see O.C.G.A. § 44-7-53).

Purpose in enacting this statute was to give defendants who are unrepresented by counsel and who are unschooled in the law an opportunity to state their defenses orally to the court as best they can and to have the substance of their defenses endorsed on the dispossessory warrant, thereby making a record upon which the case may proceed in the trial and appellate courts. Hill v. Hill, 241 Ga. 218, 244 S.E.2d 862 (1978); Brown v. Wilson Chevrolet-Olds, Inc., 150 Ga. App. 525, 258 S.E.2d 139 (1979); Denson v. Housing Auth., 150 Ga. App. 493, 258 S.E.2d 183 (1979) (see O.C.G.A. § 44-7-53).

Section not in conflict with Uniform State Court Rule 8.3. — Distinction made under Uniform State Court Rule 8.3 between dispossessory cases (one-day notice of trial) and other cases (20-day notice of trial) is not in conflict with the mandate of subsection (b) of O.C.G.A. § 44-7-53 that a trial of the issues in a dispossessory shall be had in accordance with the procedure prescribed for civil actions in courts of record. Favors v. Arnold, 181 Ga. App. 286, 351 S.E.2d 641 (1986).

Tenant's possession pending litigation. — Failure to pay the rent as required will result in dispossession of the tenant pending final outcome of the litigation; the requirement of rent payments into the court registry is mentioned only in connection with the tenant's right of continued possession pending the litigation. Jelks v. World of Realty, Inc., 153 Ga. App. 720, 266 S.E.2d 357 (1980).

Money judgment held improper. — Nothing in former Code 1933, § 61-303 or § 61-304 (see O.C.G.A. § 44-7-53 or § 44-7-54) provided for, or was consistent with, the entry of a money judgment against the defendant upon the defendant's failure to pay rent into the registry of the court. Jelks v. World of Realty, Inc., 153 Ga. App. 720, 266 S.E.2d 357 (1980).

Defects in title no defense. — Claimed defects in landlord's title to premises cannot be raised as defense to proceeding for possession under former Code 1933, § 61-301 et seq. (see O.C.G.A. § 44-7-50 et seq.). McKinney v. South Boston Sav. Bank, 156 Ga. App. 114, 274 S.E.2d 34 (1980); Roberts v. Collins, 199 Ga. App. 614, 405 S.E.2d 508 (1991); Hague v. Kennedy, 205 Ga. App. 586, 423 S.E.2d 283 (1992), cert. denied, 205 Ga.

App. 900, 423 S.E.2d 283 (1992).

Void sale no defense. — Because two borrowers' allegation of wrongful foreclosure of their home was not a valid defense to a dispossessory action brought by the purchaser of their home at a nonjudicial foreclosure sale, pursuant to O.C.G.A. §§ 44-7-50 and 44-7-53, the trial court's order issuing a writ of dispossession was affirmed. Vines v. LaSalle Bank Nat'l Ass'n, 302 Ga. App. 353, 691 S.E.2d 242 (2010).

Return of service sufficient. — When a hold-over tenant failed to answer a summons issued under former Code 1933, § 61-302 (see O.C.G.A. § 44-7-51) and a default judgment was rendered against the tenant, the marshal's return of service reciting that ''default may be opened not later than 8-17-78'' which was given to the tenant was sufficient under former Code 1933, § 61-303 (see O.C.G.A. § 44-7-53). Bannister v. Airport Assocs., 149 Ga. App. 501, 254 S.E.2d 742 (1979).

Date on back of summons. — While better practice would be to include the statement required by this statute within the main paragraph of the summons, the placing of the date on the back does not constitute a failure to comply with this statute so as to void the summons. Woodruff v. B-X Corp., 154 Ga. App. 197, 267 S.E.2d 757 (1980) (see O.C.G.A. § 44-7-53).

Magistrate court had jurisdiction over dispossessory proceedings involving a property owner who, by remaining in possession of the premises after a lawful foreclosure of one's deed to secure debt, became a tenant at sufferance and subject to summary dispossession by the purchaser at the foreclosure sale. California Fed. Sav. & Loan Ass'n v. Day, 193 Ga. App. 690, 388 S.E.2d 727 (1989).

Subsection (a) of O.C.G.A. § 44-7-53 prohibits opening defaults in dispossessory actions in magistrate court. Johnson v. Housing Auth., 198 Ga. App. 816, 403 S.E.2d 97 (1991).

Grantor remaining in possession. — When the grantor, or the grantor's privy, in a security deed remain in possession of the premises after lawful foreclosure of the deed, the grantor is a tenant at sufferance and is subject to being summarily dispossessed by the purchaser at the foreclosure sale, or by the purchaser's privy. Collins v. Administrator of Veterans Affairs, 156 Ga. App. 374, 274 S.E.2d 760 (1980).

Sale pursuant to power of sale. — When all right, title, and interest of an owner has been divested by a sale made pursuant to a power of sale given by the owner in a deed to land to secure a debt, and the owner thereafter remains in possession, the owner is a tenant at sufferance of the purchaser and, as such, may be summarily dispossessed. Swindell v. Walker, 71 Ga. App. 603, 31 S.E.2d 670 (1944).

Proper parties. — Only proper parties to an issue arising under a warrant sued out to dispossess a tenant holding over are the alleged landlord and the tenant, and it is error to allow other persons under whom the tenant claimed possession to be made parties defendant to the proceeding. Fitzgerald Trust Co. v. Shepard, 60 Ga. App. 674, 4 S.E.2d 689 (1939).

Discharge in bankruptcy not payment of rent. — Discharge in bankruptcy of a debt existing on account of overdue rent is not payment of the rent within the meaning of this statute. Carter v. Sutton, 147 Ga. 496, 94 S.E. 760 (1917). See Hamilton v. McCroskey, 112 Ga. 651, 37 S.E. 859 (1901) (see O.C.G.A. § 44-7-53).

Issuance of writ of possession at initial hearing is error. — Trial court errs in granting an immediate writ of possession at the initial hearing stage of the dispossessory proceedings. The purpose of that hearing is not to decide the substantive issues involved, but rather to determine the amount of money that the tenant has to pay into the registry of the court in order to remain in possession of the premises pending the ultimate resolution of the litigation. Bradshaw v. Jackson Hills Apts., 169 Ga. App. 447, 313 S.E.2d 734 (1984).

Landlord not estopped from dispossessing tenant by accepting rent after proceedings instituted. — When a tenant's check is tendered and accepted at a time when the tenant is in continued possession of the premises, but after dispossessory proceedings have been instituted on the basis that the tenant is a tenant holding over, the acceptance of the rent, accruing after the dispossessory proceedings have been instituted, does not estop the landlord from pressing to dispossess the tenant. Cheeves v. Horne, 167 Ga. App. 786, 307 S.E.2d 687 (1983).

General Consideration (Cont'd)

There is no right to trial by jury in summary dispossessory action. West v. VA, 182 Ga. App. 767, 357 S.E.2d 121 (1987).

Cited in Sanks v. Georgia, 401 U.S. 144, 91 S. Ct. 593, 27 L. Ed. 2d 741 (1971); Dampier v. Bank of Alapaha, 124 Ga. App. 618, 184 S.E.2d 693 (1971); Blocker v. Blackburn, 228 Ga. 285, 185 S.E.2d 56 (1971); Vlahos v. DeLong, 132 Ga. App. 722, 209 S.E.2d 12 (1974); Gainesville Liquidation, Inc. v. Hanley, 134 Ga. App. 472, 214 S.E.2d 723 (1975); Houston Gen. Ins. Co. v. Stein Steel & Supply Co., 134 Ga. App. 624, 215 S.E.2d 511 (1975); Speir v. Davis, 235 Ga. 788, 221 S.E.2d 575 (1976); Hodkinson v. Maloof, 137 Ga. App. 602, 224 S.E.2d 524 (1976); Smith v. Hudgens, 140 Ga. App. 562, 231 S.E.2d 530 (1976); Powers v. Simmerson, 142 Ga. App. 335, 235 S.E.2d 769 (1977); King v. Ellis, 146 Ga. App. 157, 246 S.E.2d 1 (1978); Crymes v. Crymes, 148 Ga. App. 299, 251 S.E.2d 155 (1978); Marshall v. U.S. Mgt. Corp., 149 Ga. App. 141, 253 S.E.2d 818 (1979); Leverette v. Moran, 153 Ga. App. 825, 266 S.E.2d 574 (1980); Crump v. Jordan, 154 Ga. App. 503, 268 S.E.2d 787 (1980); Peter E. Blum & Co. v. First Bank Bldg. Corp., 156 Ga. App. 680, 275 S.E.2d 751 (1980); King v. Chrisler, 160 Ga. App. 784, 287 S.E.2d 124 (1982); Smith v. Mack, 161 Ga. App. 95, 289 S.E.2d 299 (1982); Housing Auth. v. Hudson, 250 Ga. 109, 296 S.E.2d 558 (1982); Jordan v. Atlanta Neighborhood Hous. Servs., Inc., 169 Ga. App. 600, 313 S.E.2d 787 (1984); Taylor v. Carver State Bank, 177 Ga. App. 856, 341 S.E.2d 502 (1986); Kelley v. Daugherty, 201 Ga. App. 291, 410 S.E.2d 759 (1991); Browning v. Federal Home Loan Mtg. Corp., 210 Ga. App. 115, 435 S.E.2d 450 (1993).

Transfer to Court of Record

In general. — When an affidavit is made before a justice of the peace, and the tenant contests the dispossessory proceeding, the trial of the issue shall be in a court of record, and the justice of the peace shall transfer the proceedings to such court. Lopez v. Dlearo, 232 Ga. 339, 206 S.E.2d 454 (1974); Lamb v. Sims, 153 Ga. App. 556, 265 S.E.2d 879 (1980); Rucker v. Fuller, 247 Ga. 423, 276 S.E.2d 600 (1981).

No automatic transfer. — There is no automatic transfer of a dispossessory action from the state court to the superior court upon the defendant's timely answer in the state court. Rowe v. Fleet Mtg. Corp., 226 Ga. App. 593, 487 S.E.2d 133 (1997).

Defendant in a dispossessory action was not entitled to an automatic transfer to superior court when the state court was the court of record with jurisdiction over the action. Gentry v. Chateau Properties, 236 Ga. App. 371, 511 S.E.2d 892 (1999).

State Court of DeKalb County is a "court of record," and thus is authorized to adjudicate a contested dispossessory action. Napper v. National Mtg. Group, Inc., 194 Ga. App. 148, 390 S.E.2d 70 (1990).

Filing in justice court. — If the landlord chooses to file a dispossessory action in the justice court, the landlord does so with the risk that the tenant will answer, causing the justice court to lose jurisdiction. Rucker v. Fuller, 247 Ga. 423, 276 S.E.2d 600 (1981).

How transfer effected. — Transfer of the case from the justice court to the superior court is not initiated by the tenant; rather, the transfer takes place by operation of the law. The tenant has merely answered the complaint and formed issues which must be tried in another court. Rucker v. Fuller, 247 Ga. 423, 276 S.E.2d 600 (1981).

Payment of costs upon transfer. — When a dispossessory case is transmitted to the superior court unaccompanied by required advance costs or a proper pauper's affidavit, the clerk shall not be required to docket such case. The payment of advance costs and fees required by law shall be the responsibility of the plaintiff in the dispossessory action. In the event that the case is not docketed because of failure to pay costs or present a pauper's affidavit, the case must be dismissed for want of prosecution. Rucker v. Fuller, 247 Ga. 423, 276 S.E.2d 600 (1981).

Transfer denied. — Because the commercial tenants did not assert a counterclaim in a landowner's dispossessory action, as the tenants were permitted to do under O.C.G.A. § 44-7-51(b), and the relief the tenants sought under O.C.G.A. § 44-7-53(b), to enjoin the landowner from pursuing the dispossessory action in the state court, was within the court's inherent jurisdiction to simply deny relief in the dispossessory action, there was no cause to

grant the tenants' motion to transfer the matter to a superior court. Davita, Inc. v. Othman, 270 Ga. App. 93, 606 S.E.2d 112 (2004).

Removal to superior court was proper. — Superior court's order vacating justice of peace's order in contested dispossessory action for lack of jurisdiction and removing case to superior court for a proceeding on merits was proper. Young v. Hinton, 163 Ga. App. 692, 295 S.E.2d 150 (1982).

Transfer improper when defendant does not answer. — If the defendant never files an answer to a dispossessory proceeding in the justice of the peace court, that court retains jurisdiction over the case and the justice of the peace court's attempt to transfer the case to the state court is without foundation in law. Jones v. Cooke, 169 Ga. App. 516, 313 S.E.2d 773 (1984).

Dispossessory action held not transferable. — In a dispossessory action filed in state court, there was no evidence of the lack of a landlord-tenant relationship, and no evidence justifying a challenge to the ownership of the land so as to require transfer of the case to the superior court. Bread of Life Baptist Church v. Price, 194 Ga. App. 693, 392 S.E.2d 15 (1990).

After a credit corporation filed a dispossessory warrant in state court and alleged that it was the owner of a house and that the defendants were tenants at sufferance, and after the defendants denied that they were tenants at sufferance and alleged that they owned the premises, the defendants' contention that the case should have been transferred to the superior court because the case involved a dispute over title to the premises was without merit. Claimed defects in the landlord's title to premises cannot be raised as a defense to a proceeding for possession. Thomas v. Wells Fargo Credit Corp., 200 Ga. App. 592, 409 S.E.2d 71, cert. denied, 200 Ga. App. 897, 409 S.E.2d 71 (1991).

Because the state court is a court of record with jurisdiction over a dispossessory action, the trial court did not err in denying the defendant's motion to transfer. Solomon v. Norwest Mtg. Corp., 245 Ga. App. 875, 538 S.E.2d 783 (2000).

Answer

Unqualified right to answer and counterclaim. — Statute gives a tenant an unqualified right to answer and counterclaim in all dispossessory proceedings; it is unnecessary that this answer and counterclaim be accompanied by any bond or rent payment. Mountain Hardwoods & Pine, Inc. v. Coosa River Sawmill Co., 233 Ga. 414, 211 S.E.2d 712 (1975); Seagraves v. Mount Zion Village, Inc., 134 Ga. App. 719, 215 S.E.2d 688 (1975); McKisic v. College Park Hous. Auth., 134 Ga. App. 813, 216 S.E.2d 369 (1975) (see O.C.G.A. § 44-7-53).

Defendant in a dispossessory proceeding has an unqualified right to answer and counterclaim. Stroup v. Robbie Jon Dev. Corp., 159 Ga. App. 652, 284 S.E.2d 667 (1981).

Opening of default judgment improper. — Intent of the 1982 amendment to O.C.G.A. § 44-7-53 was to deny the tenant the opportunity to contest the dispossessory action if the tenant failed to answer the summons within the seven days prescribed, and thus the trial court had no authority to grant a motion to open a default judgment. A.G. Spanos Dev., Inc. v. Caras, 170 Ga. App. 243, 316 S.E.2d 793 (1984).

The 1982 amendment of subsection (a) of O.C.G.A. § 44-7-53, which deleted language pertaining to opening of default, indicates the legislative intent to deny a tenant an opportunity to contest a dispossessory action if the tenant fails to answer the summons within the prescribed time. Avery v. Warrick, 172 Ga. App. 674, 324 S.E.2d 532 (1984).

What constitutes an "answer" in a dispossessory action is to be liberally construed. Rucker v. Fuller, 247 Ga. 423, 276 S.E.2d 600 (1981).

Formalities not required. — Tenant's attempt to contest a dispossessory proceeding is not to be ignored, or dismissed, because of a failure to meet the formalities required for other judicial proceedings but not expressly required for a dispossessory proceeding. Lamb v. Housing Auth., 146 Ga. App. 786, 247 S.E.2d 597 (1978).

Answer not conditioned on rent payment. — Failure to make a rent payment does not render defective the answer and counterclaim so that no issue remains to be tried. Seagraves v. Mount Zion Village, Inc., 134 Ga. App. 719, 215 S.E.2d 688 (1975); Jelks v. World of Realty, Inc., 153 Ga. App. 720, 266 S.E.2d 357 (1980).

Motion for dismissal treated as answer. — In a dispossessory action against the former

Answer (Cont'd)

owners of property by purchasers at a foreclosure sale, the former owners' pro se motion for dismissal was legally sufficient since it created a triable issue as to the existence of a landlord-tenant relationship. Womack v. Columbus Rentals, Inc., 223 Ga. App. 501, 478 S.E.2d 611 (1996).

Oral or written answer. — "Answer" which is sufficient to open the default may be oral or in writing. Hill v. Hill, 241 Ga. 218, 244 S.E.2d 862 (1978).

Unsigned answer. — Written but unsigned answer is sufficient to create a contested dispossessory proceeding and thus to open a default to a dispossessory summary. Lamb v. Housing Auth., 146 Ga. App. 786, 247 S.E.2d 597 (1978).

Effect of failure to answer. — Language "If the tenant fails to answer" is construed to mean and refer to the time of the hearing. If the tenant fails to so answer, the court shall issue a writ of possession; and the plaintiff shall be entitled to a verdict and judgment by default for all rents due, in open court or chambers, as if every item and paragraph of the affidavit were supported by proper evidence without the intervention of the jury. West Court Square v. Assayag, 129 Ga. App. 59, 198 S.E.2d 510 (1973).

Tenant waived any argument that the manager filing a dispossession action against the tenant lacked authority to bring the action as it ceased to exist under O.C.G.A. § 14-3-1105 due to a merger; the tenant failed to raise the issue in the dispossession proceedings, or to answer the dispossession affidavit at all under O.C.G.A. § 44-7-53, making all of the allegations in the complaint admitted, and the tenant was barred from relitigating the matter in a suit for wrongful possession by collateral estoppel. Vickers v. Merry Land & Inv. Co., 263 Ga. App. 316, 587 S.E.2d 816 (2003).

Answer raised issue of fact as to landlord-tenant relationship. — Since the defendants in a dispossessory action denied that a landlord-tenant relationship existed, and there was no evidence or admission that the plaintiff was the owner of the premises or that the defendants were on the premises without the landlord's consent, genuine issues of material fact remained as to the plaintiff's allegations that it was the owner of the premises and that the defendants were tenants at sufferance. The trial court therefor erred in striking the defendants' answer, granting a judgment on the pleadings, and entering an immediate writ of possession. Thomas v. Wells Fargo Credit Corp., 200 Ga. App. 592, 409 S.E.2d 71, cert. denied, 200 Ga. App. 897, 409 S.E.2d 71 (1991).

Case on trial calendar. — Under the provisions of this statute, a tenant who has filed the tenant's answer in a dispossessory proceeding is entitled to have the case placed upon the trial calendar so that a trial of the issues may be had in accordance with the procedure prescribed for civil actions in courts of record. Whipper v. Kirk, 156 Ga. App. 218, 274 S.E.2d 662 (1980) (see O.C.G.A. § 44-7-53).

OPINIONS OF THE ATTORNEY GENERAL

Trial in magistrate court. — If a tenant answers, a trial of the issues may be had in the magistrate court. 1983 Op. Att'y Gen. No. U83-69.

RESEARCH REFERENCES

Am. Jur. 2d. — 49 Am. Jur. 2d, Landlord and Tenant, § 960.

C.J.S. — 52A C.J.S., Landlord and Tenant, §§ 1384, 1392.

ALR. — Tenant's liability in damages for holding over after expiration of term as affected by reason or excuse for so doing, 122 ALR 280.

Retaliatory eviction of tenant for reporting landlord's violation of law, 23 ALR5th 140.

44-7-54. Payment of rent and utility payments into court; issuance of writ upon failure to pay; disposition of funds.

(a) In any case where the issue of the right of possession cannot be finally determined within two weeks from the date of service of the copy of the summons and the copy of the affidavit, the tenant shall be required to pay into the registry of the trial court:

(1) All rent and utility payments which are the responsibility of the tenant payable to the landlord under terms of the lease which become due after the issuance of the dispossessory warrant, said rent and utility payments to be paid as such become due. If the landlord and the tenant disagree as to the amount of rent, either or both of them may submit to the court any written rental contract for the purpose of establishing the amount of rent to be paid into the registry of the court. If the amount of rent is in controversy and no written rental agreement exists between the tenant and landlord, the court shall require the amount of rent to be a sum equal to the last previous rental payment made by the tenant and accepted by the landlord without written objection; and

(2) All rent and utility payments which are the responsibility of the tenant payable to the landlord under terms of the lease allegedly owed prior to the issuance of the dispossessory warrant; provided, however, that, in lieu of such payment, the tenant shall be allowed to submit to the court a receipt indicating that payment has been made to the landlord. In the event that the amount of rent is in controversy, the court shall determine the amount of rent to be paid into court in the same manner as provided in paragraph (1) of this subsection.

(b) If the tenant should fail to make any payment as it becomes due pursuant to paragraph (1) or (2) of subsection (a) of this Code section, the court shall issue a writ of possession and the landlord shall be placed in full possession of the premises by the sheriff, the deputy, or the constable.

(c) The court shall order the clerk of the court to pay to the landlord the payments claimed under the rental contracts paid into the registry of the court as said payments are made; provided, however, that, if the tenant claims that he or she is entitled to all or any part of the funds and such claim is an issue of controversy in the litigation, the court shall order the clerk to pay to the landlord without delay only that portion of the funds to which the tenant has made no claim in the proceedings or may make such other order as is appropriate under the circumstances. That part of the funds which is a matter of controversy in the litigation shall remain in the registry of the court until a determination of the issues by the trial court. If either party appeals the decision of the trial court, that part of the funds equal to any sums found by the trial court to be due from the landlord to the tenant shall remain in the registry of the court until a final determination of the issues. The court shall order the clerk to pay to the landlord without delay the

remaining funds in court and all payments of future rent made into court pursuant to paragraph (1) of subsection (a) of this Code section unless the tenant can show good cause that some or all of such payments should remain in court pending a final determination of the issues. (Code 1933, § 61-304, enacted by Ga. L. 1970, p. 968, § 3; Ga. L. 1982, p. 3, § 44; Ga. L. 1982, p. 1134, § 2; Ga. L. 1983, p. 513, § 1; Ga. L. 1988, p. 923, § 2; Ga. L. 1998, p. 1380, § 2.)

JUDICIAL DECISIONS

Rent means money. — General Assembly in giving tenants the right to remain in possession during the pendency of a dispossessory proceeding by tendering the payment of rent into court intended "rent" to mean "money." Lipshutz v. Shantha, 144 Ga. App. 196, 240 S.E.2d 738 (1977).

Repair receipts as rent. — While valid receipts for repairs are a defense to the merits of a dispossessory action, repair receipts do not constitute payment of rent within the contemplation of this statute. Lipshutz v. Shantha, 144 Ga. App. 196, 240 S.E.2d 738 (1977) (see O.C.G.A. § 44-7-54).

Order of court. — No bond or payment of rent need accompany the defendant's answer, although the alleged tenant may be required to pay rent into the registry of the court by order of the court. Cloud v. Groves, 135 Ga. App. 50, 217 S.E.2d 381 (1975).

Tenant in possession pending litigation. — Tenant may be allowed to remain in possession of the premises pending the final outcome of the litigation provided that at the time of the tenant's answer the tenant pays rent into the registry of the court. Marshall v. U.S. Mgt. Corp., 149 Ga. App. 141, 253 S.E.2d 818 (1979).

After the magistrate court ruled against the tenant and the tenant appealed the decision to the superior court and, without order, paid all rent due into the registry of that court, the tenant was entitled, under the provisions of O.C.G.A. §§ 44-7-54 and 44-7-56, to remain in possession of the premises until the litigation was concluded. Green v. Barton, 237 Ga. App. 553, 515 S.E.2d 864 (1999).

Answer not conditioned on payment. — Filing of a bond or payment of rent into court is not a condition precedent to filing an answer and counterclaim. McKisic v. College Park Hous. Auth., 134 Ga. App. 813, 216 S.E.2d 369 (1975).

Effect of failure to pay into registry. — If a tenant fails to pay into court the rent and failed to post supersedeas bond as required by the order of a lower court, the court properly entered an order giving landlords immediate possession. Mitchell v. Excelsior Sales & Imports, Inc., 243 Ga. 813, 256 S.E.2d 785 (1979); Mitcham v. Reese, 190 Ga. App. 689, 379 S.E.2d 637 (1989).

Generally, a tenant's failure to pay into the registry determines only the tenant's right to remain on the premises pending determination of the other issues. Leverette v. Moran, 153 Ga. App. 825, 266 S.E.2d 574 (1980).

While the trial court, in dispossessory proceedings, did not err in awarding possession to the landlord upon the tenants' failure to make a payment of purported arrearages into the registry of the court, the court did err in dismissing the tenants' counterclaim, which the tenants had an unqualified right to submit. Moran v. Mid-State Homes, Inc., 171 Ga. App. 618, 320 S.E.2d 625 (1984).

There was no error in granting a writ of possession to a landlord in an action between the landlord and tenant over a disputed lease with an option to purchase since the tenant had been ordered to make the lease payments into the court registry and the tenant had defaulted on making two timely payments, pursuant to O.C.G.A. § 44-7-54(b). Burnett v. Reeves, 258 Ga. App. 846, 575 S.E.2d 747 (2002).

Tenant, who was sued by a landlord and was making the tenant's rental payments to the court, breached a commercial lease when the tenant failed to pay the full amount of an additional payment that was due at the end of the year, and the appellate court held that the trial court was required, pursuant to O.C.G.A. § 44-7-54(b), to grant the landlord's request for a writ of possession while the case was still pending because

the tenant breached the lease. Vinings Jubilee Partners, Ltd. v. Vinings Dining, Inc., 266 Ga. App. 34, 596 S.E.2d 209 (2004).

Money judgment improper. — Nothing in § 44-7-53 or this section provides for, or was consistent with, the entry of a money judgment against the defendant upon the defendant's failure to pay rent into the registry of the court. Jelks v. World of Realty, Inc., 153 Ga. App. 720, 266 S.E.2d 357 (1980).

Effect of interim order on terms of lease. — Trial court's interim order, which required payment of rent into the registry of the court on the first business day of each month, did not materially alter the terms of the lease, which specified that the tenant would not be considered in default of the tenant's obligation to pay rent until 30 days after receiving notice that rent was past due. The lease provision in question clearly did not extend the date on which rent was to be considered due but merely qualified the landlord's right to institute dispossessory proceedings against the tenant based on a failure to pay rent. Diplomat Restaurant, Inc. v. Anthony, 180 Ga. App. 431, 349 S.E.2d 284 (1986).

Final judgment. — Issuance of a writ of possession in a dispossessory action, based on a tenant's failure to comply with the terms of an interim order requiring the payment of rent into the registry of the court, constitutes a final judgment in the case when no claim for damages remains to be tried. Diplomat Restaurant, Inc. v. Anthony, 180 Ga. App. 431, 349 S.E.2d 284 (1986).

Appellate procedure. — Amount of rents in a dispossessory proceeding do not control the appellate procedure. Vlahos v. DeLong, 132 Ga. App. 722, 209 S.E.2d 12 (1974).

Appellate court assumed evidence supported mortgagee's entitlement to deposited funds. — Mortgagee was entitled to funds deposited into a state court's registry pursuant to O.C.G.A. § 44-7-54(c) in a dispossessory proceeding because the mortgagors appealed the state court's ruling granting the mortgagee a writ of possession and failed to provide a transcript of the bench trial, requiring the appellate court to assume that the evidence presented supported the state court's decision. Mackey v. Fed. Nat'l Mortg., 294 Ga. App. 495, 669 S.E.2d 397 (2008).

Cited in Sanks v. Georgia, 401 U.S. 144, 91 S. Ct. 593, 27 L. Ed. 2d 741 (1971); Brown v. Hemperley, 125 Ga. App. 828, 189 S.E.2d 131 (1972); Browning v. F.E. Fortenberry & Sons, 131 Ga. App. 498, 206 S.E.2d 101 (1974); Lopez v. Dlearo, 232 Ga. 339, 206 S.E.2d 454 (1974); First Fed. Sav. & Loan Ass'n v. Shepherd, 131 Ga. App. 692, 206 S.E.2d 571 (1974); Mountain Hardwoods & Pine, Inc. v. Coosa River Sawmill Co., 233 Ga. 414, 211 S.E.2d 712 (1975); Seagraves v. Mount Zion Village, Inc., 134 Ga. App. 719, 215 S.E.2d 688 (1975); Minit Chek Food Stores, Inc. v. Plaza Capital, Inc., 135 Ga. App. 110, 217 S.E.2d 415 (1975); Golden Key Restaurant & Lounge, Inc. v. Key Mgt. Corp., 137 Ga. App. 251, 223 S.E.2d 284 (1976); Smith v. Hudgens, 140 Ga. App. 562, 231 S.E.2d 530 (1976); Powers v. Simmerson, 142 Ga. App. 335, 235 S.E.2d 769 (1977); Filsoof v. Chatham, 144 Ga. App. 464, 241 S.E.2d 582 (1978); Lamb v. Housing Auth., 146 Ga. App. 786, 247 S.E.2d 597 (1978); Howington v. W.H. Ferguson & Sons, 147 Ga. App. 636, 249 S.E.2d 687 (1978); Mathews v. Fidelcor Mtg. Corp., 148 Ga. App. 292, 251 S.E.2d 68 (1978); Yeomans v. American Nat'l Ins. Co., 150 Ga. App. 334, 258 S.E.2d 1 (1979); Johnson v. Gwinnett County Bank, 156 Ga. App. 597, 275 S.E.2d 157 (1980); Peter E. Blum & Co. v. First Bank Bldg. Corp., 156 Ga. App. 680, 275 S.E.2d 751 (1980); Community Educ. Ctr., Inc. v. Cohen, 158 Ga. App. 456, 280 S.E.2d 839 (1981); Officenters Int'l Corp. v. Interstate N. Assocs., 166 Ga. App. 93, 303 S.E.2d 292 (1983); Cheeves v. Horne, 167 Ga. App. 786, 307 S.E.2d 687 (1983); Hall v. VNB Mtg. Corp., 170 Ga. App. 867, 318 S.E.2d 674 (1984); Carter v. Landel/Arundel, Inc., 172 Ga. App. 115, 322 S.E.2d 108 (1984); Baker v. G.T., Ltd., 194 Ga. App. 450, 391 S.E.2d 1 (1990); Kelley v. Daugherty, 201 Ga. App. 291, 410 S.E.2d 759 (1991); T.J. Brooklyne, Inc. v. Sullivan 75, L.P., 239 Ga. App. 588, 521 S.E.2d 644 (1999).

RESEARCH REFERENCES

Am. Jur. 2d. — 49 Am. Jur. 2d, Landlord and Tenant, § 956.

C.J.S. — 52A C.J.S., Landlord and Tenant, § 1361 et seq.

ALR. — Liability for rent accruing after landlord's institution of action or proceedings against tenant to recover possession, 93 ALR 1474.

44-7-55. Judgment; writ of possession; landlord's liability for wrongful conduct; distribution of funds paid into court; personal property.

(a) If, on the trial of the case, the judgment is against the tenant, judgment shall be entered against the tenant for all rents due and for any other claim relating to the dispute. The court shall issue a writ of possession, both of execution for the judgment amount and a writ to be effective at the expiration of seven days after the date such judgment was entered, except as otherwise provided in Code Section 44-7-56.

(b) If the judgment is for the tenant, he shall be entitled to remain in the premises and the landlord shall be liable for all foreseeable damages shown to have been caused by his wrongful conduct. Any funds remaining in the registry of the court shall be distributed to the parties in accordance with the judgment of the court.

(c) Any writ of possession issued pursuant to this article shall authorize the removal of the tenant or his or her personal property or both from the premises and permit the placement of such personal property on some portion of the landlord's property or on other property as may be designated by the landlord and as may be approved by the executing officer; provided, however, that the landlord shall not be a bailee of such personal property and shall owe no duty to the tenant regarding such personal property. After execution of the writ, such property shall be regarded as abandoned. (Code 1933, § 61-305, enacted by Ga. L. 1970, p. 968, § 4; Ga. L. 1994, p. 1150, § 2; Ga. L. 1998, p. 1380, § 3; Ga. L. 2004, p. 151, § 1.)

JUDICIAL DECISIONS

Constitutionality of former section, see Rush v. Southern Property Mgt., Inc., 121 Ga. App. 360, 173 S.E.2d 744 (1970).

Construction of subsection (c). — While O.C.G.A. § 44-7-55(c) provides that the landlord shall not be a bailee and shall owe no duty to the tenant with regard to the tenant's personal property, a Georgia appellate court interprets that provision as being contingent upon the landlord first placing the tenant's property on some portion of the landlord's property or on other specific property designated by the landlord and approved by the executing officer. Washington v. Harrison, 299 Ga. App. 335, 682 S.E.2d 679 (2009), cert. denied, No. S09C2052, 2010 Ga. LEXIS 45 (Ga. 2010).

Collection of notes for back lease payments and associated costs may be tried with dispossessory action. — When corporate tenant executed a demand promissory note to landlord for attorney fees paid by landlord for collecting rent due prior to the date thereof, later executed another demand promissory note to landlord to defer lease payments for the months of June through September, and subsequently defaulted on its lease payments to landlord and also defaulted on its payments on the demand notes, since the promissory notes were

clearly claims ''relating to the dispute'' between the parties, the trial court erred in ruling that the collection of the notes could not be tried with the dispossessory action, and the trial court also erred in excluding the notes and letters demanding payment thereof from evidence. Twin Tower Joint Venture v. American Mktg. & Communications Corp., 166 Ga. App. 364, 304 S.E.2d 493 (1983).

Authority of magistrate in dispossessory action. — Magistrate had the power to enter a judgment in a dispossessory action directing the landlord to perform repairs to the tenant's apartment; thus, the landlord's argument that the magistrate lacked subject matter jurisdiction to enter such an order was rejected. H. J. Russell & Co. v. Manuel, 264 Ga. App. 273, 590 S.E.2d 250 (2003).

Improper disposal of personal property. — Trial court properly found a couple liable for converting personal property belonging to an owner with whom the couple were involved in a dispute over certain real property since the couple wrongfully had a salvage company dispose of the personal property instead of complying with O.C.G.A. § 44-7-55(c) by placing the property at the front of the lot. However, the damages award of $192,487.13 in favor of the owner was vacated as the owner's opinion testimony as to the value of the owner's property was insufficient for valuation purposes. Washington v. Harrison, 299 Ga. App. 335, 682 S.E.2d 679 (2009), cert. denied, No. S09C2052, 2010 Ga. LEXIS 45 (Ga. 2010).

Writ upheld. — Appellate court upheld the trial court's grant to a landowner of a writ of possession against the commercial tenants as there was evidence that supported the finding that the landowner had given adequate and repeated notices to the tenants, and any possible risks to the tenants' patients was caused by their own delays in responding to the landowner's notice and proposed extensions of the lease term; no proof that the landowner breached a non-compete covenant in the lease was offered, and the trial court's determination that the tenants failed to show misconduct by the landowner was supported by the evidence. Davita, Inc. v. Othman, 270 Ga. App. 93, 606 S.E.2d 112 (2004).

Cited in Sanks v. Georgia, 401 U.S. 144, 91 S. Ct. 593, 27 L. Ed. 2d 741 (1971); Blocker v. Blackburn, 228 Ga. 285, 185 S.E.2d 56 (1971); Browning v. F.E. Fortenberry & Sons, 131 Ga. App. 498, 206 S.E.2d 101 (1974); Lopez v. Dlearo, 232 Ga. 339, 206 S.E.2d 454 (1974); First Fed. Sav. & Loan Ass'n v. Shepherd, 131 Ga. App. 692, 206 S.E.2d 571 (1974); Vlahos v. DeLong, 132 Ga. App. 722, 209 S.E.2d 12 (1974); Burger King Corp. v. Garrick, 149 Ga. App. 186, 253 S.E.2d 852 (1979); Lantz v. White, 152 Ga. App. 389, 262 S.E.2d 640 (1979); Leverette v. Moran, 153 Ga. App. 825, 266 S.E.2d 574 (1980); Housing Auth. v. Hudson, 250 Ga. 109, 296 S.E.2d 558 (1982); America Net, Inc. v. U.S. Cover, Inc., 243 Ga. App. 204, 532 S.E.2d 756 (2000).

RESEARCH REFERENCES

Am. Jur. 2d. — 49 Am. Jur. 2d, Landlord and Tenant, § 960.

C.J.S. — 52A C.J.S., Landlord and Tenant, § 1392.

ALR. — Liability for damage to person or goods during execution of eviction process, 56 ALR 1039.

Measure of damages for tenant's failure to surrender possession of rented premises, 32 ALR2d 582.

Right of landlord legally entitled to possession to dispossess tenant without legal process, 6 ALR3d 177.

Landlord and tenant: respective rights in excess rent when landlord relets at higher rent during lessee's term, 50 ALR4th 403.

44-7-56. Appeal; possession and payment of rent pending appeal.

Any judgment by the trial court shall be appealable pursuant to Chapters 2, 3, 6, and 7 of Title 5, provided that any such appeal shall be filed within seven days of the date such judgment was entered and provided, further, that, after the notice of appeal is filed with the clerk of the trial court, the

clerk shall immediately notify the trial judge of the notice of appeal and the trial judge may, within 15 days, supplement the record with findings of fact and conclusions of law which will be considered as a part of the order of the judge in that case. If the judgment of the trial court is against the tenant and the tenant appeals this judgment, the tenant shall be required to pay into the registry of the court all sums found by the trial court to be due for rent in order to remain in possession of the premises. The tenant shall also be required to pay all future rent as it becomes due into the registry of the trial court pursuant to paragraph (1) of subsection (a) of Code Section 44-7-54 until the issue has been finally determined on appeal. (Code 1933, § 61-306, enacted by Ga. L. 1970, p. 968, § 5; Ga. L. 1984, p. 859, § 1; Ga. L. 1985, p. 149, § 44; Ga. L. 1994, p. 1150, § 3; Ga. L. 1998, p. 1380, § 4; Ga. L. 2006, p. 656, § 1.3/HB 1273.)

Law reviews. — For annual survey of appellate practice and procedure, see 43 Mercer L. Rev. 73 (1991). For annual survey of trial practice and procedure, see 58 Mercer L. Rev. 405 (2006).

JUDICIAL DECISIONS

Effect of failure to pay rent or bond. — After a tenant failed to pay into court the rent and failed to post supersedeas bond as required by the order of a lower court, the court properly entered an order giving landlords immediate possession. Mitchell v. Excelsior Sales & Imports, Inc., 243 Ga. 813, 256 S.E.2d 785 (1979).

Payment of rent into registry required. — When the plaintiff filed a dispossessory warrant, judgment was entered against the defendants, and the defendants appealed, the trial court did not err in requiring the defendants to pay rent into the registry of the court as a condition of the defendants remaining on the premises. Thomas v. Wells Fargo Credit Corp., 200 Ga. App. 592, 409 S.E.2d 71, cert. denied, 200 Ga. App. 897, 409 S.E.2d 71 (1991).

Pending an appeal, the trial court may require payment of rent into the registry of the court, even if the relationship as tenants at sufferance has not been decided by the court. Bellamy v. FDIC, 236 Ga. App. 747, 512 S.E.2d 671 (1999).

Unless the landlord moves the court to require payment of rent into the registry of the court, the tenant could remain in possession without such payment, pending appeal. Green v. Barton, 237 Ga. App. 553, 515 S.E.2d 864 (1999).

When the magistrate court ruled against the tenant and the tenant appealed the decision to the superior court and, without order, paid all rent due into the registry of that court, the tenant was entitled, under the provisions of O.C.G.A. §§ 44-7-54 and 44-7-56, to remain in possession of the premises until the litigation was concluded. Green v. Barton, 237 Ga. App. 553, 515 S.E.2d 864 (1999).

In a dispossessory action brought by the buyer at a foreclosure sale against the occupant of the property that had been foreclosed upon, the occupant could not assert the alleged invalidity of the foreclosure sale as a defense. Thus, the court affirmed the order requiring the occupant to pay rent into court pending the occupant's appeal. Jackman v. Lasalle Bank, N.A., 299 Ga. App. 894, 683 S.E.2d 925 (2009).

Trial findings not entered absent request. — Requirement that notice of appeal be sent from the clerk to the trial judge does not impose a burden on the judge, when notice is not sent, to enter findings and conclusions in the absence of a request by one of the parties. Such entry is permissive, not mandatory. Poor v. Leader Fed. Bank for Savs., 221 Ga. App. 889, 473 S.E.2d 563 (1996).

In a dispossessory proceeding, as the mortgagors did not request the state court to enter findings of fact and conclusions of law

until after a ruling had been entered, the state court was not required to include that information pursuant to O.C.G.A. § 9-11-52(a) as to each of the mortgagors' defenses and counterclaims; O.C.G.A. § 44-7-56, which provided a mechanism for trial courts to enter findings of fact and conclusions of law in dispossessory cases being appealed, was permissive, not mandatory. Mackey v. Fed. Nat'l Mortg., 294 Ga. App. 495, 669 S.E.2d 397 (2008).

Appellate procedure. — Amount of rents in a dispossessory proceeding do not control the appellate procedure. Vlahos v. DeLong, 132 Ga. App. 722, 209 S.E.2d 12 (1974).

O.C.G.A. § 44-7-56 does not provide any special right of direct appeal, rather that section expressly makes any appeal taken in regard to dispossessory proceedings subject to the provisions of ''Chapters 2, 3, 6, and 7 of Title 5'' as applicable. Whiddon v. Stargell, 192 Ga. App. 826, 386 S.E.2d 884 (1989).

O.C.G.A. § 44-7-56 applied to require dismissal of an appeal based on untimely notice because, even though an arbitration award settled the dispute, the action was begun as a dispossessory proceeding. Ray M. Wright, Inc. v. Jones, 239 Ga. App. 521, 521 S.E.2d 456 (1999).

Seven-day time limitation of O.C.G.A. § 44-7-56 for filing an appeal did not apply when in an action begun as a dispossessory proceeding, the issue of possession was resolved by agreement and the payment of rent into court was suspended, leaving only the issues of unpaid rent and breach of the lease contract. America Net, Inc. v. U.S. Cover, Inc., 243 Ga. App. 204, 532 S.E.2d 756 (2000).

After trial court had initially granted partial summary judgment to a landlord, upholding the landlord's position that the tenant was not entitled to a credit for reconditioning expenses, but the court reserved ruling on whether a writ of possession should be granted, and after the tenant appealed that judgment pursuant to O.C.G.A. § 9-11-56(h) but the court dismissed that appeal for failure to comply with O.C.G.A. § 44-7-56, the landlord's subsequent appeal from the final order granting a writ of possession to the landlord was dismissed to the extent that the appeal sought to relitigate the identical issues that the tenant attempted to litigate in the first appeal under O.C.G.A. § 9-11-56(h), and the prior appellate ruling was binding on the court under the law of the case rule, O.C.G.A. § 9-11-60(h). Eckerd Corp. v. Alterman Real Estate, Ltd., 266 Ga. App. 860, 598 S.E.2d 510 (2004).

Similar to a postjudgment order requiring the posting of a supersedeas bond, a postjudgment order requiring the payment of rent pending appeal under O.C.G.A. § 44-7-56 is subject to direct appeal, as there is nothing left to be decided in the trial court. Owens v. Green Tree Servicing LLC, 300 Ga. App. 22, 684 S.E.2d 99 (2009).

Time limitations. — Trial court erred in denying the landlord's motion for a new trial as the landlord filed the motion within 30 days of the dismissal of the complaint pursuant to O.C.G.A. § 5-5-40(a). SBP Mgmt., LLC v. Price, 277 Ga. App. 130, 625 S.E.2d 523 (2006).

Cited in Sanks v. Georgia, 401 U.S. 144, 91 S. Ct. 593, 27 L. Ed. 2d 741 (1971); Lopez v. Dlearo, 232 Ga. 339, 206 S.E.2d 454 (1974); Howington v. W.H. Ferguson & Sons, 147 Ga. App. 636, 249 S.E.2d 687 (1978); Jeffries v. Georgia Residential Fin. Auth., 503 F. Supp. 610 (N.D. Ga. 1980); Skelton v. Hill Aircraft & Leasing Corp., 180 Ga. App. 814, 351 S.E.2d 98 (1986); Browning v. Federal Home Loan Mtg. Corp., 210 Ga. App. 115, 435 S.E.2d 450 (1993); Lewis v. Countrywide Funding Corp., 225 Ga. App. 440, 484 S.E.2d 66 (1997).

RESEARCH REFERENCES

Am. Jur. 2d. — 49 Am. Jur. 2d, Landlord and Tenant, § 960.

C.J.S. — 52A C.J.S., Landlord and Tenant, § 1399 et seq.

44-7-57. Application of article to croppers and servants.

This article shall apply to croppers and servants who continue to hold possession of lands and tenements after their employment as croppers or servants has terminated and in the same manner as it relates to tenants. (Code 1933, § 61-308, enacted by Ga. L. 1941, p. 319, § 1.)

RESEARCH REFERENCES

Am. Jur. 2d. — 49 Am. Jur. 2d, Landlord and Tenant, § 960.

C.J.S. — 52A C.J.S., Landlord and Tenant, § 1381.

ALR. — Benefit to landlord from sowing of crops or other acts of tenant after his wrongful failure to surrender possession as basis of claim or allowance against landlord or one claiming under him, 113 ALR 1059.

44-7-58. False statements in affidavit or answer; penalty.

Anyone who, under oath or affirmation, knowingly and willingly makes a false statement in an affidavit signed pursuant to Code Section 44-7-50 or in an answer filed pursuant to Code Section 44-7-51 shall be guilty of a misdemeanor. (Code 1933, § 61-9905, enacted by Ga. L. 1976, p. 1372, § 7.)

RESEARCH REFERENCES

Am. Jur. 2d. — 51 Am. Jur. 2d, Liens, § 79 et seq.

C.J.S. — 53 C.J.S., Liens, §§ 46, 50.

44-7-59. Removal of transportable housing from lands subject to writ of possession.

If the court issues a writ of possession to property upon which the tenant has placed a manufactured home, mobile home, trailer, or other type of transportable housing and the tenant does not move the same within ten days after a final order is entered, the landlord shall be entitled to have such transportable housing moved from the property at the expense of the tenant by a motor common carrier licensed by the Public Service Commission for the transportation of manufactured housing. There shall be a lien upon such transportable housing to the extent of moving fees and storage expenses in favor of the person performing such services. Such lien may be claimed and foreclosed in the same manner as special liens on personalty by mechanics under Code Sections 44-14-363 and 44-14-550, except that storage fees not to exceed $4.00 per day shall be expressly allowed. (Code 1981, § 44-7-59, enacted by Ga. L. 1987, p. 842, § 1.)

JUDICIAL DECISIONS

Cited in Coweta County Impound & Storage, Inc. v. Security Pacific Fin. Servs., 216 Ga. App. 664, 455 S.E.2d 370 (1995); GMC Group, Inc. v. Harsco Corp., 293 Ga. App. 707, 667 S.E.2d 916 (2008).

ARTICLE 4

DISTRESS WARRANTS

Law reviews. — For comment discussing due process problems with Georgia's distress warrant proceedings prior to the adoption of the 1975 Acts, see 9 Ga. St. B.J. 336 (1973).

JUDICIAL DECISIONS

Remedy strictly construed. — Remedy of distraint is purely a creature of statute, and is subject to strict rules of construction. D. Jack Davis Corp. v. Karp, 175 Ga. App. 482, 333 S.E.2d 685 (1985).

Contracting to avoid statutory requirements. — Landlord may not avoid in any lease ''for the use or rental of real property as a dwelling place'' any of the requirements set forth in former Code 1933, § 61-401 et seq. (see O.C.G.A. Art. 4, Ch. 7, T. 44); however, a landlord may contract to avoid these statutory requirements when renting property which was not to be used as a dwelling place. Colonial Self Storage of S.E., Inc. v. Concord Properties, Inc., 147 Ga. App. 493, 249 S.E.2d 310 (1978); Wilkerson v. Chattahoochee Parks, 244 Ga. 472, 260 S.E.2d 867 (1979).

Cited in Chatham v. World Arts & Crafts Ctr., Inc., 147 Ga. App. 421, 249 S.E.2d 139 (1978).

RESEARCH REFERENCES

ALR. — Subject matter covered by landlord's statutory lien for rent, 9 ALR 300; 96 ALR 249.

Goods owned by stranger or subject to an encumbrance in his favor as subject to distraint for rent, 62 ALR 1106.

44-7-70. Power of landlord to distrain for rent.

The landlord shall have power to distrain for rent as soon as the same is due if the tenant is seeking to remove his property from the premises. (Laws 1811, Cobb's 1851 Digest, p. 901; Code 1863, § 2267; Code 1868, § 2259; Code 1873, § 2285; Code 1882, § 2285; Civil Code 1895, § 3124; Civil Code 1910, § 3700; Code 1933, § 61-401; Ga. L. 1975, p. 1514, § 2.)

JUDICIAL DECISIONS

Contents of affidavit. — Former Code 1933, § 61-402 (see O.C.G.A. § 44-7-71) did not require that the affidavit used in applying for a distress warrant aver both nonpayment of rent and removal of goods from the premises; this construction avoids a conflict between former Code 1933, §§ 61-401 and 61-402 (see O.C.G.A. §§ 44-7-70 and 44-7-71) was in keeping with the historical role of the distress warrant, and permits both sections to be read in accordance with their plain meaning. Cobb v. McCrary, 152 Ga. App. 212, 262 S.E.2d 538 (1979).

Strict construction. — Law governing pro-

ceedings for distraint for rent must be strictly construed. Williams v. Stancil, 119 Ga. App. 800, 168 S.E.2d 643 (1969).

Tenancy required. — Relationship of landlord and tenant, either by express contract or by legal implication, is an essential basis of a distress warrant. Hearn v. Huff, 6 Ga. App. 56, 64 S.E. 298 (1909).

Landlord relationship a prerequisite. — Existence of the relationship of landlord and cropper is a prerequisite to enforcing such a lien. South Cent. Farm Credit v. V.T. Properties, Inc., 208 Ga. App. 296, 430 S.E.2d 645 (1993).

Equitable estoppel. — Although the doctrine of equitable estoppel cannot create or convey title, the doctrine may be used to establish the existence of a landlord-tenant relationship. Touch Indus., Inc. v. 75 Canton Bus. Park Ltd. Partnership, 202 Ga. App. 548, 415 S.E.2d 40 (1992).

Tenant at sufferance is liable for the reasonable rental value of the premises, and may be distrained for rent. Bible v. Allday, 93 Ga. App. 231, 91 S.E.2d 306 (1956).

Liability of subtenant to tenant. — One who rents land and sublets the land to a third person stands in the relation of landlord to the subtenant and may have a distress warrant for the landlord's rent. Harrison v. Guill, 46 Ga. 427 (1872).

Effect of subletting. — Landlord has the right to sue out a distress warrant against a tenant for rent due and unpaid, although the landlord may have permitted another party to use and occupy the premises. Willingham v. Faircloth, 52 Ga. 126 (1874).

Rent payable in specifics. — Landlord may collect the landlord's rent by a distress warrant, even though the rent be payable in specifics, the value of which is not fixed by the contract. Toler v. Seabrook, 39 Ga. 14 (1869).

Intent of agricultural tenant as to crops. — Intent and purpose of an agricultural tenant in removing crops grown on the rented premises is immaterial. Wheeler v. Mote, 37 Ga. App. 547, 140 S.E. 904 (1927).

Demand of payment. — Landlord may distrain for rent without any previous demand for payment from tenant or without the allegation thereof in affidavit. Buffington v. Hilley, 55 Ga. 655 (1876); Hill v. Reeves, 57 Ga. 31 (1876); McDougal v. Sanders, 75 Ga. 140 (1885).

Merchant selling goods. — Merchant may sell and dispose of a considerable amount of the merchant's stock, including all of a certain class, at a reduced rate and with the intention of not replacing these goods, even though the value of the stock is thereby greatly reduced, without being subject to a distress for rent under the part of this statute relative to tenants seeking to remove their goods from the premises. Estill v. Savannah Bank & Trust Co., 138 Ga. 607, 75 S.E. 659 (1912) (see O.C.G.A. § 44-7-71).

Cited in Davis v. State, 147 Ga. App. 107, 248 S.E.2d 181 (1978); D. Jack Davis Corp. v. Karp, 175 Ga. App. 482, 333 S.E.2d 685 (1985).

RESEARCH REFERENCES

Am. Jur. 2d. — 49 Am. Jur. 2d, Landlord and Tenant, § 591.

C.J.S. — 52A C.J.S., Landlord and Tenant, § 1275 et seq.

ALR. — Landlord's lien or right of distress on property sold to tenant on conditional sale, 45 ALR 949.

Validity and effect of acceleration clause in lease or bailment, 58 ALR 300; 128 ALR 750.

Right of distraint for taxes which tenant has agreed to pay, 88 ALR 884.

Doctrine of breach by anticipatory repudiation of contract as applicable to lease, 137 ALR 432.

Landlord's remedy by way of distress or lien on defaulting tenant's property on leased premises as including right to collect for all unpaid utility expenses, 99 ALR3d 1100.

44-7-71. Application for distress warrant.

When rent is due or the tenant is seeking to remove his property, the landlord, his agent, his attorney in fact, or his attorney at law may, upon a statement of the facts under oath, apply for a distress warrant before the

judge of the superior court, the state court, the civil court, or the magistrate court within the county where the tenant may reside or where his property may be found. (Laws 1811, Cobb's 1851 Digest, p. 900; Code 1863, §§ 4011, 5101, 5102; Code 1868, § 4010; Ga. L. 1869, p. 14, § 1; Code 1873, § 4082; Ga. L. 1875, p. 23, § 1; Code 1882, § 4082; Civil Code 1895, § 4818; Civil Code 1910, § 5390; Code 1933, § 61-402; Ga. L. 1975, p. 1514, § 2; Ga. L. 1983, p. 884, § 3-29.)

JUDICIAL DECISIONS

Construction. — Statute is phrased in the disjunctive and must be so construed absent a clear indication that a disjunctive construction is contrary to the legislative intent. Cobb v. McCrary, 152 Ga. App. 212, 262 S.E.2d 538 (1979) (see O.C.G.A. § 44-7-71).

Authority is conferred by statute. — Authority to issue dispossessory or distress warrants does not exist unless expressly conferred by statute. White v. Johnson, 151 Ga. App. 345, 259 S.E.2d 731 (1979).

Contents of affidavit. — Former Code 1933, § 61-402 (see O.C.G.A. § 44-7-71) did not require that the affidavit used in applying for a distress warrant aver both nonpayment of rent and removal of goods from the premises; this construction avoided a conflict between former Code 1933, §§ 61-401 and 61-402 (see O.C.G.A. §§ 44-7-70 and 44-7-71), was in keeping with the historical role of the distress warrant, and permitted both sections to be read in accordance with the statutes' plain meaning. Cobb v. McCrary, 152 Ga. App. 212, 262 S.E.2d 538 (1979).

Defective summons and affidavit. — If the summons and affidavit are defective, a trial court was not authorized to dismiss them for failure to state a claim upon which relief can be granted; the deficiency was in the nature of the defense of ''insufficiency of process'' as described in Ga. L. 1972, p. 689, §§ 4 and 5 (see O.C.G.A. § 9-11-12(b)(4)), and failure to raise this defense specifically in a defensive pleading waived the defense. White v. Johnson, 151 Ga. App. 345, 259 S.E.2d 731 (1979).

Failure to verify affidavit. — Party's failure to have the affidavit provided for in this statute verified before a state court judge does not change the fact that a state court is empowered to issue a distress warrant. Cobb v. McCrary, 152 Ga. App. 212, 262 S.E.2d 538 (1979) (see O.C.G.A. § 44-7-71).

Warrant issued by clerk. — If the clerk and deputy clerks have been granted the power to perform all purely ministerial duties which, under the laws of this state, are performable by a justice of the peace, a distress warrant issued by the clerk or deputy clerk is valid. White v. Johnson, 151 Ga. App. 345, 259 S.E.2d 731 (1979).

Agents, attorneys-in-fact, or attorneys-at-law may proceed for and in behalf of landlords against tenants to collect rent past due or to recover possession of the premises. Jackson v. Oliphant, 88 Ga. App. 313, 76 S.E.2d 625 (1953).

Demand unnecessary. — Landlord may distrain for rent without a previous demand and refusal to pay, and without the allegation thereof in the landlord's affidavit. Hill v. Reeves, 57 Ga. 31 (1876). See also Buffington v. Hilley, 55 Ga. 655 (1876); McDougal v. Sanders, 75 Ga. 140 (1885).

Amendment. — An affidavit for a distress warrant is amendable. Bryant v. Mercier, 82 Ga. 409, 9 S.E. 166 (1889). See also Beach v. Averett, 106 Ga. 73, 31 S.E. 806 (1898).

Time for answer. — Timely answer to an application for a distress warrant is made if the tenant files the tenant's answer before the date of a rescheduled hearing, regardless of the length of time between the date of service of the summons for the tenant to appear and the date of filing of the answer. Daniel v. Wells Oil Co., 205 Ga. App. 331, 422 S.E.2d 55 (1992).

Rent on premises in another state. — One who has rent due one for premises which are in another state, or upon a contract of rental made in another state may proceed to collect one's rent by distress warrant in this state. Davis v. DeVaughn, 7 Ga. App. 324, 66 S.E. 956 (1910).

Trustees of an unincorporated religious society, holding title in themselves to the

society's real property, may bring a distress warrant for rent through their secretary and agent against a tenant in possession of the property who is holding over and beyond the tenant's term and who refuses to pay rent. Jackson v. Oliphant, 88 Ga. App. 313, 76 S.E.2d 625 (1953).

Insane tenant. — When tenant was sane when rent contract was entered into and during period when rent accrued, fact that tenant was adjudged insane prior to the time the distress warrant was issued and had no guardian at that time would not render a distress warrant void. Miller v. West, 83 Ga. App. 297, 63 S.E.2d 426 (1951).

Cited in D. Jack Davis Corp. v. Karp, 175 Ga. App. 482, 333 S.E.2d 685 (1985).

OPINIONS OF THE ATTORNEY GENERAL

Magistrate court has jurisdiction to try cases and issue writs and judgments in dispossessory and distress warrant proceedings when the amount in controversy exceeds $3,000.00. 1988 Op. Att'y Gen. No. U88-18.

RESEARCH REFERENCES

Am. Jur. 2d. — 49 Am. Jur. 2d, Landlord and Tenant, § 591.

C.J.S. — 52A C.J.S., Landlord and Tenant, § 1274.

ALR. — Landlord's remedy by way of distress or lien on defaulting tenant's property on leased premises as including right to collect for all unpaid utility expenses, 99 ALR3d 1100.

44-7-72. Issuance of summons; service on defendant; time for hearing.

When the affidavit provided for in Code Section 44-7-71 is made, the judge of the superior court, the state court, the civil court, or the magistrate court before whom it was made shall grant and issue a summons to the marshal or the sheriff or his deputy of the county where the tenant resides or where his property may be found. A copy of the summons and the affidavit shall be personally served upon the defendant. If an officer is unable to serve the defendant personally, service may be given by delivering the summons and affidavit to any person who is sui juris residing on the premises. The summons served on the defendant pursuant to this Code section shall command and require the tenant to appear at a hearing on a day certain not less than five nor more than seven days from the date of actual service. (Code 1933, § 61-403, enacted by Ga. L. 1975, p. 1514, § 2; Ga. L. 1982, p. 1134, § 3; Ga. L. 1983, p. 884, § 3-30.)

JUDICIAL DECISIONS

Authority conferred by statute. — Authority to issue dispossessory or distress warrants does not exist unless expressly conferred by statute. White v. Johnson, 151 Ga. App. 345, 259 S.E.2d 731 (1979).

Defective summons and affidavit. — When the summons and affidavit are defective, a trial court was not authorized to dismiss them for failure to state a claim upon which relief can be granted; the deficiency was in the nature of the defense of "insufficiency of process" as described in Ga. L. 1972, p. 689, §§ 4 and 5 (see O.C.G.A. § 9-11-12(b)(4)), and failure to raise this defense specifically in a defensive pleading waived the defense. White v. Johnson, 151 Ga. App. 345, 259 S.E.2d 731 (1979).

Warrant issued by clerk. — If the clerk and

deputy clerks have been granted the power to perform all purely ministerial duties which, under the laws of this state, are performable by a justice of the peace, a distress warrant issued by the clerk or deputy clerk is valid. White v. Johnson, 151 Ga. App. 345, 259 S.E.2d 731 (1979).

Time for answer. — Timely answer to an application for a distress warrant is made if the tenant filed the tenant's answer before the date of a rescheduled hearing, regardless of the length of time between the date of service of the summons for the tenant to appear and the date of filing of the answer. Daniel v. Wells Oil Co., 205 Ga. App. 331, 422 S.E.2d 55 (1992).

Cited in Don Pepe, Inc. v. JMAPCO, Inc., 157 Ga. App. 216, 276 S.E.2d 886 (1981).

RESEARCH REFERENCES

Am. Jur. 2d. — 49 Am. Jur. 2d, Landlord and Tenant, § 615 et seq.

C.J.S. — 52A C.J.S., Landlord and Tenant, § 1303.

44-7-73. When tender of payment by tenant serves as complete defense.

In an action for nonpayment of rent, the tenant shall be allowed to tender to the landlord, within seven days of the day the tenant was served with the summons pursuant to Code Section 44-7-72, all rents allegedly owed plus the cost of the distress warrant. Such a tender shall be a complete defense to the action. (Code 1933, § 61-408, enacted by Ga. L. 1975, p. 1514, § 2.)

JUDICIAL DECISIONS

Cited in D. Jack Davis Corp. v. Karp, 175 Ga. App. 482, 333 S.E.2d 685 (1985).

RESEARCH REFERENCES

Am. Jur. 2d. — 49 Am. Jur. 2d, Landlord and Tenant, § 596 et seq.

C.J.S. — 52A C.J.S., Landlord and Tenant, § 1301.

ALR. — Relief against forfeiture of lease for nonpayment of rent, 31 ALR2d 321.

44-7-74. Answer; grant of distress warrant on failure to answer; trial; possession pending final outcome.

(a) At or before the time of the hearing, the defendant may answer in writing. The defendant may answer orally at the time of the hearing. If the answer is oral, the substance thereof shall be endorsed upon the affidavit. The answer may contain any legal or equitable defense or counterclaim.

(b) If the tenant fails to answer, the court shall grant a distress warrant; and the plaintiff shall be entitled to a verdict and judgment by default for all rents due as if every item and paragraph of the affidavit provided for in Code Section 44-7-71 were supported by proper evidence, which verdict shall be in open court or chambers and without the intervention of a jury.

(c) If the tenant answers, a trial of the issues shall be had in accordance with the procedure prescribed for civil actions in courts of record except that if the action is tried in the magistrate court the trial shall be had in accordance with the procedures prescribed for that court. Every effort shall be made by the trial court to expedite a trial of the issues. The defendant shall be allowed to remain in possession of the premises and his property pending the final outcome of the litigation, provided that he complies with Code Section 44-7-75. (Ga. L. 1920, p. 147, § 1; Code 1933, § 61-406; Code 1933, § 61-404, enacted by Ga. L. 1975, p. 1514, § 2; Ga. L. 1982, p. 3, § 44; Ga. L. 1983, p. 884, § 3-30.1.)

JUDICIAL DECISIONS

Time for answer. — Timely answer to an application for a distress warrant is made if the tenant files the tenant's answer before the date of a rescheduled hearing, regardless of the length of time between the date of service of the summons for the tenant to appear and the date of filing of the answer. Daniel v. Wells Oil Co., 205 Ga. App. 331, 422 S.E.2d 55 (1992).

RESEARCH REFERENCES

Am. Jur. 2d. — 49 Am. Jur. 2d, Landlord and Tenant, § 615 et seq.

C.J.S. — 52A C.J.S., Landlord and Tenant, §§ 1301, 1305 et seq.

44-7-75. Payment of rent into court; transfer and possession of property pending trial; seizure; disposition of funds.

(a) At the time the tenant answers, the tenant shall pay into the registry of the trial court all rent admittedly owed prior to the issuance of the summons; provided, however, that, in lieu of such payment, the tenant shall be allowed to submit to the court a receipt indicating that the payment has been made to the landlord. In the event that the amount of rent is in controversy, the court shall determine the amount of rent to be paid into court in the same manner as provided in subsection (b) of this Code section.

(b) The tenant shall pay into the registry of the trial court all rent which becomes due after the issuance of the summons and shall pay said rent as it becomes due. If the landlord and tenant disagree as to the amount of rent, either or both of them may submit to the court any written rental contract for the purpose of establishing the amount of the rent to be paid into the registry of the court. If the amount of rent is in controversy and no written rental agreement exists between the tenant and the landlord, the court shall require the amount of rent to be a sum equal to the last previous rental payment made by the tenant and accepted by the landlord without written objection.

(c) If the landlord is also seeking a dispossessory warrant against the tenant pursuant to Article 3 of this chapter, money paid into court under

Code Section 44-7-54 shall fully satisfy the requirements under subsections (a) and (b) of this Code section.

(d) After the date of the service of the summons as provided in Code Section 44-7-72, the tenant shall not transfer, convey, remove, or conceal his property without either posting bond as provided in Code Section 44-7-76 or complying with subsections (a) and (b) of this Code section.

(e) If the tenant shall fail to comply with any of the provisions of this Code section, the tenant shall not be entitled to retain possession of his property pending a trial on the merits as provided by Code Section 44-7-74 unless he posts bond as provided by Code Section 44-7-76. Failure to comply with any provision of this Code section shall in no way affect the tenant's ability to litigate the issues raised in his answer but shall only affect the possession of the property pendente lite. If judgment is against the tenant, the property involved shall be seized by the marshal, the sheriff, or the deputy, as the case may be, and held thereby for levy and sale after judgment as provided by Code Section 44-7-79.

(f) The court shall order the clerk of the court to pay to the landlord the amounts paid into the registry of the court as such payments are made; provided, however, that, if the tenant claims that he is entitled to all or a part of the funds and such claim is an issue of controversy in the litigation, the court shall order the clerk to pay to the landlord without delay only that portion of the funds to which the tenant has made no claim in the proceedings. That part of the funds which is a matter of controversy in the litigation shall remain in the registry of the court until a final determination of the issues. (Code 1933, § 61-405, enacted by Ga. L. 1975, p. 1514, § 2; Ga. L. 1982, p. 3, § 44.)

JUDICIAL DECISIONS

Cited in D. Jack Davis Corp. v. Karp, 175 Ga. App. 482, 333 S.E.2d 685 (1985).

RESEARCH REFERENCES

Am. Jur. 2d. — 49 Am. Jur. 2d, Landlord and Tenant, § 615 et seq.

C.J.S. — 52A C.J.S., Landlord and Tenant, § 1376 et seq.

ALR. — Right to withdraw tender after money deposited or paid in court to keep tender good, 73 ALR 1281.

44-7-76. Bond; determination of amount; effect of approval on alienability of property.

In all cases where the tenant may desire to transfer, remove, or convey any of his property after the service of summons, the tenant shall post bond with good security for a sum equal to the value of the property or the amount of the rent alleged to be due, whichever is less, to be estimated by the judge,

for the delivery of the property at the time and place of sale if the property shall be found subject to such rent. Upon the approval of the bond by the judge, the tenant may convey, transfer, or remove his property without restriction. (Laws 1811, Cobb's 1851 Digest, p. 900; Code 1863, § 5103; Code 1868, § 4012; Code 1873, § 4083; Code 1882, § 4083; Ga. L. 1894, p. 51, § 1; Civil Code 1895, § 4819; Civil Code 1910, § 5391; Code 1933, § 61-404; Code 1933, § 61-411, enacted by Ga. L. 1975, p. 1514, § 2.)

JUDICIAL DECISIONS

Purpose of the bond is to insure the delivery of the property at the time and place of sale by the officer of the court in case the landlord obtains a judgment in the action. D. Jack Davis Corp. v. Karp, 175 Ga. App. 482, 333 S.E.2d 685 (1985).

RESEARCH REFERENCES

Am. Jur. 2d. — 49 Am. Jur. 2d, Landlord and Tenant, § 615 et seq.

C.J.S. — 52A C.J.S., Landlord and Tenant, § 1273.

44-7-77. Judgment and satisfaction; landlord's liability; distribution of funds; return of property.

(a) If, on the trial of the case, the judgment is against the tenant, the judgment shall be entered against the tenant for all rent due and for any other claim relating to the dispute and the distress warrant shall be granted.

(b) If the judgment is for the tenant, he shall be entitled to remain in the premises and in possession of his property and the landlord shall be liable for all foreseeable damages shown to have been caused by his wrongful conduct. Any funds remaining in the registry of the court shall be distributed to the parties in accordance with the judgment of the court. If the tenant has been deprived of the possession of his property pendente lite pursuant to subsection (e) of Code Section 44-7-75, the court shall order that the property be returned immediately to the tenant. (Code 1933, § 61-406, enacted by Ga. L. 1975, p. 1514, § 2; Ga. L. 1982, p. 3, § 44.)

JUDICIAL DECISIONS

Damages in addition to rent. — Distress proceeding may be used to recover damages in addition to rent if the damages are somehow related to the lease; thus, the trial court did not err in admitting evidence regarding physical damages to the property at the time the property was vacated. Powell v. Estate of Austin, 218 Ga. App. 446, 462 S.E.2d 378 (1995).

RESEARCH REFERENCES

Am. Jur. 2d. — 49 Am. Jur. 2d, Landlord and Tenant, § 615 et seq.

C.J.S. — 52A C.J.S., Landlord and Tenant, §§ 1311, 1312.

ALR. — Landlord and tenant: respective rights in excess rent when landlord relets at higher rent during lessee's term, 50 ALR4th 403.

44-7-78. Appeal; possession pending appeal.

Any judgment by the trial court shall be appealable to the appellate court pursuant to Chapters 2, 3, 6, and 7 of Title 5. If the judgment of the trial court is against the tenant and the tenant appeals this judgment, the tenant shall remain in the premises and in possession of his property; provided, however, that the tenant shall comply with all provisions of Code Section 44-7-75 or 44-7-76 until the issue has been finally determined on appeal. (Code 1933, § 61-407, enacted by Ga. L. 1975, p. 1514, § 2.)

RESEARCH REFERENCES

C.J.S. — 52A C.J.S., Landlord and Tenant, § 1313.

44-7-79. Execution and levy of distress warrant; sale.

Whenever a distress warrant is granted pursuant to this article, the distress warrant may be levied by the marshal, the sheriff, or the deputy on any property belonging to said tenant whether found on the premises or elsewhere; and the marshal, the sheriff, or the deputy shall advertise and sell the property in the same manner as in the case of levy and sale under execution. (Laws 1811, Cobb's 1851 Digest, p. 900; Code 1863, §§ 4011, 5101, 5102; Code 1868, § 4010; Ga. L. 1869, p. 14, § 1; Code 1873, § 4082; Ga. L. 1875, p. 23, § 1; Code 1882, § 4082; Civil Code 1895, § 4818; Civil Code 1910, § 5390; Code 1933, § 61-402; Code 1933, § 61-409, enacted by Ga. L. 1975, p. 1514, § 2.)

RESEARCH REFERENCES

Am. Jur. 2d. — 49 Am. Jur. 2d, Landlord and Tenant, § 604 et seq.

C.J.S. — 52A C.J.S., Landlord and Tenant, § 1312.

44-7-80. Time for attachment of landlord's lien; priorities.

The landlord's lien for his rent shall attach from the time that the affidavit is made pursuant to Code Section 44-7-71; but it shall take precedence over no lien of older date except as to the crop raised on the premises. (Orig. Code 1863, § 2268; Code 1868, § 2260; Code 1873, § 2286; Code 1882, § 2286; Civil Code 1895, § 3125; Civil Code 1910, § 3701; Code 1933, § 61-403; Code 1933, § 61-410, enacted by Ga. L. 1975, p. 1514, § 2.)

Law reviews. — For article, "The New Documentary Concerns Associated With Intelligent Buildings," see 22 Ga. St. B.J. 16 (1985).

JUDICIAL DECISIONS

Cited in D. Jack Davis Corp. v. Karp, 175 Ga. App. 482, 333 S.E.2d 685 (1985).

RESEARCH REFERENCES

Am. Jur. 2d. — 49 Am. Jur. 2d, Landlord and Tenant, §§ 557, 583, 584.

C.J.S. — 52A C.J.S., Landlord and Tenant, § 1273.

ALR. — Landlord's remedy by way of distress or lien on defaulting tenant's property on leased premises as including right to collect for all unpaid utility expenses, 99 ALR3d 1100.

44-7-81. Claims by third persons; oath and bond; method of trial.

A third person may make a claim to the distrained property by giving the oath and the bond as is required in cases of other claims. Such a claim shall be returned and tried as is provided by law for the trial of the right of property levied upon by execution. (Orig. Code 1863, § 5104; Code 1868, § 4013; Code 1873, § 4084; Code 1882, § 4084; Civil Code 1895, § 4820; Civil Code 1910, § 5392; Code 1933, § 61-407; Code 1933, § 61-412, enacted by Ga. L. 1975, p. 1514, § 2.)

RESEARCH REFERENCES

Am. Jur. 2d. — 49 Am. Jur. 2d, Landlord and Tenant, § 607 et seq.

C.J.S. — 52A C.J.S., Landlord and Tenant, § 1283.

44-7-82. Application of article to tenant's mobile home.

(a) As used in this Code section, the term ''mobile home'' means a movable or portable dwelling over 32 feet in length and over eight feet wide which is constructed to be towed on its own chassis and to be connected to utilities and is designed without a permanent foundation for year-round occupancy. A mobile home may consist of one or more components that can be retracted for towing purposes and subsequently expanded for additional capacity or may consist of two or more units separately towable but designed to be joined into one integral unit.

(b) A tenant's mobile home, as defined in subsection (a) of this Code section, shall be considered ''property,'' as that term is used in this article. (Code 1933, § 61-413, enacted by Ga. L. 1978, p. 938, § 2.)

RESEARCH REFERENCES

Am. Jur. 2d. — 49 Am. Jur. 2d, Landlord and Tenant, § 604 et seq.

C.J.S. — 52A C.J.S., Landlord and Tenant, § 1281.

ARTICLE 5

CROPPERS

RESEARCH REFERENCES

Am. Jur. Proof of Facts. — Sharecropper Status, 20 POF2d 713.

ALR. — Sharecropper's share in crop wholly or partly unharvested as subject to garnishment, 82 ALR2d 858.

Judicial or execution sale of realty as affecting debtor's share in crops grown by tenant or cropper, 13 ALR 1425; 113 ALR 1355.

Necessity of filing lease or contract which reserves title to crops in lessor, 14 ALR 1362.

Survivability and assignability of cropping contract, or lease with cropping features, 64 ALR 1418.

Farmland cultivation arrangement as creating status of landlord-tenant or landowner-cropper, 95 ALR3d 1013.

44-7-100. Nature of relationship between owner and cropper.

Where a person is employed to work for part of the crop, the relationship of landlord and tenant does not arise. The title to the crop, subject to the interest of the cropper therein, and the possession of the land remain in the owner of the land. (Civil Code 1895, § 3131; Civil Code 1910, § 3707; Code 1933, § 61-501.)

History of Code section. — This Code section is derived from the decision in Appling v. Odom, 46 Ga. 583 (1872).

JUDICIAL DECISIONS

Distinction between tenant and cropper. — Fundamental distinction between the relationships of landlord and cropper and landlord and tenant is that the status of cropper is that of a laborer who has agreed to work for and under the landlord for a certain proportion of the crop as wages, but who does not thereby acquire any dominion or control over the premises upon which such labor is to be performed, the cropper having the right merely to enter and remain thereupon for the purpose of performing the cropper's engagement. A tenant does not occupy the status of a laborer, but under such a contract acquires possession, dominion, and control over the premises for the term covered by the agreement, usually paying therefor a fixed amount either in money or specifics, and in making the crop performs the labor for the tenant and not for the landlord. Souter v. Cravy, 29 Ga. App. 557, 116 S.E. 231 (1923); Shepard v. State, 45 Ga. App. 519, 165 S.E. 320 (1932).

Distinction between cropper and contractor. — If the agreement is not that one shall perform services personally, but shall procure and furnish labor, one is not a servant but a contractor. Barron v. Collins, 49 Ga. 580 (1873); Duncan v. Anderson, 56 Ga. 398 (1876); Vinson v. State, 124 Ga. 19, 52 S.E. 79 (1905).

Items furnished by landlord. — When the owner was to furnish the land, stock, tools, and supplies to make a crop, and the other person was to do the work and receive a part of the crop so made, the legal relation which existed between them was that of landlord and cropper. Hackney v. State, 101 Ga. 512, 28 S.E. 1007 (1897); Hancock v. Boggus, 111 Ga. 884, 36 S.E. 970 (1900); Williams v. Mitchem, 151 Ga. 227, 106 S.E. 284 (1921); Shepard v. State, 45 Ga. App. 519, 165 S.E. 320 (1932).

Interpretation of contract. — Legal relation of the parties is to be determined not by the statement that the land was ''rented,'' or

that the owner was to receive a part of the crop "as rent," but by the entire contract. Kiker v. Jones, 20 Ga. App. 704, 93 S.E. 253 (1917).

No partnership created. — If one furnishes land or material and another does the labor necessary to produce the thing to be sold, and the latter receives a part of the profits as compensation for one's services, no partnership is created. Cherry v. Strong, 96 Ga. 183, 22 S.E. 707 (1895); Thornton v. McDonald, 108 Ga. 3, 33 S.E. 680 (1899); Thornton v. George, 108 Ga. 9, 33 S.E. 633 (1899); Jordan v. Jones, 110 Ga. 47, 35 S.E. 151 (1900); Padgett v. Ford, 117 Ga. 508, 43 S.E. 1002 (1903); Smart v. Hill, 29 Ga. App. 400, 116 S.E. 66 (1923).

Violation of duty as contract and tort. — Contract of landlord and cropper, when performance of it has been entered upon, creates a status between the parties from which reciprocal rights and duties spring; a tort, as well as a breach of contract, may arise from the violation of one of these duties. Tapley v. Youmans, 95 Ga. App. 161, 97 S.E.2d 365 (1957).

Landlord has no lien for supplies. — When the relationship of landlord and cropper exists under this statute, there is no lien on the crop in favor of the landlord for supplies furnished to the cropper, for the landlord has title. Fields v. Argo, 103 Ga. 387, 30 S.E. 29 (1898) (see O.C.G.A. § 44-7-100).

Laborer's lien. — When title to the subject matter of the trover action was in the landlord, the remedy of the cropper was to assert a laborer's lien on the crops. Wells v. Aldridge, 75 Ga. App. 702, 44 S.E.2d 183 (1947).

Cropper's damages for landlord's wrongful refusal to perform. — If the landlord wrongfully refuses to perform the landlord's part of the contract, the cropper may sue immediately for the cropper's special injuries, if any, including the value of services rendered, or the cropper may wait until the expiration of the harvest season and sue for the full value of the cropper's share of the crop or what the cropper's share would reasonably have been under a faithful performance of the contract by both parties. Surrency v. O'Quinn, 45 Ga. App. 455, 165 S.E. 171 (1932).

Eviction of cropper not available remedy. — Proceeding to evict one in possession of lands cannot be maintained unless the relation of landlord and tenant exists between the parties; if the relation of landlord and cropper exists, the cropper cannot be dispossessed under a summary warrant. Tapley v. Youmans, 95 Ga. App. 161, 97 S.E.2d 365 (1957).

Cropper's right of action against third party. — Cropper had such an interest in crops, even though not all had matured and the cropper's contract had not been fully completed by the cropper, as would support an action against one who wrongfully destroyed the crops, which right of action was joint and several with that of the landlord who likewise had an interest in the crops. Thombley v. Hightower, 52 Ga. App. 716, 184 S.E. 331 (1936).

Cited in Borders v. Herrington, 45 Ga. App. 449, 165 S.E. 148 (1932); George v. Cox, 46 Ga. App. 125, 166 S.E. 868 (1932); Herndon v. Sheats, 176 Ga. 199, 167 S.E. 506 (1933); Overstreet v. Dees, 52 Ga. App. 689, 184 S.E. 368 (1936); Flynt v. Barrett, 73 Ga. App. 396, 36 S.E.2d 868 (1946); Bexley v. State, 85 Ga. App. 888, 70 S.E.2d 602 (1952).

RESEARCH REFERENCES

Am. Jur. 2d. — 49 Am. Jur. 2d, Landlord and Tenant, § 549.

C.J.S. — 51C C.J.S., Landlord and Tenant, § 1 et seq. 52A C.J.S., Landlord and Tenant, § 1500 et seq.

ALR. — Recovery for failure of cropper or one leasing land on shares for failure to plant or cultivate crop, 39 ALR 1357.

Right to crops sown or grown by one wrongfully in possession of land, 57 ALR 584.

44-7-101. Title to crops.

Whenever the relationship of landlord and cropper exists, the title to and right to control and possess the crops grown and raised upon the lands of

the landlord by the cropper shall be vested in the landlord until the landlord has received his part of the crops so raised and has been fully paid for all advances made to the cropper in the year the crops were raised for the purpose of raising the crops. (Ga. L. 1889, p. 113, § 1; Civil Code 1895, § 3129; Civil Code 1910, § 3705; Code 1933, § 61-502.)

JUDICIAL DECISIONS

Analysis

General Consideration
Advances to Cropper
Division and Settlement

General Consideration

Certainty of meaning of section. — Statute in no uncertain terms declares ''the title to and right to control and process'' the crop is in the landlord and until the landlord has received the landlord's share of the crop and been paid for all advances made to aid in making the crop. This law may be harsh and inequitable, but it is not ambiguous. Goodson v. Watson, 125 Ga. 413, 54 S.E. 84 (1906) (see O.C.G.A. § 44-7-101).

Cropper and tenant distinguished. — If the owners of land employ one to work on the land, and agree to give one a part of the crop for making the crop, then the title would be in the landowners, and the landowners could take it and give one off one's part; but when the landowners turn over the land to one who is to farm thereon, and from the crop one is to pay the landowners sixteen hundred pounds of lint cotton, this creates the relation of landlord and tenant; the title to the cotton is in the tenant, and the landlords have only a lien thereon, and cannot take the cotton without the consent of the tenant. Wadley v. Williams, 75 Ga. 272 (1885).

Stock as crop. — Crops are the product of the soil and do not include the increase of livestock; when a landlord furnishes to a cropper livestock, the increase of which is to be raised by the latter on shares and to be divided equally between the parties, their relation with reference thereto is that of owners or tenants in common, and not that of landlord and cropper. Ellis, McKinnon & Brown v. Hopps, 30 Ga. App. 453, 118 S.E. 583 (1923).

Cropper is laborer. — Cropper has the status of a laborer. DeLoach v. Delk, 119 Ga. 884, 47 S.E. 204 (1904).

Cropper not partner. — That the cropper furnishes the labor necessary to the making of the crop, and is to receive a portion thereof as compensation for the cropper's services, does not place the cropper in the situation of a partner having an undivided interest in the product of the cropper's labor. Padgett v. Ford, 117 Ga. 508, 43 S.E. 1002 (1903).

Crops are wages. — Part of the crop to which the cropper is entitled is in the nature of wages. McElmurray v. Turner, 86 Ga. 215, 12 S.E. 359 (1890); DeLoach v. Delk, 119 Ga. 884, 47 S.E. 204 (1904); Vinson v. State, 124 Ga. 19, 52 S.E. 79 (1905). See also Taylor v. Coney, Lovejoy & Co., 101 Ga. 655, 28 S.E. 974 (1897); Betts v. State, 6 Ga. App. 773, 65 S.E. 841 (1909).

Landlord and cropper as tenants in common. — When, after a full settlement between a landlord and cropper in which the landlord is paid for all advances made to the cropper to aid in making the crops, it is found that a number of bales of cotton are subject to equal division between the parties, but in lieu of such division the cropper, at the direction of the landlord, deposits the cotton in a warehouse and obtains a receipt therefor issued by the warehouseman jointly to the landlord and the cropper as bailors, which receipt is delivered to and accepted by the landlord with the understanding that the cotton will not be sold until such time as the landlord and the cropper shall both agree upon, the relation of tenants in common as to such cotton results as between the parties to whom the warehouse receipt is issued, and the landlord will hold the receipt as a symbol of the property for the use of the landlord and the cropper as a cotenant, they

General Consideration (Cont'd)

being tenants in common as to the property represented thereby. George v. Bullard, 178 Ga. 589, 173 S.E. 920 (1934).

Laborer's lien. — Cropper is one who works for wages payable in part of the crop produced; cropper is a laborer and may maintain a laborer's lien upon the crop as the property of the cropper's employer. McElmurray v. Turner, 86 Ga. 215, 12 S.E. 359 (1890); Lewis v. Owens, 124 Ga. 228, 52 S.E. 333 (1905); Vinson v. State, 124 Ga. 19, 52 S.E. 79 (1905); Faircloth v. Webb, 125 Ga. 230, 53 S.E. 592 (1906); Garrick v. Jones, 2 Ga. App. 382, 58 S.E. 543 (1907); Howard v. Franklin, 32 Ga. App. 737, 124 S.E. 554 (1924).

Enforcement of laborer's lien. — Cropper is not ordinarily entitled to enforce a lien against a landlord without showing full compliance on the cropper's part with the terms of the agreement. Harvey v. Lewis, 19 Ga. App. 655, 91 S.E. 1052 (1917).

Trover against landlord improper. — Cropper cannot maintain against the landlord an action of trover, the title to the crops being in the latter. Bryant v. Pugh, 86 Ga. 525, 12 S.E. 927 (1891); DeLoach v. Delk, 119 Ga. 884, 47 S.E. 204 (1904); Smart v. Hill, 29 Ga. App. 400, 116 S.E. 66 (1923).

Cropper's damages. — If the landlord wrongfully refuses to perform the landlord's part of the contract, the cropper may sue immediately for the cropper's special injuries, if any, including the value of services rendered, or the cropper may wait until the expiration of the harvest season and sue for the full value of the cropper's share of the crop or what the cropper's share would reasonably have been under a faithful performance of the contract by both parties. Surrency v. O'Quinn, 45 Ga. App. 455, 165 S.E. 171 (1932).

Nonperformance caused by landlord. — Lack of full performance by the cropper will not defeat the foreclosure of such a lien when, without fault on the cropper's part, such failure to fully comply with the cropper's contractual obligation is caused by the unauthorized acts and conduct of the landlord. Lewis v. Owens, 124 Ga. 228, 52 S.E. 333 (1905); Haralson v. Speer, 1 Ga. App. 573, 58 S.E. 142 (1907); Ballard v. Daniel, 18 Ga. App. 449, 89 S.E. 603 (1916); Payne v. Trammell, 29 Ga. App. 475, 115 S.E. 923 (1923).

Mortgageable interest. — While the cropper has a ''mortgageable interest'' in the crops, such interest cannot be subjected to the mortgage debt until the cropper has acquired title; and this the cropper cannot do before a division between oneself and the landlord. Jordan v. Jones, 110 Ga. 47, 35 S.E. 151 (1900); Fountain v. Fountain, 10 Ga. App. 758, 73 S.E. 1096 (1912).

Interest of landlord. — Landlord's interest in the title to crops grown by the landlord's cropper is only to the extent of the value of the landlord's portion of the crops, as well as of any indebtedness for advances made to the cropper. Way v. Bailey, 18 Ga. App. 57, 88 S.E. 799 (1916); Franklin v. Tanner, 34 Ga. App. 254, 129 S.E. 114 (1925).

Landlord's cause of action. — If the relation of landlord and cropper existed, and there was not an actual division and settlement between the landlord and cropper according to the terms of the contract, the landlord could bring against the cropper an action of trover to recover the share of the crop belonging to the landlord and of which the cropper was in possession. Harley v. Davis, 7 Ga. App. 386, 66 S.E. 1102 (1910); DeLoach v. Delk, 119 Ga. 884, 47 S.E. 204 (1904); Welch v. Lindsey, 27 Ga. App. 164, 107 S.E. 891 (1921).

Possession of land. — If the relationship is one of the landlord and cropper, then the possession of the land remains in the owner. Taylor v. Coney, Lovejoy & Co., 101 Ga. 655, 28 S.E. 974 (1897); Betts v. State, 6 Ga. App. 773, 65 S.E. 841 (1909); Parks v. Langley, 17 Ga. App. 761, 88 S.E. 695 (1916); Kiker v. Jones, 20 Ga. App. 704, 93 S.E. 253 (1917); Cullars v. State, 28 Ga. App. 113, 110 S.E. 330 (1922).

Control of crop by landlord. — See Almand v. Scott, 80 Ga. 95, 4 S.E. 892, 12 Am. St. R. 241 (1887); Parks v. Langley, 17 Ga. App. 761, 88 S.E. 695 (1916).

Landlord's recovery for loss of labor. — Landowner cannot recover for the loss of time by cropper and family on account of sickness although the cropper is only hired to raise the crop. Central Ga. Power Co. v. Parker, 144 Ga. 135, 86 S.E. 324 (1915).

Conversion by cropper. — It is a conversion for a cropper, without consent of the

landlord, to gather and sell a part of the crop and apply the proceeds to the cropper's own use. Williams v. Mitchem, 151 Ga. 227, 106 S.E. 284 (1921); Payne v. Trammell, 29 Ga. App. 475, 115 S.E. 923 (1923).

Landlord's recovery from third person. — Landlord, until the landlord has received the landlord's part of the crops and has been fully paid for all advances made to the cropper, ordinarily has such possession of the crops as will authorize the issuance of a possessory warrant at the landlord's instance to recover possession of the crops from a third person who takes possession thereof without the landlord's consent and without other lawful warrant or authority. Whitworth v. Carter, 39 Ga. App. 625, 147 S.E. 904 (1929).

Waiver of landlord's lien. — Even if the relationship of landlord and cropper is shown, an executed waiver of the landlord's lien on the crops is an agreement that would alter the landlord's rights. Trapnell v. Swainsboro Prod. Credit Ass'n, 208 Ga. 89, 65 S.E.2d 179 (1951).

Variation by agreement. — While it is ordinarily true that under the relation of landlord and cropper the landlord has the right to control and possess the crops until the landlord has received the landlord's portion and is fully paid for all advances made by the landlord to aid in their production, the right may be varied by special agreement. Hanson v. Fletcher, 183 Ga. 858, 190 S.E. 29 (1937).

Collusion to defeat creditor. — If by collusion the landlord and the cropper attempt to defeat the creditor by refusing to make a division or otherwise, undoubtedly equity would afford relief. Fountain v. Fountain, 10 Ga. App. 758, 73 S.E. 1096 (1912).

Indictment for stealing. — In an accusation of stealing or attempting to steal a portion of the growing crop, the ownership should be alleged to be in the landlord, and not in the cropper. Betts v. State, 6 Ga. App. 773, 65 S.E. 841 (1909).

Instructions. — Court erred in failing to charge that title did not pass to tenant until advances are paid when it appears that the landlord had made advances for which the landlord had not been paid. Smith v. Anglin, 14 Ga. App. 311, 80 S.E. 693 (1914).

Cited in Rhodes v. Verdery, 157 Ga. 162, 121 S.E. 221 (1924); Folds v. Harris, 34 Ga. App. 445, 129 S.E. 664 (1925); Youngblood v. Duncan, 49 Ga. App. 300, 175 S.E. 411 (1934); Crews v. Roberson, 62 Ga. App. 855, 10 S.E.2d 114 (1940); Flynt v. Barrett, 73 Ga. App. 396, 36 S.E.2d 868 (1946).

Advances to Cropper

Suretyship by landlord insufficient. — That the title to the crops will vest in the landlord until paid for all advances means that the landlord must actually furnish the advances and not merely stand surety for the cropper to some other person who furnishes them. Rhodes v. Verdery, 157 Ga. 162, 121 S.E. 221 (1924).

Third party making advances. — If the landlord is unable to make advances and requests another to do so, the person making the advances has a claim against the crops that will prevail over the landlord's claims or interest therein. Trapnell v. Swainsboro Prod. Credit Ass'n, 208 Ga. 89, 65 S.E.2d 179 (1951).

Remedy of third party lienholder. — When after signing a waiver of all liens upon the crops grown by one's tenant in favor of a lien of a third party for advances to aid in making crops, the landlord receives the proceeds from the crops, which are sufficient to satisfy the lien for advances, and converts the same to the landlord's own use, a petition of the holder of the lien for such advances against the landlord and the tenant, seeking judgment against them as trustees ex maleficio for the full amount of such advances, states a cause of action against both the owner and tenant. Trapnell v. Swainsboro Prod. Credit Ass'n, 208 Ga. 89, 65 S.E.2d 179 (1951).

Division and Settlement

Title before settlement and division. — When the relation of landlord and cropper is created, the title to all crops grown on the land remains in the landlord until there has been an actual division and settlement whereby one receives in full one's share of the produce. Wadley v. Williams, 75 Ga. 272 (1885); Almand v. Scott, 80 Ga. 95, 4 S.E. 892, 12 Am. St. R. 241 (1887); Taylor v. Coney, Lovejoy & Co., 101 Ga. 655, 28 S.E. 974 (1897); Smart v. Hill, 29 Ga. App. 400, 116 S.E. 66 (1923); Cavin v. McWhorter, 37 Ga. App. 477, 140 S.E. 778 (1927); Courson

Division and Settlement (Cont'd)

v. Land, 54 Ga. App. 534, 188 S.E. 360 (1936).

Title after settlement and before division. — When there has been no division of the crop between the landlord and the cropper and when the cropper's portion of the crop has not been set aside, no title to the crop passes into the cropper, although the cropper may have settled with the landlord for all advances made. Atlanta Trust Co. v. Oliver-McDonald Co., 36 Ga. App. 360, 136 S.E. 824 (1927).

What amounts to division. — When a cropper has settled with the cropper's landlord for all advances made and has delivered to the landlord the latter's part of all the crops raised except certain cotton in the possession of the cropper which, under the terms of the contract, is to be divided between the landlord and the cropper, a transformation by the cropper of such remaining cotton into two bales of different weights, one weight representing the amount of cotton that belongs to the landlord and the other weight representing the amount of cotton belonging to the cropper, amounts to a division of the cotton, since each man's portion is identified by the different weights; and, upon delivery by the cropper to the landlord of the bale representing the landlord's portion of the cotton, the landlord's title to the other bale is immediately divested from the landlord and vested in the cropper. Thompson v. Price, 30 Ga. App. 653, 118 S.E. 598 (1923).

Interest of cropper before settlement. — Before there has been a settlement paying the landlord in full for advances and rent, the tenant has such an interest as will sustain an allegation of joint ownership with the landlord. Randolph v. State, 16 Ga. App. 328, 85 S.E. 258 (1915); Parker v. State, 23 Ga. App. 591, 99 S.E. 220 (1919).

RESEARCH REFERENCES

Am. Jur. 2d. — 49 Am. Jur. 2d, Landlord and Tenant, § 545.

C.J.S. — 51C C.J.S., Landlord and Tenant, § 2.

ALR. — Cropper's right to thresher's lien or lien for other work on share of owner, 35 ALR 450.

Right to crops sown or grown by one wrongfully in possession of land, 57 ALR 584.

44-7-102. Recovery of crops sold or disposed of without landlord's consent.

In all cases where a cropper unlawfully sells or otherwise disposes of any part of a crop or where the cropper seeks to take possession of such crops or to exclude the landlord from the possession thereof while the title thereto remains in the landlord, the landlord shall have the right to repossess the crops by any process of law by which the owner of the property can recover it under the laws of this state. (Ga. L. 1889, p. 113, § 3; Civil Code 1895, § 3130; Civil Code 1910, § 3706; Code 1933, § 61-503.)

JUDICIAL DECISIONS

In general. — When the relationship of landlord and cropper exists, this gives to the landlord the right to repossess the crops not only when the cropper unlawfully sells or disposes of any part of the crops or seeks to take possession of the crops, but also when the cropper seeks "to exclude the landlord from the possession" of the crops. Peacock v. American Plant Co., 49 Ga. App. 267, 175 S.E. 262 (1934).

Livestock as crops. — Statute defines the relations and rights of landlord and cropper only as to crops; crops are the product of the soil and do not include the increase of

livestock. Ellis, McKinnon & Brown v. Hopps, 30 Ga. App. 453, 118 S.E. 583 (1923) (see O.C.G.A. § 44-7-102).

Landlord's remedy. — When the relationship of landlord and cropper exists, the landlord may assert the landlord's title to the crops by trover. Cowart v. Dees, 7 Ga. App. 601, 67 S.E. 705 (1910).

Withholding all of crop until gathered. — Even if the contract provided that the cropper should gather, gin, and hold, the cropper has some discretion in this and may wait until all the crop is gathered before the cropper gins and sells the crop, without laying the cropper liable in trover. Forehand v. Jones, 84 Ga. 508, 10 S.E. 1090 (1890).

Prior payments of debts due cropper. — Landlord may be subjected to the prior payment of an indebtedness the landlord owes the cropper before the landlord recovers possession. Cowart v. Dees, 7 Ga. App. 601, 67 S.E. 705 (1910).

Cropper not removing crop. — When the crop had been divided and put in separate houses on the land, but it did not appear that the cropper was seeking to remove the crop, there was no cause of action. Visage v. Bowers, 122 Ga. 760, 50 S.E. 952 (1905).

Bona fide purchaser. — Since the title to the crops remains in the landlord until actual division and settlement, a bona fide purchaser of such a severed crop will not be protected in an action of trover brought against the purchaser by the landlord. Kirkland v. Wallace, 29 Ga. App. 238, 114 S.E. 649 (1922).

Cited in George v. Cox, 46 Ga. App. 125, 166 S.E. 868 (1932); J.L. Stifel & Sons v. McCormick, 59 Ga. App. 449, 1 S.E.2d 220 (1939); Crews v. Roberson, 62 Ga. App. 855, 10 S.E.2d 114 (1940).

RESEARCH REFERENCES

C.J.S. — 52A C.J.S., Landlord and Tenant, § 1500 et seq.

ALR. — Cropper's right to thresher's lien or lien for other work on share of owner, 35 ALR 450.

Recovery for failure of cropper or one leasing land on shares for failure to plant or cultivate crop, 39 ALR 1357.

Right to crops sown or grown by one wrongfully in possession of land, 57 ALR 584.

44-7-103. Illegal sale by cropper; refusal of landlord to deliver cropper's share; penalties.

(a) Any cropper who sells or otherwise disposes of any part of the crop grown by him without the consent of the landlord before the landlord has received his part of the crop and payment in full for all advances made to the cropper in the year the crop was raised for the purpose of raising such crop shall be guilty of a misdemeanor.

(b) Any landlord who fails or refuses, on demand, to deliver to the cropper the part of the crop or its value to which the cropper is entitled after payment for all advances made to him as provided in subsection (a) of this Code section shall be guilty of a misdemeanor. (Ga. L. 1889, p. 113, § 2; Ga. L. 1892, p. 115, § 1; Penal Code 1895, § 680; Penal Code 1910, § 729; Code 1933, § 61-9904.)

JUDICIAL DECISIONS

Applicability. — Statute does not apply to tenants. Hackney v. State, 101 Ga. 512, 28 S.E. 1007 (1897) (see O.C.G.A. § 44-7-103).

Statute applies only to debts created by advances to croppers. Brown v. State, 2 Ga. App. 657, 58 S.E. 1070 (1907) (see O.C.G.A. § 44-7-103).

Essence of the offense is the sale of the crop before settling in full with the landlord and before the landlord received the landlord's part of the crop, and without the landlord's consent. McGarr v. State, 13 Ga. App. 80, 78 S.E. 776 (1913).

Relationship required. — Person cannot be convicted under this statute unless the evidence shows that the relationship of landlord and cropper existed between the person and the person's landlord. Shepard v. State, 45 Ga. App. 519, 165 S.E. 320 (1932) (see O.C.G.A. § 44-7-103).

Landlord's ownership. — Landlord need not own land in fee simple. Freeman v. State, 30 Ga. App. 133, 116 S.E. 920 (1923).

Indictment. — All that was necessary in an indictment for selling crops without the landlord's consent was to charge that the accused sold a quantity of bales of cotton grown on the rented land, the sale being without the landlord's consent, and before paying the agreed rent for the premises, and with the intent to defraud the landlord, and thereby causing a loss to the landlord. Barbour v. State, 66 Ga. App. 498, 18 S.E.2d 40 (1941).

Description of crops. — In an indictment for the offense of selling crops without the landlord's consent, it is sufficient to describe the crops sold in the most general terms, and a more particular description is mere surplusage and need not be proved. Barbour v. State, 66 Ga. App. 498, 18 S.E.2d 40 (1941).

Element of crime omitted from instruction. — Before a cropper can be legally convicted of selling a part of the crop grown by the cropper, it is necessary to show that the sale was ''without the consent of the landlord''; and when the judge, in charging the jury, leaves out this essential ingredient of the crime, the charge is not complete, and the error requires the grant of a new trial. Moon v. State, 42 Ga. App. 467, 156 S.E. 640 (1931).

Cited in Scott v. State, 6 Ga. App. 332, 64 S.E. 1005 (1909); Smith v. State, 7 Ga. App. 468, 67 S.E. 202 (1910); Curry v. State, 17 Ga. App. 272, 86 S.E. 533 (1915); Veal v. State, 40 Ga. App. 256, 149 S.E. 328 (1929); Knight v. State, 80 Ga. App. 373, 56 S.E.2d 128 (1949).

RESEARCH REFERENCES

Am. Jur. 2d. — 49 Am. Jur. 2d, Landlord and Tenant, § 549.

C.J.S. — 52A C.J.S., Landlord and Tenant, § 1246.

ALR. — Judicial or execution sale of realty as affecting debtor's share in crops grown by tenant or cropper, 13 ALR 1425; 113 ALR 1355.