OFFICIAL CODE OF GEORGIA ANNOTATED

With Provision for Subsequent Pocket Parts

Prepared by

The Code Revision Commission
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and
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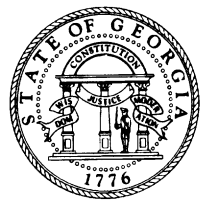

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Title 14. Property

(Chapters 8 through 16)

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and Annotations taken from the Georgia Reports
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THE STATE OF GEORGIA

OFFICE OF SECRETARY OF STATE

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

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

IN TESTIMONY WHEREOF, I have hereunto set my hand and affixed the seal of my office, at the Capitol, in the City of Atlanta, this 1st Day of July in the year of our Lord Two Thousand and Twenty- Two and of the Independence of the United States of America the Two Hundred and Forty-Sixth.

Brad Raffensperger

Brad Raffensperger, Secretary of State

Preface

This volume cumulates and replaces the 2002 edition of Volume 32 of the Official Code of Georgia Annotated, as supplemented by the 2021 Cumulative Supplement. The 2002 Volume 32 and its 2021 Supplement may be recycled or, if so desired, retained for historical purposes.

This volume contains all laws specifically codified in Title 44, Chapters 8 through 16, by the General Assembly through the 2022 Session. This volume also contains case annotations reflecting decisions posted to LexisNexis® through May 13, 2022. These annotations will appear in the following traditional reporter sources: Georgia Supreme Court Opinions; Georgia Appeals Court Opinions; Southeastern Reporter, Second Series; Supreme Court Reporter; Federal Reporter, Third Series; Federal Supplement, Second Series; Federal Rules Decisions; and Bankruptcy Reporter.

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

This volume retains amendment notes and effective date notes for Acts passed during the 2020, 2021, and 2022 Sessions of the General Assembly. In order to determine the changes which were made or the effective date applied to a Code section by an Act passed prior to the 2020 Session of the General Assembly, the user should consult the Georgia Laws.

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User's Guide

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

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44-8-6.	Nonnavigable tidewaters;		

Cross references.

Georgia Water Quality Control Act, § 12-5-20 et seq.

Law reviews.

For article, "Riparian Rights in Georgia," see 18 Ga. B. J. 401 (1956).

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, "The Right to Rainwater: An Unlikely Fairy Tale," see 69 Mercer L. Rev. 575 (2018).

For comment, "Canals, Community, and Coastal Permits: Overcoming Inadequate Remedies for Erosion Within the Barataria-Terrebonne National Estuary," see 70 Emory L.J. 663 (2021).

JUDICIAL DECISIONS

Georgia's law of riparian rights is a natural flow theory modified by reasonable use provision. Pyle v. Gilbert, 245 Ga. 403, 265 S.E.2d 584, 1980 Ga. LEXIS 809 (1980), overruled in part, Tunison v. Harper, 286 Ga. 687, 690 S.E.2d 819, 2010 Ga. LEXIS 222 (2010).

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For discussion of fishing and public passage rights on non-tidal rivers of the state, see 1985 Op. Att'y Gen. No. U85-8.

RESEARCH REFERENCES

Am. Jur. Proof of Facts.

Unreasonable Alteration of Surface Drainage, 6 POF2d 301.

Interference with Use of Senior Well — Withdrawal from Common Aquifer, 8 POF2d 515.

Citizens' Suits under the Safe Drinking Water Act, 67 POF3d 95.

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Right to follow accretions across division line previously submerged by action of water, 8 A.L.R. 640; 41 A.L.R. 395.

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Right of riparian owner to embank against flood or overflow water from stream, 22 A.L.R. 956; 53 A.L.R. 1180; 23 A.L.R.2d 750.

Title to beds of natural lakes or ponds, 23 A.L.R. 757; 112 A.L.R. 1108.

Liability of owner of flowage rights for draining off water to the damage of property overflowed, 29 A.L.R. 1325.

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Constitutionality of statutes affecting riparian rights, 56 A.L.R. 277.

Duty of lower land to receive surface water diverted to upper land by artificial conditions outside of both tracts, 72 A.L.R. 344.

Right to injunction to protect water rights as affected by fact that party seeking injunction contemplates no immediate use of rights, or by doctrine of comparative injury, 106 A.L.R. 687.

Appropriation of water as creating right, as against subsequent appropriator, to continue method or means of diversion, 121 A.L.R. 1044.

Assignability and divisibility of easement in gross or license in respect of land or water, 130 A.L.R. 1253.

Waters: rights in respect of changes by accretion or reliction due to artificial conditions, 134 A.L.R. 467.

Rights and duties of owners inter se with respect to upkeep and repair of water easement, 169 A.L.R. 1147.

Liability, as regards surface waters, for raising surface level of land, 12 A.L.R.2d 1338.

Rights of fishing, boating, bathing, or the like in inland lakes, 57 A.L.R.2d 569.

Easements: way by necessity where property is accessible by navigable water, 9 A.L.R.3d 600.

Res ipsa loquitur as applicable in actions for damage to property by the overflow or escape of water, 91 A.L.R.3d 186.

Extinguishment by prescription of natural servitude for drainage of surface waters, 42 A.L.R.4th 462.

Liability for diversion of surface water by raising surface level of land, 88 A.L.R.4th 891.

44-8-1. Ownership of running water; right to divert or adulterate water.

Running water belongs to the owner of the land on which it runs; but the landowner has no right to divert the water from its usual channel nor may he so use or adulterate it as to interfere with the enjoyment of it by the next owner.

History.

Ga. L. 1855-56, p. 12, § 1; Code 1863, § 2206; Code 1868, § 2201; Code 1873, § 2227; Code 1882, § 2227; Civil Code 1895, § 3057; Civil Code 1910, § 3629; Code 1933, § 85-1301.

Law reviews.

For article, "Georgia Water Law, Use and Control Factors," see 19 Ga. B. J. 119 (1956).

For article discussing federal liability for pollution abatement in condemnation actions, see 17 Mercer L. Rev. 364 (1966).

For article discussing legal questions relating to interbasin transfer of water supply, see 13 Ga. St. B.J. 48 (1976).

For article, "Hazardous Waste Issues in Real Estate Transactions," see 38 Mercer L. Rev. 581 (1987).

For article, "Water Rights, Public Resources, and Private Commodities: Examining the Current and Future Law Governing the Allocation of Georgia Water," see 38 Ga. L. Rev. 1009 (2004).

For article, "Special Challenges to Water Markets in Riparian States," see 21 Ga. St. U.L. Rev. 305 (2004).

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General Consideration

O.C.G.A. § 44-8-1 does not speak to the landlord-tenant relationship, but only to the relations between adjoining proprietors. Uniroyal, Inc. v. Hood, 588 F.2d 454, 1979 U.S. App. LEXIS 17321 (5th Cir. 1979).

Diversion of Water

No change in common law. — Construing together O.C.G.A.§§ 44-8-1, 44-8-3, and 51-9-7, there is no change in the common law. Pool v. Lewis, 41 Ga. 162, 1870 Ga. LEXIS 53 (1870); White v. East Lake Land Co., 96 Ga. 415, 23 S.E. 393, 1895 Ga. LEXIS 95 (1895); Price v. High Shoals Mfg. Co., 132 Ga. 246, 64 S.E. 87, 1909 Ga. LEXIS 73 (1909).

Section allows propelling machinery on water without diversion. — O.C.G.A.§§ 44-8-1 and 51-9-7 secure to the owner of land over which a stream passes the legal use of it, for the purpose of propelling such machinery as is suited to the size and capacity of the stream; provided, the water is not obstructed for an unreasonable time, and is not diverted from its natural channel when it passes to the lands of the next proprietor. Pool v. Lewis, 41 Ga. 162, 1870 Ga. LEXIS 53 (1870).

Riparian landowner rights to ditch land not altered. — O.C.G.A. § 44-8-1 made no substantial change in the common-law rights of landowners, with respect to ditching out and protecting their property. Grant v. Kuglar, 81 Ga. 637, 8 S.E. 878, 1888 Ga. LEXIS 296 (1888); Price v. High Shoals Mfg. Co., 132 Ga. 246, 64 S.E. 87, 1909 Ga. LEXIS 73 (1909).

Riparian owners entitled to reasonable use. — Under a proper construction of O.C.G.A. §§ 13-6-5, 44-8-1, 51-9-7, and 51-12-11, every riparian owner is entitled to a reasonable use of the water in the stream. If the general rule that each riparian owner could not in any way inter-

rupt or diminish the flow of the stream were strictly followed, the water would be of little practical use to any proprietor, and the enforcement of such rule would deny, rather than grant, the use thereof. Price v. High Shoals Mfg. Co., 132 Ga. 246, 64 S.E. 87, 1909 Ga. LEXIS 73 (1909).

Including right to irrigate. — Irrigation is not per se a diversion of water prohibited by law. Pyle v. Gilbert, 245 Ga. 403, 265 S.E.2d 584, 1980 Ga. LEXIS 809 (1980), overruled in part, Tunison v. Harper, 286 Ga. 687, 690 S.E.2d 819, 2010 Ga. LEXIS 222 (2010).

If reasonable amount used for home or farm. — A reasonable amount of water may be diverted for irrigation, under the general right of use for domestic and agricultural purposes. Pyle v. Gilbert, 245 Ga. 403, 265 S.E.2d 584, 1980 Ga. LEXIS 809 (1980), overruled in part, Tunison v. Harper, 286 Ga. 687, 690 S.E.2d 819, 2010 Ga. LEXIS 222 (2010).

Upper riparian owner has right to pass water along unobstructed by lower riparian owner, and lower riparian owner has duty to receive water unobstructed by upper riparian owner. Brown v. Tomlinson, 246 Ga. 513, 272 S.E.2d 258, 1980 Ga. LEXIS 1178 (1980).

If upper owner does not increase flow. — Where two lots adjoin, lower lot owes servitude to the higher, to receive water naturally running from it, provided owner of the latter has done nothing to increase flow by artificial means. Brown v. Tomlinson, 246 Ga. 513, 272 S.E.2d 258, 1980 Ga. LEXIS 1178 (1980).

Lower riparian owners also have riparian rights to natural flow of stream running through upper riparian owners' property. Brown v. Tomlinson, 246 Ga. 513, 272 S.E.2d 258, 1980 Ga. LEXIS 1178 (1980).

Landowner may not damage neighbor by diverting runoff. — A landowner has no right incident to ownership of land to divert surface water runoff so as to damage an adjoining proprietor. Uniroyal, Inc. v. Hood, 588 F.2d 454, 1979 U.S. App. LEXIS 17321 (5th Cir. 1979).

Landowner may not use water on nonriparian land. — Riparian rights are appurtenant only to lands which actually touch on the water course, or through which it flows, and a riparian owner or proprietor cannot lawfully use, or convey to another the right to use water flowing along or through property, upon nonriparian land or lands physically separated from the lands bordering upon the stream. Hendrix v. Roberts Marble Co., 175 Ga. 389, 165 S.E. 223, 1932 Ga. LEXIS 256 (1932).

Riparian owners have only usufruct to use water. — No riparian proprietor has the right to use the water to the prejudice of other proprietors above or below the riparian proprietor, as the riparian proprietor has no property in the water itself, but a simple usufruct while it passes along. Robertson v. Arnold, 182 Ga. 664, 186 S.E. 806, 1936 Ga. LEXIS 536 (1936).

Injunction justified to prevent diversion. — Where a lower riparian proprietor petitions for an interlocutory injunction against an upper proprietor, who is threatening to interfere with petitioner's rights in a nonnavigable stream flowing through land, by diverting part of the water above the lands of the petitioner, and returning it to the stream below such lands, and where it appears from the record that the defendant, a nonresident, admits the contemplated trespass, and defends solely upon the ground that the diversion of the water will not damage the petitioner to any material extent, it is error to refuse the injunction prayed because (1) the diversion of the water would be an injury to the petitioner's property and property rights; (2) the injunction would prevent a multiplicity of suits; and (3) the injunction would restrain acts of the defendant which might, with the lapse of time, become the foundation of an adverse right. Robertson v. Arnold, 182 Ga. 664, 186 S.E. 806, 1936 Ga. LEXIS 536 (1936).

Use of more water than proportionate share grounds for damages. — For other than domestic purposes, the right of each proprietor in the use of the water is limited by the rights of the other proprietors; and consequently, if an upper proprietor appropriates to own use more of the water than the proportionate share to which the owner is entitled, a lower proprietor may maintain an action for the

Diversion of Water (Cont'd)

recovery of damages therefor. White v. East Lake Land Co., 96 Ga. 415, 23 S.E. 393, 1895 Ga. LEXIS 95 (1895).

Damages amount based on complete or partial diversion. — If diversion of water is complete, the lower proprietor is entitled to full damages; if partial, the damages should be apportioned. White v. East Lake Land Co., 96 Ga. 415, 23 S.E. 393, 1895 Ga. LEXIS 95 (1895).

The damaged proprietor is under no legal obligation to exercise ordinary care to avoid or lessen such damages. Satterfield v. Rowan, 83 Ga. 187, 9 S.E. 677, 1889 Ga. LEXIS 30 (1889); Price v. High Shoals Mfg. Co., 132 Ga. 246, 64 S.E. 87, 1909 Ga. LEXIS 73 (1909).

Whether use reasonable is question for jury. — The question as to whether or not the use of the water by the first proprietor is reasonable is one of fact for determination by jury. White v. East Lake Land Co., 96 Ga. 415, 23 S.E. 393, 1895 Ga. LEXIS 95 (1895); Price v. High Shoals Mfg. Co., 132 Ga. 246, 64 S.E. 87, 1909 Ga. LEXIS 73 (1909).

No relief if 20 years of prescriptive use passed. — Where dam on lower riparian owner's property creating pond on upper riparian owner's property was in existence for more than 20 years, lower riparian owner lost right to receive natural flow of water from upper riparian owner and the latter acquired right to maintain accumulated water on land. Brown v. Tomlinson, 246 Ga. 513, 272 S.E.2d 258, 1980 Ga. LEXIS 1178 (1980).

No relief if upper landowner failed to complain before pond drainage began. — Even though appellant, upper riparian landowner, had acquired prescriptive right to maintain accumulated water on land, the upper riparian owner was not entitled to permanent injunction preventing lower riparian owner from draining the pond by breaking dam on lower riparian property where appellant failed to attend meetings where draining of the pond was discussed and did not bring action until one month after appellent became aware that pond was being drained, and where appellee testified in court that the plan was to refill and restock the pond. Brown v. Tomlinson, 246 Ga. 513, 272 S.E.2d 258, 1980 Ga. LEXIS 1178 (1980).

If landowner not riparian proprietor. — Where the petition disclosed that the plaintiff was not a riparian owner at the time the action was filed, the petition did not state a cause of action either for legal or equitable relief on account of the erection by the defendants of a dam across a nonnavigable stream flowing through the property of the defendants and across land occupied by the plaintiff with the consent of the owner. Moulton v. Bunting McWilliams Post No. 658, VFW, 213 Ga. 859, 102 S.E.2d 593, 1958 Ga. LEXIS 307 (1958).

Pollution

A lower riparian owner is entitled to have water flow upon land in its natural state free from adulteration. Kingsley Mill Corp. v. Edmonds, 208 Ga. 374, 67 S.E.2d 111, 1951 Ga. LEXIS 368 (1951).

An upper riparian owner cannot lawfully pollute the water of a stream so as to render it unfit for use by a lower owner. Satterfield v. Rowan, 83 Ga. 187, 9 S.E. 677, 1889 Ga. LEXIS 30 (1889); Horton v. Fulton, 130 Ga. 466, 60 S.E. 1059, 1908 Ga. LEXIS 315 (1908).

Several owners may petition to restrain pollution of nonnavigable stream. — The owner of land is entitled to the use of water of a nonnavigable stream flowing through land. Several lower riparian landowners have such a community of interest that they may join in a petition to restrain an upper proprietor or stranger from adulterating the water. Horton v. Fulton, 130 Ga. 465, 60 S.E. 1059 (1908); Cairo Pickle Co. v. Muggridge, 206 Ga. 80, 55 S.E.2d 562, 1949 Ga. LEXIS 613 (1949).

Through an injunction. — Injuring "a fishing privilege," or rendering land less valuable for pasture purposes, by polluting the water of a nonnavigable stream, gives rise to a cause of action. Injunction will lie to prevent continuing trespasses. Cairo Pickle Co. v. Muggridge,

206 Ga. 80, 55 S.E.2d 562, 1949 Ga. LEXIS 613 (1949).

Petition showing damage not subject to dismissal. — A petition of a lower riparian owner showing an adulteration, by an upper-riparian owner, of water flowing through their properties with resultant damage to such lower owner, in violation of O.C.G.A. § 44-8-1 and 51-9-7, is not demurrable (now motion to dismiss) as stating no cause of action. Vickers v. City of Fitzgerald, 216 Ga. 476, 117 S.E.2d 316, 1960 Ga. LEXIS 509 (1960), overruled, City of Chamblee v. Maxwell, 264 Ga. 635, 452 S.E.2d 488, 1994 Ga. LEXIS 894 (1994).

Grounds for injunction to restrain sewage disposal on dairy. — Where no question of prescriptive rights was involved in suit by a dairy farmer seeking to enjoin a manufacturing company from polluting a stream, and where there was evidence, though conflicting, that the stream was being polluted, and that the petitioner had not acquiesced or consented for the water from the defendants' sewerage disposal plant to be discharged upon defendant's land, the trial court did not abuse its discretion in granting an interlocutory injunction. Kingsley Mill Corp. v. Edmonds, 208 Ga. 374, 67 S.E.2d 111, 1951 Ga. LEXIS 368 (1951).

OPINIONS OF THE ATTORNEY GENERAL

Riparian owner may prohibit fishing on part of navigable river. — A property owner may bar public fishing in a fresh water stream on that portion of the stream that runs through land held by the property owner, although the stream is navigable. 1960-61 Ga. Op. Att'y Gen. 237.

RESEARCH REFERENCES

Am. Jur. 2d.

78 Am. Jur. 2d, Waters, §§ 1, 5-31, 230, 253.

Am. Jur. Pleading and Practice Forms.

24B Am. Jur. Pleading and Practice Forms, Waters, § 6.

C.J.S.

65 C.J.S., Navigable Waters, §§ 64, 85. 93 C.J.S., Waters, §§ 9 et seq., 20 et seq., 134 et seq., 199 et seq.

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Right of owner of upland to make a use, not connected with navigation, of the shore between high and low water mark, which excludes the general public, 10 A.L.R. 1053; 107 A.L.R. 1347.

Liability of one who diverts stream into new channel for overflow, 12 A.L.R. 187.

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Right of riparian owner on navigable water to access to water, 89 A.L.R. 1156.

Appropriation of water as creating right, as against subsequent appropriator, to continue method or means of diversion, 121 A.L.R. 1044.

Agreement in respect of water rights in stream as creating a mere personal obligation, covenant running with the land, or an easement, 127 A.L.R. 835.

Right of riparian owner to continuation

of periodic and seasonal overflows from stream, 20 A.L.R.2d 656.

Landowner's right to relief against pollution of his water supply by industrial or commercial waste, 39 A.L.R.3d 910.

Propriety of injunctive relief against diversion of water by municipal corporation or public utility, 42 A.L.R.3d 426.

Liability of oil and gas lessee or operator for injuries to or death of livestock, 51 A.L.R.3d 304.

Modern status of rules governing interference with drainage of surface waters, 93 A.L.R.3d 1193.

Exemption from sales or use tax of water, oil, gas, other fuel, or electricity provided for residential purposes, 15 A.L.R.4th 269.

Liability for diversion of surface water by raising surface level of land, 88 A.L.R.4th 891.

44-8-2. Rights of adjoining owners in nonnavigable streams; principles when stream is boundary; accretions.

The beds of nonnavigable streams belong to the owner of the adjacent land. If the stream is a dividing line between two parcels of land, each owner's boundary shall extend to the thread or the center of the main current of the water. If the current changes gradually, the boundary line follows the current. If from any cause the stream takes a new channel, the original line, if identifiable, remains the boundary. Gradual accretions of land on either side accrue to the owner of that side.

History.

Orig. Code 1863, § 2207; Code 1868, § 2202; Code 1873, § 2228; Code 1882, § 2228; Civil Code 1895, § 3058; Civil Code 1910, § 3630; Code 1933, § 85-1302.

Cross references.

Jurisdiction of county over stream of water which forms boundary of county, § 36-1-2.

Diversion, obstruction, or pollution of nonnavigable watercourses as constituting trespass, § 51-9-7.

Law reviews.

For article on principles of water law in the southeast, see 13 Mercer L. Rev. 344 (1962).

JUDICIAL DECISIONS

Section follows common law. — O.C.G.A. § 44-8-2 declares that where land is bounded by a nonnavigable stream the boundary extends to the center or thread of the stream. This rule has been part of the common law even before the section was passed. Jones v. Water Lot Co., 18 Ga. 539, 1855 Ga. LEXIS 238 (1855); Boardman v. Scott, 102 Ga. 404, 30 S.E. 982, 1897 Ga. LEXIS 512 (1897); State v. Georgia Ry. & Power Co., 141 Ga. 153, 80 S.E. 657, 1913 Ga. LEXIS 365 (1913).

Where land is bounded by a nonnavigable stream the boundary extends to the center or thread of the stream. Outlaw v. Outlaw, 225 Ga. 100, 165 S.E.2d 845, 1969 Ga. LEXIS 391 (1969).

Land grants bounded on river. — Under O.C.G.A. § 44-8-2 where a plot calls for a nonnavigable river as a boundary, the line is to determine at it, and the land embraced in the grant will extend to the middle thread of the stream. Stanford v. Mangin, 30 Ga. 355, 1860 Ga. LEXIS 102 (1860); State v. Georgia Ry. & Power Co., 141 Ga. 153, 80 S.E. 657, 1913 Ga. LEXIS 365 (1913).

Extension of property to midstream applies in condemnation proceedings. — In a notice to acquire an easement of flowage on certain described land bounded by a nonnavigable stream, where

the easement sought to be acquired is to overflow the land, which is specifically described, and also to raise and flow-back the water in the stream to a certain depth, the description of the property sought to be impressed with the easement of flowage is sufficiently comprehensive and definite to include flowage rights over both the land described and also the bed of the stream on which it abuts to the center of the stream. Central Ga. Power Co. v. Maddox, 135 Ga. 246, 69 S.E. 109, 1910 Ga. LEXIS 500 (1910).

Boundary line running to stream presumed to run to center. — Where a boundary line is described as running to the stream, language which describes it as thereafter running "with," "along," "by," "on," "up," or "down" the stream will be construed to carry the title to the center unless contrary intention appears from the instrument. Westmoreland v. Beutell, 153 Ga. App. 558, 266 S.E.2d 260, 1980 Ga. App. LEXIS 1899 (1980).

Ownership of artificial pond shores only to low-water mark. — Under a deed bounding land conveyed by an artificial pond, the lien of the land conveyed did not extend to the thread of the stream from whose waters the pond was formed, but only to the low-water mark of the pond. Boardman v. Scott, 102 Ga. 404, 30 S.E. 982, 1897 Ga. LEXIS 512 (1897).

Owner of bed of nontidal stream has exclusive fishing rights. — Where tidal waters are not involved, the ownership of the fee in the bed of the stream generally carries with it the exclusive right of fishery in the stream. West v. Baumgartner, 124 Ga. App. 318, 184 S.E.2d 213, 1971 Ga. App. LEXIS 912 (1971), rev'd, 228 Ga. 671, 187 S.E.2d 665, 1972 Ga. LEXIS 884 (1972).

Under common law. — By the common law the right to take fish belongs essentially to the right of soil in streams where the tide does not ebb and flow. Bosworth v. Nelson, 170 Ga. 279, 152 S.E. 575, 1930 Ga. LEXIS 437 (1930).

If the riparian owner owns both sides of the stream, no one but the owner may come within the limits of land and take fish. The same right applies so far as land extends to the thread of the stream, where the owner owns upon one side only. Within these limits, by the common law, the owner's rights of fishery are sole and exclusive. Bosworth v. Nelson, 170 Ga. 279, 152 S.E. 575, 1930 Ga. LEXIS 437 (1930).

Milling privileges do not give fishing rights. — As the owner of land adjoining a nonnavigable stream, is, under O.C.G.A. § 44-8-2, the owner of the soil to the center of the stream, it follows that if one proprietor owns the land on both sides of a stream the proprietor has the exclusive right of fishing therein, and a grant of mill privileges in the stream does not carry the fishing privileges. Thompson v. Tennyson, 148 Ga. 701, 98 S.E. 353, 1919 Ga. LEXIS 38 (1919).

Upper owner may use water above mill. — Riparian owners are each entitled to the center of the stream, and where there was a dam in the stream forming a mill pond in which the lower riparian owner was entitled to milling privileges, the upper riparian owner had, nevertheless, the right to a reasonable use of the water to the center of the stream, provided such use did not interfere with the milling privileges. Rome Ry. & Light Co. v. Loeb, 141 Ga. 202, 80 S.E. 785, 1915C Am. Ann. Cas. 1023 (1914).

Right to reasonable use of water in nonnavigable watercourse on nonriparian land can be acquired by grant from a riparian owner. Pyle v. Gilbert, 245 Ga. 403, 265 S.E.2d 584, 1980 Ga. LEXIS 809 (1980), overruled in part, Tunison v. Harper, 286 Ga. 687, 690 S.E.2d 819, 2010 Ga. LEXIS 222 (2010).

OPINIONS OF THE ATTORNEY GENERAL

The consent of the riparian owner must be obtained before removing floating logs from nonnavigable streams. 1958-59 Ga. Op. Att'y Gen. 220.

For discussion of the scope of riparian rights and the "right of access" to a nonnavigable, freshwater impoundment, see 1980 Op. Att'y Gen. No. 80-130.

RESEARCH REFERENCES

Am. Jur. 2d.

78 Am. Jur. 2d, Waters, §§ 230, 260-280, 282, 283, 383, 384, 406, 407, 411, 413.

C.J.S.

65 C.J.S., Navigable Waters, § 94 et seq. 93 C.J.S., Waters, §§ 11 et seq., 91 et seq., 170 et seq.

ALR.

Right to hasten the flow and increase the volume of water in a stream by alterations or improvements in the bed, 9 A.L.R. 1211.

Right of owner of upland to make a use, not connected with navigation, of the shore between high and low water mark, which excludes the general public, 10 A.L.R. 1053; 107 A.L.R. 1347.

Right of riparian owner to embank against flood or overflow water from stream, 22 A.L.R. 956; 53 A.L.R. 1180; 23 A.L.R.2d 750.

Right to place bathhouse or similar structure on shore in front of riparian owner, 24 A.L.R. 1273.

Right of riparian owner on navigable water to access to water, 89 A.L.R. 1156.

Waters: rights in respect of changes by accretion or reliction due to artificial conditions, 134 A.L.R. 467.

Right of riparian owner to continuation of periodic and seasonal overflows from stream, 20 A.L.R.2d 656.

Right of riparian owner to construct dikes, embankments, or other structures necessary to maintain or restore bank of stream or to prevent flood, 23 A.L.R.2d 750.

Applicability of rules of accretion and reliction so as to confer upon owner of island or bar in navigable stream title to additions, 54 A.L.R.2d 643.

Apportionment and division of area of river as between riparian tracts fronting on same bank, in absence of agreement or specification, 65 A.L.R.2d 143.

Rights to land created at water's edge by filling or dredging, 91 A.L.R.2d 857.

Right to accretion built up from one tract of land and extending laterally in front of adjoining tract without being contiguous thereto, 61 A.L.R.3d 1173.

Riparian owner's right to new land created by reliction or by accretion influenced by artificial condition not produced by such owner, 63 A.L.R.3d 249.

Deeds: description of land conveyed by reference to river or stream as carrying to thread or center or only to bank thereof — modern status, 78 A.L.R.3d 604.

Modern status of rules governing interference with drainage of surface waters, 93 A.L.R.3d 1193.

44-8-3. Exclusive possession by owner of nonnavigable streams; interference by legislature with lawful use.

The owner of a nonnavigable stream is entitled to the same exclusive possession of the stream as he has of any other part of his land. The legislature has no power to compel or interfere with the owner's lawful use of the stream, for the benefit of those above or below him on the stream, except to restrain nuisances.

History.

Orig. Code 1863, § 2210; Code 1868, § 2205; Code 1873, § 2231; Code 1882, § 2231; Civil Code 1895, § 3061; Civil Code 1910, § 3633; Code 1933, § 85-1305.

Law reviews.

For article on principles of water law in the southeast, see 13 Mercer L. Rev. 344 (1962).

JUDICIAL DECISIONS

Section deals with owners, not state. — O.C.G.A. § 44-8-3 was not intended to deprive the state of its power of eminent domain, but rather it was defini-

tive of the rights of one riparian owner as against the other. Nolan v. Central Ga. Power Co., 134 Ga. 201, 67 S.E. 656, 1910 Ga. LEXIS 152 (1910); Whitney v. Central Ga. Power Co., 134 Ga. 213, 67 S.E. 197, 1910 Ga. LEXIS 153 (1910).

O.C.G.A. § 44-8-3 does not apply to tidal waters. West v. Baumgartner, 124 Ga. App. 318, 184 S.E.2d 213, 1971 Ga. App. LEXIS 912 (1971), rev'd, 228 Ga. 671, 187 S.E.2d 665, 1972 Ga. LEXIS 884 (1972).

Landowner of nontidal stream bed has exclusive fishing rights. — Where tidal waters are not involved, the ownership of the fee in the bed of the stream generally carries with it the exclusive right of fishery in the stream. West v. Baumgartner, 124 Ga. App. 318, 184 S.E.2d 213, 1971 Ga. App. LEXIS 912 (1971), rev'd, 228 Ga. 671, 187 S.E.2d 665, 1972 Ga. LEXIS 884 (1972).

By the common law the right to take fish belongs essentially to the right of soil in streams where the tide does not ebb and flow. Bosworth v. Nelson, 170 Ga. 279, 152 S.E. 575, 1930 Ga. LEXIS 437 (1930).

With extent of rights dependent on whether one or both shores owned. — If the riparian owner owns both sides of the stream, no one but the owner may come within the limits of land and take fish. The same right applies so far as the owner's land extends to the thread of the stream, where the owner upon one side only. Within these limits, by common law, the owner's rights of fishery are sole and exclusive. Bosworth v. Nelson, 170 Ga. 279, 152 S.E. 575, 1930 Ga. LEXIS 437 (1930).

Summary judgment appropriate. — Because there was no admissible evidence demonstrating the navigability of a stream, the trial court correctly granted summary judgment on that question. Givens v. Ichauway, Inc., 268 Ga. 710, 493 S.E.2d 148, 1997 Ga. LEXIS 746 (1997).

OPINIONS OF THE ATTORNEY GENERAL

Owner of nonnavigable streams who owns land on both sides of the stream has exclusive fishing rights in that stream. 1962 Ga. Op. Att'y Gen. 249.

Person owns rights to nonnavigable stream's center if owns one bank. — The Supreme Court of Georgia has held that "the owner of land adjoining a nonnavigable stream is the owner of the soil to the center of the thread of the stream, and of the fishing rights to the center of the thread on his side of the stream; if one proprietor owns the land on both sides of the stream, he has the exclusive right of fishing therein." 1960-61 Ga. Op. Att'y Gen. 235.

Consent of riparian owner must be obtained before removing floating logs from nonnavigable streams. 1958-59 Ga. Op. Att'y Gen. 220.

The owner of land adjacent to a navigable stream owns to the low-water mark of that stream, and there is no question but that the owner of the land may prevent fishing from upon lands and could well have exclusive fishing rights to the low-water mark thereof. 1962 Ga. Op. Att'y Gen. 249.

Landowner around lake can prohibit fishing up to navigable stream's low-water mark. — Where the river is navigable at the point where the lake comes into the stream, and the same person owns the land on both sides of the lake and the land on both sides of the mouth of the lake, the owner would have the exclusive fishing rights to the low-water mark of navigable stream; assuming the conditions above, the lake and the lands could be posted by the owner notwithstanding the fact that the lake and lands might be posted by operation of law. 1962 Ga. Op. Att'y Gen. 249.

RESEARCH REFERENCES

Am. Jur. 2d.
78 Am. Jur. 2d, Waters, §§ 10, 229-232, 274-276, 382, 383.
C.J.S.
T93 C.J.S., Waters, §§ 39, 40.
ALR.
Right of owner of upland to make a use, not connected with navigation, of the shore between high and low water mark, which excludes the general public, 10 A.L.R. 1053; 107 A.L.R. 1347.

Specific description with reference to water, in conveyance of riparian land, as marking the extent of grantee's ownership of the submerged land and the shore, 74 A.L.R. 597.

Apportionment and division of area of river as between riparian tracts fronting on same bank, in absence of agreement or specification, 65 A.L.R.2d 143.

44-8-4. Construction of dams, canals, and appurtent works on nonnavigable streams; liability for resultant damages.

It shall be lawful for all corporations and individuals owning or controlling lands on both sides of any nonnavigable stream to construct and maintain a dam or dams, together with canals and appurtenances thereof, across the stream for the development of water power and for other purposes; provided, however, this Code section shall not be construed to release individuals or corporations constructing such dam or dams and appurtenant works from liability to private property owners for damages resulting from the construction and operation thereof either by overflow or otherwise.

History.
Ga. L. 1908, p. 78, § 1; Civil Code 1910, § 3634; Code 1933, § 85-1306.
Cross references.
Georgia Safe Dams Act, § 12-5-370 et seq.

Law reviews.
For note, "Regulation of Artificial Lakes and Recreational Subdivisions in Georgia," recommending methods for future regulation, see 8 Ga. St. B.J. 580 (1972).

JUDICIAL DECISIONS

Obstruction of nonnavigable stream is trespass. — The obstruction of a nonnavigable stream so as to impede its course or cause it to overflow or injure the land of another is a trespass upon property. Groover v. Hightower, 59 Ga. App. 491, 1 S.E.2d 446, 1939 Ga. App. LEXIS 332 (1939).

Railroad must clean drainage ditch to prevent backup on neighbor. — Where a railroad company constructs a fill or embankment which obstructs the natural drainage and flow of water from adjacent land belonging to another, and the railroad constructs a ditch or drain to carry off the water and prevent backup, the railroad owes a duty to the landowner of the land not to permit the ditch to fill up and become obstructed so as to turn the water back upon the adjacent land, and where the ditch has become so obstructed, the railroad has a duty to clean out the ditch so that it can carry off the water, and railroad must not pond the water and back it up upon the adjacent land. Southern Ry. v. Thacker, 50 Ga. App. 706, 179 S.E. 225, 1935 Ga. App. LEXIS 272 (1935).

Section does not permit dam injurious to health. — O.C.G.A. § 44-8-4 deals generally with the right of an owner of land on both sides of a nonnavigable stream to construct and maintain a dam or dams across such stream "for the development of water-power and other pur-

poses." It is not confined to companies or persons furnishing heat, light, or power to the public. It was hardly intended to declare broadly that any owner of land might build a dam and be free from all damages resulting therefrom, if it created a nuisance injurious to health. Central Ga. Power Co. v. Nolen, 143 Ga. 776, 85 S.E. 945, 1915 Ga. LEXIS 614 (1915).

Nuisance action justified for damage from dangerous dam. — The right of a company to build a dam does not include a right to build or maintain it in such negligent or improper manner as to cause a nuisance injurious to the health of the adjacent community. For damages arising from such things, an action will lie. Central Ga. Power Co. v. Nolen, 143 Ga. 776, 85 S.E. 945, 1915 Ga. LEXIS 614 (1915).

Action for damages. — If the erection of a dam for a grist mill should create a continuing nuisance, it may be abated or damages to those whose property may be damaged are recoverable under the terms of O.C.G.A. § 44-8-4. Gray v. Chason, 158 Ga. 313, 123 S.E. 290, 1924 Ga. LEXIS 143 (1924).

Judge may refuse injunction until jury trial. — It is within the discretion of a judge to refuse an injunction against erecting a dam which might cause injury to the health of a community, until all the issues of fact could be passed on by a jury. Gray v. Chason, 158 Ga. 313, 123 S.E. 290, 1924 Ga. LEXIS 143 (1924).

Lawful hydroelectric dam not nuisance. — Where a dam is lawfully and properly constructed and maintained by a public utility company for the production of electricity, the defendant cannot be held liable for creating or maintaining an abatable nuisance. Georgia Power Co. v. Moore, 47 Ga. App. 411, 170 S.E. 520, 1933 Ga. App. LEXIS 420 (1933).

RESEARCH REFERENCES

Am. Jur. 2d.

78 Am. Jur. 2d, Waters, §§ 18-22, 26, 27, 29, 30, 41, 79, 200-205, 211-220.

C.J.S.

65 C.J.S., Navigable Waters, §§ 23 et seq., 55 et seq., 64. 93 C.J.S., Waters, §§ 11, 18 et seq., 38 et seq., 146, 311 et seq.

ALR.

Power of Legislature to relieve one authorized to construct a dam from liability for damages to adjoining property, 6 A.L.R. 1326.

Right of owner of upland to make a use, not connected with navigation, of the shore between high and low water mark, which excludes the general public, 10 A.L.R. 1053; 107 A.L.R. 1347.

Applicability of rule of strict or absolute liability to overflow or escape of water caused by dam failure, 51 A.L.R.3d 965.

Res ipsa loquitur as applicable in actions for damage to property by the overflow or escape of water, 91 A.L.R.3d 186.

Liability for overflow of water confined or diverted for public power purposes, 91 A.L.R.3d 1065.

44-8-5. Rights of adjoining landowners in navigable streams.

(a) As used in this chapter, the term "navigable stream" means a stream which is capable of transporting boats loaded with freight in the regular course of trade either for the whole or a part of the year. The mere rafting of timber or the transporting of wood in small boats shall not make a stream navigable.

(b) The rights of the owner of lands which are adjacent to navigable streams extend to the low-water mark in the bed of the stream.

History.

Orig. Code 1863, §§ 2208, 2209; Code 1868, §§ 2203, 2204; Code 1873, §§ 2229, 2230; Code 1882, §§ 2229, 2230; Civil

Code 1895, §§ 3059, 3060; Civil Code 1910, §§ 3631, 3632; Code 1933, §§ 85-1303, 85-1304; Ga. L. 1982, p. 3, § 44.

Law reviews.

For article, "Some Legal Problems Involved in Saving Georgia's Marshlands," see 7 Ga. St. B.J. 27 (1970).

For article, "Public Rights in Georgia's Tidelands," see 9 Ga. L. Rev. 79 (1974).

For annual survey article on real property law, see 50 Mercer L. Rev. 307 (1998).

JUDICIAL DECISIONS

The common law is in force as regards tide waters except as affected by O.C.G.A. § 44-8-5. Shively v. Bowlby, 152 U.S. 1, 14 S. Ct. 548, 38 L. Ed. 331, 1894 U.S. LEXIS 2090 (1894).

Section merely gives riparian proprietors right to river bottoms. — The intention of O.C.G.A. § 44-8-5 was not to change the common law with reference to the boundaries of landowners abutting on the sea or any of its inlets, but rather to insure to riparian proprietors the right to the river bottoms upon their lands for agricultural purposes. Johnson v. State, 114 Ga. 790, 40 S.E. 807, 1902 Ga. LEXIS 795 (1902); State v. Ashmore, 236 Ga. 401, 224 S.E.2d 334, 1976 Ga. LEXIS 892, cert. denied, 429 U.S. 830, 97 S. Ct. 90, 50 L. Ed. 2d 93, 1976 U.S. LEXIS 2534 (1976).

Navigability for federal regulatory purposes is governed by federal law and state law is not authoritative in such cases. United States v. Lewis, 355 F. Supp. 1132, 1973 U.S. Dist. LEXIS 14562 (S.D. Ga. 1973).

Federal consent needed for construction of bridge. — O.C.G.A. § 44-8-5 determines whether a stream is navigable and requires the consent of the United States War Department (now Department of Defense) to the construction of a bridge over it. Brantley v. Lee, 139 Ga. 600, 77 S.E. 788, 1913 Ga. LEXIS 536 (1913).

Section provides definite test of river's navigability. — O.C.G.A. § 44-8-5 gives a clear and explicit definition, and the test by which to determine the navigability of a particular river in this state is found in the navigable capacity measured by the essentials of this definition. Seaboard Air-Line Ry. v. Sikes, 4 Ga. App. 7, 60 S.E. 868, 1908 Ga. App. LEXIS 182 (1908).

Ogeechee and Canoochee rivers are not navigable waters. Seaboard Air-Line Ry. v. Sikes, 4 Ga. App. 7, 60 S.E. 868, 1908 Ga. App. LEXIS 182 (1908); Brantley v. Lee, 139 Ga. 600, 77 S.E. 788, 1913 Ga. LEXIS 536 (1913).

Knoxboro creek, a stream running into the Savannah river, is navigable under O.C.G.A. § 44-8-5. Charleston & S. Ry. v. Johnson, 73 Ga. 306, 1884 Ga. LEXIS 120 (1884).

O.C.G.A. § 44-8-5 is not applicable to tidal waters. West v. Baumgartner, 124 Ga. App. 318, 184 S.E.2d 213, 1971 Ga. App. LEXIS 912 (1971), rev'd, 228 Ga. 671, 187 S.E.2d 665, 1972 Ga. LEXIS 884 (1972); State v. Ashmore, 236 Ga. 401, 224 S.E.2d 334, 1976 Ga. LEXIS 892, cert. denied, 429 U.S. 830, 97 S. Ct. 90, 50 L. Ed. 2d 93, 1976 U.S. LEXIS 2534 (1976).

O.C.G.A. §§ 44-8-5 and 44-8-7 did not give a couple a superior right over their neighbor to construct a dock over the marshland opposite their property. O.C.G.A. § 44-8-5 did not apply to tidewaters, such as the marshland at issue here, and under O.C.G.A. § 44-8-7, the state retained fee simple title to the foreshore in all navigable tidewaters. Kelso v. Baxter, 292 Ga. App. 663, 665 S.E.2d 381, 2008 Ga. App. LEXIS 835 (2008), cert. denied, No. S08C1918, 2008 Ga. LEXIS 917 (Ga. Oct. 27, 2008).

O.C.G.A. § 44-8-5 not applicable to parts of the sea. — O.C.G.A. § 44-8-5 is not applicable to a bay, estuary, or arm of the sea. Johnson v. State, 114 Ga. 790, 40 S.E. 807, 1902 Ga. LEXIS 795 (1902).

O.C.G.A. § 44-8-5 not applicable to non-navigable streams. — There is nothing in case law that imposes a servitude of common passage on a stream that is not navigable as defined in O.C.G.A.

§ 44-8-5. Givens v. Ichauway, Inc., 268 Ga. 710, 493 S.E.2d 148, 1997 Ga. LEXIS 746 (1997).

Deed conveying property bounded by river conveyed title to riverbed. — Deed conveying title to property bounded on three sides by a river, conveyed title to the riverbed, in the absence of a reservation of title by the grantor. Kal-O-Mine Indus., Inc. v. Camp (In re Lumpkin Sand & Gravel, Inc.), 104 B.R. 529, 1989 Bankr. LEXIS 1450 (Bankr. M.D. Ga. 1989), aff'd, 111 B.R. 370, 1990 U.S. Dist. LEXIS 2578 (M.D. Ga. 1990).

Summary judgment appropriate. — Because there was no admissible evidence demonstrating the navigability of a stream, the trial court correctly granted summary judgment on that question. Givens v. Ichauway, Inc., 268 Ga. 710, 493 S.E.2d 148, 1997 Ga. LEXIS 746 (1997).

OPINIONS OF THE ATTORNEY GENERAL

The law does not allow a dock or pier to be constructed in a nonnavigable body of water by virtue of a "right of access" reserved by a riparian owner-grantor. 1980 Op. Att'y Gen. No. 80-130.

Owner of both banks of navigable stream has sole fishing rights. — The owner of nonnavigable streams, if that individual owns the land on both sides of the stream, is entitled to exclusive fishing rights in that stream. 1962 Ga. Op. Att'y Gen. 249.

As owner of navigable stream bank does to low-water mark. — The owner of land adjacent to a navigable stream owns to the low-water mark of that stream, and there is no question but that the owner of the land may prevent fishing from upon lands and could well have exclusive fishing rights to the low-water mark thereof. 1962 Ga. Op. Att'y Gen. 249.

Owner of land around lake up to navigable stream's low-water mark. — Where the river is navigable at the point where the lake comes into the stream, and the same person owns the land on both sides of the lake and the land on both sides of the mouth of the lake, that individual should have the exclusive fishing rights to the low-water mark of a navigable stream; assuming the conditions above, the lake and the lands could be posted by the owner notwithstanding the fact that the lake and lands might be posted by operation of law. 1962 Ga. Op. Att'y Gen. 249.

Beds and sunken timber in navigable stream are state property. — Because title to the beds of navigable streams is in the state, legislative authorization would be necessary to remove sunken timber from the rivers of the state. 1958-59 Ga. Op. Att'y Gen. 220.

RESEARCH REFERENCES

Am. Jur. 2d.

78 Am. Jur. 2d, Waters, §§ 59-116, 261-265, 274-276, 381, 382, 386, 387, 395-397.

C.J.S.

65 C.J.S., Navigable Waters, §§ 1 et seq., 82 et seq., 105.

ALR.

Right of owner of upland to make a use, not connected with navigation, of the shore between high and low water mark, which excludes the general public, 10 A.L.R. 1053; 107 A.L.R. 1347.

Right to damages for the destruction of riparian owner's access to navigability by improvement of navigation, 21 A.L.R. 206.

Right to place bathhouse or similar structure on shore in front of riparian owner, 24 A.L.R. 1273.

Periodical, seasonal, or intermittent stream as a watercourse, 40 A.L.R. 839.

Riparian or littoral owner's right of view over navigable water, 52 A.L.R. 1186.

Specific description with reference to water, in conveyance of riparian land, as marking the extent of grantee's ownership of the submerged land and the shore, 74 A.L.R. 597.

Right of riparian owner on navigable water to access to water, 89 A.L.R. 1156.

Waters: rights in respect to changes by accretion or reliction due to artificial conditions, 134 A.L.R. 467.

Right of riparian owner to continuation of periodic and seasonal overflows from stream, 20 A.L.R.2d 656.

Apportionment and division of area of river as between riparian tracts fronting on same bank, in absence of agreement of specification, 65 A.L.R.2d 143.

Right of public in shore of inland navigable lake between high- and low-water marks, 40 A.L.R.3d 776.

44-8-6. Nonnavigable tidewaters; title; rights of adjoining landowners; principles when tidewaters are boundaries; accretions.

The title to the beds of all nonnavigable tidewaters where the tide regularly ebbs and flows shall vest in the owner of the adjacent land for all purposes, including, among others, the exclusive right to the oysters, clams, and other shellfish therein or thereon. If the water is the dividing line between two parcels of land, each owner's boundary shall extend to the main thread or channel of the water. If the main thread or channel of the water changes gradually, the boundary line shall follow the same according to the change. If for any cause the water takes a new channel, the original line, if identifiable, remains the boundary. Gradual accretions of land on either side accrue to the owner of that side.

History.

Ga. L. 1902, p. 108, § 1; Civil Code 1910, § 3635; Code 1933, § 85-1307.

Law reviews.

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

For article, "Public Rights in Georgia's Tidelands," see 9 Ga. L. Rev. 79 (1974).

For comment on State v. Ashmore, 236 Ga. 401, 224 S.E.2d 334 (1976), see 10 Ga. L. Rev. 1051 (1976).

For article discussing State v. Ashmore, 236 Ga. 401, 224 S.E.2d 334, cert. denied, 429 U.S. 830, 97 S. Ct. 90, 50 L. Ed. 2d 93 (1976) and Lines v. Ashmore, 236 Ga. 401, 224 S.E.2d 334 (1976), see 12 Ga. St. B.J. 201 (1976).

For comment on State v. Ashmore, 236 Ga. 401, 224 S.E.2d 334, (1976), see 27 Mercer L. Rev. 1229 (1976).

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

Section is constitutional. — The constitutional ratification in 1945 of former Code 1933, §§ 85-1307 through 85-1309 (see now O.C.G.A. §§ 44-8-6 through 44-8-8) which had been in effect since its enactment and had not been held to be unconstitutional, was effective and immunized these sections from a later successful constitutional attack. State v. Ashmore, 236 Ga. 401, 224 S.E.2d 334, 1976 Ga. LEXIS 892, cert. denied, 429 U.S. 830, 97 S. Ct. 90, 50 L. Ed. 2d 93, 1976 U.S. LEXIS 2534 (1976).

O.C.G.A. § 44-8-6 deals with title to the beds of nonnavigable tidewaters. State v. Ashmore, 236 Ga. 401, 224 S.E.2d 334, 1976 Ga. LEXIS 892, cert. denied, 429 U.S. 830, 97 S. Ct. 90, 50 L. Ed. 2d 93, 1976 U.S. LEXIS 2534 (1976).

Classification of tidewaters as navigable or not. — O.C.G.A. § 44-8-6 through 44-8-8 contemplate only two categories, nonnavigable and navigable tidewaters. State v. Ashmore, 236 Ga. 401, 224 S.E.2d 334, 1976 Ga. LEXIS 892, cert. denied, 429 U.S. 830, 97 S. Ct. 90, 50 L. Ed. 2d 93, 1976 U.S. LEXIS 2534 (1976).

Individual rights to foreshore. — Whatever rights individual parties may have in the foreshore must be determined

under O.C.G.A. §§ 44-8-6 through 44-8-8. State v. Ashmore, 236 Ga. 401, 224 S.E.2d 334, 1976 Ga. LEXIS 892, cert. denied, 429 U.S. 830, 97 S. Ct. 90, 50 L. Ed. 2d 93, 1976 U.S. LEXIS 2534 (1976).

Oystermen have exclusive rights in tidal beds. — The purpose of O.C.G.A. § 44-8-6 through and 44-8-8 was to overcome the decision that land underlying tidal waters was public land and to give "oystermen" a property right in oyster beds, particularly oyster beds they had planted. State v. Ashmore, 236 Ga. 401, 224 S.E.2d 334, 1976 Ga. LEXIS 892, cert. denied, 429 U.S. 830, 97 S. Ct. 90, 50 L. Ed. 2d 93, 1976 U.S. LEXIS 2534 (1976).

Shellfishing. — O.C.G.A. § 44-8-6 insofar as the exclusive right of fishery is concerned, conveys only the exclusive rights to oysters, clams and other shellfish. West v. Baumgartner, 124 Ga. App. 318, 184 S.E.2d 213, 1971 Ga. App. LEXIS 912 (1971), rev'd, 228 Ga. 671, 187 S.E.2d 665, 1972 Ga. LEXIS 884 (1972).

Ownership of tidal waters is in the state. West v. Baumgartner, 124 Ga. App. 318, 184 S.E.2d 213, 1971 Ga. App. LEXIS 912 (1971), rev'd, 228 Ga. 671, 187 S.E.2d 665, 1972 Ga. LEXIS 884 (1972).

Public may otherwise fish tidal waters. — The right to the soil under navigable tidal waters is in the state and the public has a right of common fishery in all tidal waters, whether actually navigable or nonnavigable. West v. Baumgartner, 124 Ga. App. 318, 184 S.E.2d 213, 1971 Ga. App. LEXIS 912 (1971), rev'd, 228 Ga. 671, 187 S.E.2d 665, 1972 Ga. LEXIS 884 (1972).

OPINIONS OF THE ATTORNEY GENERAL

The boundaries of tidewater lands owned by the state extend to the low-water mark in contrast to either the point of high water or mean water. 1965-66 Op. Att'y Gen. No. 66-49.

State owns three miles out to sea as political sovereign. — If the state is classed with all of the other owners of tidewater land, the boundaries of its property clearly extend to the low-water mark or encompass generally the entire tidewater bed; on the other hand, when the state's unique position as local political sovereign is taken into consideration, its rights of ownership extend far beyond this point for an additional three miles out to sea. 1965-66 Op. Att'y Gen. No. 66-49.

Person with nonexclusive title to marshland may not impede public enjoyment. — In the unlikely event that one should establish a title to marshland, such person could not use the property in such a way as to impede the public right of enjoyment thereof unless the grant to the marshland expresses a full relinquishment of all public rights. 1970 Op. Att'y Gen., Position Paper, 3-23-70.

Ownership of harvesting rights. — Where shellfish harvesting is proposed for the subtidal (below low water mark) areas of tidal creeks and rivers which are inlets of the ocean, sounds, or navigable rivers, such areas are not "nonnavigable tidewaters" within the meaning of the 1902 Act, and, as a result, the beds of such tidewaters continue to be owned by the state. 1985 Op. Att'y Gen. No. 85-16.

The state owns the harvesting rights to shellfish occurring in intertidal areas of marsh islands which contain no high ground since there must be adjacent high ground for O.C.G.A. §§ 44-8-6 through 44-8-8 to have any effect. 1985 Op. Att'y Gen. No. 85-16.

The owner of the adjacent property owns the harvesting rights to shellfish occurring in intertidal areas adjacent to high ground. 1985 Op. Att'y Gen. No. 85-16.

RESEARCH REFERENCES

Am. Jur. 2d.

78 Am. Jur. 2d, Waters, §§ 274, 275, 375, 380, 381, 386, 387, 391, 398, 411, 424.

C.J.S.

65 C.J.S., Navigable Waters, § 94 et seq.

ALR.

Applicability of rules of accretion and reliction so as to confer upon owner of island or bar in navigable stream title to additions, 54 A.L.R.2d 643.

Apportionment and division of area of river as between riparian tracts fronting on same bank, in absence of agreement or specification, 65 A.L.R.2d 143.

Rights to land created at water's edge by filling or dredging, 91 A.L.R.2d 857.

Right to accretion built up from one tract of land and extending laterally in front of adjoining tract without being contiguous thereto, 61 A.L.R.3d 1173.

44-8-7. Rights of owners of land adjacent to or covered by navigable tidewaters.

(a) A navigable tidewater is any tidewater, the sea or any inlet thereof, or any other bed of water where the tide regularly ebbs and flows which is in fact used for the purposes of navigation or is capable of transporting at mean low tide boats loaded with freight in the regular course of trade. The mere rafting of timber thereon or the passage of small boats thereover, whether for the transportation of persons or freight, shall not be deemed navigation within the meaning of this Code section and shall not make tidewaters navigable.

(b) For all purposes, including, among others, the exclusive right to the oysters and clams but not other fish therein or thereon, the boundaries and rights of the owners of land adjacent to or covered in whole or in part by navigable tidewaters shall extend to the low-water mark in the bed of the water.

History.

Ga. L. 1902, p. 108, §§ 2, 3; Civil Code 1910, §§ 3636, 3637; Code 1933, §§ 85-1308, 85-1309; Ga. L. 1982, p. 3, § 44.

Cross references.

Confirmation of tidewater titles, Ga. Const. 1983, Art. I, Sec. III, Para. III.

Law reviews.

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

For article, "Public Rights in Georgia's Tidelands," see 9 Ga. L. Rev. 79 (1974).

For comment on State v. Ashmore, 236 Ga. 401, 224 S.E.2d 334 (1976), see 10 Ga. L. Rev. 1051 (1976).

For article discussing State v. Ashmore, 236 Ga. 401, 224 S.E.2d 334, cert. denied, 429 U.S. 830, 97 S. Ct. 90, 50 L. Ed. 2d 93 (1976) and Lines v. Ashmore, 236 Ga. 401, 224 S.E.2d 334 (1976), see 12 Ga. St. B.J. 201 (1976).

For comment on State v. Ashmore, 236 Ga. 401, 224 S.E.2d 334, cert. denied, 429 U.S. 830, 97 S. Ct. 90, 50 L. Ed. 2d 93 (1976), see 27 Mercer L. Rev. 1229 (1976).

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
Rights to Tidal Waters
Navigability of Tidal Waters

General Consideration

O.C.G.A. § 44-8-7 is constitutional. — The constitutional ratification in 1945 of former Code 1933, §§ 85-1307 through 85-1309 (see now O.C.G.A. §§ 44-8-6 through 44-8-8), which had been in effect since its enactment and had not been held to be unconstitutional, was effective and immunized these sections from a later successful constitutional attack. State v. Ashmore, 236 Ga. 401, 224 S.E.2d 334, 1976 Ga. LEXIS 892, cert. denied, 429 U.S. 830, 97 S. Ct. 90, 50 L. Ed. 2d 93, 1976 U.S. LEXIS 2534 (1976).

Confirmed by constitutional amendment. — O.C.G.A. § 44-8-7 conveying title to the lands in the bed of the navigable and nonnavigable tidal streams has been ratified and affirmed by the people in a constitutional amendment, Ga. Const. 1976, Art. I, Sec. III, Para. II (see Ga. Const. 1983, Art. I, Sec. III, Para. III). West v. Baumgartner, 124 Ga. App. 318, 184 S.E.2d 213, 1971 Ga. App. LEXIS 912 (1971), rev'd, 228 Ga. 671, 187 S.E.2d 665, 1972 Ga. LEXIS 884 (1972).

Purpose of section to prevent considering tidal waters public. — The purpose of O.C.G.A §§ 44-8-6 through 44-8-8 was to overcome the decision that land underlying tidal waters was public land and to give "oystermen" a property right in oyster beds, particularly oyster beds they had planted. State v. Ashmore, 236 Ga. 401, 224 S.E.2d 334, 1976 Ga. LEXIS 892, cert. denied, 429 U.S. 830, 97 S. Ct. 90, 50 L. Ed. 2d 93, 1976 U.S. LEXIS 2534 (1976).

Authority of Department of Natural Resources. — O.C.G.A. § 44-8-7 does not establish the method that the state must follow in allocating use of state-owned water bottoms; instead, as the state agency designated to manage the tidelands, the Department of Natural Resources may determine the appropriate method by which to apportion use of the state's property. Dorroh v. McCarthy, 265 Ga. 750, 462 S.E.2d 708, 1995 Ga. LEXIS 851 (1995).

Rights to Tidal Waters

Oystermen have exclusive license to tidal shellfish. — The oystermen under O.C.G.A. § 44-8-7 have the exclusive right to the oysters in the tidal waters next to their land. That right is a privilege or a license. State v. Ashmore, 236 Ga. 401, 224 S.E.2d 334, 1976 Ga. LEXIS 892, cert. denied, 429 U.S. 830, 97 S. Ct. 90, 50 L. Ed. 2d 93, 1976 U.S. LEXIS 2534 (1976).

Planting or harvesting shellfish adjoining their land. — The intention of O.C.G.A. § 44-8-7 was to insure to riparian owners the right to the tidewaters for all purposes relating to the planting and cultivation of oysters and clams, and an exclusive right to harvest those crops as well as oysters and clams growing there naturally. State v. Ashmore, 236 Ga. 401, 224 S.E.2d 334, 1976 Ga. LEXIS 892, cert. denied, 429 U.S. 830, 97 S. Ct. 90, 50 L. Ed. 2d 93, 1976 U.S. LEXIS 2534 (1976).

Limited exclusive right to tidal beds. — The legislature in O.C.G.A. § 44-8-7 was granting nothing but the right to plant, cultivate and harvest oysters and clams. State v. Ashmore, 236 Ga. 401, 224 S.E.2d 334, 1976 Ga. LEXIS 892, cert. denied, 429 U.S. 830, 97 S. Ct. 90, 50 L. Ed. 2d 93, 1976 U.S. LEXIS 2534 (1976).

Section deals only with rights. — The legislature interpreted O.C.G.A. § 44-8-7 as dealing only with "rights." State v. Ashmore, 236 Ga. 401, 224 S.E.2d 334, 1976 Ga. LEXIS 892, cert. denied, 429 U.S. 830, 97 S. Ct. 90, 50 L. Ed. 2d 93, 1976 U.S. LEXIS 2534 (1976).

Individual rights in foreshore. — Whatever rights individual parties may have in the foreshore must be determined under O.C.G.A. §§ 44-8-6 through 44-8-8. State v. Ashmore, 236 Ga. 401, 224 S.E.2d 334, 1976 Ga. LEXIS 892, cert. denied, 429 U.S. 830, 97 S. Ct. 90, 50 L. Ed. 2d 93, 1976 U.S. LEXIS 2534 (1976).

O.C.G.A. § 44-8-7 did not undertake to take the title to land from one person and confer it upon another. Aiken v. Wallace, 134 Ga. 873, 68 S.E. 937, 1910 Ga. LEXIS 382 (1910).

Since state owns foreshore of navigable tidalwaters. — The extension of boundaries referred to in O.C.G.A. § 44-8-7 does no more than establish the extent of the rights. It conveys no title to the underlying land; the state has fee simple title to the foreshore in all navigable tidewaters. State v. Ashmore, 236 Ga. 401,

Rights to Tidal Waters (Cont'd)

224 S.E.2d 334, 1976 Ga. LEXIS 892, cert. denied, 429 U.S. 830, 97 S. Ct. 90, 50 L. Ed. 2d 93, 1976 U.S. LEXIS 2534 (1976).

Must be served as adjoining landowner when neighbor registers. — Whichever line, low tide or high tide, correctly divides private property sought to be registered from the state's property, the state is still an adjoining landowner and should be so named in the petition and served other than by the advertisement "To Whom it May Concern," and a land registration judgment, if granted, would not be binding upon the state or any adjoining landowner who was not named and served. State v. Bruce, 231 Ga. 783, 204 S.E.2d 106, 1974 Ga. LEXIS 1232 (1974).

Statute did not provide right to construct dock over marshland. — O.C.G.A. §§ 44-8-5 and 44-8-7 did not give a couple a superior right over their neighbor to construct a dock over the marshland opposite their property. Section 44-8-5 did not apply to tidewaters, such as the marshland at issue here, and under § 44-8-7, the state retained fee simple title to the foreshore in all navigable tidewaters. Kelso v. Baxter, 292 Ga. App. 663, 665 S.E.2d 381, 2008 Ga. App. LEXIS 835 (2008), cert. denied, No. S08C1918, 2008 Ga. LEXIS 917 (Ga. Oct. 27, 2008).

State gives public right to fish tidal waters. — The right to the soil under navigable tidal waters is in the state and the public has a right of common fishery in all tidal waters, whether actually navigable or nonnavigable. West v. Baumgartner, 124 Ga. App. 318, 184 S.E.2d 213, 1971 Ga. App. LEXIS 912 (1971), rev'd, 228 Ga. 671, 187 S.E.2d 665, 1972 Ga. LEXIS 884 (1972).

If state grants individuals land under tidewaters, no exclusive fishing rights presumed. — Where the state owns the soil under navigable tidal waters, it may convey merely the soil without an exclusive right of fishery; in such a case, the grantee takes the soil subject to the piscatory rights of the public. A grant of the soil will ordinarily not be construed to convey the fishing rights unless the intention to do so is so clearly and fully expressed that the grant is incapable of any other reasonable construction. West v. Baumgartner, 124 Ga. App. 318, 184 S.E.2d 213, 1971 Ga. App. LEXIS 912 (1971), rev'd, 228 Ga. 671, 187 S.E.2d 665, 1972 Ga. LEXIS 884 (1972).

Navigability of Tidal Waters

Section classifies tidewaters only as navigable and nonnavigable. — O.C.G.A. §§ 44-8-6 through 44-8-8 contemplate only two categories, nonnavigable and navigable tidewaters. State v. Ashmore, 236 Ga. 401, 224 S.E.2d 334, 1976 Ga. LEXIS 892, cert. denied, 429 U.S. 830, 97 S. Ct. 90, 50 L. Ed. 2d 93, 1976 U.S. LEXIS 2534 (1976).

Definition of navigable inlet. — Under O.C.G.A. § 44-8-7, a navigable tidewater includes any inlet of the sea where the tide regularly ebbs and flows, which is in fact used for purposes of navigation, or is of such a character as to be capable of bearing upon its bosom, at mean low tide, boats loaded with freight in the regular course of trade. With respect to the latter classification it is not essential that there be a public terminus at both ends of the inlet, but the navigability of the inlet is determined by the capability of the water to bear boats of the character described in that section at mean low tide. Rauers v. Persons, 144 Ga. 23, 86 S.E. 244, 1915 Ga. LEXIS 24 (1915).

Gradual accretions of land from navigable tidewaters accrue to the adjacent land owner in fee simple. State v. Ashmore, 236 Ga. 401, 224 S.E.2d 334, 1976 Ga. LEXIS 892, cert. denied, 429 U.S. 830, 97 S. Ct. 90, 50 L. Ed. 2d 93, 1976 U.S. LEXIS 2534 (1976).

Navigability for federal regulatory purposes is governed by federal law and state law is not authoritative in such cases. United States v. Lewis, 355 F. Supp. 1132, 1973 U.S. Dist. LEXIS 14562 (S.D. Ga. 1973).

OPINIONS OF THE ATTORNEY GENERAL

The boundaries of tidewater lands owned by the state extend to the low-water mark in contrast to either the point of high water or mean water. 1965-66 Op. Att'y Gen. No. 66-49.

Boundaries extend three miles when state not compared with tidewater landowners. — If the state is classed with all of the other owners of tidewater land, the boundaries of its property clearly extend to the low-water mark or encompass generally the entire tidewater bed; on the other hand, when the state's unique position as local political sovereign is taken into consideration, its rights of ownership extend far beyond this point for an additional three miles out to sea. 1965-66 Op. Att'y Gen. No. 66-49.

Person with nonexclusive title to marsh may not impede public enjoyment. — In the unlikely event that one should establish a title to marshland, such person could not use the property in such a way as to impede the public right of enjoyment thereof unless the grant to the marshland expresses a full relinquishment of all public rights. 1970 Op. Att'y Gen., Position Paper, 3-23-70.

Ownership of harvesting rights. — Where shellfish harvesting is proposed for the subtidal (below low water mark) areas of tidal creeks and rivers which are inlets of the ocean, sounds, or navigable rivers, such areas are not "nonnavigable tidewaters" within the meaning of the 1902 Act, and, as a result, the beds of such tidewaters continue to be owned by the state. 1985 Op. Att'y Gen. No. 85-16.

The state owns the harvesting rights to shellfish occurring in intertidal areas of marsh islands which contain no high ground since there must be adjacent high ground for O.C.G.A. §§ 44-8-6 through 44-8-8 to have any effect. 1985 Op. Att'y Gen. No. 85-16.

The owner of the adjacent property owns the harvesting rights to shellfish occurring in intertidal areas adjacent to high ground. 1985 Op. Att'y Gen. No. 85-16.

RESEARCH REFERENCES

Am. Jur. 2d.

78 Am. Jur. 2d, Waters, §§ 60, 269, 274, 275, 375, 381, 386, 387, 391, 398.

C.J.S.

65 C.J.S., Navigable Waters, §§ 1 et seq., 88, 103, 105.

ALR.

Right of owner of upland to make a use, not connected with navigation, of the shore between high and low water mark, which excludes the general public, 10 A.L.R. 1053; 107 A.L.R. 1347.

Right of grantor of railroad right of way or his privy to recover damages for interference with surface water by construction of road, 19 A.L.R. 487.

Right to drain surface water into natural watercourse, 28 A.L.R. 1262.

Periodical, seasonal, or intermittent stream as a watercourse, 40 A.L.R. 839.

Riparian or littoral owner's right of view over navigable water, 52 A.L.R. 1186.

Right of riparian owner on navigable water to access to water, 89 A.L.R. 1156.

Right of riparian owner to continuation of periodic and seasonal overflows from stream, 20 A.L.R.2d 656.

Right of public to fish in stream notwithstanding objection by riparian owner, 47 A.L.R.2d 381.

Right of public in shore of inland navigable lake between high- and low-water marks, 40 A.L.R.3d 776.

Riparian owner's right to new land created by reliction or by accretion influenced by artificial condition not produced by such owner, 63 A.L.R.3d 249.

44-8-8. Exclusive appropriation of tidewaters.

Nothing in Code Sections 44-8-6 and 44-8-7 shall be so construed as to authorize such an exclusive appropriation of any tidewater, navi-

gable or nonnavigable, by any person as will prevent the free use of the same by other persons for the purposes of passage and for the transportation of such freights as may be capable of being carried thereon.

History.

Ga. L. 1902, p. 108, § 3; Civil Code 1910, § 3637; Code 1933, § 85-1309.

Law reviews.

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

For article, "Public Rights in Georgia's Tidelands," see 9 Ga. L. Rev. 79 (1974).

For comment on State v. Ashmore, 236 Ga. 401, 224 S.E.2d 334 (1976), see 10 Ga. L. Rev. 1051 (1976).

For article discussing State v. Ashmore, 236 Ga. 401, 224 S.E.2d 334, cert. denied, 429 U.S. 830, 97 S. Ct. 90, 50 L. Ed. 2d 93 (1976), and Lines v. Ashmore, 236 Ga. 401, 224 S.E.2d 334 (1976), see 12 Ga. St. B.J. 201 (1976).

For comment on State v. Ashmore, 236 Ga. 401, 224 S.E.2d 334, cert. denied, 429 U.S. 830, 97 S. Ct. 90, 50 L. Ed. 2d 93 (1976), see 27 Mercer L. Rev. 1229 (1976).

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

Section is constitutional. — The constitutional ratification in 1945 of former Code 1933, §§ 85-1307 through 85-1309 (see now O.C.G.A. §§ 44-8-6 through 44-8-8), which had been in effect since its enactment and had not been held to be unconstitutional, was effective and immunized these sections from a later successful constitutional attack. State v. Ashmore, 236 Ga. 401, 224 S.E.2d 334, 1976 Ga. LEXIS 892, cert. denied, 429 U.S. 830, 97 S. Ct. 90, 50 L. Ed. 2d 93, 1976 U.S. LEXIS 2534 (1976).

Confirmed by constitutional amendment. — O.C.G.A. § 44-8-8 conveying title to the lands in the bed of the navigable and nonnavigable tidal streams has been ratified and affirmed by the people in a constitutional amendment, Ga. Const. 1976, Art. I, Sec. III, Para. II (see, now, Ga. Const. 1983, Art. I, Sec. III, Para. III). West v. Baumgartner, 124 Ga. App. 318, 184 S.E.2d 213, 1971 Ga. App. LEXIS 912 (1971), rev'd, 228 Ga. 671, 187 S.E.2d 665, 1972 Ga. LEXIS 884 (1972).

Purpose to deny tidal beds public. — The purpose of O.C.G.A. §§ 44-8-6 through 44-8-8 was to overcome the decision that land underlying tidal waters was public land and to give "oystermen" a property right in oyster beds, particularly oyster beds they had planted. State v. Ashmore, 236 Ga. 401, 224 S.E.2d 334, 1976 Ga. LEXIS 892, cert. denied, 429 U.S. 830, 97 S. Ct. 90, 50 L. Ed. 2d 93, 1976 U.S. LEXIS 2534 (1976).

Oystermen have exclusive license to tidal shellfish. — The oystermen under O.C.G.A. § 44-8-8 have the exclusive right to the oysters in the tidal waters next to their land. That right is a privilege or a license. State v. Ashmore, 236 Ga. 401, 224 S.E.2d 334, 1976 Ga. LEXIS 892, cert. denied, 429 U.S. 830, 97 S. Ct. 90, 50 L. Ed. 2d 93, 1976 U.S. LEXIS 2534 (1976).

Planting or harvesting shellfish adjoining land. — The intention of O.C.G.A. § 44-8-8 was to insure to riparian owners the right to the tidewaters for all purposes relating to the planting and cultivation of oysters and clams, and an exclusive right to harvest those crops as well as oysters and claims growing there naturally. State v. Ashmore, 236 Ga. 401, 224 S.E.2d 334, 1976 Ga. LEXIS 892, cert. denied, 429 U.S. 830, 97 S. Ct. 90, 50 L. Ed. 2d 93, 1976 U.S. LEXIS 2534 (1976).

Section grants no other exclusive right to tidal beds. — The legislature in O.C.G.A. § 44-8-8 was granting nothing but the right to plant, cultivate and harvest oysters and clams. State v. Ashmore, 236 Ga. 401, 224 S.E.2d 334, 1976 Ga. LEXIS 892, cert. denied, 429 U.S. 830, 97 S. Ct. 90, 50 L. Ed. 2d 93, 1976 U.S. LEXIS 2534 (1976).

Section deals only with rights. — The legislature interpreted O.C.G.A.

§ 44-8-8 as dealing only with "rights." State v. Ashmore, 236 Ga. 401, 224 S.E.2d 334, 1976 Ga. LEXIS 892, cert. denied, 429 U.S. 830, 97 S. Ct. 90, 50 L. Ed. 2d 93, 1976 U.S. LEXIS 2534 (1976).

Rights in the foreshore. — Whatever rights individual parties may have in the foreshore must be determined under O.C.G.A. §§ 44-8-6 through 44-8-8. State v. Ashmore, 236 Ga. 401, 224 S.E.2d 334, 1976 Ga. LEXIS 892, cert. denied, 429 U.S. 830, 97 S. Ct. 90, 50 L. Ed. 2d 93, 1976 U.S. LEXIS 2534 (1976).

Navigability of tidewaters only classification under section. — O.C.G.A. §§ 44-8-6 through 44-8-8 contemplate only two categories: nonnavigable and navigable tidewaters. State v. Ashmore, 236 Ga. 401, 224 S.E.2d 334, 1976 Ga. LEXIS 892, cert. denied, 429 U.S. 830, 97 S. Ct. 90, 50 L. Ed. 2d 93, 1976 U.S. LEXIS 2534 (1976).

O.C.G.A. § 44-8-8 did not undertake to take the title to land from one person and confer if upon another. Aiken v. Wallace, 134 Ga. 873, 68 S.E. 937, 1910 Ga. LEXIS 382 (1910).

State owns foreshore of tidal waters. — The extension of boundaries referred to in O.C.G.A. § 44-8-8 does no more than establish the extent of the rights. It conveys no title to the underlying land; the state has fee simple title to the foreshore in all navigable tidewaters. State v. Ashmore, 236 Ga. 401, 224 S.E.2d 334, 1976 Ga. LEXIS 892, cert. denied, 429 U.S. 830, 97 S. Ct. 90, 50 L. Ed. 2d 93, 1976 U.S. LEXIS 2534 (1976).

Must be served as adjoining landowner when neighbor registers. — Whichever line, low tide or high tide, correctly divides private property sought to be registered from the state's property, the state is still an adjoining landowner and should be so named in the petition and served other than by the advertisement "To Whom it May Concern," and a land registration judgment, if granted, would not be binding upon the state or any adjoining landowner who was not named and served. State v. Bruce, 231 Ga. 783, 204 S.E.2d 106, 1974 Ga. LEXIS 1232 (1974).

OPINIONS OF THE ATTORNEY GENERAL

The boundaries of tidewater lands owned by the state extend to the low-water mark in contrast to either the point of high water or mean water. 1965-66 Op. Att'y Gen. No. 66-49.

Boundaries extend three miles when state not compared with tidewater landowners. — If the state is classed with all of the other owners of tidewater land, the boundaries of its property clearly extend to the low-water mark or encompass generally the entire tidewater bed; on the other hand, when the state's unique position as local political sovereign is taken into consideration, its rights of ownership extend far beyond this point for an additional three miles out to sea. 1965-66 Op. Att'y Gen. No. 66-49.

Person with nonexclusive title to marshland may not impede public enjoyment. — In the unlikely event that one should establish a title to marshland, such person could not use the property in such a way as to impede the public right of enjoyment thereof unless the grant to the marshland expresses a full relinquishment of all public rights. 1970 Op. Att'y Gen., Position Paper, 3-23-70.

Ownership of harvesting rights. — Where shellfish harvesting is proposed for the subtidal (below low water mark) areas of tidal creeks and rivers which are inlets of the ocean, sounds, or navigable rivers, such areas are not "nonnavigable tidewaters" within the meaning of the 1902 Act, and, as a result, the beds of such tidewaters continue to be owned by the state. 1985 Op. Att'y Gen. No. 85-16.

The state owns the harvesting rights to shellfish occurring in intertidal areas of marsh islands which contain no high ground since there must be adjacent high ground for O.C.G.A. §§ 44-8-6 through 44-8-8 to have any effect. 1985 Op. Att'y Gen. No. 85-16.

The owner of the adjacent property owns the harvesting rights to shellfish occurring in intertidal areas adjacent to

high ground. 1985 Op. Att'y Gen. No. 85-16.

RESEARCH REFERENCES

Am. Jur. 2d.

78 Am. Jur. 2d, Waters, §§ 60, 269, 274, 275, 375, 381, 386, 387, 391, 398.

C.J.S.

65 C.J.S., Navigable Waters, §§ 1 et seq., 88, 103, 105.

ALR.

Right of owner of upland to make a use, not connected with navigation, of the shore between high and low water mark, which excludes the general public, 10 A.L.R. 1053; 107 A.L.R. 1347.

Right of grantor of railroad right of way or his privy to recover damages for interference with surface water by construction of road, 19 A.L.R. 487.

Right to drain surface water into natural watercourse, 28 A.L.R. 1262.

Riparian or littoral owner's right of view over navigable water, 52 A.L.R. 1186.

Right of riparian owner on navigable water to access to water, 89 A.L.R. 1156.

Right of riparian owner to continuation of periodic and seasonal overflows from stream, 20 A.L.R.2d 656.

Right of public to fish in stream notwithstanding objection by riparian owner, 47 A.L.R.2d 381.

Right of public in shore of inland navigable lake between high- and low-water marks, 40 A.L.R.3d 776.

Riparian owner's right to new land created by reliction or by accretion influenced by artificial conditions not produced by such owner, 63 A.L.R.3d 249.

44-8-9. Construction of levees and ditches; diversion of watercourses.

All persons owning lands on any watercourses are authorized to ditch and embank their lands in order to protect the lands from freshets and overflows in the watercourses, provided that the ditching and embanking does not divert the watercourse from its ordinary channel; but nothing in this Code section shall be so construed as to prevent the owners of lands from diverting nonnavigable watercourses through their own lands.

History.

Laws 1793, Cobb's 1851 Digest, p. 26; Ga. L. 1855-56, p. 12, §§ 1, 2; Code 1863, § 2211; Code 1868, § 2206; Code 1873, § 2232; Code 1882, § 2232; Civil Code 1895, § 3062; Civil Code 1910, § 3638; Code 1933, § 85-1310.

JUDICIAL DECISIONS

Section subordinate to United States Constitution regarding commerce. — O.C.G.A. § 44-8-9 was passed after the adoption by the state of the Constitution of the United States, and is of course subordinate to the provision in the latter instrument relating to the control of commerce, and as a consequence, of the navigable waters by congress. Mills v. United States, 46 F. 738, 1891 U.S. Dist. LEXIS 78 (D. Ga. 1891).

Legislature cannot allow harmful ditching or diversion of water. — The construction long ago and repeatedly put by the Georgia Supreme Court on the last part of O.C.G.A. § 44-8-9, which says "nothing shall be so construed as to prevent the owners of land, etc.," necessitates

the conclusion that this whole statute is not alternative but only declaratory of the common law. The legislature did not intend to give riparian owners the privilege of ditching or embanking their lands, or of diverting unnavigable watercourses, so as to injure neighboring proprietors without liability therefor. Persons v. Hill, 33 Ga. 141 (1864); Cheeves v. Danielly, 80 Ga. 114, 4 S.E. 902, 1887 Ga. LEXIS 337 (1887); Grant v. Kuglar, 81 Ga. 637, 8 S.E. 878, 1888 Ga. LEXIS 296 (1888); O'Connell v. East Tenn. V. & Ga. Ry., 87 Ga. 246, 13 S.E. 489, 1891 Ga. LEXIS 142 (1891).

O.C.G.A. § 44-8-9 applies to municipal corporations. Collins v. Mayor of Macon, 69 Ga. 542, 1882 Ga. LEXIS 259 (1882).

RESEARCH REFERENCES

Am. Jur. 2d.

50 Am. Jur. 2d, Levees and Flood Control, § 13 et seq. 78 Am. Jur. 2d, Waters, §§ 11, 26, 85, 220.

C.J.S.

93 C.J.S., Waters, §§ 18 et seq., 43 et seq., 297 et seq.

ALR.

Right to hasten by improvement of street or highway the flow of surface water along natural drainways, 5 A.L.R. 1530; 36 A.L.R. 1463.

Right of owner of upland to make a use, not connected with navigation, of the shore between high and low water mark, which excludes the general public, 10 A.L.R. 1053; 107 A.L.R. 1347.

Liability of one who diverts stream into new channel for overflow, 12 A.L.R. 187.

Right to compensation for damages to land left outside of levee, 20 A.L.R. 302.

Right of riparian owner to embank against flood or overflow water from stream, 22 A.L.R. 956; 53 A.L.R. 1180; 23 A.L.R.2d 750.

Right to drain surface water into natural watercourse, 28 A.L.R. 1262.

What constitutes natural drainway or watercourse for flow of surface water, 81 A.L.R. 262.

Right of riparian owner to continuation of periodic and seasonal overflows from stream, 20 A.L.R.2d 656.

Right of riparian owner to construct dikes, embankments, or other structures necessary to maintain or restore bank of stream or to prevent flood, 23 A.L.R.2d 750.

Modern status of rules governing interference with drainage of surface waters, 93 A.L.R.3d 1193.

44-8-10. Construction or establishment of private bridge or ferry; grant of franchise to construct or operate public bridge or ferry; compensation to landowner for interference with possession; exclusive franchises.

The right to construct a bridge or to establish a ferry for private use across a watercourse within or adjoining one's lands is appurtenant to the ownership of the land; but the right to establish and operate a public bridge or ferry is a franchise to be granted by the state. Where the grant of such a franchise interferes with an owner's right of exclusive possession, just compensation must first be paid to the landowner. No such franchise granted by this state shall be held to be exclusive unless it is plainly and expressly declared to be exclusive in the grant; except, however, that any municipality of this state having a population of more than 200,000 according to the United States decennial census of 1930 or any future such census is authorized to grant an exclusive franchise pertaining to streets or sidewalks for a period of three years, but not subject to renewal, to any person, firm, or

corporation under this authority to grant such a franchise whether or not it is plainly or expressly stated in the charter of the municipality.

History.

Orig. Code 1863, §§ 2212, 2213; Code 1868, §§ 2207, 2208; Code 1873, §§ 2233, 2234; Code 1882, §§ 2233, 2234; Civil Code 1895, §§ 3063, 3064; Civil Code 1910, §§ 3639, 3640; Code 1933, §§ 85-1311, 85-1312; Ga. L. 1937, p. 502, § 1; Ga. L. 1982, p. 2107, § 47.

Cross references.

Licenses for toll roads and bridges issued by county or municipality, § 36-60-21.

JUDICIAL DECISIONS

Strict construction of franchise grants. — Grants of exclusive privileges to a corporation or an individual are to be strictly construed. McLeod v. Burroughs, 9 Ga. 213, 1851 Ga. LEXIS 1 (1851).

No constitutional right to ferry monopoly if not in contract. — Where the holder of a franchise has no contract with the state for a monopoly, the exclusive privilege which the holder had been fortunate enough to enjoy before a rival is chartered is not property in the constitutional sense; and the owner is not entitled to compensation when such privilege is taken away. State Hwy. Bd. v. Willcox, 168 Ga. 883, 149 S.E. 182, 1929 Ga. LEXIS 264 (1929).

Legislature may give second franchise. — When the state grants a franchise that is not in its terms exclusive, it may subsequently grant a competing franchise that may utterly destroy the value of the first franchise, without incurring any obligation to make compensation. State Hwy. Bd. v. Willcox, 168 Ga. 883, 149 S.E. 182, 1929 Ga. LEXIS 264 (1929).

Without unconstitutional impairment of contract obligations. — A grant of a ferry franchise to meet the public convenience is not an exclusive grant that will, on account of the prohibition against impairing the obligations of contracts, preclude the legislature from granting a bridge franchise detracting from its value. State Hwy. Bd. v. Willcox, 168 Ga. 883, 149 S.E. 182, 1929 Ga. LEXIS 264 (1929).

No damages for loss of profits. — Where a franchise has been granted solely for public convenience, there can be no damages for its depreciating in value from the subsequent grant of a similar franchise. State Hwy. Bd. v. Willcox, 168 Ga. 883, 149 S.E. 182, 1929 Ga. LEXIS 264 (1929).

State can condemn land for toll bridges or ferry. — The state can grant franchises to individuals or corporations to build toll bridges over streams, or to operate ferries over the same for toll. The grant of a franchise to do either is not exclusive and does not prevent the legislature from granting another franchise for either purpose. The legislature can condemn land for either purpose; and, if the taking of land does not prevent the exercise of the prior franchise, the same is not such taking of the property of the holder of the prior franchise as will entitle the holder to compensation. State Hwy. Bd. v. Willcox, 168 Ga. 883, 149 S.E. 182, 1929 Ga. LEXIS 264 (1929).

Without paying first franchise for lost profits. — Loss of profits in operating public ferry, resulting from condemnation of land for bridge on public highway, not recoverable. State Hwy. Bd. v. Willcox, 168 Ga. 883, 149 S.E. 182, 1929 Ga. LEXIS 264 (1929).

RESEARCH REFERENCES

Am. Jur. 2d.

35 Am. Jur. 2d, Ferries, §§ 1-9, 13 et seq., 28, 32, 33. 36 Am. Jur. 2d, Franchises for Public Entities, § 27 et seq. 39 Am. Jur. 2d, Highways, Streets, and Bridges, §§ 46 et seq., 61, 110, 153. 40 Am. Jur. 2d, Highways, Streets, and Bridges, § 619. 78 Am. Jur. 2d, Waters, §§ 28, 41, 113 et seq.

Am. Jur. Pleading and Practice Forms.

12 Am. Jur. Pleading and Practice Forms, Ferries, § 3.

C.J.S.

37 C.J.S., Franchises, § 1 et seq. 65 C.J.S., Navigable Waters, §§ 25 et seq., 51 et seq. 93 C.J.S., Waters, § 20 et seq.

ALR.

Power of public service commission to increase franchise rates, 3 A.L.R. 730; 9 A.L.R. 1165; 28 A.L.R. 587; 29 A.L.R. 356.

May paramount right of public to improve navigability of stream without compensating riparian owner for resulting damage be extended to improvements for purposes not in aid of navigation, 18 A.L.R. 403.

Right in respect of navigable waters as franchise subject to taxation, 36 A.L.R. 1523.

Competition by grantor of nonexclusive franchise, or provision therefor, as violation of constitutional rights of franchise holder, 114 A.L.R. 192.

Validity and construction of restrictive covenant not to compete ancillary to franchise agreement, 50 A.L.R.3d 746.

Validity, construction, and effect of clause in franchise contract prohibiting transfer of franchise or contract, 59 A.L.R.3d 244.

Liability for interference with franchise, 97 A.L.R.3d 890.

CHAPTER 9

EASEMENTS

Article 1

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44-9-47. Motions and proceedings subsequent to judgment; payment of compensation; nonpayment as abandonment; effect of abandonment on subsequent application.
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Cross references.

Duties of department as to scenic rivers, § 12-5-353.

Acquisition of property for transportation purposes generally, T. 32, C. 3.

RESEARCH REFERENCES

Am. Jur. Proof of Facts.

Abandonment of Easement, 3 POF2d 647.

Intent to Create Negative Easement, 5 POF2d 621.

Wrongful Interference with Right of Way, 32 POF2d 389.

Extent of Easement over Servient Estate, 33 POF2d 669.

Establishment of Private Prescriptive Easement, 2 POF3d 125, 197.

Easements — Existence of Way of Necessity, 11 POF3d 601.

Proof of Intent to Abandon Easements, 53 POF3d 519.

Grantor's Intent to Create Reciprocal Negative Easement by Common Development Scheme of Subdivision, 62 POF3d 1.

Permissive Possession or Use of Land as Defeating Claim of Adverse Possession or Prescriptive Easement, 68 POF3d 239.

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Proof of Extent of Easement of Way Created by Express Grant or Reservation, 81 POF3d 199.

ARTICLE 1
IN GENERAL

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.

Respective rights of adjoining owners as to pumping oil, 5 A.L.R. 421.

Respective rights of owners of different parcels into which land subject to an oil and gas lease has been subdivided, 5 A.L.R. 1162; 16 A.L.R. 588; 64 A.L.R. 634.

Right to remove or rebuild fence separating one's land from his neighbor's land, 8 A.L.R. 1644.

Property rights of abutting owners in trees cut or removed from street or highway, 9 A.L.R. 1269.

Right of co-owner of a party or division wall to remove or demolish his own building, 9 A.L.R. 1329.

Duty of one removing mineral under highway to support surface, 9 A.L.R. 1333.

Implied easement of light and air over private alley or right of way, 9 A.L.R. 1634.

Interference with easement of light, air, or view by structure in street or highway as ground for injunction at instance of abutting owner, 40 A.L.R. 1321.

Precipitation of rainwater or snow from a building upon adjoining premises, 48 A.L.R. 1248.

Reservation by grantor of the right to require payment for existing party wall when used, 52 A.L.R. 494.

Liability of abutting owner or occupant for condition of part of private driveway which is within street, 59 A.L.R. 441.

Right of abutting owner to complain of misuse of public park or violation of rights or easements appurtenant thereto, 60 A.L.R. 770.

Liability for damage to person or property by fall of tree, 72 A.L.R. 615.

Right and remedy of owner whose land is drained of oil or gas which runs to waste through well on land of another, 85 A.L.R. 1154.

Rights in respect of street number or street name, 98 A.L.R. 1213.

What amounts to use of party wall which will impose obligation to contribute to cost thereof, 113 A.L.R. 471.

Spite fences and other spite structures, 133 A.L.R. 691.

Duty and liability of owner in respect of lateral or surface support as affected by excavation, or other conditions, created by his predecessor in title, 139 A.L.R. 1267.

Adjoining owner's use of wall standing on or near dividing line as imposing obligation to contribute to cost, where he was not party to oral agreement or unrecorded written agreement under which it was erected, 140 A.L.R. 1424.

Visible easement rule as applicable to reciprocal or cross easements resulting from common development and use of adjoining properties in different ownership, 155 A.L.R. 543.

Liability for overflow or escape of water from reservoir, ditch, or artificial pond, 169 A.L.R. 517.

Use of party wall for nonstructural purposes, 2 A.L.R.2d 1135.

Right to increase height of party wall, 24 A.L.R.2d 1053.

Liability of employer for injury to adjoining realty resulting from excavation work by independent contractor on his premises, 33 A.L.R.2d 111.

Encroachment of structure on or over adjoining property or way as rendering title unmarketable, 47 A.L.R.2d 331.

Easements: way by necessity where property is accessible by navigable water, 9 A.L.R.3d 600.

Rights and liabilities of adjoining landowners as to trees, shrubbery, or similar plants growing on boundary line, 26 A.L.R.3d 1372.

Locating easement of way created by necessity, 36 A.L.R.4th 769.

Encroachment of trees, shrubbery, or other vegetation across boundary line, 65 A.L.R.4th 603.

Liability for spread of fire intentionally set for legitimate purpose, 25 A.L.R.5th 391.

Neighborly accommodation as defense against adverse possession or prescriptive easement, 56 A.L.R.7th 8.

44-9-1. Methods of acquiring private ways.

The right of private way over another's land may arise from an express grant, from prescription by seven years' uninterrupted use through improved lands or by 20 years' use through wild lands, by implication of law when the right is necessary to the enjoyment of lands granted by the same owner, or by compulsory purchase and sale through the superior court in the manner prescribed by Article 3 of this chapter.

History.

Orig. Code 1863, § 2214; Code 1868, § 2209; Code 1873, § 2235; Code 1882, § 2235; Civil Code 1895, § 3065; Civil Code 1910, § 3641; Code 1933, § 85-1401; Ga. L. 1982, p. 3, § 44.

Cross references.

Acquisition and loss of title to land through adverse possession generally, § 44-5-160 et seq.

Law reviews.

For note distinguishing easement from conditional limitation, see 10 Ga. B.J. 335 (1948).

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 56 Mercer L. Rev. 395 (2004).

For annual survey of zoning and land use law, see 58 Mercer L. Rev. 477 (2006).

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

For annual survey on real property law, see 70 Mercer L. Rev. 209 (2018).

JUDICIAL DECISIONS

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General Consideration
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General Consideration

O.C.G.A. § 44-9-1 is general section in reference to the modes of acquiring right of private way over the lands of another. Watkins v. Country Club, 120 Ga. 45, 47 S.E. 538, 1904 Ga. LEXIS 442 (1904).

Section inapplicable when owner receives adequate compensation. — The principles of O.C.G.A. § 44-9-1 are not to be confounded with the principles of sections regulating the establishment of a new or necessary way in any of those cases wherein adequate compensation to the landowner is provided. Hendricks v. Carter, 21 Ga. App. 527, 94 S.E. 807, 1918 Ga. App. LEXIS 388 (1918).

Right of way over land of another may be acquired by one of four methods: (1) by express grant; (2) by prescription, seven years' uninterrupted use through improved lands, or 20 years' use over wild lands; (3) by implication of law, when such right is necessary to the enjoyment of lands granted by the same owner; and (4) by compulsory purchase and sale in the manner prescribed by law. Jones v.

General Consideration (Cont'd)

Mauldin, 208 Ga. 14, 64 S.E.2d 452, 1951 Ga. LEXIS 527 (1951).

Way of necessity by implication of law. — Right of private way over another's land may arise by implication of law when the right is necessary to the enjoyment of lands granted by the same owner; thus, a way of necessity arises in Georgia by implication of law under O.C.G.A. § 44-9-1 when the common owner sells the dominant estate first and retains the servient estate. DeNapoli v. Owen, 341 Ga. App. 517, 801 S.E.2d 314, 2017 Ga. App. LEXIS 235 (2017), cert. denied, No. S17C1927, 2017 Ga. LEXIS 988 (Ga. Dec. 11, 2017).

Absent an adequate remedy at law, equity will protect right to use a private way. Phinizy v. Gardner, 159 Ga. 136, 125 S.E. 195, 1924 Ga. LEXIS 396 (1924).

Elements for prescriptive easement not met. — Trial court properly determined that the neighbors did not possess a prescriptive easement across the property since the property was wild and, consequently, the landowner had the right to exclude the neighbors from the property as the neighbors' continued use of the driveway constituted a trespass. Floyd v. Chapman, 353 Ga. App. 434, 838 S.E.2d 99, 2020 Ga. App. LEXIS 16 (2020).

Injunctive relief against the infringement of a private right is well established. Stone Mt. Scenic R.R. v. Stone Mt. Mem. Ass'n, 230 Ga. 800, 199 S.E.2d 216, 1973 Ga. LEXIS 1067 (1973).

Grant

Crucial test to determine whether deed creates easement in land is intention of the parties, which is determined by looking to the whole deed, and not merely upon disjointed parts of it; the recitals in the deed, the contract, the subject matter, the object, purpose, and the 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 Ga. LEXIS 448 (1936).

There is no implied reservation of an easement by a grantor of land, and O.C.G.A. § 44-9-1 implies that a way of necessity is available only to a grantee and not to a grantor. Farris Constr. Co. v. 3032 Briarcliff Rd. Assocs., 247 Ga. 578, 277 S.E.2d 673, 1981 Ga. LEXIS 779 (1981).

Doctrine of implied reservation of an easement by a grantor of land does not seem to have been adopted in this state; but in other states where the doctrine has been applied, the weight of authority seems to be that, in order to imply such reservation in the grantor, the easement in question must be one of necessity as distinguished from convenience. Farris Constr. Co. v. 3032 Briarcliff Rd. Assocs., 247 Ga. 578, 277 S.E.2d 673, 1981 Ga. LEXIS 779 (1981).

Nothing passes as incident to granted easement but what is requisite to its fair enjoyment. Notwithstanding such a grant, there remains in the grantor the right of full dominion and use of the land, except so far as a limitation thereof is essential to the reasonable enjoyment of the easement granted. Folk v. Meyerhardt Lodge No. 314, 218 Ga. 248, 127 S.E.2d 298, 1962 Ga. LEXIS 472 (1962).

Agreement did not constitute a grant of easement where it was neither a deed nor in a form that could be recorded, did not use language of the grant of an easement, was conditional on the occurrence of certain acts that never occurred, had no legal description to identify the property or easement, and was not performed. Central of Ga. R.R. v. DEC Assocs., 231 Ga. App. 787, 501 S.E.2d 6, 1998 Ga. App. LEXIS 561 (1998).

Easement by prescription not acquired where O.C.G.A. § 44-9-1 not complied with. — Defendant landowner, which had conveyed parcel to plaintiff landowner's predecessor in title without reserving any easement in deed, did not acquire an easement by prescription where adverse use could not begin until after the severance of the two estates and where the strip of land over which the easement is claimed was owned by the claimant until a time less than seven years prior to bringing of action by the plaintiff landowner seeking to enjoin defendant landowner from the continued

use of the strip of land in question. Farris Constr. Co. v. 3032 Briarcliff Rd. Assocs., 247 Ga. 578, 277 S.E.2d 673, 1981 Ga. LEXIS 779 (1981).

Creation of easement. — While notice may subject a purchaser of land to an existing easement even where the easement is not referenced in the deed of conveyance, notice that there is a driveway across purchased property cannot create an easement where none exists. Deas v. Hughes, 264 Ga. 9, 440 S.E.2d 458, 1994 Ga. LEXIS 89 (1994).

A conveyance of land accompanied by a plat showing the existence of a rail line on adjacent property did not create an express or implied easement over the rail lines. Macon-Bibb County Indus. Auth. v. Central of Ga. R.R., 266 Ga. 281, 466 S.E.2d 855, 1996 Ga. LEXIS 911 (1996).

Where written statement giving permission to go on land contained no legal description, it was, at best, a revocable license which never ripened into an easement because defendant did not expend money preceding use of the road. Lovell v. Anderson, 242 Ga. App. 537, 530 S.E.2d 233, 2000 Ga. App. LEXIS 255 (2000).

Trial court erred in ordering the neighbors to remove the utility lines or obtain an easement to keep the lines in place because the landowner's deed from the predecessor stated that the landowner took the land subject to all easements for roads and utilities in use or of record and the easement for utilities was filed on August 16, 2006, years before the landowner's purchase of the property in 2017. Floyd v. Chapman, 353 Ga. App. 434, 838 S.E.2d 99, 2020 Ga. App. LEXIS 16 (2020).

Adequate description of easement found. — Partial summary judgment in favor of the lot owners was affirmed as, although the record did not contain a plat showing property designated as "Area #6," the description in a conveyance to a homeowners' association as "located between Lot No. 77, Lake George, and Pine Avenue, including causeway to the creek, near the railroad bridge, known as the headwaters of the Gress River" disclosed with sufficient certainty the location of the lot owners' easement; moreover, all the parties described the 1.542 acres eventually conveyed to the property owner contesting the easement as "Area # 6." Wynns v. White, 273 Ga. App. 209, 614 S.E.2d 830, 2005 Ga. App. LEXIS 457 (2005).

Because the deed of certain landowners incorporated a recorded plat's reservation of a 1.32 acre strip of the landowners' property to be used for access to the neighbor's property, and because the plat was recorded, the landowners were deemed to have been on notice of that reservation and took title subject to the easement described therein; since there was nothing ambiguous or unclear about the location or the nature of the use of the 1.32 acre strip of land, the trial court did not err by declaring a judgment in favor of the neighboring property owner. Hernandez v. Whittemore, 287 Ga. App. 251, 651 S.E.2d 180, 2007 Ga. App. LEXIS 925 (2007).

No authority to obtain express easement by abandonment. — Grant of partial summary judgment in favor of the plaintiff on the defendant's abandonment counterclaim was upheld because Georgia law does not recognize partial abandonment of an express easement. Sorrow v. 380 Properties, LLC, 354 Ga. App. 118, 840 S.E.2d 470, 2020 Ga. App. LEXIS 130 (2020), cert. denied, No. S20C1299, 2020 Ga. LEXIS 973 (Ga. Dec. 7, 2020).

Claim of easement of necessity invalid. — Where defendant's property borders on a public street but the only way to the rear of their building is through a neighbor's property, there can be no claim of an easement of necessity. Greer v. Piedmont Realty Invs., Inc., 248 Ga. 821, 286 S.E.2d 712, 1982 Ga. LEXIS 705 (1982).

Necessity based. — Private way by implication is based on necessity and not convenience; moreover, a reasonable necessity for a way must exist at the time of the severance to support the implication of a way of necessity. DeNapoli v. Owen, 341 Ga. App. 517, 801 S.E.2d 314, 2017 Ga. App. LEXIS 235 (2017), cert. denied, No. S17C1927, 2017 Ga. LEXIS 988 (Ga. Dec. 11, 2017).

Word "appurtenances" in a deed only carries easements already existing, and appurtenant to estate granted; it will not include an inchoate prescriptive right over the land of another. Olsen v. Noble, 209 Ga. 899, 76 S.E.2d 775, 1953 Ga. LEXIS 442 (1953).

Grant (Cont'd)

Way appurtenant cannot be created without a dominant, as well as a servient, estate. Olsen v. Noble, 209 Ga. 899, 76 S.E.2d 775, 1953 Ga. LEXIS 442 (1953).

Prescription

1. Definitions

Improved lands comprehends the entire tract, though only a part thereof is in actual cultivation; the woodland on such a tract is not wild land, but, in connection with that portion which is cultivated, constitutes a single tract of "improved land." Hopkins v. Roach, 127 Ga. 153, 56 S.E. 303, 1906 Ga. LEXIS 779 (1906).

Railroad tracks "improved land." — If a railroad was constructed and the tracks were made to cross a private way by means of a trestle, the land of the railroad company at such a point of intersection was "improved land" within the meaning of O.C.G.A. § 44-9-1, and the period of prescription would be seven years. Carlton v. Seaboard Air-Line Ry., 143 Ga. 516, 85 S.E. 863, 1917A Am. Ann. Cas. 497 (1915).

"Wild lands" used in contradistinction to "improved lands." — "Wild lands," as used in O.C.G.A. § 44-9-1, is evidently used in contradistinction to the descriptive words "improved lands." Watkins v. Country Club, 120 Ga. 45, 47 S.E. 538, 1904 Ga. LEXIS 442 (1904).

"Wild" land located separate and apart from cultivated lands. — The land which O.C.G.A. § 44-9-1 designates as "wild" is that which is located separate and apart from lands which are partly in cultivation. Smith v. E.B. Burney Constr. Co., 231 Ga. 772, 204 S.E.2d 93, 1974 Ga. LEXIS 1230 (1974).

"Wild land" is segregated tract of land remaining, as it were, in state of nature, unenclosed, and with no indicia pointing to use by the owner. Smith v. E.B. Burney Constr. Co., 231 Ga. 772, 204 S.E.2d 93, 1974 Ga. LEXIS 1230 (1974).

2. Requirements

Party setting up prescription claim required to strictly follow law. — While a right of private way over another's land may arise by prescription from seven years' uninterrupted use through improved lands, where a private way is claimed by prescription, the party setting up such a claim must be strictly within the requirements of the law. Hasty v. Wilson, 223 Ga. 739, 158 S.E.2d 915, 1967 Ga. LEXIS 682 (1967).

Use may originate in permission, yet ripen by prescription. — Possession must be adverse in order to form the basis for prescription. A notable exception exists, however, in the case of private ways. The use may originate in permission, and yet may ripen by prescription. Burnum v. Thomas, 71 Ga. App. 690, 31 S.E.2d 925, 1944 Ga. App. LEXIS 193 (1944); Ponder v. Williams, 80 Ga. App. 145, 55 S.E.2d 668, 1949 Ga. App. LEXIS 794 (1949).

Tenant cannot originate adverse user in landlord's favor where easement not included in lease. — A tenant cannot originate an adverse user in landlord's favor where the lease does not expressly or impliedly include the easement; use by the tenant inures to the landlord's benefit if it expressly or impliedly includes the easement. Olsen v. Noble, 209 Ga. 899, 76 S.E.2d 775, 1953 Ga. LEXIS 442 (1953).

Tenant in common may acquire prescriptive rights. — A limited partner, as a tenant in common of the real estate of the partners, may acquire prescriptive rights even though one of the other tenants in common might be barred from acquiring such prescriptive rights because of that tenant's purported permissive possession. Hasty v. Wilson, 223 Ga. 739, 158 S.E.2d 915, 1967 Ga. LEXIS 682 (1967).

One tenant cannot deprive other tenants from prescribing adversely. — One tenant in common who is in possession of jointly owned property cannot deprive the other tenants in common who are also in possession thereof from prescribing adversely against a third party. Hasty v. Wilson, 223 Ga. 739, 158 S.E.2d 915, 1967 Ga. LEXIS 682 (1967).

Prescriber acquires private way by continuous use for statutory period. — If a private way was less than 15 (now 20) feet in width, and the prescriber kept

it in repair and used it as such continuously for the statutory period required by O.C.G.A. § 44-9-1, the prescriber would acquire a private way by prescription. Carlton v. Seaboard Air-Line Ry., 143 Ga. 516, 85 S.E. 863, 1917A Am. Ann. Cas. 497 (1915).

One of the prime requisites to title by prescription of a private way is that the same private way be used the entire period necessary to establish the prescriptive right. Fulford v. Fulford, 228 Ga. 772, 187 S.E.2d 867, 1972 Ga. LEXIS 904 (1972).

Use, to constitute prescriptive right, must be uninterrupted. — The use of a private way through the improved lands of another for a period of seven years, to constitute a prescriptive right, must be shown to have been uninterrupted to come within the terms of O.C.G.A. § 44-9-1. Puryear v. Clements, 53 Ga. 232, 1874 Ga. LEXIS 451 (1874).

Prescription arises notwithstanding fact prescriber knows land is another's property. — A prescription under O.C.G.A. § 44-9-1 may arise notwithstanding the fact that the prescriber may know that the land over which the individual undertakes to prescribe is the property of another. Carlton v. Seaboard Air-Line Ry., 143 Ga. 516, 85 S.E. 863, 1917A Am. Ann. Cas. 497 (1915).

Prescriber must give notice. — It is fundamental that prescription is to be strictly construed, and that the prescriber must give some notice, actual or constructive, to the one against whom the prescriber intends to prescribe. Burnum v. Thomas, 71 Ga. App. 690, 31 S.E.2d 925, 1944 Ga. App. LEXIS 193 (1944); Ponder v. Williams, 80 Ga. App. 145, 55 S.E.2d 668, 1949 Ga. App. LEXIS 794 (1949).

Use alone is insufficient to acquire prescriptive title under O.C.G.A. § 44-9-1. An owner's acquiescence in the mere use of the owner's road establishes, at most, a revocable license. To establish a prescriptive easement over the private property of another pursuant to O.C.G.A. § 44-9-1, it is necessary to show that the owner was given notice that the user intended to appropriate it as the user's own. Eileen B. White & Assocs. v. Gunnells, 263 Ga. 360, 434 S.E.2d 477, 1993 Ga. LEXIS 638 (1993).

Easement and right of way. — 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 Ga. App. LEXIS 1285 (2002), cert. denied, No. S03C0355, 2003 Ga. LEXIS 159 (Ga. Feb. 10, 2003).

When use originates by permission, prescription runs upon notification of changed position. — When the use of a private way originates by permission of the owner, prescription does not begin to run until the user notifies the owner, by repairs or otherwise, that the user has changed position from that of a mere licensee to that of a prescriber. Burnum v. Thomas, 71 Ga. App. 690, 31 S.E.2d 925, 1944 Ga. App. LEXIS 193 (1944); Ponder v. Williams, 80 Ga. App. 145, 55 S.E.2d 668, 1949 Ga. App. LEXIS 794 (1949).

One who seeks to ripen an absolute right to the use of a private way by prescription, instead of obtaining it by express grant, must, when that individual enters with the consent of the owner, bring some affirmative notice to the owner, by making repairs or otherwise, of intention to prescribe through seven years' use. First Christian Church v. Realty Inv. Co., 180 Ga. 35, 178 S.E. 303, 1934 Ga. LEXIS 446 (1934).

Use of a trail. — Where neighbor's use of a trail across private property was permissive, and there was no showing of any adverse use, a private way by prescription was not established. Douglas v. Knox, 232 Ga. App. 551, 502 S.E.2d 490, 1998 Ga. App. LEXIS 741 (1998).

Use by members of the public alone is insufficient to acquire prescriptive title. It must be kept open and in repair. Tribble v. Mayor of Forsyth, 225 Ga. 204, 167 S.E.2d 142, 1969 Ga. LEXIS 432 (1969).

Notice by repair requirement. — The crux of the requirement for repairs

Requirements (Cont'd)

lies not in the actual effectuation of repairs by the prescriber but in the notice of adverse use the performance of such repairs would give to the property owner. The importance of this "notice by repair" requirement is best illustrated in situations where the initial use of the private way was permissive. Georgia Pac. Corp. v. Johns, 204 Ga. App. 594, 420 S.E.2d 39, 1992 Ga. App. LEXIS 932 (1992).

Showing repairs is required in order to give notice to the landowner that the prescriber's use of a road is adverse and not permissive. Chota, Inc. v. Woodley, 251 Ga. 678, 309 S.E.2d 132, 1983 Ga. LEXIS 959 (1983).

Prescriber must show that way kept open and in repair during statutory period. — In order to set up a prescriptive right of way, it is essential that the prescriber show not only that the prescriber has been in the uninterrupted use thereof for seven years or more, that it does not exceed 15 (now 20) feet in width, and that it is the same number of feet originally appropriated, but that the prescriber has kept it open and in repair during this period. Rogers v. Wilson, 171 Ga. 802, 156 S.E. 817, 1931 Ga. LEXIS 469 (1931).

The right of a private way over another's land may arise by prescription from seven years' uninterrupted use through improved lands, but in order to set up this prescriptive right of way, it is essential that the prescriber show not only that the prescriber has been in the uninterrupted use thereof for seven years or more, that it does not exceed 15 (now 20) feet in width, and that it is the same number of feet originally appropriated, but that the prescriber has kept it open and in repair during this period. First Christian Church v. Realty Inv. Co., 180 Ga. 35, 178 S.E. 303, 1934 Ga. LEXIS 446 (1934).

In order for one to take or keep another's land as a road for that person's private use, the person should be compelled to keep it open and in repair. Keeping it open and working it would be the best evidence of that person's intention to appropriate it for a road, and would put the owner upon notice that the person did intend to appropriate it. Burnum v. Thomas, 71 Ga. App. 690, 31 S.E.2d 925, 1944 Ga. App. LEXIS 193 (1944); Ponder v. Williams, 80 Ga. App. 145, 55 S.E.2d 668, 1949 Ga. App. LEXIS 794 (1949).

In order to set up a prescriptive right of way, it is essential that the prescriber show not only that the prescriber has been in the uninterrupted use thereof for seven years or more, that it does not exceed 20 feet in width, and that it is the same number of feet originally appropriated, but also that the prescriber has kept it open and in repair during this period. Hasty v. Wilson, 223 Ga. 739, 158 S.E.2d 915, 1967 Ga. LEXIS 682 (1967).

Passive keeping in repair is notice, but inaction will not suffice; the expression "keeping in repair" originated in an age when private ways were unpaved and of necessity had to be repaired in order that the use thereof might be continued, and was then the equivalent of action and affirmative notice of an intention to prescribe, even where the use originated in consent. First Christian Church v. Realty Inv. Co., 180 Ga. 35, 178 S.E. 303, 1934 Ga. LEXIS 446 (1934).

If repairs made by landowner's permission, no prescriptive right acquired. — Where the landowner was merely passive and made no objection to the use of and repairing the road, then such use and repairs thereon would be the proper basis for obtaining a prescriptive right to the road. But, if the use of and the repairs made on the road were by the permission of the landowner, then the plaintiff would not acquire a prescriptive right or title to the road. Burnum v. Thomas, 71 Ga. App. 690, 31 S.E.2d 925, 1944 Ga. App. LEXIS 193 (1944).

Evidence of use by previous owners. — Where plaintiff filed a petition in the probate court to remove an obstruction from a private way, the mere fact that the property may not have been used at the time defendant purchased it did not render it "wild land" since evidence of use by the previous owners remained. Henderson v. Cam Dev. Co., 190 Ga. App. 199, 378 S.E.2d 495, 1989 Ga. App. LEXIS 154 (1989).

Use of driveway and railroad crossing. — Trial court properly awarded a property owner compensatory damages in

an inverse condemnation suit against the Georgia Department of Transportation (DOT) because the property owner established the acquisition of a prescriptive easement over the driveway and railroad crossing at issue and, thus, had a compensable property interest as a result of DOT closing the driveway. Ga. Dep't of Transp. v. Jackson, 322 Ga. App. 212, 744 S.E.2d 389, 2013 Ga. App. LEXIS 480 (2013).

Failure to establish prescriptive rights. — Trial court properly granted summary judgment to a neighbor in a trespass action that involved use of a roadway to gain access to a marsh area as the defending neighbors failed to show prescriptive rights to the roadway were obtained since there was no evidence in the record indicating that the defending neighbors maintained the roadway during any seven year period in any manner; the record established that the roadway was too wide to function as a private right of way; and even if the defending neighbors had obtained a parol license to use the roadway, such license was still revocable. Warner v. Brown, 290 Ga. App. 510, 659 S.E.2d 885, 2008 Ga. App. LEXIS 360 (2008).

In a declaratory judgment action brought by adjoining landowners seeking rights to access an undeveloped lot in a subdivision for use as a soccer field, the trial court properly granted summary judgment to the property owners who had terminated the access and use of the adjoining landowners to the field. There existed no express easement to grant the adjoining landowners access, no dedication of the field was established for public use, the treatment of the field for fire ants was merely maintenance, and since the adjoining landowners had previously used the lot with permission, no prescriptive rights were established. De Castro v. Durrell, 295 Ga. App. 194, 671 S.E.2d 244, 2008 Ga. App. LEXIS 1291 (2008), cert. denied, No. S09C0637, 2009 Ga. LEXIS 214 (Ga. Apr. 20, 2009).

Plaintiff did not have a prescriptive easement over a road because the plaintiff's use of the road, at the very least, was by acquiescence; many others used the road beside the plaintiff; the plaintiff admitted that the plaintiff did very little maintenance on the road during the time the hunters used the road as the hunters were maintaining the road for the hunters' own use, and, prior to that, the plaintiff maintained the road for the plaintiff as well as others; and the plaintiff did not show that the plaintiff's use of the road was adverse as the plaintiff's inaction when the defendant's predecessor-in-interest installed locked gates on the road did not evidence an intention to appropriate the land as the plaintiff's own. Wilkes 581 Farms, LLC v. McAvoy, 356 Ga. App. 732, 848 S.E.2d 905, 2020 Ga. App. LEXIS 517 (2020).

Evidence of easement must be shown. — Grant of a declaratory judgment and injunctions to the sellers was reversed because at the time that the buyers purchased Lot 2 from the sellers, the sellers failed to expressly retain an easement over Lot 2 and no way of necessity existed at the time of the sale to the buyers; thus, there was no easement by implication. DeNapoli v. Owen, 341 Ga. App. 517, 801 S.E.2d 314, 2017 Ga. App. LEXIS 235 (2017), cert. denied, No. S17C1927, 2017 Ga. LEXIS 988 (Ga. Dec. 11, 2017).

3. Results

When way legally obtained and continued for statutory period, right becomes absolute. — When the use of a private way has been legally obtained and is continued as long as seven years, of which the owner has had six months' knowledge without moving for damages, the right of use becomes absolute, and the owner is barred from claiming damages. First Christian Church v. Realty Inv. Co., 180 Ga. 35, 178 S.E. 303, 1934 Ga. LEXIS 446 (1934).

Landowner acquires right to accumulated water where dam creating pond exists more than 20 years. — Where a dam on a lower riparian owner's property creating a pond on the upper riparian owner's property was in existence for more than 20 years, the lower riparian owner lost his right to receive the natural flow of water from the upper riparian owner and the latter acquired the right to maintain accumulated water on

Results (Cont'd)

his land. Brown v. Tomlinson, 246 Ga. 513, 272 S.E.2d 258, 1980 Ga. LEXIS 1178 (1980).

Prescriptive easement abandoned. — Defendants were entitled to summary judgment on the plaintiff's claim for a prescriptive easement because the undisputed evidence showed that the plaintiff abandoned any prescriptive easement as the plaintiff's own evidence was that the plaintiff and the plaintiff's family had not used the defendants' tract to access the plaintiff's property at all since July 13, 1994, which was well beyond the seven-year period that would generally raise a presumption of abandonment; and the plaintiff pointed to nothing to show that the presumption of abandonment should be rebutted. Albenberg v. Szalay, 332 Ga. App. 665, 774 S.E.2d 730, 2015 Ga. App. LEXIS 378 (2015).

4. Interference and Obstructions

Obstruction of private right of way after right to use way is acquired is unlawful. First Christian Church v. Realty Inv. Co., 180 Ga. 35, 178 S.E. 303, 1934 Ga. LEXIS 446 (1934).

Prescriptive rights-of-way awarded. — Where the evidence showed that defendant's predecessor-in-title never prevented the public from using the roads, and that plaintiffs never sought permission to do so, the repairs were extensive enough to put the owner on notice that others were using the road. Therefore, the landowners were required to remove obstructions from the private road and the plaintiffs were awarded prescriptive rights-of-way. Georgia Pac. Corp. v. Johns, 204 Ga. App. 594, 420 S.E.2d 39, 1992 Ga. App. LEXIS 932 (1992).

Showing required to sustain application for removal of obstructions from private way based upon prescription. — To sustain an application for the removal of obstructions from an alleged private way, the right to which is based upon prescription by seven years' use, it is essential that the applicant show not only that the applicant has been in the uninterrupted use thereof for seven years or more, that it does not exceed 15 (now 20) feet in width, and that it is the same number of feet originally appropriated, but that the applicant has kept it open and in repair during this period. First Christian Church v. Realty Inv. Co., 180 Ga. 35, 178 S.E. 303, 1934 Ga. LEXIS 446 (1934).

In a proceeding for the removal of an obstruction from a private way, a prescriptive right to use which the applicant claims to have acquired under O.C.G.A. § 44-9-1, it is necessary, to sustain this application, to show not only that the applicant has been in the uninterrupted use thereof for seven years or more, that it does not exceed 15 (now 20) feet in width, and that it is the same number of feet originally appropriated, but that the applicant has kept it open and in repair during this period. Scarboro v. Edenfield, 58 Ga. App. 619, 199 S.E. 325, 1938 Ga. App. LEXIS 69 (1938).

Because the record contained no evidence that a neighboring landowner's predecessor in interest, or its agents, used the road continuously for at least 20 years, the predecessor did not acquire a private way by prescription and, hence, the neighbor lacked any private way by prescription over a landowner's property to clear timber and remove barbed wire from that roadway without committing a trespass. Norton v. Holcomb, 285 Ga. App. 78, 646 S.E.2d 94, 2007 Ga. App. LEXIS 386 (2007), cert. denied, No. S07C1221, 2007 Ga. LEXIS 654 (Ga. Sept. 10, 2007).

Implication

Private way created by necessary implication is wholly distinct from "compulsory purchase and sale." Calhoun v. Ozburn, 186 Ga. 569, 198 S.E. 706, 1938 Ga. LEXIS 653 (1938).

Right of a private way over another's land is based on necessity and not convenience. Miller v. Slater, 182 Ga. 552, 186 S.E. 413, 1936 Ga. LEXIS 490 (1936).

Every essential requisite must appear. — Before one can assert a way of necessity over the land of another, every essential requisite to such a right must affirmatively appear. Hasty v. Wilson, 223 Ga. 739, 158 S.E.2d 915, 1967 Ga. LEXIS 682 (1967).

Need must exist at time of sale. — A reasonable necessity for a way must exist at the time of the severance to support the implication of a way of necessity. Bruno v. Evans, 200 Ga. App. 437, 408 S.E.2d 458, 1991 Ga. App. LEXIS 1051 (1991), cert. denied, No. S91C1444, 1991 Ga. LEXIS 525 (Ga. Sept. 6, 1991).

Implication that grantor conveys means of access to otherwise inaccessible land. — At common law, where the grantor conveyed land otherwise inaccessible, there was of necessity an implication that the grantor had unintentionally omitted to convey a means of access thereto. This necessary implication entitled the land-locked grantee to a way out to whatever public or private roads furnished access to the original tract, in the laying out of which due regard, of course, had to be had to the convenience of the grantor. Such ways by implication are still recognized in this state by O.C.G.A. § 44-9-1. Gaines v. Lunsford, 120 Ga. 370, 47 S.E. 967, 1904 Ga. LEXIS 557 (1904).

Where A owns a tract of land and conveys by deed to B a portion of the land, and the only means of ingress and egress that B has to the public road is a private way then in existence over the land of A, though no mention is made in the deed as to the right of B to use the way, an implication arises that A had inadvertently omitted to convey a means of access, and entitles the land-locked grantee to use the private way across the land of the vendor. Such a way is necessary for the use and enjoyment of the granted land enclosed by other lands of the grantor, and is an implied easement which runs with the granted land. Burk v. Tyrrell, 212 Ga. 239, 91 S.E.2d 744, 1956 Ga. LEXIS 328 (1956).

Claim not allowed when one has way of own. — One is not allowed to claim a road over another's land as a way of necessity when one has, or can have, such a way over own land. Hasty v. Wilson, 223 Ga. 739, 158 S.E.2d 915, 1967 Ga. LEXIS 682 (1967).

Property accessible only through easement. — In a dispute over a driveway easement between a landowner and a couple, the trial court properly granted the landowner an interlocutory injunction. Even if the landowner's deed had not incorporated by reference a plat that showed the easement, it was critical that the landowner's property could be accessed only through the easement, which gave rise to an easement by implication. Haygood v. Tilley, 295 Ga. App. 90, 670 S.E.2d 800, 2008 Ga. App. LEXIS 1185 (2008), cert. denied, No. S09C0581, 2009 Ga. LEXIS 187 (Ga. Feb. 23, 2009), cert. denied, 558 U.S. 1123, 130 S. Ct. 1077, 175 L. Ed. 2d 903, 2010 U.S. LEXIS 403 (2010).

Way of necessity arises when common owner sells dominant estate first and retains servient estate. The common owner is impliedly deemed to have granted an easement to pass over the subservient estate. Hasty v. Wilson, 223 Ga. 739, 158 S.E.2d 915, 1967 Ga. LEXIS 682 (1967).

If the common owner sells the servient estate first, the common owner has deeded everything within power to deed and retains no easement in the servient estate. Therefore, when the common grantor subsequently deeds the dominant estate to a third party, the third party can obtain no higher interest than that of the grantor and receives no easement over the servient estate. Bruno v. Evans, 200 Ga. App. 437, 408 S.E.2d 458, 1991 Ga. App. LEXIS 1051 (1991), cert. denied, No. S91C1444, 1991 Ga. LEXIS 525 (Ga. Sept. 6, 1991).

Where owner with plat sells subdivided lots, purchasers acquire easement shown on plat. — Where the owner of property has it surveyed, marked off, and subdivided into streets, lots, and alleys, has a plat drawn showing the location of the same, records the plat and thereafter sells the lots to various purchasers, giving deeds thereto which refer to the plat and, in describing the location of the lots sold, refer to the streets and alleys shown on the plat as part of the boundaries thereof, the purchasers acquire a perpetual and indefeasible easement over such streets and alleys as a means of ingress and egress to their lots, which cannot be forfeited or abandoned by a mere nonuser or failure for a long period of time to open and improve such streets or alleys, and this is true whether such

Implication (Cont'd)

streets and alleys are ever formally dedicated or accepted by public authority as public streets or alleys or not. Barnes v. Cheek, 84 Ga. App. 653, 67 S.E.2d 145, 1951 Ga. App. LEXIS 760 (1951).

When a developer sells lots according to a subdivision plat, which has a lake area designated on it, the purchasers acquire an irrevocable easement in that park, with which the developer may not interfere. Higgins v. Odom, 246 Ga. 309, 271 S.E.2d 211, 1980 Ga. LEXIS 1096 (1980).

Way necessary runs with granted land. — A way necessary for the use and enjoyment of granted land enclosed by other land of the grantor is an implied easement which runs with the granted land, and passes not only to the immediate but subsequent grantees. Calhoun v. Ozburn, 186 Ga. 569, 198 S.E. 706, 1938 Ga. LEXIS 653 (1938); Jones v. Mauldin, 208 Ga. 14, 64 S.E.2d 452, 1951 Ga. LEXIS 527 (1951).

Whether an easement is created by express grant or by implication, once the location becomes fixed, the same rule controls relocation issues, so long as the grant contains no conditions or reservations. Herren v. Pettengill, 273 Ga. 122, 538 S.E.2d 735, 2000 Ga. LEXIS 859 (2000).

Proof inadequate for determination. — Trial court erred in granting summary judgment, pursuant to O.C.G.A. § 9-11-56, to a property owner who sought an easement by implication of law pursuant to O.C.G.A. § 44-9-1 over adjoining property owners' land, as the record was insufficient to support such a determination; the parties' accounts of how the land was divided upon foreclosure from the original grantor differed greatly and there were no deeds, deed assignments, dates, or foreclosure information provided in the record in order to properly determine if such an easement was created. Boyer v. Whiddon, 264 Ga. App. 137, 589 S.E.2d 709, 2003 Ga. App. LEXIS 1416 (2003).

Implied easement not established. — Implied easement for a driveway leading to an owner's home across the neighbors' property was not established because access to the owner's home across the neighbors' property was unnecessary, but merely convenient, and because the owner's deed made no mention of a plat allegedly relied on by the owner or a right of way bordering the property, and the plat itself was not recorded. Eardley v. McGreevy, 279 Ga. 562, 615 S.E.2d 744, 2005 Ga. LEXIS 452 (2005).

In determining when a common owner had conveyed land to the defendants and to another landowner, the trial court erred in using the date of recording, not the date of the conveyance; thus, no implied easement of necessity could exist across the defendants' property for the benefit of the other landowner, and when the common owners sold the property to the other landowner they no longer owned the land now belonging to the defendants, and thus could not convey an easement across land in which they owned no interest. Burnette v. Caplan, 287 Ga. App. 142, 650 S.E.2d 798, 2007 Ga. App. LEXIS 899 (2007).

Owner of property adjacent to a bankruptcy debtor's private airport did not have an implied easement of necessity to use the airport since the owner had ingress and egress to the owner's property by use of driveways and roads not owned by the debtor. Flyboy Aviation Props., LLC v. Franck, 501 B.R. 808, 2013 Bankr. LEXIS 4532 (Bankr. N.D. Ga. 2013).

Trial court erred in finding that the appellee was entitled to implied easements over and across the appellant's property because the appellee's property was not landlocked, and there was no necessity nor unity of title as there was no common owner of the entire development from the outset as title to the development was divided among separate corporate entities. Emson Investment Properties, LLC v. JHJ Jodeco 65, LLC, 349 Ga. App. 644, 824 S.E.2d 113, 2019 Ga. App. LEXIS 118 (2019), cert. denied, No. S19C0994, 2019 Ga. LEXIS 765 (Ga. Nov. 4, 2019).

OPINIONS OF THE ATTORNEY GENERAL

Easement over state property may be granted only by the General Assembly. 1957 Ga. Op. Att'y Gen. 252; 1958-59 Ga. Op. Att'y Gen. 285.

RESEARCH REFERENCES

Am. Jur. 2d.

25 Am. Jur. 2d, Easements and Licenses, § 13 et seq.

C.J.S.

28A C.J.S., Easements, §§ 1, 21, 15, 39 et seq., 52 et seq., 145 et seq., 160 et seq. 37 C.J.S., Frauds, Statute of, § 63.

ALR.

Implied easement upon severance of tract where building is near or encroaches upon the dividing line, 9 A.L.R. 488; 41 A.L.R. 1210; 53 A.L.R. 910.

Nature and extent of right granted by contract for use of wall or roof for advertising purposes, 10 A.L.R. 1108; 119 A.L.R. 1523.

Permission or license from owner of servient estate as extinguishing an existing easement, 50 A.L.R. 1295.

Rule of visible easements as applied to easement of light or air, 56 A.L.R. 1138.

Implied easement in respect of drains, pipes, or sewers upon severance of tract, 58 A.L.R. 824.

Easement by prescription for use of land near boundary line, 58 A.L.R. 1037.

May right of way be appurtenant where the servient tenement is not adjacent to the dominant, 76 A.L.R. 597.

Change from street cars to motorbuses as affecting rights as between street railway companies and abutting owners or owners across whose property the company has a right of way, 102 A.L.R. 391.

Locating easement of way created by a grant which does not definitely describe its location, 110 A.L.R. 174.

Enlargement of easement by use for purpose or in a manner other than that specified in the grant, 110 A.L.R. 915.

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 A.L.R. 545.

Right of owner of easement of way to make improvements or repairs thereon, 112 A.L.R. 1303.

Agreement in respect of water rights in stream as creating a mere personal obligation, covenant running with the land, or an easement, 127 A.L.R. 835.

Implied easement, upon division of tract, in respect of railroad spur or branch or siding, 138 A.L.R. 779.

Private easement in way vacated, abandoned, or closed by public, 150 A.L.R. 644.

Acquisition of easement or other property right by prescription, predicated upon acts amounting to a private nuisance, 152 A.L.R. 343.

Type of vehicle or mode of travel permissible on express easement of way created in limited terms, 156 A.L.R. 1050.

Roadway or pathway used at time of severance of tract as visible or apparent easement, 164 A.L.R. 1001.

Easement by prescription: presumption and burden of proof as to adverse character of use, 170 A.L.R. 776.

Right of owner of easement to alter its use in such a way as to deprive servient estate of an incidental benefit, 172 A.L.R. 193.

Easements or privileges of tenant of part of building as to other parts not included in lease, 24 A.L.R.2d 123.

Maintenance, use, or grant of right of way over restricted property as violation or restrictive covenant, 25 A.L.R.2d 904.

Necessary parties defendant to suit to prevent or remove obstruction or interference with easement of way, 28 A.L.R.2d 409.

Power of executor to create easements, 44 A.L.R.2d 573.

Conveyance of land as bounded by road, street, or other way as giving grantee rights in or to such way, 46 A.L.R.2d 461.

Foreclosure of mortgage or trust deed as affecting easement claimed in, over, or under property, 46 A.L.R.2d 1197.

Easement by prescription in artificial drains, pipes, or sewers, 55 A.L.R.2d 1146.

Extent and reasonableness of use of private way in exercise of easement granted in general terms, 3 A.L.R.3d 1256.

Easements: way by necessity where property is accessible by navigable water, 9 A.L.R.3d 600.

Right to maintain gate or fence across right of way, 52 A.L.R.3d 9.

Tacking as applied to prescriptive easements, 72 A.L.R.3d 648.

What constitutes unity of title or ownership sufficient for creation of an easement by implication or way of necessity, 94 A.L.R.3d 502.

Way of necessity over another's land, where a means of access does exist, but is claimed to be inadequate, inconvenient, difficult, or costly, 10 A.L.R.4th 447.

Way of necessity where only part of land is inaccessible, 10 A.L.R.4th 500.

Location of easement of way created by grant which does not specify location, 24 A.L.R.4th 1053.

Locating easement of way created by necessity, 36 A.L.R.4th 769.

Scope of prescriptive easement for access (easement of way), 79 A.L.R.4th 604.

What constitutes, and remedies for, misuse of easement, 111 A.L.R.5th 313.

44-9-2. Acquisition of easement of light and air.

A right to an easement of light and air passing over another's land through existing lights or windows may not be acquired by prescription; but, when a person sells a house and the light necessary for the reasonable enjoyment thereof is derived from and across adjoining land belonging to such person, the easement of light and air over such vacant lot shall pass as an incident to the house sold as being necessary to the enjoyment thereof.

History.

Civil Code 1895, § 3046; Civil Code 1910, § 3618; Code 1933, § 85-1201.

History of Section.

This Code section is derived from the decisions in Turner v. Thompson, 58 Ga. 268 (1876) and Thompson v. Turner, 69 Ga. 219 (1881).

Law reviews.

For comment on Hornsby v. Smith, 191 Ga. 491, 13 S.E.2d 20 (1941), see 3 Ga. B.J. 61 (1941).

JUDICIAL DECISIONS

Easement is acquired by implied grant and is based upon necessity, and when the necessity ceases, the easement ceases. S.A. Lynch Corp. v. Stone, 211 Ga. 516, 87 S.E.2d 57, 1955 Ga. LEXIS 372 (1955).

Section applicable to lease of adjoining lot. — The principle O.C.G.A. § 44-9-2 states is equally applicable to a case where the owner of two adjoining lots leases one upon which there is a dwelling house dependable upon a window overlooking the adjoining lot for light and air. Indeed, the reason for the rule is more cogent in a case of tenancy than of purchase. Darnell v. Columbus Show-Case Co., 129 Ga. 62, 58 S.E. 631, 1907 Ga. LEXIS 307 (1907).

One who subsequently rends adjoining land is invested with no greater privileges than landlord, and is liable to neighbor tenant in damages resulting from interference with the latter's implied easement. Darnell v. Columbus Show-Case Co., 129 Ga. 62, 58 S.E. 631, 1907 Ga. LEXIS 307 (1907).

Damages recoverable for obstruction. — Ordinarily the damage recoverable is the depreciated rental value of the tenement; but if the instrumentality which obstructs the light and air is so constructed as to project rain through the window of the tenement to the injury of the tenant's bedroom furnishings and to personal discomfort, and this is done with the view of causing the tenant to abandon lease, punitive damages may be allowed. Darnell v. Columbus Show-Case Co., 129 Ga. 62, 58 S.E. 631, 1907 Ga. LEXIS 307 (1907).

It is error to enjoin the building of a house or a lot because the building would obstruct the light and air from a church. Smyth v. Nelson, 135 Ga. 96, 68 S.E. 1032, 1910 Ga. LEXIS 422 (1910).

RESEARCH REFERENCES

Am. Jur. 2d.
1 Am. Jur. 2d, Adjoining Landowners, § 90 et seq.
C.J.S.
2 C.J.S., Adjoining Landowners, §§ 68-74. 28A C.J.S., Easements, §§ 51, 85, 87, 111, 121, 151.
ALR.
Implied easement of light and air over private alley or right of way, 9 A.L.R. 1634.
Interference with easement of light, air, or view by structure in street or highway as ground for injunction at instance of abutting owner, 40 A.L.R. 1321.
Permission or license from owner of servient estate as extinguishing an existing easement, 50 A.L.R. 1295.
Easement of view from public street, 90 A.L.R. 793.
Right to injunction to protect easement of light and air, 93 A.L.R. 1180.
Location of easement of way created by grant which does not specify location, 24 A.L.R.4th 1053.

44-9-3. Right of lateral support from adjoining land; right to make excavations up to boundary line; notice to adjoining landowner; standard of care.

(a) Owners of adjoining lands owe to each other the lateral support of the soil of each to that of the other in its natural state. If they derive title from a common grantor, the lateral support shall include the weight of walls and other burdens that may be on it. If, at the time of the sale by such common grantor, there are buildings adjoining each other, the right shall extend to the lateral support which each adjacent wall gives to the other.

(b) On giving reasonable notice of his intention to the adjoining landowner, the owner of land has the right to make proper and needful excavations up to the boundary line for purposes of construction, provided that he uses ordinary care and takes reasonable precautions to sustain the land of the other.

History.
Civil Code 1895, §§ 3047, 3048; Civil Code 1910, §§ 3619, 3620; Code 1933, §§ 85-1202, 85-1203.
History of Section.
This Code section is derived from the decisions in Montgomery v. Trustees of Masonic Hall, 70 Ga. 38 (1883) and Harrison v. Kiser, 79 Ga. 588, 4 S.E. 320 (1887).
Law reviews.
For comment on Levison v. Goode, 164 Ga. 361, 138 S.E. 583 (1927), see 1 Ga. L. Rev. No. 2, p. 47 (1927).

JUDICIAL DECISIONS

Owner not prevented from agreeing to removal of lateral support. — Under O.C.G.A. § 44-9-3, owners of adjoining land owe to each other the lateral support of the soil. But there is nothing in law which prevents an owner from agreeing to a removal of lateral support. And the successor in title of a landowner who grants a right of way to a railroad has no cause of action against a second railroad, a purchaser from the first, because the successor's land, unless supported would be washed into the cut constructed by the railroad to whom was granted the right of

way. Seaboard Air-Line Ry. v. McMurrain, 132 Ga. 181, 63 S.E. 1098, 1909 Ga. LEXIS 61 (1909).

Each adjoining owner owns part of party wall, with corresponding easement of support. — In the absence of any contractual or statutory provision to the contrary, the owners of adjoining premises are not tenants in common of a party wall erected partly on the land of each, but each owns in severalty the part thereof which rests upon that person's side of the line, with an easement of support from the other. Wilensky v. Robinson, 203 Ga. 423, 47 S.E.2d 270, 1948 Ga. LEXIS 346 (1948).

Extent of easement acquired by prescription to use wall of adjoining owner for supporting building is the enjoyment of the use of the wall for the support of the house as it existed during the period of prescription. Levinson v. Goode, 164 Ga. 361, 138 S.E. 583, 1927 Ga. LEXIS 192 (1927) (for comment, see 1 Ga. L. Rev. No. 2, p. 47 (1927)).

Where deprivation of lateral support alleged, cause of action laid. — Where damage accruing out of the lowering of the grade of adjoining property so as to deprive a plaintiff of lateral support for a lot is alleged, a cause of action is laid. Seal v. Aldredge, 100 Ga. App. 458, 111 S.E.2d 769, 1959 Ga. App. LEXIS 643 (1959).

Liability attaches to act of going through and beyond property line. — Where, in excavating, the owner of land goes through and beyond owner's line and undermines the soil of an adjoining landowner, liability attaches to the act, not on the ground of a lack of the proper care in doing the work, but on the ground that the act is a trespass. Bass v. West, 110 Ga. 698, 36 S.E. 244, 1900 Ga. LEXIS 616 (1900).

Adjoining landowner may maintain ejectment against encroacher. — The right of the owner of land extends downward indefinitely; therefore, if one party, building upon own land, encroaches upon the adjoining land of neighbor, no question should arise as to the right of the latter to maintain ejectment against the former, and it is immaterial whether the encroachment is upon the surface of the soil or below it. Wachstein v. Christopher, 128 Ga. 229, 57 S.E. 511, 1907 Ga. LEXIS 69 (1907).

Landowner may excavate up to boundary line, but must avoid unnecessary injury to adjoining property. — Under the provisions of O.C.G.A. § 44-9-3, a landowner is not denied the right to the full use of this property, including the right to make excavations upon property up to the boundary line of the adjoining landowner, but in making such excavations, the landowner must avoid unnecessary injury to the property of the adjoining landowner. Paul v. Bailey, 109 Ga. App. 712, 137 S.E.2d 337, 1964 Ga. App. LEXIS 965 (1964).

Where excavation contemplated, reasonable notice should be given to adjoining landowner. — Where an excavation is contemplated, the owner of the premises on which the excavating is to be done should, as manifesting that degree of care and precaution required of the owner, give reasonable notice to the adjoining landowner of the owner's intention to excavate, so that an opportunity may be afforded the adjacent owner to take steps necessary to protect buildings and other structures. Montgomery v. Trustees of Masonic Hall, 70 Ga. 38, 1883 Ga. LEXIS 296 (1883); Bass v. West, 110 Ga. 698, 36 S.E. 244, 1900 Ga. LEXIS 616 (1900).

Where a proprietor desires to make a necessary excavation up to the line of a lot for the purpose of constructing a building, and the adjacent proprietor has an existing building, the wall of which extends along the property line, so that the work of excavating will withdraw the lateral support of the wall and tend to render it unsafe, it is the duty of the party desiring to make the excavation to give the adjoining proprietor reasonable notice of intention to make the excavation, and also to exercise ordinary care and take reasonable precautions to sustain the land of the other, so as to avoid injury to the land, including the building thereon. Massell Realty Imp. Co. v. MacMillan Co., 168 Ga. 164, 147 S.E. 38, 1929 Ga. LEXIS 96 (1929).

Person causing injury to adjoining property liable for damages. — It is the person who makes the excavation

which later causes injury to the adjoining property, and not the person in possession at the time of the injury, who is liable for the damages caused. Paul v. Bailey, 109 Ga. App. 712, 137 S.E.2d 337, 1964 Ga. App. LEXIS 965 (1964).

Owner liable for injury resulting from negligent contractor's excavation. — The owner of land on which an excavation is negligently and carelessly made by a contractor, who acts under the direction and control of the owner, is liable for any injury resulting therefrom to buildings and other structures on the adjoining property, although the contractor undertook to protect the adjoining buildings under a contract requiring such an undertaking. Bass v. West, 110 Ga. 698, 36 S.E. 244, 1900 Ga. LEXIS 616 (1900).

Injury not sustained until land suffers actual physical disturbance. — An injury for which damages may be recoverable is not sustained by the adjoining landowner unless and until the excavation and resulting withdrawal of lateral support causes the owner's land to crack, slide, fall in, or otherwise suffer actual physical disturbance, for the actionable wrong is not the excavation, but the act of allowing injury to the other land through the failure to exercise ordinary care to sustain the land. Paul v. Bailey, 109 Ga. App. 712, 137 S.E.2d 337, 1964 Ga. App. LEXIS 965 (1964).

If irreparable injury probable result, equity affords relief by injunction. — If irreparable injury to the property of the adjacent proprietor will probably result from the failure by the excavator to exercise ordinary care and reasonable precaution to sustain the land with the buildings thereon, equity will afford relief by an injunction. Massell Realty Imp. Co. v. MacMillan Co., 168 Ga. 164, 147 S.E. 38, 1929 Ga. LEXIS 96 (1929).

Summary judgment on duty of lateral support not authorized. — Because the appellees held prescriptive title by adverse possession to that part of the alleyway located between the parties' properties and were not required to remove the terraces and construction debris from the alleyway, the appellants were not entitled to summary judgment on the appellants claim seeking a declaration that the appellants would have no duty of lateral support once the terraces and debris were removed. Kelley v. Randolph, 295 Ga. 721, 763 S.E.2d 858, 2014 Ga. LEXIS 730 (2014).

Applicability. — Appellate court failed to discern how O.C.G.A. § 44-9-3(a) had anything to do with the maintenance of a dam to preserve a lake, and declined the landowners' invitation to extend the statutory interpretation. Bishop Eddie Long Ministries, Inc. v. Dillard, 272 Ga. App. 894, 613 S.E.2d 673, 2005 Ga. App. LEXIS 332 (2005), cert. denied, No. S05C1459, 2005 Ga. LEXIS 703 (Ga. Oct. 11, 2005), cert. denied, No. S05C1369, 2005 Ga. LEXIS 704 (Ga. Oct. 11, 2005).

RESEARCH REFERENCES

Am. Jur. 2d.

1 Am. Jur. 2d, Adjoining Landowners, §§ 26, 40 et seq.

Am. Jur. Pleading and Practice Forms.

19A Am. Jur. Pleading and Practice Forms, Party Walls, § 3.

C.J.S.

2 C.J.S., Adjoining Landowners, §§ 2-5, 7, 9-14, 15-38, 58, 59, 62-64, 66. 28A C.J.S., Easements, §§ 63, 66 et seq., 75 et seq., 81. 66 C.J.S., Nuisances, §§ 42 et seq., 62.

ALR.

Right of co-owner of a party or division wall to remove or demolish his own building, 9 A.L.R. 1329.

Liability of adjoining landowner for using neighbor's wall to support fill, 10 A.L.R. 1321.

Implied easement upon severance of tract where building is near or encroaches upon the dividing line, 41 A.L.R. 1210; 53 A.L.R. 910.

Physical conditions which will charge purchaser of servient estate with notice of easement, 41 A.L.R. 1442; 74 A.L.R. 1250.

Liability of municipality for injury to lateral support in grading street, 44 A.L.R. 1494.

Liability of one excavating on his own premises for resulting injury to adjoining building, 50 A.L.R. 486; 59 A.L.R. 1252.

Validity of statute or ordinance relating to protection of adjoining property in making excavations, 55 A.L.R. 464.

Damages recoverable by owner or occupier of surface on account of subsidence due to mining operations, 56 A.L.R. 310.

Change in conditions as terminating party-wall agreement or easement, 85 A.L.R. 288.

Right of excavating landowner to recover from adjoining owner amount expended by former to prevent subsidence of soil or collapse of building upon latter's land, or to recover damages caused by such subsidence or collapse, 129 A.L.R. 623.

Duty and liability of owner in respect of lateral or surface support as affected by excavation, or other conditions, created by his predecessor in title, 139 A.L.R. 1267.

Adjoining owner's use of wall standing on or near dividing line as imposing obligation to contribute to cost, where he was not party to oral agreement or unrecorded written agreement under which it was erected, 140 A.L.R. 1424.

Use of party wall for nonstructural purposes, 2 A.L.R.2d 1135.

Right to increase height of party wall, 24 A.L.R.2d 1053.

Measure of damages for loss of or interference with lateral support, 36 A.L.R.2d 1253.

Revocability of parol license with respect to use of wall, 41 A.L.R.2d 558.

Party walls and party-wall agreements as affecting marketability of title, 81 A.L.R.2d 1020.

Liability of excavators for damages to noncoterminous tract from removal of lateral support, 87 A.L.R.2d 710.

Liability for damages to adjacent land or building caused by dredging, 62 A.L.R.3d 526.

Liability of landowner withdrawing ground water from own land for subsidence of adjoining owner's land, 5 A.L.R.4th 614.

44-9-4. Parol license; when revocable; when easement running with land.

A parol license to use another's land is revocable at any time if its revocation does no harm to the person to whom it has been granted. A parol license is not revocable when the licensee has acted pursuant thereto and in so doing has incurred expense; in such case, it becomes an easement running with the land.

History.

Civil Code 1895, § 3069; Civil Code 1910, § 3645; Code 1933, § 85-1404.

History of Section.

This Code section is derived from the decisions in Sheffield v. Collier, 3 Ga. 82 (1847); Mitchell v. Mayor of Rome, 49 Ga. 19 (1872); Baker v. McGuire, 53 Ga. 245 (1874); Southwestern R.R. v. Mitchell, 69 Ga. 114 (1882), and City Council v. Burum & Co., 93 Ga. 68, 19 S.E. 820 (1893).

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).

For annual survey article on real property law, see 50 Mercer L. Rev. 307 (1998).

For annual survey article on real property law, see 52 Mercer L. Rev. 383 (2000).

For annual survey of zoning and land use law, see 57 Mercer L. Rev. 447 (2005).

For survey article on zoning and land use law, see 59 Mercer L. Rev. 493 (2007).

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).

For annual survey on zoning and land use law, see 61 Mercer L. Rev. 427 (2009).

JUDICIAL DECISIONS

License is a mere permissive use, generally in parol and revocable, while an easement created by agreement constitutes an interest in land requiring a writing within the statute of frauds, and subject to the rules governing the construction of deeds. Barton v. Gammell, 143 Ga. App. 291, 238 S.E.2d 445, 1977 Ga. App. LEXIS 2291 (1977).

Terms of the license must be strictly followed and cannot be extended or varied by the licensee. Mayor of Athens v. Gregory, 231 Ga. 710, 203 S.E.2d 507, 1974 Ga. LEXIS 1198 (1974).

O.C.G.A. § 44-9-4 enunciates a principle which would appear to be based on equitable estoppel in order to protect a party from loss. Jordan v. Coalson, 235 Ga. 326, 219 S.E.2d 439, 1975 Ga. LEXIS 867 (1975).

O.C.G.A. § 44-9-4 is operative only where there is an express oral license. Jordan v. Coalson, 235 Ga. 326, 219 S.E.2d 439, 1975 Ga. LEXIS 867 (1975).

O.C.G.A. § 44-9-4 is operative only where there is an express oral license. It does not apply to implied licenses nor is it susceptible to such an interpretation, and it will not be extended beyond its plain terms so as to establish irrevocable property rights in another's land under an implied license. Berolzheimer v. Taylor, 230 Ga. 595, 198 S.E.2d 301, 1973 Ga. LEXIS 997 (1973).

It was error to hold that the defendant had an irrevocable license to use a curb cut under O.C.G.A. § 44-9-4; it was undisputed that the trustees of the trust that owned the land in question never granted the defendant an express oral license to use the curb cut, and at most the defendant had an implied license, to which O.C.G.A. § 44-9-4 did not apply. Postnieks v. Chick-fil-A, Inc., 285 Ga. App. 724, 647 S.E.2d 281, 2007 Ga. App. LEXIS 516 (2007).

License not made irrevocable by mere expenditures upon improvements to enjoy license. — Where the licensee merely improves own property in the expectation of enjoying the license, it was not such an expenditure as would make the license irrevocable, since it cannot be said that the license became an agreement for a valuable consideration and the licensee a purchaser for value. Miller v. Slater, 187 Ga. 552, 186 S.E. 413 (1936).

Trial court properly granted summary judgment to a neighbor in a trespass action that involved use of a roadway to gain access to a marsh area as the defending neighbors failed to show prescriptive rights to the roadway were obtained since there was no evidence in the record indicating that the defending neighbors maintained the roadway during any seven year period in any manner; the record established that the roadway was too wide to function as a private right of way; and even if the defending neighbors had obtained a parol license to use the roadway, such license was still revocable despite the expenditure of funds to build a dock. Warner v. Brown, 290 Ga. App. 510, 659 S.E.2d 885, 2008 Ga. App. LEXIS 360 (2008).

The mere fact that a licensee erects improvements upon the person's own land and thereby incurs expense in the expectation of enjoying the license would not be such an expenditure as would make the licensee a purchaser for value and the license irrevocable. Tift v. Golden Hwde. Co., 204 Ga. 654, 51 S.E.2d 435, 1949 Ga. LEXIS 466 (1949).

The mere fact that a licensee erects improvements upon own land and thereby incurs expense in the expectation of enjoying the license would not be such an expenditure as would make the licensee a purchaser for value and the license irrevocable. Cox v. Zucker, 214 Ga. 44, 102 S.E.2d 580, 1958 Ga. LEXIS 333 (1958).

License becomes irrevocable when licensee erects necessary valuable improvements. — A parol license becomes irrevocable when the licensee, on the faith of the license, expends money and erects valuable improvements necessary to enjoy the license. Miller v. Slater, 182 Ga. 552, 186 S.E. 413, 1936 Ga. LEXIS 490 (1936).

Because a lessee had a license concerning a sign on its leased property, made

improvements in reliance of the lease, and a second lessee took ownership of the property with actual notice of the sign, the trial court abused its discretion in denying the lessee an interlocutory injunction barring the second lessee from interfering with the sign, as the license became irrevocable; moreover, the fact that the lessee did not own the land in which the sign was located was irrelevant. Lowe's Home Ctrs., Inc. v. Garrison Ridge Shopping Ctr. Marietta, GA, L.P., 283 Ga. App. 854, 643 S.E.2d 288, 2007 Ga. App. LEXIS 213 (2007), cert. denied, No. S07C0993, 2007 Ga. LEXIS 452 (Ga. June 4, 2007).

Executed parol license, where expenses have been incurred, ripens into easement running with the land. Berolzheimer v. Taylor, 230 Ga. 595, 198 S.E.2d 301, 1973 Ga. LEXIS 997 (1973); Hopkins v. Virginia Highland Assocs., 247 Ga. App. 243, 541 S.E.2d 386, 2000 Ga. App. LEXIS 1180 (2000).

As between private persons, a parol license, though primarily revocable, is not so when the licensee has executed it, and in so doing has incurred expense. A mere license without consideration is determinable at the pleasure of the licensor, yet if the enjoyment of a license must necessarily be and is preceded by the expenditure of money, such a license then becomes an agreement on a valuable consideration, and is irrevocable. Tanner-Brice Co. v. Sims, 174 Ga. 13, 161 S.E. 819, 1931 Ga. LEXIS 2 (1931).

The principle embodied in O.C.G.A. § 44-9-4 is that, if the enjoyment of the license must necessarily be preceded by the expenditure of money and the licensee has incurred expense in executing it, the license becomes an agreement for a valuable consideration and the licensee becomes a purchaser for value. Miller v. Slater, 182 Ga. 552, 186 S.E. 413, 1936 Ga. LEXIS 490 (1936).

To give a verbal agreement the same dignity and binding effect as a writing under seal, duly recorded, it must appear that it has been executed by one of the parties and in so doing that one has incurred expense. It must also appear that subsequent grantees took with notice of the agreement. Such a verbal agreement is enforceable to the same extent as if written. Meadows v. Page, 187 Ga. 686, 1 S.E.2d 656, 1939 Ga. LEXIS 760 (1939).

One having executed an oral agreement or license, and having incurred expense in so doing, the oral license, which would otherwise be revocable on the death of the licensor, is taken out of the statute of frauds and becomes irrevocable. Smith v. Fischer, 59 Ga. App. 791, 1 S.E.2d 684, 1939 Ga. App. LEXIS 412 (1939).

If the enjoyment of the parol license must be preceded necessarily by the expenditure of money, and the grantee incurred expense in executing it, it becomes an agreement for a valuable consideration, and the licensee a purchaser for value. Mathis v. Holcomb, 215 Ga. 488, 111 S.E.2d 50, 1959 Ga. LEXIS 521 (1959); Waters v. Pervis, 153 Ga. App. 71, 264 S.E.2d 551, 1980 Ga. App. LEXIS 1682 (1980).

Trial court properly granted a corporation's summary judgment motion and awarded a corporation injunctive relief, barring an owner from interfering with the corporation's right of access to a highway, as the corporation's predecessor improved property on which it held a parol license, which created an easement that ran with the land under O.C.G.A. § 44-9-4, and which passed to the corporation. Blake v. RGL Assocs., Inc., 267 Ga. App. 709, 600 S.E.2d 765, 2004 Ga. App. LEXIS 765 (2004).

Parol license could be revoked. — A parol license to use neighboring property for ingress, egress, and parking could be revoked where the licensee's enjoyment of the license was not preceded necessarily by the expenditure of money. McCorkle v. Morgan, 268 Ga. 730, 492 S.E.2d 891, 1997 Ga. LEXIS 749 (1997).

Evidence supported a finding that a lot owner had abandoned any interest the lot owner had in an unused alley: the alley was unused since the 1970s, a neighboring owner improved the alley and blocked the alley's use in 1991, the owner consented to the improvements and supported a re-zoning plan that included fencing, and did not object until 2001. Even if an oral license was granted, such a license was revocable at any time. Donald Azar, Inc. v. Muche, 326 Ga. App. 726, 755 S.E.2d 266, 2014 Ga. App. LEXIS 117 (2014).

Instruction in an action seeking an easement that tracked the language of O.C.G.A. § 44-9-4, given without a further clarifying instruction as to what type of "harm" would make a parol license irrevocable, was not harmful error. Carroll v. Pierce, 221 Ga. App. 805, 472 S.E.2d 560, 1996 Ga. App. LEXIS 662 (1996).

Easement found to be acquired. — Where an owner of land, by a written instrument under seal, conveys to another the privilege of building a storehouse on the land, and agrees in the instrument that the grantee shall have "the use of the said property, free of rent, so long as he desires to use it," and that when the grantee and successors fail to use it as a business then the grantee shall have the privilege of selling the house or removing it, and where the grantee, upon the faith of this conveyance, incurs expense in erecting such a house upon a lot designated by the owner for the purposes contemplated by the parties, the grantee thereby acquires an easement under O.C.G.A. § 44-9-4 and such an interest in the property conveyed as is assignable by the grantee and cannot be revoked by the grantor. Ainslie v. Eason & Waters, 107 Ga. 747, 33 S.E. 711, 1899 Ga. LEXIS 142 (1899).

Under O.C.G.A. § 44-9-4, a license to prospect gold could not be revoked after the licensee, by much labor and at considerable expense, located and developed gold. Brown v. Bowman, 119 Ga. 153, 46 S.E. 410, 1903 Ga. LEXIS 72 (1903).

Under O.C.G.A. § 44-9-4, a telegraph company, which with the consent of a railroad company built its lines upon the latter's right of way, and maintained, renewed, and operated the same for 40 or 50 years, acquired a perpetual easement. Western Union Tel. Co. v. Georgia R.R. & Banking Co., 227 F. 276, 1915 U.S. Dist. LEXIS 1073 (D. Ga. 1915).

The right to cut and remove timber, not being a mere license resting in parol, but being in writing and for a value, the licensee stands upon the footing of a purchaser for value, and the right or license is not revocable at the will of the grantor. Harrell v. Williams & Sons, 159 Ga. 230, 125 S.E. 452, 1924 Ga. LEXIS 418 (1924).

Where a parol license is granted for the opening and use of a ditch on the land of the licensor for the purpose of draining a pond on the land occupied by the licensee as a tenant, the fact that the licensee is a tenant, and not the owner of the land on which the pond is located, does not prevent the license from becoming irrevocable upon the licensee executing the license and incurring expense in so doing, at least so long as the licensee continues to exercise the license granted; and whether or not the license granted in is only personal to the licensee, or is appurtenant to the land, if the licensee subsequently purchases the land, the license in either event remains irrevocable for the licensee's benefit. Dickey v. Yarbrough, 186 Ga. 120, 197 S.E. 234, 1938 Ga. LEXIS 561 (1938).

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 a wall on the plaintiffs' lot, and to eject the corporation from 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 support of its building. Joel v. Publix-Lucas Theater, Inc., 193 Ga. 531, 19 S.E.2d 730, 1942 Ga. LEXIS 463 (1942).

Where a purchaser of land was allowed the right to build a private way at purchaser's own expense, which was used as a means of ingress and egress to the rear of the property and which was kept in repair during the six or eight years the purchasers occupied the house that the purchaser built on the property, the purchaser obtained an easement running with the land, and the easement passed with the dominant estate to each of successors in title, unless it could be proved that the easement was forfeited or abandoned or that the successors in title to the grantor of the easement took title to the servient estate with no notice, actual or constructive, of the existence of the easement. Mathis v. Holcomb, 215 Ga. 488, 111 S.E.2d 50, 1959 Ga. LEXIS 521 (1959).

Where, by parol license, the petitioner permitted a company to dispose of its industrial waste by means of a pipe which extended for some distance on the land of

the petitioner, the company thereafter discharged waste water on the land of the petitioner, and the company expended money on the faith of this parol license, the petitioner could not revoke the license, and it became an easement running with the land. It was such an easement as could be claimed by a subsequent owner of the manufacturing plant. Bell Indus., Inc. v. Jones, 220 Ga. 684, 141 S.E.2d 533, 1965 Ga. LEXIS 606 (1965).

Trial court erred by granting a guitar store summary judgment in a suit brought by a diving store to enforce an easement because there was no genuine issue of fact that the guitar store's predecessor in interest had granted the diving store a license to maintain the sign at issue on the guitar store's property in writing and money was paid, thus, the license created thereby ran with the land. Aquanaut Diving & Eng'g, Inc. v. Guitar Ctr. Stores, Inc., 324 Ga. App. 570, 751 S.E.2d 175, 2013 Ga. App. LEXIS 882 (2013).

Easement by estoppel. — There was no merit to the argument that Georgia law did not recognize the concept of easement by estoppel. The ripening of a license under O.C.G.A. § 44-9-4 into an easement because of the expenditure of funds in reliance thereon had often been described as an application of the doctrine of equitable estoppel. Waters v. Ellzey, 290 Ga. App. 693, 660 S.E.2d 392, 2008 Ga. App. LEXIS 333 (2008), cert. denied, No. S08C1353, 2008 Ga. LEXIS 634 (Ga. July 7, 2008).

Easement not acquired. — Where written statement giving permission to go on land contained no legal description, it was, at best, a revocable license which never ripened into an easement because defendant did not expend money preceding use of the road. Lovell v. Anderson, 242 Ga. App. 537, 530 S.E.2d 233, 2000 Ga. App. LEXIS 255 (2000).

Under O.C.G.A. § 44-9-4, a car wash owner did not show that a parol license to use a gas station's property for ingress and egress had ripened into an easement running with the land; there was no evidence that the car wash's lessor built any structure on the gas station's land or invested a substantial amount in improving the gas station's land, and there was no evidence of an express license granted to the car wash by the gas station. Decker Car Wash, Inc. v. BP Prods. N. Am., Inc., 286 Ga. App. 263, 649 S.E.2d 317, 2007 Ga. App. LEXIS 742 (2007), cert. denied, No. S07C1692, 2007 Ga. LEXIS 767 (Ga. Oct. 9, 2007).

Marina did not acquire an irrevocable license to access a lake and erect a dock pursuant to O.C.G.A. § 44-9-4 because even assuming that the prior dock created an irrevocable license in favor of the prior property owner, the evidence failed to show that the marina's dock fell within the property covered by the alleged license; the prior dock fell into disrepair and was no longer in existence, and the dock the marina erected was not in the same location as the prior dock. Camp Cherokee, Inc. v. Marina Lane, LLC, 316 Ga. App. 366, 729 S.E.2d 510, 2012 Ga. App. LEXIS 563 (2012).

In a declaratory judgment action brought by adjoining landowners seeking rights to access an undeveloped lot in a subdivision for use as a soccer field, the trial court properly granted summary judgment to the property owners who had terminated the access and use of the adjoining landowners to the field. There existed no express easement to grant the adjoining landowners access, no dedication of the field was established for public use, the treatment of the field for fire ants was merely maintenance, and since the adjoining landowners had previously used the lot with permission, no prescriptive rights were established. De Castro v. Durrell, 295 Ga. App. 194, 671 S.E.2d 244, 2008 Ga. App. LEXIS 1291 (2008), cert. denied, No. S09C0637, 2009 Ga. LEXIS 214 (Ga. Apr. 20, 2009).

In a civil dispute between property owners regarding a water well, the trial court did not err by granting summary judgment on the plaintiffs' declaratory judgment claim that they had an easement running with the land as there was no agreement between the plaintiffs and the original property owner, whereby the plaintiffs sought and received permission from the original property owner to use the well that was now on the defendants'

property. Steward v. Arandia, 360 Ga. App. 356, 861 S.E.2d 206, 2021 Ga. App. LEXIS 362 (2021).

No oral license to use land found. — Since plaintiff pointed to no evidence of any express oral license, it followed that the trial court did not err in finding O.C.G.A. § 44-9-4 inapplicable. Parrott v. Fairmont Dev., Inc., 256 Ga. App. 253, 568 S.E.2d 148, 2002 Ga. App. LEXIS 885 (2002).

Trial court erred by not finding parol license. — In a suit brought by a property owner seeking to specifically perform an oral agreement to purchase a strip of real estate, the trial court properly denied the property owner's request for an interlocutory judgment based on a violation of the statute of frauds and because another held a first right of refusal over the sale/purchase of the property. However, the trial court erred by concluding that the property owner had not obtained a parol license to use the strip since the property owner had made expenditures to improve the land and, as to the right of first refusal held by another, the grant of a parol license was not the equivalent to a sale of the property to have in anyway interfered with that right. Meinhardt v. Christianson, 289 Ga. App. 238, 656 S.E.2d 568, 2008 Ga. App. LEXIS 53 (2008).

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License not revocable after expenditure and improvements. — There are cases where a license to erect a dam is not revocable after the expenditure of money and the making of improvements in pursuance thereof, and a license to cut a ditch for drainage is not revocable after the ditch has been dug at expense to the licensee. 1958-59 Ga. Op. Att'y Gen. 285.

Transportation department acquires permission from owner in form of license for erection of retaining wall. — The Department of Transportation is charged with the responsibility of acquiring the proper permission from a property owner in the form of a license for the erection of a retaining wall; after permission is acquired, a wall may be erected and the original license is converted into an easement by operation of law; permission for the erection of retaining walls should be in writing in order to avoid the necessity of a factual determination by a court as to whether permission was granted in the first instance. 1971 Op. Att'y Gen. No. 71-165.

RESEARCH REFERENCES

Am. Jur. 2d.

25 Am. Jur. 2d, Easements and Licenses, § 137 et seq.

C.J.S.

28 C.J.S., Easements, §§ 10 et seq., 53 et seq., 127. 37 C.J.S., Frauds, Statute of, §§ 63, 91. 53 C.J.S., Licenses, §§ 50 et seq., 89 et seq.

ALR.

Injunction as a proper remedy by licensor where license to use real property is revoked, 56 A.L.R. 1110.

Extinguishment or modification of easement by parol agreement, 71 A.L.R. 1370.

Physical conditions which will charge purchaser of servient estate with notice of easement, 74 A.L.R. 1250.

Roadway or pathway used at time of severance of tract as visible or apparent easement, 100 A.L.R. 1321; 164 A.L.R. 1001.

Affirmative covenants as running with land, 102 A.L.R. 781; 118 A.L.R. 982.

Right of licensee for use of real property to compensation for expenditures upon revocation of license, 120 A.L.R. 549.

License in real property as involving freeholder or title or interest in real estate, within constitutional or statutory provisions relating to jurisdiction or venue, 138 A.L.R. 147.

Parol evidence rule as applied to question of easement by necessity or visible easement, 165 A.L.R. 567.

Revocation of license to cut and remove timber as affecting rights in respect of timber cut but not removed, 26 A.L.R.2d 1194.

Duration of license in or on real property granted for a specific purpose where no period has been specified, 74 A.L.R.2d 886.

Right of owners of parcels into which dominant tenement is or will be divided to use right of way, 10 A.L.R.3d 960.

44-9-5. Cessation of easement of necessity upon purchase of land providing access to highway.

Where a way of necessity is appurtenant to land and the owner thereof purchases other land which provides him access to a highway over his own land, the way of necessity ceases.

History.

Civil Code 1895, § 3066; Civil Code 1910, § 3642; Code 1933, § 85-1402.

History of Section.

This Code section is derived from the decision in Russell v. Napier, 82 Ga. 770, 9 S.E. 746 (1889).

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Where the evidence fails to show any necessity for the way, the way ceases. Charleston & W.C. Ry. v. Fleming, 118 Ga. 699, 45 S.E. 664, 1903 Ga. LEXIS 664 (1903).

This easement is acquired by implied grant and is based upon necessity, and when the necessity ceases, the easement ceases. S.A. Lynch Corp. v. Stone, 211 Ga. 516, 87 S.E.2d 57, 1955 Ga. LEXIS 372 (1955).

A way of necessity cannot exist in a vacuum, to be retained by one having no property to be served by the way. Seignious v. Metropolitan Atlanta Rapid Transit Auth., 252 Ga. 69, 311 S.E.2d 808, 1984 Ga. LEXIS 581 (1984).

Landlocked owner who can reach highway by another road not entitled to condemn neighbor's land. — The use of the common-law phrase "way of necessity" and the many authorities holding that wherever necessity ceases the right to such way ceases lead to the conclusion that if the owner of a landlocked farm can reach a highway by means of another private or quasi-private road, the landowner is not under that necessity which above entitles the landowner to condemn the land of a neighbor. Gaines v. Lunsford, 120 Ga. 370, 47 S.E. 967, 1904 Ga. LEXIS 557 (1904).

RESEARCH REFERENCES

Am. Jur. 2d.

25 Am. Jur. 2d, Easements and Licenses, §§ 42, 92, 108, 115.

C.J.S.

28A C.J.S., Easements, §§ 40 et seq., 91 et seq., 119, 120, 162.

ALR.

Easement of way of necessity as affected by common ownership of parcels which are not accessible one from the other, 5 A.L.R. 1557.

Dedication of footway by permissive use, 7 A.L.R. 125.

Implied easement in respect of drains, pipes, or sewers upon severance of tract, 58 A.L.R. 824.

May right of way be appurtenant where the servient tenement is not adjacent to the dominant, 76 A.L.R. 597.

Roadway or pathway used at time of severance of tract as visible or apparent easement, 100 A.L.R. 1321; 164 A.L.R.1001.

Right of owner of servient estate to alter conditions essential to enjoyment of easement in connection with stairway, or other part of building, 101 A.L.R. 1292.

Cessation of easement of way by necessity upon cessation of necessity, 103 A.L.R. 993.

Private easement in way vacated, abandoned, or closed by public, 150 A.L.R. 644.

Commencement and duration of express easement as affected by provision in instrument creating it, 154 A.L.R. 5.

Conveyance of land as bounded by road, street, or other way as giving grantee rights in or to such way, 46 A.L.R.2d 461.

Easements: way by necessity where property is accessible by navigable water, 9 A.L.R.3d 600.

Right to maintain gate or fence across right of way, 52 A.L.R.3d 9.

Way of necessity over another's land, where a means of access does exist, but is claimed to be inadequate, inconvenient, difficult, or costly, 10 A.L.R.4th 447.

Way of necessity where only part of land is inaccessible, 10 A.L.R.4th 500.

44-9-6. Loss of easement by abandonment or nonuse.

An easement may be lost by abandonment or forfeited by nonuse if the abandonment or nonuse continues for a term sufficient to raise the presumption of release or abandonment.

History.

Civil Code 1895, § 3068; Civil Code 1910, § 3644; Code 1933, § 85-1403.

History of Section.

This Code section is derived from the decision in Winham, King & Aldridge v. McGuire, 51 Ga. 578 (1874).

Law reviews.

For comment on Aggregate Supply Co. v. Sewell, 217 Ga. 407, 122 S.E.2d 580 (1961), as to nonabandonability of a profit a'prendre, see 14 Mercer L. Rev. 473 (1963).

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Analysis

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Applicability

O.C.G.A. § 44-9-6 applies to a municipal corporation, as well as an individual. Mayor of Savannah v. Bartow Inv. Co., 137 Ga. 198, 72 S.E. 1095, 1911 Ga. LEXIS 359 (1911); Mayor of Savannah v. Barnes, 148 Ga. 317, 96 S.E. 625, 1918 Ga. LEXIS 327 (1918).

There is a distinction between corporeal and incorporeal hereditaments; the former cannot be lost by abandonment; but the latter may be extinguished under certain circumstances. Tietjen v. Meldrim, 169 Ga. 678, 151 S.E. 349, 1930 Ga. LEXIS 8 (1930).

A perfect legal title to the corporeal hereditament cannot be lost by abandonment. Aggregate Supply Co. v. Sewell, 217 Ga. 407, 122 S.E.2d 580, 1961 Ga. LEXIS 471 (1961) (for comment, see 14 Mercer L. Rev. 474 (1963)).

Profit a'prendre. — The right to remove sand and gravel, granted by a lease, amounts to the profit a'prendre and not an easement. There is a distinction between a profit a'prendre and an easement, the latter may be lost by abandonment, while the former may not. Aggregate Supply Co. v. Sewell, 217 Ga. 407, 122 S.E.2d 580, 1961 Ga. LEXIS 471 (1961) (for comment, see 14 Mercer L. Rev. 474 (1963)).

Abandonment

Municipal corporation may, by abandonment, relinquish control over street which has been dedicated to it for public use. Kelsoe v. Town of Oglethorpe, 120 Ga. 951, 48 S.E. 366, 1904 Ga. LEXIS 755 (1904).

Where prescription to a private way has ripened, title is divested by abandonment, though not by neglect, and the duty to repair continues. Kirkland v. Pitman, 122 Ga. 256, 50 S.E. 117, 1904 Ga. LEXIS 807 (1904).

Owner of easement arising from grant, express or implied, does not lose easement by mere nonuse, and nonuse without other evidence of intent to abandon will not constitute abandonment. Smith v. Gwinnett County, 248 Ga. 882, 286 S.E.2d 739, 1982 Ga. LEXIS 725 (1982).

Easement acquired by grant not lost unless clear and unequivocal intention to abandon. — An easement of way acquired by a grant will not be lost by a nonuse for any length of time, unless there is clear and unequivocal evidence of an intention to abandon it; when such nonuse is accompanied by acts manifesting a clear intent to abandon, which destroy the object for which the easement was created or the means of its enjoyment, an abandonment will take place. Tietjen v. Meldrim, 169 Ga. 678, 151 S.E. 349, 1930 Ga. LEXIS 8 (1930).

An easement of way acquired by a grant, will not be lost by a nonuse for any length of time, unless there is a clear and unequivocal evidence of an intention to abandon it. Gilbert v. Reynolds, 233 Ga. 488, 212 S.E.2d 332, 1975 Ga. LEXIS 1355 (1975).

In a dispute over an easement, although a fence blocked the roadway claimed by the appellees, the evidence did not constitute clear, unequivocal, and decisive evidence of an intent to abandon the easement as one of the appellees testified that the fence could be clipped and unclipped to travel on the easement; the other appellee gave undisputed testimony that the appellees and their family had made use of the easement ever since the appellees' father conveyed the easements in 1998, including to maintain the water lines that come from a spring and which provide water to Tract 1 as well as to access the barn/shed on the eastern end of Tract 1. Houston v. Flory, 329 Ga. App. 882, 766 S.E.2d 227, 2014 Ga. App. LEXIS 791 (2014).

Abandonment of access to park not established. — Trial court did not err in concluding that the easement for access to the park had not been abandoned because evidence was presented that some residents used the access until the property owner blocked access. Doxey v. Crissey, 355 Ga. App. 891, 846 S.E.2d 166, 2020 Ga. App. LEXIS 397 (2020).

Mere nonuse cannot constitute abandonment. — Where an easement has been acquired by grant, a mere nonuse, without further evidence of an intent to abandon it, will not constitute abandonment. Mayor of Savannah v. Barnes, 148 Ga. 317, 96 S.E. 625, 1918 Ga. LEXIS 327 (1918).

An easement acquired by a grant cannot be lost by mere nonuse, without further evidence of an intention to abandon. Tietjen v. Meldrim, 169 Ga. 678, 151 S.E. 349, 1930 Ga. LEXIS 8 (1930).

Trial court did not err in granting a directed verdict for the alleged trespasser in finding that platted subdivision road the alleged trespasser was using was a public road as the easement that existed on the road was acquired from the grantor; thus, evidence of nonuse of the road without a showing of an intent to abandon the easement meant the easement had not been abandoned. Hand v. Pettitt, 258 Ga. App. 170, 573 S.E.2d 421, 2002 Ga. App. LEXIS 1375 (2002).

Trial court erred by finding that the county abandoned its public use easement in the road, and therefore it erred by granting the trust a temporary injunction to prevent the developer from developing an unpaved portion of the road pursuant to permits issued by the county, because the county's nonuse of the unpaved portion of the road did not show that it abandoned its easement under O.C.G.A. § 44-9-6 over that segment of the road. Pulte Home Co., LLC v. Juanita M. Aycock Living Trust, 360 Ga. App. 225, 860 S.E.2d 820, 2021 Ga. App. LEXIS 370 (2021).

No presumption arises from mere nonuse for time less than required for

perfection by prescription. Gilbert v. Reynolds, 233 Ga. 488, 212 S.E.2d 332, 1975 Ga. LEXIS 1355 (1975).

The seeking of permission to use an area formally held through an easement would authorize a jury to conclude that the one seeking the permission had abandoned the easement. Lockard v. Davis, 169 Ga. App. 208, 312 S.E.2d 194, 1983 Ga. App. LEXIS 3027 (1983).

Questions of fact remained as to abandonment. — In a dispute over access to a roadway, the trial court erred in granting plaintiff summary judgment enjoining defendant from obstructing the road because questions of fact remained as to abandonment of the roadway leading to plaintiff's property, which were not properly resolved by the trial court. Pass v. Forestar GA Real Estate Group, Inc., 337 Ga. App. 244, 787 S.E.2d 250, 2016 Ga. App. LEXIS 303 (2016), cert. denied, No. S16C1689, 2016 Ga. LEXIS 830 (Ga. Dec. 8, 2016).

Nonuse

Easement may be forfeited by owner without the owner's "absolute refusal" to exercise privileges thereunder. McElwaney v. MacDiarmid, 131 Ga. 97, 62 S.E. 20, 1908 Ga. LEXIS 29 (1908).

Where easement is acquired by mere user, doctrine of extinction by mere nonuse may apply. Tietjen v. Meldrim, 169 Ga. 678, 151 S.E. 349, 1930 Ga. LEXIS 8 (1930).

Prescriptive easement abandoned by nonuse. — Defendants were entitled to summary judgment on the plaintiff's claim for a prescriptive easement because the undisputed evidence showed that the plaintiff abandoned any prescriptive easement as the plaintiff's own evidence was that the plaintiff and the plaintiff's family had not used the defendants' tract to access the plaintiff's property at all since July 13, 1994, which was well beyond the seven-year period that would generally raise a presumption of abandonment; and the plaintiff had pointed to nothing to show that the presumption of abandonment should be rebutted. Albenberg v. Szalay, 332 Ga. App. 665, 774 S.E.2d 730, 2015 Ga. App. LEXIS 378 (2015).

Forfeiture not incurred unless nonuse raises presumption of release. — The right to an easement may be lost by an abandonment or by a forfeiture by a nonuser; but the forfeiture will not be incurred unless a nonuse is for a period sufficient to raise the presumption of a release or abandonment. Mathis v. Holcomb, 215 Ga. 488, 111 S.E.2d 50, 1959 Ga. LEXIS 521 (1959).

Mere nonuse for 20 years affords a presumption, though not a conclusive one, of extinguishment, even in cases where no other circumstances indicating an intention to abandon appears; and if there has been in the meantime some act done by the owner of the land charged with the easement, inconsistent with or adverse to the right, a much stronger presumption of extinguishment will arise. Gilbert v. Reynolds, 233 Ga. 488, 212 S.E.2d 332, 1975 Ga. LEXIS 1355 (1975).

Evidence

Evidence to establish forfeiture of easement by abandonment or nonuse must be decisive and unequivocal. Gaston v. Gainesville & D.E. Ry., 120 Ga. 516, 48 S.E. 188, 1904 Ga. LEXIS 625 (1904); Tietjen v. Meldrim, 169 Ga. 678, 151 S.E. 349, 1930 Ga. LEXIS 8 (1930); Calfee v. Jones, 54 Ga. App. 481, 188 S.E. 307, 1936 Ga. App. LEXIS 676 (1936).

The evidence to establish a forfeiture of an easement by abandonment or nonuse must be decisive and unequivocal; and where the testimony is in dispute as to the facts, the question as to any abandonment is for the jury, in applying to the evidence the law charged by the judge. Moxley v. Adams, 190 Ga. 164, 8 S.E.2d 525, 1940 Ga. LEXIS 424 (1940).

Abandonment (as used in O.C.G.A. § 44-9-6) is a mixed question of law and fact. Gaston v. Gainesville & D.E. Ry., 120 Ga. 516, 48 S.E. 188, 1904 Ga. LEXIS 625 (1904); Mayor of Savannah v. Bartow Inv. Co., 137 Ga. 198, 72 S.E. 1095, 1911 Ga. LEXIS 359 (1911).

Generally, abandonment is a mixed question of law and fact, which applies to

Evidence (Cont'd)

a municipal corporation, as well as to an individual. Hames v. City of Marietta, 212 Ga. 331, 92 S.E.2d 534, 1956 Ga. LEXIS 359 (1956).

Whether there has been an abandonment of an easement by the public authority under O.C.G.A. § 44-9-6 is a mixed question of law and fact and is for the jury whenever the evidence is in conflict. Jackson v. Chatham County, 225 Ga. 641, 170 S.E.2d 418, 1969 Ga. LEXIS 594 (1969).

Abandonment question for jury. — It would be a question for the jury, under all the facts, to determine whether a right once acquired by a continuous use was subsequently abandoned under O.C.G.A. § 44-9-6 by nonuse. Seaboard Air-Line Ry. v. Sikes, 4 Ga. App. 7, 60 S.E. 868, 1908 Ga. App. LEXIS 182 (1908).

Where the testimony is in dispute as to the facts indicating an abandonment, the determination of the true facts, to which the law of abandonment given in charge by the court is to be applied, is for the jury. Calfee v. Jones, 54 Ga. App. 481, 188 S.E. 307, 1936 Ga. App. LEXIS 676 (1936).

Evidence held to show abandonment or forfeiture. — The evidence was held to show that if any easement of way in the streets in controversy ever existed in the purchases of lots in another division of the tract, there had been an abandonment or forfeiture by nonuse under the terms of O.C.G.A. § 44-9-6. Mayor of Savannah v. Bartow Inv. Co., 137 Ga. 198, 72 S.E. 1095, 1911 Ga. LEXIS 359 (1911).

There was evidence from which the jury was authorized to find no loss of easement by an abandonment or forfeiture by nonuse under the provisions of O.C.G.A. § 44-9-6. Monroe v. Estes, 139 Ga. 729, 78 S.E. 130, 1913 Ga. LEXIS 582 (1913).

Illustrative Cases

Easement obtained by prescription runs with land unless forfeiture or abandonment proved. — Where a purchaser of land was allowed the right to build a private way at the purchaser's own expense, which was used as a means of ingress and egress to the rear of the property and which was kept in repair during the six or eight years the purchaser occupied the house that the purchaser built on the property, the purchaser obtained an easement running with the land, and the easement passed with the dominant estate to each of successors in title, unless it could be proved that the easement was forfeited or abandoned or that the successors in title to the grantor of the easement took title to the servient estate with no notice, actual or constructive, of the existence of the easement. Mathis v. Holcomb, 215 Ga. 488, 111 S.E.2d 50, 1959 Ga. LEXIS 521 (1959).

Easement designated on plat not lost by purchaser of lot by mere nonuse. — Where the owner of land in a city had it surveyed and laid off into lots, caused a plat of the same to be made which referred to a designated strip of land, shown on the plat as an avenue, and being so situated as to afford an outlet from the lots into a public street of the city, and where the owner sold the lots at a public auction, representing that they were sold by the plat, and the purchaser at the sale and the purchaser's successors in title acquired the right to use this strip as a way to and from the lots, the easement thus acquired by the purchaser and those holding under the purchaser would not be lost by mere lapse of time or nonuse, unless expressly abandoned. Harris v. Powell, 177 Ga. 15, 169 S.E. 355, 1933 Ga. LEXIS 99 (1933).

Right to use nonnavigable watercourse lost by discontinuance for time sufficient to infer abandonment. — A right acquired by the public to use a watercourse not navigable may be lost by a discontinuance of such a use for the time sufficient to justify an inference of abandonment under O.C.G.A. § 44-9-6. Seaboard Air-Line Ry. v. Sikes, 4 Ga. App. 7, 60 S.E. 868, 1908 Ga. App. LEXIS 182 (1908).

When bridges constructed on land acquired by easement dismantled, easement abandoned. — When bridges constructed by a county on land on which only an easement was acquired were dismantled by the state, the easement therein was abandoned, since abandonment is conclusively shown by the fact that the steel in the bridges was moved

elsewhere and stored. Stewart County v. Holloway, 69 Ga. App. 344, 25 S.E.2d 315, 1943 Ga. App. LEXIS 74 (1943).

An easement across railroad tracks, even if created by an unrecorded agreement, would not remain valid after 25 years without any use. Central of Ga. R.R. v. DEC Assocs., 231 Ga. App. 787, 501 S.E.2d 6, 1998 Ga. App. LEXIS 561 (1998).

RESEARCH REFERENCES

Am. Jur. 2d.

25 Am. Jur. 2d, Easements and Licenses, § 110 et seq.

C.J.S.

28A C.J.S., Easements, §§ 117, 124 et seq.

ALR.

Loss of easement by adverse possession, or nonuser, 1 A.L.R. 884; 66 A.L.R. 1099; 98 A.L.R. 1291; 25 A.L.R.2d 1265; 62 A.L.R.5th 219.

Permission or license from owner of servient estate as extinguishing an existing easement, 50 A.L.R. 1295.

Misuse of easement, or violation of conditions of its enjoyment, as ground of forfeiture, 78 A.L.R. 1222.

Failure or delay or original grantee to assert or exercise right of way by necessity as precluding subsequent assertion or exercise, 133 A.L.R. 1393.

Who entitled to land upon its abandonment for railroad purposes, where railroad's original interest or title was less than fee simple absolute, 136 A.L.R. 296.

Private easement in way vacated, abandoned, or closed by public, 150 A.L.R. 644.

Commencement and duration of express easement as affected by provision in instrument creating it, 154 A.L.R. 5.

Rights and duties of owners inter se with respect to upkeep and repair of water easement, 169 A.L.R. 1147.

Abandonment, waiver, or forfeiture of easement on ground of misuse, 16 A.L.R.2d 609.

Conveyance of land as bounded by road, street, or other way as giving grantee rights in or to such way, 46 A.L.R.2d 461.

What constitutes abandonment of a railroad right of way, 95 A.L.R.2d 468.

Right to maintain gate or fence across right of way, 52 A.L.R.3d 9.

What constitutes, and remedies for, misuse of easement, 111 A.L.R.5th 313.

44-9-7. Effect of sale of property for taxes or assessments on easements or rights of way.

No sale of real property under a fi. fa. for taxes or under a fi. fa. for any assessment for improvements shall extinguish or affect any easement or right of way in, over, under, or across said real property, which easement or right of way was created by an operation of law or by an express grant; provided, however, that an easement or right of way created by an express grant must be recorded prior to the recording of the fi. fa. for taxes or assessment for improvements under which the real property subject to the easement or right of way was sold.

History.

Ga. L. 1969, p. 39, § 1.

RESEARCH REFERENCES

Am. Jur. 2d.

20 Am. Jur. 2d, Covenants, Conditions, and Restrictions, § 243. 25 Am. Jur. 2d, Easements and Licenses, §§ 121, 122. 72 Am. Jur. 2d, State and Local Taxation, §§ 872, 873.

C.J.S.

84 C.J.S., Taxation, §§ 111, 494 et seq.,

510 et seq. 85 C.J.S., Taxation, §§ 1186, 1370 et seq.

ALR.

Implied easement, upon division of tract, in respect of railroad spur or branch or siding, 138 A.L.R. 779.

Extinguishment of easement by implication or prescription, by sale of servient estate to purchase without notice, 174 A.L.R. 1241.

Conveyance of land as bounded by road, street, or other way as giving grantee rights in or to such way, 46 A.L.R.2d 461.

Relative rights, as between municipality and abutting landowners, to minerals, oil, and gas underlying streets, alleys, or parks, 62 A.L.R.2d 1311.

Right to maintain gate or fence across right of way, 52 A.L.R.3d 9.

What constitutes unity of title or ownership sufficient for creation of an easement by implication or way of necessity, 94 A.L.R.3d 502.

ARTICLE 2

SOLAR EASEMENTS

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.

Implied easement upon severance of tract where building is near or encroaches upon the dividing line, 9 A.L.R. 488; 41 A.L.R. 1210; 53 A.L.R. 910.

Implied easement of light and air over private alley or right of way, 9 A.L.R. 1634.

What are "minerals" within deed, lease, or license, 17 A.L.R. 156; 86 A.L.R. 983.

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 A.L.R. 1249.

Liability of abutter to one injured while using private way or road, 28 A.L.R. 856.

Roadway or pathway used at time of severance of tract as visible easement, 34 A.L.R. 233; 100 A.L.R. 1321; 164 A.L.R. 1001.

Destruction of building as terminating easement therein, 34 A.L.R. 606; 154 A.L.R. 82.

Interference with easement of light, air, or view by structure in street or highway as ground for injunction at instance of abutting owner, 40 A.L.R. 1321.

Automobile traffic as additional burden on right of way, 53 A.L.R. 553.

Rights, privileges, or easements of public, its grantees or licensees, on land bordering on navigable water, 53 A.L.R. 1191.

Locating easement of way of necessity, 68 A.L.R. 528.

Character of easement in respect of water as one in gross or appurtenant, 89 A.L.R. 1187.

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

Right of owner of servient estate to alter conditions essential to enjoyment of easement in connection with stairway, or other part of building, 101 A.L.R. 1292.

Affirmative covenants as running with land, 102 A.L.R. 781; 118 A.L.R. 982.

Locating easement of way created by a grant which does not definitely describe its location, 110 A.L.R. 174.

Enlargement of easement by use for purpose or in a manner other than that specified in the grant, 110 A.L.R. 915.

Easement appurtenant to land, created subsequent to mortgage of dominant estate, as inuring to the benefit of the mortgagee or of purchaser at foreclosure sale and his subsequent grantees, 116 A.L.R. 1078.

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 A.L.R. 1267.

Nature and extent of right granted by contract for use of wall or roof for advertising purposes, 119 A.L.R. 1523.

Use of cemetery grounds for purposes other than interment, 130 A.L.R. 130.

Private cemeteries, 130 A.L.R. 250; 75 A.L.R.2d 591.

Assignability and diversibility of easement in gross or license in respect of land or water, 130 A.L.R. 1253.

Easement as precluding subsequent acquisition of easement in same land by third person, 133 A.L.R. 1200.

Failure or delay of original grantee to assert or exercise right of way by necessity as precluding subsequent assertion or exercise, 133 A.L.R. 1393.

Relief in injunction suit in respect of easement as affected by doubt as to right to, or extent or location of, easement; necessity of first establishing easement at law, 139 A.L.R. 165.

Adjoining owner's use of wall standing on or near dividing line as imposing obligation to contribute to cost, where he was not party to oral agreement or unrecorded written agreement under which it was erected, 140 A.L.R. 1424.

Express easements of light, air, and view, 142 A.L.R. 467.

Commencement and duration of express easement as affected by provision in instrument creating it, 154 A.L.R. 5.

Visible easement rule as applicable to reciprocal or cross easements resulting from common development and use of adjoining properties in different ownership, 155 A.L.R. 543.

Parol evidence rule as applied to question of easement by necessity or visible easement, 165 A.L.R. 567.

Easement or servitude or restrictive covenant as affected by sale for taxes, 168 A.L.R. 529.

Rights and duties of owners inter se with respect to upkeep and repair of water easement, 169 A.L.R. 1147.

Liability, as regards surface waters, for raising surface level of land, 12 A.L.R.2d 1338.

Easement or privileges of tenant of part of building as to other parts not included in lease, 24 A.L.R.2d 123.

Right to park vehicles on private way, 37 A.L.R.2d 944.

Easement by prescription in artificial drains, pipes, or sewers, 55 A.L.R.2d 1146.

Liability with respect to improvement assessments or charges as between vendor and purchaser, 59 A.L.R.2d 1044.

Grant, reservation, or exception as creating separate and independent legal estate in solid minerals or as passing only incorporeal privilege or license, 66 A.L.R.2d 978.

Private or family cemeteries, 75 A.L.R.2d 591.

Relocation of easements (other than those originally arising by necessity); rights as between private parties, 80 A.L.R.2d 743.

Acquisition of right of way by prescription as affected by change of location or deviation during prescriptive period, 80 A.L.R.2d 1095.

Reservation or exception in deed in favor of stranger, 88 A.L.R.2d 1199.

Deed to railroad company as conveying fee or easement, 6 A.L.R.3d 973.

Easements: way by necessity where property is accessible by navigable water, 9 A.L.R.3d 600.

Right of servient owner to maintain, improve, or repair easement of way at expense of dominant owner, 20 A.L.R.3d 1026.

Construction and operation of parking-space provision in shopping-center lease, 56 A.L.R.3d 596.

Separate assessment and taxation of air rights, 56 A.L.R.3d 1300.

Conveyance of "right of way," in connection with conveyance of another tract, as passing fee or easement, 89 A.L.R.3d 767.

Location of easement of way created by grant which does not specify location, 24 A.L.R.4th 1053.

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

Locating easement of way created by necessity, 36 A.L.R.4th 769.

Liability for diversion of surface water by raising surface level of land, 88 A.L.R.4th 891.

Easement, servitude, or covenant as affected by sale for taxes, 7 A.L.R.5th 187.

44-9-20. Short title.

This article shall be known and may be cited as the "Solar Easement Act of 1978."

History.
Ga. L. 1978, p. 2076, § 1.
Law reviews.
For article surveying Georgia cases dealing with environment, natural resources, and land use from June 1977 through May 1978, see 30 Mercer L. Rev. 75 (1978).

44-9-21. Legislative findings and declaration of policy.

The General Assembly finds that the use of solar energy in this state can help reduce the nation's reliance upon imported fuels and that solar energy development should, therefore, be encouraged. The General Assembly further finds that, as the use of solar energy devices increases, the possibility of future shading of such devices by buildings or vegetation will also increase. Therefore, the General Assembly declares that solar easements may be established to allow the owner of a solar energy device to negotiate for assurance of continued access to sunlight.

History.
Ga. L. 1978, p. 2076, § 2.
Cross references.
State building, plumbing and electrical codes, § 8-2-20 et seq.
Law reviews.
For article surveying Georgia cases dealing with environment, natural resources, and land use from June 1977 through May 1978, see 30 Mercer L. Rev. 75 (1978).

RESEARCH REFERENCES

ALR.
Separate assessment and taxation of air rights, 56 A.L.R.3d 1300.

44-9-22. Establishment of solar easements.

Any easement obtained for the purpose of ensuring the exposure of a solar energy device shall be created in writing and shall be subject to the same requirements of conveyance and recording as other easements.

History.
Ga. L. 1978, p. 2076, § 3.
Law reviews.
For article surveying Georgia cases dealing with environment, natural resources, and land use from June 1977 through May 1978, see 30 Mercer L. Rev. 75 (1978).

RESEARCH REFERENCES

Am. Jur. 2d.
25 Am. Jur. 2d, Easements and Licenses, §§ 16, 18, 19. 63 Am. Jur. 2d, Property, § 14.

C.J.S.
28A C.J.S., Easements, §§ 39, 52 et seq., 110 et seq., 151, 177, 183 et seq., 209, 210.
ALR.
Rule of visible easements as applied to easement of light or air, 56 A.L.R. 1138.
Express easements of light, air, and view, 142 A.L.R. 467.

44-9-23. Contents of solar easements.

Any instrument creating a solar easement shall include, but shall not be limited to:

(1) A definite and certain description of the airspace affected by such easement; and

(2) Any terms or conditions or both under which the solar easement is granted or will be terminated.

History.
Ga. L. 1978, p. 2076, § 4.
Law reviews.
For article surveying Georgia cases dealing with environment, natural resources, and land use from June 1977 through May 1978, see 30 Mercer L. Rev. 75 (1978).

RESEARCH REFERENCES

Am. Jur. 2d.
25 Am. Jur. 2d, Easements and Licenses, §§ 8, 99.
C.J.S.
2A C.J.S., Aeronautics and Aerospace, § 8. 28A C.J.S., Easements, §§ 39, 53 et seq., 85 et seq., 110, 118 et seq., 151, 177, 183 et seq.

ARTICLE 3

PRIVATE WAYS

Cross references.
Taking of private ways upon payment of just compensation, Ga. Const. 1983, Art. I, Sec. III, Para. II.

JUDICIAL DECISIONS

Constitutionality, see Cato v. Arnold, 222 Ga. 567, 151 S.E.2d 149, 1966 Ga. LEXIS 556 (1966).

Unconstitutionality of O.C.G.A. § 44-9-47 does not invalidate general scheme. — Although O.C.G.A. § 44-9-47 is unconstitutional, that portion of Art. 3, Ch. 9, T. 44, is not such an integral part of the statute as to invalidate the general legislative scheme. Arnold v. Selected Sites, Inc., 229 Ga. 468, 192 S.E.2d 260, 1972 Ga. LEXIS 653 (1972).

When road has been used as private way for as much as one year, an owner of land over which it passes may not close it up without first giving the common users of the way 30-days' notice in writing, that they may take steps to have it made permanent by proceeding before the ordinary (now probate judge), in the manner provided by O.C.G.A. Art. 3, Ch. 9, T. 44. Hall v. Browning, 195 Ga. 423, 24 S.E.2d 392, 1943 Ga. LEXIS 506 (1943).

Those who travel over a route may acquire an inchoate right before they secure perfect title. Thus, even incom-

plete and partial prescription will prevent the owner from obstructing a private way which has been used for 12 months, unless the person first gives 30-days' notice in writing of intention to the common users. Hall v. Browning, 195 Ga. 423, 24 S.E.2d 392, 1943 Ga. LEXIS 506 (1943).

RESEARCH REFERENCES

ALR.

Right to string wires across railroad right of way, 18 A.L.R. 619.

Right of owner of property not abutting on closed section to compensation for vacation of street or highway, 93 A.L.R. 639.

Right to park vehicles on private way, 37 A.L.R.2d 944.

Power to directly regulate or prohibit abutter's access to street or highway, 73 A.L.R.2d 652.

Power to restrict or interfere with access of abutter by traffic regulations, 73 A.L.R.2d 689.

Relocation of easements (other than those originally arising by necessity); rights as between private parties, 80 A.L.R.2d 743.

What constitutes unity of title or ownership sufficient for creation of an easement by implication or by way of necessity, 94 A.L.R.3d 502.

Way of necessity over another's land, where a means of access does exist, but is claimed to be inadequate, inconvenient, difficult, or costly, 10 A.L.R.4th 447.

Way of necessity where only part of land is inaccessible, 10 A.L.R.4th 500.

Neighborly accommodation as defense against adverse possession or prescriptive easement, 56 A.L.R.7th 8.

44-9-40. Authority of superior court to grant private ways; filing of petition as declaration of necessity; when proceeding enjoined.

(a) The superior court shall have jurisdiction to grant private ways to individuals to go from and return to their property and places of business. Private ways shall not exceed 20 feet in width and may be as much less as the applicant may choose or as the court may find to be reasonably necessary. They shall be kept open and in repair by the person on whose application they are established or his successor in title.

(b) When any person or corporation of this state owns real estate or any interest therein to which the person or corporation has no means of access, ingress, and egress and when a means of ingress, egress, and access may be had over and across the lands of any private person or corporation, such person or corporation may file his or its petition in the superior court of the county having jurisdiction; said petition shall allege such facts and shall pray for a judgment condemning an easement of access, ingress, and egress not to exceed 20 feet in width over and across the property of the private person or corporation. The filing of the petition shall be deemed to be the declaration of necessity; however, where it appears that the condemnor owns a right of access, ingress, and egress to his property over another route or owns an easement to a right of private way over another route, which right or easement is not less than 20 feet in width and which alternate route affords such person or corporation a reasonable means of access,

ingress, and egress, or where the judge shall find that the exercise of such right of condemnation by the condemnor is otherwise unreasonable, the judge of the superior court is authorized under such circumstances to find that the condemnation and the declaration of necessity constitute an abuse of discretion and to enjoin the proceeding.

History.

Laws 1834, Cobb's 1851 Digest, p. 955; Ga. L. 1853-54, p. 88, § 1; Code 1863, §§ 692, 693; Code 1868, §§ 754, 755; Code 1873, §§ 720, 721; Code 1882, §§ 720, 721; Civil Code 1895, §§ 661, 662; Civil Code 1910, §§ 807, 808; Code 1933, §§ 83-101, 83-102; Ga. L. 1953, Nov.-Dec. Sess., p. 98, § 1; Ga. L. 1967, p. 143, § 2; Ga. L. 1982, p. 3, § 44.

Law reviews.

For article surveying Georgia cases in the area of real property from June 1979 through June 1980, see 32 Mercer L. Rev. 175 (1980).

For survey article on real property law, see 59 Mercer L. Rev. 371 (2007).

For survey article on zoning and land use law, see 59 Mercer L. Rev. 493 (2007).

For summary review article on zoning and land use law, see 60 Mercer L. Rev. 457 (2008).

JUDICIAL DECISIONS

Editor's notes. — In light of the similarity of the statutory provisions, decisions decided under former Code 1910, §§ 807 and 808 and Code 1933, §§ 83-101 and 83-102 are included in the annotations for this Code section.

Former section exclusive provision giving jurisdiction to grant private ways. — There is no other provision of law which gives the ordinary (now probate court) jurisdiction to grant private ways over the lands of others, except as indicated in this former section. Porter v. Foster, 146 Ga. 154, 90 S.E. 967, 1916 Ga. LEXIS 636 (1916).

Existing easements not contemplated. — The statutory provisions giving the ordinary (now probate judge) the authority to grant private ways over the lands of others to individuals to go to and return from their farms or places of residence contemplate the grant of easements that did not exist, and provide due notice and a hearing for the owner of the land before property is taken, and compensation for the injury done. Porter v. Foster, 146 Ga. 154, 90 S.E. 967, 1916 Ga. LEXIS 636 (1916).

Law does not authorize probate judge to declare private way to be permanent. Herndon v. Strickland, 86 Ga. 323, 12 S.E. 642, 1890 Ga. LEXIS 241 (1890).

Proceedings to acquire easements different from proceedings to remove obstructions. — In proceedings under the former provisions to acquire private easements, the questions involved are different from those in a proceeding under O.C.G.A. § 44-9-59, to remove obstructions from an existing private way, and the notice required to be given to the landowner in each instance is different, as is also the judgment to be rendered by the ordinary (now probate judge). Porter v. Foster, 146 Ga. 154, 90 S.E. 967, 1916 Ga. LEXIS 636 (1916).

Private way cannot exceed 20 feet in width. — An applicant cannot establish any right whatsoever in a private way if the width of the pathway exceeds the statutory 20-foot limit at any point when originally claimed by the applicant. Rizer v. Harris, 182 Ga. App. 31, 354 S.E.2d 660, 1987 Ga. App. LEXIS 1613 (1987).

Because there was no practical way to limit the plaintiff's use of the driveway entrance to 20 feet authorized by law, and this conflicted with the rule that private ways under O.C.G.A. § 44-9-40(a) cannot exceed 20 feet in width, the trial court did not err by ruling that the plaintiff was not

entitled to seek a private way of necessity pursuant to § 44-9-40 in the manner in which the plaintiff pled. Beamer Rentals, Inc. v. Greentree Investment Partners, LLC, 361 Ga. App. 871, 864 S.E.2d 184, 2021 Ga. App. LEXIS 519 (2021).

Evidence was not inadequate as to the width of a private way not exceeding 20 feet, where in addition to a nonexpert witness' guess that it was between 15 and 20 feet, several witnesses testified that a gate spanning the road was 16 feet wide and a tenant on the property testified the road had not been maintained wider than the 16 feet during tenancy, and although defendant's expert testified that the roadbed varied from 24 to 31 feet in width, the expert stated that outside the 16-foot strip maintained by the tenant, the only evidence that more footage was being used was some old levelling now covered by grass and scrub trees and the expert could only guess as to how recently the old levelling apart from the 16-foot strip had been bulldozed. Rizer v. Harris, 182 Ga. App. 31, 354 S.E.2d 660, 1987 Ga. App. LEXIS 1613 (1987).

Power under this former section is restricted to "cases of necessity." Chattanooga, Rome & S.R.R. v. Philpot, 112 Ga. 153, 37 S.E. 181, 1900 Ga. LEXIS 78 (1900).

Way sought must be absolutely indispensable. — In a proceeding under the former provisions of this section, to condemn a private way over the lands of another person, in order to entitle the applicant to relief, it must appear that the way sought is absolutely indispensable as a means of reaching property. Wyatt v. Hendrix, 146 Ga. 143, 90 S.E. 957, 1916 Ga. LEXIS 631 (1916).

No choice of way where reasonable way tendered. — The applicant is not entitled to choose route where the landowner has tendered a way reasonably convenient to both parties. Wyatt v. Hendrix, 146 Ga. 143, 90 S.E. 957, 1916 Ga. LEXIS 631 (1916).

Cases of necessity do not arise except way sought is absolutely indispensable to the applicant as a means of reaching the applicant's property. If there is in existence a way suitable for all the purposes for which the property is to be used, and can presently be used, although owned by another, a case of necessity does not arise, even though such a way may be less convenient than the one proposed. Moore v. Dooley, 240 Ga. 472, 241 S.E.2d 232, 1978 Ga. LEXIS 765 (1978).

Trial court's denial of a condemnation of easement action was affirmed as the trial court's finding of fact that two alternate routes existed to the landlocked property was not clearly erroneous, even though the owners of the landlocked property claimed that they could not get permission to use the two alternate routes. Blount v. Chambers, 257 Ga. App. 663, 572 S.E.2d 32, 2002 Ga. App. LEXIS 1254 (2002).

Proof of necessity of private way. — Even though there was evidence of two other potential routes to petitioner's property, there was at least some evidence to show necessity upon which the jury could conclude that the road was necessary to access the property. Hensley v. Henry, 246 Ga. App. 417, 541 S.E.2d 398, 2000 Ga. App. LEXIS 1246 (2000).

Under statute that was in derogation of the common law, and, thus, was strictly construed, the filing of the condemnor's petition for a right of way across the condemnee's property was deemed to be a declaration of necessity, and, thus, the evidentiary hearing held in the trial court was not a trial and did not involve a final judgment; rather, the hearing was a show cause hearing that placed the burden on the condemnee to show why a right of way should not be granted based on the declaration of necessity put forth in the petition. Morrison v. Derdziak, 255 Ga. App. 89, 564 S.E.2d 500, 2002 Ga. App. LEXIS 486 (2002).

Owner was entitled to a condemnation of a private way of necessity under O.C.G.A. § 44-9-40(b) over the tip of the owner's triangle shaped lot, as the owner's only access to the lake front property was either by boat or by foot on a path of several hundred feet, which was unreasonable, the owner did not cause the lot to be landlocked, and there was no undue inconvenience to the condemnees, since a survey error caused the strange lot shape. Pierce v. Wise, 282 Ga. App. 709, 639 S.E.2d 348, 2006 Ga. App. LEXIS 1392 (2006), cert. denied, No. S07C0569, 2007 Ga. LEXIS 340 (Ga. Apr. 24, 2007).

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 Ga. App. LEXIS 91 (2007), cert. denied, No. S07C0864, 2007 Ga. LEXIS 390 (Ga. May 14, 2007).

Trial court erred in dismissing a property owner's statutory claim for an easement of necessity for failure to state a claim because the complaint sufficiently alleged that the owner had used a half mile of a private road on the defendant's land to access the owner's property since purchasing that land in 2006, that without such access, the owner had no legal means of ingress, and the owner had no ability to negotiate and acquire deeded fee simple title to roads to access the owner's property. S-D RIRA, LLC v. Outback Prop. Owners' Ass'n, 330 Ga. App. 442, 765 S.E.2d 498, 2014 Ga. App. LEXIS 846 (2014), cert. denied, No. S15C0643, 2015 Ga. LEXIS 341 (Ga. May 11, 2015), cert. denied, No. S17C0778, 2017 Ga. LEXIS 509 (Ga. June 5, 2017).

Condemnor required to show no other "reasonable means of access." — To condemn a private way over another's land the test for necessity is not "absolutely indispensable" test but the statutory test which requires a condemnor to show no other "reasonable means of access." Kellett v. Salter, 244 Ga. 601, 261 S.E.2d 597, 1979 Ga. LEXIS 1341 (1979).

Private way created by necessary implication is wholly distinct from "compulsory purchase and sale." Calhoun v. Ozburn, 186 Ga. 569, 198 S.E. 706, 1938 Ga. LEXIS 653 (1938).

Where condemnor establishes that only access to property is by navigable waters, he has established a prima facie case that the condemnor has no reasonable means of access. The burden then shifts to the condemnee to go forward with the evidence and demonstrate that access to the navigable waters constitutes a reasonable means of access under the peculiar circumstances of the case. International Paper Realty Corp. v. Miller, 255 Ga. 676, 341 S.E.2d 445, 1986 Ga. LEXIS 640 (1986).

Right of private way over another's and may arise by prescription from seven years' uninterrupted use through improved lands; but in order to set up such a prescriptive right of way, it is essential that the prescriber show not only that the prescriber has been in the uninterrupted use thereof for seven years or more, but also that it does not exceed 15 (now 20) feet in width, that it is the same number of feet originally appropriated, and that the prescriber has kept it open and in repair during this period. Hall v. Browning, 195 Ga. 423, 24 S.E.2d 392, 1943 Ga. LEXIS 506 (1943).

In order to acquire a prescriptive title to a private way over another's land, the burden of proof is on the prescriber to show that the prescriber has been in the uninterrupted use thereof for seven years or more, that it is the same number of feet originally appropriated, that it has been kept open and in repair during such period, and is of the width permitted by law. Bedingfield v. McCullough, 106 Ga. App. 759, 128 S.E.2d 374, 1962 Ga. App. LEXIS 843 (1962).

Failure of landowner to reserve easement. — Where the developer of a condominium could have reserved an easement over land it sold in order to provide access to other remaining land, the trial court did not err in declaring that condemnation of a private way was "otherwise unreasonable." Mersac, Inc. v. National Hills Condominium Assoc., 267 Ga. 493, 480 S.E.2d 16, 1997 Ga. LEXIS 23 (1997).

Failure of lessee to reserve easement. — Because genuine issues of material fact remained as to whether a lessee's failure to reserve an easement to the subject property at the time the lessee executed a corrective quitclaim deed was otherwise unreasonable, foreclosing the condemnation action, partial summary judgment to the lessee was unwarranted.

Wright v. Brookshire, 286 Ga. App. 162, 648 S.E.2d 485, 2007 Ga. App. LEXIS 718 (2007).

Usufruct holder could not seek easement by necessity. — Courts of Georgia have drawn distinctions between the rights of a holder of a usufruct and those of a title holder. A usufruct is not subject to ad valorem taxation pursuant to O.C.G.A. § 48-5-3, and the usufruct interest does not authorize the tenant to seek an easement by necessity, pursuant to O.C.G.A. § 44-9-40(b). However, the usufruct holder's possessory rights may constitute a property interest for which just compensation is payable under Ga. Const. 1983, Art. I, Sec. III, Para. I(a). The Stuttering Foundation, Inc. v. Glynn County, 301 Ga. 492, 801 S.E.2d 793, 2017 Ga. LEXIS 526 (2017).

Granting of easement under O.C.G.A. § 44-9-40 shall not authorize cancellation of covenant of limited use already in force with respect to the property involved. Bateman v. Fordham, 232 Ga. 520, 207 S.E.2d 501, 1974 Ga. LEXIS 993 (1974).

"Prima facie case of necessity" shown by the existence of landlocked property does not equate to an absolute entitlement to a private way to such property regardless of the reasonableness involved. DOT v. Freeman, 187 Ga. App. 883, 371 S.E.2d 887, 1988 Ga. App. LEXIS 1007 (1988).

The feasibility of implementing a grantee's plans for landlocked property was not relevant to the question whether granting a private way would be "otherwise unreasonable so as to justify denial of the private way." The feasibility issue was appropriately left for jury consideration in regard to the claimed value of the condemned property. DOT v. Freeman, 187 Ga. App. 883, 371 S.E.2d 887, 1988 Ga. App. LEXIS 1007 (1988).

The effort of private parties to widen a roadway without agreement of adjoining landowners may succeed only by acquisition of a private way, as provided in O.C.G.A. § 44-9-40. Keith v. Whitehead, 258 Ga. 142, 365 S.E.2d 435, 1988 Ga. LEXIS 162 (1988).

Payment before final judgment for private way. — Requiring pre-appeal payment forces a petitioner for a private way to pay for that which the petitioner has not obtained and may not ever obtain. O.C.G.A. § 44-9-47 requires payment of the just and adequate compensation before the final judgment granting a private way is entered by the court but after all appeals have been exhausted. Cline v. McMullan, 263 Ga. 321, 431 S.E.2d 368, 1993 Ga. LEXIS 520 (1993), overruled in part, Gilliam v. State, 312 Ga. 60, 860 S.E.2d 543, 2021 Ga. LEXIS 467 (2021).

Applicant seeking private way of necessity did not voluntarily landlock itself. — Because the evidence in the record failed to support the trial court's conclusion that a corporate landowner voluntarily landlocked itself, and no other evidence showed that granting a private way of necessity would be otherwise unreasonable, the trial court erred by denying the corporation's petition for condemnation of a private way of necessity over an existing private access easement. Dovetail Props. v. Herron, 287 Ga. App. 808, 652 S.E.2d 856, 2007 Ga. App. LEXIS 1107 (2007).

Attempt to enforce right to obtain private way. — Trial court erred by characterizing the property owner's argument that the court was exercising the court's constitutional right by attempting to obtain a private way to the owner's landlocked property as a new claim not raised in the complaint. The complaint brought pursuant to O.C.G.A. § 44-9-40 et seq. was necessarily an attempt to enforce the owner's constitutional right to obtain a private way and the statute existed for the sole purpose of providing a procedure to enforce rights preserved by Ga. Const. 1983, Art. I, Sec. III, Para. II. Dehco, Inc. v. Bd. of Regents of the Univ. Sys. of Ga., 350 Ga. App. 760, 830 S.E.2d 333, 2019 Ga. App. LEXIS 380 (2019).

Easement accorded with statute. — Trial court did not err in limiting an easement for ingress and egress down the center line of a street because the easement recognized accorded with the statutory private way easements that Georgia law allowed for such access to public roads under O.C.G.A. § 44-9-40. Goodson v. Ford, 290 Ga. 662, 725 S.E.2d 229, 2012 Ga. LEXIS 254 (2012).

Use of driveway and railroad crossing. — Trial court properly awarded a property owner compensatory damages in

an inverse condemnation suit against the Georgia Department of Transportation (DOT) because the property owner established the acquisition of a prescriptive easement over the driveway and railroad crossing at issue and, thus, had a compensable property interest as a result of DOT closing the driveway. Ga. Dep't of Transp. v. Jackson, 322 Ga. App. 212, 744 S.E.2d 389, 2013 Ga. App. LEXIS 480 (2013).

Standing to pursue claim. — When plaintiff filed the plaintiff's second petition, the plaintiff had an existing right to cross over the lands of one of the defendants but the plaintiff still could not cross the other defendant's property, and the landlocked parcel was, therefore, still without a means of access, ingress, and egress. The lack of a "means of access, ingress, and egress" adequately established the standing of plaintiff to pursue a condemnation action. Canton Partners v. Scarbrough Group, Inc., 316 Ga. App. 57, 728 S.E.2d 733, 2012 Ga. App. LEXIS 482 (2012).

Those who use a private way must keep the same in repair, and cannot take advantage of their own default by turning out to avoid obstructions which they should have removed. Kirkland v. Pitman, 122 Ga. 256, 50 S.E. 117, 1904 Ga. LEXIS 807 (1904).

Way's obstruction gives rise to right of action for damages. — The obstruction of a prescriptive private way would constitute an interference with a private right, and give a right of action in tort for damages from the alleged violation of this right. Hall v. Browning, 195 Ga. 423, 24 S.E.2d 392, 1943 Ga. LEXIS 506 (1943).

RESEARCH REFERENCES

Am. Jur. 2d.

25 Am. Jur. 2d, Easements and Licenses, §§ 7, 13, 18, 74 et seq., 87, 124, 125.

C.J.S.

28A C.J.S., Easements, §§ 8, 9, 13, 52, 152 et seq., 182 et seq.

ALR.

Private easement in way vacated, abandoned, or closed by public, 150 A.L.R. 644.

Easements or privileges of tenant of part of building as to other parts not included in lease, 24 A.L.R.2d 123.

Necessary parties defendant to suit to prevent or remove obstruction or interference with easement of way, 28 A.L.R.2d 409.

44-9-41. Contents of petition; manner of service and advertisement; fees.

The petition shall describe the easement of private way sought to be condemned over the lands of another and shall state the distance and direction of the private way and the nature of any improvements through which the private way will go. There shall be attached to the petition or incorporated therein a plat showing the measurements and location of the private way. The petition shall state the names and addresses of all persons owning an interest in the property, if known, and shall be served in the following manner:

(1) Where the owner or owners of the property over which the private way is sought are known and reside in the county in which the land is located, the sheriff of the county shall serve each of the persons with a copy of the petition and any orders of the court thereon; and the sheriff shall make a return of the service;

(2) Where the owners of the property are known but reside in

another county of this state, they may be served (A) either by the sheriff of the county in which the property is located or by the sheriff of the county of the residence of the owner or owners, such sheriff to make a return of the service, or (B) by the person or corporation seeking to condemn the private way or an agent thereof, in which event the return of service duly filed as a part of the record shall be prima-facie evidence as to the service so made and if not traversed shall be conclusive as to the service;

(3) Where the owner or owners of the property are known but reside outside of this state, the petition shall set forth the addresses of such nonresident owners, in which event it shall be the duty of the clerk of the superior court to cause a true and correct copy of the petition to be served upon the nonresident owner or owners. The clerk shall make and enter upon the original petition or attach thereto his certificate which certifies that he has served the owner or owners by mailing a copy of the petition by certified mail or statutory overnight delivery to the address given in the petition; and the clerk shall be allowed a fee of $2.00 for each entry of service to be taxed against the costs in the case;

(4) In the event any of the owners are minors or persons non compos mentis, the petition shall so state, in which case the petition shall be served on each minor defendant and each non compos mentis defendant in the same manner as provided by paragraph (3) of subsection (e) of Code Section 9-11-4; and

(5) In all cases, the matter shall be advertised once a week for four consecutive weeks in the county newspaper which carries the sheriff's advertisements. The advertisement shall describe the easement to be condemned as set forth in the petition and the owner or owners of the property so far as the same are known. Where this Code section has been complied with so far as possible, the advertisement shall be final and conclusive service upon all persons who are unknown or upon persons who are known but whose addresses and places of residence are unknown; and, in such event, the certificate of the sheriff of the county in which the land is located that such persons do not reside within said county, that he has made diligent inquiry as to their addresses, and that the same are unknown, which certificate is duly filed with the clerk, shall be prima-facie evidence of the fact so certified and unless traversed by a party at interest shall be conclusive. For each certificate the sheriff shall charge the same fee as is provided by law for the service of the petition upon residents of the county.

History.

Orig. Code 1863, § 694; Code 1868, § 756; Code 1873, § 722; Code 1882, § 722; Civil Code 1895, § 663; Civil Code 1910, § 809; Code 1933, § 83-103; Code 1933, § 83-102, enacted by Ga. L. 1967, p.

143, § 2; Ga. L. 2000, p. 1225, § 6; Ga. L. 2000, p. 1589, § 3.

JUDICIAL DECISIONS

Editor's notes. — In light of the similarity of the statutory provisions, decisions decided under former Code 1910, § 809 and Code 1933, § 83-103 are included in the annotations for this Code section.

One entering with consent must bring notice to owner of intention to prescribe. — One who seeks to ripen an absolute right to the use of a private way by prescription, instead of obtaining it by express grant, must, when one enters with the consent of the owner, bring some affirmative notice to the owner, by making repairs or otherwise, of the person's intention to prescribe through seven years' use. First Christian Church v. Realty Inv. Co., 180 Ga. 35, 178 S.E. 303, 1934 Ga. LEXIS 446 (1934).

Passive keeping in repair is notice, but inaction will not suffice; the expression "keeping in repair" originated in an age when private ways were unpaved and of necessity had to be repaired in order that the use thereof might be continued, and was then the equivalent of action and affirmative notice of an intention to prescribe, even where the use originated in consent. First Christian Church v. Realty Inv. Co., 180 Ga. 35, 178 S.E. 303, 1934 Ga. LEXIS 446 (1934).

Claim fails where failure to keep way open and in repair. — Where the plaintiff failed to show that plaintiff and predecessors in title had kept the alleged private way open and in repair, plaintiff's claim to a private way must fail. Woods v. Brannen, 208 Ga. 495, 67 S.E.2d 702, 1951 Ga. LEXIS 419 (1951).

When way legally obtained and continued for statutory period, right becomes absolute. — When the use of a private way has been obtained under the former provisions of this section, and is continued as long as seven years, of which the owner has had six months' knowledge without moving for damages, the right of use becomes absolute, and the owner is barred from claiming damages. First Christian Church v. Realty Inv. Co., 180 Ga. 35, 178 S.E. 303, 1934 Ga. LEXIS 446 (1934).

Obstruction of private right of way after right to use way is acquired is unlawful. First Christian Church v. Realty Inv. Co., 180 Ga. 35, 178 S.E. 303, 1934 Ga. LEXIS 446 (1934).

RESEARCH REFERENCES

Am. Jur. 2d.
25 Am. Jur. 2d, Easements and Licenses, §§ 106, 107.

C.J.S.
28A C.J.S., Easements, § 113 et seq.

44-9-42. Selection of assessors.

The petition for condemnation shall name an assessor to act on behalf of the person or corporation seeking to condemn the easement of private way; and the selection of a board of assessors shall be in the way and manner provided for by Part 3 of Article 1 of Chapter 2 of Title 22.

History.
Code 1933, § 83-103, enacted by Ga. L. 1967, p. 143, § 2.

44-9-43. Show cause order; selection of assessors; hearing before assessors.

Upon the filing of the petition for condemnation, the judge of the superior court, after taking into consideration the requirements of service provided for in Code Section 44-9-41, shall make and enter up an order requiring the owner or owners of the property to show cause before him on a day certain as to why the easement for private way should not be condemned and requiring the said owner or owners to name an assessor to act on his or their behalf. On the return day, the judge shall fix the time and place for a hearing before the board of assessors; but the same may be changed by the board of assessors in accordance with Code Section 22-2-60. In all other respects, the hearing before the board of assessors, together with the assessment of damages by them, shall be as is provided for in Part 4 of Article 1 of Chapter 2 of Title 22.

History.
Code 1933, § 83-104, enacted by Ga. L. 1967, p. 143, § 2.

JUDICIAL DECISIONS

Word "established" means laying out of way under order of the probate judge. Watkins v. Country Club, 120 Ga. 45, 47 S.E. 538, 1904 Ga. LEXIS 442 (1904).

Condemnation procedure. — After the condemnor's petition for right of way was filed, the trial court, assuming the petition was properly served, had to enter an order requiring the condemnee to show cause why the easement for the private way should not be condemned, and, thus, the trial court's evidentiary hearing was a show cause hearing, and neither a trial nor other proceeding involving a final judgment. Morrison v. Derdziak, 255 Ga. App. 89, 564 S.E.2d 500, 2002 Ga. App. LEXIS 486 (2002).

Selection of assessors. — Statutory procedure required that once the condemnee failed to show a right of way should not be granted out of necessity the court was required to submit the issue of compensation for such private way to a board of assessors named in the court's order approving the private way and the court followed that procedure by specifically naming two assessors for that purpose in its order. Morrison v. Derdziak, 255 Ga. App. 89, 564 S.E.2d 500, 2002 Ga. App. LEXIS 486 (2002).

44-9-44. Appeals from award of assessors; jury trial.

Either party shall have the right to appeal from the award of the board of assessors to a jury in the superior court; and such appeals shall be made in accordance with and shall be controlled by Part 5 of Article 1 of Chapter 2 of Title 22.

History.
Code 1933, § 83-105, enacted by Ga. L. 1967, p. 143, § 2.

JUDICIAL DECISIONS

Appeal from award of assessors. — Before a right of way could be granted, either the condemnee or condemnor had the right to appeal a board of assessor's award properly filed and recorded with the clerk of court; however, because the board of assessors did not file such an award, the 10-day time period for appealing a properly filed and recorded award did not start running, and, thus, the condemnor did not exhaust the appellate process and obtain a final judgment. Morrison v. Derdziak, 255 Ga. App. 89, 564 S.E.2d 500, 2002 Ga. App. LEXIS 486 (2002).

44-9-45. Maintenance of private way by condemnor; failure to maintain as abandonment.

Upon the final condemnation of the private way, it shall become the duty of the condemnor or his successors in title to maintain the private way and to keep it open and in a state of good repair. Failure to comply with this requirement for a period of one year shall constitute an abandonment of the private way; and the title thereto shall revert to the owner of the property over which the private way was condemned or his successors in title.

History.
Code 1933, § 83-105-A, enacted by Ga. L. 1967, p. 143, § 2.

RESEARCH REFERENCES

Am. Jur. 2d.
25 Am. Jur. 2d, Easements and Licenses, § 112 et seq.
C.J.S.
28A C.J.S., Easements, § 124 et seq.
ALR.
Reversion of title upon abandonment or vacation of public street or highway, 18 A.L.R. 1008; 70 A.L.R. 564.

44-9-46. Determination of amount of compensation and other issues by jury; payment and disposition of damages.

The amount of compensation to be assessed against the condemnor for the private way desired shall be determined by a verdict of the jury; and the case shall stand for trial at the first term after service is perfected or at any subsequent term at which the case may be reached for trial. If an issue is made by pleadings filed by any defendant regarding the condemnor's right to have a private way established or with respect to the location or width thereof, such issues shall likewise be determined by the jury. Damages assessed shall be paid into the court and shall be disbursed by the clerk in accordance with the court's order regarding the party or parties entitled thereto.

History.
Code 1933, § 83-106, enacted by Ga. L. 1967, p. 143, § 2.

JUDICIAL DECISIONS

Determination of amount of compensation. — If condemnee filed an appeal to a jury after the Board of Assessors made its award, as the condemnee had a right to do, the trial court jury had the right to determine more than just the value of the right of way; it could also consider the issue of damages, if any, that the condemnee might have sustained. Morrison v. Derdziak, 255 Ga. App. 89, 564 S.E.2d 500, 2002 Ga. App. LEXIS 486 (2002).

44-9-47. Motions and proceedings subsequent to judgment; payment of compensation; nonpayment as abandonment; effect of abandonment on subsequent application.

With respect to the judgment of the court in such case, any party may have all remedies provided by law, including a motion for a new trial, a motion for an appeal, a motion for judgment on the pleadings, or a motion for judgment notwithstanding the verdict. Before the judgment becomes final and after the determination of any motions or appeals, the compensation fixed by the jury shall be paid in cash into the registry of the court by the applicant; and, upon the failure to pay the compensation, the private way applied for shall be considered abandoned. Upon a motion made by any interested party and a notice of not less than ten days to the applicant for the private way, the court shall enter a judgment of abandonment accordingly. If the right to the private way is abandoned in this manner and, after notice to the applicant, the court so finds, no application for a private way over the same land shall thereafter be filed by the same applicant or his successor in title.

History.
Code 1933, § 83-106-A, enacted by Ga. L. 1967, p. 143, § 2; Ga. L. 1982, p. 3, § 44.

JUDICIAL DECISIONS

Former provision allowing for postponed payment after judgment unconstitutional. — The former portion of O.C.G.A. § 44-9-47 allowing for 60 days to pay for a private way after the entry of judgment is unconstitutional, because the grant of the private way is made before the payment is required. Arnold v. Selected Sites, Inc., 229 Ga. 468, 192 S.E.2d 260, 1972 Ga. LEXIS 653 (1972).

When property right is taken or vested. — No property right is taken from a property owner, nor vested in a private way petitioner, until after all of the rights have been finally established, the compensation is paid and the court makes such a "grant" by final judgment. Cline v. McMullan, 263 Ga. 321, 431 S.E.2d 368, 1993 Ga. LEXIS 520 (1993), overruled in part, Gilliam v. State, 312 Ga. 60, 860 S.E.2d 543, 2021 Ga. LEXIS 467 (2021).

Payment before final judgment for private way. — Requiring pre-appeal payment forces a petitioner for a private way to pay for that which the petitioner has not obtained and may not ever obtain. O.C.G.A. § 44-9-47 requires payment of the just and adequate compensation before the final judgment granting a private way is entered by the court but after all appeals have been exhausted. Cline v. McMullan, 263 Ga. 321, 431 S.E.2d 368, 1993 Ga. LEXIS 520 (1993), overruled in part, Gilliam v. State, 312 Ga. 60, 860 S.E.2d 543, 2021 Ga. LEXIS 467 (2021).

RESEARCH REFERENCES

Am. Jur. 2d.
25 Am. Jur. 2d, Easements and Licenses, § 127 et seq.

C.J.S.
28A C.J.S., Easements, § 205 et seq.

44-9-48. Agreements between parties as to payment of compensation.

Code Section 44-9-47 shall not divest the court of jurisdiction to permit payment by the applicant of the compensation fixed by the jury upon terms to which the parties agree, including security for compensation so fixed, provided and on condition that the agreement of the parties is approved by the court and that the court fixes reasonable conditions under which the right of private way shall be abandoned and a judgment of abandonment entered after notice for a period of ten days in the manner provided by Code Section 44-9-47.

History.
Code 1933, § 83-106-B, enacted by Ga. L. 1967, p. 143, § 2.

44-9-49. Establishment of private way by agreement between parties.

Private ways may be established by an agreement in writing between the parties concerned, which agreement may stipulate any damages to be paid. The agreement shall be entered on the official minutes of the county commission and the road deed file and, when so done, shall have the same effect as though established by Code Sections 44-9-40 through 44-9-48.

History.
Orig. Code 1863, § 698; Code 1868, § 760; Code 1873, § 726; Code 1882, § 726; Civil Code 1895, § 667; Civil Code 1910, § 813; Code 1933, § 83-107.

RESEARCH REFERENCES

Am. Jur. 2d.
25 Am. Jur. 2d, Easements and Licenses, §§ 3, 21.

C.J.S.
28A C.J.S., Easements, §§ 59, 147, 155, 160.

ALR.
Private easement in way vacated, abandoned, or closed by public, 150 A.L.R. 644.
Maintenance, use, or grant of right of way over restricted property as violation of restrictive covenant, 25 A.L.R.2d 904.

44-9-50. Recording of private way; protection of owner's use.

When a private way becomes established, it shall be entered on and fully described on the official minutes of the county commission and the road deed file; and the owner thereof shall be entitled to be protected in the use of the same as a public road.

History. Orig. Code 1863, § 699; Code 1868, § 761; Code 1873, § 727; Code 1882, § 727; Civil Code 1895, § 668; Civil Code 1910, § 814; Code 1933, § 83-108.

44-9-51. Establishment of private way by several landowners; duties and privileges of subsequent vendees.

Several landowners may join together in opening a private way or in maintaining it after establishment or both. When this has been done and has been entered on the official minutes of the county commission and the road deed file, the duties and privileges incident thereto shall extend to vendees of the same real estate.

History. Orig. Code 1863, § 700; Code 1868, § 762; Code 1873, § 728; Code 1882, § 728; Civil Code 1895, § 669; Civil Code 1910, § 815; Code 1933, § 83-109.

JUDICIAL DECISIONS

O.C.G.A. § 44-9-51 does not refer to the right of prescription. Thompson v. Easley, 87 Ga. 320, 13 S.E. 511, 1891 Ga. LEXIS 157 (1891).

RESEARCH REFERENCES

Am. Jur. 2d.
25 Am. Jur. 2d, Easements and Licenses, § 52.

44-9-52. Establishment and apportionment of private way by several landowners.

When several landowners join together in opening a private way, they may apportion the road work among themselves.

History. Orig. Code 1863, § 701; Code 1868, § 763; Code 1873, § 729; Code 1882, § 729; Civil Code 1895, § 670; Civil Code 1910, § 816; Code 1933, § 83-110.

44-9-53. Establishment of private way over wild lands without notice to landowner; assessment of damages after notice.

If a private way is established over the wild lands of a person who has no notice of the proceeding, at any time within six months after the receipt of such notice he may proceed to have damages assessed against all the landowners who habitually use the private way.

History. Orig. Code 1863, § 702; Code 1868, § 764; Code 1873, § 730; Code 1882, § 730; Civil Code 1895, § 671; Civil Code 1910, § 817; Code 1933, § 83-111.

RESEARCH REFERENCES

Am. Jur. 2d.
25 Am. Jur. 2d, Easements and Licenses, §§ 53, 129, 130.

C.J.S.
28A C.J.S., Easements, §§ 209, 210.

44-9-54. Establishment of private way by prescription.

Whenever a private way has been in constant and uninterrupted use for seven or more years and no legal steps have been taken to abolish it, it shall not be lawful for anyone to interfere with that private way.

History.
Ga. L. 1872, p. 60, § 1; Code 1873, § 737; Code 1882, § 737; Civil Code 1895, § 678; Civil Code 1910, § 824; Code 1933, § 83-112.

Cross references.
Acquisition and loss of property through adverse possession generally, § 44-5-160 et seq.

JUDICIAL DECISIONS

Analysis

Applicability
Requirements
Results
Interference and Obstructions

Applicability

O.C.G.A. §§ 44-9-54 and 44-9-59 are confined to cases of private ways which arise by prescriptive right acquired by seven years' possession or use. Clark v. Anderson, 52 Ga. App. 500, 183 S.E. 852, 1936 Ga. App. LEXIS 162 (1936).

Constitutional provision on compensation inapplicable. — The constitutional provision which declares that private ways may be granted upon just compensation being first paid has no application to a private way acquired by prescription by seven years' continuous use of the way. Everedge v. Alexander, 75 Ga. 858, 1885 Ga. LEXIS 252 (1885).

No prescription against one who establishes way. — A case in which the plaintiffs are claiming to use the private way of the defendant, established for defendant's private use and benefit and paid for by defendant, is not within the provisions of O.C.G.A. § 44-9-54. Puryear v. Clements, 53 Ga. 232, 1874 Ga. LEXIS 451 (1874).

No estoppel of grantor. — If a grantor, after conveying land, continued to use a private way, the fact that the grantor had such a conveyance would not prevent him from acquiring under a private way by prescription. Carlton v. Seaboard Air-Line Ry., 143 Ga. 516, 85 S.E. 863, 1917A Am. Ann. Cas. 497 (1915).

Tenant in common acquires no prescriptive right by use of way over the common property so long as all of the tenants have an undisputed use of the premises. Boyd v. Hand, 65 Ga. 468, 1880 Ga. LEXIS 233 (1880).

Railroad tracks "improved land" subject to seven-year prescription period. — If the railroad was constructed and the tracks were made to cross a private way by means of a trestle, the land of the railroad company at such a point of intersection was "improved land" within the meaning of O.C.G.A. § 44-9-54, and the period of prescription would be seven years. Carlton v. Seaboard Air-Line Ry., 143 Ga. 516, 85 S.E. 863, 1917A Am. Ann. Cas. 497 (1915).

Mere use of private railroad crossing not enough to acquire prescriptive rights. — Property owner's mere use of a private railroad crossing was not

Applicability (Cont'd)

enough for the owner to acquire prescriptive rights pursuant to O.C.G.A. § 44-9-54 because no written agreement or easement from the railway existed concerning the private crossing; the owner admitted that the owner's use of the private crossing had been with the permission of the railway, the crossing had been repaired and maintained throughout by the railway, and the fact that the railway restored the crossing so that the owner could continue to use the crossing was evidence that the railroad permitted, rather than forbade, continued use of the crossing. Yawn v. Norfolk S. Ry. Co., 307 Ga. App. 849, 706 S.E.2d 197, 2011 Ga. App. LEXIS 91 (2011).

Section not applicable to wild lands. — O.C.G.A. § 44-9-54 cannot be construed to mean that seven years uninterrupted use of a way over wild or unimproved land will give title to the way by prescription, without bringing it into plain and irreconcilable conflict with O.C.G.A. § 44-9-41. Watkins v. Country Club, 120 Ga. 45, 47 S.E. 538, 1904 Ga. LEXIS 442 (1904).

Requirements

Party setting up claim required to strictly follow law. — While a right of private way over another's land may arise by prescription from seven years' uninterrupted use through improved lands, where a private way is claimed by prescription, the party setting up such a claim must be strictly within the requirements of the law. Hasty v. Wilson, 223 Ga. 739, 158 S.E.2d 915, 1967 Ga. LEXIS 682 (1967).

Strict adherence. — Where a private way is claimed by prescription, the parties setting up such a claim must bring themselves strictly within the requirements of the law. Brown v. Statham, 21 Ga. App. 101, 94 S.E. 273, 1917 Ga. App. LEXIS 453 (1917); Elliott v. Adams, 173 Ga. 312, 160 S.E. 336, 1931 Ga. LEXIS 310 (1931).

Easement by prescription not acquired where O.C.G.A. § 44-9-54 not complied with. — Defendant landowner, who had conveyed parcel to plaintiff landowner's predecessor in title without reserving any easement in deed, did not acquire an easement by prescription where adverse use could not begin until after the severance of the two estates and where the strip of land over which the easement is claimed was owned by the claimant until a time less than seven years prior to bringing of action by the plaintiff landowner seeking to enjoin defendant landowner from the continued use of the strip of land in question. Farris Constr. Co. v. 3032 Briarcliff Rd. Assocs., 247 Ga. 578, 277 S.E.2d 673, 1981 Ga. LEXIS 779 (1981).

To invoke provisions of O.C.G.A. § 44-9-54, the claimant must also be within O.C.G.A. § 44-9-1. First Christian Church v. Realty Inv. Co., 180 Ga. 35, 178 S.E. 303, 1934 Ga. LEXIS 446 (1934).

To entitle one to a prescriptive right of way over the land of another, it must be shown that the prescriber has been in the uninterrupted use of a permanent road over the land, not exceeding 15 (now 20) feet in width, and that the prescriber has kept it open and in repair for seven years. Childers v. Holloway, 69 Ga. 758, 1882 Ga. LEXIS 356 (1882); Nott v. Tinley, 69 Ga. 766, 1882 Ga. LEXIS 373 (1882); Collier v. Farr, 81 Ga. 749, 7 S.E. 860, 1888 Ga. LEXIS 337 (1888); Johnson v. Sams, 136 Ga. 448, 71 S.E. 891, 1911 Ga. LEXIS 572 (1911).

To acquire a prescriptive right to a private way over land, it is necessary to show the uninterrupted use of a permanent way, not over 15 (now 20) feet wide, kept open and in repair for seven years. Raines v. Petty, 170 Ga. 53, 152 S.E. 44, 1930 Ga. LEXIS 396 (1930).

The acquisition of a private way, i.e., a right of ingress and egress over the land of another by prescription, rests upon a unique statutory foundation. Therefore, because plaintiff had not shown a likelihood of success on the claim that defendant has established a private way on debtor's property by prescription, the plaintiff's request for a preliminary injunction was denied. Metropolitan Life Ins. Co. v. Popescu, 172 B.R. 691, 1994 Bankr. LEXIS 1588 (Bankr. N.D. Ga. 1994).

Use may originate in permission, yet ripen by prescription. — Possession must be adverse in order to form the

basis for prescription. A notable exception exists, however, in the case of private ways. The use may originate in permission, and yet may ripen by prescription. Burnum v. Thomas, 71 Ga. App. 690, 31 S.E.2d 925, 1944 Ga. App. LEXIS 193 (1944); Duncan v. Sluder, 204 Ga. 458, 50 S.E.2d 78, 1948 Ga. LEXIS 462 (1948).

The doctrine that prescriptive titles to the fee in real estate by seven years' possession cannot originate in consent, because the possession there must be adverse all the time, does not prevail or apply to a right of way, under O.C.G.A. § 44-9-54. Everedge v. Alexander, 75 Ga. 858, 1885 Ga. LEXIS 252 (1885).

Knowledge and acquiescence of owner is of very essence of right of way against owner. Everedge v. Alexander, 75 Ga. 858, 1885 Ga. LEXIS 252 (1885).

Prescriber must give notice. — It is fundamental that prescription is to be strictly construed, and that the prescriber must give some notice, actual or constructive, to the individual against whom the prescriber intends to prescribe. Burnum v. Thomas, 71 Ga. App. 690, 31 S.E.2d 925, 1944 Ga. App. LEXIS 193 (1944).

When use originates by permission, prescription runs upon notification of changed position. — One who seeks to ripen an absolute right to the use of a private way by prescription, instead of obtaining it by express grant, must, when that person enters with the consent of the owner, bring some affirmative notice to the owner, by making repairs or otherwise, of intention to prescribe through seven years' use. First Christian Church v. Realty Inv. Co., 180 Ga. 35, 178 S.E. 303, 1934 Ga. LEXIS 446 (1934).

When the use of a private way originates by permission of the owner, prescription does not begin to run until the user notifies the owner, by repairs or otherwise, that the user has changed position from that of a mere licensee to that of a prescriber. Burnum v. Thomas, 71 Ga. App. 690, 31 S.E.2d 925, 1944 Ga. App. LEXIS 193 (1944); Duncan v. Sluder, 204 Ga. 458, 50 S.E.2d 78, 1948 Ga. LEXIS 462 (1948); Nassar v. Salter, 213 Ga. 253, 98 S.E.2d 557, 1957 Ga. LEXIS 352 (1957); Hunt v. Parker, 221 Ga. 484, 145 S.E.2d 483, 1965 Ga. LEXIS 505 (1965).

Owner of property adjacent to a bankruptcy debtor's private airport did not have a prescriptive easement to use the airport since the owner's use of the airport was permissive and any repairs or maintenance to the airport were not substantial enough to serve as notice to the debtor of an adverse claim. Flyboy Aviation Props., LLC v. Franck, 501 B.R. 808, 2013 Bankr. LEXIS 4532 (Bankr. N.D. Ga. 2013).

Prescriber must show that way kept open and in repair during statutory period. — To acquire a private way by prescription it is essential that the prescriber keep the way in repair for the period of prescription. Charleston & W.C. Ry. v. Fleming, 118 Ga. 699, 45 S.E. 664, 1903 Ga. LEXIS 664 (1903).

In order to set up a prescriptive right of way, it is essential that the prescriber show not only that prescriber has been in the uninterrupted use thereof for seven years or more, that it does not exceed 15 (now 20) feet in width, and that it is the same number of feet originally appropriated, but that the prescriber has kept it open and in repair during this period. Rogers v. Wilson, 171 Ga. 802, 156 S.E. 817, 1931 Ga. LEXIS 469 (1931).

The right of private way over another's land may arise by prescription from seven years' uninterrupted use through improved lands, but in order to set up this prescriptive right of way, it is essential that the prescriber show not only that one has been in the uninterrupted use thereof for seven years or more, that it does not exceed 15 (now 20) feet in width, and that it is the same number of feet originally appropriated, but that the person has kept it open and in repair during this period. First Christian Church v. Realty Inv. Co., 180 Ga. 35, 178 S.E. 303, 1934 Ga. LEXIS 446 (1934); Hall v. Browning, 195 Ga. 423, 24 S.E.2d 392, 1943 Ga. LEXIS 506 (1943).

In order for one to take or keep another's land as a road for private use, that one should be compelled to keep it open and in repair. Keeping it open and working it would be the best evidence of that person's intention to appropriate it for a road, and would put the owner upon notice that the person did intend to appropriate it. Bur-

Requirements (Cont'd)

num v. Thomas, 71 Ga. App. 690, 31 S.E.2d 925, 1944 Ga. App. LEXIS 193 (1944).

Though O.C.G.A. § 44-9-54 is silent as to the necessity for keeping open and in repair a private way, it has been held by the Supreme Court many times that these are essential requirements. Hardin v. Snow, 201 Ga. 58, 38 S.E.2d 836, 1946 Ga. LEXIS 423 (1946).

One of the essential requirements for the acquiring of a prescriptive right of way over the lands of another is that the party claiming such right has kept the way in repair. Sams v. Seaboard Air Line R.R., 218 Ga. 569, 129 S.E.2d 859, 1963 Ga. LEXIS 263 (1963).

In order to set up a prescriptive right of way, it is essential that the prescriber show not only that the prescriber has been in the uninterrupted use thereof for seven years or more, that it does not exceed 20 feet in width, and that it is the same number of feet originally appropriated, but also that the prescriber has kept it open and in repair during this period. Hasty v. Wilson, 223 Ga. 739, 158 S.E.2d 915, 1967 Ga. LEXIS 682 (1967).

Crux of repairs requirement lies in notice of adverse use. — The crux of the requirement for repairs, or maintenance of the private way, lies not in the actual effectuation of repairs by the prescriber but in the notice of adverse use the performance of such repairs would give to the property owner. Rizer v. Harris, 182 Ga. App. 31, 354 S.E.2d 660, 1987 Ga. App. LEXIS 1613 (1987); Georgia Pac. Corp. v. Johns, 204 Ga. App. 594, 420 S.E.2d 39, 1992 Ga. App. LEXIS 932 (1992); Keng v. Franklin, 267 Ga. 472, 480 S.E.2d 25, 1997 Ga. LEXIS 39 (1997).

Passive keeping in repair is notice, but inaction will not suffice; the expression "keeping in repair" originated in an age when private ways were unpaved and of necessity had to be repaired in order that the use thereof might be continued, and was then the equivalent of action and affirmative notice of an intention to prescribe, even where the use originated in consent. First Christian Church v. Realty Inv. Co., 180 Ga. 35, 178 S.E. 303, 1934 Ga. LEXIS 446 (1934).

If repair made by landowner's permission, no prescriptive right acquired. — Where the landowner was merely passive and made no objection to the use of and repairing the road, then such use and repairs thereon would be the proper basis for obtaining a prescriptive right to the road. But, if the use of and the repairs made on the road were by the permission of the landowner, then the plaintiff would not acquire a prescriptive right or title to the road. Burnum v. Thomas, 71 Ga. App. 690, 31 S.E.2d 925, 1944 Ga. App. LEXIS 193 (1944).

Because an adjoining landowner's use and repair of a landowner's road began with permission, a special master's finding that the adjoining landowner never asked for permission and that the owners never objected to their activities from 1968 to 2008 was inadequate to establish the adverse notice necessary to establish an easement by prescription. McGregor v. River Pond Farm, LLC, 312 Ga. App. 652, 719 S.E.2d 546, 2011 Ga. App. LEXIS 1008 (2011).

It is not incumbent upon the prescriber to make repairs where none are needed. The requirement is limited to the making of such repairs as become necessary in order to make a way usable. Hardin v. Snow, 201 Ga. 58, 38 S.E.2d 836, 1946 Ga. LEXIS 423 (1946).

Mere passing over the land would not work prescription. Raines v. Petty, 170 Ga. 53, 152 S.E. 44, 1930 Ga. LEXIS 396 (1930).

To acquire a prescriptive right to a private way over land, it is necessary to show the uninterrupted use of a permanent way, not over 15 (now 20) feet wide, kept open and in repair for seven years. It is not sufficient to show that those claiming the prescription have been accustomed for more than seven years to pass over the land, changing the way as they saw fit, to avoid obstructions or for convenience. Short v. Walton, 61 Ga. 28, 1878 Ga. LEXIS 8 (1878).

Merely traveling over insufficient. — That one has been in the habit of traveling across the land of another by a

route more than 15 (now 20) feet wide, which was not kept in repair, and was not permanent in its location, will not suffice. Childers v. Holloway, 69 Ga. 758, 1882 Ga. LEXIS 356 (1882).

Merely passing through an alley in a city, belonging to the owner of the adjacent property and kept open by the owner for personal use or the use of the owner's tenants, will not ripen into a right to continue such passing by any lapse of time, no repairs being made nor any other acts being done so as to give notice to the owner of a claim of right to pass, as distinguished from a mere license or permission. Nassar v. Salter, 213 Ga. 253, 98 S.E.2d 557, 1957 Ga. LEXIS 352 (1957).

Location of the way must not shift from place to place as to any part of the route, but the way must occupy the same ground all the while and be kept in repair on that ground. Raines v. Petty, 170 Ga. 53, 152 S.E. 44, 1930 Ga. LEXIS 396 (1930).

Where way changed by petitioner, no prescriptive right. — Where it appears that a private way claimed to exist by prescription was not permanent, but was obstructed and changed by the petitioner personally, the county erred in ordering it opened. Leathers v. Furr, 62 Ga. 421, 1879 Ga. LEXIS 548 (1879).

Where one who had for a period of more than two years used as a private way a strip of land belonging to another, then at the request of the owner abandoned this strip and, with the owner's consent, used in its stead as a private way, for more than five but less than seven years, another strip of land belonging to the owner, no prescriptive right to the use of either strip as a private way arose in favor of the person first mentioned. Peters v. Little, 95 Ga. 151, 22 S.E. 44, 1894 Ga. LEXIS 456 (1894).

Right to way acquired with unlocked gates effective. — Where the plaintiff's right to a way in question in a proceeding was acquired with unlocked gates thereon, plaintiff's right to the way was just as effective, except for this impediment, as though plaintiff's right had been acquired without gates on the way. Deaton v. Taliaferro, 80 Ga. App. 685, 57 S.E.2d 215, 1950 Ga. App. LEXIS 753 (1950).

Average width not to exceed statutory limit. — It will not alter the case that the average width of the road, considering its entire length, was not over 15 (now 20) feet. Childers v. Holloway, 69 Ga. 758, 1882 Ga. LEXIS 356 (1882).

Rights not defeated by wider places. — Where a private way of the general width of 15 (now 20) feet, but with a few wider places, is laid out by the owner of the land, and the same is used for the statutory period, the existence of the wider places will not defeat the rights of the users of the way. Kirkland v. Pitman, 122 Ga. 256, 50 S.E. 117, 1904 Ga. LEXIS 807 (1904).

Where the general width of a private way does not exceed 20 feet, the mere existence of a few wider places will not defeat the right of the users; accordingly, the increased width of a private road as it formerly turned out in either direction into a public road could not be said, as a matter of law, to have caused a forfeiture of the rights of a petitioner for the removal by a railroad of obstructions from the road. Latham Homes Sanitation, Inc. v. CSX Transp., Inc., 245 Ga. App. 573, 538 S.E.2d 107, 2000 Ga. App. LEXIS 983 (2000).

By running around spot few hours until road repaired. — Whilst the way is confined by the law to a track of 15 (now 20) feet, yet the mere running around one spot until the road there could be repaired within a few hours, which was done, and it was immediately resumed as the way again, is not an increase of width as to break the continuance of the use of it. Everedge v. Alexander, 75 Ga. 858, 1885 Ga. LEXIS 252 (1885).

Use need not be by one party, but may be continued by successor in title. Thompson v. Easley, 87 Ga. 320, 13 S.E. 511, 1891 Ga. LEXIS 157 (1891).

Results

Character of the use during the prescribing period determines the

Results (Cont'd)

right to the prescriber. Hill v. Miller, 144 Ga. 404, 87 S.E. 385, 1915 Ga. LEXIS 221 (1915).

When way legally obtained and continued for statutory period, right becomes absolute. — When the use of a private way has been legally obtained and is continued as long as seven years, of which the owner has had six months' knowledge without moving for damages, the right of use becomes absolute, and the owner is barred from claiming damages. First Christian Church v. Realty Inv. Co., 180 Ga. 35, 178 S.E. 303, 1934 Ga. LEXIS 446 (1934).

Prescription passes with land. — Where one has acquired a prescriptive right to a private way, whether the prescription be of common-law or statutory origin, the right to the way presumably passes with the land to which it is appurtenant. Nugent v. Watkins, 124 Ga. 150, 52 S.E. 158, 1905 Ga. LEXIS 680 (1905).

Interference and Obstructions

Obstruction of private right of way after right to use way is acquired is unlawful. First Christian Church v. Realty Inv. Co., 180 Ga. 35, 178 S.E. 303, 1934 Ga. LEXIS 446 (1934).

Once an easement has been acquired, the owner of the servient tenement may not unilaterally alter the path of the easement. When a subsequent owner obstructs part of a private way but permits the private way to be changed a few feet so that its use is continued without interruption, such permissive change will not defeat a title by prescription to a private way that has already ripened, nor create a new date from which prescriptive title must ripen as to the permitted change. BMH Real Estate Pshp. v. Montgomery, 246 Ga. App. 301, 540 S.E.2d 256, 2000 Ga. App. LEXIS 1219 (2000).

To sustain an application for the removal of obstructions from an alleged private way, the right to which is based upon prescription by seven years' use, it is essential that the applicant show not only that the applicant has been in the uninterrupted use thereof for seven years or more, that it does not exceed 15 (now 20) feet in width, and that it is the same feet originally appropriated, but that the applicant has kept it open and in repair during this period. First Christian Church v. Realty Inv. Co., 180 Ga. 35, 178 S.E. 303, 1934 Ga. LEXIS 446 (1934).

Before an applicant can have obstructions removed from a private way, the applicant must show that it is in the same 15 (now 20) feet originally appropriated. Collier v. Farr, 81 Ga. 749, 7 S.E. 860, 1888 Ga. LEXIS 337 (1888).

Before an applicant can have obstructions removed from a private way, the applicant must show not only that there has been an uninterrupted use for more than seven years, but that it is not more than 15 (now 20) feet wide, that the applicant has kept it open and in repair, and that it is the same feet originally appropriated. Clark v. Anderson, 52 Ga. App. 500, 183 S.E. 852, 1936 Ga. App. LEXIS 162 (1936); Priest v. Dupree, 60 Ga. App. 149, 3 S.E.2d 106, 1939 Ga. App. LEXIS 523 (1939); Roach v. Smith, 79 Ga. App. 348, 53 S.E.2d 688, 1949 Ga. App. LEXIS 653 (1949).

In order for an applicant to have an obstruction removed from a private way, it is necessary for the applicant to show that the applicant and predecessors in title have been in constant and uninterrupted use of the way for seven years or more, that during such time they have kept the way open and in repair, that it does not exceed 15 (now 20) feet in width, and that it is the same number of feet originally appropriated. Deaton v. Taliaferro, 80 Ga. App. 685, 57 S.E.2d 215, 1950 Ga. App. LEXIS 753 (1950).

Where no evidence of repairs, no obstruction removed. — Where the evidence did not show that the users of an alley had at any time made repairs to the alleged 15-foot (now 20-foot) alley as to which they claimed a prescriptive right of user, they were not entitled to have removed, under O.C.G.A. § 44-9-54, an obstruction which had been placed in the alley. Maddox v. Willis, 205 Ga. 596, 54 S.E.2d 632, 1949 Ga. LEXIS 570 (1949).

Applicant not entitled to judgment by proof that road closed without notice after year's use. — Under a proceeding to cause obstructions to be re-

moved from a private way, and alleging solely that the way was one established by prescription for more than seven years, the applicant is not entitled to a judgment by proof that the road has been in use as a private way for more than a year, and that the owner has closed it without giving to the common users 30 days' notice in writing, in order that they might take legal steps to have it made permanent, as required by O.C.G.A. § 44-9-56. Cowart v. Baker, 62 Ga. App. 502, 8 S.E.2d 732, 1940 Ga. App. LEXIS 317 (1940).

Prescriptive rights-of-way awarded. — Where the evidence showed that defendant's predecessor-in-title never prevented the public from using the roads, and that plaintiffs never sought permission to do so, the repairs were extensive enough to put the owner on notice that others were using the road. Therefore, the landowners were required to remove obstructions from the private road and the plaintiffs were awarded prescriptive rights-of-way. Georgia Pac. Corp. v. Johns, 204 Ga. App. 594, 420 S.E.2d 39, 1992 Ga. App. LEXIS 932 (1992).

Prescriber using private way may legally remove obstructions. — Where one has used a private way for more than 30 years without gates or other obstructions, the erection of gates or fences across the way by another would give the prescriber the right to have the obstructions removed in the manner provided by law. Hill v. Miller, 144 Ga. 404, 87 S.E. 385, 1915 Ga. LEXIS 221 (1915).

Obstruction of private way gives rise to damage action. — The obstruction of a prescriptive private way would constitute an interference with a private right, and gives rise to a right of action in tort for damages from the alleged violation of the right. Hall v. Browning, 195 Ga. 423, 24 S.E.2d 392, 1943 Ga. LEXIS 506 (1943).

Threatened obstruction prevented by injunction. — To place an obstruction across a private way sufficient to prevent its use would constitute a nuisance, and the threatened obstruction may be prevented by an injunction in equity. A different case might be presented if the obstruction had already been placed across the private way, since the law provides a legal remedy for its removal. Hardin v. Snow, 201 Ga. 58, 38 S.E.2d 836, 1946 Ga. LEXIS 423 (1946).

RESEARCH REFERENCES

Am. Jur. 2d.

25 Am. Jur. 2d, Easements and Licenses, § 45 et seq.

C.J.S.

28A C.J.S., Easements, §§ 14 et seq., 129, 145, 163.

ALR.

Necessary parties defendant to suit to prevent or remove obstruction or interference with easement of way, 28 A.L.R.2d 409.

Acquisition of right of way by prescription as affected by change of location or deviation during prescriptive period, 80 A.L.R.2d 1095.

Right of owners of parcels into which dominant tenement is or will be divided to use right of way, 10 A.L.R.3d 960.

Right to maintain gate or fence across right of way, 52 A.L.R.3d 9.

Tacking as applied to prescriptive easements, 72 A.L.R.3d 648.

Scope of prescriptive easement for access (easement of way), 79 A.L.R.4th 604.

44-9-55. Establishment of private way by prescription; when owners barred from damages.

When a person has established a private way and has enjoyed its use for as long as seven years, the right to use the private way shall become complete and the owners shall be barred from damages, provided that the owners have had six months' knowledge of such facts without moving for damages.

History.
Orig. Code 1863, § 703; Code 1868, § 765; Code 1873, § 731; Code 1882, § 731; Civil Code 1895, § 672; Civil Code 1910, § 818; Code 1933, § 83-113; Ga. L. 1982, p. 3, § 44.

JUDICIAL DECISIONS

O.C.G.A. § 44-9-55 applicable to statutory ways. — The words "six months' knowledge" and "without moving for damages" are applicable to ways laid out by statutory proceedings and not to prescriptive ways. Watkins v. Country Club, 120 Ga. 45, 47 S.E. 538, 1904 Ga. LEXIS 442 (1904).

O.C.G.A. § 44-9-55 is apparently intended as a statute of limitations upon the right of the owner of land over which a private way is laid out to have damages for the subjection of land to the servitude of the way assessed and paid. And the "six months' knowledge" of the owner of the land in that section refers to knowledge of the laying out of a way under statutory proceedings. First Christian Church v. Realty Inv. Co., 180 Ga. 35, 178 S.E. 303, 1934 Ga. LEXIS 446 (1934).

One entering with consent must bring notice to owner of prescriptive use. — One who seeks to ripen an absolute right to the use of a private way by prescription, instead of obtaining it by express grant, must, when one enters with the consent of the owner, bring some affirmative notice to the owner, by making repairs or otherwise, of the owner's intention to prescribe through seven years' use. First Christian Church v. Realty Inv. Co., 180 Ga. 35, 178 S.E. 303, 1934 Ga. LEXIS 446 (1934).

Prescriber must show way kept open and in repair during statutory period. — In order to set up a prescriptive right of way, it is essential that the prescriber show not only that the prescriber has been in the uninterrupted use thereof for seven years or more, that it does not exceed 15 (now 20) feet in width, and that it is the same number of feet originally appropriated, but that the prescriber has kept it open and in repair during this period. Rogers v. Wilson, 171 Ga. 802, 156 S.E. 817, 1931 Ga. LEXIS 469 (1931).

Passive keeping in repair is notice, but inaction will not suffice; the expression "keeping in repair" originated in an age when private ways were unpaved and of necessity had to be repaired in order that the use thereof might be continued, and was then the equivalent of action and affirmative notice of an intention to prescribe, even where the use originated in consent. First Christian Church v. Realty Inv. Co., 180 Ga. 35, 178 S.E. 303, 1934 Ga. LEXIS 446 (1934).

When way legally obtained and continued for statutory period, right becomes absolute. — When use of a private way has been legally obtained and is continued as long as seven years, of which the owner has had six months' knowledge without moving for damages, the right of use becomes absolute, and the owner is barred from claiming damages. First Christian Church v. Realty Inv. Co., 180 Ga. 35, 178 S.E. 303, 1934 Ga. LEXIS 446 (1934).

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Am. Jur. 2d.
25 Am. Jur. 2d, Easements and Licenses, §§ 129, 130.
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28A C.J.S., Easements, §§ 191, 209, 210.
ALR.
Acquisition of right of way by prescription as affected by change of location or deviation during prescriptive period, 80 A.L.R.2d 1095.

44-9-56. Notice of closing of private way after one year's use.

If a road has been used as a private way for as much as one year, the

owner of the land over which it passes may not close it up without first giving the common users of the private way 30 days' written notice so that they may take steps to have it made permanent pursuant to Code Sections 44-9-42 through 44-9-48.

History.
Orig. Code 1863, § 704; Code 1868, § 766; Code 1873, § 732; Code 1882, § 732; Civil Code 1895, § 673; Civil Code 1910, § 819; Code 1933, § 83-114.

JUDICIAL DECISIONS

Where tenant permitted to use road, succeeding tenant cannot close road without giving notice. — Where a landlord leases a farm and permits the tenant to open thereon a road for the tenant's convenience and the convenience of the community, and, after the expiration of the lease and the removal of the tenant from the land, the tenant and others are permitted for more than one year to use the road, another tenant who has succeeded the first cannot, though so authorized by the landlord, close the road without giving the 30 days' notice required by O.C.G.A. § 44-9-56. Dodson v. Scarborough, 110 Ga. 4, 35 S.E. 291, 1900 Ga. LEXIS 311 (1900).

Those who travel over a route may acquire inchoate right before they secure perfect title. Even incomplete and partial prescription will prevent the owner from obstructing a private way which has been used for 12 months, unless the first gives 30 days' notice in writing of that intention to the common users. Hall v. Browning, 195 Ga. 423, 24 S.E.2d 392, 1943 Ga. LEXIS 506 (1943).

Way need not be established. — In order to entitle one who has used and maintained a road as a private way for as much as one year to the notice prescribed by O.C.G.A. § 44-9-56, it is not necessary that the way so used and maintained should have been actually established as a private way, but such use for only that limited period is sufficient to give to the common user such an inchoate right as will entitle the user to the notice mentioned before the landowner will be permitted to close the way. Ford v. Waters, 27 Ga. App. 83, 107 S.E. 351, 1921 Ga. App. LEXIS 700 (1921).

Prescription is not standard. — The right defined in O.C.G.A. § 44-9-56 is not dependent upon such use as could ultimately result in prescription. Barnes v. Holcomb, 35 Ga. App. 713, 134 S.E. 628, 1926 Ga. App. LEXIS 1091 (1926).

Way claimed must not vary. — The right defined in O.C.G.A. § 44-9-56 does not require such use as could ultimately result in prescription. However, the use required by O.C.G.A. § 44-9-56 must resemble a prescriptive use in at least one respect: the way claimed must not vary from the location originally appropriated. Jordan v. Ridgdill, 120 Ga. App. 63, 169 S.E.2d 675, 1969 Ga. App. LEXIS 680 (1969).

Petitioner proceeding on theory of perfect prescriptive way must recover on case laid. — Since the petitioner proceeded in pleadings on the theory of a perfect prescriptive right of way, petitioner must recover on the case as laid; no judgment was obtainable in petitioner's favor on the ground that no written notice had been given by the owner of an intention to close the driveway. Duncan v. Sluder, 204 Ga. 458, 50 S.E.2d 78, 1948 Ga. LEXIS 462 (1948).

Right to have way made permanent is conditional upon proceedings before ordinary (now superior court) after the required notice is given. Moore v. McConnell, 105 Ga. App. 758, 125 S.E.2d 675, 1962 Ga. App. LEXIS 1030 (1962).

Burden of proving notice is upon one whose duty it is to give it. Powell v. Amoss, 85 Ga. 273, 11 S.E. 598, 1890 Ga. LEXIS 40 (1890).

Closing of way not justified by remedy to prevent others from misusing land. — That the owner may have a remedy to prevent other people who have discontinued using a part of the private way from running over the shrubbery in

owner's yard does not justify the owner in seeking to close the private way as it has actually existed for more than 12 months. Riggs v. Martin, 198 Ga. 824, 33 S.E.2d 15, 1945 Ga. LEXIS 241 (1945).

Removal of obstruction from way may be based upon both O.C.G.A. §§ 44-9-56 and 44-9-59. Moore v. McConnell, 105 Ga. App. 758, 125 S.E.2d 675, 1962 Ga. App. LEXIS 1030 (1962).

Remedy provided in O.C.G.A. § 44-9-59 is applicable to prescriptive ways and private ways used for one year where the landowner fails to give 30 days' notice under O.C.G.A. § 44-9-56. Johnson v. Williams, 138 Ga. 853, 76 S.E. 380, 1912 Ga. LEXIS 736 (1912); Ford v. Waters, 27 Ga. App. 83, 107 S.E. 351, 1921 Ga. App. LEXIS 700 (1921).

Applicant alleging prescription not entitled to judgment by proof that road closed without notice. — Under a proceeding to cause obstructions to be removed from a private way and alleging solely that the way was one established by prescription for more than seven years, the applicant is not entitled to a judgment by proof that the road has been in use as a private way for more than a year, and that the owner has closed it without giving to the common users 30 days' notice in writing, in order that they might take legal steps to have it made permanent, as required by O.C.G.A. § 44-9-56. Nugent v. Watkins, 129 Ga. 382, 58 S.E. 888, 1907 Ga. LEXIS 384 (1907). See also Gardner v. Swann, 114 Ga. 304, 40 S.E. 271, 1901 Ga. LEXIS 677 (1901); Fraley v. Nabors, 131 Ga. 457, 62 S.E. 527, 1908 Ga. LEXIS 110 (1908); Cowart v. Baker, 62 Ga. App. 502, 8 S.E.2d 732, 1940 Ga. App. LEXIS 317 (1940).

Jury instructions. — In a trespass action, where there was no objection to the court's failure to charge the defendant's request regarding O.C.G.A. § 44-9-56 and the existence of the roadway was continually disputed at trial, the failure to give such instruction did not work a gross injustice so as to deprive the defendant of a fair trial. Milam v. Attaway, 195 Ga. App. 496, 393 S.E.2d 753, 1990 Ga. App. LEXIS 547 (1990).

OPINIONS OF THE ATTORNEY GENERAL

Purpose of O.C.G.A. § 44-9-56 is to give the users an opportunity to take proper steps to undertake to make the private way a permanent one, which would give the owner an opportunity to show any cause why it should not be made permanent. 1950-51 Ga. Op. Att'y Gen. 431.

RESEARCH REFERENCES

Am. Jur. 2d.
25 Am. Jur. 2d, Easements and Licenses, § 110.

C.J.S.
28A C.J.S., Easements, § 117.

44-9-57. Limitation on use of private ways for specific commercial purposes.

(a) When a private way is established over the land of another for the purpose of hauling wood, timber, or any other commodity to any place of landing where the business of rafting or shipping is carried on or to any railroad depot, the use of the private way shall not extend to the use of any landing erected by a person for his own benefit.

(b) Notwithstanding subsection (a) of this Code section, if there is only one bluff or place of landing, the owner may not appropriate it to himself exclusively if he will not be damaged by the admission of others

to its use or if he is properly compensated for any damages he sustains; but no person shall be entitled to use the wood-slide or other improvement erected by another for his own use or a timber landing while the owner is using it.

History.
Ga. L. 1853-54, p. 90, § 2; Code 1863, §§ 705, 706; Code 1868, §§ 767, 768; Code 1873, §§ 733, 734; Code 1882, §§ 733, 734; Civil Code 1895, §§ 674, 675; Civil Code 1910, §§ 820, 821; Code 1933, §§ 83-115, 83-116.

RESEARCH REFERENCES

ALR.
Scope of prescriptive easement for access (easement of way), 79 A.L.R.4th 604.

44-9-58. Petition to use another's landing.

When the applicant for a private way also desires to use another's landing, he must state this desire in his petition so that proper damages may be assessed for such use.

History.
Orig. Code 1863, § 707; Code 1868, § 769; Code 1873, § 735; Code 1882, § 735; Civil Code 1895, § 676; Civil Code 1910, § 822; Code 1933, § 83-117.

44-9-59. Obstructions; proceedings for removal; petition; rule nisi; order; appeal; fees.

(a) In the event the owner or owners of land over which a private way may pass or any other person obstructs, closes up, or otherwise renders the private way unfit for use, the party or parties injured by the obstructions or other interference may petition the judge of the probate court in the county where the private way has been in use to remove the obstructions; and, upon the petition being filed, the judge shall issue a rule nisi directed to the party or parties complained against calling upon the offending parties to show cause why the obstructions should not be removed and the free use of said private way reestablished. The rule shall be served by the sheriff or his deputy at least three days before the day set for the hearing; and when the day arrives the judge shall proceed to hear evidence as to the obstructions or other interference. If it appears that the private way has been in continuous, uninterrupted use for seven years or more and no steps were taken to prevent the enjoyment of the same, the judge shall grant an order directing the party or parties so obstructing or otherwise interfering with the right of way to remove the obstructions or other interference within 48 hours; and, if the party or parties fail to remove the obstructions, the judge shall issue a warrant commanding the sheriff to remove the obstructions immediately.

(b) Except as otherwise provided in Article 6 of Chapter 9 of Title 15, either party who is dissatisfied with the judgment of the judge of the probate court pursuant to subsection (a) of this Code section may appeal to the superior court as a matter of right.

(c) The fee of the judge of the probate court in a proceeding under subsection (a) of this Code section shall be paid by the losing party. The sheriff's fees shall be the same as those charged for serving a petition or other process of court.

History.
Ga. L. 1872, p. 60, §§ 2-4; Code 1873, §§ 738, 739, 740; Code 1882, §§ 738, 739, 740; Civil Code 1895, §§ 679, 680, 681; Civil Code 1910, §§ 825, 826, 827; Code 1933, §§ 83-119, 83-120, 83-121; Ga. L. 1953, Jan.-Feb. Sess., p. 519, § 1; Ga. L. 1986, p. 982, § 16.

Editor's notes.
Ga. L. 1986, p. 982, § 25, not codified by the General Assembly, provided that that Act would apply to all cases filed on or after July 1, 1986.

JUDICIAL DECISIONS

Analysis

Applicability
Available Remedies
Procedural Requirements
Appeal
Illustrative Cases

Applicability

O.C.G.A. § 44-9-59 applies only to ways acquired by prescription. Belcher v. Kelly, 143 Ga. 525, 85 S.E. 696, 1915 Ga. LEXIS 508 (1915) (citing Holloway v. Birdsong, 1913 Ga. LEXIS 415, 139 Ga. 316, 77 S.E. 146 (1913)).

O.C.G.A. §§ 44-9-54 and 44-9-59, giving the ordinary (now probate judge) jurisdiction summarily to try obstructions to private ways, is confined to cases of private ways which arise by prescriptive right acquired by seven years' possession or use. Clark v. Anderson, 52 Ga. App. 500, 183 S.E. 852, 1936 Ga. App. LEXIS 162 (1936).

Obstruction of private right of way after right to use way is acquired is unlawful. — Once an easement has been acquired, the owner of the servient tenement may not unilaterally alter the path of the easement. When a subsequent owner obstructs part of a private way but permits the private way to be changed a few feet so that its use is continued without interruption, such permissive change will not defeat a title by prescription to a private way that has already ripened, nor create a new date from which prescriptive title must ripen as to the permitted change. BMH Real Estate Pshp. v. Montgomery, 246 Ga. App. 301, 540 S.E.2d 256, 2000 Ga. App. LEXIS 1219 (2000).

Notice by repair requirement. — The crux of the requirement for repairs lies not in the actual effectuation of repairs by the prescriber but in the notice of adverse use the performance of such repairs would give to the property owner. The importance of this "notice by repair" requirement is best illustrated in situations where the initial use of the private way was permissive. Georgia Pac. Corp. v. Johns, 204 Ga. App. 594, 420 S.E.2d 39, 1992 Ga. App. LEXIS 932 (1992).

Removal of obstruction from way may be based upon both O.C.G.A. §§ 44-9-56 and 44-9-59. Moore v. McConnell, 105 Ga. App. 758, 125 S.E.2d 675, 1962 Ga. App. LEXIS 1030 (1962).

Summary remedy is applicable to

prescriptive ways and private ways used for one year where the landowner fails to give 30 days' notice, as provided in O.C.G.A. § 44-9-56. But while an applicant for such an order of removal may base the applicant's right to relief upon both sections, yet in the event the applicant prevails and the obstruction is ordered to be removed, the judgment should show upon which claim of the applicant it rests. Hall v. Browning, 195 Ga. 423, 24 S.E.2d 392, 1943 Ga. LEXIS 506 (1943).

Available Remedies

If obstruction completed, statutory removal adequate legal remedy. — If an obstruction of a private way has been completed, the statutory remedy for a removal of the obstruction would afford a full, adequate, and complete remedy at law — whether those deprived of the use rely on a full prescriptive right, or rely only on an inchoate one-year right. Hall v. Browning, 195 Ga. 423, 24 S.E.2d 392, 1943 Ga. LEXIS 506 (1943).

Petition for injunctive relief fails. — O.C.G.A. §§ 41-2-1, 41-2-5, and 44-9-59, make ample provision for removal of completed obstructions from private and public ways; thus, when it does not appear why one of these remedies is not adequate and complete, a petition asking for injunctive relief fails to state a cause of action. Levinson v. Pendley, 209 Ga. 335, 72 S.E.2d 306, 1952 Ga. LEXIS 483 (1952).

If the obstruction of a private way has been completed, the statutory remedy before the judge of the probate court will afford to the users a full and adequate remedy at law by removal of the obstruction, so that a petition for injunction will not lie. Justice v. Dunbar, 241 Ga. 327, 245 S.E.2d 286, 1978 Ga. LEXIS 952 (1978).

Injunction justified to prevent threatened obstruction. — O.C.G.A. § 44-9-59 does not give such a plain remedy at law as will justify the refusal of an injunction to prevent a threatened, continued obstruction. Dodson v. Evans, 151 Ga. 435, 107 S.E. 59, 1921 Ga. LEXIS 279 (1921); Phinizy v. Gardner, 159 Ga. 136, 125 S.E. 195, 1924 Ga. LEXIS 396 (1924). But see Childers v. Holloway, 69 Ga. 757, 1882 Ga. LEXIS 355 (1882).

Where one gives notice of an intention to close a private way, but has not actually obstructed the same, the statutory remedies for removing obstructions do not apply. In a proper case, an injunction may issue to prevent the threatened injury. Croker v. Lewis, 217 Ga. 762, 125 S.E.2d 50, 1962 Ga. LEXIS 387 (1962).

Constantly recurring obstruction. — The statutory remedy provided by O.C.G.A. § 44-9-59 for the removal of an obstruction from a private way is available only for the removal of an existing obstruction and is not an adequate and complete remedy when there is a constantly recurring obstruction of a temporary nature. Hancock v. Moriarity, 215 Ga. 274, 110 S.E.2d 403, 1959 Ga. LEXIS 450 (1959).

No authority to impose conditions on removal of obstructions. — On a hearing under O.C.G.A. § 44-9-59, there is no authority to order the obstructions removed on the performance of certain conditions by the petitioner. Allen v. Meyerhardt, 64 Ga. 337, 1879 Ga. LEXIS 68 (1879).

No authority to close way. — On a hearing under O.C.G.A. § 44-9-59, there is no authority to order the way closed. Allen v. Meyerhardt, 64 Ga. 337, 1879 Ga. LEXIS 68 (1879).

No provision for taking property of owner. — The statutory proceeding provided for in O.C.G.A. § 44-9-59 contemplates merely the removal of obstructions from existing private ways, and has no reference to taking the property of the owner of the land. Porter v. Foster, 146 Ga. 154, 90 S.E. 967, 1916 Ga. LEXIS 636 (1916).

Procedural Requirements

Agent cannot proceed under O.C.G.A. § 44-9-59. — Where the claim of a right to a private way is founded upon an uninterrupted use of the way for more than seven years by the owners of a certain plantation, their agents, servants, and tenants, the right is not in the agents or servants themselves, but in the owners; their agent cannot institute and carry on a proceeding under O.C.G.A. § 44-9-59 in the agent's own name, either individually or as an agent. Cunningham v. Elliott, 92 Ga. 159, 18 S.E. 365, 1893 Ga. LEXIS 33 (1893).

Procedural Requirements (Cont'd)

Required showing. — The petition should show that the alleged private way from which it was sought to remove the obstruction complained of was not over 15 (now 20) feet in width, as well as the fact that it had been kept open and in repair for the period prescribed. Holloway v. Birdsong, 139 Ga. 316, 77 S.E. 146, 1913 Ga. LEXIS 415 (1913).

The burden is on the plaintiff to show the constant and uninterrupted use of the way for seven years or longer, and that it has been kept in repair during that time. Goodwin v. Bickers, 22 Ga. App. 13, 95 S.E. 311, 1918 Ga. App. LEXIS 100 (1918).

Where persons claiming a prescriptive right of way apply for the removal of obstructions from it, they must show not only that there has been an uninterrupted use of it for more than seven years, but that it is not more than 15 (now 20) feet wide, and that it has been kept open and in repair, and is the same number of feet originally appropriated. Barnett v. Davis, 38 Ga. App. 494, 144 S.E. 330, 1928 Ga. App. LEXIS 309 (1928).

Before an applicant can have obstructions removed from a private way, the applicant must show not only that there has been an uninterrupted use for more than seven years, but that it is not more than 15 (now 20) feet wide, that the applicant has kept it open and in repair, and that it is the same number of feet originally appropriated. Walker v. Greene, 46 Ga. App. 274, 167 S.E. 546, 1933 Ga. App. LEXIS 26 (1933); Clark v. Anderson, 52 Ga. App. 500, 183 S.E. 852, 1936 Ga. App. LEXIS 162 (1936); Roach v. Smith, 79 Ga. App. 348, 53 S.E.2d 688, 1949 Ga. App. LEXIS 653 (1949).

In a proceeding for the removal of an obstruction from a private way, a prescriptive right to use which the applicant claims to have acquired, it is necessary, to sustain the application, to show not only that the applicant has been in the uninterrupted use thereof for seven years or more, that it does not exceed 15 (now 20) feet in width, and that it is the same number of feet originally appropriated, but that the applicant has kept it open and in repair during this period. Scarboro v. Edenfield, 58 Ga. App. 619, 199 S.E. 325, 1938 Ga. App. LEXIS 69 (1938).

In order to sustain a proceeding under O.C.G.A. § 44-9-59, it is necessary for the applicant to show that the applicant has been in the uninterrupted use of the way for seven years or more, that it does not exceed 15 (now 20) feet in width, that it is the same number of feet originally appropriated, and that the applicant has kept it open and in repair during this period. Burnum v. Thomas, 71 Ga. App. 690, 31 S.E.2d 925, 1944 Ga. App. LEXIS 193 (1944).

Where the plaintiff's right to the private way was based on prescription by seven years of uninterrupted use of the same through the improved lands of the defendant, and the proceeding to remove the obstructions was brought under O.C.G.A. § 44-9-59, in order to sustain such a proceeding it is necessary for the applicant to show that the applicant or the applicant's predecessors in title have been in uninterrupted use of the way for seven years or more, that it does not exceed 15 (now 20) feet in width, that it is the same number of feet originally appropriated, and that the applicant and the applicant's predecessors in title have kept it open and in repair during this period. Ponder v. Williams, 80 Ga. App. 145, 55 S.E.2d 668, 1949 Ga. App. LEXIS 794 (1949).

In order for an applicant to have an obstruction removed from a private way, it is necessary for the applicant to show that the applicant and the applicant's predecessors in title have been in constant and uninterrupted use of the way for seven years or more and that during such time they have kept the way open and in repair and that it does not exceed 15 (now 20) feet in width and is the same number of feet originally appropriated. Deaton v. Taliaferro, 80 Ga. App. 685, 57 S.E.2d 215, 1950 Ga. App. LEXIS 753 (1950).

Where the general width of a private way does not exceed 20 feet, the mere existence of a few wider places will not defeat the right of the users; accordingly, the increased width of a private road as it formerly turned out in either direction into a public road could not be said, as a matter of law, to have caused a forfeiture of the rights of a petitioner for the removal

by a railroad of obstructions from the road. Latham Homes Sanitation, Inc. v. CSX Transp., Inc., 245 Ga. App. 573, 538 S.E.2d 107, 2000 Ga. App. LEXIS 983 (2000).

Not necessary to allege way laid out by petitioner, or that defendant knew of use. — In an action by one holding the land under a deed from the prescriber, to require the removal of obstacles erected in the way, it is not necessary to allege that the way was laid out by the petitioner, or that the defendant had knowledge that the way was laid out, used, and enjoyed. Nugent v. Watkins, 124 Ga. 150, 52 S.E. 158, 1905 Ga. LEXIS 680 (1905).

Description of way sufficient if land accurately defined. — In a proceeding to remove an obstruction from a private way over the land of another, it is not necessary to describe the way insofar as it extends over the land of others; it is sufficient if the description of the way through the land where the obstruction is alleged to have been placed is accurately defined. Johnson v. Williams, 138 Ga. 853, 76 S.E. 380, 1912 Ga. LEXIS 736 (1912).

Description need not be as sufficient as that to lay out and establish way. — A description of a road which would not be sufficient in a proceeding to lay out and establish may be sufficient to identify an existing way across which an obstruction has been placed. Kirkland v. Pitman, 122 Ga. 256, 50 S.E. 117, 1904 Ga. LEXIS 807 (1904). See also Brennan v. Brooks, 131 Ga. 94, 61 S.E. 1035, 1908 Ga. LEXIS 26 (1908).

Petition dismissed upon failure to allege land improved. — Where, in a petition to have obstructions removed from an alleged private way, the petitioner based petitioner's alleged right to the relief for which the petitioner prayed upon seven years' continuous and uninterrupted use of the way, and failed to allege that the land over which the way was claimed was improved land, a demurrer (now motion to dismiss) predicated upon such failure was properly sustained. Watkins v. Country Club, 120 Ga. 45, 47 S.E. 538, 1904 Ga. LEXIS 442 (1904).

No defense against recovery for interference with abutting street that landowner has other access. — It is no defense to the lot owner's right to recover for a substantial interference with the owner's easement in one of the streets upon which the owner's lot abuts that the owner has access to his lot from the other street. Felton v. State Hwy. Bd., 47 Ga. App. 615, 171 S.E. 198, 1933 Ga. App. LEXIS 577 (1933).

Applicant alleging prescription not entitled to judgment by proving road used for year summarily closed. — Under a proceeding to cause obstructions to be removed from a private way, and alleging solely that the way was one established by prescription for more than seven years, the applicant is not entitled to judgment by proof that the road has been in use as a private way for more than a year, and that the owner has closed it without giving to the common users 30 days' notice in writing, in order that they might take legal steps to have it made permanent, as required by O.C.G.A. § 44-9-56. Cowart v. Baker, 62 Ga. App. 502, 8 S.E.2d 732, 1940 Ga. App. LEXIS 317 (1940).

Venue in county in which property located. — Neither the probate court nor the superior court erred in refusing to transfer an action seeking removal of an obstruction from a private way to the county in which the defendant resided since such action was properly brought in the county in which the property at issue was located. Lee v. Collins, 249 Ga. App. 674, 547 S.E.2d 583, 2001 Ga. App. LEXIS 289 (2001), cert. denied, No. S01C1357, 2001 Ga. LEXIS 811 (Ga. Oct. 1, 2001).

Appeal

Appeal made in conformity with general provisions. — O.C.G.A. § 44-9-59 does not itself provide any mode of appeal. An appeal made in accord with O.C.G.A. § 44-9-59 must be made in conformity with the general laws contained in T. 5, C. 3. Rogers v. Anderson, 95 Ga. App. 637, 98 S.E.2d 388, 1957 Ga. App. LEXIS 881 (1957).

Failure to serve opposing party with notice not ground to dismiss. — The failure to serve the opposing party with notice of appeal to the superior court from the ruling ordering an obstruction removed from a private way is not a ground to dismiss the appeal, as there is

Appeal (Cont'd)

no requirement for giving of such notice. Slocumb v. Ross, 119 Ga. App. 567, 168 S.E.2d 208, 1969 Ga. App. LEXIS 1169 (1969).

One not party to original proceeding not bound by judgment, although present at review hearing. — One who is not a party to a proceeding to remove obstructions from a private way under O.C.G.A. § 44-9-59, and has no notice of such proceeding until after judgment was rendered, and who has taken no part in the trial, is not bound by the judgment, although it should appear that the individual was physically present at the hearing of the certiorari (now appeal) brought by the defendant to review the judgment rendered against the individual in the proceeding, but took no part therein. Elliott v. Adams, 173 Ga. 312, 160 S.E. 336, 1931 Ga. LEXIS 310 (1931).

Court cannot set aside judgment where conflicting evidence. — On a proceeding to remove obstructions from a private way, there being sufficient evidence to sustain the finding that the private way claimed existed by prescription, the superior court has no legal right to set aside that judgment on the facts, unless abused, although there may have been conflict in the testimony. Franklin v. Wesley, 73 Ga. 145, 1884 Ga. LEXIS 83 (1884).

Where the user of a private way over the land of another person brings a petition under O.C.G.A. § 44-9-59 for the removal of an obstruction placed across the way, barring its further use, and alleges that the way has been in constant and uninterrupted use by the petitioner and others for more than seven years, and when, upon a trial, there is a conflict of the evidence and the ordinary (now probate judge) settles that conflict, it is not error for the superior court to refuse to disturb the settlement of the issues of fact. Cowart v. Baker, 62 Ga. App. 502, 8 S.E.2d 732, 1940 Ga. App. LEXIS 317 (1940).

If essential facts disputed, should remand for new trial. — Upon the hearing of the writ of certiorari (now appeal), if the rights of the parties depend upon the determination of disputed facts, the court should not pass final judgment, but should remand the case for a new trial under O.C.G.A. § 44-9-59. Desvergers v. Kruger, 60 Ga. 100, 1878 Ga. LEXIS 381 (1878).

Appeal from superior court must be to Court of Appeals. — An appeal from a judgment of a superior court in an action to remove obstructions from a private way under O.C.G.A. § 44-9-59 is not one of which the Supreme Court has jurisdiction under the Constitution, and it must be transferred to the Court of Appeals. Carter. v. Kinman, 231 Ga. 759, 204 S.E.2d 299, 1974 Ga. LEXIS 1223, transferred, 132 Ga. App. 845, 209 S.E.2d 230, 1974 Ga. App. LEXIS 1844 (1974).

The Court of Appeals, not the Supreme Court, had jurisdiction of an action begun in the probate court as a petition for removal of an obstruction of a private way, which was appealed as such to the superior court, and which also concerned whether plaintiffs had an easement across defendant's property. Stutts v. Moore, 218 Ga. App. 624, 463 S.E.2d 30, 1995 Ga. App. LEXIS 825 (1995).

Illustrative Cases

Right to way acquired with unlocked gates effective. — Where the right to a way was acquired with unlocked gates thereon, the right was just as effective, except for this impediment, as though the right had been acquired without gates. Deaton v. Taliaferro, 80 Ga. App. 685, 57 S.E.2d 215, 1950 Ga. App. LEXIS 753 (1950).

Where fence constructed upon way, removal proper remedy. — Where the main purpose of the action was to enjoin the proposed building of a fence upon an alleged private way, and as to the area claimed as a way the construction of the fence had been completed before the defendant was served with the petition or had knowledge of the restraining order, the court did not err in refusing an interlocutory injunction, the plaintiff's remedy in the circumstances being an action at law for removal of the obstruction. Braswell v. Clark, 180 Ga. 727, 180 S.E. 486, 1935 Ga. LEXIS 541 (1935).

Renewal not required. — The trial court properly refused to order a property owner to remove a fence which obstructed

a field road where there was evidence that some old limbs and dead trees were removed from the road from time to time, but there was no evidence that the road was ever scraped, ditched, or otherwise repaired. Simmons v. Bearden, 234 Ga. App. 81, 506 S.E.2d 220, 1998 Ga. App. LEXIS 1142 (1998).

Cause of action for injunctive relief stated. — A petition alleging that the plaintiff purchased a described tract of land, and at the same time acquired an easement adjacent thereto over a lane as a means of ingress and egress from the public road to plaintiff's farm, that plaintiff had used this lane without interruption since the date it was acquired until the defendant obstructed the same by placing a "cattle gap" across it, that the obstruction had interfered with the plaintiff's movement of cattle along the lane to a pasture, thereby causing the plaintiff much inconvenience, trouble, and injury to plaintiff's cattle, and thereby depriving plaintiff's family of necessary milk and food, stated a cause of action for injunctive relief. Ozbolt v. Miller, 206 Ga. 558, 57 S.E.2d 601, 1950 Ga. LEXIS 508 (1950).

Prescriptive rights-of-way awarded. — Where the evidence showed that defendant's predecessor-in-title never prevented the public from using the roads, and that plaintiffs never sought permission to do so, the repairs were extensive enough to put the owner on notice that others were using the road. Therefore, the landowners were required to remove obstructions from the private road and the plaintiffs were awarded prescriptive rights-of-way. Georgia Pac. Corp. v. Johns, 204 Ga. App. 594, 420 S.E.2d 39, 1992 Ga. App. LEXIS 932 (1992).

Prescriptive rights surrendered. — Because a petitioner had surrendered all prescriptive rights in a "settlement road" freely and voluntarily for crossing licenses that were terminated under the contractual terms of the license agreements, then it had no prescriptive rights for purposes of O.C.G.A. § 44-9-59. Latham Homes Sanitation, Inc. v. CSX Transp., Inc., 245 Ga. App. 573, 538 S.E.2d 107, 2000 Ga. App. LEXIS 983 (2000).

Ownership of land not required. — There is no requirement that a plaintiff must actually own property as a condition precedent to plaintiff's adverse usage of a private way for seven years; thus, the plaintiff established seven years use of a private way where plaintiff and family began to use a private road within two weeks of signing a contract to purchase land with a cabin on it and continued such use for more than seven years. Lee v. Collins, 249 Ga. App. 674, 547 S.E.2d 583, 2001 Ga. App. LEXIS 289 (2001), cert. denied, No. S01C1357, 2001 Ga. LEXIS 811 (Ga. Oct. 1, 2001).

RESEARCH REFERENCES

Am. Jur. 2d.

25 Am. Jur. 2d, Easements and Licenses, §§ 58 et seq., 98 et seq., 119, 125, 129, 130.

C.J.S.

28A C.J.S., Easements, § 177 et seq.

ALR.

Right of owner or occupant of property to damages for obstruction or interference with access incident to building operations on other private property, 86 A.L.R. 101.

Liability in connection with injury allegedly caused by defective condition of private road or driveway, 44 A.L.R.3d 355.

Right to maintain gate or fence across right of way, 52 A.L.R.3d 9.

Location of easement of way created by grant which does not specify location, 24 A.L.R.4th 1053.

44-9-60. Conditions for converting private ways into public roads.

Once a private way is established, the judge of the probate court may declare it a public road, provided it is of sufficient length and importance and the number of persons who habitually use it can and will do

as much work thereon as is their proper share in working the road alone or in connection with adjacent public roads.

History.
Orig. Code 1863, § 709; Code 1868, § 771; Code 1873, § 741; Code 1882, § 741; Civil Code 1895, § 682; Civil Code 1910, § 828; Code 1933, § 83-122.

RESEARCH REFERENCES

ALR.
Private easement in way vacated, abandoned, or closed by public, 150 A.L.R. 644.

ARTICLE 4

RIGHTS OF WAY FOR MINING, QUARRYING, AND OTHER BUSINESSES

RESEARCH REFERENCES

ALR.
What is "top" or "apex" of vein or lode, 1 A.L.R. 418.

Pollution of stream by mining operations, 39 A.L.R. 891.

Doctrine of potential possession or ownership as applied to sale or mortgage of royalty or other interest in oil or gas to be produced, 88 A.L.R. 1281.

Instrument conveying land, minerals, or mineral rights as raising implied obligation to drill and develop for oil and gas, 137 A.L.R. 415.

Estoppel to assert termination of oil and gas lease because of cessation of operations, 137 A.L.R. 1037.

Surface owner's right of access through solid mineral seam or vein conveyed to another, or through the space left by its removal, to reach underlying strata, water, oil, gas, etc., 25 A.L.R.2d 1250.

Right of mineral lessee to deposit topsoil, waste materials, and the like upon lessor's additional land not being mined, 26 A.L.R.2d 1453.

Liability of strip or other surface mine or quarry operator to person, other than employee, injured or killed during mining operations, 84 A.L.R.2d 733.

44-9-70. Obtaining rights of way for mining, quarrying, and other business.

Any person, firm, corporation, company of persons, or corporation chartered under the laws of any state of the United States who is actually engaged in the business of mining iron, copper, gold, coal, or any other metal or mineral; quarrying marble, granite, or any other stone; or making copperas, sulphur, saltpeter, alum, or other similar articles and who needs a right of way for a railroad, turnpike, or roadway; an easement for pipelines or power lines; or a common road across the lands of others in order to operate his business successfully may obtain a right of way in the manner provided in this article for acquiring the right to convey water across the lands of others by the owners of mines. All proceedings in relation thereto shall be had and

the damages shall be assessed and paid according to the method of condemning land provided in Title 22.

History.

Ga. L. 1862-63, p. 171, § 1; Code 1868, § 772; Code 1873, § 742; Code 1882, § 742; Ga. L. 1887, p. 35, § 2; Civil Code 1895, § 650; Ga. L. 1904, p. 51, § 1; Civil Code 1910, § 795; Code 1933, § 83-201; Ga. L. 1952, p. 38, § 1.

Cross references.

Mining and drilling generally, § 12-4-20 et seq.

JUDICIAL DECISIONS

O.C.G.A. Art. 4, Ch. 9, T. 44 is a constitutional exercise of legislative authority. Jones & Co. v. Venable, 120 Ga. 1, 47 S.E. 549, 1904 Ga. LEXIS 430 (1904).

O.C.G.A. § 44-9-70's "necessity" standard, which is based upon the successful operation of the applicant's business, is a valid exercise of the General Assembly's state constitutional authority with respect to the declaration of private ways of necessity. Benton v. Georgia Marble Co., 258 Ga. 58, 365 S.E.2d 413, 1988 Ga. LEXIS 158 (1988).

O.C.G.A. § 44-9-70 does not constitute a delegation of the state's power of eminent domain with respect to property to be condemned for a public purpose. Benton v. Georgia Marble Co., 258 Ga. 58, 365 S.E.2d 413, 1988 Ga. LEXIS 158 (1988).

O.C.G.A. Art. 4, Ch. 9, T. 44 applies only to corporations chartered within this state. Chestatee Pyrites Co. v. Cavenders Creek Gold Mining Co., 119 Ga. 354, 46 S.E. 422, 1904 Ga. LEXIS 835 (1904).

RESEARCH REFERENCES

Am. Jur. Pleading and Practice Forms.

17B Am. Jur. Pleading and Practice Forms, Mines and Minerals, § 2.

ALR.

Validity of statute restricting the right of mining so as not to interfere with surface, 28 A.L.R. 1330.

Condemnation of premises or part thereof as affecting rights of landlord and tenant inter se, 163 A.L.R. 679.

Condemner's waiver, surrender, or limitation, after award, of rights or part of property acquired by condemnation, 5 A.L.R.2d 724.

Compensation for, or extent of rights acquired by, taking of land, as affected by condemner's promissory statements as to character of use or undertakings to be performed by it, 7 A.L.R.2d 364.

Correlative rights of dominant and servient owners in right of way for pipeline, 28 A.L.R.2d 626.

Right to intervene in court review of zoning proceeding, 46 A.L.R.2d 1059.

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

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

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

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

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

44-9-71. Appointment of arbitrators in right of way disputes.

In the event the parties disagree as to the necessity for the right of way sought to be condemned and as to the compensation to be paid to the landowners therefor, arbitrators may be selected as provided by Parts 1 and 2 of Article 2 of Chapter 9 of Title 9.

History.
Ga. L. 1887, p. 35, § 3; Civil Code 1895, § 651; Civil Code 1910, § 796; Code 1933, § 83-202.

44-9-72. Arbitration of requests for diversions of watercourses.

In all cases where it may be deemed desirable and necessary to divert any watercourse from its usual channel for any of the purposes specified in Code Section 44-9-70, it shall be lawful to submit the request to arbitration as provided in Chapter 9 of Title 9; and the arbitrators shall decide if it is necessary to divert the watercourse, who will be damaged by the diversion, and the amount of damage which will result.

History.
Ga. L. 1862-63, p. 171, § 1; Code 1868, § 774; Code 1873, § 744; Code 1882, § 744; Civil Code 1895, § 652; Civil Code 1910, § 797; Code 1933, § 83-203.

44-9-73. Right of mine owner to control water power with canal or dam; damages to intervening landowners; application to probate court for such right.

(a) The owner of any mine shall have the right to enter upon any land between the mine and the water power upon which the mine is dependent and to cut thereon such ditch, canal, or tunnel or to construct such flume or other aqueduct and to build such dam as may be necessary to control the water power; provided, however, that the mine owner shall first have the damages assessed arising to the owner of the intervening land or to the owner of the land on which the dam is to be erected and shall pay such damages to the owner of the land so intervening or on which such dam is to be erected.

(b) After giving the owner of the land to be entered upon at least five days' notice of his intention to make such application, the owner of the mine shall present to the judge of the probate court of the county his written application for the right and privilege of cutting such ditch, canal, or tunnel or constructing such flume or aqueduct or erecting such dam.

History.
Ga. L. 1868, p. 139, §§ 1, 2; Code 1873, §§ 746, 747; Code 1882, §§ 746, 747; Civil Code 1895, §§ 653, 654; Civil Code 1910, §§ 798, 799; Code 1933, §§ 83-204, 83-205.

RESEARCH REFERENCES

ALR.
Validity of statute restricting the right of mining so as not to interfere with surface, 28 A.L.R. 1330.

44-9-74. Right to drain mine, carry off ore or transport items over adjoining land; compensation of landowner; application for such right; proceedings.

(a) The owner of any mine shall have the right to enter upon any land and to cut and open thereon such ditches, canals, and tunnels or to construct such flumes or other aqueducts or such rope, wire, track, or other tramway or such wagonway as may be necessary to drain his mine, to carry off and drain away the water and tailings of the mine or mining operations, or to carry off and transport any crude ore from the mine or mining operations to the mill or other place of reduction where the ore is to be refined; provided, however, that the mine owner shall first have the damages arising or which may arise to the owner of the land assessed and shall pay same to the owners of such land.

(b) The mine owner who desires the right and privilege of cutting and opening ditches, canals, or tunnels or of constructing such flumes or other aqueducts shall make his application under and according to the provisions and requirements specified in Title 22 and all proceedings in relation thereto shall be had and the damages shall be assessed and paid according to the method of condemning land provided in Title 22, all of which provisions and requirements are extended to the owners of mines desiring to drain their mines and to carry off the water and tailings from their mines and mining operations through or over the land of others.

History.
Ga. L. 1870, p. 264, §§ 1, 2; Code 1873, §§ 752, 753; Code 1882, §§ 752, 753; Ga. L. 1895, p. 20, § 1; Civil Code 1895, §§ 655, 656; Civil Code 1910, §§ 800, 801; Code 1933, §§ 83-207, 83-208.

RESEARCH REFERENCES

ALR.
Rights and obligations, with respect to adjoining landowners, arising out of secondary recovery of gas, oil, and other fluid minerals, 19 A.L.R.4th 1182.

44-9-75. Application of article to lessee of mine.

Any person or company of persons engaged in working a mine under a lease shall be held and regarded as the owner or owners and as such shall be entitled to avail himself or themselves of the benefits and privileges of this article.

History.
Ga. L. 1868, p. 139, § 6; Code 1873, § 750; Code 1882, § 750; Civil Code 1895, § 657; Ga. L. 1897, p. 21, § 1; Code 1933, § 83-209.

RESEARCH REFERENCES

ALR.
Validity of statute restricting the right of mining so as not to interfere with surface, 28 A.L.R. 1330.

Right to incidental gas or oil under mining lease, 64 A.L.R. 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 A.L.R. 1244.

Constitutionality of statute or ordinance limiting right of surface owner in respect of oil or gas, 67 A.L.R. 1346; 99 A.L.R. 1119.

Effect of acquisition by assignee or sublessee of lessee in mining lease of rights inconsistent with those reserved by lessee, 69 A.L.R. 936.

Overriding royalty as affected by surrender, forfeiture, abandonment, or loss of lease, 135 A.L.R. 557.

Deed or mortgage of real estate as affecting right to oil and gas or royalty interest under existing lease, 140 A.L.R. 1280.

Construction and effect of provision in mineral lease excusing payment of minimum rent or royalty, 28 A.L.R.2d 1013.

Expenses and taxes deductible by lessee in computing lessor's oil and gas royalty or other return, 73 A.L.R.2d 1056.

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 A.L.R.2d 1058.

Construction of oil and gas lease as to the lessee's right and duty of geophysical or seismograph exploration or survey, 28 A.L.R.3d 1426.

44-9-76. Amount of water allowed to be withdrawn from stream above mill or factory by mine owner or lessee.

In no instance shall a greater amount of water, measured in cubic feet, than the surplus be withdrawn and carried away entirely from a stream above any mill or factory, surplus water being that full amount of water that would run to waste with a tight mill dam at such mill or factory. This Code section shall apply as fully to owners of mines as to lessees of mines.

History.
Ga. L. 1868, p. 139, § 6; Ga. L. 1897, p. 21, § 1; Civil Code 1910, § 803; Code 1933, § 83-206.

ARTICLE 5

TIMBER TRAMWAYS

RESEARCH REFERENCES

ALR.
Tramroad or other private railroad as a nuisance, 57 A.L.R. 943.

Exercise of power of eminent domain for purposes of logging road or logging railroad, 86 A.L.R. 552.

44-9-90. Petition for construction of tramway.

Any person or corporation desiring to build or construct any tramway

to connect with any waterway or railway in this state for the purpose of transporting lumber, naval stores, and timber by means of the same may make application in writing to the judge of the probate court or the county commissioners of the county in which the tramway is to be located, which application shall set out the length of the tramway, the starting place and the terminus, and the line of its location.

History.
Ga. L. 1887, p. 103, § 1; Civil Code 1895, § 658; Civil Code 1910, § 804; Code 1933, § 83-301.
History of Section.
This Code section is derived, in part, from the decision in Normandale Lumber Co. v. Knight, 89 Ga. 111, 14 S.E. 882 (1892).

JUDICIAL DECISIONS

O.C.G.A. § 44-9-90 applies only in cases of necessity. Normandale Lumber Co. v. Knight, 89 Ga. 111, 14 S.E. 882, 1892 Ga. LEXIS 278 (1892); Valdosta, M. & W.R.R. v. Adel Lumber Co., 136 Ga. 559, 71 S.E. 803, 1911 Ga. LEXIS 142 (1911); Alaculsey Lumber Co. v. Shippen Bros. Lumber Co., 143 Ga. 296, 84 S.E. 967, 1915 Ga. LEXIS 402 (1915); Hutchinson v. Caldwell Lumber Co., 146 Ga. 356, 91 S.E. 208, 1917 Ga. LEXIS 304 (1917).

Right of way limited in length. — Where, in an attempt to condemn land for a right of way, the notice states that a strip 20 feet wide is to be condemned, this is manifestly not an attempt to apply O.C.G.A. Art. 5, Ch. 9, T. 44. Garbutt Lumber Co. v. Georgia & Ala. Ry., 111 Ga. 714, 36 S.E. 942, 1900 Ga. LEXIS 700 (1900).

Procedure for condemnation of right of way for a tramroad under O.C.G.A. § 44-9-90 is that prescribed in O.C.G.A. § 22-1-6 et seq. Hutchinson v. Copeland, 146 Ga. 357, 91 S.E. 206, 1917 Ga. LEXIS 305 (1917).

Superior court given jurisdiction to entertain petition to enjoin proceeding. — The pendency of a proceeding to condemn land as a way of necessity for a tramroad is such a proceeding as to give the superior court of the county where the condemnation proceeding is pending jurisdiction to entertain a petition to enjoin the proceeding. Hutchinson v. Copeland, 146 Ga. 357, 91 S.E. 206, 1917 Ga. LEXIS 305 (1917).

RESEARCH REFERENCES

ALR.
Exercise of power of eminent domain for purposes of logging road or logging railroad, 86 A.L.R. 552.

44-9-91. Proceedings to lay out way; maximum width.

When the application provided for in Code Section 44-9-90 has been filed in the office of the judge of the probate court or the office of the county commissioners, as the case may be, all the proceedings thereafter shall be the same as are allowed and directed by Title 22 for condemning property, except that the strip of land to be used for such purpose shall not exceed 20 feet in width.

History.
Ga. L. 1887, p. 103, § 2; Civil Code 1895, § 659; Civil Code 1910, § 805; Code 1933, § 83-302; Ga. L. 1953, Nov.-Dec. Sess., p. 98, § 2; Ga. L. 1982, p. 3, § 44.

History of Section.
This Code section is derived, in part, from the decision in Normandale Lumber Co. v. Knight, 89 Ga. 111, 14 S.E. 882 (1892).

JUDICIAL DECISIONS

For enumeration of successive steps in proceedings, see Normandale Lumber Co. v. Knight, 89 Ga. 111, 14 S.E. 882, 1892 Ga. LEXIS 278 (1892).

44-9-92. Abandonment; effect.

If the tramway so laid out shall at any time cease to be used for such purposes, the land employed for such way shall revert to the owner thereof.

History.
Ga. L. 1887, p. 103, § 3; Civil Code 1895, § 660; Civil Code 1910, § 806; Code 1933, § 83-303.

CHAPTER 10

HISTORIC PRESERVATION

Article 1

Uniform Conservation Easements

Sec.
44-10-1. Short title.
44-10-2. Definitions.
44-10-3. Creation or alteration of conservation easements; acceptance; duration; effect on existing rights and duties; limitation of liability; encumbered property must be located within boundaries of locality holding easement.
44-10-4. Actions affecting easements; parties; power of court to modify or terminate easement.
44-10-5. Validity of easement.
44-10-6. Interests covered by article; interests not invalidated by article.
44-10-7. Construction and application of article to effect uniformity of laws.
44-10-8. Recordation of easements; revaluation of encumbered property; appeals.

Article 2

Ordinances Providing for Historical Preservation

44-10-20. Short title.
44-10-21. Legislative purpose; intent.
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44-10-23. Exemptions.
44-10-24. Establishment or designation of historic preservation commission; number, eligibility, and terms of members.
44-10-25. Powers and duties of historic preservation commission.
44-10-26. Designation by ordinance of historic properties or districts; required provisions; investigation and report; submittal to Department of Community Affairs; notice and hearing; notification of owners.
44-10-27. Requirement for certificate of appropriateness; local or state actions.
44-10-28. Review of applications; procedure; approval, modification, or rejection; negotiations for acquisitions; variances; appeals.
44-10-29. Certain changes or uses not prohibited.
44-10-30. Court action or proceedings to prevent improper changes or illegal acts or conduct.
44-10-31. Violations of this article; penalties.

Cross references.

Preservation of historic areas, § 12-3-50 et seq.

Written permission from land owner for archeological artifact collection, § 12-3-621.

ARTICLE 1

UNIFORM CONSERVATION EASEMENTS

Editor's notes.

Ga. L. 1992, p. 2227, § 1, effective July 1, 1992, repealed the Code sections formerly codified at this article and enacted the current article. The former article consisted of Code Sections 44-10-1 through 44-10-5 and was based on Ga. L. 1976, p. 1181, §§ 1-5; Ga. L. 1981, Ex.

Sess., p. 8; Ga. L. 1982, p. 3, § 44; Ga. L. 1982, p. 1227, § 1; and Ga. L. 1985, p. 149, § 44.

44-10-1. Short title.

This article shall be known and may be cited as the "Georgia Uniform Conservation Easement Act."

History.
Code 1981, § 44-10-1, enacted by Ga. L. 1992, p. 2227, § 1.

Law reviews.
For article, "A Time to Preserve: A Call for Formal Private-Party Rights in Perpetual Conservation Easements," see 40 Ga. L. Rev. 85 (2005).

44-10-2. Definitions.

As used in this article, the term:

(1) "Conservation easement" means a nonpossessory interest of a holder in real property imposing limitations or affirmative obligations, the purposes of which include retaining or protecting natural, scenic, or open-space values of real property; assuring its availability for agricultural, forest, recreational, or open-space use; protecting natural resources; maintaining or enhancing air or water quality; or preserving the historical, architectural, archeological, or cultural aspects of real property.

(2) "Holder" means:

(A) A governmental body empowered to hold an interest in real property under the laws of this state or the United States; or

(B) A charitable corporation, charitable association, or charitable trust, the purposes or powers of which include retaining or protecting the natural, scenic, or open-space values of real property; assuring the availability of real property for agricultural, forest, recreational, or open-space use; protecting natural resources; maintaining or enhancing air or water quality; or preserving the historical, architectural, archeological, or cultural aspects of real property.

(3) "Third-party right of enforcement" means a right provided in a conservation easement to enforce any of its terms granted to a governmental body, charitable corporation, charitable association, or charitable trust, which, although eligible to be a holder, is not a holder.

History.
Code 1981, § 44-10-2, enacted by Ga. L. 1992, p. 2227, § 1.

Code Commission notes.
Pursuant to Code Section 28-9-5, in 1992, "archeological" was substituted for

"archaeological" in paragraph (1) and in subparagraph (2)(B).

OPINIONS OF THE ATTORNEY GENERAL

Location of conservation easement. — Where the purpose of a conservation easement is to preserve land or water areas predominantly in their natural, scenic, landscape, or open condition or in agricultural, farming, forest, or open space use, it is not essential that the land be located within a historic district. 1976 Op. Att'y Gen. No. 76-50.

RESEARCH REFERENCES

ALR.

May paramount right of public to improve navigability of stream without compensating riparian owner for resulting damage extended to improvements for purposes not in aid of navigation, 18 A.L.R. 403.

44-10-3. Creation or alteration of conservation easements; acceptance; duration; effect on existing rights and duties; limitation of liability; encumbered property must be located within boundaries of locality holding easement.

(a) Except as otherwise provided in this article, a conservation easement may be created, conveyed, recorded, assigned, released, modified, terminated, or otherwise altered or affected in the same manner as other easements, except that a conservation easement may not be created or expanded by the exercise of the power of eminent domain.

(b) No right or duty in favor of or against a holder and no right in favor of a person having a third-party right of enforcement arises under a conservation easement before its acceptance by the holder and a recordation of the acceptance.

(c) Except as provided in subsection (c) of Code Section 44-10-4, a conservation easement is unlimited in duration unless the instrument creating it otherwise provides.

(d) An interest in real property in existence at the time a conservation easement is created is not impaired by it unless the owner of the interest is a party to the conservation easement or consents to it.

(e) The ownership or attempted enforcement of rights held by the holder of an easement shall not subject such holder to any liability for any damage or injury that may be suffered by any person on the property or as a result of the condition of such property encumbered by a conservation easement.

(f) No county, municipality, or consolidated government shall hold a

conservation easement unless the encumbered real property lies at least partly within the jurisdictional boundaries of such county, municipality, or consolidated government.

History.

Code 1981, § 44-10-3, enacted by Ga. L. 1992, p. 2227, § 1; Ga. L. 1993, p. 91, § 44; Ga. L. 1993, p. 794, § 1; Ga. L. 2012, p. 257, § 3-2/HB 386.

Cross references.

Duties of department as to scenic rivers, § 12-5-353.

Editor's notes.

Ga. L. 2012, p. 257, § 7-1(e)/HB 386, not codified by the General Assembly, provides that the 2012 amendment shall be applicable to all taxable years beginning on or after January 1, 2013.

Ga. L. 2012, p. 257, § 7-1(h)/HB 386, not codified by the General Assembly, provides: "Tax, penalty, and interest liabilities and refund eligibility for prior taxable years shall not be affected by the passage of this Act and shall continue to be governed by the provisions of general law as it existed immediately prior to the effective date of the relevant portion of this Act." This Act became effective January 1, 2013.

Ga. L. 2012, p. 257, § 7-1(i)/HB 386, not codified by the General Assembly, provides: "This Act shall not abate any prosecution, punishment, penalty, administrative proceedings or remedies, or civil action related to any violation of law committed prior to the effective date of the relevant portion of this Act." This Act became effective January 1, 2013.

Ga. L. 2012, p. 257, § 7-2/HB 386, not codified by the General Assembly, provides for severability.

Law reviews.

For note on 1993 amendment of this Code section, see 10 Ga. St. U. L. Rev. 207 (1993).

For article on the 2012 amendment of this Code section, see 29 Ga. St. U. L. Rev. 112 (2012).

OPINIONS OF THE ATTORNEY GENERAL

Conservation easement possible outside historic district. — Where the purpose of a conservation easement is to preserve land or water areas predominantly in their natural, scenic, landscape, or open condition or in agricultural, farming, forest, or open space use, it is not essential that the land be located within a historic district. 1976 Op. Att'y Gen. No. 76-50.

RESEARCH REFERENCES

Am. Jur. 2d.

20 Am. Jur. 2d, Covenants, Conditions, and Restrictions, § 47 et seq. 25 Am. Jur. 2d, Easements and Licenses, §§ 5, 8, 82, 83 et seq.

C.J.S.

28A C.J.S., Easements, §§ 13, 52 et seq., 130, 143 et seq., 159 et seq.

ALR.

Relief in injunction suit in respect of easement as affected by doubt as to right to, or extent or location of, easement; necessity of first establishing easement at law, 139 A.L.R. 165.

What constitutes unity of title or ownership sufficient for creation of an easement by implication or way of necessity, 94 A.L.R.3d 502.

Scope of prescriptive easement for access (easement of way), 79 A.L.R.4th 604.

44-10-4. Actions affecting easements; parties; power of court to modify or terminate easement.

(a) An action affecting a conservation easement may be brought by:

(1) An owner of an interest in the real property burdened by the easement;

(2) A holder of the easement;

(3) A person having a third-party right of enforcement; or

(4) A person authorized by other law.

(b) The easement holder shall be a necessary party in any proceeding of or before any governmental agency which may result in a license, permit, or order for any demolition, alteration, or construction on the property.

(c) This article does not affect the power of a court to modify or terminate a conservation easement in accordance with the principles of law and equity.

History.
Code 1981, § 44-10-4, enacted by Ga. L. 1992, p. 2227, § 1.

44-10-5. Validity of easement.

A conservation easement is valid even though:

(1) It is not appurtenant to an interest in real property;

(2) It can be or has been assigned to another holder;

(3) It is not of a character that has been recognized traditionally at common law;

(4) It imposes a negative burden;

(5) It imposes affirmative obligations upon the owner of an interest in the burdened property or upon the holder;

(6) The benefit does not touch or concern real property; or

(7) There is no privity of estate or of contract.

History.
Code 1981, § 44-10-5, enacted by Ga. L. 1992, p. 2227, § 1.

RESEARCH REFERENCES

ALR.
May easement or right of way be appurtenant where servient tenement is not adjacent to dominant, 15 A.L.R.7th 1.

44-10-6. Interests covered by article; interests not invalidated by article.

(a) This article applies to any interest created after July 1, 1992,

which complies with this article, whether designated as a conservation or facade easement, or as a covenant, protective covenant, equitable servitude, restriction, easement, or otherwise.

(b) This article applies to any interest created before July 1, 1992, if such interest would have been enforceable had such interest been created after July 1, 1992, unless retroactive application contravenes the Constitution or laws of this state or the United States.

(c) This article does not invalidate any interest, whether designated as a conservation or preservation or facade easement or as a covenant, protective covenant, equitable servitude, restriction, easement, or otherwise, that is enforceable under other law of this state.

History.
Code 1981, § 44-10-6, enacted by Ga. L. 1992, p. 2227, § 1.

44-10-7. Construction and application of article to effect uniformity of laws.

This article shall be applied and construed to effectuate its general purpose to make uniform the laws with respect to the subject of this article among states enacting it.

History.
Code 1981, § 44-10-7, enacted by Ga. L. 1992, p. 2227, § 1.

44-10-8. Recordation of easements; revaluation of encumbered property; appeals.

A conservation easement may be recorded in the office of the clerk of the superior court of the county where the land is located. Such recording shall be notice to the board of tax assessors of such county of the conveyance of the conservation easement and shall entitle the owner to a revaluation of the encumbered real property so as to reflect the existence of the encumbrance on the next succeeding tax digest of the county. Any owner who records a conservation easement and who is aggrieved by a revaluation or lack thereof under this Code section may appeal to the board of equalization and may appeal from the decision of the board of equalization in accordance with Code Section 48-5-311.

History.
Code 1981, § 44-10-8, enacted by Ga. L. 1992, p. 2227, § 1.

RESEARCH REFERENCES

Am. Jur. 2d.
71 Am. Jur. 2d, State and Local Taxation, §§ 139, 140, 673, 674, 684, 685.
C.J.S.
84 C.J.S., Taxation, §§ 111, 494 et seq., 510 et seq. 85 C.J.S., Taxation, §§ 1186, 1370.
ALR.
Permission or license from owner of servient estate as extinguishing an existing easement, 50 A.L.R. 1295.

ARTICLE 2

ORDINANCES PROVIDING FOR HISTORICAL PRESERVATION

Law reviews.
For article, "Hazardous Waste Issues in Real Estate Transactions," see 38 Mercer L. Rev. 581 (1987).

RESEARCH REFERENCES

ALR.
Validity and construction of statute or ordinance protecting historical landmarks, 18 A.L.R.4th 990.

44-10-20. Short title.

This article shall be known and may be cited as the "Georgia Historic Preservation Act."

History.
Ga. L. 1980, p. 1723, § 1.
Law reviews.
For annual survey of law on real property, see 62 Mercer L. Rev. 283 (2010).

JUDICIAL DECISIONS

Number of active commission members. — A county historic preservation commission's decision was not void because the commission did not have seven members as required by an ordinance. Neither the ordinance nor the Historical Preservation Act, O.C.G.A. § 44-10-20 et seq., provided that failure to have seven active members invalidated a decision; such an express requirement was necessary under O.C.G.A. § 1-3-1(c). DeKalb County v. Buckler, 288 Ga. App. 346, 654 S.E.2d 193, 2007 Ga. App. LEXIS 1199 (2007), cert. denied, No. S08C0514, 2008 Ga. LEXIS 374 (Ga. Apr. 21, 2008).

Substantial compliance as standard of review. — Because the Georgia Historic Preservation Act (HPA), O.C.G.A. § 44-1-20 et seq., does not expressly provide that a county's failure to strictly comply with the HPA's uniform procedures invalidates an ordinance adopted thereunder, and because the developers failed to show the developers were harmed by the county's alleged failure to strictly comply with the procedures of the HPA, the trial court properly applied the "substantial compliance" standard of review. Buckler v. DeKalb County Bd. of Comm'rs, 299 Ga. App. 465, 683 S.E.2d 22, 2009 Ga. App. LEXIS 825 (2009), cert. denied, No. S09C2027, 2010 Ga. LEXIS 3 (Ga. Jan. 12, 2010).

44-10-21. Legislative purpose; intent.

The General Assembly finds that the historical, cultural, and esthetic heritage of this state is among its most valued and important assets and that the preservation of this heritage is essential to the promotion of the health, prosperity, and general welfare of the people. Therefore, in order to stimulate the revitalization of central business districts in this state's municipalities, to protect and enhance this state's historical and esthetic attractions to tourists and visitors and thereby promote and stimulate business in this state's cities and counties, to encourage the acquisition by cities and counties of conservation easements pursuant to Code Sections 44-10-1 through 44-10-8, and to enhance the opportunities for federal tax relief of this state's property owners under the relevant provisions of the Tax Reform Act of 1976 allowing tax deductions for rehabilitation of certified historic structures, the General Assembly establishes a uniform procedure for use by each county and municipality in the state in enacting ordinances providing for the protection, enhancement, perpetuation, and use of places, districts, sites, buildings, structures, and works of art having a special historical, cultural, or esthetic interest or value.

History.
Ga. L. 1980, p. 1723, § 2; Ga. L. 1993, p. 91, § 44.

U.S. Code.
The federal Tax Reform Act of 1976, referred to in this Code section, was codified as 26 U.S.C. § 191, before being repealed in 1981.

44-10-22. Definitions.

As used in this article, the term:

(1) "Certificate of appropriateness" means a document approving a proposal to make a material change in the appearance of a designated historic property or of a structure, site, or work of art located within a designated historic district, which document must be obtained from a historic preservation commission before such material change may be undertaken.

(2) "Commission" means a historic preservation commission created or established pursuant to Code Section 44-10-24.

(3) "Designation" means a decision by the local governing body of a municipality or county wherein a property or district proposed for preservation is located to designate such property or district as a "historic property" or as a "historic district" and thereafter to prohibit all material changes in appearance of such property or within such district prior to the issuance of a certificate of appropriateness by the historic preservation commission.

(4) "Exterior architectural features" means the architectural style,

general design, and general arrangement of the exterior of a building or other structure, including, but not limited to, the kind or texture of the building material; the type and style of all windows, doors, and signs; and other appurtenant architectural fixtures, features, details, or elements relative to the foregoing.

(5) "Historic district" means a geographically definable area, urban or rural, which contains structures, sites, works of art, or a combination thereof which:

(A) Have special character or special historical or esthetic interest or value;

(B) Represent one or more periods or styles of architecture typical of one or more eras in the history of the municipality, county, state, or region; and

(C) Cause such area, by reason of such factors, to constitute a visibly perceptible section of the municipality or county.

(6) "Historic preservation jurisdiction," in the case of a county, means the unincorporated area of the county; and, in the case of a municipality, such term means the area within the corporate limits of the municipality.

(7) "Historic property" means a structure, site, or work of art, including the adjacent area necessary for the proper appreciation or use thereof, deemed worthy of preservation by reason of its value to the municipality, county, state, or region for one or more of the following reasons:

(A) It is an outstanding example of a structure representative of its era;

(B) It is one of the few remaining examples of a past architectural style;

(C) It is a place or structure associated with an event or person of historic or cultural significance to the municipality, county, state, or region; or

(D) It is a site of natural or esthetic interest that is continuing to contribute to the cultural or historical development and heritage of the municipality, county, state, or region.

(8) "Local governing body" means the elected governing body or governing authority of any municipality or county of this state.

(9) "Material change in appearance" means a change that will affect only the exterior architectural features of a historic property or of any structure, site, or work of art within a historic district and may include any one or more of the following:

(A) A reconstruction or alteration of the size, shape, or facade of a historic property, including relocation of any doors or windows or removal or alteration of any architectural features, details, or elements;

(B) Demolition of a historic property;

(C) Commencement of excavation;

(D) A change in the location of advertising visible from the public way on any historic property; or

(E) The erection, alteration, restoration, or removal of any building or other structures within a designated historic district, including walls, fences, steps, and pavements, or other appurtenant features, except exterior paint alterations.

(10) "Person" includes any natural person, corporation, or unincorporated association.

History.
Ga. L. 1980, p. 1723, § 3.

44-10-23. Exemptions.

Cities or counties which have adopted ordinances relative to planning and zoning for historic purposes as of March 31, 1980, under authority granted by a local constitutional amendment or by any other means, including cities or counties which have subsequently replaced or amended in whole or in part such ordinances, shall not be required to comply with this article and are authorized to create and regulate historic districts, zones, or sites pursuant to their existing local historic preservation ordinances.

History.
Ga. L. 1980, p. 1723, § 12; Ga. L. 1989, p. 1160, § 1.

Law reviews.
For note on 1989 amendment to this Code section, see 6 Ga. St. U.L. Rev. 173 (1989).

44-10-24. Establishment or designation of historic preservation commission; number, eligibility, and terms of members.

(a) The local governing body of a municipality or county electing to enact an ordinance to provide for the protection, enhancement, perpetuation, or use of historic properties or historic districts shall establish or designate a historic preservation commission. Such local governing body shall determine the number of members of the commission, which shall be at least three, and the length of their terms, which shall be no greater than three years. A majority of the members of any such

commission shall have demonstrated special interest, experience, or education in history or architecture; all the members shall reside within the historic preservation jurisdiction of their respective municipality or county except as otherwise provided by subsection (b) of this Code section; and all shall serve without compensation. In establishing such a commission and making appointments to it, a local governing body may seek the advice of any state or local historical agency, society, or organization.

(b) The local governing body of a county and the local governing body or bodies of one or more municipalities lying wholly or partially within such county may establish or designate a joint historic preservation commission. If a joint commission is established, the local governing bodies of the county and the municipality or municipalities involved shall determine the residence requirements for members of the joint commission.

History.
Ga. L. 1980, p. 1723, § 4.
Law reviews.
For survey article on local government law, see 60 Mercer L. Rev. 263 (2008).

44-10-25. Powers and duties of historic preservation commission.

Any municipal, county, or joint historic preservation commission appointed or designated pursuant to Code Section 44-10-24 shall be authorized to:

(1) Prepare an inventory of all property within its respective historic preservation jurisdiction having the potential for designation as historic property;

(2) Recommend to the municipal or county local governing body specific places, districts, sites, buildings, structures, or works of art to be designated by ordinance as historic properties or historic districts;

(3) Review applications for certificates of appropriateness and grant or deny the same in accordance with Code Section 44-10-28;

(4) Recommend to the municipal or county local governing body that the designation of any place, district, site, building, structure, or work of art as a historic property or as a historic district be revoked or removed;

(5) Restore or preserve any historic properties acquired by the municipality or county;

(6) Promote the acquisition by the city or county governing authority of conservation easements in accordance with Code Sections 44-10-1 through 44-10-8;

(7) Conduct an educational program on historic properties located within its historic preservation jurisdiction;

(8) Make such investigations and studies of matters relating to historic preservation as the local governing body or the commission itself may from time to time deem necessary or appropriate for the purposes of this article;

(9) Seek out state and federal funds for historic preservation and make recommendations to the local governing body concerning the most appropriate use of any funds acquired;

(10) Consult with historic preservation experts in the Department of Community Affairs or its successor and the Georgia Trust for Historic Preservation, Inc.; and

(11) Submit to the Department of Community Affairs or its successor a list of historic properties or historic districts designated as such pursuant to Code Section 44-10-26.

History.
Ga. L. 1980, p. 1723, § 5; Ga. L. 1993, p. 91, § 44; Ga. L. 1996, p. 6, § 44; Ga. L. 2020, p. 38, § 11/SB 473.

The 2020 amendment, effective July 1, 2020, substituted "Department of Community Affairs" for "Division of Historic Preservation of the Department of Natural Resources" in paragraphs (10) and (11).

44-10-26. Designation by ordinance of historic properties or districts; required provisions; investigation and report; submittal to Department of Community Affairs; notice and hearing; notification of owners.

(a) Ordinances adopted by local governing bodies to designate historic properties or historic districts shall be subject to the following requirements:

(1) Any ordinance designating any property as a historic property or any district as a historic district shall require that the designated property or district be shown on the official zoning map of the county or municipality adopting such ordinance or that, in the absence of an official zoning map, the designated property or district be shown on a map of the county or municipality adopting such ordinance and kept by the county or municipality as a public record to provide notice of such designation in addition to other notice requirements specified by this Code section;

(2) Any ordinance designating any property as a historic property shall describe each property to be designated, shall set forth the name or names of the owner or owners of the property, and shall require that a certificate of appropriateness be obtained from the historic

preservation commission prior to any material change in appearance of the designated property; and

(3) Any ordinance designating any district as a historic district shall include a description of the boundaries of the district, shall list each property located therein, shall set forth the name or names of the owner or owners of each property, and shall require that a certificate of appropriateness be obtained from the historic preservation commission prior to any material change in appearance of any structure, site, or work of art located within the designated historic district.

(b) No ordinance designating any property as a historic property and no ordinance designating any district as a historic district nor any amendments thereto may be adopted by the local governing body nor may any property be accepted or acquired as historic property by the local governing body until the following procedural steps have been taken:

(1) The commission shall make or cause to be made an investigation and shall report on the historic, cultural, architectural, or esthetic significance of each place, district, site, building, structure, or work of art proposed for designation or acquisition. This report shall be submitted to the Department of Community Affairs or its successor which will be allowed 30 days to prepare written comments concerning the report;

(2) The commission and the local governing body shall hold a public hearing on the proposed ordinance. Notice of the hearing shall be published at least three times in the principal newspaper of general circulation within the municipality or county in which the property or properties to be designated or acquired are located; and written notice of the hearing shall be mailed by the commission to all owners and occupants of such properties. All the notices shall be published or mailed not less than ten nor more than 20 days prior to the date set for the public hearing; and

(3) Following the public hearing, the local governing body may adopt the ordinance as prepared, adopt the ordinance with any amendments it deems necessary, or reject the proposal.

(c) Within 30 days immediately following the adoption of the ordinance, the owners and occupants of each designated historic property and the owners and occupants of each structure, site, or work of art located within a designated historic district shall be given written notification of such designation by the local governing body, which notice shall apprise said owners and occupants of the necessity for obtaining a certificate of appropriateness prior to undertaking any material change in the appearance of the historic property designated or within the historic district designated.

History.
Ga. L. 1980, p. 1723, § 6; Ga. L. 1996, p. 6, § 44; Ga. L. 2020, p. 38, § 11/SB 473.

The 2020 amendment, effective July 1, 2020, substituted "Department of Community Affairs" for "Division of Historic Preservation of the Department of Natural Resources" in the second sentence of paragraph (b)(1).

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No due process violation in claimed notice deficiencies. — As the developers knew when the developers bought the developers' property that the property was in a historic district and subject to the district's restrictions on development, the developers failed to show that the developers were denied due process or otherwise harmed by any of the claimed notice deficiencies in the county's designation of the historic district. Buckler v. DeKalb County Bd. of Comm'rs, 299 Ga. App. 465, 683 S.E.2d 22, 2009 Ga. App. LEXIS 825 (2009), cert. denied, No. S09C2027, 2010 Ga. LEXIS 3 (Ga. Jan. 12, 2010).

Substantial compliance with notice provisions sufficient. — As the developers failed to show the developers were harmed by a county's alleged lack of strict compliance with the notice procedures of the Georgia Historic Preservation Act (HPA), O.C.G.A. § 44-10-20 et seq., and as the record established that the county substantially complied with the HPA in designating a historic district, the county's ordinance was valid. Buckler v. DeKalb County Bd. of Comm'rs, 299 Ga. App. 465, 683 S.E.2d 22, 2009 Ga. App. LEXIS 825 (2009), cert. denied, No. S09C2027, 2010 Ga. LEXIS 3 (Ga. Jan. 12, 2010).

44-10-27. Requirement for certificate of appropriateness; local or state actions.

(a) After the designation by ordinance of a historic property or of a historic district, no material change in the appearance of the historic property or of a structure, site, or work of art within the historic district shall be made or be permitted to be made by the owner or occupant thereof unless and until application for a certificate of appropriateness has been submitted to and approved by the commission. Such application shall be accompanied by such drawings, photographs, or plans as may be required by the commission.

(b) The Department of Transportation and any contractors, including cities and counties, performing work funded by the Department of Transportation are exempt from this article. Local governments are exempt from the requirement of obtaining certificates of appropriateness; provided, however, that local governments shall notify the commission 45 days prior to beginning an undertaking that would otherwise require a certificate of appropriateness and allow the commission an opportunity to comment.

History.
Ga. L. 1980, p. 1723, § 7.

JUDICIAL DECISIONS

City's delay in notifying the historic preservation commission of its action to condemn property in its historic district for a road-widening project did not demonstrate bad faith with respect to the condemnation. Fowler v. City of Marietta, 233 Ga. App. 622, 504 S.E.2d 726, 1998 Ga. App. LEXIS 994 (1998), aff'd in part and rev'd in part, 271 Ga. 349, 519 S.E.2d 217, 1999 Ga. LEXIS 618 (1999), vacated, 240 Ga. App. 115, 522 S.E.2d 711, 1999 Ga. App. LEXIS 1239 (1999).

44-10-28. Review of applications; procedure; approval, modification, or rejection; negotiations for acquisitions; variances; appeals.

(a) Prior to reviewing an application for a certificate of appropriateness, the commission shall take such action as may reasonably be required to inform the owners of any property likely to be affected materially by the application and shall give the applicant and such owners an opportunity to be heard. In cases where the commission deems it necessary, it may hold a public hearing concerning the application.

(b) The commission shall approve the application and issue a certificate of appropriateness if it finds that the proposed material change in appearance would not have a substantial adverse effect on the esthetic, historical, or architectural significance and value of the historic property or the historic district. In making this determination, the commission shall consider, in addition to any other pertinent factors, the historical and architectural value and significance; architectural style; general design, arrangement, texture, and material of the architectural features involved; and the relationship thereof to the exterior architectural style and pertinent features of other structures in the immediate neighborhood.

(c) In its review of applications for certificates of appropriateness, the commission shall not consider interior arrangement or uses having no effect on exterior architectural features.

(d) The commission shall approve or reject an application for a certificate of appropriateness within 45 days after the filing thereof by the owner or occupant of a historic property or of a structure, site, or work of art located within a historic district. Evidence of approval shall be by a certificate of appropriateness issued by the commission. Failure of the commission to act within the 45 day period shall constitute approval, and no other evidence of approval shall be needed.

(e) In the event the commission rejects an application, it shall state its reasons for doing so and shall transmit a record of such action and the reasons therefor, in writing, to the applicant. The commission may suggest alternative courses of action it thinks proper if it disapproves of

the application submitted. The applicant, if he so desires, may make modifications to the plans and may resubmit the application at any time after doing so.

(f) In cases where the application covers a material change in the appearance of a structure which would require the issuance of a building permit, the rejection of an application for a certificate of appropriateness by the commission shall be binding upon the building inspector or other administrative officer charged with issuing building permits; and, in such a case, no building permit shall be issued.

(g) Where such action is authorized by the local governing body and is reasonably necessary or appropriate for the preservation of a unique historic property, the commission may enter into negotiations with the owner for the acquisition by gift, purchase, exchange, or otherwise of the property or any interest therein.

(h) Where, by reason of unusual circumstances, the strict application of any provision of this article would result in exceptional practical difficulty or undue hardship upon any owner of any specific property, the commission, in passing upon applications, shall have the power to vary or modify strict adherence to the provisions or to interpret the meaning of the provision so as to relieve such difficulty or hardship; provided, however, that such variance, modification, or interpretation shall remain in harmony with the general purpose and intent of the provisions so that the architectural or historical integrity or character of the property shall be conserved and substantial justice done. In granting variations, the commission may impose such reasonable and additional stipulations and conditions as will in its judgment best fulfill the purpose of this article.

(i) The commission shall keep a record of all applications for certificates of appropriateness and of all its proceedings.

(j) Any person adversely affected by any determination made by the commission relative to the issuance or denial of a certificate of appropriateness may appeal such determination to the governing body of the county or municipality in whose historic preservation jurisdiction the property in question is located; and such governing body may approve, modify and approve, or reject the determination made by the commission if the governing body finds that the commission abused its discretion in reaching its decision. The ordinances adopted in conformity with Code Section 44-10-26 shall specify the procedures for the review of decisions of the commission by the governing body of the county or municipality involved. Appeals from decisions of the governing body made pursuant to this article may be taken to the superior court in the manner provided by law for appeals from a conviction for municipal or county ordinance violations.

History.
Ga. L. 1980, p. 1723, § 8.

44-10-29. Certain changes or uses not prohibited.

Nothing in this article shall be construed to prevent the ordinary maintenance or repair of any exterior architectural feature in or on a historic property, which maintenance or repair does not involve a material change in design, material, or outer appearance thereof, nor to prevent any property owner from making any use of his property not prohibited by other laws, ordinances, or regulations.

History.
Ga. L. 1980, p. 1723, § 9.

44-10-30. Court action or proceedings to prevent improper changes or illegal acts or conduct.

The municipal or county governing body or the historic preservation commission shall be authorized to institute any appropriate action or proceeding in a court of competent jurisdiction to prevent any material change in the appearance of a designated historic property or historic district, except those changes made in compliance with the provisions of an ordinance adopted in conformity with this article, or to prevent any illegal act or conduct with respect to such historic property or historic district.

History.
Ga. L. 1980, p. 1723, § 11.

44-10-31. Violations of this article; penalties.

Violations of any ordinance adopted in conformity with this article shall be punished in the same manner as provided by charter or local law for the punishment of violations of other validly enacted municipal or county ordinances.

History.
Ga. L. 1980, p. 1723, § 10.

CHAPTER 11

EJECTMENT AND PROCEEDINGS AGAINST INTRUDERS

Article 1

Ejectment

Sec.

44-11-1. Requirement that plaintiff recover on strength of own title; effect of common grantor on proof of title.

44-11-2. When plaintiff may recover on prior possession alone.

44-11-3. Right of joint owner to bring an action alone; effect of judgment.

44-11-4. Joint action against separate claimants; when prohibited.

44-11-5. Making true claimant a defendant; effect of judgment as to such defendant.

44-11-6. Disclaimer by defendant; effect on costs.

44-11-7. Recovery of mesne profits.

44-11-8. Setoff of value of improvements against mesne profits by trespasser.

44-11-9. Setoff of value of improvements against mesne profits by adverse claimant; right of plaintiff to election; payment by defendant to plaintiff and acquisition of title; sale; levy; molding of decree; title of purchaser.

44-11-10. When previous warrantor may be codefendant.

44-11-11. Necessity for substitution upon death of codefendant in ejectment.

44-11-12. Annexation of title abstract to petition.

44-11-13. When judgment conclusive of title.

44-11-14. Issuance of writ of possession; levy and sale clause.

44-11-15. Persons not subject to writ of possession.

Article 2

Proceedings Against Intruders

44-11-30. Manner of ejecting intruders; affidavit; ejection by sheriff; counteraffidavit.

44-11-31. Sheriff competent to administer oath to person in possession.

44-11-32. Procedure on submission of counteraffidavit; trial.

44-11-33. Issuance of writ of possession; fi. fa. for costs.

Cross references.

Civil actions relating to injuries to real estate generally, T. 51, C. 9.

ARTICLE 1

EJECTMENT

JUDICIAL DECISIONS

Action in ejectment is proper legal method of trying title to land. Bright v. City of Washington, 95 Ga. App. 84, 97 S.E.2d 163, 1957 Ga. App. LEXIS 721 (1957).

Municipality may maintain action in ejectment to recover possession of street. Bright v. City of Washington, 95 Ga. App. 84, 97 S.E.2d 163, 1957 Ga. App. LEXIS 721 (1957).

Conveyance of interest by one of several plaintiffs pending action. — Where one of several plaintiffs in ejectment conveys an interest in the premises during the pendency of the action, the action may still proceed in that plaintiff's name to recover the interest. Poland Laundry Mach. Co. v. Pyle, 50 Ga. App. 453, 178 S.E. 474, 1935 Ga. App. LEXIS 172 (1935).

Where there is an assignment for benefit of creditors after commencement of action, and where such an assignment of a chose in action is not made until after the assignor has filed an action on the assigned claim, the action in the name of the original plaintiff is not thereby abated; but the original plaintiff, without amendment and without the presence of the assignee, may continue to prosecute the claim to a judgment, holding the amount represented by the secured debt as the trustee for the assignee. Poland Laundry Mach. Co. v. Pyle, 50 Ga. App. 453, 178 S.E. 474, 1935 Ga. App. LEXIS 172 (1935).

Complaint can be sufficient without specifying which portion of tract plaintiffs claim. — Where a complaint in an ejectment action, together with the abstract of title which was duly made a part thereof, fully and completely describes the 250 acres of land claimed to be owned by the plaintiffs, and alleges that the six acres sought to be recovered "are situate in the 250 acre tract," the sheriff would have no trouble in executing a writ of possession for the reason that the sheriff could put the petitioners in possession of any part of the 250 acres found to be in the possession of the defendant. Crews v. Russell, 199 Ga. 732, 35 S.E.2d 444, 1945 Ga. LEXIS 373 (1945).

RESEARCH REFERENCES

ALR.

Constructive notice by record of true title or interest as affecting right to compensation for improvements, 68 A.L.R. 288; 82 A.L.R. 921.

44-11-1. Requirement that plaintiff recover on strength of own title; effect of common grantor on proof of title.

A plaintiff in ejectment must recover on the strength of his own title and not on the weakness of the defendant's title. Where both parties claim under a common grantor, it is not necessary to show title back of such common grantor.

History.

Civil Code 1895, § 5004; Civil Code 1910, § 5582; Code 1933, § 33-101.

Law reviews.

For comment on Brooks v. Williams, 227 Ga. 59, 178 S.E.2d 880 (1970), see 23 Mercer L. Rev. 399 (1972).

For article discussing origin and construction of Georgia provision concerning ejectment, see 14 Ga. L. Rev. 239 (1980).

JUDICIAL DECISIONS

Analysis

General Consideration
Proof of Title
Acquiescence
Common Grantor
Proper Parties
Description of Land

General Consideration

History of section. — The first sentence of O.C.G.A. § 44-11-1 is derived from the decisions in Harris v. Cannon, 6 Ga. 382, 1849 Ga. LEXIS 49 (1849) and Hitch v. Robinson, 73 Ga. 140, 1884 Ga. LEXIS 72 (1884).

The second sentence of O.C.G.A. § 44-11-1 is practically a rule of estoppel or admission, and is derived from the common-law decisions in the cases of Wood v. Milly McGuire's Children, 17 Ga. 303, 1855 Ga. LEXIS 113 (1855); Harrison v. Hatcher, 44 Ga. 638, 1872 Ga. LEXIS 393 (1872); Hanson v. Crawley, 51 Ga. 528, 1874 Ga. LEXIS 185 (1874); Werner v. Footman, 54 Ga. 128, 1875 Ga. LEXIS 97 (1875); Greenfield v. McIntyre, 112 Ga. 691, 38 S.E. 44, 1901 Ga. LEXIS 60 (1901); Holder v. Scarborough, 119 Ga. 256, 46 S.E. 93, 1903 Ga. LEXIS 777 (1903); Garbutt Lumber Co. v. Wall, 126 Ga. 172, 54 S.E. 944, 1906 Ga. LEXIS 354 (1906); Deen v. Williams, 128 Ga. 265, 57 S.E. 427, 1907 Ga. LEXIS 81 (1907); Gaskins v. Gray Lumber Co., 6 Ga. App. 167, 64 S.E. 714, 1909 Ga. App. LEXIS 231 (1909); Sinclair v. Friedlander, 197 Ga. 797, 30 S.E.2d 398, 1944 Ga. LEXIS 316 (1944).

Purpose of ejectment is to evict one from realty who wrongfully withholds possession from the person legally entitled thereto. Douglas v. Vourtsanis, 203 Ga. 64, 45 S.E.2d 203, 1947 Ga. LEXIS 551 (1947).

O.C.G.A. § 44-11-1 is qualified by O.C.G.A. § 44-7-9. Ingold, Inc. v. Adair, 247 Ga. 155, 274 S.E.2d 560, 1981 Ga. LEXIS 650 (1981).

Academic principle of section is rule of evidence. — O.C.G.A. § 44-11-1 requirement that a plaintiff in ejectment must recover because of plaintiff's own title and not the defendant's defective title is a rule of evidence. Jackson v. Sanders, 199 Ga. 222, 33 S.E.2d 711, 1945 Ga. LEXIS 297 (1945).

Plaintiff may not eject tenant in possession on basis of vague lease if vagueness cured. — A plaintiff cannot rely on vagueness of the legal description to eject a tenant when at the time the plaintiff in ejectment acquired the property, the tenant was in possession under a recorded lease and the vagueness had been cured so that the description was adequate to give the plaintiff notice. Roe v. Doe, 246 Ga. 138, 268 S.E.2d 901, 1980 Ga. LEXIS 995 (1980).

No ejectment action where landlord-tenant relationship. — Where 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 Ga. App. LEXIS 1809 (1987).

Breach of lease contract not case respecting title to land. — Landlord's complaint for ejectment, alleging that landlord has a presently enforceable lease contract with tenant and that tenant has breached this contract so as to entitle landlord to possession, does not allege a case respecting title to land under Ga. Const. 1976, Art. VI, Sec. IV, Para. I (see, now, Ga. Const. 1983, Art. VI, Sec. IV, Para. I), for purposes of subject matter jurisdictional requirements. Ingold, Inc. v. Adair, 247 Ga. 155, 274 S.E.2d 560, 1981 Ga. LEXIS 650 (1981).

Landlord may eject on basis of lease. — By virtue of the qualification to O.C.G.A. § 44-11-1 that is found in O.C.G.A. § 44-7-9, 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 the contract as to entitle the landlord to possession. The landlord is entitled to recover upon the admission of title in the landlord, which grows out of the relation of landlord and tenant, if

according to the law applicable to the facts of the case, that relation did exist. Ingold, Inc. v. Adair, 247 Ga. 155, 274 S.E.2d 560, 1981 Ga. LEXIS 650 (1981).

Until after default by the grantor, grantee in security deed has no right of entry such as will authorize grantee to maintain an action against the grantor for recovery of the land, with the accompanying right to apply the rents and profits until they are sufficient to discharge the debt. Sweat v. Arline, 186 Ga. 460, 197 S.E. 893, 1938 Ga. LEXIS 618 (1938).

Security deed holder may not eject if debt paid. — While the holder of a security deed to land may sue in ejectment to recover possession of the property, where the debt is not paid at maturity, the holder cannot recover solely upon such a deed where the debt has been paid in full. This proposition will hold true regardless of whether payment of the debt without the cancellation of the security deed or a reconveyance of the property will operate to divest the legal title and cause it to revert to the debtor. Even if the legal title may in such a case be considered as remaining in the holder of the security deed, it is not a title accompanied by the right of possession, and for this reason will not authorize a recovery in ejectment. Capps v. Smith, 175 Ga. 795, 166 S.E. 234, 1932 Ga. LEXIS 335 (1932).

Action against county. — A county is liable to suit in an action to recover land owned by the plaintiffs and which has been taken possession of by the county, where it refuses on demand to deliver possession. Lynch v. Harris County, 188 Ga. 651, 4 S.E.2d 573, 1939 Ga. LEXIS 593 (1939).

Trespasser may not take land by paying damages. — In no event should a landowner be obliged to submit to invasion or be compelled to part with property, or any portion thereof, upon the mere payment of damages by a trespasser. Randolph v. Merchants & Mechanics Banking & Loan Co., 181 Ga. 671, 183 S.E. 801, 1936 Ga. LEXIS 406 (1936).

Action of ejectment will lie to recover mine or mineral interests in lands, to which the plaintiff has title, though another owns the surface, and although the plaintiff has never been in possession. Hale v. Turner, 183 Ga. 593, 189 S.E. 10, 1936 Ga. LEXIS 144 (1936).

Ejectment action will establish boundaries in cities. — As the processioning statutes do not have application to a determination of the boundaries of coterminous lots located within the corporate limits of cities and towns, an action of ejectment for recovery of land in a city taken over by an encroachment of an adjacent lot owner constitutes a proper remedy for establishment of the true dividing line in such a dispute. Smith v. Bailey, 183 Ga. 869, 189 S.E. 905, 1937 Ga. LEXIS 418 (1937).

Judge may charge boundary question where city plaintiff shows prior possession. — Where plaintiff in ejectment against the owner of adjacent city lot shows prior possession under a color of title of the lot occupied by plaintiff, and defendant adjacent lot owner shows no superior title to the lot thus occupied by the plaintiff, and where the only conflict in the evidence is whether the property sued for lies within the boundaries of the plaintiff's lot or those of the adjacent lot of the defendant, the essential question in determining title to the land in dispute concerns boundary only, and it is not error to charge the jury that the question is one of fact as to where the line is between the two parties. Smith v. Bailey, 183 Ga. 869, 189 S.E. 905, 1937 Ga. LEXIS 418 (1937).

No recovery by joint plaintiffs if one unentitled. — Where a joint action for land is brought by several persons and the evidence shows that one of them is not entitled to recover, there can be no recovery at all. The rule in such case is the same whether the action is in the statutory or fictitious form. Guess v. Morgan, 196 Ga. 265, 26 S.E.2d 424, 1943 Ga. LEXIS 331 (1943).

Directed verdict for joint plaintiffs wrong if one unentitled. — In an action in ejectment, where the plaintiffs sued jointly as heirs at law of a certain person, directed verdict for plaintiffs was erroneous in that there was no evidence to show that one of the plaintiffs was entitled to recover any interest in the land upon such theory. Guess v. Morgan, 196 Ga. 265, 26 S.E.2d 424, 1943 Ga. LEXIS 331 (1943).

Landowners' trespass and negligence suit. — Trial court properly denied a neighbor's motion for summary judg-

General Consideration (Cont'd)

ment and the appellate court reversed the denial of the cross-motion for summary judgment filed by the adjoining landowners in a trespass and negligence suit, because the neighbor purchased property without first obtaining a survey and the adjoining landowners' home was already encroaching upon the neighbor's property by two feet at the time of the purchase; the adjoining landowners were not liable for their predecessor's conduct in building the house and a fence across the property line of the neighbor's predecessor in title, in the absence of evidence that their predecessor was acting as their agent, and were, therefore, entitled to summary judgment. Navajo Constr., Inc. v. Brigham, 271 Ga. App. 128, 608 S.E.2d 732, 2004 Ga. App. LEXIS 1640 (2004), cert. denied, No. S05C0716, 2005 Ga. LEXIS 321 (Ga. Apr. 26, 2005).

Proof of Title

Equity requires plaintiff recover on strength of own title. — The rule that a plaintiff must recover upon the strength of plaintiff's own title, and not upon the weakness of the defendant's, has been applied to equity suits involving title to land as well as to common-law ejectment. Bright v. Cudahy Packing Co., 192 Ga. 584, 15 S.E.2d 880, 1941 Ga. LEXIS 535 (1941).

Except recovery from intruder permissible based on prior possession only. — While under O.C.G.A. § 44-11-1 a plaintiff in ejectment must recover on the strength of plaintiff's own title, and not on the weakness of the defendant's title, under O.C.G.A. § 44-11-2 plaintiff may recover upon prior possession alone, against one who subsequently acquires possession of the land by mere entry and without any lawful right whatever. Smith v. Bailey, 183 Ga. 869, 189 S.E. 905, 1937 Ga. LEXIS 418 (1937).

Perfect equity is the equivalent of legal title and is a good defense to an action in ejectment brought by one who took with notice of such equity. Bank of Arlington v. Sasser, 182 Ga. 474, 185 S.E. 826, 1936 Ga. LEXIS 457 (1936).

Constructive possession sufficient if under color of title. — Where reliance is had upon possession alone, and not upon possession under color of title, the possession must be actual; but where the possession is accompanied by color of title, the possession relied upon may be either actual or constructive. Smith v. Bailey, 183 Ga. 869, 189 S.E. 905, 1937 Ga. LEXIS 418 (1937).

Plaintiff must hold true title. — Broadly speaking, O.C.G.A. § 44-11-1 means that the plaintiff must be the holder of the true title, a title good against the whole world, but as limited by exceptions. It means that the plaintiff must either have the true title, or else stand in such legal relation to the defendant that the latter is estopped from denying title. Bridges v. McGalliard, 207 Ga. 422, 61 S.E.2d 922, 1950 Ga. LEXIS 617 (1950).

Plaintiff must recover on title had at start of action. — When an action is brought for the recovery of land, either under the common-law form or under the Code, the plaintiff must recover, if at all, upon the state of plaintiff's title as it existed at the commencement of the action. Evidence of any after-acquired title is wholly inadmissible and ineffective to prove the required title. Durham v. Crawford, 196 Ga. 381, 26 S.E.2d 778, 1943 Ga. LEXIS 365 (1943).

Tenders pending action insufficient. — Since the right to recover in ejectment land sold under a tax sale depends upon the plaintiff's title where an action is brought, without benefit from any subsequently acquired title, two alleged tenders made during pendency of the action were ineffective. Durham v. Crawford, 196 Ga. 381, 26 S.E.2d 778, 1943 Ga. LEXIS 365 (1943).

Title must be accompanied by right of possession. — Where the plaintiff's title to the land is controverted, plaintiff must show not only that plaintiff had the legal title to the property in dispute at the commencement of the action, but that such legal title was accompanied by the right of possession. Capps v. Smith, 175 Ga. 795, 166 S.E. 234, 1932 Ga. LEXIS 335 (1932).

Action against purchaser at sale under security deed. — In an ejectment suit by a grantee of the purchaser at a sale had in accordance with the powers con-

ferred by a security deed, against the grantor in such deed, the plaintiff is not required to show title personally other than by showing the sale, and in such a suit a verdict is demanded in favor of the plaintiff, where the defendant does not attack the validity of the sale or of any of the deeds under which the plaintiff claims, but alleges only that defendant had become a purchaser of the land from the plaintiff's grantor, which was not sustained by evidence, and that defendant had acquired title to the land after the date of the security deed with warranty, since where a vendor, with no title to land, sells or mortgages the land, but afterwards acquires title, such title inures to the benefit of the vendee or mortgagee. Morris v. Butler, 184 Ga. 845, 193 S.E. 883, 1937 Ga. LEXIS 663 (1937).

O.C.G.A. § 44-11-1 not pertinent where suit brought for injunction and damages for cutting timber. Farrar Lumber Co. v. Brindle, 170 Ga. 37, 151 S.E. 923, 1930 Ga. LEXIS 393 (1930).

Plaintiff must have interest or right in land. — A plaintiff in a suit to enjoin cutting and converting trees standing on land, as in other cases of injunction, must have some interest or right in the land to protect. First Nat'l Bank v. Harmon, 186 Ga. 847, 199 S.E. 223, 1938 Ga. LEXIS 730 (1938).

When donee of parol gift of land gains title. — A parol gift of land, accompanied by possession, based upon a consideration meritorious, is not of itself sufficient to pass title into the donee, but a donee of land under a parol gift based upon a meritorious consideration, who, with the consent of the donor, enters into possession, and makes valuable improvements upon the faith of the gift, acquires a perfect equity as against the donor, the donor's heirs, and those claiming under the donor with notice and in such circumstances the donee can defend an action of ejectment by proof of such perfect equity. Smith v. Lanier, 199 Ga. 255, 34 S.E.2d 91, 1945 Ga. LEXIS 305 (1945).

Gifts of land and effect. — 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 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 Ga. LEXIS 578 (1938).

A donee of land under a parol gift who, in pursuance thereof, enters into possession with the consent of the donor, and makes valuable improvements upon the faith of the gift, acquires such a perfect equity in the premises as that, upon a suit in ejectment against the donee by the donor or the donee's heirs at law, the donee may, by proof of these facts, successfully defend possession, and a plea setting up such equity should not be stricken on demurrer (now motion to dismiss), even though it contains no prayer for specific performance. Parker v. Parker, 214 Ga. 509, 105 S.E.2d 742, 1958 Ga. LEXIS 475 (1958).

What plaintiff must aver. — The purpose of ejectment is to eject the defendant from possession of the land involved. Consequently, the averments of the plaintiff must allege that plaintiff is entitled to possession and the defendant wrongfully or unlawfully keeps plaintiff out of possession. Harry v. Scenic Heights Dev. Corp., 220 Ga. 497, 140 S.E.2d 192, 1965 Ga. LEXIS 546 (1965).

Ways plaintiff can prove title. — The plaintiff may carry the burden of establishing plaintiff's own title either by tracing title from the original source of title to plaintiff personally, through conveyances, transmission of title by operation of law, or both; or through presumptions which the law recognizes as arising from certain given states of fact; or by the admissions, actual or implied, of the defendant or privies in estate; or by showing title by prescription, or a certificate under O.C.G.A. Art. 2, Ch. 2, T. 44; or by proving such a state of facts as will estop the defendant from denying plaintiff's title. Bridges v. McGalliard, 207 Ga. 422, 61 S.E.2d 922, 1950 Ga. LEXIS 617 (1950).

Defense that plaintiff's own claim to title is void or insufficient. — A plaintiff in ejectment must recover on the

Proof of Title (Cont'd)

strength of plaintiff's own title, and not on the weakness of the title of the defendant. Consequently, in such an action it is generally a good defense that the plaintiff's claim of title is void and insufficient to support plaintiff's alleged claim of title. Crump v. McEntire, 190 Ga. 684, 10 S.E.2d 186, 1940 Ga. LEXIS 544 (1940).

Efforts to defend title. — When a defendant defends an action involving title to realty, contrary to the unsupported claim of many, the defendant can defend against the action by showing that the common grantor at one time in the past owned the true and full title to the property, but that the common grantor parted with title before the claim of the plaintiff came into being. Brooks v. Williams, 227 Ga. 59, 178 S.E.2d 880, 1970 Ga. LEXIS 399 (1970).

Defendant may show paramount title of another. — A defendant in ejectment can defeat the plaintiff therein by showing a paramount title to the premises in dispute outstanding in another, without connecting defendant's possession therewith. Guthrie v. Gaskins, 171 Ga. 303, 155 S.E. 185, 1930 Ga. LEXIS 340 (1930).

Defense of prescriptive right under color of title. — In an action to recover land, if the plaintiffs make out a prima facie case, and the defendants rest their claim upon an alleged prescription under color of title for over seven years, the burden is upon them to affirmatively establish the same by evidence. Bussey v. Jackson, 104 Ga. 151, 30 S.E. 646, 1898 Ga. LEXIS 296 (1898).

In ejectment action where defendants allege adverse title to property, under the law, the defendants are entitled to prevail in the case if the plaintiff fails to establish title to the property as alleged, and are not required to prove by a preponderance of evidence that they have adverse title to the property. Morgan v. Lester, 215 Ga. 570, 111 S.E.2d 228, 1959 Ga. LEXIS 544 (1959).

Judge may charge jury plaintiff must recover through own title. — It is always proper in an ejectment case to tell the jury that "in an ejectment case the plaintiff must recover upon the strength of his own title, and not upon the weakness of the defendant's title." Sikes v. Seckinger, 170 Ga. 1, 152 S.E. 65, 1930 Ga. LEXIS 384 (1930).

Directed verdict justified for defendant long in possession when plaintiff's claim vague. — Where, the evidence adduced on the trial of ejectment suit was too vague and indefinite to show title in the plaintiffs, by virtue of inheritance through parties dying years ago, the trial court did not err, at the conclusion of evidence offered by both sides, in directing a verdict for the defendant who, according to the plaintiffs' evidence, had been in possession of the premises for a long number of years prior to the institution of the suit. Floyd v. Bell, 202 Ga. 269, 42 S.E.2d 639, 1947 Ga. LEXIS 401 (1947).

Plaintiff must prove title even if verdict for defendant lacks evidence. — Even if the verdict for the defendant was without evidence to support it that fact would not relieve the plaintiff of the burden placed on plaintiff by law, in a complaint for land, to show title in plaintiff. Woodard v. Bowen, 213 Ga. 185, 97 S.E.2d 573, 1957 Ga. LEXIS 337 (1957).

Acquiescence

Landowner estopped from recovery where landowner allows use by public utility for long period. — If a landowner stands by and permits, without legal objection, a public utility company to appropriate the owner's land to its necessary corporate use until such becomes a necessary and constituent part of its service to the public, and the rights of the public intervene to such extent that to oust the company would interrupt the service and deny it to the public, the landowner, not to protect the company but to benefit the public, will be estopped from recovering the land in ejectment or from enjoining its use for the service, but will, if the landowner moves in time, be remitted to an appropriate action for damages. Georgia Power Co. v. Kelly, 182 Ga. 33, 184 S.E. 861, 1936 Ga. LEXIS 280 (1936).

Purchaser's action against utility enjoinable. — Subsequent purchaser of land, after predecessor in title had conveyed land to the State Highway Department (now Department of Transporta-

tion), and after electric power company, with right of eminent domain, without condemning the land or acquiring it from the owner, had constructed, with the permission of the State Highway Department (now Department of Transportation), its electric power line along the highway and over the land was serving the public through such line, could not eject the power company or enjoin the service until the purchaser was compensated for the land, and where such purchaser declared an intention to remove the power line from the land, the purchaser would be enjoined, at the instance of the power company, from interfering with the service. Georgia Power Co. v. Kelly, 182 Ga. 33, 184 S.E. 861, 1936 Ga. LEXIS 280 (1936).

Applicability of O.C.G.A. § 44-4-6. — There is nothing which would prevent the rule of law declared in O.C.G.A. § 44-4-6 from being applied in an action for land, where the evidence shows the acquiescence 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 Ga. LEXIS 345 (1944).

Proof of parol agreement by mere acquiescence of adjoining landowners insufficient. — Where the defendant contends simply that the land in controversy was given to defendant by parol agreement, but that for some reason the land was not included in defendant's deed, in order to set up an equitable title in defense of an ejectment suit, 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 Ga. LEXIS 305 (1945).

Common Grantor

Holder of better title from common grantor wins. — Where the evidence shows that plaintiff and defendant claim under a common grantor, the holder of the better title from such grantor is entitled to prevail in an ejectment suit. Owens v. Conyers, 189 Ga. 793, 7 S.E.2d 675, 1940 Ga. LEXIS 379 (1940); Holliday v. Guill, 196 Ga. 723, 27 S.E.2d 398, 1943 Ga. LEXIS 412 (1943); Patellis v. Tanner, 199 Ga. 304, 34 S.E.2d 84, 1945 Ga. LEXIS 304 (1945).

Plaintiff must show title from grantor. — The mere fact that both parties claim under a common grantor does not dispense with the need to show that the plaintiff has acquired title or an interest from the common grantor. First Nat'l Bank v. Harmon, 186 Ga. 847, 199 S.E. 223, 1938 Ga. LEXIS 730 (1938); Holliday v. Guill, 196 Ga. 723, 27 S.E.2d 398, 1943 Ga. LEXIS 412 (1943).

Even if both parties have deeds to separate tracts. — Where plaintiff claims one tract, and defendant claims another, plaintiff is not relieved of the necessity of proving title merely because the parties had deeds to the two tracts claimed by them respectively, their claims of title going back to a common grantor who also was a grantee in a prior deed covering both tracts. Sinclair v. Friedlander, 197 Ga. 797, 30 S.E.2d 398, 1944 Ga. LEXIS 316 (1944).

Where defendant holds under same grantor, plaintiff need not prove title in common source. — If plaintiff shows that defendant holds under grantor under whom plaintiff claims, plaintiff makes the prima facie case for the application of the ordinary rule relieving the plaintiff of the necessity of proving title into the common source. Beetles v. Steadham, 186 Ga. 110, 197 S.E. 270, 1938 Ga. LEXIS 578 (1938).

Plaintiff may examine defendant to show common grantor. — Plaintiff may examine defendant orally on the witness stand for the purpose of showing that the defendant holds under the common grantor. Beetles v. Steadham, 186 Ga. 110, 197 S.E. 270, 1938 Ga. LEXIS 578 (1938).

Reliance on common grantor rule opens plaintiff's title to attack. — When a plaintiff establishes and relies upon the common grantor rule, plaintiff opens chain of title derived therefrom to any attack which the defendant may find available. North Ga. Prod. Credit Ass'n v. Vandergrift, 239 Ga. 755, 238 S.E.2d 869, 1977 Ga. LEXIS 1322 (1977).

Plaintiff recovers by showing title and right of entry from common grantor. — Where plaintiff and defendant both claim under a common grantor,

Common Grantor (Cont'd)

or propositus, that common grantor or propositus will, for the purposes of the case, be treated as a true and original source of title. The plaintiff may recover by showing legal title and right of entry as derived from that source. Beetles v. Steadham, 186 Ga. 110, 197 S.E. 270, 1938 Ga. LEXIS 578 (1938).

Use of sheriff's deed to prove chain of title. — A sheriff's deed executed in pursuance of a foreclosure of a security deed, when accompanied by appropriate supporting documents, is admissible in evidence as proof of a link in the chain of title from the common grantor, although there is no evidence of possession of the land by the grantor in the security deed. Owens v. Conyers, 189 Ga. 793, 7 S.E.2d 675, 1940 Ga. LEXIS 379 (1940).

Purchase by deed prevails over oral gift from same grantor. — In an action for land, where the plaintiff and the defendant claim under a common propositus, the plaintiff's claim being based upon a purchase by deed from the defendant's husband, and the defendant's claim being based upon an oral gift from the same person, and where the defendant had made no valuable improvements on the faith of the gift, nor acquired prescriptive title based on actual possession thereunder, verdict in the plaintiff's favor is supported by the evidence. Beetles v. Steadham, 186 Ga. 110, 197 S.E. 270, 1938 Ga. LEXIS 578 (1938).

Proper Parties

Ejectment must be commenced against the person in possession. Douglas v. Vourtsanis, 203 Ga. 64, 45 S.E.2d 203, 1947 Ga. LEXIS 551 (1947).

Petition brought in ejectment against one not in possession, to evict the actual occupants who were not parties to the suit, fails to state a cause of action. Douglas v. Vourtsanis, 203 Ga. 64, 45 S.E.2d 203, 1947 Ga. LEXIS 551 (1947).

Actual tenant in possession is proper defendant in action of ejectment; that tenant is the adverse holder to the plaintiff, and plaintiff has a full right to treat the tenant as the person keeping plaintiff out of the land. Douglas v. Vourtsanis, 203 Ga. 64, 45 S.E.2d 203, 1947 Ga. LEXIS 551 (1947).

Tenant must be joined in suit against landlord. — Both in the fictitious form and in the statutory action for land, where the premises are actually occupied by a tenant, an action cannot be maintained against the landlord without adjoining the tenant. Douglas v. Vourtsanis, 203 Ga. 64, 45 S.E.2d 203, 1947 Ga. LEXIS 551 (1947).

Tenant's wrongful eviction claim dismissed following foreclosure. — Trial court properly granted summary judgment to a property company and others in a tenant's suit asserting wrongful eviction and other claims because the tenant was properly summarily dispossessed following a foreclosure on the real estate at issue. Oduok v. Wedean Props., 319 Ga. App. 785, 738 S.E.2d 626, 2013 Ga. App. LEXIS 69 (2013).

Amendment to reflect change of lessor. — There can be no recovery in ejectment where the sole lessor of the plaintiff was dead when the suit was brought, but an amendment introducing a new lessor of the plaintiff is permissible any time before trial. Roberts v. Tift, 136 Ga. 901, 72 S.E. 234, 1911 Ga. LEXIS 269 (1911).

Joinder of prior grantors. — Where in an action in the nature of a complaint for land it is necessary, in order for the defendant to establish a claim to the land, that deeds respecting the land in controversy be reformed, it is permissible to make prior grantors to the plaintiff parties to the action, so as to authorize the granting of such relief. In such a case the grantors in the deed which it is sought to reform by reason of their obligations as warrantors of the title are proper and necessary parties. Volunteer State Life Ins. Co. v. Powell-White Co., 196 Ga. 372, 26 S.E.2d 815, 1943 Ga. LEXIS 368 (1943).

Description of Land

Description must be sufficient for sheriff to execute writ of possession. — In an action for the recovery of land and ejectment the description of the property in the declaration must be sufficiently definite to enable the sheriff, in the event the plaintiff recovers, to execute a writ of

possession from the description given. Hamil v. Gormley, 188 Ga. 585, 4 S.E.2d 471, 1939 Ga. LEXIS 586 (1939); Guess v. Morgan, 196 Ga. 265, 26 S.E.2d 424, 1943 Ga. LEXIS 331 (1943); Phillips v. Wilson, 212 Ga. 54, 90 S.E.2d 553, 1955 Ga. LEXIS 543 (1955); White v. Gordon, 213 Ga. 730, 101 S.E.2d 759, 1958 Ga. LEXIS 261 (1958).

Failure to identify lands so that writ of possession might issue. — Plaintiff cannot recover where plaintiff fails to establish any title to the lands described in the petition, and fails to so identify the lands that a writ of possession might properly issue. Edwards v. Fryer, 210 Ga. 560, 81 S.E.2d 823, 1954 Ga. LEXIS 378 (1954).

Description that land bounded by plaintiff's land "on three sides" insufficient. — Petition in a statutory complaint for land which bounds the property on three sides by "other property" of the plaintiff, but gives neither measurements of the boundaries nor a starting point on the ascertainable boundary to determine the location of the tract, falls below the required standard for the description of the land. Hamil v. Gormley, 188 Ga. 585, 4 S.E.2d 471, 1939 Ga. LEXIS 586 (1939).

Sufficiency of description may be raised in motion to dismiss. — The question of sufficiency of description in a declaration in ejectment may be raised by general demurrer (now motion to dismiss), and an oral motion to dismiss may be made after pleading. Hamil v. Gormley, 188 Ga. 585, 4 S.E.2d 471, 1939 Ga. LEXIS 586 (1939).

Ambiguity must be patent. — A declaration in ejectment, which upon its face discloses a patent ambiguity, is subject to general demurrer (now motion to dismiss), but unless the ambiguity is patent, and appears on the face of the declaration, the suit cannot be dismissed for uncertainty in the description. White v. Gordon, 213 Ga. 730, 101 S.E.2d 759, 1958 Ga. LEXIS 261 (1958).

Description in petition and map, if sustained by proof, sufficient to withstand motion to dismiss. — The description of land set apart contained in the petition of a plaintiff when considered in connection with a map attached as an exhibit, while it may not afford a precise identification of the land sued for, is sufficient, as against a general demurrer (now motion to dismiss), to afford a basis for recovery of land, if the allegations of the petition are sustained by proof. Dubberly v. Chapman, 177 Ga. 416, 170 S.E. 228, 1933 Ga. LEXIS 190 (1933).

RESEARCH REFERENCES

Am. Jur. 2d.

25 Am. Jur. 2d, Ejectment, § 7.

Am. Jur. Pleading and Practice Forms.

9 Am. Jur. Pleading and Practice Forms, Ejectment, § 1.

C.J.S.

28A C.J.S., Ejectment, § 9.

ALR.

Right of owner of interest in mineral in situ to maintain ejectment, 35 A.L.R. 234.

Instructions in ejectment on rule that plaintiff must recover on strength of own title, 159 A.L.R. 646.

Common source of title doctrine, 5 A.L.R.3d 375.

44-11-2. When plaintiff may recover on prior possession alone.

A plaintiff in ejectment may recover the premises in dispute upon his prior possession alone against one who subsequently acquires possession of the land by mere entry and without any lawful right whatsoever.

History.

Orig. Code 1863, § 3278; Code 1868, § 3290; Code 1873, § 3366; Code 1882, § 3366; Civil Code 1895, § 5008; Civil Code 1910, § 5586; Code 1933, § 33-102.

JUDICIAL DECISIONS

Heirs at law, donees by parol gift of land, partnerships, lessors of plaintiff, and administrators ejected by their successors may recover under O.C.G.A. § 44-11-2. McKay v. Kendrick, 44 Ga. 607, 1872 Ga. LEXIS 378 (1872); Boynton v. Brown, 67 Ga. 396, 1881 Ga. LEXIS 192 (1881); Wolfe v. Baxter, 86 Ga. 705, 13 S.E. 18, 1891 Ga. LEXIS 48 (1891); McDonough & Co. v. Carter & Co., 98 Ga. 703, 25 S.E. 938, 1896 Ga. LEXIS 125 (1896); Ellis v. Dasher, 101 Ga. 5, 29 S.E. 268, 1897 Ga. LEXIS 146 (1897); Watkins v. Nugen, 118 Ga. 375, 45 S.E. 260, 1903 Ga. LEXIS 565 (1903); Whitehead v. Pitts, 127 Ga. 774, 56 S.E. 1004, 1907 Ga. LEXIS 477 (1907).

A cestui of an executed trust may maintain an action of ejectment. Glover v. Stamps, 73 Ga. 209, 1884 Ga. LEXIS 102 (1884).

Squatter may be ejected. Eaton v. Freeman, 63 Ga. 535, 1879 Ga. LEXIS 272 (1879).

Section applies to equity bills. — O.C.G.A. § 44-11-2 applies where a bill in equity was filed as the equivalent of an action of ejectment. Nolan v. Pelham, 77 Ga. 262, 2 S.E. 639, 1887 Ga. LEXIS 101 (1887).

With prior possession alone, section allows recovery from subsequent unlawful occupant. — While under O.C.G.A. § 44-11-1, a plaintiff in ejectment must recover on the strength of plaintiff's own title, and not on the weakness of the defendant's title, under O.C.G.A. § 44-11-2 plaintiff may recover upon prior possession alone, against one who subsequently acquires possession of the land by mere entry and without any lawful right whatever. Smith v. Bailey, 183 Ga. 869, 189 S.E. 905, 1937 Ga. LEXIS 418 (1937).

Prior possession requires occupancy. — A mere entry upon premises, when unaccompanied by an actual occupancy, is not a prior possession. Flannery & Co. v. Hightower, 97 Ga. 592, 25 S.E. 371, 1895 Ga. LEXIS 534 (1895).

Constructive possession under color of title. — Where reliance is had upon possession alone, and not upon possession under color of title, the possession must be actual; but where the possession is accompanied by color of title, the possession relied upon may be either actual or constructive. Smith v. Bailey, 183 Ga. 869, 189 S.E. 905, 1937 Ga. LEXIS 418 (1937).

Possession for less than prescriptive period supports recovery for damages. — Possession as referred to in O.C.G.A. § 44-11-2, for less than the prescriptive period, will support a recovery against one who after such possession commenced enters without a lawful right. Slaughter v. Land, 194 Ga. 156, 21 S.E.2d 72, 1942 Ga. LEXIS 544 (1942).

Prior possession sufficient for recovery against trespasser. — Prior possession is some evidence of title, and is sufficient as a basis for recovery of possession as against a trespasser. Terrell v. Gould, 168 Ga. 607, 148 S.E. 515, 1929 Ga. LEXIS 196 (1929); Chandler v. Raney, 201 Ga. 544, 40 S.E.2d 661, 1946 Ga. LEXIS 283 (1946); Grand Lodge, I.O.O.F. v. City of Thomasville, 226 Ga. 4, 172 S.E.2d 612, 1970 Ga. LEXIS 407 (1970).

Where a plaintiff relies on prior possession, plaintiff need not aver that the defendant is a trespasser. Horton v. Murden, 117 Ga. 72, 42 S.E. 786 (1903); Moss v. Chappell, 126 Ga. 196, 54 S.E. 968, 1906 Ga. LEXIS 361 (1906); Jackson v. Strickland, 127 Ga. 106, 56 S.E. 107, 1906 Ga. LEXIS 754 (1906).

Entry under mere claim of right not sufficient to defeat prior possession, for a mere claim of right is not a "lawful right" of entry within the meaning of O.C.G.A. § 44-11-2. Chandler v. Raney, 201 Ga. 644, 40 S.E.2d 661 (1946); Grand Lodge, I.O.O.F. v. City of Thomasville, 226 Ga. 4, 172 S.E.2d 612, 1970 Ga. LEXIS 407 (1970).

A defendant in an action of ejectment, where prior possession is shown in the plaintiff, cannot successfully defend by showing merely that the plaintiff did not in fact have title, or by setting up outstanding title in a third person, unless defendant connects personally with that title. Grand Lodge, I.O.O.F. v. City of Thomasville, 226 Ga. 4, 172 S.E.2d 612, 1970 Ga. LEXIS 407 (1970); Fessenden v.

Parrigin, 228 Ga. 61, 183 S.E.2d 771, 1971 Ga. LEXIS 461 (1971).

Defendant may set up a bona fide possession with title in a third person. Johnson v. Lancaster, 5 Ga. 39, 1848 Ga. LEXIS 70 (1848); Jones v. Scoggins, 11 Ga. 119, 1852 Ga. LEXIS 19 (1852).

Where lessor of plaintiff was ejected, plaintiff cannot be said to have voluntarily abandoned, because plaintiff did not resume possession immediately upon the land becoming vacant again. McKay v. Kendrick, 44 Ga. 607, 1872 Ga. LEXIS 378 (1872); Lovett v. Taylor, 144 Ga. 210, 87 S.E. 7, 1915 Ga. LEXIS 134 (1915).

Action proper against possessor where petition alleges possessor claims under will. — If the petition in ejectment alleges that the defendant as an individual is in possession of the property claiming the title thereto as a devisee under the will, there is no exemption from the action, and the action is properly brought against the party in possession. Sharp v. Autry, 183 Ga. 282, 188 S.E. 354, 1936 Ga. LEXIS 217 (1936).

Possession at time of death supports administrator's claim for land and mesne profit. — If a person dies while in possession of land under a bona fide claim of right thereto, such possession at the time of death is prima facie evidence of title in the deceased that will support an action of complaint for land and mesne profit instituted by the administrator of such deceased person against a third person, who after the death of the intestate entered possession adversely and not under a better title. Segars v. Crump, 177 Ga. 665, 170 S.E. 785, 1933 Ga. LEXIS 385 (1933).

Bona fide entry may be made under void deed. Watkins v. Nugen, 118 Ga. 375, 45 S.E. 260, 1903 Ga. LEXIS 565 (1903); Wilcox v. Moore, 118 Ga. 351, 45 S.E. 400, 1903 Ga. LEXIS 558 (1903).

Utility not ejectable if appropriated land becomes necessary for public service. — If a landowner permits, without legal objection, a public utility company to appropriate the owner's land to its necessary corporate use until such becomes a necessary and constituent part of its service to the public, and the rights of the public intervene to such extent that to oust the company would interrupt the service and deny it to the public, to protect the public rather than the company, the landowner is estopped from recovering the land in ejectment or from enjoining its use for the service, but may, if the owner moves in time, sue for damages. Wiggins v. Southern Bell Tel. & Tel. Co., 245 Ga. 526, 266 S.E.2d 148, 1980 Ga. LEXIS 845 (1980).

Plaintiff in fi. Fa. Has burden if defendant not in possession. — Where property is levied on under execution and claimed by a third party, O.C.G.A. § 9-13-102 imposes the burden of proof on the plaintiff in fi. fa. in all cases where the property levied on is, at the time of such levy, not in possession of the defendant in execution. One of the ways in which the onus may be carried is to show possession in the defendant in fi. fa. after the rendition of the judgment. Such proof will raise a presumption of title in the defendant and require a finding in favor of the plaintiff in fi. fa. in the absence of rebutting evidence. Roughton v. Roughton, 178 Ga. 367, 173 S.E. 673, 1934 Ga. LEXIS 56 (1934).

Defendant has burden to show record title or adverse possession. — The burden is on the defendant to show that defendant has a title superior to the plaintiffs' rights acquired by possession either by showing record title to the property, or title by adverse possession. Grand Lodge, I.O.O.F. v. City of Thomasville, 226 Ga. 4, 172 S.E.2d 612, 1970 Ga. LEXIS 407 (1970).

Evidence of prior possession shifts burden of proof. — Evidence of prior possession alone is sufficient to require the defendant to prove that defendant has a better title than that of the plaintiff. Terrell v. Gould, 158 Ga. 607, 148 S.E. 515 (1929); Crews v. Russell, 199 Ga. 732, 35 S.E.2d 444, 1945 Ga. LEXIS 373 (1945); Grand Lodge, I.O.O.F. v. City of Thomasville, 226 Ga. 4, 172 S.E.2d 612, 1970 Ga. LEXIS 407 (1970).

Nonsuit proper where right to possession not proven. Priester v. Melton, 123 Ga. 375, 51 S.E. 330, 1905 Ga. LEXIS 470 (1905); Delay v. Felton, 133 Ga. 15, 65 S.E. 122, 1909 Ga. LEXIS 132 (1909).

Nonsuit proper where property given up with animo revertendi. — A

nonsuit is proper where premises are relinquished with an animo revertendi. Administrators of Jones v. Nunn, 12 Ga. 469, 1853 Ga. LEXIS 18 (1853); McKay v. Kendrick, 44 Ga. 607, 1872 Ga. LEXIS 378 (1872); King v. Sears, 91 Ga. 577, 18 S.E. 830, 1893 Ga. LEXIS 288 (1893); Jackson v. Strickland, 127 Ga. 106, 56 S.E. 107, 1906 Ga. LEXIS 754 (1906); Lovett v. Taylor, 144 Ga. 210, 87 S.E. 7, 1915 Ga. LEXIS 134 (1915); Walton v. Whitton, 158 Ga. 741, 124 S.E. 338, 1924 Ga. LEXIS 334 (1924).

Ejectment petition properly denied. — Where a successor received title to a disputed parcel of land by means of a quitclaim deed, an original property owner was not able in an ejectment petition to seek recovery based upon prior possession, which required that the defendant subsequently acquired possession by mere entry and without any lawful right whatsoever. Brooks v. Green, 277 Ga. 722, 594 S.E.2d 629, 2004 Ga. LEXIS 273 (2004).

RESEARCH REFERENCES

Am. Jur. 2d.
25 Am. Jur. 2d, Ejectment, § 19 et seq.

C.J.S.
28A C.J.S., Ejectment, §§ 16, 17.

44-11-3. Right of joint owner to bring an action alone; effect of judgment.

Any joint tenant, tenant in common, or other person having a part interest in lands or tenements may bring an action of ejectment for the recovery of such lands or tenements or an action for damages for injury thereto without joining with him any other person as plaintiff. The judgment in such a case shall not affect the rights of those interested in such lands or tenements who are not parties to the action.

History.
Ga. L. 1855-56, p. 227, § 1; Code 1863, § 3271; Code 1868, § 3282; Code 1873, § 3358; Code 1882, § 3358; Civil Code 1895, § 4999; Civil Code 1910, § 5577; Code 1933, § 33-103.

JUDICIAL DECISIONS

Section limits recovery in separate action by tenant in common. — O.C.G.A. § 44-11-3, which is an application of O.C.G.A. § 9-2-23 permitting tenants in common to sue severally, limits the amount of recovery. Sanford v. Sanford, 58 Ga. 259, 1877 Ga. LEXIS 73 (1877); Wilson v. Chandler, 60 Ga. 129, 1878 Ga. LEXIS 396 (1878).

Remedy against cotenant for taking disproportionate profits or committing waste. — A tenant in common can recover in equity the tenant's interest in property when a cotenant has taken more than that tenant's share of the profits or has committed waste, but the remedy is partition, not ouster of tenant in common from the property. Thompson v. Sanders, 113 Ga. 1024, 39 S.E. 419, 1901 Ga. LEXIS 465 (1901).

Joint tenant may not sue another joint tenant absent disclaimer of title. Lawton v. Adams, 29 Ga. 273, 1859 Ga. LEXIS 326 (1859).

One tenant in common may alone enjoin cutting of timber. — A tenant in common or other person having part interest in land may enjoin the cutting of timber by third parties without joining the other tenants as plaintiffs. Camp v. Garbutt Lumber Co., 129 Ga. 411, 58 S.E. 870, 1907 Ga. LEXIS 390 (1907); Harrell

v. Rose Bros. & Co., 157 Ga. 640, 122 S.E. 240, 1924 Ga. LEXIS 218 (1924).

Possession at time of death supports administrator's claim for land and mesne profit. — If a person dies while in possession of land under a bona fide claim of right thereto, such possession at the time of death is prima facie evidence of title in the deceased that will support an action of complaint for land and mesne profit instituted by the administrator of such deceased person against a third person, who after the death of the intestate entered possession adversely and not under a better title. Segars v. Crump, 177 Ga. 665, 170 S.E. 785, 1933 Ga. LEXIS 385 (1933).

RESEARCH REFERENCES

Am. Jur. 2d.
25 Am. Jur. 2d, Ejectment, § 26.

C.J.S.
28 C.J.S., Ejectment, § 50.

44-11-4. Joint action against separate claimants; when prohibited.

When several persons claim several parcels of land under distinct titles and do not sustain to each other the relationship of landlord and tenant, a joint action of ejectment may not be maintained against them nor may a joint or several recovery be had in such action either for the premises or for mesne profits.

History.
Orig. Code 1863, § 3272; Code 1868, § 3283; Code 1873, § 3359; Code 1882, § 3359; Civil Code 1895, § 5000; Civil Code 1910, § 5578; Code 1933, § 33-113.
History of Section.
This Code section is derived from the decision in Wood v. Milly McGuire's Children, 17 Ga. 303 (1855); Ivey v. Cowart, 124 Ga. 159, 52 S.E. 436, 110 Am. St. R. 160 (1905).

JUDICIAL DECISIONS

Noncompliance with Code section subject to motion to dismiss. — The point that O.C.G.A. § 44-11-4 has not been complied with may be raised by demurrer (now motion to dismiss) if the fact appears on the face of the proceedings. Lewis v. Adams, 61 Ga. 559, 1878 Ga. LEXIS 182 (1878).

Nonsuit. — A defendant may move for nonsuit if O.C.G.A. § 44-11-4 has not been complied with, and such irregularity first appears from the evidence. Doe v. Roe, 26 Ga. 238, 1858 Ga. LEXIS 294 (1858); Ivey v. Cowart, 124 Ga. 159, 52 S.E. 436, 1905 Ga. LEXIS 682 (1905); Bradley v. Chattanooga Iron & Coal Co., 144 Ga. 478, 87 S.E. 465, 1915 Ga. LEXIS 644 (1915).

Plaintiff may merely drop suit against improper parties. — In the event defendant moves for a nonsuit, the plaintiff may dismiss the suit as regards the improper parties. Doe v. Roe, 26 Ga. 238, 1858 Ga. LEXIS 294 (1858); Ivey v. Cowart, 124 Ga. 159, 52 S.E. 436, 1905 Ga. LEXIS 682 (1905); Bradley v. Chattanooga Iron & Coal Co., 144 Ga. 478, 87 S.E. 465, 1915 Ga. LEXIS 644 (1915).

Equity may grant relief where the interests of the parties are complicated. Smith v. King, 50 Ga. 192, 1873 Ga. LEXIS 238 (1873).

RESEARCH REFERENCES

C.J.S.
28A C.J.S., Ejectment, § 1 et seq.
ALR.
Avoidance of multiplicity of suits as ground for jurisdiction in equity of a suit by one out of possession to quiet title against persons in possession of different portions of the land in severalty, 30 A.L.R. 109.

44-11-5. Making true claimant a defendant; effect of judgment as to such defendant.

A plaintiff in ejectment may in all cases make the true claimant a defendant by serving a copy of the pending action upon him, and the person so notified shall be bound by the judgment.

History.
Orig. Code 1863, § 3273; Code 1868, § 3284; Code 1873, § 3360; Code 1882, § 3360; Civil Code 1895, § 5001; Civil Code 1910, § 5579; Code 1933, § 33-114.

JUDICIAL DECISIONS

Right to introduce new defendants, pending action, seems to be without restriction as to residence. Gardner v. Granniss, 57 Ga. 539, 1876 Ga. LEXIS 169 (1876).

True claimant need only be joined to be held for mesne profits. — The only necessity for making the true claimant a party in the manner provided by O.C.G.A. § 44-11-5 is to hold that claimant for the mesne profits. Roe v. Doe, 47 Ga. 540, 1873 Ga. LEXIS 159 (1873); Williamson v. Heyser, 74 Ga. 271, 1884 Ga. LEXIS 371 (1884).

Landlord may defend in ejectment. — A landlord, including all persons claiming title consistent with the persons sued as tenants in possession, may appear and defend in an action of ejectment. Rodgers v. Bell, 53 Ga. 94, 1874 Ga. LEXIS 412 (1874); Bower v. Cohen, 126 Ga. 35, 54 S.E. 918, 1906 Ga. LEXIS 307 (1906).

Unless title acquired after action brought. — A landlord may not appear and defend if the landlord acquired title subsequent to the time the action was brought. Roe v. Doe, 36 Ga. 611, 1867 Ga. LEXIS 106 (1867).

Substitution of landlord for tenant upon tenant's death. — In a statutory action against a tenant to recover realty and mesne profits, the landlord can be substituted as defendant by serving the landlord with a copy of the writ, after the death of the plaintiff and the original defendant, without joining the representatives of the deceased tenant. Blalock v. Newhill, 78 Ga. 245, 1 S.E. 383, 1886 Ga. LEXIS 223 (1886).

Cestui que trust can be substituted as plaintiffs when trustee dies, pending an action in the statutory form to recover real estate and mesne profits. Blalock v. Newhill, 78 Ga. 245, 1 S.E. 383, 1886 Ga. LEXIS 223 (1886).

Defendant not bound by judgment when not made a party. — A judgment in a former action for land in which the defendant was not a party and was not notified or made a party under O.C.G.A. § 44-11-5, is not admissible in evidence against the defendant in a later action for the land. Harrison v. Hester, 163 Ga. 250, 135 S.E. 845, 1926 Ga. LEXIS 56 (1926).

Where defendant disclaims title and possession, owner or landowner not bound if not party. — When in an action for land, the defendant disclaims both title and right of possession, and a judgment thereupon is rendered against defendant in favor of the plaintiff, the same does not bind or conclude the true owner or landlord as to title, when the latter is neither a party to the action nor had any notice of the action. Sanford v. Tanner, 114 Ga. 1005, 41 S.E. 668, 1902

Ga. LEXIS 860 (1902); Hodges v. Stuart Lumber Co., 140 Ga. 569, 13 Ga. App. 419, 79 S.E. 225, 79 S.E. 462, 1913 Ga. App. LEXIS 182 (1913).

RESEARCH REFERENCES

Am. Jur. 2d.
25 Am. Jur. 2d, Ejectment, § 27.

C.J.S.
28A C.J.S., Ejectment, § 51 et seq.

44-11-6. Disclaimer by defendant; effect on costs.

A defendant in ejectment may disclaim any claim of title or right of possession. After such disclaimer is filed, such defendant shall not be liable for any future court costs.

History.
Orig. Code 1863, § 3274; Code 1868, § 3285; Code 1873, § 3361; Code 1882, § 3361; Civil Code 1895, § 5003; Civil Code 1910, § 5581; Code 1933, § 33-112.

JUDICIAL DECISIONS

Defendant can plead not guilty or file disclaimer. — The defendant in ejectment may at the first term file a disclaimer of title or of possession, after which defendant will not be liable for future costs, or, among others, defendant may file a plea of not guilty. Elliott v. Robinson, 192 Ga. 682, 16 S.E.2d 433, 1941 Ga. LEXIS 543 (1941).

Limits on liability after disclaimer. — Where one of defendants in ejectment asserts no interest in the land, nor any claim against any of the plaintiffs, and having disclaimed any claim of title or right of possession, defendant could not be liable for any future costs, and in the event of another trial, defendant's only liability would be the possibility of a judgment against defendant for mesne profits. Reese v. Baker, 197 Ga. 265, 29 S.E.2d 412, 1944 Ga. LEXIS 264 (1944).

Disclaimer does not dismiss action. — A defendant on filing a disclaimer, is not entitled to have the action dismissed as to that defendant; as the plaintiff may prove that plaintiff was in actual possession, and then take a verdict on the disclaimer of title. Killen v. Compton, 60 Ga. 116, 1878 Ga. LEXIS 390 (1878).

Disclaimer, unless withdrawn, is conclusive. Shingler v. Bailey, 135 Ga. 666, 70 S.E. 563, 1911 Ga. LEXIS 39 (1911).

Defendant's plea for set off and plaintiff's recovery limited to land described in demises. — Where a not guilty plea is filed in an ejectment action, and is amended by a plea seeking to set off the value of permanent improvements placed on the land by defendant against mesne profits and to impress a lien upon the land for any balance, the issues thus raised are restricted to the land described in the demises. If the plaintiff prevails, the sheriff will put plaintiff in possession of only the land so described. Even if the defendant might be in possession of other land, and makes permanent improvements on such land, those facts are outside the issues made by the pleadings, and wholly irrelevant to the case. Elliott v. Robinson, 192 Ga. 682, 16 S.E.2d 433, 1941 Ga. LEXIS 543 (1941).

RESEARCH REFERENCES

Am. Jur. 2d.
25 Am. Jur. 2d, Ejectment, § 37.

C.J.S.
28A C.J.S., Ejectment, § 66.

44-11-7. Recovery of mesne profits.

(a) By adding a count in his petition and submitting the evidence to the jury, the plaintiff in ejectment may recover by way of damages all such sums of money to which he may be entitled by way of mesne profits, together with the premises in dispute.

(b) No plaintiff in ejectment shall have and maintain a separate action in his behalf for the recovery of mesne profits which may have accrued to him from the premises in dispute.

History.

Laws 1839, Cobb's 1851 Digest, p. 489; Code 1863, §§ 3269, 3270; Code 1868, §§ 3280, 3281; Code 1873, §§ 3356, 3357; Code 1882, §§ 3356, 3357; Civil Code 1895, §§ 4997, 4998; Civil Code 1910, §§ 5575, 5576; Code 1933, §§ 33-104, 33-105.

Cross references.

Form to be used in action for recovery of real estate and mesne profits, § 9-10-200.

JUDICIAL DECISIONS

Analysis

General Consideration
Bar to Separate Action

General Consideration

History of action of ejectment. — At common law, the action of ejectment was originally a fictitious action, by a tenant ousted of the tenant's term, in effect an action of trespass. The title of the freehold was not formally and directly in issue and the remedy was in damages only. In the modern development of the law, the fiction passed out and the action is now generally by one claiming ownership of real property to recover title and possession, together with rents and revenues, usually called mesne profits, and damages resulting from the unlawful detention. Sweat v. Atlantic Coast Line R.R., 81 F.2d 492, 1936 U.S. App. LEXIS 3470 (5th Cir. 1936).

O.C.G.A. § 44-11-7 refers only to plaintiffs in ejectment and says nothing of the defendant. Moody v. McHan, 66 Ga. App. 29, 16 S.E.2d 889, 1941 Ga. App. LEXIS 103 (1941).

Count for mesne profits may be in name of nominal plaintiff. Shadwick v. McDonald, 15 Ga. 392, 1854 Ga. LEXIS 51 (1854).

Value of premises is material evidence on question of mesne profits only. Roe v. Doe, 42 Ga. 403, 1871 Ga. LEXIS 75 (1871).

Mesne profits recoverable up to final judgment. — While in an action of ejectment, mesne profits may be recovered up to the time of the final judgment, this exception to the general rule is based on O.C.G.A. § 44-11-7. Lankford v. Dockery, 85 Ga. App. 86, 67 S.E.2d 800, 1951 Ga. App. LEXIS 1005 (1951).

Mesne profits recoverable. — In an ejectment action, the trial court erred in adopting the special master's finding that concluded that the ejector was entitled to recover the property but had no right to recover mesne profits because a plaintiff in an ejectment action may seek recovery of mesne profits, such as rental income from the land. Small v. Irving, 291 Ga. 316, 729 S.E.2d 323, 2012 Ga. LEXIS 639 (2012).

Defendant not liable for mesne profits taken, prior to defendant's own entry, by those under whom defendant claims. Gardner v. Granniss, 57 Ga. 539, 1876 Ga. LEXIS 169 (1876).

No liability for increments from improvements. — A defendant in ejectment cannot be compelled to pay an enhance-

ment amount as rent in consequence of defendant's own improvements. That rule applies though defendant is a trespasser. Dean v. Feely, 69 Ga. 804, 1883 Ga. LEXIS 121 (1883).

Plaintiff owner not entitled to recover mesne profits for time prior to requisition of title. Patellis v. Tanner, 199 Ga. 304, 34 S.E.2d 84, 1945 Ga. LEXIS 304 (1945).

Mesne profits and land value unrelated to subsequent action for breach of warranty. — The mesne profits and the value of land involved in an ejectment action have no connection with the measure of damages recoverable in a subsequent action by the vendee, who has lost the land, against the vendor on breach of warranty. Cook v. Pollard, 50 Ga. App. 752, 179 S.E. 264, 1935 Ga. App. LEXIS 278 (1935).

Where grantor entitled to cancellation of deed for fraud or mental incapacity of grantor, the grantor is also entitled to the rents and profits of the land for the time that the grantee was wrongfully in possession. Moody v. McHan, 66 Ga. App. 29, 16 S.E.2d 889, 1941 Ga. App. LEXIS 103 (1941).

Heir may petition to recover rents and land for period grantee in wrongful possession. — Where the heir, or devisee under a will of the deceased grantor, petitions to set aside the deed of the grantee, the heir, or devisee, may ordinarily, under a proper allegation, ask in the same petition to recover rents and profits for the time during which the grantee was in wrongful possession. Moody v. McHan, 66 Ga. App. 29, 16 S.E.2d 889, 1941 Ga. App. LEXIS 103 (1941).

Rent of sawmill is an element of damages. Morris v. Tinker, 60 Ga. 466, 1878 Ga. LEXIS 508 (1878).

Recovery in ejectment as bar to trespass, see Cunningham v. Morris, 19 Ga. 583, 1856 Ga. LEXIS 231 (1856).

Burden of proof on claimant of mesne profits. — One who in an action to recover land claims mesne profits has the burden of producing evidence to show entitlement to some amount. Patellis v. Tanner, 199 Ga. 304, 34 S.E.2d 84, 1945 Ga. LEXIS 304 (1945).

O.C.G.A. § 44-11-7 on damages for trespass not applicable. — O.C.G.A. § 51-9-6 which limits claims for damages in cases of continuous trespass to those incurred before suit is filed did not apply in an ejectment action by a landowner against an outdoor sign company. Outdoor Sys. v. Woodson, 221 Ga. App. 901, 473 S.E.2d 204, 1996 Ga. App. LEXIS 747 (1996).

Bar to Separate Action

Rule at common law changed. — O.C.G.A. § 44-11-7 changed the common law which was to the effect that a plaintiff in ejectment must resort to a separate action for mesne profits. Shadwick v. McDonald, 15 Ga. 392, 1854 Ga. LEXIS 51 (1854); Cobb v. Wrightsville & T.R.R., 129 Ga. 377, 58 S.E. 862, 1907 Ga. LEXIS 383 (1907); Brydie v. Pritchard, 97 Ga. App. 1, 101 S.E.2d 915, 1958 Ga. App. LEXIS 688 (1958).

Applicability of O.C.G.A. § 44-11-7(b). — The prohibitory terms of O.C.G.A. § 44-11-7(b) apply only to those persons who have as plaintiffs in a prior ejectment action recovered possession. Brydie v. Pritchard, 97 Ga. App. 1, 101 S.E.2d 915, 1958 Ga. App. LEXIS 688 (1958).

The requirement that recovery of property and mesne profits be in one action only applies to those persons who have as plaintiffs in a prior ejection action recovered possession; thus, an equitable petition by an executor to enjoin the defendant's building on real estate will not bar as an ejectment the defendant's right to sue for mesne profits after title is shown to be in defendant. Parker v. Salmons, 113 Ga. 1167, 39 S.E. 475, 1901 Ga. LEXIS 534 (1901); Jones v. Cliett, 114 Ga. 673, 40 S.E. 719, 1902 Ga. LEXIS 756 (1902).

Heirs of one tenant in common cannot have an equitable accounting for personal property of their ancestor against another cotenant, and mesne profits accruing prior to the testator's death are not realty; in such a case, the requirement that ejectment and mesne profits be sued for in one action does not apply. Smith v. Smith, 141 Ga. 498, 141 Ga. 629, 81 S.E. 895, 1914 Ga. LEXIS 83 (1914).

Abandonment of ejectment count does not prohibit continuance of action for profits. — The mere abandonment of the count in ejectment by the

Bar to Separate Action (Cont'd)

plaintiff who has not had a prior recovery in such action is not such a prior recovery as would prohibit the continuance of the action for mesne profits. Brydie v. Pritchard, 97 Ga. App. 1, 101 S.E.2d 915, 1958 Ga. App. LEXIS 688 (1958).

One who has filed an action in ejectment in the fictitious form with a count for mesne profits may, by showing that since the commencement of the action the individual has parted with title to the land in dispute, abandon the ejectment element and proceed for mesne profits only during the time the individual claims to have been the owner of the land. Brydie v. Pritchard, 97 Ga. App. 1, 101 S.E.2d 915, 1958 Ga. App. LEXIS 688 (1958).

Where parties agree to limit issues at trial, later action for mesne profits barred. — Where parties, through counsel, agree to limit the issues to recovery of the real property in ejectment, and the plaintiff wins, the plaintiff may not later sue for mesne profits. Neil v. Harris, 133 Ga. 493, 66 S.E. 246, 1909 Ga. LEXIS 255 (1909).

Regardless of form of action to recover land, separate action for mesne profits barred. — Whether an action brought for the recovery of land is in the form of ejectment, or a complaint for land in the statutory form, or an equitable petition for the recovery of the land, the plaintiff cannot thereafter, in a separate action, recover mesne profits against the same defendant for rents which may have accrued to plaintiff from the premises in dispute. Moody v. McHan, 66 Ga. App. 29, 16 S.E.2d 889, 1941 Ga. App. LEXIS 103 (1941).

When the plaintiffs in a former action, brought for the recovery of the land, took a judgment favorable to themselves, whether it was in terms that they should recover the land, or merely that they had a right to recover, and that the same be partitioned, they should in that action also have had settled and adjudicated the question of mesne profits. They had the right to eliminate that question from that action if they wished to; but, when it was once eliminated, it ceased to exist as a basis of a claim on the part of these plaintiffs against the defendant, and it could not be revived and insisted upon in a separate action. Milton v. Milton, 176 Ga. 88, 166 S.E. 857, 1932 Ga. LEXIS 392 (1932).

New trial may be granted on question of mesne profits alone, without including the issue of rights to the real property. Cowart v. Strickland, 149 Ga. 397, 100 S.E. 447, 1919 Ga. LEXIS 255 (1919).

When the Supreme Court of Georgia has reversed a decision for plaintiff in an ejection action as regards mesne profits, due to improper amendment for such profits without notice to defendant by plaintiff the Supreme Court will permit the plaintiff if under O.C.G.A. § 5-6-8 to give appropriate notice to the defendant and to bring action for the profits. Brown v. Tyson, 150 Ga. 598, 104 S.E. 420, 1920 Ga. LEXIS 242 (1920).

Mesne profits accruing up to appeal not recoverable in separate action. — The mesne profits accruing to the plaintiff up to the time of the verdict can be recovered only in that proceeding and upon proper pleadings therefor. Those accruing thereafter, and while the case is on appeal to the Supreme Court of Georgia, can be recovered only in the manner pointed out in Brown v. Tyson, 150 Ga. 598, 104 S.E. 420 (1920). This is the plaintiff's exclusive remedy, and plaintiff cannot maintain a separate and independent action, to recover therefor. The petition is therefore subject to demurrer (now motion to dismiss) and should be dismissed. Beetles v. Steadham, 187 Ga. 601, 1 S.E.2d 431, 1939 Ga. LEXIS 424 (1939).

RESEARCH REFERENCES

Am. Jur. 2d.

25 Am. Jur. 2d, Ejectment, § 54 et seq.

C.J.S.

28A C.J.S., Ejectment, § 139 et seq.

44-11-8. Setoff of value of improvements against mesne profits by trespasser.

A trespasser may not set off improvements in an action brought for mesne profits except when the value of the premises has been increased by the repairs or improvements which have been made. In that case, the jury may take into consideration the improvements or repairs and may diminish the profits by that amount but not below the sum which the premises would have been worth without such improvements or repairs.

History.
Orig. Code 1863, § 3397; Code 1868, § 3416; Code 1873, § 3468; Code 1882, § 3468; Civil Code 1895, § 5087; Civil Code 1910, § 5671; Code 1933, § 33-106.

JUDICIAL DECISIONS

O.C.G.A. § 44-11-8 does not allow an excess recovery by trespasser who sued for mesne profits, and hence states a different rule than O.C.G.A. § 44-11-9, regulating the set off of improvements by one who took possession bona fide. Beverly v. Burke, 9 Ga. 440, 1851 Ga. LEXIS 35 (1851); Dean v. Feely, 69 Ga. 804, 1883 Ga. LEXIS 121 (1883); Dudley v. Johnson, 102 Ga. 1, 29 S.E. 50, 1897 Ga. LEXIS 435 (1897); Moate v. Rives, 146 Ga. 425, 91 S.E. 420, 1917 Ga. LEXIS 329 (1917).

O.C.G.A. § 44-11-8 inapplicable to equitable proceeding for accounting and partition. Smith v. Smith, 141 Ga. 498, 141 Ga. 629, 81 S.E. 895, 1914 Ga. LEXIS 83 (1914).

Basis for setoff amount. — The increased value of the premises is the subject matter of setoff, and not the actual value of the improvements. Roe v. Doe, 39 Ga. 328, 1869 Ga. LEXIS 213 (1869).

Setoff of improvements made by spouse. — The husband of a legatee and life tenant may not setoff the value of improvements made by his wife, when he is sued by another legatee. Burns v. Richardson, 145 Ga. 430, 89 S.E. 418, 1916 Ga. LEXIS 353 (1916).

RESEARCH REFERENCES

Am. Jur. 2d.
25 Am. Jur. 2d, Ejectment, § 57.
Am. Jur. Pleading and Practice Forms.
14 Am. Jur. Pleading and Practice Forms, Improvements, § 2.

44-11-9. Setoff of value of improvements against mesne profits by adverse claimant; right of plaintiff to election; payment by defendant to plaintiff and acquisition of title; sale; levy; molding of decree; title of purchaser.

(a) In all actions for the recovery of land, the defendant who has a bona fide possession of the land under adverse claim of title may set off the value of all permanent improvements placed on the land in good faith by himself or other bona fide claimants under whom he claims. If the legal title to the land is found to be in the plaintiff and if the value

of such improvements at the time of the trial exceeds the mesne profits, the jury may render a verdict in favor of the plaintiff for the land and in favor of the defendant for the amount of the excess of the value of the improvements over the mesne profits.

(b) The verdict mentioned in subsection (a) of this Code section shall find the value of the land itself at the time of the trial. Such verdict shall give the plaintiff the right:

(1) To have and recover the premises subject to the payment to the defendant of the excess of the value of the improvements over the mesne profits, such payment to be made by the plaintiff to the defendant within such time as may be fixed by the court in the decree; or

(2) To receive from the defendant the value of the land and the mesne profits found by the jury to be due to the plaintiff, such payment to be made by the defendant to the plaintiff within such time as the court may direct by its decree.

In the event that the plaintiff fails to make the payment pursuant to paragraph (1) of this subsection within the time allowed in the decree, the defendant shall have the right to pay to the plaintiff the value of the land and the mesne profits in accordance with paragraph (2) of this subsection. In all cases in which a setoff of improvements is sought in excess of mesne profits, the jury shall have the right to fix the time from which mesne profits shall be allowed.

(c) Upon the defendant making the payment to the plaintiff with all court costs of the proceedings, the defendant shall then acquire and have all the right and title the plaintiff had and held in and to the property in dispute. The court may by its decree require the plaintiff to make such titles to the lands in dispute as may be necessary in the premises, or to have the premises sold by a commissioner appointed by the court and the proceeds of such sale divided between the plaintiff and the defendant in the ratio or proportion that the value of the land itself bears to the amount of the excess of value of improvements over the mesne profits, or to recover the value of the land itself together with the amount of any excess of the value of the mesne profits over and above the value of the improvements. In case the plaintiff elects to recover the value of the land itself together with the amount of the excess of value of mesne profits over the value of the improvements, any fi. fa. issued upon the verdict and judgment entered therein shall be levied upon the lands and improvements; and the same shall be sold by the sheriff after due advertisement under the law governing sheriffs' sales.

(d) In those cases contemplated by this Code section, the court shall mold a decree to carry out and effectuate fully the provisions of the verdict.

(e) The purchaser of the premises, whether the same are sold by a commissioner appointed by the court or by the sheriff under a fi. fa. as provided in subsection (c) of this Code section, shall acquire all the right, title, and interest in the land and the improvements owned and possessed by the plaintiff or the defendant.

History.

Ga. L. 1897, p. 79, § 1; Civil Code 1910, §§ 5587, 5588, 5589, 5590; Code 1933, §§ 33-107, 33-108, 33-109, 33-110.

Cross references.

Setoff of improvements by one in bona fide possession, § 13-7-10.

JUDICIAL DECISIONS

Analysis

General Consideration
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General Consideration

Section constitutional. — O.C.G.A. § 44-11-9, regulating the rights of setoff by a bona fide holder of property, and procedures thereunder, is constitutional. Mills v. Geer, 111 Ga. 275, 36 S.E. 673, 1900 Ga. LEXIS 530 (1900); Bellinger v. Thompson, 112 Ga. 111, 37 S.E. 110, 1900 Ga. LEXIS 55 (1900); Ayer v. Chapman, 147 Ga. 715, 95 S.E. 257, 1918 Ga. LEXIS 120 (1918).

O.C.G.A. § 44-11-9 contemplates that defendant in ejectment, who has made permanent improvements, may set them off against a successful plaintiff in such action. Mid-State Homes, Inc. v. Johnson, 218 Ga. 397, 128 S.E.2d 197, 1962 Ga. LEXIS 511 (1962).

No set-off allowed. — Where the defendant in a dispossessory action was the tenant of an aunt, who held a life estate in the property in question, the trial court correctly ruled that the individual was a tenant at sufferance, that a dispossessory action would lie, and that the tenant was not entitled to a set-off, under O.C.G.A. § 44-11-9 for improvements. Fallin v. Rule, 194 Ga. App. 865, 392 S.E.2d 314, 1990 Ga. App. LEXIS 375 (1990).

Section strictly construed. — O.C.G.A. § 44-11-9, while in conformity with what has become recognized equitable principles, is nevertheless contrary to the early common-law rule and by its terms, the right to an equitable setoff is greatly enlarged and extended. Accordingly, the words "permanent improvements bona fide placed thereon" must be given a strict rather than liberal and general interpretation. Tennessee, Ala. & Ga. Ry. v. Zugar, 193 Ga. 386, 18 S.E.2d 758, 1942 Ga. LEXIS 407 (1942).

Value of all improvements recoverable. — O.C.G.A. § 44-11-9 wrought a great change in providing that the value of all improvements as described can be recovered. If the recovery for permanent improvements did not exceed the mesne profits, it is obvious that the purposes of O.C.G.A. § 44-11-9 would fail in many, if not most, instances. Since the passage of O.C.G.A. § 44-11-9, all improvements might be recovered. Harper v. Durden, 177 Ga. 216, 170 S.E. 45, 1933 Ga. LEXIS 151 (1933).

When one sought the aid of equity in recovering land, the court was allowed to make compensation for improvements a condition of relief; judgment ordering landowners to pay for improvements on their property was affirmed where the testimony at trial amply supported the trial court's conclusion that the improvements on the land were placed in good

General Consideration (Cont'd)

faith. Gay v. Strain, 261 Ga. App. 708, 583 S.E.2d 529, 2003 Ga. App. LEXIS 745 (2003).

Valuation of improvements and accounting for mesne profits. — In an action by remainderman, where the improvements were made during the pendency of a precedent life estate by the defendant bona fide in possession under an adverse claim of title, the value of the improvements is to be estimated at the time of the bringing of the action, and the defendant need only account for mesne profits accruing subsequently to the falling in of the life estate. Hawks v. Smith, 141 Ga. 422, 81 S.E. 200, 1914 Ga. LEXIS 235 (1914); Burns v. Richardson, 145 Ga. 430, 89 S.E. 418, 1916 Ga. LEXIS 353 (1916); Ayer v. Chapman, 147 Ga. 715, 95 S.E. 257, 1918 Ga. LEXIS 120 (1918).

Plaintiff may not recover as mesne profits the increased income from defendant's improvements. — Where the defendant in an action to recover land is in bona fide possession under adverse claim of title, the mesne profits are to be assessed upon the value of the property as it stood when the defendant's title accrued, and the plaintiff may not recover the increased income as mesne profits from improvements the defendant made in good faith. Norris v. Richardson, 151 Ga. 31, 105 S.E. 493, 1921 Ga. LEXIS 137 (1921); Winn v. Rainey, 153 Ga. 641, 113 S.E. 8, 1922 Ga. LEXIS 138 (1922).

Sale of recovered land to provide for improvements. — O.C.G.A. § 44-11-9 authorizes an allowance to a defendant, in the same ejectment case in which the plaintiff recovers, of any excess in value of the defendant's improvements on the land involved over the mesne profits and in proper cases provides for a sale of the recovered land by a commissioner and a division of the proceeds between the parties in the ratio or proportion that the value of the land itself bears to the amount of said excess of value of improvements over the mesne profits. Smith v. Bailey, 183 Ga. 869, 189 S.E. 905, 1937 Ga. LEXIS 418 (1937).

Under O.C.G.A. § 44-11-9 permanent improvements may be setoff against remaindermen who recover land. Harper v. Durden, 177 Ga. 216, 170 S.E. 45, 1933 Ga. LEXIS 151 (1933).

Where improvements placed pursuant to agreement with one tenant no recovery from cotenant. — Party in possession of premises, seeking to recover the value of the improvements erected upon the property in question in virtue of a contract with owner of undivided one-half interest who agreed to make a will giving the possessor fee simple title to the entire property if the possessor would repair it and render certain personal services to partial owner, cannot recover for such improvements as against administrator of deceased owner of other undivided one-half interest. Bowles v. White, 206 Ga. 343, 57 S.E.2d 187, 1950 Ga. LEXIS 342 (1950).

Recovery for improvements placed by tenant of adverse possessor. — A tenant who leases land from a bona fide possessor under adverse claim of right, may setoff, in an action brought against the tenant by the true owner, the value of permanent improvements that the tenant placed on the property. Moate v. Rives, 146 Ga. 425, 91 S.E. 420, 1917 Ga. LEXIS 329 (1917).

Improvements by adverse possessor who neither ousted nor notified tenant in common. — The right of a defendant in adverse possession to setoff the value of improvements does not apply where a tenant in common was not ousted, nor given notice of adverse possession by the defendant, and where there is no contract transferring title from plaintiffs to defendant. Smith v. Smith, 141 Ga. 498, 141 Ga. 629, 81 S.E. 895, 1914 Ga. LEXIS 83 (1914).

Permanent improvements by tenant of holder of void deed. — Permanent improvements having been made by the tenant of the holder of a void deed, as a part of the terms of a rental contract which was ratified and adopted by the owner, the holder of such void deed is not entitled to receive credit for the value of such permanent improvements placed upon the premises by such tenant, in an accounting for such rents and profits. Yudelson v. Northwestern Mut. Life Ins. Co., 193 Ga. 518, 18 S.E.2d 833, 1942 Ga. LEXIS 415 (1942).

Party in possession under bond for title, or verbal agreement to buy land, is not a bona fide holder under adverse claim of title, and may not setoff the value of permanent improvement. Puckett v. Heaton, 153 Ga. 69, 111 S.E. 402, 1922 Ga. LEXIS 15 (1922).

Setoff of mortgagee's improvements generally. — The right of a mortgagee in possession to setoff the improvements placed upon property is not controlled by O.C.G.A. § 44-11-9 where the action is not for the recovery of land, but is an equity case for an accounting by a trustee. However, the equity rule does not differ essentially from the statutory rule. That section allows the setoff for improvements only if placed thereon by the mortgagee personally or other bona fide claimants under whom the mortgagee claims, and the equity rule provides that the plaintiff will be compelled to reimburse the occupant for expenditures. Either of these rules would require a disbursement by the party to be reimbursed. Yudelson v. Northwestern Mut. Life Ins. Co., 193 Ga. 518, 18 S.E.2d 833, 1942 Ga. LEXIS 415 (1942).

Mortgagee may not recover for improvements made without mortgagor's consent. — As to permanent improvements, a mortgagee in possession is not authorized, without the consent of the mortgagor, to make such improvements and thereby increase the burden on the mortgagor upon a redemption of the premises. Yudelson v. Northwestern Mut. Life Ins. Co., 193 Ga. 518, 18 S.E.2d 833, 1942 Ga. LEXIS 415 (1942).

Recovery of mesne profits not barred by possession in receiver. — The fact that the property was in possession of the receiver as property of defendant's grantor will not itself prevent a recovery of mesne profits. Acme Brewing Co. v. Central R.R. & Banking Co., 115 Ga. 494, 42 S.E. 8, 1902 Ga. LEXIS 464 (1902).

Mesne profits recoverable. — In an ejectment action, the trial court erred in adopting the special master's finding that concluded that the ejector was entitled to recover the property but had no right to recover mesne profits because a plaintiff in an ejectment action may seek recovery of mesne profits, such as rental income from the land. Small v. Irving, 291 Ga. 316, 729 S.E.2d 323, 2012 Ga. LEXIS 639 (2012).

Defendant may not claim as assets to avoid bankruptcy improvements conveyed by him. — The right to setoff the value of permanent improvements against a demand for mesne profits is one which inures to the successor in title of the person by whom such improvements were made while the latter was in adverse possession. Thus, if a defendant in a bankruptcy proceeding conveys property to a spouse, with mention in the deed as to impending claims on the land, defendant cannot cite improvements made on the property as defendant's own assets to avert bankruptcy. R.P. Brown & Co. v. Glover Grocery Co., 287 F. 709, 1923 U.S. App. LEXIS 2381 (5th Cir. 1923).

One holding in good faith not guilty of trespass. — If it be true that notice of an adverse claim is not inconsistent with the good faith of a holder of land, it would seem, a fortiori, that one holding in good faith would not be guilty of a willful trespass in exercising the rights of ownership. Tennessee, Ala. & Ga. Ry. v. Zugar, 193 Ga. 386, 18 S.E.2d 758, 1942 Ga. LEXIS 407 (1942).

Barbed wire fence as improvement. See Calhoun v. Babcock Bros. Lumber Co., 198 Ga. 74, 30 S.E.2d 872, 1944 Ga. LEXIS 345 (1944).

Good Faith and Notice

Defendant must show improvements bona fide placed thereon. — In order to entitle the defendant in an ejectment action, claiming to be a bona fide holder, to the provisions in defendant's favor contained in O.C.G.A. § 44-11-9, defendant must show that defendant is not only a bona fide holder, but that the improvements upon the property have been bona fide placed thereon. Zugar v. Tennessee, A. & G. R. Co., 65 Ga. App. 658, 16 S.E.2d 149, 1941 Ga. App. LEXIS 366 (1941), rev'd, 193 Ga. 386, 18 S.E.2d 758, 1942 Ga. LEXIS 407 (1942).

"Bona fide" assumes absence of notice of adverse claim. — The words "bona fide" as used in the sense of a bona fide holder, or bona fide purchaser, carry

Good Faith and Notice (Cont'd)

as their technical, primary connotation the absence of notice or knowledge of an outstanding adverse claim. Tennessee, Ala. & Ga. Ry. v. Zugar, 193 Ga. 386, 18 S.E.2d 758, 1942 Ga. LEXIS 407 (1942).

"Adverse claim of title," under O.C.G.A. § 44-11-9, need not be evidenced by any writing. Walton v. Sikes, 165 Ga. 422, 141 S.E. 188, 1927 Ga. LEXIS 420 (1927).

Clear and definite notice nullifies claim for improvements. — Since O.C.G.A. § 44-11-9 must be taken as using the words "bona fide placed thereon" in their primary technical sense, clear and definite notice of an adverse claim, as by an action in ejectment, as distinguished from imperfect notice, will nullify the right of the holder to claim that the improvements were bona fide erected. However, it is unquestionable that mere notice or knowledge of an adverse claim does not destroy the bona fide character of a reasonable and honest claim by one in possession. Tennessee, Ala. & Ga. Ry. v. Zugar, 193 Ga. 386, 18 S.E.2d 758, 1942 Ga. LEXIS 407 (1942).

Distinction exists between personal and presumed notice. — A distinction is drawn between personal notice, proven either by positive or presumptive evidence, and notice which is a mere legal presumption, and which does not, as a consequence, necessarily affect the conscience of the party. Harper v. Durden, 177 Ga. 216, 170 S.E. 45, 1933 Ga. LEXIS 151 (1933).

Good faith unimpeached by mere constructive notice. — When the controversy is between the record owner of land and a defeated occupant seeking pay for improvements, constructive notice of the adverse title will not impeach the good faith of the occupant in putting betterments on the land, and this can be done only by proof that the occupant had actual notice of the successful title when the improvements were made. Harper v. Durden, 177 Ga. 216, 170 S.E. 45, 1933 Ga. LEXIS 151 (1933).

When conveyance has been properly recorded, record is constructive notice of its contents, and of all interests, legal and equitable, created by its terms. Harper v. Durden, 177 Ga. 216, 170 S.E. 45, 1933 Ga. LEXIS 151 (1933).

Recordation of deed not necessarily conclusive as to good faith. — In an action for land, where the defendant seeks, under O.C.G.A. § 44-11-9, to setoff valuable improvements, the fact that the plaintiff's deed was duly recorded is not necessarily conclusive, as against the defendant, on the question of good faith. McKaig v. Hardy, 196 Ga. 582, 27 S.E.2d 11, 1943 Ga. LEXIS 381 (1943).

The fact that the plaintiff may have had a title deed or record at the time the defendant took possession of the lot does not necessarily show lack of good faith on the part of the defendant. Claxton v. Claxton, 214 Ga. 715, 107 S.E.2d 320, 1959 Ga. LEXIS 320 (1959).

Purchaser need not make every possible search to determine if the purchaser's title is bad. Norris v. Richardson, 151 Ga. 31, 105 S.E. 493, 1921 Ga. LEXIS 137 (1921).

Payment of valuable consideration raises presumption of good faith. Harper v. Durden, 177 Ga. 216, 170 S.E. 45, 1933 Ga. LEXIS 151 (1933).

Improvements placed pending action may not be setoff. — Where, pending an action to recover land, the defendant places improvements on it, defendant is not entitled to set them off under O.C.G.A. § 44-11-9. Harper v. Durden, 177 Ga. 216, 170 S.E. 45, 1933 Ga. LEXIS 151 (1933).

The value of improvements placed upon land by a defendant pending an action brought by another to recover it from defendant cannot be setoff against the land itself, under O.C.G.A. § 44-11-9. Zugar v. Tennessee, A. & G. R. Co., 65 Ga. App. 658, 16 S.E.2d 149, 1941 Ga. App. LEXIS 366 (1941), rev'd, 193 Ga. 386, 18 S.E.2d 758, 1942 Ga. LEXIS 407 (1942).

Where a defendant enters upon land in good faith under an adverse claim of title, and, after an action is brought against defendant by one who has actual title to the property, erects improvements upon the land, it cannot be held that defendant has bona fide placed improvements thereon, so as to entitle defendant to setoff the value of such improvements against

the land. Zugar v. Tennessee, A. & G. R. Co., 65 Ga. App. 658, 16 S.E.2d 149, 1941 Ga. App. LEXIS 366 (1941), rev'd, 193 Ga. 386, 18 S.E.2d 758, 1942 Ga. LEXIS 407 (1942).

A person who enters onto land in the good faith belief that the person has title, but before the person makes improvements, is sued by the actual title holder is not entitled to setoff improvements the person makes subsequent to the actions commencement, if the person is made aware beforehand of the defects in title and the character of the plaintiff's title. Richards v. Edwardy, 138 Ga. 690, 76 S.E. 64, 1912 Ga. LEXIS 658 (1912).

Improvements made to land after knowledge of title defect. — A person who enters onto land in the good faith belief that the person has title, but before the person makes improvements, is sued by the actual title holder is not entitled to setoff improvements the person makes subsequent to the actions commencement, if the person is made aware beforehand of the defects in title and the character of the plaintiff's title. Richards v. Edwardy, 138 Ga. 690, 76 S.E. 64, 1912 Ga. LEXIS 658 (1912).

Except against claim for mesne profits. — Defendants who improve land, pending an action may not set up the value of such improvements, except to extinguish the claim for mesne profits. Hinesley v. Stewart, 139 Ga. 7, 76 S.E. 385, 1912 Ga. LEXIS 501 (1912).

Defendant's faith in own title, as against adverse one of which defendant was aware, is not enough to confer the right to reimbursement. Harper v. Durden, 177 Ga. 216, 170 S.E. 45, 1933 Ga. LEXIS 151 (1933).

Notice of improvement by another bona fide possessor. — A plaintiff who has title to land and sees another who is a bona fide possessor place valuable improvements on the property, and does not give notice of title, is not subsequently estopped from asserting title. Kemp v. Hammock, 144 Ga. 717, 87 S.E. 1030, 1916 Ga. LEXIS 102 (1916); Green v. Ellis, 145 Ga. 241, 88 S.E. 976, 1916 Ga. LEXIS 260 (1916).

Good faith of possessor of land is generally an issue for the jury to consider, and possessor's knowledge of an opposing claim of title is a circumstance to be considered in this determination. Moate v. Rives, 146 Ga. 425, 91 S.E. 420, 1917 Ga. LEXIS 329 (1917).

Knowledge considered by jury to determine good faith. — One may be the possessor of land in good faith though aware of an opposing claim, where such knowledge would not of itself impute bad faith, if one enters in full confidence of title or the title of one under whom one immediately claims. But knowledge of an opposing claim of title is a circumstance to be considered by the jury in determining one's good faith. Claxton v. Claxton, 214 Ga. 715, 107 S.E.2d 320, 1959 Ga. LEXIS 320 (1959).

Pleadings

Defendant's plea must allege value of premises. Moore v. Carey, 116 Ga. 28, 42 S.E. 258, 1902 Ga. LEXIS 15 (1902).

Plea must include value of profits and improvements. — A plea under O.C.G.A. § 44-11-9 must set forth the value of the land, the value of the permanent improvements claimed to have been placed thereon, and the amount of mesne profits admitted to be due, because the verdict must contain a finding with reference to all three. A plea which fails to set forth the facts from which the jury can find the value of the land and the value of the mesne profits, as well as the value of the permanent improvements, is not a sufficient plea under the act, and should on proper and timely motion be stricken because of its insufficiency. Bridges v. Henry, 210 Ga. 415, 80 S.E.2d 173, 1954 Ga. LEXIS 303 (1954).

Jury Instructions

Charge that good faith not necessarily destroyed by error of judgment or lack of diligence. — It is error to refuse a request to charge the jury that under O.C.G.A. § 44-11-9 "the good faith of the purchaser or the defendant who has possession is not necessarily destroyed by error of judgment or the failure to exercise all possible diligence." Walton v. Sikes, 165 Ga. 422, 141 S.E. 188, 1927 Ga. LEXIS 420 (1927).

Charge as to obligation of true owner. — The court errs in charging the

Jury Instructions (Cont'd)

jury as follows: "One who enters upon land under a conveyance from one not in possession, and, so far as appears, not having any color of title, enters and improves the premises at his peril. The true owner is under no obligation to account to him for taxes paid or for the cost of improvements over and above the mesne profits accruing." Walton v. Sikes, 165 Ga. 422, 141 S.E. 188, 1927 Ga. LEXIS 420 (1927).

Timing and value of improvements question for jury. — Where the evidence demands a finding by the jury that valuable permanent improvements were erected on the land while defendant's predecessor in title was in actual possession under a claim adverse to that asserted by the plaintiffs, and would authorize, but does not demand, a finding by the jury that defendant placed such improvements on the land after it had been given to him and that the value of such improvements was in excess of the stipulated rental value of the property, it makes an issue of fact which it is the province of the jury to settle, and the trial judge errs in directing a verdict in favor of the plaintiffs for the premises sued for and for mesne profits. Parker v. Parker, 214 Ga. 509, 105 S.E.2d 742, 1958 Ga. LEXIS 475 (1958).

Judge may limit jury to facts disclosed during trial. — The phrase "take into consideration all the facts and circumstances of the case as they have transpired here in your presence" does not limit the jury to a consideration only of the facts and circumstances of the case as they happened on the trial of the case, but does properly limit the jury to a consideration of the facts and circumstances of the case as they were disclosed to the jury on the trial of the case. Sheridan v. Haggard, 95 Ga. App. 792, 99 S.E.2d 163, 1957 Ga. App. LEXIS 920 (1957).

Remedies

Election of remedies only after verdict. — The time for making an election does not arrive until after the verdict is rendered and the decree of the court has been entered. Acme Brewing Co. v. Central R.R. & Banking Co., 115 Ga. 494, 42 S.E. 8, 1902 Ga. LEXIS 464 (1902).

Election of remedies must be made available. — In an ejectment action, a trial court erred by adopting the recommendation of the special master that title be vested in the ejector and that the ejectee have a judgment against the ejector in the amount of $60,000 because the trial court deprived the ejector of the ejector's statutory right to elect to recover the property within a period of time to be fixed by the trial court's decree as set forth in O.C.G.A. § 44-11-9. Small v. Irving, 291 Ga. 316, 729 S.E.2d 323, 2012 Ga. LEXIS 639 (2012).

No damage remedy if improvements admittedly exceed profits. — A plaintiff cannot take a money verdict where plaintiff admits that the value of the improvements exceeds mesne profits. Acme Brewing Co. v. Central R.R. & Banking Co., 115 Ga. 494, 42 S.E. 8, 1902 Ga. LEXIS 464 (1902).

RESEARCH REFERENCES

Am. Jur. 2d.

25 Am. Jur. 2d, Ejectment, §§ 123, 159. 47 Am. Jur. 2d, Judicial Sales, § 234 et seq.

Am. Jur. Pleading and Practice Forms.

14 Am. Jur. Pleading and Practice Forms, Improvements, § 2.

C.J.S.

28A C.J.S., Ejectment, §§ 119 et seq., 157. 50 C.J.S., Judicial Sales, § 39.

ALR.

Right to crops sown or grown by one wrongfully in possession of land, 39 A.L.R. 958; 57 A.L.R. 584; 91 A.L.R. 102; 131 A.L.R. 457.

Right as against remainderman to allowance under statute for improvements made during continuance of life estate by one in possession under mistaken claim of title to fee, 89 A.L.R. 635.

Betterment or occupying claimant acts

as available to plaintiff seeking affirmative relief, 137 A.L.R. 1078.

44-11-10. When previous warrantor may be codefendant.

A previous warrantor of the title to the land in dispute may be a codefendant in an action of ejectment, provided he would be answerable in damages in case of eviction.

History.
Orig. Code 1863, § 3276; Code 1868, § 3288; Code 1873, § 3364; Code 1882, § 3364; Civil Code 1895, § 5006; Civil Code 1910, § 5584; Code 1933, § 33-115.

JUDICIAL DECISIONS

Warrantor defending action bound by subsequent judgment on warranty. — Where the warrantor having been notified of an action, conducted the defense of it under O.C.G.A. § 44-11-10, the warrantor is bound by the judgment rendered in a subsequent action on the warranty. Lord v. Cannon, 75 Ga. 300, 1885 Ga. LEXIS 121 (1885).

RESEARCH REFERENCES

C.J.S.
28A C.J.S., Ejectment, § 51 et seq.

44-11-11. Necessity for substitution upon death of codefendant in ejectment.

If a codefendant in any action of ejectment dies after the commencement of the action, the action may proceed against the surviving defendant without making the representative of the deceased codefendant a party.

History.
Orig. Code 1863, § 3374; Code 1868, § 3393; Code 1873, § 3441; Code 1882, § 3441; Civil Code 1895, § 5038; Civil Code 1910, § 5620; Code 1933, § 33-116.

JUDICIAL DECISIONS

Procedure upon death of sole defendant. — After the sole defendant in an action of ejectment has died, and another defendant has been brought in, and has pleaded to the merits, the action may proceed as to the latter, without making the representatives of the former a party. Gardner v. Granniss, 57 Ga. 539, 1876 Ga. LEXIS 169 (1876).

RESEARCH REFERENCES

C.J.S.
28A C.J.S., Ejectment, § 51 et seq.
ALR.
Abatement by pendency of another action as affected by addition or omission of parties defendant in second suit, 44 A.L.R. 806.

44-11-12. Annexation of title abstract to petition.

The plaintiff shall attach an abstract of the title relied on for recovery to the petition for the recovery of land and mesne profits.

History.
Ga. L. 1860, p. 43, § 1; Code 1863, § 3312; Code 1868, § 3324; Code 1873, § 3401; Code 1882, § 3401; Civil Code 1895, § 5002; Civil Code 1910, § 5580; Code 1933, § 33-117.

JUDICIAL DECISIONS

Section requires abstract of title in addition to notice. — O.C.G.A. § 44-11-12 requires the annexation of an abstract of the title relied on for recovery in addition to notice of the title. Minor v. Sullivan, 220 Ga. 793, 141 S.E.2d 910, 1965 Ga. LEXIS 634 (1965).

Object of the abstract is not to show title in the plaintiff on the face of the pleadings, but only to give notice of what is relied upon at the trial. Yonn v. Pittman, 82 Ga. 637, 9 S.E. 667, 1889 Ga. LEXIS 313 (1889); Callahan v. Beeland, 170 Ga. 760, 154 S.E. 226, 1930 Ga. LEXIS 234 (1930); Segars v. Crump, 177 Ga. 665, 170 S.E. 785, 1933 Ga. LEXIS 385 (1933).

Petition may state that plaintiff "claims title" under abstract. — Where the petition departs from the statutory form and alleges that the plaintiff "claims title" under an abstract of title annexed to the petition, this is equivalent to an allegation that the plaintiff's title is as defined in the abstract. Dugas v. Hammond, 130 Ga. 87, 60 S.E. 268, 1908 Ga. LEXIS 236 (1908).

No dismissal although inadmissible affidavit added to abstract. — Inclusion of an ex parte affidavit of possession in the abstract of title attached to the petition, did not make the petition subject to demurrer (now motion to dismiss) merely because the affidavit would not be admissible in evidence. Palmer v. Mann, 206 Ga. 144, 56 S.E.2d 467, 1949 Ga. LEXIS 438 (1949).

Declaration in ejectment is amendable by adding abstract, which is a necessary part of the declaration. Camp v. Smith, 61 Ga. 449, 1878 Ga. LEXIS 149 (1878); Carter v. Greer, 72 Ga. 897, 1884 Ga. LEXIS 337 (1884); Oellrich v. Georgia R.R., 73 Ga. 389, 1884 Ga. LEXIS 135 (1884).

Abstract unnecessary in common-law ejection. — O.C.G.A. § 44-11-12's requirement that an abstract of title be attached to the petition applies only to actions for recovery of land and mesne profits, not actions of ejectment brought in the common-law form. Georgia Iron & Coal Co. v. Allison, 116 Ga. 444, 42 S.E. 794, 1902 Ga. LEXIS 134 (1902).

Abstract unnecessary in injunctions against trespass. — The requirement that a plaintiff attach to the petition, an abstract of the title plaintiff relies on, does not apply to a plaintiff suing in equity to enjoin a trespass, such as cutting timber; such action is not an action to recover land. Fletcher v. Fletcher, 123 Ga. 326, 51 S.E. 418, 1905 Ga. LEXIS 457 (1905).

Abstract unnecessary in petitions to reform deed. — A plaintiff who petitions in equity to reform a deed which the defendant had fraudulently altered, need not attach to the petition an abstract of the title relied on, in order to recover land and mesne profits. Prater v. Bennett, 98 Ga. 413, 25 S.E. 510, 1896 Ga. LEXIS 56 (1896).

RESEARCH REFERENCES

Am. Jur. 2d.
25 Am. Jur. 2d, Ejectment, § 34.

C.J.S.
28A C.J.S., Ejectment, § 61.

44-11-13. When judgment conclusive of title.

A judgment in ejectment shall be conclusive as to the title between the parties thereto unless the jury awards the plaintiff less than the fee.

History.
Orig. Code 1863, § 3275; Code 1868, § 3286; Code 1873, § 3362; Code 1882, § 3362; Civil Code 1895, § 5005; Civil Code 1910, § 5583; Code 1933, § 33-119.

JUDICIAL DECISIONS

Judgment in ejectment is conclusive where verdict is taken by consent, and will serve to exclude deeds offered by the defendant, which would set up a title independent of the one established in a prior ejectment involving the same lands between privies of the parties. McDowell v. Sutlive, 78 Ga. 142, 2 S.E. 937, 1886 Ga. LEXIS 194 (1886).

Issue of title must be tried. — O.C.G.A. § 44-11-13 is applicable only where the issue as to the title was actually litigated in the previous suit, but where the merits of the case were not adjudicated, the judgment is not conclusive. Banks v. Sirmans, 218 Ga. 413, 128 S.E.2d 66, 1962 Ga. LEXIS 517 (1962).

Tenant's ability to litigate all issues. — A judgment in ejectment for a landlord against a tenant where the landlord relies for recovery upon privity existing between the parties, involving only the right of possession, is not conclusive in later action by the tenant, as the tenant cannot be bound on issues which the tenant could not litigate in the first action. Parker v. Stambaugh, 71 Ga. 735, 1883 Ga. LEXIS 260 (1883); Vada Naval Stores Co. v. Sapp, 148 Ga. 677, 98 S.E. 79, 1919 Ga. LEXIS 24 (1919).

Lesser estate involved in first trial. — O.C.G.A. § 44-11-13 makes the judgment between the same real parties to the title conclusive against those parties, with the single exception that, if the fee was not involved, but a less estate, the claimant of the fee could sue again, though the claimant had been defeated on a trial of an estate less than a fee in the same land. Poore v. Rigsby, 206 Ga. 66, 55 S.E.2d 547, 1949 Ga. LEXIS 610 (1949).

Dismissal if controlling issue res judicata. — Upon application of O.C.G.A. § 44-11-13 to the facts alleged in the plaintiff's petition, the defendant's demurrer (now motion to dismiss) based upon the ground that the controlling issue in the case was res adjudicata should have been sustained, and the court erred in overruling it. Merritt v. Hutchings, 168 Ga. 734, 148 S.E. 916, 1929 Ga. LEXIS 226 (1929).

Generally, cases respecting title to land shall be tried in superior court where land lies. Pearson v. George, 211 Ga. 18, 83 S.E.2d 593, 1954 Ga. LEXIS 458 (1954).

RESEARCH REFERENCES

Am. Jur. 2d.
25 Am. Jur. 2d, Ejectment, § 50.

C.J.S.
28A C.J.S., Ejectment, § 126 et seq.

44-11-14. Issuance of writ of possession; levy and sale clause.

When a verdict in ejectment is rendered in favor of the plaintiff and a judgment is entered thereon, the clerk of the superior court shall issue a writ of possession in which the clerk shall incorporate a clause directing the sheriff to collect by levy and sale of the defendant's property all sums of money awarded to the plaintiff in ejectment as mesne profits and costs.

History.
Orig. Code 1863, § 3559; Code 1868, § 3582; Code 1873, § 3637; Code 1882, § 3637; Civil Code 1895, § 5418; Civil Code 1910, § 6023; Code 1933, § 33-120.

JUDICIAL DECISIONS

Writ must describe land exactly. — In an action to recover land, the plaintiff in the petition must describe land with such certainty that the sheriff can deliver possession to plaintiff in accordance with writ, if the decision be in plaintiff's favor. Harwell v. Foster, 97 Ga. 264, 22 S.E. 994, 1895 Ga. LEXIS 357 (1895); Hollywood Cem. Corp. v. Hudson, 133 Ga. 271, 65 S.E. 777, 1909 Ga. LEXIS 208 (1909); Williams v. Perry, 136 Ga. 453, 71 S.E. 886, 1911 Ga. LEXIS 103 (1911).

No writ if plaintiff does not describe exact tract claimed. — If the plaintiff sues for a certain number of acres embraced in a larger tract, but only describes the larger tract, such petition is too indefinite to be made the basis of a recovery. Harwell v. Foster, 97 Ga. 264, 22 S.E. 994, 1895 Ga. LEXIS 357 (1895).

If verdict too vague for sheriff to find land. — If the verdict is intended to find for the plaintiff only a portion of the premises sued for, but that verdict is so vague in description that the sheriff cannot ascertain and locate with certainty what land is involved, no writ of possession should be issued. Hicks v. Brinson, 100 Ga. 595, 28 S.E. 380, 1897 Ga. LEXIS 109 (1897).

Injunction if verdict vague. — An injunction to enjoin the execution of a writ may be had in a proper case, as when the jury verdict is too vague to permit proper execution and removal of part of a brick wall would destroy the building to which it was attached. Hicks v. Brinson, 100 Ga. 595, 28 S.E. 380, 1897 Ga. LEXIS 109 (1897).

Injunction cannot protect mortgagor indefinitely from claim against home. — It is proper to protect homestead against an execution of a writ favoring a mortgagee, but a verdict which restrains enforcement of writ after termination of homestead and which perpetually enjoins the mortgagee from dispossessing the mortgagor is too broad. American Freehold Land Mtg. Co. v. Walker, 119 Ga. 341, 46 S.E. 426, 1904 Ga. LEXIS 829 (1904).

Owner of an undivided interest will be put in possession as tenant in common. Burney v. Arnold, 134 Ga. 141, 67 S.E. 712, 1910 Ga. LEXIS 141 (1910).

RESEARCH REFERENCES

C.J.S.
28A C.J.S., Ejectment, § 131 et seq.

44-11-15. Persons not subject to writ of possession.

The writ of possession shall not issue against third persons who were not known in the action on which such writ of possession is founded nor against third persons who were not put in possession by and do not claim under or by virtue of any conveyance from the defendant in the action.

History.
Laws 1811, Cobb's 1851 Digest, p. 511; Code 1863, § 3560; Code 1868, § 3583; Code 1873, § 3638; Code 1882, § 3638; Civil Code 1895, § 5419; Civil Code 1910, § 6024; Code 1933, § 33-121.

JUDICIAL DECISIONS

Action against one of several possessors holding independently of one another. — Where an action for land is brought against one of several persons in possession, holding independently of each other, and it appears that neither claims under the other, the judgment, as a rule, will bind only the one who is a defendant in the action, and the others, not being parties, cannot be expelled, even though the action, the judgment, and the writ embrace the whole of the premises, and treat the defendant in the action as sole occupant. Injunction will lie to prevent its execution. Bethune v. Wilkins, 8 Ga. 118, 1850 Ga. LEXIS 21 (1850); Stokes v. Morrow, 54 Ga. 597, 1875 Ga. LEXIS 276 (1875); Jefferson v. Hartley, 81 Ga. 716, 9 S.E. 174, 1888 Ga. LEXIS 320 (1888); McSwain v. Ricketson, 129 Ga. 176, 58 S.E. 655, 1907 Ga. LEXIS 327 (1907); Browning v. Guest, 147 Ga. 400, 94 S.E. 234, 1917 Ga. LEXIS 213 (1917).

Sheriff liable for removing person not named in writ. — If the sheriff, in executing a writ of possession, removes from the premises any person not mentioned in the writ and not within its legal operation according to O.C.G.A. § 44-11-15, such removal amounts to official misconduct, and the sheriff is thereby subject to liability both personally and as regards the sheriff's sureties. Jefferson v. Hartley, 81 Ga. 716, 9 S.E. 174, 1888 Ga. LEXIS 320 (1888).

RESEARCH REFERENCES

C.J.S.
28A C.J.S., Ejectment, § 131 et seq.

ARTICLE 2

PROCEEDINGS AGAINST INTRUDERS

RESEARCH REFERENCES

ALR.
Punitive damages for wrongful seizure of chattel by one claiming security interest, 35 A.L.R.3d 1016.

44-11-30. Manner of ejecting intruders; affidavit; ejection by sheriff; counteraffidavit.

When any person, either by himself, his agent, or his attorney in fact, shall take and subscribe an affidavit in writing before any officer authorized to administer an oath setting forth that he claims, in good faith, the right of possession to the described land or tenement and that such land or tenement is in the hands of another named person who does not in good faith claim a right to such possession and yet refuses to abandon the same, it shall be the duty of the sheriff of the county where the land or tenement is located, upon receiving such affidavit, to exhibit such affidavit to the person described as being in possession of such land or tenement at the earliest possible day and to turn such person out of possession unless the person in possession tenders to the sheriff a counteraffidavit stating that he claims, in good faith, a legal right to the possession of the land or tenement.

History.
Ga. L. 1853-54, p. 52, § 1; Code 1863, § 3979; Code 1868, § 4000; Code 1873, § 4072; Code 1882, § 4072; Civil Code 1895, § 4808; Civil Code 1910, § 5380; Code 1933, § 105-1501.

JUDICIAL DECISIONS

Analysis

General Consideration
Procedure

General Consideration

Similarity of eviction and ejectment warrants. — 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 they accomplish are the same, the dispossession of one in favor of another who is legally entitled to the possession. Dantley v. Burge, 88 Ga. App. 478, 77 S.E.2d 107, 1953 Ga. App. LEXIS 1114 (1953).

Process not abused when used in eviction. — This process was designed to accomplish eviction and to gain possession of the premises, and where it was used by the defendant to accomplish that end, it cannot, then, be said that the process was perverted or put to a use which the law did not intend that it be put. Dantley v. Burge, 88 Ga. App. 478, 77 S.E.2d 107, 1953 Ga. App. LEXIS 1114 (1953).

Basis for determining validity of process. — In determining whether the process was perverted and put to an unintended use, the law, in an abuse of legal process case, will look to the nature of the process and the ultimate end it is designed to accomplish, and not to the specific purpose of that particular process. Dantley v. Burge, 88 Ga. App. 478, 77 S.E.2d 107, 1953 Ga. App. LEXIS 1114 (1953).

Section construed liberally as to defendant. — O.C.G.A. § 44-11-30 provides for a harsh and speedy process, and should be construed strictly as to the plaintiff but liberally as to the defendant. Paige v. Dodson, 46 Ga. 223, 1872 Ga. LEXIS 36 (1872).

Section applies to intruders, squatters, and disseizors. — The remedy prescribed in O.C.G.A. § 44-11-30 is intended to apply only to intruders, squatters or disseizors, who enter in bad faith and without any claim or shadow of right. Sheats v. Blair, 7 Ga. App. 272, 66 S.E. 812, 1910 Ga. App. LEXIS 238 (1910).

No application to discharged employees. — The remedy prescribed in O.C.G.A. § 44-11-30 cannot be made to apply against a discharged employee, for the employee's entry was not originally unlawful and the employee could easily defeat the proceeding by filing a counter-affidavit of claim of right. MacKenzie v. Minis, 132 Ga. 323, 63 S.E. 900, 1909 Ga. LEXIS 85 (1909).

No application to vendor who remains in possession. — Where the owner of land sells and conveys it to another by absolute conveyance, but does not actually go out of possession, even though the vendee be also in possession, the latter cannot eject the former from the premises as an intruder, by the summary process of O.C.G.A. § 44-11-30. Russel v. Chambers, 43 Ga. 478, 1871 Ga. LEXIS 282 (1871); Williams v. McMichael, 64 Ga. 445, 1879 Ga. LEXIS 101 (1879); Durden v. Clack, 94 Ga. 278, 21 S.E. 521, 1894 Ga. LEXIS 65 (1894); Thompson v. Glover, 120 Ga. 440, 47 S.E. 935, 1904 Ga. LEXIS 580 (1904).

Proceeding emphasizes defendant's good faith, not plaintiff's title. — In a proceeding to eject an intruder, the sole question concerns the good faith of the defendant in entering upon the land and in claiming the right of possession; title is only incidentally involved. Lane v. Williams, 114 Ga. 124, 39 S.E. 919, 1901 Ga. LEXIS 602 (1901); Forman v. Pelham, 8 Ga. App. 822, 70 S.E. 158, 1911 Ga. App. LEXIS 162 (1911).

Purchasers of real property under warranty deed from the record title holder's

brother sufficiently established their good faith to be entitled to a jury trial on the title holder's claim in ejectment; therefore, a jury verdict in the purchasers' favor was upheld. Sims v. Merritt, 270 Ga. App. 877, 608 S.E.2d 547, 2004 Ga. App. LEXIS 1661 (2004).

Section must be followed in ejection. — O.C.G.A. § 44-11-30 prescribes the manner in which one must eject intruders from possession of land and tenements, and where persons are in possession of lands and tenements, and another person who claims right of possession claims that those holding possession are intruders holding without good faith, the claimant must resort to the judicial manner prescribed in O.C.G.A. § 44-11-30 in ejecting the alleged intruders. Allison v. Hodo, 84 Ga. App. 790, 67 S.E.2d 606, 1951 Ga. App. LEXIS 798 (1951).

Owner cannot forcibly evict intruders. — Even if defendants in ejectment are intruders and not tenants, plaintiff owes them a duty not to use force in evicting them from the premises. Allison v. Hodo, 84 Ga. App. 790, 67 S.E.2d 606, 1951 Ga. App. LEXIS 798 (1951).

Owner liable in damages for wrongful ouster. — If one without regard for O.C.G.A. § 44-11-30 forcefully ejects the alleged intruders, that person can be held liable for any damages arising out of such wrongful ouster. Allison v. Hodo, 84 Ga. App. 790, 67 S.E.2d 606, 1951 Ga. App. LEXIS 798 (1951).

Removing furniture into the yard instead of into some protective place of storage aggravates the wrongful ouster, regardless of the manner in which the furniture was removed, and the court is authorized to award additional damages either to deter the wrongdoer or as compensation for the wounded feelings of one wrongfully ousted. Allison v. Hodo, 84 Ga. App. 790, 67 S.E.2d 606, 1951 Ga. App. LEXIS 798 (1951).

Plaintiff with only color of title may remove possessor in bad faith. — A plaintiff in possession under a deed conferring color of title, if not title, may evict as an intruder a person who has entered on the premises in bad faith, under a pretended claim of title. It is not the rightfulness or sufficiency of the possessor's claim that gives the possessor the right to evict, but the possessor's honesty. Burdock v. Miller, 21 Ga. 368, 1857 Ga. LEXIS 68 (1857); McHan v. Stansell, 39 Ga. 197, 1869 Ga. LEXIS 202 (1869); Thorpe v. Atwood, 100 Ga. 597, 28 S.E. 287, 1897 Ga. LEXIS 110 (1897).

Subsequent entry by one who surrenders land is intrusion. — Where parties having possession of land made a formal surrender thereof, evidence by writing, and afterward, in direct contravention of such surrender, entered on the land, they were intruders, and subject to the proceedings provided for by O.C.G.A. § 44-11-30. Burdock v. Miller, 21 Ga. 368, 1857 Ga. LEXIS 68 (1857); Baker v. Downing, 69 Ga. 746, 1882 Ga. LEXIS 329 (1882).

If one joint plaintiff should not recover, none may. — Where a joint action for land is brought by several persons, and the evidence shows that one of them is not entitled to recover, there can be no recovery at all. The rule in such case is the same whether the action be in the statutory or fictitious form. Paine v. Thomas, 228 Ga. 519, 186 S.E.2d 737, 1972 Ga. LEXIS 824 (1972).

Plaintiff who purchased realty at executor's private sale and who received the executor's authorization to take possession is entitled to eject from possession an earlier purchaser who has failed to make payments, even if the testator did not confer on the executors the right to sell at private sale. Bagley v. Stephens, 78 Ga. 304, 2 S.E. 304, 2 S.E. 545, 1886 Ga. LEXIS 234 (1886).

Procedure

Plaintiff's affidavit may be made before county judge. — Affidavit may be made before any officer authorized to administer an oath, thus differing from the affidavit which is the foundation of a proceeding against a tenant, which must be taken before a judge of the superior court or a justice of the peace. (See O.C.G.A. § 44-7-50.) Consequently, a county judge can administer the oath in this proceeding and then determine the issue made by the defendant's counter-affidavit. Griswold v. Rutherford, 109 Ga. 398, 34 S.E. 602, 1899 Ga. LEXIS 666 (1899); Rigell v. Sir-

Procedure (Cont'd)

mans, 123 Ga. 455, 51 S.E. 381, 1905 Ga. LEXIS 492 (1905).

Attorneys at law. — An attorney at law is not such an agent, without special appointment, as would authorize the attorney to make an affidavit under the provisions of O.C.G.A. § 44-11-30. Montgomery v. Walker, 41 Ga. 681, 1871 Ga. LEXIS 166 (1871).

Defendant may take an oath to the counteraffidavit before the sheriff who comes to turn defendant out of possession. Simpson v. Wall, 41 Ga. 105, 1870 Ga. LEXIS 37 (1870).

File any time before eviction. — The defendant must make and file a counteraffidavit before actual eviction, but it may be made at any time before such eviction. Simpson v. Wall, 41 Ga. 105, 1870 Ga. LEXIS 37 (1870); Montgomery v. Walker, 41 Ga. 681, 1871 Ga. LEXIS 166 (1871); Sheats v. Blair, 7 Ga. App. 272, 66 S.E. 812, 1910 Ga. App. LEXIS 238 (1910).

Sheriff will dispossess unless counteraffidavit shown. — When an affidavit is made for the removal of an intruder, as provided by O.C.G.A. § 44-11-30, it is the duty of the sheriff, at the earliest practicable day, to exhibit the affidavit to the person described therein, as being in possession of the land, and to turn such person out of the possession thereof, unless the person so in possession shall at once tender to the sheriff the counteraffidavit prescribed in O.C.G.A. § 44-11-30. Simpson v. Wall, 41 Ga. 105, 1870 Ga. LEXIS 37 (1870).

Defective counteraffidavit gives the defendant no standing in court, it cannot be amended, and a second one cannot be made. Hass v. Gardner, 36 Ga. 477, 1867 Ga. LEXIS 71 (1867); Paige v. Dodson, 46 Ga. 223, 1872 Ga. LEXIS 36 (1872); Yancey v. Karwisch, 129 Ga. 788, 59 S.E. 777, 1907 Ga. LEXIS 584 (1907); Stephens v. Mathis, 142 Ga. 117, 82 S.E. 520, 1914 Ga. LEXIS 611 (1914).

Clerical error not defective. — A defendant's affidavit that defendant "claims the bona fide legal right to possession" of the premises complies with O.C.G.A. § 44-11-30; placing the word "the" before the words "bona fide" is an evident clerical mistake, the real meaning being that defendant "claims the bona fide, the legal right to the possession." Paige v. Dodson, 46 Ga. 223, 1872 Ga. LEXIS 36 (1872).

Husband's counteraffidavit may state he is wife's agent. — A husband may make a counteraffidavit that he holds possession as agent of his wife and thus make an issue for trial. Jackson v. Dickson, 73 Ga. 126, 1884 Ga. LEXIS 54 (1884).

It is error to dismiss counter-affidavit properly made because of nonappearance of defendant at trial. Yancey v. Karwisch, 129 Ga. 788, 59 S.E. 777, 1907 Ga. LEXIS 584 (1907).

If counter-affidavit shows bad faith, directed verdict proper. — Where the action is brought under O.C.G.A. § 44-11-30, as a summary action to eject intruders, the sole question in such a case is whether or not the defendant in good faith claims the right to occupy the premises in question; and when the counter-affidavit taken with the admissions of the defendant made on cross-examination and under oath show that no issuable defense is made, or that the defendant does not in good faith claim the right to possession of the disputed premises a finding in favor of the plaintiffs is demanded and it is proper for the trial judge to direct a verdict for the plaintiffs. Krasner v. Crosswell, 80 Ga. App. 134, 55 S.E.2d 381, 1949 Ga. App. LEXIS 790 (1949).

County court has jurisdiction to try applications for eviction of intruders, and it would be no ground to dismiss a proceeding for this purpose that the evidence showed the plaintiff's remedy was by ejectment; but such evidence would require an adjudication in favor of the defendant on the merits. Durden v. Clack, 94 Ga. 278, 21 S.E. 521, 1894 Ga. LEXIS 65 (1894).

Equity court may have final adjudication. — When in the course of proceedings under O.C.G.A. § 44-11-30 equitable jurisdiction arises, a court of equity may hold the case for final adjudication. Wyley v. Whitely, 38 Ga. 605, 1869 Ga. LEXIS 281 (1869).

No trial by justice of the peace. — A proceeding instituted under O.C.G.A.

§ 44-11-30 cannot be made the basis of a trial before a justice of the peace and a jury. Such a trial is coram non judice, and its result a nullity. Music v. Barber, 99 Ga. 799, 27 S.E. 164, 1896 Ga. LEXIS 524 (1896).

No necessity of process and return. — Under O.C.G.A. § 44-11-30, no process or return of service is required. Hill v. Security Loan & Abstract Co., 35 Ga. App. 93, 132 S.E. 107, 1926 Ga. App. LEXIS 567 (1926).

Bona fide claim to possession good defense. — That the alleged intruder claims the legal right to possession of the land in good faith is a legal defense against eviction under such process. Hill v. Security Loan & Abstract Co., 35 Ga. App. 93, 132 S.E. 107, 1926 Ga. App. LEXIS 567 (1926).

Where evidence is conflicting, verdict against defendant should not be directed. Stilwell v. Watkins, 135 Ga. 149, 68 S.E. 1114, 1910 Ga. LEXIS 449 (1910).

Where the evidence is conflicting, the plaintiff should not be nonsuited. Coffey v. Pace, 106 Ga. 293, 32 S.E. 115, 1898 Ga. LEXIS 83 (1898).

Certiorari is proper remedy where dissatisfied with judgment. — The proper procedure by a party dissatisfied with a judgment in the proceeding is by certiorari, not by appeal. Rigell v. Sirmans, 123 Ga. 455, 51 S.E. 381, 1905 Ga. LEXIS 492 (1905).

RESEARCH REFERENCES

Am. Jur. 2d.
25 Am. Jur. 2d, Ejectment, §§ 1 et seq.
C.J.S.
28A C.J.S., Ejectment, §§ 1 et seq., 24 et seq.
ALR.
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 A.L.R. 1369; 28 A.L.R. 1333; 64 A.L.R. 900.

Right to eject customer from store, 33 A.L.R. 421.

Life tenant's right of action for injury or damage to property, 49 A.L.R.2d 1117.

Right of landlord legally entitled to possession to dispossess tenant without legal process, 6 A.L.R.3d 177.

44-11-31. Sheriff competent to administer oath to person in possession.

The sheriff shall be a competent officer to administer the oath to the person in possession if he desires to tender the counteraffidavit provided for in Code Section 44-11-30.

History.
Ga. L. 1853-54, p. 52, § 2; Code 1863, § 3980; Code 1868, § 4001; Code 1873, § 4073; Code 1882, § 4073; Civil Code 1895, § 4809; Civil Code 1910, § 5381; Code 1933, § 105-1502.

RESEARCH REFERENCES

C.J.S.
28A C.J.S., Ejectment, § 34 et seq.

44-11-32. Procedure on submission of counteraffidavit; trial.

If the party in possession submits a counteraffidavit as provided in Code Section 44-11-30, the sheriff shall not turn him out of possession but shall leave both parties in their respective positions. In such an

event, the sheriff shall return both affidavits to the office of the clerk of the superior court of the county in which the land is located for a trial of the issue before a jury in accordance with the laws of this state.

History.
Ga. L. 1853-54, p. 52, § 3; Code 1863, § 3981; Code 1868, § 4002; Code 1873, § 4074; Code 1882, § 4074; Civil Code 1895, § 4810; Civil Code 1910, § 5382; Code 1933, § 105-1503.

JUDICIAL DECISIONS

Jurisdiction of superior court exclusive. Chambliss v. Hawkins, 123 Ga. 361, 51 S.E. 337, 1905 Ga. LEXIS 468 (1905).

When trial held. — The proceeding under O.C.G.A. § 44-11-30 being strictly summary and there being no provision as to when an issue formed upon a counter-affidavit to such a proceeding under O.C.G.A. § 44-11-32 may be tried, the trial of such an issue may be held at the term of court during which the counter-affidavit is filed. Hill v. Security Loan & Abstract Co., 35 Ga. App. 93, 132 S.E. 107, 1926 Ga. App. LEXIS 567 (1926).

Purchasers of real property under warranty deed from the record title holder's brother sufficiently established their good faith to be entitled to a jury trial on the title holder's claim in ejectment; therefore, a jury verdict in the purchasers' favor was upheld. Sims v. Merritt, 270 Ga. App. 877, 608 S.E.2d 547, 2004 Ga. App. LEXIS 1661 (2004).

Case on intruder warrant could not be in magistrate court. — Superior court erred in finding that the later-filed action, seeking an intruder warrant, had to be abated according to O.C.G.A. § 9-2-44, because, per the explicit language of O.C.G.A. § 44-11-32, the case on the intruder warrant could not have been brought in the magistrate court and, thus, the prior pending action doctrine did not apply. Brixmor/IA Northeast Plaza, LLC v. Sublet Atlanta Realty, LLC, 347 Ga. App. 223, 818 S.E.2d 681, 2018 Ga. App. LEXIS 493 (2018).

RESEARCH REFERENCES

Am. Jur. 2d.
25 Am. Jur. 2d, Ejectment, §§ 75 et seq., 44 et seq.

C.J.S.
28A C.J.S., Ejectment, § 111 et seq.

44-11-33. Issuance of writ of possession; fi. fa. for costs.

If the jury, upon the trial provided for in Code Section 44-11-32, finds for the plaintiff, the clerk of the court shall issue a writ of possession and a fi. fa. for the costs of the proceeding.

History.
Ga. L. 1853-54, p. 52, § 3; Code 1863, § 3982; Code 1868, § 4003; Code 1873, § 4075; Code 1882, § 4075; Civil Code 1895, § 4811; Civil Code 1910, § 5383; Code 1933, § 105-1504.

RESEARCH REFERENCES

Am. Jur. 2d.
25 Am. Jur. 2d, Ejectment, § 134 et seq.

C.J.S.
28A C.J.S., Ejectment, § 131 et seq.

CHAPTER 12

RIGHTS IN PERSONALTY

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Article 3

Bailments

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Part 2

Hiring

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44-12-61. Qualified ownership and rights of hirer.
44-12-62. Duties of hirer; liability for acts of bailor's agents.
44-12-63. Obligations of bailor.
44-12-64. Duty to return property; assumption of risks; time of return.
44-12-65. Effect of breach of contract; action for conversion by bailor.
44-12-66. Effect of loss or destruction of thing hired; liability of hirer.
44-12-67. When hirer may relet; effect of reletting without consent of bailor.
44-12-68. Consent required for removal of hired thing from state or hazardous use.
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44-12-322. Effect of part on other laws of this state.

Cross references.
Obtaining of title to personal property through adverse possession, § 44-5-177.

RESEARCH REFERENCES

ALR.
Bailee's duty to insure bailed property, 28 A.L.R.3d 513.
Modern status of rules as to ownership of treasure trove as between finder and owner of property on which found, 61 A.L.R.4th 1180.

ARTICLE 1

IN GENERAL

44-12-1. Partition of personal property.

Application may be made and partition of personal property may be obtained in the same manner and under the same regulations as are prescribed by law for obtaining a partition of lands and tenements.

History.
Orig. Code 1863, § 3908; Code 1868, § 3938; Code 1873, § 4008; Code 1882, § 4008; Civil Code 1895, § 4798; Civil Code 1910, § 5370; Code 1933, § 85-1707.

Law reviews.
For article, "Joint Bank Accounts: A Different Form of Joint Tenancy," see 17 Ga. St. B.J. 184 (1981).

JUDICIAL DECISIONS

Superior courts have jurisdiction in matters of partition; therefore, a petition to a city court for a partition of personal property is a nullity and not amendable. Roberson v. Bennett, 20 Ga. App. 590, 93 S.E. 297, 1917 Ga. App. LEXIS 978 (1917).

RESEARCH REFERENCES

Am. Jur. 2d.
59 Am. Jur. 2d, Partition, § 11.
C.J.S.
68 C.J.S., Partition, § 29.
ALR.
Partition: division of building, 28 A.L.R. 727.

ARTICLE 2

CHOSES IN ACTION

JUDICIAL DECISIONS

No particular language needed for valid assignment of chose in action. — To constitute a valid assignment of a chose in action, either in toto or pro tanto, no particular form of words or formal instrument is necessary. Any language which makes an appropriation of the funds amounts to an equitable assignment. Salzburger Bank v. Standard Oil Co., 173 Ga. 722, 161 S.E. 584, 1931 Ga. LEXIS 390 (1931).

RESEARCH REFERENCES

ALR.
Priority of assignment of chose in action over subsequent garnishment as affected by lack of notice to debtor of assignment, 52 A.L.R. 109.

Rights and remedies incident to subrogation to one but not both elements of a single cause of action for injury to person and damage to property, 140 A.L.R. 1241.

44-12-20. "Chose in action" defined.

A chose in action is personalty to which the owner has a right of possession in the future or a right of immediate possession which is being wrongfully withheld.

History.
Orig. Code 1863, § 2219; Code 1868, § 2213; Code 1873, § 2239; Code 1882, § 2239; Civil Code 1895, § 3072; Civil Code 1910, § 3648; Code 1933, § 85-1801.

JUDICIAL DECISIONS

"Personalty" includes rent. Few v. Pou, 32 Ga. App. 620, 124 S.E. 372, 1924 Ga. App. LEXIS 565 (1924); Padgett v. Butler, 84 Ga. App. 297, 66 S.E.2d 194, 1951 Ga. App. LEXIS 680, transferred, 208 Ga. 28, 64 S.E.2d 446, 1951 Ga. LEXIS 523 (1951).

Stocks are personalty. Clark v. Baker, 186 Ga. 65, 196 S.E. 750, 1938 Ga. LEXIS 537 (1938).

Where "chose in action" exists. — The right to maintain an action against carrier for failure to deliver all or any of the goods specified in a bill of lading is a chose in action under O.C.G.A. § 44-12-20. Askew & Co. v. Southern Ry., 1 Ga. App. 79, 58 S.E. 242, 1907 Ga. App. LEXIS 153 (1907).

Judgment creditor's claim against proceeds of a sale of a bankruptcy debtor's interest in a marital residence awarded in divorce proceedings was wholly unsecured since the debtor's interest was a chose in action to which the creditor's judgment lien did not automatically attach and the creditor did not initiate a collateral proceeding to attach the lien to the chose in action. Souther v. First Bank (In re Sapp), No. 11-20841, 2015 Bankr. LEXIS 1065 (Bankr. S.D. Ga. Apr. 2, 2015).

An unpaid subscription to the capital stock of a corporation, after a call has been made, is a chose in action under O.C.G.A. § 44-12-20. Lynah v. Citizens & S. Bank, 136 Ga. 344, 71 S.E. 469, 1911 Ga. LEXIS 533 (1911).

The right to maintain an action for any damage done to property assigned while the property is still in the transferee's possession is a chose in action under O.C.G.A. § 44-12-20. Benjamin-Ozburn Co. v. Morrow Transf. & Storage Co., 13 Ga. App. 636, 79 S.E. 753, 1913 Ga. App. LEXIS 286 (1913).

Although a debtor in a bankruptcy proceeding has no vested title or interest in an exemption at the time of the sale or assignment, the debtor has a "chose in action" and a potential right in the nature of a defeasible title. Eibel v. Mechanics Loan & Sav. Co., 52 Ga. App. 349, 183 S.E. 133, 1935 Ga. App. LEXIS 168 (1935).

Where interest in an estate remains in the hands of the administrator, the right of an heir at law to have an interest in the estate is a chose in action. Clark v. Baker, 186 Ga. 65, 196 S.E. 750, 1938 Ga. LEXIS 537 (1938).

Limited partnership interest. — Financial payments to which a limited partner is entitled pursuant to statute or the partnership/certificate of formation is a chose in action. Prodigy Centers/Atlanta v. T-C Assocs., 269 Ga. 522, 501 S.E.2d 209, 1998 Ga. LEXIS 622 (1998).

Debts as choses in action. — The terms "choses in action" and "debts" are used by courts to represent the same thing when viewed from opposite sides; the chose in action is the right of the creditor to be paid, while the debt is the obligation of the debtor to pay. Water Processing Co. v. Toporek, 158 Ga. App. 502, 280 S.E.2d 901, 1981 Ga. App. LEXIS 2274, rev'd, 248 Ga. 597, 285 S.E.2d 21, 1981 Ga. LEXIS 1110 (1981).

A debt is a chose in action, for it is personalty which the person to whom the debt is owed has a right of immediate or future possession, and if possession is wrongfully withheld an action may be brought thereon. Anderson v. Burnham, 12 B.R. 286, 1981 Bankr. LEXIS 3524 (Bankr. N.D. Ga. 1981).

A judgment, as a debt of record, is encompassed within the definition of a chose in action. Anderson v. Burnham, 12 B.R. 286, 1981 Bankr. LEXIS 3524 (Bankr. N.D. Ga. 1981).

A bank deposit is within the definition of a chose in action. Ellenberg v. DeKalb County (In re Maytag Sales & Serv., Inc.), 23 B.R. 384, 1982 Bankr. LEXIS 3257 (Bankr. N.D. Ga. 1982).

The proper way to get at a chose in action is by garnishment. Water Processing Co. v. Toporek, 158 Ga. App. 502, 280 S.E.2d 901, 1981 Ga. App. LEXIS 2274, rev'd, 248 Ga. 597, 285 S.E.2d 21, 1981 Ga. LEXIS 1110 (1981).

A bankruptcy debtor's pre-petition claim constituted a chose in action against which a creditor's judgment lien did not attach because the creditor did not file a pre-petition garnishment action against it. Jankowski v. Dixie Power Sys. (In re Rose Marine, Inc.), 203 B.R. 511, 1996 Bankr. LEXIS 1615 (Bankr. S.D. Ga. 1996).

Attorney at law, who has money or other effects belonging to defendant in the attorney's hands, is subject to garnishment. Water Processing Co. v. Toporek, 158 Ga. App. 502, 280 S.E.2d 901, 1981 Ga. App. LEXIS 2274, rev'd, 248 Ga. 597, 285 S.E.2d 21, 1981 Ga. LEXIS 1110 (1981).

Showing of legal title required for recovery of personalty. — When the plaintiff relies on title to recover possession of personal property wrongfully withheld, plaintiff must show a legal title; a mere equitable title will not suffice. Eibel v. Mechanics Loan & Sav. Co., 52 Ga. App. 349, 183 S.E. 133, 1935 Ga. App. LEXIS 168 (1935).

Incomplete present existence of subject matter requires potential of future interest. — If the existence of the subject matter of a present transfer of title in an executed sale is not then actual or complete, it must at least be so potential as to amount to a present right in the vendor to a future interest or benefit. Eibel v. Mechanics Loan & Sav. Co., 52 Ga. App. 349, 183 S.E. 133, 1935 Ga. App. LEXIS 168 (1935).

Tort liability for subsequent property owners. — While it appears unfair for a municipality to be liable to subsequent adjacent property owners for any preexisting nuisance to their property, the nuisance is a continuing tort and, to the extent that it is a damage to property interests, would be an assignable chose in action which would pass to successors in title. Hammond v. City of Warner Robins, 224 Ga. App. 684, 482 S.E.2d 422, 1997 Ga. App. LEXIS 215 (1997), cert. denied, No. S97C0897, 1997 Ga. LEXIS 556 (Ga. May 30, 1997).

Absent potential existence of subject matter, actual future delivery required. — Where the instrument is merely an executory contract to sell, the parties may be bound, even though the subject matter is known to have neither an actual nor a potential existence, provided the agreement is not merely speculative, but contemplates an actual future delivery of the thing bargained for. Eibel v. Mechanics Loan & Sav. Co., 52 Ga. App. 349, 183 S.E. 133, 1935 Ga. App. LEXIS 168 (1935).

Determination of validity of "chose in action." — The validity of a trust of choses in action created by a settlement or other transaction inter vivos is determined by the law of the place where the transaction takes place. Clark v. Baker, 186 Ga. 65, 196 S.E. 750, 1938 Ga. LEXIS 537 (1938).

Criminal statute did not authorize private right of action. — O.C.G.A. §§ 44-12-20 and 51-10-1 did not authorize a mortgage borrower to bring a claim against a loan servicer for theft by conversion based on criminal statutes; the criminal statutes did not create a private right of action, and the borrower was limited to a tort claim for conversion. Stroman v. Bank of Am. Corp., 852 F. Supp. 2d 1366, 2012 U.S. Dist. LEXIS 54677 (N.D. Ga. 2012).

RESEARCH REFERENCES

Am. Jur. 2d.
63 Am. Jur. 2d, Property, § 25.

C.J.S.
73 C.J.S., Property, § 22.

ALR.

Necessity and sufficiency of statement in writing of consideration or price for sale of goods or choses in action in order to satisfy statute of frauds, 59 A.L.R. 1422.

Rights and remedies incident to subrogation to one but not both elements of a single cause of action for injury to person damage to property, 140 A.L.R. 1241.

Statute relating to joint tenancy in personal property as applicable to choses in action, 144 A.L.R. 1465.

44-12-21. Rights and remedies to enforce choses in action.

For every violation of an express or implied contract and for every injury done by another to one's person or property, the law gives a right to recover and a remedy to enforce it. The right is a chose in action, and the remedy is an action at law.

History.

Orig. Code 1863, § 2223; Code 1868, § 2217; Code 1873, § 2243; Code 1882, § 2243; Civil Code 1895, § 3076; Civil Code 1910, § 3652; Code 1933, § 85-1802.

JUDICIAL DECISIONS

Creation of right of action. — Nothing is needed under O.C.G.A. § 44-12-21 but a right in the plaintiff and some invasion of that right by the defendant to create a right of action. Stafford v. Maddox, 87 Ga. 537, 13 S.E. 559, 1891 Ga. LEXIS 218 (1891).

There can be no right of action until there has been a wrong, that is, a violation of a legal right. City of Columbus v. Anglin, 120 Ga. 785, 48 S.E. 318, 1904 Ga. LEXIS 708 (1904); Strachan Shipping Co. v. Hazlip-Hood Cotton Co., 161 Ga. 480, 131 S.E. 283, 1926 Ga. LEXIS 288 (1926).

O.C.G.A. § 44-12-21 is remedy which the law gives to enforce a right, arising from the violation of a contract, or for an injury done to a person or property. Chisholm v. Lewis & Co., 66 Ga. 729, 1881 Ga. LEXIS 98 (1881); State Hwy. Dep't v. Noble, 220 Ga. 410, 139 S.E.2d 318, 1964 Ga. LEXIS 571 (1964).

O.C.G.A. § 44-12-21 should be harmonized as to right and remedy with O.C.G.A. § 9-2-3 unless the law forbids. Cox v. Strickland, 120 Ga. 104, 47 S.E. 912, 1904 Ga. LEXIS 456 (1904).

Right of action for tort is "chose in action" under O.C.G.A. § 44-12-21. Gamble v. Cent. R.R. & Banking Co., 80 Ga. 595, 7 S.E. 315, 1888 Ga. LEXIS 198 (1888); Central R.R. & Banking Co. v. Brunswick & W.R.R., 87 Ga. 386, 13 S.E. 520, 1891 Ga. LEXIS 173 (1891), overruled, Guhl v. Davis, 242 Ga. 356, 249 S.E.2d 43, 1978 Ga. LEXIS 1204 (1978).

Assignability. — Pursuant to Georgia law, the debtor's cause of action for wrongful foreclosure was an injury to property, which made it an assignable chose in action. Colony Bank Worth v. 150 Beachview Holdings, LLC (In re Fry), No. 03-20394, No. 06-02037, 2007 Bankr. LEXIS 4743 (Bankr. S.D. Ga. Mar. 23, 2007).

Recovery for damage to property is not bar to subsequent action for injury to person where one sustains both injuries from the same act or acts of negligence of another. Endsley v. Georgia Ry. & Power Co., 37 Ga. App. 439, 140 S.E. 386, 1927 Ga. App. LEXIS 731 (1927), aff'd, 167 Ga. 416, 145 S.E. 855, 1928 Ga. LEXIS 166 (1928).

Instruction as to unrelated matters inappropriate. — In a suit to recover compensation for the damaging of real property as the consequence of a public improvement, instructions as to the measure of damages and relevant to a tort action are not appropriate as they are issues which were neither made by the pleadings nor the evidence. Clarke County Sch. Dist. v. Madden, 99 Ga. App. 670, 110 S.E.2d 47, 1959 Ga. App. LEXIS 931 (1959).

RESEARCH REFERENCES

Am. Jur. 2d.
63 Am. Jur. 2d, Property, § 23.
C.J.S.
73 C.J.S., Property, § 22.
ALR.
Presence of noxious weeds as ground for rescission of contract for purchase of land, 2 A.L.R. 1511.

Necessity, as condition of action at law, a defense thereto, based on rescission of contract, of return or tender before act of securities, commercial paper, or documents evidencing proper or contractual rights received as consideration, 105 A.L.R. 1003.

Hotel or innkeeper's liability for refusal to honor reservation, 58 A.L.R.3d 369.

Measure and element of damages recoverable from vendor where there has been a mistake as to amount of land conveyed, 94 A.L.R.3d 1091.

44-12-22. Assignment of choses in action arising upon contracts.

Except as may be otherwise provided in Title 11, all choses in action arising upon contract may be assigned so as to vest the title in the assignee, but he takes it, except negotiable instruments subject to the equities existing between the assignor and debtor at the time of the assignment, and until notice of the assignment is given to the person liable.

History.
Orig. Code 1863, § 2224; Code 1868, § 2218; Code 1873, § 2244; Code 1882, § 2244; Civil Code 1895, § 3077; Civil Code 1910, § 3653; Code 1933, § 85-1803; Ga. L. 1943, p. 263, § 1; Ga. L. 1952, p. 225, § 9; Ga. L. 1982, p. 3, § 44; Ga. L. 1987, p. 3, § 44.
Law reviews.
For note, "Wrongful Refusal to Pay Insurance Claims in Georgia," see 13 Ga. L. Rev. 935 (1979).

JUDICIAL DECISIONS

Analysis

General Consideration
Requirements for Assignment of Choses in Action
Assignable Choses in Action
Rights of Parties

General Consideration

O.C.G.A. § 44-12-22 makes all choses in action assignable with full protection to the debtor as to all equities existing until the time of notice. Gilmore v. Bangs, 55 Ga. 403, 1875 Ga. LEXIS 438 (1875); Baer v. English & Co., 84 Ga. 403, 11 S.E. 453, 1889 Ga. LEXIS 276 (1889); Hartford Fire Ins. Co. v. Amos, 98 Ga. 533, 25 S.E. 575, 1896 Ga. LEXIS 92 (1896); Herring v. First Nat'l Bank, 13 Ga. App. 492, 79 S.E. 359, 1913 Ga. App. LEXIS 231 (1913); Few v. Pou, 32 Ga. App. 620, 124 S.E. 372, 1924 Ga. App. LEXIS 565 (1924); Lamon v. Perry, 33 Ga. App. 248, 125 S.E. 907, 1924 Ga. App. LEXIS 829 (1924).

Except where contract involves relation of personal confidence, such as to show that the party conferring the rights must necessarily have intended them to be exercised only by that party upon whom they were actually conferred. Tifton, T. & G. Ry. v. Bedgood & Co., 116 Ga. 945, 43 S.E. 257, 1903 Ga. LEXIS 121 (1903); Adair v. Smith, 23 Ga. App. 290, 98 S.E. 224, 1919 Ga. App. LEXIS 91 (1919).

Intent of O.C.G.A. § 44-12-22. — To avoid disturbing the time-honored rule

that none save the holder of the legal title can prosecute an action, O.C.G.A. § 44-12-22 provides that a regular assignment, in conformity to established custom, should operate to pass the legal title, and thus enable the assignee to maintain a suit in own name. Haug v. Riley, 101 Ga. 372, 29 S.E. 44, 1897 Ga. LEXIS 236 (1897).

The manifest intent of O.C.G.A. § 44-12-22 seems to be that the notice prescribed is intended to fix the status of all equities, and that, after such notice has been given, any equities subsequently arising are barred. Ellis v. Dudley, 19 Ga. App. 566, 91 S.E. 904, 1917 Ga. App. LEXIS 239 (1917).

Manner of assignment not prescribed by this section. — O.C.G.A. § 44-12-22 does not undertake to prescribe the manner in which choses in action may be assigned so as to vest the title. Haug v. Riley, 101 Ga. 372, 29 S.E. 44, 1897 Ga. LEXIS 236 (1897).

O.C.G.A. § 44-12-22 does not prohibit parties from providing that their contract shall not be assignable. Mingledorff's, Inc. v. Hicks, 133 Ga. App. 27, 209 S.E.2d 661, 1974 Ga. App. LEXIS 956 (1974).

O.C.G.A. §§ 9-12-21 and 44-12-22 must be construed together harmoniously. Western Nat'l Bank v. Maverick Nat'l Bank, 90 Ga. 339, 16 S.E. 942, 1892 Ga. LEXIS 182 (1892).

"Assigned" means transferred. Haug v. Riley, 101 Ga. 372, 29 S.E. 44, 1897 Ga. LEXIS 236 (1897).

Damages to property and person distinguished. — O.C.G.A. §§ 44-12-22 and 44-12-24 distinguish damages to property and damages to person, and under them a right of action for damage to the person cannot be assigned, and a right of action for damage to property can be assigned. Benjamin-Ozburn Co. v. Morrow Transf. & Storage Co., 13 Ga. App. 636, 79 S.E. 753, 1913 Ga. App. LEXIS 286 (1913).

Executed sale and executory contract to sell distinguished. — In an executed sale, as distinguished from an executory contract to sell, where the instrument purports to make a present transfer of title, if the existence of the subject matter is not then actual or complete, it must at least be so potential as to amount to a present right in the vendor to a future interest or benefit; but where the instrument is merely an executory contract to sell, the parties may be bound, even though the subject matter is known to have neither an actual nor a potential existence, provided the agreement is not merely speculative, but contemplates an actual future delivery of the thing bargained for. Eibel v. Mechanics Loan & Sav. Co., 52 Ga. App. 349, 183 S.E. 133, 1935 Ga. App. LEXIS 168 (1935).

Requirements for Assignment of Choses in Action

Assignment of chose in action must be in writing. Hawkes v. Mobley, 174 Ga. 481, 163 S.E. 494, 1932 Ga. LEXIS 74 (1932); Jarecky v. Arnold, 51 Ga. App. 954, 182 S.E. 66, 1935 Ga. App. LEXIS 505 (1935); Lumpkin v. American Sur. Co., 69 Ga. App. 887, 27 S.E.2d 412, 1943 Ga. App. LEXIS 210 (1943).

No special form of words is necessary to make assignment of chose in action. — Any language, however informal, will be sufficient to vest the title in the assignee, if it shows the intention of the owner of the chose in action to at once transfer it so that it will be the property of the transferee. Southern Mut. Life Ins. Ass'n v. Durdin, 132 Ga. 495, 64 S.E. 264, 1909 Ga. LEXIS 341 (1909); Myers v. Adams, 14 Ga. App. 520, 81 S.E. 595, 1914 Ga. App. LEXIS 359 (1914); Peck v. Calhoun, 38 Ga. App. 764, 145 S.E. 528, 1928 Ga. App. LEXIS 445 (1928); Baker v. Sutton, 47 Ga. App. 176, 170 S.E. 95, 1933 Ga. App. LEXIS 331 (1933); Lumpkin v. American Sur. Co., 61 Ga. App. 777, 7 S.E.2d 687, 1940 Ga. App. LEXIS 264 (1940).

Where the petition set forth a right in the petitioners, as assignees of a written option, to a reconveyance of described land upon the tender and offer to perform as made to the defendant, the court did not err in overruling the motion to dismiss the action. Barron v. Anderson, 204 Ga. 7, 48 S.E.2d 846, 1948 Ga. LEXIS 546 (1948).

Proof of immediate change of ownership required for assignment. — In order to infer an equitable assignment,

Requirements for Assignment of Choses in Action (Cont'd)

such facts and circumstances must appear, as would not only raise an equity between the assignor and the assignee, but show that the parties contemplated an immediate change of ownership with respect to the particular fund in question, not a change of ownership when the fund should be collected or realized, but at the time of the transaction relied upon to constitute the assignment. Brown Guano Co. v. Bridges, 34 Ga. App. 652, 130 S.E. 695, 1925 Ga. App. LEXIS 460 (1925).

Potential existence of fund assigned required. — It is not necessary that the fund attempted to be assigned shall be in actual existence at the time, for it is well settled that it is sufficient if it exists potentially. Brown Guano Co. v. Bridges, 34 Ga. App. 652, 130 S.E. 695, 1925 Ga. App. LEXIS 460 (1925).

Previous acceptance by debtor required for partial assignment of debt. — A partial assignment of a debt due the assignor will not vest in the assignee such a title to the part of the debt assigned as can be enforced in a common-law action, without a previous acceptance by the debtor. Rivers v. Wright & Co., 117 Ga. 81, 43 S.E. 499, 1903 Ga. LEXIS 158 (1903); Central of Ga. Ry. v. Dover, 1 Ga. App. 240, 57 S.E. 1002, 1907 Ga. App. LEXIS 204 (1907); Ison Co. v. Atlantic Coast Line R.R., 17 Ga. App. 459, 87 S.E. 754, 1916 Ga. App. LEXIS 685 (1916).

Employer's assent to assignment of wages required to maintain action. — An action at law by the assignee against a railway company, for that part of the wages earned by the assignor at the date of the assignment, cannot be maintained, unless the railway company assented to the assignment. Central of Ga. Ry. v. Dover, 1 Ga. App. 240, 57 S.E. 1002, 1907 Ga. App. LEXIS 204 (1907).

Assignable Choses in Action

All choses in action arising upon contract, including accounts receivable, may be assigned so as to vest title and the right to sue on them in the assignee. William Iselin & Co. v. Davis, 157 Ga. App. 739, 278 S.E.2d 442, 1981 Ga. App. LEXIS 1997 (1981).

Claim arising from breach of contract to become surety on a guano note is assignable. Adams v. Williams, 125 Ga. 430, 54 S.E. 99, 1906 Ga. LEXIS 183 (1906).

Insurance policies. — A policy of insurance being a chose in action may be assigned so as to vest the title in the assignee, but the assignee takes it subject to the equities existing between the assignor and debtor at the time of the assignment. Morris v. Georgia Loan, Sav. & Banking Co., 109 Ga. 12, 34 S.E. 378, 1899 Ga. LEXIS 577 (1899); Sprouse v. Skinner, 155 Ga. 119, 116 S.E. 606, 1923 Ga. LEXIS 21 (1923); Baldwin v. Atlanta Joint Stock Land Bank, 189 Ga. 607, 7 S.E.2d 178, 1940 Ga. LEXIS 346 (1940); Parramore v. Williams, 215 Ga. 179, 109 S.E.2d 745, 1959 Ga. LEXIS 427 (1959).

After a life insurance policy has matured by the death of the insured, the policy may be assigned as any chose in action regardless of any stipulation in the policy. Progressive Life Ins. Co. v. Bohannon, 74 Ga. App. 617, 40 S.E.2d 564, 1946 Ga. App. LEXIS 598 (1946).

A beneficiary, having only a divestible interest which is not a vested right, is, in effect, divested of this interest by the assignment of an insurance policy subject to the payment of a debt. Ruis v. Bank of Albany, 213 Ga. 41, 96 S.E.2d 580, 1957 Ga. LEXIS 291 (1957).

An assignment of an insurance policy for value received which recites that it "is an absolute assignment" is an absolute assignment as against the original beneficiary, and the insured under such an assignment will have no interest in the policy after assignment. Parramore v. Williams, 215 Ga. 179, 109 S.E.2d 745, 1959 Ga. LEXIS 427 (1959).

Reinsurance company proceeding as sole claimant. — Trial court properly denied the appellant's motion to stay arbitration and granted the appellees' motion to compel arbitration because the assignment of the claims to the reinsurance company was valid and enforceable and, therefore, the reinsurance company could proceed as the sole claimant. McLarens Young Int'l, Inc. v. Am. Safety Cas. Ins. Co., 334 Ga. App. 819, 780 S.E.2d 464, 2015 Ga. App. LEXIS 730 (2015).

Subscription to capital stock of railroad company is a chose in action and assignable, and the assignee can enforce its payment under circumstances where the company could do so. Chattanooga R. & C.R.R. v. Warthen, 98 Ga. 599, 25 S.E. 988, 1896 Ga. LEXIS 110 (1896).

Any chose in action involving a property right may be assigned, and so a deed, as made after a breach, vested all the rights of the grantor as to this property, including the right to sue. Evans v. Brown, 196 Ga. 364, 27 S.E.2d 300 (1943).

Automobile retail installment sales contract. — Automobile dealer had the right to assign a retail installment sales contract, and a discount deducted from the face amount of the contract when it was sold to a finance company was not a finance charge required to be disclosed by the dealer to the purchasers. Chancellor v. Gateway Lincoln-Mercury, Inc., 233 Ga. App. 38, 502 S.E.2d 799, 1998 Ga. App. LEXIS 885 (1998).

Chose in action based on tort is transferable where it directly involves right of property. Colter v. Livingston, 154 Ga. 401, 114 S.E. 430, 1922 Ga. LEXIS 376 (1922); Lamon v. Perry, 33 Ga. App. 248, 125 S.E. 907, 1924 Ga. App. LEXIS 829 (1924); Lumpkin v. American Sur. Co., 69 Ga. App. 887, 27 S.E.2d 412, 1943 Ga. App. LEXIS 210 (1943); Ricketts v. Liberty Mut. Ins. Co., 127 Ga. App. 483, 194 S.E.2d 311, 1972 Ga. App. LEXIS 922 (1972).

While action is pending for tort, there can be no legal assignment of the cause of action or of the damages to be recovered. Gamble v. Cent. R.R. & Banking Co., 80 Ga. 595, 7 S.E. 315, 1888 Ga. LEXIS 198 (1888); Sullivan v. Curling, 149 Ga. 96, 99 S.E. 533, 1919 Ga. LEXIS 145 (1919); Colter v. Livingston, 154 Ga. 401, 114 S.E. 430, 1922 Ga. LEXIS 376 (1922).

An action of deceit arising under O.C.G.A. § 51-6-2, which is a tort, is not assignable. Bates & Co. v. Forsyth, 64 Ga. 232, 1879 Ga. LEXIS 38 (1879).

An action of deceit arising under O.C.G.A. § 51-6-2, which is a tort, is not assignable. Bates & Co. v. Forsyth, 64 Ga. 232, 1879 Ga. LEXIS 38 (1879).

Bank entitled to assign right of action against defalcating employee. — Where a surety company contracts to indemnify a bank against loss occasioned by the defalcation of any employee thereof, and upon an alleged defalcation by one of the bank's employees, the company pays the loss sustained by the bank upon the presentation to it by the bank of a claim of loss in accordance with the terms of the contract, the bank may properly transfer and assign its right of action against the employee to recover the amount of its loss to the company, and the surety company may maintain an action in its own name against the defalcating employee of the bank to recover the amount paid by it to the bank under the contract of indemnity made with the bank. Lumpkin v. American Sur. Co., 61 Ga. App. 777, 7 S.E.2d 687, 1940 Ga. App. LEXIS 264 (1940).

Liability is asset assignable by trustee in bankruptcy of a corporation under an order of the referee in bankruptcy. Baker v. Sutton, 47 Ga. App. 176, 170 S.E. 95, 1933 Ga. App. LEXIS 331 (1933).

Transfer of note is fully within the terms of O.C.G.A. § 44-12-22. Jackson v. State, 5 Ga. App. 177, 62 S.E. 726, 1908 Ga. App. LEXIS 58 (1908).

Account is assignable. — See Mordecai v. Stewart, 37 Ga. 364, 1867 Ga. LEXIS 175 (1867); Barron v. Walker, 80 Ga. 121, 7 S.E. 272, 1887 Ga. LEXIS 339 (1887); Akin v. Feagin, 90 Ga. 72, 15 S.E. 654, 1892 Ga. LEXIS 126 (1892); Nix v. Ellis, 118 Ga. 345, 45 S.E. 404, 1903 Ga. LEXIS 557 (1903); Central of Ga. Ry. v. King Bros. & Co., 137 Ga. 369, 73 S.E. 632, 1912 Ga. LEXIS 24 (1912); Southern Ry. v. Pitner & Raines, 17 Ga. App. 451, 87 S.E. 754, 1916 Ga. App. LEXIS 673 (1916).

Right of action on letter of credit is assignable. Adams v. Williams, 125 Ga. 430, 54 S.E. 99, 1906 Ga. LEXIS 183 (1906).

Bond for title is assignable. — Although a bond for title obligated the owners of certain land to make title thereto to the obligee, heirs, executors, and admin-

Assignable Choses in Action (Cont'd)

istrators, without adding assigns, it is nevertheless assignable under O.C.G.A. § 44-12-22. Fulcher & Co. v. Daniel & Son, 80 Ga. 74, 4 S.E. 259, 1887 Ga. LEXIS 324 (1887).

Architects' certificate is assignable. Timmons v. Citizens Bank, 11 Ga. App. 69, 74 S.E. 798, 1912 Ga. App. LEXIS 261 (1912).

Entry in bank book. — An entry in a bank book is equivalent to a receipt for money and is, consequently, evidence of a loan and of a contract for repayment on demand; as such, it is sufficient to establish the relation of debtor and creditor between the parties and it is assignable so as to vest a right of action in the assignee in the assignee's own name. Flanders & Huguenin v. Maynard, 58 Ga. 56, 1877 Ga. LEXIS 8 (1877).

Covenants are assignable. Tucker v. McArthur, 103 Ga. 409, 30 S.E. 283, 1898 Ga. LEXIS 134 (1898).

Right of heir to interest in ancestor's estate is assignable. Greenwood v. Greenwood, 178 Ga. 605, 173 S.E. 858, 1934 Ga. LEXIS 112 (1934).

Contingent right in certain real estate is assignable even though it is not at all certain that it would ever be transformed into a present right. Chattahoochee Holdings, Inc. v. Marshall, 146 Ga. App. 658, 247 S.E.2d 167, 1978 Ga. App. LEXIS 2496 (1978).

Title to exemption assignable by debtor. — Although a debtor has no vested title or interest in an exemption at the time of its sale or assignment, the debtor has a chose in action and a potential right in the nature of a defeasible title, which is assignable. Eibel v. Mechanics Loan & Sav. Co., 52 Ga. App. 349, 183 S.E. 133, 1935 Ga. App. LEXIS 168 (1935).

An interest in the title to an exemption may be assigned in good faith to a creditor, not only before the exemption is set aside by the court, but even before bankruptcy proceedings are instituted. Eibel v. Mechanics Loan & Sav. Co., 52 Ga. App. 349, 183 S.E. 133, 1935 Ga. App. LEXIS 168 (1935).

O.C.G.A. § 44-12-22 inapplicable to bill of lading. Postell v. Avery & Co., 12 Ga. App. 507, 77 S.E. 666, 1913 Ga. App. LEXIS 614 (1913).

Exclusive use of name. — The exclusive use of a person's name conveyed to a party for consideration may be assigned by that party in an enforceable contract. Fletcher v. Atlanta Bd. of Realtors, Inc., 250 Ga. 21, 295 S.E.2d 737, 1982 Ga. LEXIS 979 (1982).

Legal malpractice claims. — Appellate court properly affirmed the denial of summary judgment to a lawyer on a legal malpractice claim because in light of assignments allowable under O.C.G.A. §§ 44-12-22 and 44-12-24, the Georgia Supreme Court agrees that the assignment of legal malpractice claims is not prohibited as a matter of law. Villanueva v. First Am. Title Ins. Co., 292 Ga. 630, 740 S.E.2d 108, 2013 Ga. LEXIS 268 (2013).

Georgia Supreme Court agrees with the Georgia Court of Appeals that legal malpractice claims are not per se unassignable. Villanueva v. First Am. Title Ins. Co., 292 Ga. 630, 740 S.E.2d 108, 2013 Ga. LEXIS 268 (2013).

Rights of Parties

Assignee can acquire no greater rights than the assignor had. Healey v. Morgan, 135 Ga. App. 915, 219 S.E.2d 628, 1975 Ga. App. LEXIS 1871 (1975).

Contracting parties may waive or renounce what law has established in their favor provided such waiver or renunciation does not thereby injure others or affect the public interest. Young v. John Deere Plow Co., 102 Ga. App. 132, 115 S.E.2d 770, 1960 Ga. App. LEXIS 570 (1960).

Debtor under a conditional sale contract, by expressly agreeing not to set up as a defense to an action on the contract by the assignee thereof any claim the debtor may have had against the assignor of the contract, waived the right to plead failure of consideration in an action on the contract by the assignee, and such plea and the cross action for the down payment are without merit. Jones v. Universal C.I.T. Credit Corp., 88 Ga. App. 24, 75 S.E.2d 822, 1953 Ga. App. LEXIS 998 (1953); Young v. John Deere Plow Co., 102 Ga. App. 132, 115 S.E.2d 770, 1960 Ga. App. LEXIS 570 (1960).

Because third party failed to present sufficient evidence supporting its position that it had a right, as successor in interest, to sue on a creditor's account with the creditor's debtor in order to support that right, summary judgment in its favor in suit against the debtor was erroneously entered. Ponder v. CACV of Colo., LLC, 289 Ga. App. 858, 658 S.E.2d 469, 2008 Ga. App. LEXIS 218 (2008).

Agreement for debt setoff. — If the agreement is for a consideration, it is binding on the same terms as any other agreement; and if it is executed, it needs no consideration. National Sur. Corp. v. Algernon Blair, Inc., 114 Ga. App. 30, 150 S.E.2d 256, 1966 Ga. App. LEXIS 648, rev'd, 222 Ga. 672, 151 S.E.2d 724, 1966 Ga. LEXIS 595 (1966).

Claim of assignee of judgment is subject to such equities and defenses as may have existed in favor of the judgment debtor against the judgment creditor at the time of the assignment, but is not subject to rights which did not then exist in favor of such judgment debtor and of which the judgment debtor did not become possessed until some time later, as by the subsequent purchase of judgments against the judgment creditor. Sheffield v. Preacher, 175 Ga. 719, 165 S.E. 742, 1932 Ga. LEXIS 318 (1932).

Equities existing between assignor and debtor include the terms and conditions of the contract under which the indebtedness arose. National Sur. Corp. v. Algernon Blair, Inc., 114 Ga. App. 30, 150 S.E.2d 256, 1966 Ga. App. LEXIS 648, rev'd, 222 Ga. 672, 151 S.E.2d 724, 1966 Ga. LEXIS 595 (1966).

Holder's rights unaffected by equities between maker and payee. — The equities between the maker and the payee, originating after a transfer to a third person, will not affect the rights of the holder, though the transfer is made after the note becomes due. Central Trust Co. v. Fargason, 21 Ga. App. 696, 94 S.E. 902, 1918 Ga. App. LEXIS 484 (1918).

Effect of mere equitable assignment. — An assignee may sue in own name, but a mere equitable assignment or interest arising from paying for a chose in action, without written transfer, gives no right to sue upon it in the name of the equitable assignee. Florida Coca Cola Bottling Co. v. Ricker, 136 Ga. 411, 71 S.E. 734, 1911 Ga. LEXIS 562 (1911). See also Lamon v. Perry, 33 Ga. App. 248, 125 S.E. 907, 1924 Ga. App. LEXIS 829 (1924).

Right to sue where subject matter of assignment not mere naked right of action. — Where the subject matter of a sale, purchase, and assignment is not a mere naked right of action, but assignable property, such as an execution, mortgage and note, the ownership carried with it a right to sue as an incident of such ownership. Reed v. Janes, 84 Ga. 380, 11 S.E. 401, 1889 Ga. LEXIS 273 (1889).

Upon the transfer to the plaintiffs of a bill of lading calling for a full quantity of corn, there is assigned to plaintiffs the right of action for the defendant's loss or conversion of a part of the corn. Askew & Co. v. Southern Ry., 1 Ga. App. 79, 58 S.E. 242, 1907 Ga. App. LEXIS 153 (1907).

Mere equitable title insufficient when plaintiff relies on title to recover possession of personal property wrongfully withheld from the plaintiff who must show a legal title; a mere equitable title will not suffice. Eibel v. Mechanics Loan & Sav. Co., 52 Ga. App. 349, 183 S.E. 133, 1935 Ga. App. LEXIS 168 (1935).

Absent description of property equitable interest conveyed by instrument other than draft. — An instrument, other than a draft, purporting to assign a sum of money to be paid out of a fund claimed to be in the hands of another, without describing the identical money intended to be conveyed, will not of itself convey legal title to any part of the fund which in fact may be in the hands of such other person; if anything is conveyed it is an equitable interest in the entire fund. Western & A.R.R. v. Union Inv. Co., 128 Ga. 74, 57 S.E. 100, 1907 Ga. LEXIS 31 (1907).

Choses in action are not subject to seizure and sale under executions based upon ordinary judgment, and can only be reached by the judgment creditor through a garnishment or some other collateral proceeding; and, inasmuch as such garnishment or collateral proceeding is necessary to fix the lien of the judgment so as to make it effective, an

Rights of Parties (Cont'd)

assignment of the chose in action by the debtor before the institution of such collateral proceeding passes to the assignee the property of the debtor in the chose in action assigned, freed from the lien of a general judgment previously rendered against the assignor. Greenwood v. Greenwood, 178 Ga. 605, 173 S.E. 858, 1934 Ga. LEXIS 112 (1934).

Assignment of entire chose in action entitled to priority over prior partial assignment. — Where a second assignment is of the entire chose in action, it vests in the assignee the legal title to the whole chose in action, and it is entitled to priority over the holder of a prior partial assignment of a chose in action to which the debtor of the assignor has not assented. King Bros. & Co. v. Central of Ga. Ry., 135 Ga. 225, 69 S.E. 113, 1912A Am. Ann. Cas. 672 (1910).

RESEARCH REFERENCES

Am. Jur. 2d.

6 Am. Jur. 2d, Assignments, §§ 58, 59. 63 Am. Jur. 2d, Property, §§ 26, 27.

Am. Jur. Pleading and Practice Forms.

2A Am. Jur. Pleading and Practice Forms, Assignments, § 2.

C.J.S.

6A C.J.S., Assignments, § 36. 73 C.J.S., Property, § 22.

ALR.

Assignability of right of action ex delicto for injury to property, as affected by statute, 5 A.L.R. 130.

Payment of judgment by debtor without notice of its assignment, 32 A.L.R. 1021.

Priority as between one who redelivers papers or securities not transferable by endorsement or delivery to pledgor or assignee and a bona fide purchaser from the latter, 37 A.L.R. 1540.

Priority of assignment of chose in action over subsequent garnishment as affected by lack of notice to debtor of assignment, 52 A.L.R. 109.

Meaning and scope of covenant in assignment of claim as regards legality or quality of claim, 91 A.L.R. 548.

Assignability of statutory claim against employer for nonpayment of wages, 48 A.L.R.2d 1385.

Law governing assignment of wages or salary, 1 A.L.R.3d 927.

Validity, in contract for installment sale of consumer goods, or commercial paper given in connection therewith, of provision waiving, as against assignee, defenses good against seller, 39 A.L.R.3d 518.

44-12-23. Assignment of a fund.

A fund may be assigned in writing. The written acceptance of a draft will be treated as an assignment pro tanto of funds of the drawer in the hands of the acceptor.

History.

Civil Code 1895, § 3078; Civil Code 1910, § 3654; Code 1933, § 85-1804.

History of Section.

This Code section is derived from the decisions in Baer v. English & Co., 84 Ga. 403, 11 S.E. 453 (1890) and Jones v. Glover, 93 Ga. 484, 21 S.E. 50 (1893).

JUDICIAL DECISIONS

O.C.G.A. § 44-12-23 applies solely to sureties. Davis v. Perkins, 178 Ga. 195, 172 S.E. 562, 1934 Ga. LEXIS 8 (1934).

RESEARCH REFERENCES

Am. Jur. 2d.
6 Am. Jur. 2d, Assignments, §§ 51-54.
C.J.S.
6A C.J.S., Assignments, § 19.
ALR.
Priority as between one who redelivers papers or securities not transferable by endorsement or delivery to pledgor or assignee and a bona fide purchaser from the latter, 37 A.L.R. 1540.

Enforceability in equity of assignment of part of a debt without the debtor's consent, 80 A.L.R. 413.

Meaning and scope of covenant in assignment of claim as regards legality or quality of claim, 91 A.L.R. 548.

Assignability of claim for tax refund, and rights of assignee in respect thereof, 134 A.L.R. 1202.

44-12-24. What rights of action may and may not be assigned.

Except for those situations governed by Code Sections 11-2-210 and 11-9-406, a right of action is assignable if it involves, directly or indirectly, a right of property. A right of action for personal torts, for legal malpractice, or for injuries arising from fraud to the assignor may not be assigned.

History.
Civil Code 1895, § 3079; Civil Code 1910, § 3655; Code 1933, § 85-1805; Ga. L. 2001, p. 362, § 33; Ga. L. 2013, p. 634, § 1/HB 160; Ga. L. 2013, p. 636, § 1/HB 359.
History of Code section.
This Code section is derived from the decisions in Central R.R. & Banking Co. v. Brunswick & W.R.R., 87 Ga. 386, 13 S.E. 520 (1891) and Sullivan v. Curling, 149 Ga. 96, 99 S.E. 533 (1919).
Law reviews.
For article, "Uninsured Motorist Coverage in Georgia," see 4 Ga. St. B.J. 329 (1968).

For note, "Wrongful Refusal to Pay Insurance Claims in Georgia," see 13 Ga. L. Rev. 935 (1979).

For note, "Conflicts of Interest in the Liability Insurance Setting," see 13 Ga. L. Rev. 973 (1979).

For comment, "The Employer's/Insurance Carrier's Right to Subrogation Under the Georgia Workers' Compensation Act (O.C.G.A. Section 34-9-11.1): How Long Will It Last?," see 46 Mercer L. Rev. 1575 (1995).

For annual survey on legal ethics, see 64 Mercer L. Rev. 189 (2012).

For annual survey on legal ethics, see 65 Mercer L. Rev. 175 (2013).

For note, "Laissez Fair: The Case for Alternative Litigation Funding and Assignment of Lawsuit Proceeds in Georgia," see 49 Ga. L. Rev. 1121 (2015).

JUDICIAL DECISIONS

Analysis

General Consideration
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General Consideration

"Assign" means transfer so as to vest title in the recipient and allow such person to sue directly. McLanahan v. Keith, 135 Ga. App. 117, 217 S.E.2d 420, 1975 Ga. App. LEXIS 1589 (1975); In re Carroll, 89 B.R. 1007, 1988 Bankr. LEXIS 1373 (Bankr. N.D. Ga. 1988); Shook v. Pilot Life Ins. Co., 188 Ga. App. 714, 373 S.E.2d 813, 1988 Ga. App. LEXIS 1163 (1988).

Right of action is assignable if it is for damage to property or a right of action or chose in action arising from tort which involves, directly or indirectly, a right of property. Sullivan v. Curling, 149 Ga. 96, 99 S.E. 533, 1919 Ga. LEXIS 145 (1919); Lumpkin v. American Sur. Co., 69 Ga. App. 887, 27 S.E.2d 412, 1943 Ga. App. LEXIS 210 (1943).

Contract to share recovery obtained not assignment of right of action. — Where a widowed mother had a cause of action against a railway company to recover damages for the homicide of her son, and she entered into a contract with her children, by the terms of which she agreed, in consideration of advances, made by them to her for the purpose of defraying the expenses of prosecuting her cause of action to share equally with them in any recovery she might obtain in her suit, this was not an assignment of the right of action for the personal tort. Anderson v. Anderson, 12 Ga. App. 706, 78 S.E. 271, 1913 Ga. App. LEXIS 721 (1913).

Conveyance of title to land. — Conveyance of title to land neither passes title to timber cut nor assigns the right to recover damages for the trespass resulting from its wrongful removal and conversion. Rome Kraft Co. v. Davis, 213 Ga. 899, 102 S.E.2d 571, 1958 Ga. LEXIS 316 (1958).

Agreement to pay contingent fee not assignment. — An agreement to pay a contingent fee does not confer on an attorney the right of an assignee. Winslow Bros. Co. v. Murphy, 139 Ga. 231, 77 S.E. 25, 1913 Ga. LEXIS 388 (1913).

Subrogation generally. — While the common law recognized subrogation in property damage claims, it did not recognize it in personal injury claims. These principles have been followed generally in the Official Code of Georgia Annotated. Carter v. Banks, 254 Ga. 550, 330 S.E.2d 866, 1985 Ga. LEXIS 761 (1985).

Subrogation and assignment distinguished. — Subrogation effects an assignment by operation of law, but differs from an ordinary assignment of the debt in that an assignment assumes the continued existence of the debt, while subrogation follows upon its payment. Maryland Cas. Co. v. Brown, 321 F. Supp. 309, 1971 U.S. Dist. LEXIS 14970 (N.D. Ga. 1971).

Health insurance policy which merely purported to give the insurer a right to be reimbursed for benefits paid on behalf of the insured, to the extent of monies received by the insured from the tort-feasor "as a result of judgment, settlement or otherwise" did not purport to effect an assignment of a cause of action, as proscribed by O.C.G.A. § 44-12-24, but created a valid and enforceable right of subrogation. Shook v. Pilot Life Ins. Co., 188 Ga. App. 714, 373 S.E.2d 813, 1988 Ga. App. LEXIS 1163 (1988).

Subrogee is limited to indemnification only. Maryland Cas. Co. v. Brown, 321 F. Supp. 309, 1971 U.S. Dist. LEXIS 14970 (N.D. Ga. 1971).

Judgment creditor could not set aside fraudulent transfers that occurred prior to assignment of loan. — Because of the anti-assignment statute, O.C.G.A. § 44-12-24, a judgment creditor did not have standing under the Uniform Fraudulent Transfers Act (UFTA) to contest transfers by the debtor that occurred prior to assignment of the debtor's loan to the creditor. Merrill Ranch Props., LLC v. Austell, 336 Ga. App. 722, 784 S.E.2d 125, 2016 Ga. App. LEXIS 197 (2016), cert. denied, No. S16C1438, 2016 Ga. LEXIS 721 (Ga. Oct. 31, 2016).

Assignable Rights of Action

1. Requirements for Assignment

Express agreement required to assign tort action. — A right of action for a tort is not extinguished and hence not assignable under this section by a compromise settlement in which a given sum is to be paid to the injured party, unless it be expressly agreed between the parties that

the promise to pay the amount fixed by the settlement shall be accepted as a satisfaction within terms of O.C.G.A. § 13-7-9 of the original claim. Fouche & Fouche v. Morris, 112 Ga. 143, 37 S.E. 182, 1900 Ga. LEXIS 72 (1900).

Form of assignment of chose in action is immaterial; it is sufficient if it is in writing and manifests the intention of the owner to transfer to the assignee title in the chose in action. Lumpkin v. American Sur. Co., 69 Ga. App. 887, 27 S.E.2d 412, 1943 Ga. App. LEXIS 210 (1943).

No joinder of assignor in suit by assignee. — Where the right of action does involve directly or indirectly a right of property, it is assignable, and the assignee must bring the suit in own name without joining the assignor. Browder v. Cox, 83 Ga. App. 738, 64 S.E.2d 460, 1951 Ga. App. LEXIS 953 (1951).

Specific assignment required to pass right of action to subsequent purchaser. — A right of action which arises from a tort and involves property does not "run with the land," and therefore does not pass to a subsequent purchaser by deed in the absence of a specific assignment thereof. Dougherty County v. Pylant, 104 Ga. App. 468, 122 S.E.2d 117, 1961 Ga. App. LEXIS 717 (1961).

Willful and malicious injury to property specifically assignable. — Court declined to reconsider the court's ruling that Count 5 of the amended complaint was assignable under O.C.G.A. § 44-12-24 because a claim under 11 U.S.C. § 523(a)(6) for willful and malicious injury to property was specifically assignable under § 44-12-24. McAfee v. Harman (In re Harman), No. 11-05534-LRC, 2021 Bankr. LEXIS 420 (Bankr. N.D. Ga. Feb. 24, 2021).

2. Specific Acts of Assignment

Right of action based on conversion of personal property is assignable. Ricketts v. Liberty Mut. Ins. Co., 127 Ga. App. 483, 194 S.E.2d 311, 1972 Ga. App. LEXIS 922 (1972).

A cause of action for unlawful conversion may be assigned. Maryland Cas. Co. v. Brown, 321 F. Supp. 309, 1971 U.S. Dist. LEXIS 14970 (N.D. Ga. 1971).

Right of action based on destruction of property in tortious manner is assignable. Davis v. Rome Kraft Co., 96 Ga. App. 450, 100 S.E.2d 473, 1957 Ga. App. LEXIS 605 (1957), rev'd, 213 Ga. 899, 102 S.E.2d 571, 1958 Ga. LEXIS 316 (1958).

A cause of action for damages to property resulting from the negligence of the defendant is an action which involves a property right and is assignable under O.C.G.A. § 44-12-24. Hubbard v. Ruff, 97 Ga. App. 251, 103 S.E.2d 134, 1958 Ga. App. LEXIS 754 (1958).

Insured's right of action in tort assignable. — Where property covered by a policy of fire insurance is destroyed, the insurer, when settling with the insured for the loss, may take, as a consideration for the settlement, an assignment of the insured's right of action in tort against another for the destruction of the property, thereby subrogating the insurer to the insured's right to recover for the loss. Hoxie v. Americus Auto. Co., 73 Ga. App. 686, 37 S.E.2d 808, 1946 Ga. App. LEXIS 388 (1946).

Counterclaim alleging that surveyor and agents trespassed on and to wife's property and interfered with her enjoyment of her real and personal property stated an assignable property injury claim; a right of action involving a property right is assignable, including a cause of action for a tort to property. Barnes v. Collins, 205 Ga. App. 750, 423 S.E.2d 308, 1992 Ga. App. LEXIS 1313 (1992).

A tort cause of action for compensatory damages for loss of property resulting from an insurer's bad faith may be assigned. Southern Gen. Ins. Co. v. Ross, 227 Ga. App. 191, 489 S.E.2d 53, 1997 Ga. App. LEXIS 834 (1997).

Reinsurance company proceeding as sole claimant. — Trial court properly denied the appellant's motion to stay arbitration and granted the appellees' motion to compel arbitration because the assignment of the claims to the reinsurance company was valid and enforceable and, therefore, the reinsurance company could proceed as the sole claimant. McLarens Young Int'l, Inc. v. Am. Safety Cas. Ins. Co., 334 Ga. App. 819, 780 S.E.2d 464, 2015 Ga. App. LEXIS 730 (2015).

Specific Acts of Assignment (Cont'd)

Assignment of tort proceeds. — Although a court had earlier rejected a debtor's reliance on O.C.G.A. § 44-12-24 in seeking a ruling that the assignment of a tort action was invalid because the debtor had assigned the future proceeds of the action, not the right of action, the assignee creditor's default allowed the court to accept the debtor's assertion that the assignment of the proceeds to be received in the future was not a valid, enforceable assignment under Georgia law; in addition, the creditor had no lien or perfected security interest in the proceeds under O.C.G.A. § 44-14-320; thus, because there was no valid assignment and because the creditor did not have a valid, perfected security interest under Georgia law, then the creditor was an unsecured creditor with only a claim based on the debtor's breach of her promise to pay. Carson v. Rhodes (In re Carson), No. R04-43220-PWB, No. R04-43220-PWB, No. 05-4018, 2006 Bankr. LEXIS 2614 (Bankr. N.D. Ga. June 12, 2006).

Heir's right of interest in estate assignable. — The right of an heir to an interest in the estate of an ancestor is a chose in action; such choses in action are assignable. Greenwood v. Greenwood, 178 Ga. 605, 173 S.E. 858, 1934 Ga. LEXIS 112 (1934).

Deed made after breach assigns proper right. — Any chose in action involving a property right may be assigned; thus, a deed made after a breach vests all the rights of the grantor as to the property, including the right of action. Evans v. Brown, 196 Ga. 634, 27 S.E.2d 300, 1943 Ga. LEXIS 395 (1943).

Bank may properly transfer and assign its right of action against defalcating employee to recover the amount of its loss to a surety company where the surety company contracts to indemnify the bank against loss occasioned by the defalcation of any employee thereof, and upon an alleged defalcation by one of the bank's employees, the company pays the loss sustained by the bank upon the presentation to it by the bank of a claim of loss in accordance with the terms of the contract, the bank may properly transfer and assign its right of action against the employee to recover the amount of its loss to the company, and the company may maintain an action in its own name against the defalcating employee of the bank to recover the amount paid by it to the bank under the contract of indemnity made with the bank. Lumpkin v. American Sur. Co., 69 Ga. App. 887, 27 S.E.2d 412, 1943 Ga. App. LEXIS 210 (1943).

The right of a bank to recover of the defendant employee, on account of the employee's alleged wrongful acts in taking or removing the money of the bank and concealing defendant's wrongful acts by false entries upon the books of the bank, is a right to recover for injury involving the bank's property right in the money. Lumpkin v. American Sur. Co., 69 Ga. App. 887, 27 S.E.2d 412, 1943 Ga. App. LEXIS 210 (1943).

A right of action to recover amount of checks paid out by the defendant bank, the endorsements upon which were forged by the depositor's employee and which loss had been paid by insurers under policy indemnifying the depositor against dishonesty of its employees is assignable. First Nat'l Bank v. American Sur. Co., 71 Ga. App. 112, 30 S.E.2d 402, 1944 Ga. App. LEXIS 293 (1944).

Effect of assignment by debtor of property before garnishment. — Choses in action are not subject to seizure and sale under executions based upon ordinary judgments, and can only be reached by the judgment creditor through a garnishment or some other collateral proceeding; and, inasmuch as such garnishment or collateral proceeding is necessary to fix the lien of the judgment so as to make it effective, an assignment of the chose in action by the debtor before the institution of such collateral proceeding passes to the assignee the property of the debtor in the chose in action assigned, freed from the lien of a general judgment previously rendered against the assignor. Greenwood v. Greenwood, 178 Ga. 605, 173 S.E. 858, 1934 Ga. LEXIS 112 (1934).

Tax preparer's payment to a taxpayer of a discounted sum in exchange for the right to a refund was not a "loan" but instead constituted a "sale" by the taxpayer of a chose in action.

Cullen v. Bragg, 180 Ga. App. 866, 350 S.E.2d 798, 1986 Ga. App. LEXIS 2294 (1986).

Legal malpractice claim. — Trial court did not err in denying an attorney summary judgment on an insurer's malpractice claim because the loss was solely a financial loss, the claim involved a right of property, and the claim was assignable; the closing protection letter from the insurer to the insured created an assignment because the claim transferred to the insurer not merely the insured's rights of recovery but also the right of action. Villanueva v. First Am. Title Ins. Co., 313 Ga. App. 164, 721 S.E.2d 150, 2011 Ga. App. LEXIS 1082 (2011), cert. denied, No. S12C0502, 2012 Ga. LEXIS 607 (Ga. June 18, 2012), aff'd, 292 Ga. 630, 740 S.E.2d 108, 2013 Ga. LEXIS 268 (2013).

Appellate court properly affirmed the denial of summary judgment to a lawyer on a legal malpractice claim because in light of assignments allowable under O.C.G.A. §§ 44-12-22 and 44-12-24, the Georgia Supreme Court agrees that the assignment of legal malpractice claims is not prohibited as a matter of law. Villanueva v. First Am. Title Ins. Co., 292 Ga. 630, 740 S.E.2d 108, 2013 Ga. LEXIS 268 (2013).

Georgia Supreme Court agrees with the Georgia Court of Appeals that legal malpractice claims are not per se unassignable. Villanueva v. First Am. Title Ins. Co., 292 Ga. 630, 740 S.E.2d 108, 2013 Ga. LEXIS 268 (2013).

Nonassignable Rights of Action

1. In General

Tort action and action for fraud. — Under O.C.G.A. § 44-12-24, a personal tort action and an action for fraud are non-assignable. Additionally, the rights to punitive damages are not assignable. In re Estate of Sims, 259 Ga. App. 786, 578 S.E.2d 498, 2003 Ga. App. LEXIS 247 (2003).

Absent plaintiff's ownership or claim of property at institution of action, suit not maintainable. — Where property previously belonging to the plaintiff is illegally converted at a time when the title was vested in plaintiff, the plaintiff is not entitled to maintain an action in trover where it appears that at the time the suit was instituted plaintiff did not own and does not claim the property for which plaintiff sues. Browder v. Cox, 83 Ga. App. 738, 64 S.E.2d 460, 1951 Ga. App. LEXIS 953 (1951).

A conveyance of land, without more, does not assign a right of action to the grantee resulting from a trespass previously committed on such land. Rome Kraft Co. v. Davis, 213 Ga. 899, 102 S.E.2d 571, 1958 Ga. LEXIS 316 (1958).

Exemplary damages and attorney fees are recoverable only by the party who has suffered a tortious loss of property, not by those harmed only vicariously; a subrogee under the law of Georgia is limited to indemnification. Southern Ry. v. Malone Freight Lines, 174 Ga. App. 405, 330 S.E.2d 371, 1985 Ga. App. LEXIS 1819 (1985).

2. Personal Torts

Right to bring action of trespass for damage to realty is not assignable by a landowner to the successor in title. Allen v. Macon, D. & S.R.R., 107 Ga. 838, 33 S.E. 696, 1899 Ga. LEXIS 169 (1899).

A vendee of land, upon which a trespass is committed while it is the property of the vendor, has no right of action against the trespasser for damages thus occasioned; such damages are recoverable by the vendor. Rome Kraft Co. v. Davis, 213 Ga. 899, 102 S.E.2d 571, 1958 Ga. LEXIS 316 (1958).

In Georgia, assignment of a personal injury claim is not permitted. American Chain & Cable Co. v. Brunson, 157 Ga. App. 833, 278 S.E.2d 719, 1981 Ga. App. LEXIS 2027 (1981).

Subrogation provision in an automobile policy, which provided that if the insurer paid under the policy it had the right to sue anyone else who may be responsible, was a statutorily prohibited assignment of a personal injury claim. GEICO v. Hirsh, 211 Ga. App. 374, 439 S.E.2d 59, 1993 Ga. App. LEXIS 1526 (1993), cert. denied, No. S94C0482, 1994 Ga. LEXIS 509 (Ga. Mar. 25, 1994).

Subrogation provision in an automobile policy, which provided that if the insurer paid under the policy it was entitled to all

Personal Torts (Cont'd)

rights of recovery which the person to whom payment was made had against any other person, was a prohibited assignment of a personal injury claim. Southern Gen. Ins. Co. v. Ezekiel, 213 Ga. App. 665, 445 S.E.2d 807, 1994 Ga. App. LEXIS 708 (1994).

Although uninsured motorist coverage in a policy provided the insurer was subrogated to the rights of recovery of its insured, the right of action belonged to the insured, and any action against the uninsured motorist had to be brought in the name of the insured. Generali ? United States Branch v. Owens, 218 Ga. App. 584, 462 S.E.2d 464, 1995 Ga. App. LEXIS 806 (1995); Travelers Ins. Co. v. Harris, 226 Ga. App. 269, 486 S.E.2d 427, 1997 Ga. App. LEXIS 580 (1997).

Punitive damages are not assignable as property right. Maryland Cas. Co. v. Brown, 321 F. Supp. 309, 1971 U.S. Dist. LEXIS 14970 (N.D. Ga. 1971); Southern Ry. v. Malone Freight Lines, 174 Ga. App. 405, 330 S.E.2d 371, 1985 Ga. App. LEXIS 1819 (1985).

Bare right to file bill or maintain suit is not assignable. Hayslip v. Speed Check Co., 214 Ga. 479, 105 S.E.2d 455, 1958 Ga. LEXIS 466 (1958).

Title VII claims not assignable. — Because claims under Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000e et seq., for back pay, front pay, emotional pain and suffering, loss of enjoyment of life, and punitive damages were more similar to a personal injury tort action than an action to enforce contractual or property rights, an employee's assignment of a Title VII religious discrimination claim to a third party was invalid. Under O.C.G.A. § 44-12-24, a right of action for personal torts could not be assigned, and under federal common law personal injury claims were not assignable absent a statute to the contrary. Evans v. Boyd Rest. Group, LLC, 240 Fed. Appx. 393, 2007 U.S. App. LEXIS 21995 (11th Cir. 2007).

A bankruptcy trustee was the real party in interest regarding a tort action of the debtor regardless of the trustee's purported assignment to the debtor of the right to prosecute the action while the trustee retained legal title to it. United Techs. Corp. v. Gaines, 225 Ga. App. 191, 483 S.E.2d 357, 1997 Ga. App. LEXIS 347 (1997).

Federal bankruptcy law pre-empts the statute; therefore, a bankruptcy trustee properly abandoned a tort claim back to the debtor/tort victim. Denis v. Delta Airlines, Inc., 248 Ga. App. 377, 546 S.E.2d 805, 2001 Ga. App. LEXIS 273 (2001), cert. denied, No. S01C0947, 2001 Ga. LEXIS 958 (Ga. Nov. 30, 2001), cert. denied, No. S01C0945, 2001 Ga. LEXIS 959 (Ga. Nov. 30, 2001).

Tort claim becomes part of bankruptcy estate. — The defendant in a tort action which was based on an unliquidated claim that the plaintiff failed to disclose when plaintiff filed a voluntary Chapter 13 federal bankruptcy petition was entitled to summary judgment because the claim became part of the bankruptcy estate even though the statute normally prohibits the assignment of personal tort causes of action, and the federal doctrine of judicial estoppel precluded the prosecution of the claim. Spoon v. Johnson, 247 Ga. App. 754, 545 S.E.2d 328, 2001 Ga. App. LEXIS 102 (2001).

Bankruptcy debtor's agreement to pay a health care provider from the proceeds of a personal injury action created an invalid assignment since the assignment of personal injury claims was prohibited under O.C.G.A. § 44-12-24, and the putative assignment was not limited to an interest in any recovery and extended to the action itself. Klosinski v. Southeastern Neurologic Assocs. P.C (In re Oglesby), No. 99-30214, No. 99-03011A, 2000 Bankr. LEXIS 2205 (Bankr. S.D. Ga. Sept. 27, 2000).

Automobile insurance policy provision requiring only that the insured reimburse the company from the insured's recovery against a tortfeasor for medical expenses paid by the company was not an assignment of a right of action for personal torts. Sheppard v. State Farm Fire & Cas. Co., 222 Ga. App. 619, 475 S.E.2d 675, 1996 Ga. App. LEXIS 942 (1996), cert. denied, No. S97C0017, 1997 Ga. LEXIS 120 (Ga. Jan. 17, 1997).

Subrogation right. — An uninsured motorist insurer could not file a subroga-

tion action in its own name because O.C.G.A. § 44-12-24 prohibits the assignment of rights of action for personal torts. State Farm Mut. Auto. Ins. Co. v. Cox, 233 Ga. App. 296, 502 S.E.2d 778, 1998 Ga. App. LEXIS 859 (1998), aff'd, 271 Ga. 77, 515 S.E.2d 832, 1999 Ga. LEXIS 427 (1999).

Purported assignment to attorney void. — A purported assignment of an interest in a personal injury action to an attorney made in an attempt to survive termination of the attorney's contract and to give the attorney an interest in the litigation separate from statutory lien rights was void as a violation of public policy. Peoples v. Consolidated Freightways, Inc., 226 Ga. App. 265, 486 S.E.2d 604, 1997 Ga. App. LEXIS 515 (1997).

Executor's commission not assigned. — Contracts are to be construed so as to uphold and give effect to the agreement as lawful and not to render portions of the agreement meaningless; to construe a settlement agreement and promissory note as assigning an executor's commission would have risked making the settlement agreement void ab initio under O.C.G.A. § 44-12-24, and the ambiguity was resolved by holding that the executor did not waive the executor's right to a commission. In re Estate of Sims, 259 Ga. App. 786, 578 S.E.2d 498, 2003 Ga. App. LEXIS 247 (2003).

Insufficient evidence of assignment. — Debtor's motion for default judgment, in an action for a declaration that the assignment of proceeds from a lawsuit to a defendant was invalid, was denied because the debtor did not assign a right of action, so O.C.G.A. § 44-12-24 did not apply, and there was no allegation that the defendant had a lien and if so, whether it was unperfected, so O.C.G.A. § 44-14-320 did not apply. Carson v. Rhodes (In re Carson), No. R04-43220-PWB, No. R04-43220-PWB, No. 05-4018, 2005 Bankr. LEXIS 2673 (Bankr. N.D. Ga. Nov. 9, 2005).

Creditors' 11 U.S.C. § 523(a)(4) claim against a Chapter 13 debtor, their attorney, was dismissed because although the attorney failed to file a wrongful death complaint on the creditors' behalf and represented to the creditors that the attorney had, the creditors failed to allege a contract or other agreement establishing a technical trust. The creditors' wrongful death cause of action did not comprise the res of a technical trust because under O.C.G.A. § 53-12-25 only property subject to transfer by the settler could become the subject matter of a trust, and under O.C.G.A. § 44-12-24 the creditors' wrongful death action was non-transferable. Crisler v. Farr (In re Farr), No. 10-11904-JDW, No. 11-1009, 2011 Bankr. LEXIS 1875 (Bankr. M.D. Ga. May 18, 2011).

3. Injuries Arising from Fraud

Right of action for injuries arising from fraud cannot be assigned. Morehead v. Ayers, 136 Ga. 488, 71 S.E. 798, 1911 Ga. LEXIS 114 (1911); Couch v. Crane, 142 Ga. 22, 82 S.E. 459, 1914 Ga. LEXIS 252 (1914); Hayslip v. Speed Check Co., 214 Ga. 479, 105 S.E.2d 455, 1958 Ga. LEXIS 466 (1958).

It cannot be said that because money possessed by defendants was the money and property of the plaintiff, and that as it was defrauded out of this money by the defendants, a right of property was involved, either directly or indirectly. Feeney v. Decatur Developing Co., 47 Ga. App. 353, 170 S.E. 518, 1933 Ga. App. LEXIS 405 (1933).

While a judgment based on fraud could be assigned, a right of action for fraud could not; the Superior Court Consent Order assigned to the assignee did not contain a judgment based on fraud, as the lender's claim for fraud was specifically excepted from the judgment, and thus, the assignee had no standing to bring an action based on injuries arising from fraud to the lender. Cadlerock Joint Venture, L.P. v. Pittard, 358 B.R. 457, 2006 Bankr. LEXIS 3533 (Bankr. N.D. Ga. 2006).

Plaintiff assignee's objection to dischargeability under 11 U.S.C. § 523(a)(2) failed because its claim was that debtor allegedly misrepresented the state of the company's accounts receivable at the time the lender made a loan; this was a right of action arising from alleged fraud, not a right to property, and as such, the lender's right of action was not assignable under O.C.G.A. § 44-12-24 (2002). Cadlerock

Injuries Arising from Fraud (Cont'd)

Joint Venture, L.P. v. Pittard, 358 B.R. 457, 2006 Bankr. LEXIS 3533 (Bankr. N.D. Ga. 2006).

An assignee of debt is precluded from pursuing a fraudulent transfer claim even though the assignee met the definitions of a creditor with a claim under the Georgia Uniform Fraudulent Transfers Act (now the Uniform Voidable Transactions Act), O.C.G.A. § 18-2-70 et seq., because the non-assignment statute provides that a right of action for injuries arising from fraud cannot be assigned; thus, the second assignee had no standing to assert a fraudulent transfer claim against the appellee regarding two parcels of real property because a fraudulent transfer claim could not be assigned under Georgia law. RES-GA Hightower, LLC v. Golshani, 334 Ga. App. 176, 778 S.E.2d 805, 2015 Ga. App. LEXIS 596 (2015), cert. denied, No. S16C0330, 2016 Ga. LEXIS 54 (Ga. Jan. 11, 2016).

Action under Uniform Fraudulent Transfers Act could not be assigned. — In a suit by an assignee of a judgment seeking to set aside a fraudulent transfer by the judgment debtor to a corporation, the assignee's fraudulent transfer claim did not survive the assignment of the California judgment based on Georgia's assignment statute, O.C.G.A. § 44-12-24, and was not revived by O.C.G.A. § 9-11-25(c). EMM Credit, LLC v. Remington, 343 Ga. App. 710, 808 S.E.2d 96, 2017 Ga. App. LEXIS 557 (2017).

Fraudulent transfer claim could not be assigned. — Lender's assignee had no standing to pursue a fraudulent transfer claim against a guarantor because such claims were not assignable under O.C.G.A. § 44-12-24; therefore, the assignee could not prevail on a legal malpractice action against attorneys who failed to timely assert a fraudulent transfer claim. O.C.G.A. § 44-12-24 was not preempted by 12 U.S.C. § 1821 of the Financial Institutions Reform, Recovery, and Enforcement Act of 1989 (FIRREA) or by O.C.G.A. § 11-1-103 of the Uniform Commercial Code. RES-GA McDonough, LLC v. Taylor English Duma LLP, 302 Ga. 444, 807 S.E.2d 381, 2017 Ga. LEXIS 930 (2017).

Fraudulent transfer claim could not be assigned. — Georgia's bar against the assignment of fraud claims applies to claims under the former Uniform Fraudulent Transfers Act (UFTA); an issue of whether federal law preempted that bar as to direct assignees of the Federal Deposit Insurance Corporation was not resolved and was remanded to the trial court. Cmty. & S. Bank v. Lovell, 302 Ga. 375, 807 S.E.2d 444, 2017 Ga. LEXIS 925 (2017).

Assignee of debt could bring fraudulent transfer claim. — Judgment creditor had standing to pursue its claim against a judgment debtor and the transferees, although the judgment creditor was the assignee of the debt leading to the judgment, because it did not seek a remedy for an injury stemming from the previous holder of the note, but for an injury that was committed directly against it; O.C.G.A. § 44-12-24 did not apply. RES-GA YPL, LLC v. Rowland, 340 Ga. App. 713, 798 S.E.2d 315, 2017 Ga. App. LEXIS 130 (2017).

Fraud claims not assignable. — Trial court did not err in granting summary judgment on the fraud claims brought by the investor's son because claims for fraud were not assignable, even when the claims involved a right of property and, thus, the son lacked standing to bring the claims in the son's individual capacity. Patel v. Diplomat 1419VA Hotels, LLC, 358 Ga. App. 732, 856 S.E.2d 340, 2021 Ga. App. LEXIS 122 (2021).

OPINIONS OF THE ATTORNEY GENERAL

Federal preemption as to employee welfare benefit plans. — The federal Employment Retirement Income Security Act of 1974 (ERISA), preempts the application of O.C.G.A. § 44-12-24 to employee welfare benefit plans regulated by ERISA. 1989 Op. Att'y Gen. 89-40.

RESEARCH REFERENCES

C.J.S.

6A C.J.S., Assignments, §§ 7, 30.

ALR.

Assignability of right of action ex delicto for injury to property, as affected by statute, 5 A.L.R. 130.

Priority as between one who redelivers papers or securities not transferable by endorsement or delivery to pledgor or assignee and a bona fide purchaser from the latter, 37 A.L.R. 1540.

Priority of assignment of chose in action over subsequent garnishment as affected by lack of notice to debtor of assignment, 52 A.L.R. 109.

Assignability of claim against officers or directors of corporation for breach of duty, 74 A.L.R. 200; 80 A.L.R. 875; 80 A.L.R. 875.

Survivability or assignability of action or cause of action in tort for damages for fraudulently procuring purchaser or sale of property, 76 A.L.R. 403.

Meaning and scope of covenant in assignment of claim as regards legality or quality of claim, 91 A.L.R. 548.

Assignability or survivability of cause of action in tort against third person for procuring breach of contract, 93 A.L.R. 1133.

Scope and extent of subrogation in favor of one entitled to be subrogated to mortgage lien, 107 A.L.R. 785.

Assignability of right to rescind or of right to return of money or other property as incident of rescission, 110 A.L.R. 849; 162 A.L.R. 743.

Attorney's contract for contingent fee as amounting to an equitable assignment of interest in cause of action, or proceed settlement thereof, 124 A.L.R. 1508.

Right of one whose property without his consent was fraudulently or mistakenly applied to an indebtedness for which was not responsible, to be subrogated to creditor's rights or security held by him, 129 A.L.R. 196.

Rights and remedies incident to subrogation to one but not both elements of a single cause of action for injury to person damage to property, 140 A.L.R. 1241.

Assignment of, or succession to, statutory right of action for recovery of money lost at gambling, 18 A.L.R.2d 999.

Assignability of claim for personal injury or death, 40 A.L.R.2d 500; 33 A.L.R.4th 82.

Judgment debtor's personal injury claims against third person or latter's liability insurer as subject to creditor's bill, 51 A.L.R.2d 595.

Assignability of claim in tort for damage to personal property, 57 A.L.R.2d 603.

Assignability of claim for malicious prosecution, 76 A.L.R.2d 1286.

Rights and remedies of property insurer as against third-person tort-feasor who has settled with insured, 92 A.L.R.2d 102.

Intervenor's right to disqualify judge, 92 A.L.R.2d 1110.

Assignability of insured's right to recover over against liability insurer for rejection of settlement offer, 12 A.L.R.3d 1158.

Validity and effect of "loan receipt" agreement between injured party and one tort-feasor, for loan repayable to extent of injured party's recovery from a cotort-feasor, 62 A.L.R.3d 1111.

Right of "Blue Cross" or "Blue Shield," or similar hospital or medical service organization, to be subrogated to certificate holder's claims against tort-feasor, 73 A.L.R.3d 1140.

Right of provider of health or medical services, as assignee of claim under ERISA (Employment Retirement Income Security Act of 1974), to maintain action against plan payor, 133 A.L.R. Fed. 109.

ARTICLE 3

BAILMENTS

Cross references.

Liens of pawnbrokers, factors, bailees, acceptors, and depositories, § 44-14-400 et seq.

RESEARCH REFERENCES

ALR.

Negligent entrustment: bailor's liability to bailee injured through his own negligence or incompetence, 12 A.L.R.4th 1062.

PART 1

IN GENERAL

RESEARCH REFERENCES

ALR.

Acceptance of receptacle as charging one as bailee of contents, 1 A.L.R. 272; 18 A.L.R. 87.

Bailment: what amounts to delivery of, or assumption of control over, property essential to a bailment, 1 A.L.R. 394.

Duty and liability of gratuitous bailee or mandatory, 4 A.L.R. 1196; 96 A.L.R. 909.

Respective rights of carrier, or of one in similar relation to owner, and to finder of property lost or mislaid, 9 A.L.R. 1388; 170 A.L.R. 706.

Liability of bailor for personal injuries due to defects in subject of bailment, 12 A.L.R. 774; 61 A.L.R. 1336; 131 A.L.R. 845.

Validity of agreement by bailee of instrumentality to purchase his supplies from bailor, 14 A.L.R. 114; 17 A.L.R. 392.

Liability of bank for loss of Liberty bonds, 17 A.L.R. 1217; 31 A.L.R. 703; 40 A.L.R. 899.

Right to recover back cash bail taken without authority, 26 A.L.R. 211; 44 A.L.R. 1499; 48 A.L.R. 1430.

Liability of bailee where subject of bailment is stolen, 26 A.L.R. 223; 48 A.L.R. 378.

Duty and liability of farm tenant in respect to livestock leased with farm, 32 A.L.R. 857.

Bailor's action against third person for damage to, or destruction or conversion of, bailed property as affected by defendant's settlement with, release by, or judgment liability to bailee for same wrongful act, 118 A.L.R. 1338.

Liability of laundry, clothes presser, dyer, or dry cleaner or third person by whom the work is actually done, for loss of or damage to customer's goods, 130 A.L.R. 1359.

Taxation of property the subject of bailment, 135 A.L.R. 597.

Measure and elements of damages recoverable against bailee of automobile in case of loss or theft, 135 A.L.R. 1198.

Liability of warehouseman for injury to stored goods as result of failure to maintain proper temperatures, 92 A.L.R.2d 1298.

Construction and effect of motor vehicle leasing contracts, 43 A.L.R.3d 1283.

Employer's liability for theft or disappearance of employee's property left at place of employment, 46 A.L.R.3d 1306.

Liability of warehouseman or other bailee for loss of goods stored at other than agreed-upon place, 76 A.L.R.4th 883.

44-12-40. "Bailment" defined.

A bailment is a delivery of goods or property upon a contract, express or implied, to carry out the execution of a special object beneficial either to the bailor or bailee or both and to dispose of the property in conformity with the purpose of the trust.

History.

Orig. Code 1863, § 2031; Code 1868, § 2032; Code 1873, § 2058; Code 1882, § 2058; Civil Code 1895, § 2894; Civil Code 1910, § 3467; Code 1933, § 12-101.

Law reviews.

For comment on Goodyear Clearwater Mills v. Wheeler, 77 Ga. App. 570, 49 S.E.2d 184 (1948), see 11 Ga. B.J. 229 (1948).

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Analysis

General Consideration
Types of Bailments
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1. Requirements
2. Activities Establishing Bailor-Bailee Relationship
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General Consideration

Bailment is similar in nature to contract of hiring. Queen v. Patent Scaffolding Co., 46 Ga. App. 364, 167 S.E. 789, 1933 Ga. App. LEXIS 72 (1933).

Lease and bailment distinguished. — 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 Ga. App. LEXIS 1257 (1970).

Lease and bailment are not necessary mutually exclusive terms; both are indicative of a contractual relationship. Buena Vista Loan & Sav. Bank v. Bickerstaff, 121 Ga. App. 470, 174 S.E.2d 219, 1970 Ga. App. LEXIS 1257 (1970).

Notes pledged as collateral security. — Where notes of a third party are pledged as collateral security, the creditor, in the absence of special contractual provision, is entitled to retain possession of the notes so deposited until the purpose for which they were deposited is at an end, that is, until the payment of the debt secured. Johnson v. Hinson, 188 Ga. 639, 4 S.E.2d 561, 1939 Ga. LEXIS 589 (1939).

Customer's assent to limitations on warehouse receipt a jury question. — In a dispute over a storage facility's storage of a customer's seed, in which the facility sought to bind the customer to limitations printed on the reverse of the facility's warehouse receipts, the trial court erred by concluding that evidence that the facility routinely mailed warehouse receipts to the facility's customers was sufficient to bind the customer as a matter of law; because the customer denied receiving the receipts, the customer's assent was a question for the jury. Turfgrass Group v. Ga. Cold Storage Co., 346 Ga. App. 659, 816 S.E.2d 716, 2018 Ga. App. LEXIS 436 (2018).

Types of Bailments

Loan is bailment of O.C.G.A. Art. 3, Ch. 12, T. 44 for a certain time to be used by the borrower without paying for its use. Industrial Lumber Co. v. Strickland, 71 Ga. App. 298, 30 S.E.2d 792, 1944 Ga. App. LEXIS 341 (1944).

Conditional sale is species of bailment whereby the vendee unconditionally promises to pay the purchase price and the vendor reserves title personally until such payment is made. Nix v. Farmers Mut. Exch. of Calhoun, Inc., 218 F.2d 642, 1955 U.S. App. LEXIS 4462 (5th Cir. 1955).

Relationship between automobile dealer and prospective purchaser is that of bailor and bailee, not principal and agent or master and servant. Harris v. Whitehall Chevrolet Co., 55 Ga. App. 130, 189 S.E. 392, 1936 Ga. App. LEXIS 441 (1936).

Where an automobile dealer lends a demonstrator automobile to a prospective purchaser for the purpose of allowing such purchaser to test and operate it, under an oral agreement that the purchaser is to return the automobile at the end of two days in the same condition, less reasonable wear and tear, as it was when delivered to the purchaser, this constitutes the purchaser being a bailee. Warren v. Mitchell Motors, Inc., 52 Ga. App. 58, 182 S.E. 205, 1935 Ga. App. LEXIS 32 (1935).

Creation of Bailments

1. Requirements

Assent to bailment required to create duty. — Before the bailee is charged with the duty of safekeeping property the

Requirements (Cont'd)

bailee must assent to the bailment, either expressly or impliedly. Davidson v. Ramsby, 133 Ga. App. 128, 210 S.E.2d 245, 1974 Ga. App. LEXIS 988 (1974).

Delivery essential to bailment contract. — A bailment is not created unless there is a delivery of the article to be accepted by the bailee. Goodyear Clearwater Mills v. Wheeler, 77 Ga. App. 570, 49 S.E.2d 184, 1948 Ga. App. LEXIS 600 (1948) (commented on in 11 Ga. B.J. 229 (1948)).

Delivery, under which the bailee acquires an independent and temporarily exclusive possession, is essential to a contract of bailment. Hartley v. Robinson, 78 Ga. App. 594, 51 S.E.2d 617, 1949 Ga. App. LEXIS 937 (1949).

To create a bailment, express or implied, there must be an actual or constructive delivery of goods with an actual or constructive possession in the bailee, exclusive and independent of the bailor and all other persons. Davidson v. Ramsby, 133 Ga. App. 128, 210 S.E.2d 245, 1974 Ga. App. LEXIS 988 (1974).

An essential element of the bailor-bailee relationship is the actual or constructive delivery of property to the bailee who thereby acquires independent and temporarily exclusive possession of the delivered property. McDaniel v. American Druggists Ins. Co. (In re Nat'l Buy-Rite, Inc.), 11 B.R. 196, 1981 Bankr. LEXIS 3670 (Bankr. N.D. Ga. 1981).

Independent and temporarily exclusive possession of property required. — In order to constitute a bailment, it is essential that the bailee acquire an independent and temporarily exclusive possession of the property. Elliott v. Levy, 77 Ga. App. 562, 49 S.E.2d 179, 1948 Ga. App. LEXIS 599 (1948); A.A.A. Parking, Inc. v. Bigger, 113 Ga. App. 578, 149 S.E.2d 255, 1966 Ga. App. LEXIS 1141 (1966); Buckley v. Colorado Mining Co., 163 Ga. App. 431, 294 S.E.2d 665, 1982 Ga. App. LEXIS 2520 (1982).

A bailee acquires no title to the property held as bailee; the interest is limited to a right of possession for which the bailee may maintain an action if this right is impaired. McDaniel v. American Druggists Ins. Co. (In re Nat'l Buy-Rite, Inc.), 11 B.R. 196, 1981 Bankr. LEXIS 3670 (Bankr. N.D. Ga. 1981).

2. Activities Establishing Bailor-Bailee Relationship

Transfer of property by seller to prospective purchaser on approval clearly creates bailment under O.C.G.A. § 44-12-40. Stephens v. Thompson, 177 Ga. App. 528, 339 S.E.2d 784, 1986 Ga. App. LEXIS 1456 (1986).

Purpose of transaction determines existence of bailment. — If the furnishing of an automobile is within what may be said to be a "business" of the owner, one to whom the car is entrusted for such purpose is not a bailee, as in a case of lending, but is a servant or agent; if, on the other hand, the car is entrusted by the owner merely as an accommodation, with no interest or concern in the purpose for which the car will be used, then its use, whether for recreation or otherwise, is not within the business of the owner, and the transaction is a mere bailment. Hubert v. Harpe, 181 Ga. 168, 182 S.E. 167, 1935 Ga. LEXIS 52 (1935).

Permission to use employer's truck after working hours creates bailment. — Where the defendant, employed to pick up and deliver dry cleaning and laundry, drives the employer's truck in doing this work, uses the truck, with the employer's permission, after the employee finishes work in going to and from home and, where the defendant is to keep the truck in proper repair with the employer paying for such repairs, the status of bailor and bailee exists between the employer and the defendant with reference to the use of the truck by the defendant after the employee finishes work. Smith v. Burks, 89 Ga. App. 278, 79 S.E.2d 52, 1953 Ga. App. LEXIS 949 (1953).

Bailment creating liability of employer for tractor carrying trash. — Because an employer, as bailor, sent the employer's own employee with the thing bailed, a tractor with attached trash trailer, under O.C.G.A. § 44-12-62(b), a contractor, as the hirer, was liable only for the consequences of the hirer's own directions or for the hirer's gross negligence; the trial court erred in concluding that the

contractor was entitled to summary judgment on the basis that the employee was not a borrowed servant because the evidence presented at least a factual issue regarding whether the employee was the contractor's borrowed servant since there was evidence that the contractor alone supervised the employee's work hauling debris, that the contractor controlled the employee's schedule for each day, and that the contractor dictated which landfill would receive the debris and when a load was ready. Coe v. Carroll & Carroll, Inc., 308 Ga. App. 777, 709 S.E.2d 324, 2011 Ga. App. LEXIS 280 (2011), cert. denied, No. S11C1159, 2011 Ga. LEXIS 836 (Ga. Oct. 17, 2011).

Bailment when contract for car storage in garage. — Where the owner of an automobile enters into an oral contract, for the storage of a car, with the operator of a storage and service garage of automobiles, the relationship of bailor-bailee is created. Bunn v. Broadway Parking Ctr., Inc., 116 Ga. App. 85, 156 S.E.2d 464, 1967 Ga. App. LEXIS 709 (1967).

Acceptance of car for repairs and adjustments. — Where a driver hired by plaintiff took plaintiff's car, on orders from plaintiff, to defendant's garage and delivered it to the master mechanic to make repairs and adjustments, and where the master mechanic worked on the car and asked the driver to test-drive the car, along with the master mechanic, the existence of bailor and bailee relationship between the parties is established. Tyner & Blackmon v. Fryer Truck & Tractor Co., 83 Ga. App. 393, 63 S.E.2d 695, 1951 Ga. App. LEXIS 873 (1951).

Bailment denied where owner retains right to remove stored article at will without the knowledge of the person in charge of the premises and no bailment arises. Mossie v. Pilgrim Self-Service Storage, 150 Ga. App. 715, 258 S.E.2d 548, 1979 Ga. App. LEXIS 2352 (1979).

Leaving of musical equipment in restaurant. — Evidence could have authorized jury to find that bailment was in effect as to plaintiff's musical equipment left at defendant's restaurant and damaged in fire occurring when restaurant was closed. Buckley v. Colorado Mining Co., 163 Ga. App. 431, 294 S.E.2d 665, 1982 Ga. App. LEXIS 2520 (1982).

No bailment created between insured and insurer. — Court of appeals did not err in affirming an order granting an insured summary judgment in the insured's action against an insurer to recover indemnity under the insured's commercial general liability insurance policy for property damage to a company's commercial peanut cleaner because the care, custody, and control exclusion of the policy did not apply when the peanut cleaner was not in the insured's care, custody, or control; it could not be said either that a bailment of the peanut cleaner was created or that the insured had exclusive "care, custody, or control" of the cleaner at the time that the cleaner was damaged because the insured was operating as an instrumentality of the company, moving the company's peanut cleaner to serve the company's purposes while under the company's direction and control. Owners Ins. Co. v. Smith Mech. Contrs., Inc., 285 Ga. 807, 683 S.E.2d 599, 2009 Ga. LEXIS 485 (2009).

Unpublished decision: When the debtor was granted bare legal title to a residential loan package for purposes of resale as a bailment under O.C.G.A. § 44-12-40, but had no equitable interest in the loan, the loan was not property of the debtor's estate under 11 U.S.C. § 541(d), and the creditor's interest was not avoidable under 11 U.S.C. § 544(a)(1). HSBC Mortg. Servs. v. Pettigrew (In re Southstar Funding, LLC), No. 07-65842-PWB, No. 07-06524, 2008 Bankr. LEXIS 3883 (Bankr. N.D. Ga. Oct. 4, 2008).

Duty of Care

Borrower of loan is bound to take good care of thing borrowed, to use it according to the intention of the lender, and to restore it in the proper condition. Industrial Lumber Co. v. Strickland, 71 Ga. App. 298, 30 S.E.2d 792, 1944 Ga. App. LEXIS 341 (1944).

Bailee to act in good faith. — A bailee is an agent who is required not only to use the property for the special object only for which the bailee was entrusted with it, and in conformity with the pur-

Duty of Care (Cont'd)

poses of the trust, but to act in good faith where the interests of the principal are concerned. Industrial Lumber Co. v. Strickland, 71 Ga. App. 298, 30 S.E.2d 792, 1944 Ga. App. LEXIS 341 (1944).

Object of bailment mutually beneficial to both parties. — Where the object of the bailment is beneficial to both parties, the degree of diligence required of the bailee is ordinary care. Elliott v. Levy, 77 Ga. App. 562, 49 S.E.2d 179, 1948 Ga. App. LEXIS 599 (1948).

Bailor entrusting defective automobile to another. — Where bailor entrusts a defective automobile to another, or entrusts an automobile to an incompetent driver, the bailor must exercise ordinary care to prevent injuries to persons within the range of foreseeable operation of the automobile. Medlock v. Barfield, 90 Ga. App. 759, 84 S.E.2d 113, 1954 Ga. App. LEXIS 806 (1954).

Liability

Bailee's knowledge of automobile contents required for liability. — A bailee for hire as to an automobile is not liable for the contents thereof unless the bailee has actual or implied knowledge or notice as to such contents. Davidson v. Ramsby, 133 Ga. App. 128, 210 S.E.2d 245, 1974 Ga. App. LEXIS 988 (1974).

Reasonable expectation of car contents is sufficient notice. — Sufficient notice of the contents of a car exists if the articles are such as the bailee might reasonably expect to be therein. Davidson v. Ramsby, 133 Ga. App. 128, 210 S.E.2d 245, 1974 Ga. App. LEXIS 988 (1974).

Bailor's liability determined by bailment contract and doctrine of proximate cause. — The bailor's liability is not determined alone by the provisions and warranties of the bailment contract, but also by the limits imposed by the doctrine of proximate cause; that is, whether the defendant should have foreseen the consequences of defendant's negligence as a natural and probable result. Medlock v. Barfield, 90 Ga. App. 759, 84 S.E.2d 113, 1954 Ga. App. LEXIS 806 (1954).

Automobile dealer not liable for prospective purchaser's negligent operation of car. — Since the relationship between an automobile dealer and a prospective purchaser is that of bailor and bailee, the dealer is not liable for injuries accruing to a third person by reason of the negligent operation of the automobile by the prospective purchaser while trying it out. Harris v. Whitehall Chevrolet Co., 55 Ga. App. 130, 189 S.E. 392, 1936 Ga. App. LEXIS 441 (1936).

RESEARCH REFERENCES

Am. Jur. 2d.

8 Am. Jur. 2d, Bailments, § 1 et seq.

C.J.S.

8 C.J.S., Bailments, §§ 1, 14 et seq.

ALR.

Respective rights of carrier, or of one in similar relation to owner, and of finder of property lost or mislaid, 9 A.L.R. 1388; 170 A.L.R. 706.

Acceptance of receptacle as charging one as bailee of contents, 18 A.L.R. 87.

Character of contract to raise seed, 29 A.L.R. 647.

Relationship of bailor and bailee as between owner of goods in bonded warehouse and proprietor of warehouse, 77 A.L.R. 1502.

"Warehouse purchaser receipt" as bailment or contract of sale, 91 A.L.R. 907.

Storage contract as a bailment of chattels, or lease of place where chattels are stored, 138 A.L.R. 1137.

Bailee's liability as affected by bailment condition that bailor procure insurance, 83 A.L.R.3d 519.

44-12-41. Bailment contract as entire; performance as condition precedent to action upon it.

As a general rule, the contract of bailment is an entire contract and a full performance is a condition precedent to an action upon it.

History.
Orig. Code 1863, § 2081; Code 1868, § 2076; Code 1873, § 2102; Code 1882, § 2102; Civil Code 1895, § 2920; Civil Code 1910, § 3493; Code 1933, § 12-105.

Cross references.
Manner of seller's tender of delivery, § 11-2-503.

JUDICIAL DECISIONS

Bailor's refusal to allow remedy of defects grounds for bailee's suit. — Where a bailee made repairs alleged to be unsatisfactory by the bailor and offered within a reasonable time to remedy the defects, time not being of the essence of the contract, upon the bailor's refusal to allow the corrections to be made, the bailee was entitled under O.C.G.A. § 44-12-41 to sue upon the contract for the full contract price. Byck v. Weiler Co., 3 Ga. App. 387, 59 S.E. 1126, 1908 Ga. App. LEXIS 156 (1908).

RESEARCH REFERENCES

Am. Jur. 2d.
8 Am. Jur. 2d, Bailments, § 38 et seq.
C.J.S.
8 C.J.S., Bailments, § 105.
ALR.
Recovery back of amount paid to bailee for repairs of no benefit to bailor, 31 A.L.R. 698.

Validity and effect of acceleration clause in lease or bailment, 58 A.L.R. 300; 128 A.L.R. 750.

Construction and application of provision of bailment or lease contract relating to cost of repairs or replacements, or damage to chattel, 129 A.L.R. 460.

Bailee's express agreement to return property, or to return it in a specified condition, as enlarging his common-law liability, 150 A.L.R. 269.

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 purchaser price, rent, or loan, 166 A.L.R. 1353.

Bailee's liability as affected by bailment condition that bailor procure insurance, 83 A.L.R.3d 519.

Measure and elements of damages in action against garageman based on failure to properly perform repair or service on motor vehicle, 1 A.L.R.4th 347.

44-12-42. Rights of bailee in bailed property; actions to enforce rights.

During the bailment, in all cases the bailee has a right to the possession of the property and in most cases a special right of property in the thing bailed. For a violation of these rights by anyone he has a cause of action.

History.
Orig. Code 1863, § 2032; Code 1868, § 2033; Code 1873, § 2059; Code 1882, § 2059; Civil Code 1895, § 2895; Civil Code 1910, § 3468; Code 1933, § 12-102.

Cross references.
Right of action of bailee and bailor for trespass, § 51-10-4.

JUDICIAL DECISIONS

Agreement for car storage in garage creates bailment. — Where the owner of an automobile enters into an oral contract for the storage of a car with the operator of a storage and service garage for automobiles, the relationship of bailor-bailee is created. Bunn v. Broadway Parking Ctr., Inc., 116 Ga. App. 85, 156 S.E.2d 464, 1967 Ga. App. LEXIS 709 (1967).

Delivery and possession required for bailment. — To create a bailment, express or implied, there must be an actual or constructive delivery of the goods with actual or constructive possession in the bailee, exclusive and independent of the bailor and all other persons. Davidson v. Ramsby, 133 Ga. App. 128, 210 S.E.2d 245, 1974 Ga. App. LEXIS 988 (1974).

Bailee of property is entitled to its exclusive possession. Mossie v. Pilgrim Self-Service Storage, 150 Ga. App. 715, 258 S.E.2d 548, 1979 Ga. App. LEXIS 2352 (1979).

Creditor retains possession of notes pledged as collateral security. — Where notes of a third party are pledged as collateral security, the creditor, in the absence of special contractual provision, is entitled to retain possession of the notes so deposited until the purpose for which they were deposited is at an end, that is, until the payment of the debt is secured. Johnson v. Hinson, 188 Ga. 639, 4 S.E.2d 561, 1939 Ga. LEXIS 589 (1939).

Degree of diligence required of bailee where object of bailment is beneficial to both parties is that of ordinary care. Elliott v. Levy, 77 Ga. App. 562, 49 S.E.2d 179, 1948 Ga. App. LEXIS 599 (1948).

Suit in trover maintainable by bailee for hire since the bailee has such title and right of possession. McWhorter & Armour v. Moore, 7 Ga. App. 439, 67 S.E. 115, 1910 Ga. App. LEXIS 334 (1910); Macon, Dublin & Savannah R.R. v. Heard Bros., 27 Ga. App. 382, 108 S.E. 481, 1921 Ga. App. LEXIS 914 (1921).

RESEARCH REFERENCES

Am. Jur. 2d.
8 Am. Jur. 2d, Bailments, §§ 1 et seq., 63 et seq.

C.J.S.
8 C.J.S., Bailments, §§ 28, 29.

ALR.
Estoppel to assert title to personal chattel by permitting another to use it in his business, 7 A.L.R. 676.

Seizure of subject of bailment under process issued at instance of bailee as excuse for latter's failure to redeliver bailor, 139 A.L.R. 1146.

44-12-43. Care required of bailees.

All bailees are required to exercise care and diligence to protect the thing bailed and to keep it safe. Different degrees of diligence are required according to the nature of the bailments.

History.
Orig. Code 1863, § 2033; Code 1868, § 2034; Code 1873, § 2060; Code 1882, § 2060; Civil Code 1895, § 2897; Civil Code 1910, § 3470; Code 1933, § 12-103.

Cross references.
Risk of loss in the absence of breach, § 11-2-509.

JUDICIAL DECISIONS

Nothing in O.C.G.A. T. 11 repeals or affects O.C.G.A. § 44-12-43. A.A.A. Parking, Inc. v. Bigger, 113 Ga. App. 578, 149 S.E.2d 255, 1966 Ga. App. LEXIS 1141 (1966).

Whether a bailment exists depends upon the relationship between the owner of the property and the possessor of the property as to the disposition of the property. Bohannon v. State, 251 Ga. App. 771, 555 S.E.2d 112, 2001 Ga. App. LEXIS 1132 (2001).

Loan is bailment of article for certain time, to be used by the borrower without paying for its use. Industrial Lumber Co. v. Strickland, 71 Ga. App. 298, 30 S.E.2d 792, 1944 Ga. App. LEXIS 341 (1944).

Bailor entitled to election of remedies. — A bailor, setting up a breach of the duty of the bailee, may elect as to the bailor's remedy and may rely upon either his right under the contract or proceed for damages as in a case of tort. AAA Parking, Inc. v. Black, 110 Ga. App. 554, 139 S.E.2d 437, 1964 Ga. App. LEXIS 699 (1964).

"Safekeeping" construed. — The word "safekeeping" in an agreement for storage of goods in a warehouse does not imply a much higher degree of care than the law requires of a defendant nor does the word imply a guarantee against damage or harm. Harper Whse., Inc. v. Henry Chanin Corp., 102 Ga. App. 489, 116 S.E.2d 641, 1960 Ga. App. LEXIS 660 (1960).

Standard of care. — If the bailment is for the exclusive benefit of the bailor, only slight diligence is required; if the bailment is for the mutual benefit of the parties, ordinary diligence is required; and if the bailment is for the exclusive benefit of the bailee, extraordinary diligence is required. Gooden v. Day's Inn, 196 Ga. App. 324, 395 S.E.2d 876, 1990 Ga. App. LEXIS 930 (1990), cert. denied, No. S90C1417, 1990 Ga. LEXIS 639 (Ga. Sept. 4, 1990).

The degree of negligence required to impose liability upon a bailee is generally a question of law to be determined by the court. Gooden v. Day's Inn, 196 Ga. App. 324, 395 S.E.2d 876, 1990 Ga. App. LEXIS 930 (1990), cert. denied, No. S90C1417, 1990 Ga. LEXIS 639 (Ga. Sept. 4, 1990).

Borrower is bound to take good care of thing borrowed, to use it according to the intention of the lender, and to restore it at the proper condition. Industrial Lumber Co. v. Strickland, 71 Ga. App. 298, 30 S.E.2d 792, 1944 Ga. App. LEXIS 341 (1944).

Bailee in mutual benefit bailment is not insurer of bailed property, in the absence of clear contractual provisions to the contrary. Gillham v. Federal Express Money Order, Inc., 112 Ga. App. 171, 144 S.E.2d 557, 1965 Ga. App. LEXIS 631 (1965).

Ordinary diligence required of bailee in mutual benefit bailment. — A borrower, where the bailment is for the mutual benefit of both the bailor and bailee, is bound to exercise ordinary care and diligence in regard to the article borrowed. Warren v. Mitchell Motors, Inc., 52 Ga. App. 58, 182 S.E. 205, 1935 Ga. App. LEXIS 32 (1935).

Where the object of the bailment is beneficial to both parties, the degree of diligence required of the bailee is ordinary care. Elliott v. Levy, 77 Ga. App. 562, 49 S.E.2d 179, 1948 Ga. App. LEXIS 599 (1948); Goodyear Clearwater Mills v. Wheeler, 77 Ga. App. 570, 49 S.E.2d 184, 1948 Ga. App. LEXIS 600 (1948); Gillham v. Federal Express Money Order, Inc., 112 Ga. App. 171, 144 S.E.2d 557, 1965 Ga. App. LEXIS 631 (1965); Skinner v. Humble Oil & Ref. Co., 145 Ga. App. 372, 243 S.E.2d 732, 1978 Ga. App. LEXIS 1992 (1978).

Extraordinary care and diligence required if borrower benefits entirely. — In a loan entirely for the benefit of the borrower, the borrower is usually bound to exercise extraordinary care and diligence, and is liable for slight neglect concerning the thing borrowed; if a loan is for the joint benefit of the lender and the borrower, the responsibility of the borrower is varied and less stringent, according to the circumstances and purposes of the loan. Warren v. Mitchell Motors, Inc., 52 Ga. App. 58, 182 S.E. 205, 1935 Ga. App. LEXIS 32 (1935).

Presumption of negligence arises, if alleged, where possession is shown in

the bailee at the time of damage to the property. United States Sec. Whse., Inc. v. Brooks, 115 Ga. App. 834, 156 S.E.2d 217, 1967 Ga. App. LEXIS 1274 (1967); Scott v. Purser Truck Sales, Inc., 198 Ga. App. 611, 402 S.E.2d 354, 1991 Ga. App. LEXIS 189 (1991).

Mere showing of loss or injury will entitle bailor to recover unless this showing is offset by evidence adduced by the bailee. Bailey v. Insurance Co. of N. Am., 80 Ga. App. 521, 56 S.E.2d 848, 1949 Ga. App. LEXIS 873 (1949).

Loss of property after its delivery to another authorizes an inference that the loss was occasioned by negligence of the person receiving it. Elliott v. Levy, 77 Ga. App. 562, 49 S.E.2d 179, 1948 Ga. App. LEXIS 599 (1948).

Bailee may overcome prima facie case made out on the part of the bailor by proving affirmatively that the bailee exercised that degree of care which the bailment called for, or that the loss or injury was due to causes in no way connected with the lack of proper care on the bailee's part. Bailey v. Insurance Co. of N. Am., 80 Ga. App. 521, 56 S.E.2d 848, 1949 Ga. App. LEXIS 873 (1949).

A bailee, who has exercised the proper degree of care and diligence in protecting and keeping safely the thing that is bailed, is relieved from any liability for its loss or destruction. Gillham v. Federal Express Money Order, Inc., 112 Ga. App. 171, 144 S.E.2d 557, 1965 Ga. App. LEXIS 631 (1965).

Bailee not liable for unintentional invasion of bailor's interest with third persons. — A bailee who is negligent with respect to bailed goods is not liable for the unintentional invasion of the interest of the bailor in the bailor's contractual or employment relationships with third persons. Morse v. Piedmont Hotel Co., 110 Ga. App. 509, 139 S.E.2d 133, 1964 Ga. App. LEXIS 684 (1964).

Exercise of required diligence is matter of defensive pleading and proof by bailee where the failure of the bailee to use the required degree of care is in issue; it is not a matter for allegation and proof by the bailor. A.A.A. Parking, Inc. v. Bigger, 113 Ga. App. 578, 149 S.E.2d 255, 1966 Ga. App. LEXIS 1141 (1966).

Only slight diligence required by hotel in holding jewelry. — Because the hotel gratuitously agreed to store the guest's jewelry when the guest refused to allow the jewelry to be mailed to the guest, the hotel was only required to show slight diligence for purposes of the bailment claim. Jordan v. Marriott International, Inc., 346 Ga. App. 706, 816 S.E.2d 822, 2018 Ga. App. LEXIS 451 (2018).

Jury determines questions of diligence and negligence. — Ordinarily in bailment all questions of diligence and negligence are questions of fact for determination by the jury. Loeb v. Whitton, 77 Ga. App. 753, 49 S.E.2d 785, 1948 Ga. App. LEXIS 635 (1948); Gillham v. Federal Express Money Order, Inc., 112 Ga. App. 171, 144 S.E.2d 557, 1965 Ga. App. LEXIS 631 (1965).

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Am. Jur. 2d.

8 Am. Jur. 2d, Bailments, §§ 83 et seq.

C.J.S.

8 C.J.S., Bailments, § 46 et seq.

ALR.

Liability of a bailee of money who commingles it with his own funds, 20 A.L.R. 378.

Law of general average as affected by fact that necessity for sacrifice or expenditure was due to negligent navigation, 25 A.L.R. 154.

Imputing negligence of bailee to bailor where subject of bailment is damaged by third person, 30 A.L.R. 1248.

Duty and liability of farm tenant in

respect to livestock leased with farm, 32 A.L.R. 857.

Right of bailee by notice or contract to limit care to less than that fixed by statute, 34 A.L.R. 169.

Rights and liability of bailee where there is an adverse hostile title, 43 A.L.R. 149.

Liability of bailee where subject of bailment is stolen, 48 A.L.R. 378.

Relation between customer and broker receiving bonds or other securities for sale or exchange, 52 A.L.R. 501.

Liability of bailee for damage to or destruction of subject of bailment by servant acting for his own purposes or in violation of his instructions, 52 A.L.R. 711.

Liability of carrier or other bailee because of misinformation as to time or place of arrival or storage of goods, 56 A.L.R. 1382.

Duty and liability of gratuitous bailee or mandatory bailee, 96 A.L.R. 909.

Liability for loss of or damage to automobile left in parking lot, 131 A.L.R. 1175; 7 A.L.R.3d 927; 13 A.L.R.4th 362; 13 A.L.R.4th 442.

Duty and liability of fair association, or other bailee, as regards articles entrusted to it for exhibition or display, 139 A.L.R. 931.

Bailee's express agreement to return property, or to return it in a specified condition, as enlarging his common-law liability, 150 A.L.R. 269.

Liability of attorney for loss of client's money or personal property in his possession or entrusted to him, 26 A.L.R.2d 1340.

Liability of bailee for hire of automobile for loss of, or damage to, contents, 27 A.L.R.2d 796.

Stockyard operator's liability for injury to or death of stock, 40 A.L.R.2d 988.

Liability of garageman for theft or unauthorized use of motor vehicle, 43 A.L.R.2d 403.

Presumption and burden of proof in action for injury to or loss of ship or vessel during bailment or charter, 65 A.L.R.2d 1228.

Bailee's duty to insure bailed property, 28 A.L.R.3d 513.

Sufficiency of warehouseman's precautions to protect goods against fire, 42 A.L.R.3d 908.

Liability of bailee of airplane for damage thereto, 44 A.L.R.3d 862.

Liability of operator of marina or boatyard for loss of or injury to pleasure boat left for storage or repair, 44 A.L.R.3d 1332.

Liability of savings bank for payment to person presenting lost or stolen passbook or savings account card, 68 A.L.R.3d 1080.

Liability of owner or operator of parking lot or garage for loss of or damage to contents of parked motor vehicle, 78 A.L.R.3d 1057.

Bailee's liability for bailor's expense of recovering stolen subject of bailment, 80 A.L.R.3d 264.

Liability of owner of motor vehicle for negligence of garageman or mechanic, 8 A.L.R.4th 265.

Liability for loss of hat, coat, or other property deposited by customer in place of business, 54 A.L.R.5th 393.

44-12-44. Burden on bailee after loss; proper diligence standard.

In all cases of bailment, after proof of loss by the bailor, the burden of proof is on the bailee to show proper diligence.

History.

Orig. Code 1863, § 2037; Code 1868, § 2038; Code 1873, § 2064; Code 1882, § 2064; Civil Code 1895, § 2896; Civil Code 1910, § 3469; Code 1933, § 12-104.

Cross references.

Risk of loss in the absence of breach, § 11-2-509.

JUDICIAL DECISIONS

Analysis

General Consideration
Bailor's Burden of Proof
Bailee's Burden of Proof

General Consideration

Nothing in O.C.G.A. T. 11 repeals or affects O.C.G.A. § 44-12-44. A.A.A. Parking, Inc. v. Bigger, 113 Ga. App. 578, 149 S.E.2d 255, 1966 Ga. App. LEXIS 1141 (1966).

O.C.G.A. § 44-12-44 establishes rule for shifting of burden of introducing evidence or of going forward with the evidence. Deloach v. Automatic Transmission & Brake Shop, Inc., 106 Ga. App. 797, 128 S.E.2d 512, 1962 Ga. App. LEXIS 858 (1962).

O.C.G.A. § 44-12-44 means that, after the bailor proves the bailment and that there was loss to the property bailed, the burden is then placed upon the bailee to show that the exercise of proper diligence according to the nature of the bailment. Deloach v. Automatic Transmission & Brake Shop, Inc., 106 Ga. App. 797, 128 S.E.2d 512, 1962 Ga. App. LEXIS 858 (1962).

The burden referred to in O.C.G.A. § 44-12-44 is the burden of introducing evidence or of going forward with the evidence. Ammari v. Sohn, 197 Ga. App. 486, 398 S.E.2d 804, 1990 Ga. App. LEXIS 1337 (1990).

O.C.G.A. § 44-12-44 is rule of evidence rather than rule of pleading, thus, in an action ex delicto to recover for a breach of duty resulting in damage to the bailed property, it may be proper to allege the contract in order to show a duty but it is always necessary to allege negligence of the bailee as the proximate cause of the injury. A.A.A. Parking, Inc. v. Bigger, 113 Ga. App. 578, 149 S.E.2d 255, 1966 Ga. App. LEXIS 1141 (1966).

"Loss" defined. — Loss, as used in O.C.G.A. § 44-12-44, does not mean merely a casual losing of the thing bailed, but is used in the sense of damage or injury. Western Union Tel. Co. v. Fontaine, 58 Ga. 433, 1877 Ga. LEXIS 134 (1877); Hawkins v. Haynes, 71 Ga. 40, 1883 Ga. LEXIS 136 (1883); Richmond & D.R.R. v. White & Co., 88 Ga. 805, 15 S.E. 802, 1892 Ga. LEXIS 105 (1892); Central R.R. v. Hasselkus & Stewart, 91 Ga. 382, 17 S.E. 838, 1893 Ga. LEXIS 333 (1893); Allen v. Southern Ry., 33 Ga. App. 209, 126 S.E. 722, 1924 Ga. App. LEXIS 822 (1924).

"Safekeeping" construed. — The word "safekeeping" in an agreement for storage of goods in a warehouse does not imply a much higher degree of care than the law requires of a defendant nor does the word imply a guarantee against damage or harm. Harper Whse., Inc. v. Henry Chanin Corp., 102 Ga. App. 489, 116 S.E.2d 641, 1960 Ga. App. LEXIS 660 (1960).

Before bailee is charged with duty of safekeeping property, bailee must assent to bailment, either expressly or impliedly. Davidson v. Ramsby, 133 Ga. App. 128, 210 S.E.2d 245, 1974 Ga. App. LEXIS 988 (1974).

O.C.G.A. § 44-12-44 applies to carriers. Central R.R. & Banking Co. v. Anderson, 58 Ga. 393, 1877 Ga. LEXIS 121 (1877); Rome R.R. v. Wimberly, 75 Ga. 316, 1885 Ga. LEXIS 124 (1885); Holly v. Southern Ry., 119 Ga. 767, 47 S.E. 188, 1904 Ga. LEXIS 355 (1904); Southern Ry. v. Edmundson, 123 Ga. 287, 51 S.E. 474, 1905 Ga. LEXIS 445 (1905). See also Western Union Tel. Co. v. Blanchard, Williams & Co., 68 Ga. 299, 1882 Ga. LEXIS 1 (1882).

Bailor may elect remedy. — A bailor, setting up a breach of the duty of bailee, may elect as to the remedy and may rely upon either the bailor's right under the contract or proceed for damages as in a

case of tort. AAA Parking, Inc. v. Black, 110 Ga. App. 554, 139 S.E.2d 437, 1964 Ga. App. LEXIS 699 (1964).

A bailor who elects to proceed in tort must allege specific acts of negligence, even though the bailor need not prove these allegations at the trial in order to show a prima facie case under O.C.G.A. § 44-12-44. AAA Parking, Inc. v. Black, 110 Ga. App. 554, 139 S.E.2d 437, 1964 Ga. App. LEXIS 699 (1964).

Bailor's contributory negligence. — Where the plaintiff leased an airplane to the defendant, and sent with the airplane a co-pilot employed by the plaintiff, and the airplane was subsequently damaged due to a steering mechanism malfunction, the evidence created a jury question as to the plaintiff's contributory negligence. Plaintiff was not entitled to a directed verdict. Jet Air, Inc. v. EPPS Air Serv., Inc., 194 Ga. App. 829, 392 S.E.2d 245, 1990 Ga. App. LEXIS 362 (1990), cert. denied, No. S90C0892, 1990 Ga. LEXIS 767 (Ga. May 16, 1990).

Bailee not liable for unintentional invasion of bailor's third-party interests. — A bailee who is negligent with respect to bailed goods is not liable for the unintentional invasion of the interest of the bailor in the bailee's contractual or employment relationships with third persons. Morse v. Piedmont Hotel Co., 110 Ga. App. 509, 139 S.E.2d 133, 1964 Ga. App. LEXIS 684 (1964).

Jury instruction on the duties of bailor and bailee, which comported word for word with O.C.G.A. § 44-12-44 and with the standard instruction appearing at p. 39 of Suggested Pattern Jury Instructions, I (2d ed.), Council of Superior Court Judges of Ga. (Civil Cases), 1984, was not in error. Custom Coating, Inc. v. Parsons, 188 Ga. App. 506, 373 S.E.2d 291, 1988 Ga. App. LEXIS 1075 (1988).

Questions of diligence and negligence determined by jury. — Ordinarily in bailment all questions of diligence and negligence are questions of fact for determination by the jury. Loeb v. Whitton, 77 Ga. App. 753, 49 S.E.2d 785, 1948 Ga. App. LEXIS 635 (1948).

Bailor's Burden of Proof

Burden of proof required before presumption of bailee's negligence arises. — The burden is on the bailor to prove the loss, destruction, disappearance of or injury to the property while it was in the bailee's possession and exclusive control, before the presumption that the loss was occasioned by the bailee's negligence arises. Millender v. Looper, 86 Ga. App. 430, 71 S.E.2d 724, 1952 Ga. App. LEXIS 968 (1952).

Presumption of negligence arises, if alleged, where possession is shown in the bailee at the time of damage to the property. United States Sec. Whse., Inc. v. Brooks, 115 Ga. App. 834, 156 S.E.2d 217, 1967 Ga. App. LEXIS 1274 (1967).

Proof of loss or damage achieved by direct or circumstantial evidence. — Proof of loss or damage to property while under a bailee's control may be done by either direct or circumstantial evidence. Walker Elec. Co. v. Sullivan, 79 Ga. App. 13, 52 S.E.2d 477, 1949 Ga. App. LEXIS 577 (1949).

Defendant's failure to deliver stored property on demand establishes prima facie case for the plaintiff. Washburn Storage Co. v. Mobley, 94 Ga. App. 113, 94 S.E.2d 37, 1956 Ga. App. LEXIS 479 (1956); Harper Whse., Inc. v. Henry Chanin Corp., 102 Ga. App. 489, 116 S.E.2d 641, 1960 Ga. App. LEXIS 660 (1960).

A parking lot operator, charging the public for the operator's services in caring for customers' cars, cannot escape liability for the loss of a car stolen from the operator's parking lot, in the absence of clear and satisfactory proof showing diligence on the operator's part throughout the bailment. A.A.A. Parking, Inc. v. Bigger, 113 Ga. App. 578, 149 S.E.2d 255, 1966 Ga. App. LEXIS 1141 (1966).

Bailee's Burden of Proof

Burden on bailee to rebut presumption. — A presumption of negligence arises where possession is shown in the bailee at the time of damage to the property. The burden then is on the bailee to

Bailee's Burden of Proof (Cont'd)

prove that the injury to the property was not occasioned by negligence on the bailee's part. Scott v. Purser Truck Sales,Inc., 198 Ga. App. 611, 402 S.E.2d 354, 1991 Ga. App. LEXIS 189 (1991).

In order to rebut the evidentiary presumption, the bailee must negate every inference of negligence on its part, as the presumption in itself is sufficient to support a verdict in favor of the bailor, and it is only after the bailee has met its burden of proof by showing it exercised the required standard of diligence that the burden of going forward with the evidence shifts back to the bailor, who then has the burden of producing evidence to show negligence on the part of the bailee. Scott v. Purser Truck Sales, Inc., 198 Ga. App. 611, 402 S.E.2d 354, 1991 Ga. App. LEXIS 189 (1991).

Once prima facie case for plaintiff is established, defendant can prevail only by establishing that defendant exercised ordinary care to prevent the loss or destruction of the plaintiff's property. Harper Whse., Inc. v. Henry Chanin Corp., 102 Ga. App. 489, 116 S.E.2d 641, 1960 Ga. App. LEXIS 660 (1960).

Affirmative showings of diligence. — Once the bailor has proved loss or damage to property while it is under the control of the bailee, there is a presumption that the bailee was negligent unless the bailee shows to the satisfaction of the jury that the bailee exercised proper diligence. Walker Elec. Co. v. Sullivan, 79 Ga. App. 13, 52 S.E.2d 477, 1949 Ga. App. LEXIS 577 (1949).

A bailee cannot be exculpated from the liability of loss by failing to allege and prove affirmative showings of diligence. Light v. Smith, 86 Ga. App. 591, 71 S.E.2d 844, 1952 Ga. App. LEXIS 1015 (1952).

Bailee must establish absence of contributory negligence. — Although a bailee need not necessarily prove that the loss was occasioned by a particular exception, the bailee must establish that the bailee's own negligence did not contribute thereto. Haynie v. A & H Camper Sales, Inc., 233 Ga. 654, 212 S.E.2d 825, 1975 Ga. LEXIS 1409 (1975).

Evidence was sufficient to find that the defendant construction company bailee failed to carry its burden of showing that it exercised the requisite degree of care for a laser surveying unit where there was evidence that the defendant had been experiencing burglary problems, that its job superintendent had been taking the previously loaned prototype home for safekeeping, and that the plaintiff's representative advised the superintendent that the superintendent should similarly take the replacement unit home because it was more expensive than the prototype. Frontier Contracting Co. v. L.S.R., Inc., 174 Ga. App. 478, 330 S.E.2d 414, 1985 Ga. App. LEXIS 1846 (1985).

Bailee's knowledge of automobile contents required for liability. — A bailee for hire as to an automobile is not liable for the contents thereof unless the bailee has actual or implied knowledge or notice as to such contents. Davidson v. Ramsby, 133 Ga. App. 128, 210 S.E.2d 245, 1974 Ga. App. LEXIS 988 (1974).

Reasonable expectation of car contents is sufficient notice. — Sufficient notice of the contents of a car exists if the articles are such as the bailee might reasonably expect to be therein. Davidson v. Ramsby, 133 Ga. App. 128, 210 S.E.2d 245, 1974 Ga. App. LEXIS 988 (1974).

It is reversible error for trial judge to relieve defendant of this affirmative duty of producing evidence of diligence and to charge the jury in effect that the defendant was under no duty of making any defense until the plaintiff had proved all of the essential facts of its case, including negligence, by evidence. Richter Bros. v. Atlantic Co., 59 Ga. App. 137, 200 S.E. 462, 1938 Ga. App. LEXIS 458 (1938).

It is reversible error for the trial judge to relieve the defendant of the duty imposed by O.C.G.A. § 44-12-44, and to so charge the jury as to put the burden of showing negligence on the plaintiff. Elliott v. Levy, 77 Ga. App. 562, 49 S.E.2d 179, 1948 Ga. App. LEXIS 599 (1948); Goodyear Clearwater Mills v. Wheeler, 77 Ga. App. 570, 49 S.E.2d 184, 1948 Ga. App. LEXIS 600 (1948).

RESEARCH REFERENCES

Am. Jur. 2d.
8 Am. Jur. 2d, Bailments, §§ 252, 254, 255 et seq.
C.J.S.
8 C.J.S., Bailments, § 110 et seq.
ALR.
Right of bailee by notice or contract to limit care to less than that fixed by statute, 34 A.L.R. 169.

Liability of bailee where subject of bailment is stolen, 48 A.L.R. 378.

Duty and liability of fair association, or other bailee, as regards articles entrusted to it for exhibition or display, 139 A.L.R. 931.

Liability of bailee for hire of automobile for loss of, or damage to, contents, 27 A.L.R.2d 796.

Presumption and burden of proof in action for injury to or loss of ship or vessel during bailment or charter, 65 A.L.R.2d 1228.

Presumption and burden of proof where subject of bailment is destroyed or damaged by windstorm or other meteorological phenomena, 43 A.L.R.3d 607.

Presumption and burden of proof where subject of bailment is destroyed or damaged by fire, 44 A.L.R.3d 171.

Liability of bailee of airplane for damage thereto, 44 A.L.R.3d 862.

Liability of operator of marina or boatyard for loss of or injury to pleasure boat left for storage or repair, 44 A.L.R.3d 1332.

Liability of owner or operator of parking lot or garage for loss of or damage to contents of parked motor vehicle, 78 A.L.R.3d 1057.

Liability of one undertaking to develop or to otherwise process already developed photographic film for its loss or destruction, 6 A.L.R.4th 934.

Liability for loss of hat, coat, or other property deposited by customer in place of business, 54 A.L.R.5th 393.

44-12-45. When act of God or contract exception available as defense.

In order for a bailee to avail himself of an act of God or an exception under the contract as a defense, he must establish not only that the act of God or excepted fact ultimately occasioned the loss but that his own negligence did not contribute to the loss.

History.
Civil Code 1895, § 2265; Civil Code 1910, § 2713; Code 1933, § 12-106.
History of Section.
This Code section is derived from the decision in Richmond & D.R.R. v. White & Co., 88 Ga. 805, 15 S.E. 802 (1892).
Cross references.
Risk of loss in the absence of breach, § 11-2-509.

JUDICIAL DECISIONS

O.C.G.A. § 44-12-45's inapplicable to disclaimer containing absolution of liability from all perils. White v. Atlanta Parking Serv. Co., 139 Ga. App. 243, 228 S.E.2d 156, 1976 Ga. App. LEXIS 1756, cert. denied, 238 Ga. 18, 231 S.E.2d 73, 1976 Ga. LEXIS 1076 (1976).

Diligence required to preserve shipment from loss by fire. — The diligence required of a common carrier in regard to preserving goods in the course of transportation by the carrier from loss by fire is not limited to the avoidance of setting fire to such goods, but extends also to protecting and preserving them from destruction after a peril from fire has become apparent. Atlanta & W.P.R.R. v. Jacobs' Pharmacy Co., 135 Ga. 113, 68 S.E. 1039, 1910 Ga. LEXIS 431 (1910).

Bailee must prove absence of its contributory negligence. — If a common carrier relies upon the defense that the loss was occasioned by the fault of the shipper or the shipper's agent, the shipper

must bring self within the defense by negativing contributing fault on the shipper's own part. Atlanta & W.P.R.R. v. Jacobs' Pharmacy Co., 135 Ga. 113, 68 S.E. 1039, 1910 Ga. LEXIS 431 (1910).

Where a carrier is sued for loss or destruction of goods in transit, resulting from unreasonable delay in delivery, the defense that the delay was caused by an unprecedented flood or some other act of God will not avail where it appears that the delay was attributable not merely to this cause, but largely to the negligence of the carrier. Lamb v. Mitchell & Co., 15 Ga. App. 759, 84 S.E. 213, 1915 Ga. App. LEXIS 57 (1915).

The defense of a carrier would be complete, where the damage was the result of some vis major, upon proof being made that its own negligence did not contribute to the loss caused by an occurrence over which it had no control. Southern Ry. v. Standard Growers Exch., 34 Ga. App. 534, 130 S.E. 373, 1925 Ga. App. LEXIS 398 (1925).

Although a bailee need not necessarily prove that the loss was occasioned by a particular exception, the bailee must establish that personal negligence did not contribute thereto. Haynie v. A & H Camper Sales, Inc., 233 Ga. 654, 212 S.E.2d 825, 1975 Ga. LEXIS 1409 (1975).

Where goods are shipped "released," the burden is upon the carrier to show that the loss was within an exemption and not occasioned by negligence. Georgia S. & F. Ry. v. Johnson, King & Co., 121 Ga. 231, 48 S.E. 807, 1904 Ga. LEXIS 95 (1904).

Proof that goods damaged by inherent qualities rebuts carrier's negligence. — When the goods composing a shipment are of such intrinsic character as to be self-destructive or incapable of safe transportation, the presumption that damage which occurred in the course of the transportation is due to the negligence of the carrier is rebutted by showing that the damage is due to the inherent qualities of the shipment. Capital City Oil Co. v. Central of Ga. Ry., 16 Ga. App. 750, 86 S.E. 57, 1915 Ga. App. LEXIS 217 (1915).

RESEARCH REFERENCES

Am. Jur. 2d.

8 Am. Jur. 2d, Bailments, §§ 134, 136, 157.

C.J.S.

8 C.J.S., Bailments, § 56.

ALR.

Law of general average as affected by fact that necessity for sacrifice or expenditure was due to negligent navigation, 25 A.L.R. 154.

Liability of bailee where subject of bailment is stolen, 26 A.L.R. 223; 48 A.L.R. 378.

Bailee's express agreement to return property, or to return it in a specified condition, as enlarging his common-law liability, 124 A.L.R. 186; 150 A.L.R. 269.

Presumption and burden of proof where subject of bailment is destroyed or damaged by windstorm or other meteorological phenomena, 43 A.L.R.3d 607.

Liability of hotel, motel, or similar establishment for damage to or loss of guest's automobile left on premises, 52 A.L.R.3d 433.

PART 2

HIRING

RESEARCH REFERENCES

ALR.

Validity of agreement by bailee of instrumentality to purchase his supplies from bailor, 14 A.L.R. 114; 17 A.L.R. 392.

Liability of bailee for loss of or injury to goods kept at a place other than that originally intended, 17 A.L.R. 979.

Imputing negligence of bailee to bailor where subject of bailment is damaged by third person, 30 A.L.R. 1248.

Duty and liability of farm tenant in respect to livestock leased with farm, 32 A.L.R. 857.

Right of a factor, commission merchant, or produce broker to sell property to protect advances, 40 A.L.R. 387.

Liability of one contracting to make repairs for damages for improper performance of the work, 44 A.L.R. 824.

Relationship of bailor and bailee as between owner of goods in bonded warehouse and proprietor of warehouse, 77 A.L.R. 1502.

Liability of one furnishing lockers for hire or to patrons for loss of packages or goods placed therein, 19 A.L.R.2d 331.

Liability of warehouseman for injury to stored goods as result of failure to maintain proper temperatures, 92 A.L.R.2d 1298.

Bailee's duty to insure bailed property, 28 A.L.R.3d 513.

Construction and effect of motor vehicle leasing contracts, 43 A.L.R.3d 1283.

Liability of hotel, motel, or similar establishment for damage to or loss of guest's automobile left on premises, 52 A.L.R.3d 433.

44-12-60. "Hiring" defined.

The term "hiring" means a contract by which one person grants to another either the enjoyment of a thing or the use of the labor and industry of himself during a certain time and for a stipulated compensation or by which one person contracts for the labor or services of another person with regard to a thing bailed to such other person for a specified purpose.

History.

Orig. Code 1863, § 2056; Code 1868, § 2059; Code 1873, § 2085; Code 1882, § 2085; Civil Code 1895, § 2903; Civil Code 1910, § 3476; Code 1933, § 12-201.

JUDICIAL DECISIONS

Services performed for wages or under any contract of hire are one and same as a matter of law. National Trailer Convoy, Inc. v. Undercofler, 109 Ga. App. 703, 137 S.E.2d 328, 1964 Ga. App. LEXIS 963 (1964).

Lease agreement as contract for hire. — Where it was clear from the terms of an automobile lease agreement that a contract for hire was created, with lessor as bailor and lessee as bailee, the relationship between the parties was governed by the lease terms, and by the statutory obligations of a bailor under O.C.G.A. § 44-12-63. Mark Singleton Buick, Inc. v. Taylor, 194 Ga. App. 630, 391 S.E.2d 435, 1990 Ga. App. LEXIS 288 (1990).

A ski rental agreement established the relationship of bailor-bailee which was governed by the terms of the agreement and the obligations of a bailor under O.C.G.A. § 44-12-63. Benford v. RDL, Inc., 223 Ga. App. 800, 479 S.E.2d 110, 1996 Ga. App. LEXIS 1284 (1996).

Where bailment for mutual benefit exists. — Where an article is bailed to another for the purpose of making repairs on it for a consideration, the bailment is in its inception for the mutual benefit of both the bailor and the bailee. Shropshire v. Caylor, 94 Ga. App. 37, 93 S.E.2d 586, 1956 Ga. App. LEXIS 457 (1956).

RESEARCH REFERENCES

ALR.

Bailment: effect of failure to reply to notice of rate at which goods then on premises may be left, 24 A.L.R. 968.

Character of contract to raise seed, 29 A.L.R. 647.
Character of contract for use of chattels with agreement for replacements, 38 A.L.R. 175.

44-12-61. Qualified ownership and rights of hirer.

The hirer of things acquires a qualified ownership of them for the time specified, which qualified ownership entitles him to all their increase and to the possession and enjoyment of them during the period of bailment against everyone else, including the owner himself.

History.
Orig. Code 1863, § 2057; Code 1868, § 2060; Code 1873, § 2086; Code 1882, § 2086; Civil Code 1895, § 2904; Civil Code 1910, § 3477; Code 1933, § 12-202.

JUDICIAL DECISIONS

"Increase" defined. — The word "increase" means the issue of animals, or that which issues from a principal. Jackson v. Maddox, 136 Ga. 31, 70 S.E. 865, 1912B Am. Ann. Cas. 1216 (1911).

RESEARCH REFERENCES

ALR.
Duty and liability of farm tenant in respect to livestock leased with farm, 32 A.L.R. 857.

44-12-62. Duties of hirer; liability for acts of bailor's agents.

(a) The duties of the hirer of things are:

(1) To put the thing to no other use than that for which it is hired;

(2) To take ordinary care in its use;

(3) To redeliver the thing at the expiration of the bailment; and

(4) To comply generally with the terms of the hiring.

(b) If the bailor sends his own agents with the thing bailed, the hirer shall not be liable for the acts of such agents but shall only be liable either to the bailor or to third persons for the consequences of his own directions and for gross neglect.

History.
Orig. Code 1863, § 2060; Code 1868, § 2063; Code 1873, § 2089; Code 1882, § 2089; Civil Code 1895, § 2907; Civil Code 1910, § 3480; Code 1933, § 12-203.

Cross references.
Theft by conversion, § 16-8-4.

JUDICIAL DECISIONS

Lessee of personal property is termed bailee for hire. Goger v. United States, 4 B.R. 4, 1980 Bankr. LEXIS 5427 (Bankr. N.D. Ga. 1980).

Hirer is bound only for ordinary diligence in a contract of mutual benefit and is responsible only for ordinary negligence, or for that degree of care and diligence which the generality of mankind use in keeping their own goods of the same kind. Malone v. Robinson, 77 Ga. 719, 1886 Ga. LEXIS 390 (1886); Evans & Pennington v. Nail, 1 Ga. App. 42, 57 S.E. 1020, 1907 Ga. App. LEXIS 144 (1907); Brannan & Holder v. Moore, 135 Ga. 517, 69 S.E. 820, 1910 Ga. LEXIS 19 (1910).

Bailee's control and responsibility is limited in respect to conduct of servant furnished to operate chattel. Hill Aircraft & Leasing Corp. v. Simon, 122 Ga. App. 524, 177 S.E.2d 803, 1970 Ga. App. LEXIS 931 (1970).

Where the plaintiff leased an airplane to the defendant, and sent with the airplane a co-pilot employed by the plaintiff, and the airplane was subsequently damaged due to a steering mechanism malfunction, the evidence created a jury question as to the plaintiff's contributory negligence, and the plaintiff was not entitled to a directed verdict. Jet Air, Inc. v. EPPS Air Serv., Inc., 194 Ga. App. 829, 392 S.E.2d 245, 1990 Ga. App. LEXIS 362 (1990), cert. denied, No. S90C0892, 1990 Ga. LEXIS 767 (Ga. May 16, 1990).

Owner of vehicle who employs driver is responsible for driver's negligence, rather than the hirer where the hirer has no supervision or control of the servant's mechanical operation of the vehicle and no right to discharge the driver and take over the operation of the vehicle personally or put it in the hands of another to operate. Montgomery Trucking Co. v. Black, 231 Ga. 211, 200 S.E.2d 882, 1973 Ga. LEXIS 645 (1973).

Liability of party hiring crane for operator's negligence. — For a discussion of the liability of a hirer of a crane for the negligence of the crane operator in lifting a concrete hopper, see Sims Crane Serv., Inc. v. Ideal Steel Prods., Inc., 750 F.2d 884, 1985 U.S. App. LEXIS 27533 (11th Cir. 1985).

Because a contract between a crane owner and a general contractor stated that the owner's employee was a borrowed servant, a trial court correctly granted summary judgment in a negligence action arising from injuries resulting from the crane operation. Tim's Crane & Rigging, Inc. v. Gibson, 278 Ga. 796, 604 S.E.2d 763, 2004 Ga. LEXIS 950 (2004).

Trial court erred in granting summary judgment to the Georgia Ports Authority on the issue of liability in its breach of contract action against a lessee because neither the parties' contract for the lease of a gantry crane, nor the other evidence before the trial court, established that a crane operator was the lessee's borrowed servant as a matter of law under O.C.G.A. § 44-12-62(b). Cooper/T. Smith Stevedoring Co. v. State of Ga., 317 Ga. App. 362, 730 S.E.2d 168, 2012 Ga. App. LEXIS 705 (2012), cert. denied, No. S12C2016, 2013 Ga. LEXIS 34 (Ga. Jan. 7, 2013), cert. denied, No. S12C2023, 2013 Ga. LEXIS 51 (Ga. Jan. 7, 2013).

Liability of employer for tractor carrying trash. — Because an employer, as bailor, sent the employer's own employee with the thing bailed, a tractor with attached trash trailer, under O.C.G.A. § 44-12-62(b), a contractor, as the hirer, was liable only for the consequences of the hirer's own directions or for the hirer's gross negligence; the trial court erred in concluding that the contractor was entitled to summary judgment on the basis that the employee was not a borrowed servant because the evidence presented at least a factual issue regarding whether the employee was the contractor's borrowed servant since there was evidence that the contractor alone supervised the employee's work hauling debris, that the contractor controlled the employee's schedule for each day, and that the contractor dictated which landfill would receive the debris and when a load was ready. Coe v. Carroll & Carroll, Inc., 308 Ga. App. 777, 709 S.E.2d 324, 2011 Ga. App. LEXIS 280 (2011), cert. denied, No. S11C1159, 2011 Ga. LEXIS 836 (Ga. Oct. 17, 2011).

Status as employee or servant genuine issue of material fact. — Whether a backhoe operator remained an employee of the defendant contractor or became a servant of the plaintiff's employer upon renting the backhoe from the defendant is a genuine issue of material fact. Mitchell v. Burden Bros., 126 Ga.

App. 75, 189 S.E.2d 909, 1972 Ga. App. LEXIS 1051 (1972).

RESEARCH REFERENCES

Am. Jur. 2d.
8 Am. Jur. 2d, Bailments, § 83 et seq.
C.J.S.
8 C.J.S., Bailments, § 31.
ALR.
Relation between customer and broker receiving bonds or other securities for sale or exchange, 52 A.L.R. 501.
Liability of bailee for damage to or destruction of subject of bailment by servant acting for his own purposes or in violation of his instructions, 52 A.L.R. 711.
Duty and liability of fair association, or other bailee, as regards articles entrusted to it for exhibition or display, 139 A.L.R. 931.
Who is member of the immediate family within automobile lease provision restricting use of rented automobile to customer and members of his immediate family, 80 A.L.R.3d 1170.
Liability of owner or bailor of horse for injury by horse to hirer or bailee thereof, 6 A.L.R.4th 358.

44-12-63. Obligations of bailor.

The obligations of the bailor of things are:

(1) To do no act to deprive the hirer of the use and enjoyment of the chattel during the period of the bailment;

(2) To keep the thing in suitable order and repair for the purposes of the bailment; and

(3) To warrant the right of possession and that the thing bailed is free from any secret fault rendering it unfit for the purposes for which it is hired.

History.
Orig. Code 1863, § 2059; Code 1868, § 2062; Code 1873, § 2088; Code 1882, § 2088; Civil Code 1895, § 2906; Civil Code 1910, § 3479; Code 1933, § 12-204.
Cross references.
Liability of motor vehicle owner for traffic or parking violations occurring while motor vehicle leased to another, § 40-6-207.
Law reviews.
For comment on Redfern Meats, Inc. v. Hertz Corp., see 27 Mercer L. Rev. 347 (1975).

JUDICIAL DECISIONS

Analysis

General Consideration
Manufacturer's Liability
Third Party

General Consideration

Applicability. — O.C.G.A. § 44-12-63 applies to warranties under O.C.G.A. Art. 2, Pt. 3, T. 11. Redfern Meats, Inc. v. Hertz Corp., 134 Ga. App. 381, 215 S.E.2d 10, 1975 Ga. App. LEXIS 2021 (1975) (commented on in 27 Mercer L. Rev. 347 (1975)).

Due care on part of bailor requires bailor to examine thing bailed for the purpose of seeing that it has no hidden defects which would render it unsuitable

for the purposes for which it was hired. Parker v. G.O. Loving & Co., 13 Ga. App. 284, 79 S.E. 77, 1913 Ga. App. LEXIS 126 (1913); Hertz Driv-Ur-Self Stations, Inc. v. Benson, 83 Ga. App. 866, 65 S.E.2d 191, 1951 Ga. App. LEXIS 986 (1951); Yale & Towne, Inc. v. Sharpe, 118 Ga. App. 480, 164 S.E.2d 318, 1968 Ga. App. LEXIS 1436 (1968).

Scope of bailor's duty of care. — While it is the duty of the bailor to warrant against latent defects, much more is it the duty of the bailor to see that the bailed article is free from patent defects which render it unfit and unsuitable for the purposes for which it is hired. Parker v. G.O. Loving & Co., 13 Ga. App. 284, 79 S.E. 77, 1913 Ga. App. LEXIS 126 (1913); Queen v. Patent Scaffolding Co., 46 Ga. App. 364, 167 S.E. 789, 1933 Ga. App. LEXIS 72 (1933).

A bailor for hire, entrusting an automobile to another for immediate operation, has a duty of using ordinary care to ascertain that the automobile has no hidden defects rendering it dangerous, and this duty extends to those persons within the range of foreseeable operation of the automobile, such as someone on or near the highways on which the vehicle with defective brakes was to be operated. Hertz Driv-Ur-Self Stations, Inc. v. Benson, 83 Ga. App. 866, 65 S.E.2d 191, 1951 Ga. App. LEXIS 986 (1951).

Where it is clear from the terms of an automobile lease agreement that a contract for hire as defined in O.C.G.A. § 44-12-60 was created, with lessor as bailor and lessee as bailee, the relationship between the parties was governed by the lease terms, and by the statutory obligations of a bailor under O.C.G.A. § 44-12-63. Mark Singleton Buick, Inc. v. Taylor, 194 Ga. App. 630, 391 S.E.2d 435, 1990 Ga. App. LEXIS 288 (1990).

A ski rental agreement established the relationship of bailor-bailee which was governed by the terms of the agreement and the obligations of a bailor under O.C.G.A. § 44-12-63. Benford v. RDL, Inc., 223 Ga. App. 800, 479 S.E.2d 110, 1996 Ga. App. LEXIS 1284 (1996).

In renting a bicycle, a motel acted as a bailor for hire, and the relationship caused certain duties requiring the exercise of ordinary care that rose to a greater level than that owed to the general public. Perton v. Motel Properties, Inc., 230 Ga. App. 540, 497 S.E.2d 29, 1998 Ga. App. LEXIS 214 (1998).

Exculpation of bailor's liability by exculpatory clause. — The liability of a bailor under O.C.G.A. § 44-12-63 may be exculpated by an exculpatory clause, even when the damage is caused by the lessor's own negligence, as long as the exculpatory clause is not contrary to public policy and explicitly shows an intent to include the lessor's own negligence, and that negligence does not amount to willful and wanton misconduct. Hall v. Gardens Servs., Inc., 174 Ga. App. 856, 332 S.E.2d 3, 1985 Ga. App. LEXIS 1978 (1985).

A contract in which a lessor or bailor is exculpated himself from liability with a disclaimer clause is not prohibited by law or public policy. Mercedes-Benz Credit Corp. v. Shields, 199 Ga. App. 89, 403 S.E.2d 891, 1991 Ga. App. LEXIS 344 (1991).

A covenant not to sue in ski rental lease agreement barred the renter's claim of breach of warranty or contract in the absence of a showing of any latent defect in the skis or bindings. Benford v. RDL, Inc., 223 Ga. App. 800, 479 S.E.2d 110, 1996 Ga. App. LEXIS 1284 (1996).

Exculpatory clause void. — Portion of bailment contract which stated that the customer "by his acceptance and removal" of the skates agreed that they "are in acceptable operating condition, and that lessor makes no warranties, express or implied, in connection therewith," was void. Hall v. Skate Escape, Ltd., 171 Ga. App. 178, 319 S.E.2d 67, 1984 Ga. App. LEXIS 2134 (1984).

Bailor warrants soundness and suitableness of thing bailed, and is liable for any injury or damage which may result from a latent defect of which the bailee has no knowledge and the consequences of which the bailee could not avoid by the exercise of ordinary care. Queen v. Patent Scaffolding Co., 46 Ga. App. 364, 167 S.E. 789, 1933 Ga. App. LEXIS 72 (1933).

What would be ordinary care depends upon particular business in hand, the circumstances surrounding the

General Consideration (Cont'd)

particular transaction, and the situation of the parties. Hertz Driv-Ur-Self Stations, Inc. v. Benson, 83 Ga. App. 866, 65 S.E.2d 191, 1951 Ga. App. LEXIS 986 (1951).

Amount of care bailee ought to have used to discover defect is question of fact for jury. Parker v. G.O. Loving & Co., 13 Ga. App. 284, 79 S.E. 77, 1913 Ga. App. LEXIS 126 (1913).

No duty to maintain imposable upon gratuitous bailor. — As a gratuitous bailor, defendant soda bottling company had no legal duty to maintain properly the area surrounding a refreshment wagon where plaintiff had allegedly slipped, particularly after the wagon was delivered and placed under the bailee's control for its use. Prince v. Atlanta Coca-Cola Bottling Co., 210 Ga. App. 108, 435 S.E.2d 482, 1993 Ga. App. LEXIS 1082 (1993).

Scope of bailor's liability. — Since the bailor's duty extends to persons other than the parties to the actual bailment contract, the limits of the bailor's liability are not to be determined alone by the provisions and warranties of the contract of bailment, but also by the limits imposed by the doctrine of proximate cause, that is, whether the bailor should have foreseen the consequences of negligence as a natural and probable result. Hertz Driv-Ur-Self Stations, Inc. v. Benson, 83 Ga. App. 866, 65 S.E.2d 191, 1951 Ga. App. LEXIS 986 (1951).

Bailor's liability is not determined alone by the provisions and warranties of the bailment contract, but also by the common law rules of negligence. Seaboard Coast Line R.R. v. Mobil Chem. Co., 172 Ga. App. 543, 323 S.E.2d 849, 1984 Ga. App. LEXIS 2574 (1984).

Bailment for hire. — In an action in which an insurance company filed suit against a company in a subrogation action to recover money paid by the insurance company to a restaurant in Norcross, Georgia, after a fire destroyed the restaurant, the company's motion for summary judgment was denied as to the bailment claim; the bailment was for hire because: (1) the company leased the soda dispensing equipment at no cost to the restaurant because the restaurant then purchased the company's syrup for use in the equipment; and (2) the fact that the syrup was purchased through a third-party vendor did not lessen the benefit of the sale to the company, as the company was the sole supplier of the company's syrup. Colony Ins. Co. v. Coca-Cola Co., 239 F.R.D. 666, 2007 U.S. Dist. LEXIS 5113 (N.D. Ga. 2007).

Bailor's anticipation of particular ensuing consequences unnecessary for liability. — In order for a bailor to be liable as for negligence, it is not necessary that the bailor should have been able to anticipate the particular consequences which ensued. It is sufficient, if in ordinary prudence the bailor might have foreseen that some injury would result from the bailor's act or omission, or that consequences of a generally injurious nature might result. Hertz Driv-Ur-Self Stations, Inc. v. Benson, 83 Ga. App. 866, 65 S.E.2d 191, 1951 Ga. App. LEXIS 986 (1951).

Foreseeability of resulting injury from bailor's act sufficient. — It is sufficient if, in ordinary prudence, bailor might have foreseen that some injury would result from the bailor's act or omission, or that consequences of a generally injurious nature might result. Hertz Driv-Ur-Self Stations, Inc. v. Benson, 83 Ga. App. 866, 65 S.E.2d 191, 1951 Ga. App. LEXIS 986 (1951).

Bailor's knowledge of defect waives right to claim damages. — If the bailee knows of the defect or in the exercise of ordinary care ought to discover it and, notwithstanding the bailee's actual or implied knowledge, the bailee uses the thing and injury results on account of the defect, the bailee will be held to have waived the right to claim damages since, by the exercise of ordinary care, the bailee could have avoided the consequences of the bailor's neglect. Parker v. G.O. Loving & Co., 13 Ga. App. 284, 79 S.E. 77, 1913 Ga. App. LEXIS 126 (1913).

Manufacturer's Liability

Lessor not liable where manufacturer not liable. — If the evidence does not authorize a finding that allegedly defective leased equipment was in fact de-

fective so as to permit a recovery against the manufacturer under O.C.G.A. § 51-1-11(b), it clearly does not authorize a finding that it was defective so as to permit a recovery under O.C.G.A. § 44-12-63(3) against the lessor. Fortner v. W.C. Cayne & Co., 184 Ga. App. 187, 360 S.E.2d 920, 1987 Ga. App. LEXIS 2192 (1987).

Manufacturer of appliance for rent has duty to know whether appliance was constructed defectively or not. Queen v. Patent Scaffolding Co., 46 Ga. App. 364, 167 S.E. 789, 1933 Ga. App. LEXIS 72 (1933).

Liability of maker or vendor of article harmless in kind, but dangerous through defect, is under a duty to make the article carefully where its nature is such that it is reasonably certain to place life and limb in peril when negligently made and, where there is knowledge that the article will be so used by persons other than the purchaser, such maker or vendor is liable for an injury to a person resulting from a failure to perform this duty. Queen v. Patent Scaffolding Co., 46 Ga. App. 364, 167 S.E. 789, 1933 Ga. App. LEXIS 72 (1933).

Manufacturer is not liable where purchaser had knowledge of defect before injury. Queen v. Patent Scaffolding Co., 46 Ga. App. 364, 167 S.E. 789, 1933 Ga. App. LEXIS 72 (1933).

Manufacturer may be liable for injury arising from defect which the manufacturer ought to have discovered, such as one which the manufacturer could have ascertained by proper care and attention, or by making a reasonable test or inspection. Queen v. Patent Scaffolding Co., 46 Ga. App. 364, 167 S.E. 789, 1933 Ga. App. LEXIS 72 (1933).

Liability exists where manufacturer fails to warn of known defect. — A manufacturer of an article which is not inherently dangerous, but which is rendered dangerous by a defect therein, is liable for an injury to a third person arising from the defect, where the manufacturer had knowledge of the defect and failed to give notice or warning thereof to the purchaser. Queen v. Patent Scaffolding Co., 46 Ga. App. 364, 167 S.E. 789, 1933 Ga. App. LEXIS 72 (1933).

Third Party

Bailor's knowledge of animal's vicious nature required for third person's recovery. — When a third person, other than bailor and bailee, is injured by a dangerous animal, that third party cannot recover from the owner unless that party shows that the owner knew or had reasonable grounds to know of the vicious propensities of the animal and was wanting in ordinary care. Reed v. Southern Express Co., 95 Ga. 108, 22 S.E. 133, 1894 Ga. LEXIS 449 (1894).

Bailee's discovery of defect no insulation from third person's injury. — One who furnishes a motor vehicle to another in a defective condition is not as a matter of law insulated against liability to third persons because the bailee continues to operate the vehicle after discovery of the defect. Yale & Towne, Inc. v. Sharpe, 118 Ga. App. 480, 164 S.E.2d 318, 1968 Ga. App. LEXIS 1436 (1968).

Bailor's negligence superseded by unauthorized criminal acts. — Any negligence on the part of the owner/bailor of an automobile in failing to inquire as to the driving records of the bailee or another listed driver, or their intended use of the vehicle, was superseded by the unauthorized criminal acts of a third party who had borrowed the vehicle from the bailee. Alamo Rent-A-Car, Inc. v. Hamilton, 216 Ga. App. 659, 455 S.E.2d 366, 1995 Ga. App. LEXIS 259 (1995).

RESEARCH REFERENCES

Am. Jur. 2d.

8 Am. Jur. 2d, Bailments, § 100 et seq.

C.J.S.

8 C.J.S., Bailments, §§ 31, 33, 37 et seq.

ALR.

Recovery back of amount paid to bailee for repairs of no benefit to bailor, 31 A.L.R. 698.

Liability of bailor for personal injuries due to defects in subject of bailment, 61 A.L.R. 1336; 131 A.L.R. 845.

Construction and application of provi-

sion of bailment or lease contract relating to cost of repairs or replacements, or damage to chattle, 129 A.L.R. 460.

Liability of bailor for personal injuries or death due to defects in subject of bailment, 131 A.L.R. 845.

Liability for loss of or damage to automobile left in parking lot or garage, 7 A.L.R.3d 927; 13 A.L.R.4th 362; 13 A.L.R.4th 442.

Tort liability of one renting or loaning airplane to another, 4 A.L.R.2d 1306.

Liability of bailor of automotive vehicle or machine for personal injury or death due to defects therein, 46 A.L.R.2d 404.

Warranties in connection with leasing or hiring of chattels, 68 A.L.R.2d 850.

Liability of pawnbroker or pledgee for theft by third person of pawned or pledged property, 68 A.L.R.2d 1259.

Application of warranty provisions of Uniform Commercial Code to bailments, 48 A.L.R.3d 668.

Products liability: application of strict liability is tort doctrine to lessor of personal property, 52 A.L.R.3d 121.

Liability of owner or bailor of horse for injury by horse to hirer or bailee thereof, 6 A.L.R.4th 358.

Liability in negligence for death or injury related to rented bicycle, scooter, or segway, 48 A.L.R.7th Art. 3.

44-12-64. Duty to return property; assumption of risks; time of return.

The contract of hire may call for the return of the thing or of like property of the same kind and quality. If the return of the thing is specified, the risk of death or inevitable accident is with the bailor and he can retake possession immediately at the expiration of the time of hiring. If the return of like property of the same kind and quality is specified, the risk is with the bailee and he must redeliver the thing hired before the bailor's interest is revested.

History.

Orig. Code 1863, § 2058; Code 1868, § 2061; Code 1873, § 2087; Code 1882, § 2087; Civil Code 1895, § 2905; Civil Code 1910, § 3478; Code 1933, § 12-205.

Cross references.

Theft by conversion, § 16-8-4.

JUDICIAL DECISIONS

Duty of redelivery of leased item means only a duty to tender possession of the item at the premises of the bailee, in the absence of an agreement to the contrary. Goger v. United States, 4 B.R. 4, 1980 Bankr. LEXIS 5427 (Bankr. N.D. Ga. 1980).

RESEARCH REFERENCES

Am. Jur. 2d.

8 Am. Jur. 2d, Bailments, § 103 et seq.

C.J.S.

8 C.J.S., Bailments, § 86 et seq.

ALR.

Law of general average as affected by fact that necessity for sacrifice or expenditure was due to negligent navigation, 25 A.L.R. 154.

Recovery back of amount paid to bailee for repairs of no benefit to bailor, 31 A.L.R. 698.

Duty and liability of farm tenant in respect to livestock leased with farm, 32 A.L.R. 857.

Deposit of grain without obligation to return identical grain as a bailment or a sale, 54 A.L.R. 1166.

Liability for loss of or damage to auto-

mobile left in parking lot, 131 A.L.R. 1175; 7 A.L.R.3d 927; 13 A.L.R.4th 362; 13 A.L.R.4th 442.

Status, rights, and liability of parties to bailment for hire where bailee continues in possession after bailment has ensued, 144 A.L.R. 1024.

Liability of pawnbroker or pledgee for theft by third person of pawned or pledged property, 68 A.L.R.2d 1259.

Bailee's duty to insure bailed property, 28 A.L.R.3d 513.

44-12-65. Effect of breach of contract; action for conversion by bailor.

If either party violates the terms of the hiring, the other party may abandon the contract. If the hirer puts the thing to a different use than is specified in the contract, the bailor may bring an action as for a conversion even if the hirer is a minor.

History.

Orig. Code 1863, § 2061; Code 1868, § 2064; Code 1873, § 2090; Code 1882, § 2090; Civil Code 1895, § 2908; Civil Code 1910, § 3481; Code 1933, § 12-206.

JUDICIAL DECISIONS

Allegation required for infant bailee's liability for damages. — An infant bailee of a borrowed automobile is not liable for damages to the automobile caused by the bailee's reckless driving, in the absence of an allegation either that the bailee departed from the object of the bailment or that the bailee intentionally caused the damage. Jones v. Milner, 53 Ga. App. 304, 185 S.E. 586, 1936 Ga. App. LEXIS 74 (1936).

RESEARCH REFERENCES

Am. Jur. 2d.

8 Am. Jur. 2d, Bailments, § 230 et seq.

C.J.S.

8 C.J.S., Bailments, §§ 35, 99 et seq.

ALR.

Appropriation by carrier for its own use of coal or other commodity shipped over its line, 29 A.L.R. 1241.

Recovery back of amount paid to bailee for repairs of no benefit to bailor, 31 A.L.R. 698.

Relation between customer and broker receiving bonds or other securities for sale or exchange, 52 A.L.R. 501.

Validity and effect of acceleration clause in lease or bailment, 58 A.L.R. 300; 128 A.L.R. 750.

44-12-66. Effect of loss or destruction of thing hired; liability of hirer.

The loss or destruction of the thing hired without fault on the part of the hirer puts an end to the bailment, and the hirer is required to pay only for the time it was enjoyed.

History.
Orig. Code 1863, § 2063; Code 1868, § 2066; Code 1873, § 2092; Code 1882, § 2092; Civil Code 1895, § 2910; Civil Code 1910, § 3483; Code 1933, § 12-207.

Law reviews.
For annual survey of law of contracts, see 38 Mercer L. Rev. 107 (1986).

JUDICIAL DECISIONS

Provisions of O.C.G.A. § 44-12-66 must control, in the absence of a clear expression of intention by the parties that some other rule would govern their rights in the matter. Dearing Leasing Co. v. Harmon, Inc., 107 Ga. App. 682, 131 S.E.2d 128, 1963 Ga. App. LEXIS 955 (1963).

Where leased personal property is destroyed, without fault of the lessee, the lease is terminated, and so are future payments under the lease. Marjon Assocs. v. Leasing Int'l, Inc., 174 Ga. App. 679, 331 S.E.2d 20, 1985 Ga. App. LEXIS 1926 (1985).

RESEARCH REFERENCES

Am. Jur. 2d.
8 Am. Jur. 2d, Bailments, § 157.
C.J.S.
8 C.J.S., Bailments, § 106.
ALR.
Duty and liability of farm tenant in respect to livestock leased with farm, 32 A.L.R. 857.
Liability of bailee where subject of bailment is stolen, 48 A.L.R. 378.
Bailee's reimbursement of bailor as affecting latter's right of action against tortfeasor for damaging subject of bailment, 166 A.L.R. 206.
Liability of pawnbroker or pledgee for theft by third person of pawned or pledged property, 68 A.L.R.2d 1259.

44-12-67. When hirer may relet; effect of reletting without consent of bailor.

No hirer of a thing has a right to hire out the thing bailed to him to another person except with the consent, express or implied, of the bailor. If the hirer relets to another person without the consent of the bailor, the bailor may either take immediate possession of the thing bailed or waive this right and hold the hirer bound to extraordinary care and diligence on the part of himself and the hirer from him.

History.
Orig. Code 1863, § 2073; Code 1868, § 2068; Code 1873, § 2094; Code 1882, § 2094; Civil Code 1895, § 2912; Civil Code 1910, § 3485; Code 1933, § 12-208.

RESEARCH REFERENCES

Am. Jur. 2d.
8 Am. Jur. 2d, Bailments, § 51 et seq.
C.J.S.
8 C.J.S., Bailments, § 36.

44-12-68. Consent required for removal of hired thing from state or hazardous use.

No hirer of things has a right to remove such things beyond the

jurisdiction of this state except by consent of the bailor nor to put the thing hired to any hazardous use unless such use was specially contracted for.

History.
Orig. Code 1863, § 2072; Code 1868, § 2067; Code 1873, § 2093; Code 1882, § 2093; Civil Code 1895, § 2911; Civil Code 1910, § 3484; Code 1933, § 12-209; Ga. L. 1982, p. 3, § 44.

44-12-69. Rights of action of hirer and bailor.

For an interference with the possession of the thing hired, the right of action is in the hirer; for an injury to the property and for any interference with his property rights, the bailor has a right of action.

History.
Orig. Code 1863, § 2062; Code 1868, § 2065; Code 1873, § 2091; Code 1882, § 2091; Civil Code 1895, § 2909; Civil Code 1910, § 3482; Code 1933, § 12-210.

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Rights of action given by O.C.G.A. § 44-12-69 to bailor and bailee are concurrent. Lockhart v. Western & Atl. R.R., 73 Ga. 472, 1884 Ga. LEXIS 149 (1884).

At common law basis of allowing bailee to recover was possession, not interest. Small v. Wilson, 20 Ga. App. 674, 93 S.E. 518, 1917 Ga. App. LEXIS 1030 (1917).

A mere borrower may maintain an action only for interference with the borrower's possession; an action for damages for the destruction of the property in which a case should be brought by the owner. Lockhart v. Western & Atl. R.R., 73 Ga. 472, 1884 Ga. LEXIS 149 (1884).

Bailee of mule from day to day may maintain action against third person for animal's death; the bailee may recover the full value of the animal for the use of the owner and any damages to the bailee's rights of possession incurred by the injury resulting from a tortious act. Marietta Ice & Coal Co. v. Western & Atl. R.R., 24 Ga. App. 725, 102 S.E. 182, 1920 Ga. App. LEXIS 488 (1920).

Bailor has right of action against third party for damage to bailed property resulting in injury to bailor's rights of general property or reversion. Cincinnati, N.O. & Tex. Pac. Ry. v. Hilley, 121 Ga. App. 196, 173 S.E.2d 242, 1970 Ga. App. LEXIS 1170 (1970).

Effect of subsequent repair of bailed property by bailee. — A bailor's right of action against a third party for damage to bailed property is not affected by the subsequent repairing of the bailed property by the bailee, whether gratuitous or not. Cincinnati, N.O. & Tex. Pac. Ry. v. Hilley, 121 Ga. App. 196, 173 S.E.2d 242, 1970 Ga. App. LEXIS 1170 (1970).

Subsequent repair of bailed property by bailee does not affect the grounds or the measure of liability of a third-party tort-feasor by whose neglect the property was damaged. Cincinnati, N.O. & Tex. Pac. Ry. v. Hilley, 121 Ga. App. 196, 173 S.E.2d 242, 1970 Ga. App. LEXIS 1170 (1970).

RESEARCH REFERENCES

Am. Jur. 2d.
8 Am. Jur. 2d, Bailments, § 205 et seq.

C.J.S.
8 C.J.S., Bailments, § 93 et seq.

ALR.
Estoppel to assert title to personal chattel by permitting another to use it in his business, 7 A.L.R. 676.

Bailee's reimbursement of bailor as affecting latter's right of action against tortfeasor for damaging subject of bailment, 166 A.L.R. 206.

Bailee's liability for bailor's expense of recovering stolen subject of bailment, 80 A.L.R.3d 264.

44-12-70. Liability of thing hired to execution and levy; forthcoming bond.

When the period of the hiring does not exceed one year, the thing hired shall not be subject to sale under a judgment against the owner of the thing which was obtained subsequent to the contract of hire; but the thing may be levied on and a bond for its delivery at the expiration of the time for which it is hired may be demanded of the hirer.

History.
Orig. Code 1863, § 2074; Code 1868, § 2069; Code 1873, § 2095; Code 1882, § 2095; Civil Code 1895, § 2913; Civil Code 1910, § 3486; Code 1933, § 12-211.

JUDICIAL DECISIONS

"Levied" construed. — The word "levied" is to be given its technical meaning, that is, an actual seizure of the property by a levying officer under a process. Southern Flour & Grain Co. v. Northern Pac. Ry., 127 Ga. 626, 56 S.E. 742, 1907 Ga. LEXIS 444 (1907).

Right of domestic railway company superior to attaching creditor's right. — The right of a domestic railway company to use a freight car owned by a foreign railway company, for which use the domestic railway pays a stated sum, is superior by virtue of O.C.G.A. § 44-12-70 to the right of an attaching creditor, who, without any other lien seeks to subject the freight car to attachment by service of the summons of garnishment upon the domestic company. Southern Flour & Grain Co. v. Northern Pac. Ry., 127 Ga. 626, 56 S.E. 742, 1907 Ga. LEXIS 444 (1907). See also Southern Ry. v. Brown, 131 Ga. 245, 62 S.E. 177, 1908 Ga. LEXIS 55 (1908).

RESEARCH REFERENCES

Am. Jur. 2d.
8 Am. Jur. 2d, Bailments, § 223 et seq.
ALR.
Right of obligor in action on forthcoming bond or receipt for return of property seized under process to set up title in himself, 37 A.L.R. 1402.

44-12-71. Hire of labor or services; standard of care.

The hire of labor or services is the essence of every bailment in which goods are delivered to another and compensation is paid for the care, attention, or labor bestowed upon them. It includes the contracts of forwarding and commission merchants, factors, keepers of wharves, mechanics, and all agents in such transactions. In all such cases, the bailee is not only bound to exercise skill in the labor and work bestowed but it is a part of his contract that he shall exercise ordinary care and diligence in keeping and protecting the articles entrusted to him.

History.
Orig. Code 1863, §§ 2075, 2076; Code 1868, §§ 2070, 2071; Code 1873, §§ 2096, 2097; Code 1882, §§ 2096, 2097; Civil Code 1895, §§ 2914, 2915; Civil Code 1910, §§ 3487, 3488; Code 1933, §§ 12-407, 12-408.

RESEARCH REFERENCES

Am. Jur. 2d.
8 Am. Jur. 2d, Bailments, §§ 158, 179, 189.
C.J.S.
8 C.J.S., Bailments, §§ 46 et seq., 75.
ALR.
Liability of bailee for loss of or injury to goods kept at a place other than that originally intended, 12 A.L.R. 1322; 17 A.L.R. 979.
Liability of a bailee of money who commingles it with his own funds, 20 A.L.R. 378.
Duty and liability of gratuitous bailee or mandatory, 96 A.L.R. 909.
Liability of owner of motor vehicle for negligence of garageman or mechanic, 8 A.L.R.4th 265.
Liability of warehouseman or other bailee for loss of goods stored at other than agreed-upon place, 76 A.L.R.4th 883.

44-12-72. Title to article on which labor bestowed.

In cases of hire of labor or services, if the identical article, though materially changed by the labor bestowed, is to be returned, the title remains in the bailor. If the bailee furnishes a portion of the materials, the title to the entire structure is in the party furnishing the larger portion of the materials. If the bailor furnishes materials but the contract does not contemplate the use of that material specially, the title to the article constructed is in the bailee until it is delivered. If materials are furnished to the bailee for manufacture and the bailee and the bailor will each receive a share of the manufactured goods, the title remains in the bailor until the delivery to him of his portion of the manufactured goods.

History.
Orig. Code 1863, §§ 2077, 2078; Code 1868, §§ 2072, 2073; Code 1873, §§ 2098, 2099; Code 1882, §§ 2098, 2099; Civil Code 1895, §§ 2916, 2917; Civil Code 1910, §§ 3489, 3490; Code 1933, §§ 12-409, 12-410.

44-12-73. Right to possession by bailee.

The bailee for hire of labor and services is entitled to the possession of the thing bailed during the bailment.

History.
Orig. Code 1863, § 2079; Code 1868, § 2074; Code 1873, § 2100; Code 1882, § 2100; Civil Code 1895, § 2918; Civil Code 1910, § 3491; Code 1933, § 12-411.

RESEARCH REFERENCES

Am. Jur. 2d.
8 Am. Jur. 2d, Bailments, § 57.
C.J.S.
8 C.J.S., Bailments, § 28 et seq.

44-12-74. Loss or destruction of property; right of bailee to compensation.

If the thing bailed for labor and services is destroyed without fault on the part of the bailee, the loss falls upon the bailor; and the bailee may demand compensation for the labor expended and materials used upon it.

History.
Orig. Code 1863, § 2080; Code 1868, § 2075; Code 1873, § 2101; Code 1882, § 2101; Civil Code 1895, § 2919; Civil Code 1910, § 3492; Code 1933, § 12-412.

JUDICIAL DECISIONS

After loss of thing labored on employee must look to employer for compensation. Atlantic Coast Line R.R. v. Baker, 118 Ga. 809, 45 S.E. 673, 1903 Ga. LEXIS 719 (1903).

Bailee is not liable for depreciation of securities after tender to bailor. J.A. Ansley & Co. v. Anderson, Adair & Co., 35 Ga. 8, 1866 Ga. LEXIS 152 (1866).

RESEARCH REFERENCES

Am. Jur. 2d.
8 Am. Jur. 2d, Bailments, §§ 117, 189.
C.J.S.
8 C.J.S., Bailments, § 106.
ALR.
Imputing negligence of bailee to bailor where subject to bailment is damaged by third person, 6 A.L.R. 316; 30 A.L.R. 1248.
Liability for loss of or damage to property delivered on trial or with privilege of return, 31 A.L.R. 1365.
Liability of pawnbroker or pledgee for theft by third person of pawned or pledged property, 68 A.L.R.2d 1259.
Liability of warehouseman for injury to stored goods as result of failure to maintain proper temperatures, 92 A.L.R.2d 1298.
Presumption and burden of proof where subject of bailment is destroyed or damaged by fire, 44 A.L.R.3d 171.
Liability of bailee of airplane for damage thereto, 44 A.L.R.3d 862.
Liability of operator of marina or boatyard for loss of or injury to pleasure boat left for storage or repair, 44 A.L.R.3d 1332.

44-12-75. Exercise of discretion by factor; diligence.

Since peculiar confidence is reposed in a factor, he may, in the absence of instructions, exercise his discretion according to the general usages of the trade. In return, greater and more skillful diligence and the most active good faith are required of him.

History.
Orig. Code 1863, § 2090; Code 1868, § 2085; Code 1873, § 2111; Code 1882, § 2111; Civil Code 1895, § 2929; Civil Code 1910, § 3502; Code 1933, § 12-401.

JUDICIAL DECISIONS

Express contract binds factor. — If there is an express contract whereby goods will be held until a sale is authorized, the factor is bound by the terms of the agreement as actually made, and is liable to the owner for any damages which

may be sustained by reason of an unauthorized sale. Wood & Bro. v. Jones & Son, 10 Ga. App. 735, 73 S.E. 1099, 1912 Ga. App. LEXIS 664 (1912); Campbell v. Redwine Bros., 22 Ga. App. 455, 96 S.E. 347, 1918 Ga. App. LEXIS 553 (1918).

O.C.G.A. § 44-12-75 inapplicable to accounts receivable factor. — O.C.G.A. § 44-12-75 was originally intended to apply to a factor as bailee of merchantable goods, a practice rarely followed in modern day commerce, and thus it would be inappropriate to apply O.C.G.A. § 44-12-75 to an accounts receivable factor. Rather, the relationship between the parties to an accounts receivable factoring agreement must be governed by their contractual agreements and, to the extent applicable, the provisions of Title 9 of the Uniform Commercial Code. CC Fin., Inc. v. Ross, 250 Ga. 832, 301 S.E.2d 262, 1983 Ga. LEXIS 634 (1983).

Statutory duties of a factor do not apply to an accounts receivable factor. American Spacers, Ltd. v. Ross, 166 Ga. App. 829, 305 S.E.2d 659, 1983 Ga. App. LEXIS 2342 (1983).

RESEARCH REFERENCES

ALR.

Account stated as between principal and factor, 3 A.L.R. 293.

Right of a factor, commission merchant, or produce broker to sell property to protect advances, 40 A.L.R. 387.

Relation between customer and broker receiving bonds or other securities for sale or exchange, 52 A.L.R. 501.

Purchaser's right to protection under factor's act where transaction involves exchange of goods, 132 A.L.R. 525.

Stockyard operator's liability for injury to or death of stock, 40 A.L.R.2d 988.

Factor's liability based on delay in marketing and selling principal's goods, 3 A.L.R.3d 815.

44-12-76. Keeper of livery stable; diligence.

The keeper of a livery stable is a depository for hire and is bound to use the same diligence as an innkeeper.

History.

Orig. Code 1863, § 2102; Code 1868, § 2097; Code 1873, § 2124; Code 1882, § 2124; Civil Code 1895, § 2943; Civil Code 1910, § 3515; Code 1933, § 12-402.

JUDICIAL DECISIONS

Keeper of livery stable is bound to extraordinary diligence in protecting property which is committed to the keeper's care when O.C.G.A. § 44-12-76 is construed in light of O.C.G.A. § 43-21-8. Burns v. Reese, 7 Ga. App. 387, 66 S.E. 982, 1910 Ga. App. LEXIS 306 (1910); Wood v. Clary, 143 Ga. 495, 85 S.E. 694, 1915 Ga. LEXIS 497 (1915).

RESEARCH REFERENCES

ALR.

Bailment: effect of failure to reply to notice of rate at which goods then on premises may be left, 24 A.L.R. 968.

Stockyard operator's liability for injury to or death of stock, 40 A.L.R.2d 988.

44-12-77. Garage owner; diligence.

The relationship of the owner of an automobile and the owner of the

garage in which the automobile is stored is that of bailor and bailee. The bailee is bound to use ordinary care for the safekeeping and return of the automobile.

History.
Code 1933, § 12-403.
History of Section.
This Code section is derived from the decision in Hight Accessory Place v. Lam, 26 Ga. App. 163, 105 S.E. 872 (1921).

JUDICIAL DECISIONS

Nothing in O.C.G.A. Title 11 repeals or affects O.C.G.A. § 44-12-77. A.A.A. Parking, Inc. v. Bigger, 113 Ga. App. 578, 149 S.E.2d 255, 1966 Ga. App. LEXIS 1141 (1966).

Effect of O.C.G.A. § 44-12-77. — O.C.G.A. § 44-12-77 does not purport to preempt the type of arrangement which the parties may agree upon; its effect is simply to provide what the relationship will be when there has been no contract otherwise. Brown v. Five Points Parking Ctr., 121 Ga. App. 819, 175 S.E.2d 901, 1970 Ga. App. LEXIS 1372 (1970).

Automobile as subject matter of bailment. — An automobile is just as capable of being the subject matter of a bailment as any other property where the facts and circumstances show or authorize an inference that the relationship of bailor and bailee exists between the parties concerned. Goodyear Clearwater Mills v. Wheeler, 77 Ga. App. 570, 49 S.E.2d 184, 1948 Ga. App. LEXIS 600 (1948).

Bailment is created when the owner of an automobile leaves the key with the operator of the garage or parking lot, or is required to do so absent a contract creating some different relationship. Brown v. Five Points Parking Ctr., 121 Ga. App. 819, 175 S.E.2d 901, 1970 Ga. App. LEXIS 1372 (1970).

Where an automobile owner enters into an oral contract with the operator of a garage to store and service the owner's car for consideration, the relationship of bailor-bailee is created. Bunn v. Broadway Parking Ctr., Inc., 116 Ga. App. 85, 156 S.E.2d 464, 1967 Ga. App. LEXIS 709 (1967).

A bailment arose when an automobile owner's car was towed to a service station owner's facility for repair, and the station owner proved no viable defense to potential liability simply by showing that, after the car had been entrusted to that facility, the owner then entrusted it to another repair facility. Engram v. Sonny Campbell's Gulf, Inc., 200 Ga. App. 40, 406 S.E.2d 551, 1991 Ga. App. LEXIS 751 (1991).

Before bailee is charged with duty of safekeeping property, bailee must assent to bailment, either expressly or impliedly. Davidson v. Ramsby, 133 Ga. App. 128, 210 S.E.2d 245, 1974 Ga. App. LEXIS 988 (1974).

Duty of care begins with delivery of property to bailee. — The duty upon the bailee to exercise care and diligence in protecting and keeping safely the thing bailed begins with the delivery of the property to the bailee and continues until the object of the bailment has been carried out in conformity with the purpose of the trust. Loeb v. Whitton, 77 Ga. App. 753, 49 S.E.2d 785, 1948 Ga. App. LEXIS 635 (1948).

Car destroyed by fire in garage. — In all cases of bailment, after proof of loss, the burden of proof is on the bailee to show proper diligence. Therefore, when the car was delivered to a bailee who held the car for hire, and in a suit by the bailor it is pleaded that because of the negligence of the bailee the property so delivered has been destroyed by fire, upon proof of the allegations laid in the petition the onus is placed upon the bailee of showing that he exercised due care and diligence in protecting and keeping the property. Hight Accessory Place v. Lam, 26 Ga. App. 163, 105 S.E. 872, 1921 Ga. App. LEXIS 42 (1921).

Knowledge or notice of automobile's contents required for liability thereof. — A bailee for hire as to an

automobile is not liable for the contents thereof unless the bailee has actual or implied knowledge or notice as to such contents. Davidson v. Ramsby, 133 Ga. App. 128, 210 S.E.2d 245, 1974 Ga. App. LEXIS 988 (1974); White v. Atlanta Parking Serv. Co., 139 Ga. App. 243, 228 S.E.2d 156, 1976 Ga. App. LEXIS 1756, cert. denied, 238 Ga. 18, 231 S.E.2d 73, 1976 Ga. LEXIS 1076 (1976).

Sufficient notice exists if the contents of an automobile are such as the bailee might "reasonably expect" to be therein. Davidson v. Ramsby, 133 Ga. App. 128, 210 S.E.2d 245, 1974 Ga. App. LEXIS 988 (1974); White v. Atlanta Parking Serv. Co., 139 Ga. App. 243, 228 S.E.2d 156, 1976 Ga. App. LEXIS 1756, cert. denied, 238 Ga. 18, 231 S.E.2d 73, 1976 Ga. LEXIS 1076 (1976).

Inference of negligence. — Loss of property after its delivery to another authorizes an inference that its loss was occasioned by the negligence of the person receiving it. Goodyear Clearwater Mills v. Wheeler, 77 Ga. App. 570, 49 S.E.2d 184, 1948 Ga. App. LEXIS 600 (1948).

Burden is on bailee to show bailed article was not injured by bailee's negligence, and that bailee used ordinary care and diligence to protect the property from damage or injury. National Bank v. Cut Rate Auto Serv., Inc., 133 Ga. App. 635, 211 S.E.2d 895, 1974 Ga. App. LEXIS 1157 (1974).

A parking lot operator, charging the public for the operator's services in caring for customers' cars, cannot escape liability for the loss of a car stolen from the parking lot, in the absence of clear and satisfactory proof showing diligence on the operator's part throughout the bailment. Loeb v. Whitton, 77 Ga. App. 753, 49 S.E.2d 785, 1948 Ga. App. LEXIS 635 (1948).

An open-air parking lot is a garage and therefore a bailee of the vehicles parked at its facility. Park 'N Go of Ga., Inc. v. United States Fid. & Guar. Co., 266 Ga. 787, 471 S.E.2d 500, 1996 Ga. LEXIS 357 (1996).

Effect of posting sign indicating "insured garage." — If the bailor can neither limit nor relieve self of personal responsibility by the posting of a sign because the sign does not become a part of the contract, the bailor should not be held to increased liability for posting a sign to the effect that bailor's garage is an "insured garage." Brown v. Five Points Parking Ctr., 121 Ga. App. 819, 175 S.E.2d 901, 1970 Ga. App. LEXIS 1372 (1970).

Safety measures for meeting duty of care and diligence. — A parking lot operator should provide a sufficient number of attendants to diligently keep watch over all the cars on an open lot at all hours, have the lot enclosed in such a manner that a small number of employees can with reasonable safety keep the cars from being stolen, require that all cars be locked or that the keys be kept in an office or other place of safety, or adopt other safety measures reasonably and fairly sufficient to meet the duty as to care and diligence established by O.C.G.A. § 44-12-77. Loeb v. Whitton, 77 Ga. App. 753, 49 S.E.2d 785, 1948 Ga. App. LEXIS 635 (1948).

Diminution of property value authorized award. — Evidence authorized the finding that, apart from failing to perform its obligation under the contract, the truck rebuilding company had breached a duty imposed by law not to cause the diminution of the truck's value; thus, because the company's breach of its duty to safe-keep the truck gave rise to a separate cause of action for conversion, there was no error in awarding additional damages for the loss of value to the truck. 4WD Parts Ctr., Inc. v. Mackendrick, 260 Ga. App. 340, 579 S.E.2d 772, 2003 Ga. App. LEXIS 367 (2003).

RESEARCH REFERENCES

Am. Jur. Pleading and Practice Forms.

12B Am. Jur. Pleading and Practice Forms, Garages and Filling and Parking Stations, § 3.

ALR.

Liability of owner for storage of, or services in connection with, automobile, under authority, actual or assumed, of public officials, 36 A.L.R. 955; 50 A.L.R. 1309.

Duty and liability of garage keeper to owner of cars, 42 A.L.R. 135; 65 A.L.R. 431.

Liability of owner to indemnify garage keeper against damages to third persons, 44 A.L.R. 1183.

Validity of public regulations as to garages, 84 A.L.R. 1147.

Liability for loss of or damage to automobile left in parking lot, 131 A.L.R. 1175; 7 A.L.R.3d 927; 13 A.L.R.4th 362; 13 A.L.R.4th 442.

Measure and elements of damages recoverable against bailee of automobile in case of loss or theft, 135 A.L.R. 1198.

Liability of garageman, service or repair station, or filling station operator for destruction or damage of motor vehicle by fire, 16 A.L.R.2d 799.

Liability of bailee for hire of automobile for loss of, or damage to, contents, 27 A.L.R.2d 796.

Liability of garageman for theft or unauthorized use of motor vehicle, 43 A.L.R.2d 403.

Liability of garageman to one ordering repair of motor vehicle, for defective work, 92 A.L.R.2d 1408; 1 A.L.R.4th 347; 23 A.L.R.4th 274.

Liability insurance of garages, motor vehicle repair shops and sales agencies, and the like, 93 A.L.R.2d 1047.

Liability of hotel, motel, or similar establishment for damage to or loss of guest's automobile left on premises, 52 A.L.R.3d 433.

Liability of owner or operator of parking lot or garage for loss of or damage to contents of parked motor vehicle, 78 A.L.R.3d 1057.

Measure and elements of damages in action against garageman based on failure to properly perform repair or service on motor vehicle, 1 A.L.R.4th 347.

Liability of owner of motor vehicle for negligence of garageman or mechanic, 8 A.L.R.4th 265.

44-12-78. Keeper of wharf; liability.

One who keeps a wharf is a depository for hire and is liable upon the same principles as a warehouseman.

History.

Orig. Code 1863, § 2092; Code 1868, § 2087; Code 1873, § 2113; Code 1882, § 2113; Civil Code 1895, § 2931; Civil Code 1910, § 3504; Code 1933, § 12-406.

RESEARCH REFERENCES

ALR.

Liability of warehouseman for injury to stored goods as result of failure to maintain proper temperatures, 92 A.L.R.2d 1298.

PART 3

DEPOSITS

RESEARCH REFERENCES

ALR.

Liability of bailee for loss of or injury to goods kept at a place other than that originally intended, 17 A.L.R. 979.

Acceptance of receptacle as charging one as bailee of contents, 18 A.L.R. 87.

Bank deposit for purpose of meeting certain checks or classes of checks, 39 A.L.R. 1138; 56 A.L.R. 1110; 86 A.L.R. 375.

Liability for loss of contents of safe deposit box, 40 A.L.R. 874; 42 A.L.R. 1304; 133 A.L.R. 279.

44-12-90. Definitions.

As used in this part, the term:

(1) "Deposit" means the delivery of chattels by one person to another to keep for the use of the bailor.

(2) "Depository for hire" means a depository who receives or expects a reward or hire for undertaking to keep chattels for another.

(3) "Naked deposit" means an undertaking whereby a depository keeps chattels for another gratuitously.

History.
Orig. Code 1863, § 2082; Code 1868, § 2077; Code 1873, § 2103; Code 1882, § 2103; Civil Code 1895, § 2921; Civil Code 1910, § 3494; Code 1933, § 12-301.

Cross references.
Deposits of valuables with innkeepers, § 43-21-10 et seq.

JUDICIAL DECISIONS

Bank is "depository for hire" where customer rents safety deposit box. Buena Vista Loan & Sav. Bank v. Bickerstaff, 121 Ga. App. 470, 174 S.E.2d 219, 1970 Ga. App. LEXIS 1257 (1970).

Hotel landlord is naked depository if one has left a valise in the office of a hotel without calling attention thereto, and a clerk, without knowing the identity of the owner, places the valise in a room where baggage is kept. Stewart & Powell v. Head, 70 Ga. 449, 1883 Ga. LEXIS 357 (1883).

Recycler of shipping pallets was not a naked depository. — Recycler of shipping pallets did not establish status as a naked depository since it was unclear whether the recycler held the pallets gratuitously and for the benefit of the putative owner and lessor of the pallets; the recycler purchased the pallets from an entity which had no contractual relationship with the lessor, and the evidence also permitted the conclusions that the recycler claimed ownership of the pallets and that the pallets were held with an expectation of payment. CHEP USA v. Mock Pallet Co., 138 Fed. Appx. 229, 2005 U.S. App. LEXIS 12604 (11th Cir. 2005).

RESEARCH REFERENCES

Am. Jur. 2d.
8 Am. Jur. 2d, Bailments, §§ 3 et seq., 54 et seq.

C.J.S.
26B C.J.S., Depositaries, § 1 et seq.

ALR.
Acceptance of receptacle as charging one as bailee of contents, 18 A.L.R. 87.

Liability of hotel, motel, or similar establishment for damage to or loss of guest's automobile left on premises, 52 A.L.R.3d 433.

44-12-91. Voluntary or involuntary depositories; liability for naked deposit.

A person may voluntarily undertake to be a depository or may become so involuntarily, as by finding chattels. For a naked deposit, the depository is responsible only for gross negligence.

History.
Orig. Code 1863, § 2083; Code 1868, § 2078; Code 1873, § 2104; Code 1882, § 2104; Civil Code 1895, § 2922; Civil Code 1910, § 3495; Code 1933, 12-302.

JUDICIAL DECISIONS

Finder of property is involuntary bailee for true owner. Groover v. Tippins, 51 Ga. App. 47, 179 S.E. 634, 1935 Ga. App. LEXIS 543 (1935).

Finder gains title as to third parties. Groover v. Tippins, 51 Ga. App. 47, 179 S.E. 634, 1935 Ga. App. LEXIS 543 (1935).

RESEARCH REFERENCES

Am. Jur. 2d.
8 Am. Jur. 2d, Bailments, §§ 8, 164, 165 et seq.
C.J.S.
26B C.J.S., Depositaries, § 4 et seq.
ALR.
Liability of a bailee of money who commingles it with his own funds, 20 A.L.R. 378.
Duty and liability of one in possession of real property in respect of personal property which he finds thereon belonging to another, 131 A.L.R. 165.
Liability of hotel, motel, or similar establishment for damage to or loss of guest's automobile left on premises, 52 A.L.R.3d 433.
Presumption of payment as applicable to bank deposit, 69 A.L.R.3d 1311.
Liability of warehouseman or other bailee for loss of goods stored at other than agreed-upon place, 76 A.L.R.4th 883.

44-12-92. Liability of depositories for hire.

Depositories for hire are bound to exercise ordinary care and diligence and are liable as in other cases of bailment for hire.

History.
Orig. Code 1863, § 2089; Code 1868, § 2084; Code 1873, § 2110; Code 1882, § 2110; Civil Code 1895, § 2928; Civil Code 1910, § 3501; Code 1933, § 12-404.
Cross references.
Seller's right to identify goods to the contract notwithstanding breach or to salvage unfinished goods, § 11-7-204.
Liability of innkeeper for goods stolen while entrusted to his care, § 43-21-8.

JUDICIAL DECISIONS

Nothing in O.C.G.A. Title 11 repeals or affects O.C.G.A. § 44-12-92. A.A.A. Parking, Inc. v. Bigger, 113 Ga. App. 578, 149 S.E.2d 255, 1966 Ga. App. LEXIS 1141 (1966).

Defendant storage company is bound to exercise ordinary care to protect plaintiff's property, and the storage company's failure to deliver the goods on demand establishes a prima facie case for the plaintiff. Washburn Storage Co. v. Mobley, 94 Ga. App. 113, 94 S.E.2d 37, 1956 Ga. App. LEXIS 479 (1956).

Bailee can prevail only by establishing that bailee exercised ordinary care to prevent the loss or destruction of the bailor's property, once a prima face case is made against the bailee for failure to deliver the bailed goods on demand. Harper Whse., Inc. v. Henry Chanin Corp., 102 Ga. App. 489, 116 S.E.2d 641, 1960 Ga. App. LEXIS 660 (1960).

Bank must prove that it exercised ordinary care upon proof of loss by customer who rents a safety deposit box. Buena Vista Loan & Sav. Bank v. Bickerstaff, 121 Ga. App. 470, 174 S.E.2d 219, 1970 Ga. App. LEXIS 1257 (1970).

RESEARCH REFERENCES

Am. Jur. 2d.
8 Am. Jur. 2d, Bailments, § 158 et seq.
C.J.S.
26B C.J.S., Depositaries, § 11 et seq.
ALR.
Relationship of bailor and bailee as between owner of goods in bonded warehouse and proprietor of warehouse, 77 A.L.R. 1502.
Liability of warehouseman for injury to stored goods as result of failure to maintain proper temperatures, 92 A.L.R.2d 1298.
Liability of savings bank for payment to person presenting lost or stolen passbook or savings account card, 68 A.L.R.3d 1080.

44-12-93. Liability for gratuitously transporting deposits.

If one, in addition to safekeeping, undertakes gratuitously to carry money or other articles to another place, his liability is the same as that of a naked depository.

History.
Orig. Code 1863, § 2085; Code 1868, § 2080; Code 1873, § 2106; Code 1882, § 2106; Civil Code 1895, § 2924; Civil Code 1910, § 3497; Code 1933, § 12-304.

RESEARCH REFERENCES

Am. Jur. 2d.
8 Am. Jur. 2d, Bailments, § 164, et seq.
C.J.S.
26B C.J.S., Depositaries, § 11 et seq.
ALR.
Liability of warehouseman or other bailee for loss of goods stored at other than agreed-upon place, 76 A.L.R.4th 883.

44-12-94. Termination of bailment of naked deposit.

One who holds a naked deposit may at any time terminate the bailment by a redelivery of the chattels to the bailor.

History.
Orig. Code 1863, § 2086; Code 1868, § 2081; Code 1873, § 2107; Code 1882, § 2107; Civil Code 1895, § 2925; Civil Code 1910, § 3498; Code 1933, § 12-305.

RESEARCH REFERENCES

Am. Jur. 2d.
8 Am. Jur. 2d, Bailments, § 103 et seq.
C.J.S.
8 C.J.S., Bailments, § 99 et seq. 26B C.J.S., Depositaries, § 3.

44-12-95. Effect of use of naked deposit on liability.

One who holds a naked deposit may not use such deposit without increasing his responsibility unless the use is necessary to preserve the deposit or, from the circumstances, the consent of the depositor may be reasonably presumed.

History.
Orig. Code 1863, § 2087; Code 1868, § 2082; Code 1873, § 2108; Code 1882, § 2108; Civil Code 1895, § 2926; Civil Code 1910, § 3499; Code 1933, § 12-306.

RESEARCH REFERENCES

Am. Jur. 2d.
8 Am. Jur. 2d, Bailments, § 60 et seq.
C.J.S.
26B C.J.S., Depositaries, § 11 et seq.
ALR.
Liability of a bailee of money who commingles it with his own funds, 20 A.L.R. 378.

44-12-96. Reimbursement of expenses incurred by reason of naked deposit; retention of possession.

One who holds a naked deposit is entitled to be reimbursed for all charges and expenses which he incurs by reason of the deposit, and he may retain possession of the deposit until such charges and expenses are paid.

History.
Orig. Code 1863, § 2088; Code 1868, § 2083; Code 1873, § 2109; Code 1882, § 2109; Civil Code 1895, § 2927; Civil Code 1910, § 3500; Code 1933, § 12-307.

JUDICIAL DECISIONS

Profit and overhead not recoverable. — Naked depository is entitled to reimbursement only for amounts paid out or labor expended by reason of the deposit, and such reimbursement does not include profit or a pro rata portion of general overhead expenses. CHEP USA v. Mock Pallet Co., 138 Fed. Appx. 229, 2005 U.S. App. LEXIS 12604 (11th Cir. 2005).

RESEARCH REFERENCES

Am. Jur. 2d.
8 Am. Jur. 2d, Bailments, §§ 115, 117.
C.J.S.
26B C.J.S., Depositaries, § 11 et seq.

Part 4

Loans of Property

RESEARCH REFERENCES

ALR.
Liability of bailee for loss of or injury to goods kept at a place other than that originally intended, 17 A.L.R. 979.
Liability of warehouseman or other bailee for loss of goods stored at other than agreed-upon place, 76 A.L.R.4th 883.

44-12-110. Kinds of loans; nature of loan for consumption.

Loans may be either for consumption or for use. A loan for consumption is a loan of an article which is not to be returned in specie, but in kind; this is a sale and not a bailment.

History.
Orig. Code 1863, § 2103; Code 1868, § 2098; Code 1873, § 2125; Code 1882, § 2125; Civil Code 1895, § 2944; Civil Code 1910, § 3516; Code 1933, § 12-501.

JUDICIAL DECISIONS

Purpose of O.C.G.A. § 44-12-110. — O.C.G.A. § 44-12-110 is specially designed for the protection of lenders as to the enforcement of their rights. Skinner v. State, 97 Ga. 690, 25 S.E. 364, 1895 Ga. LEXIS 554 (1895).

Loan of demonstrator automobile by dealer to prospective purchaser creates bailment. — Where an automobile dealer lends a demonstrator automobile to a prospective purchaser for the purpose of allowing such purchaser to test and operate it, under an oral agreement that the purchaser is to return the automobile at the end of two days in the same condition, less reasonable wear and tear, as the automobile was when delivered to the potential purchaser, this constitutes the purchaser being a bailee. Warren v. Mitchell Motors, Inc., 52 Ga. App. 58, 182 S.E. 205, 1935 Ga. App. LEXIS 32 (1935).

Loan of whiskey on promise of similar return is sale. — The loan of a specified quantity of whiskey obtained by the borrower for the borrower's own consumption, on a promise to return to the lender a similar quantity of the same kind of liquor, is a "sale" rather than a mere bailment. Skinner v. State, 97 Ga. 690, 25 S.E. 364, 1895 Ga. LEXIS 554 (1895); Huby v. State, 111 Ga. 842, 36 S.E. 301, 1900 Ga. LEXIS 803 (1900).

Failure to define terms in jury charge not error. — Failure to explain in a charge to the jury the meanings of the terms "for consumption," "specie," and "in kind" as used in O.C.G.A. § 44-12-110 is not an error. Foote v. Kelley, 126 Ga. 799, 55 S.E. 1045, 1906 Ga. LEXIS 546 (1906).

RESEARCH REFERENCES

Am. Jur. 2d.
8 Am. Jur. 2d, Bailments, § 33 et seq.

C.J.S.
8 C.J.S., Bailments, §§ 18, 86 et seq.

44-12-111. Nature of loan for use.

A loan for use is the gratuitous grant of an article to another for his use with the expectation that the article will be returned in specie. A loan for use may be made either for a definite time or for an indefinite time and is at the will of the grantor.

History.
Orig. Code 1863, § 2104; Code 1868, § 2099; Code 1873, § 2126; Code 1882, § 2126; Civil Code 1895, § 2945; Civil Code 1910, § 3517; Code 1933, § 12-502.

JUDICIAL DECISIONS

Loan of demonstrator automobile by dealer to prospective purchaser creates bailment. — Where an automobile dealer lends a demonstrator automobile to a prospective purchaser for the purpose of allowing such purchaser to test and operate it, under an oral agreement that the purchaser is to return the automobile at the end of two days in the same condition, less reasonable wear and tear, as the automobile was when delivered to the potential purchaser, this constitutes

the purchaser being a bailee. Warren v. Mitchell Motors, Inc., 52 Ga. App. 58, 182 S.E. 205, 1935 Ga. App. LEXIS 32 (1935).

Degree of care required where bailment is for sole benefit of bailee is great care or extraordinary diligence, and the bailee is responsible for slight neglect in relation to the subject matter of the bailment. Raines v. Rice, 65 Ga. App. 68, 15 S.E.2d 246, 1941 Ga. App. LEXIS 261 (1941).

If animal is loaned without compensation, the bailee is bound to exercise extraordinary diligence, such as the most prudent man would use toward that man's own property. Raines v. Rice, 65 Ga. App. 68, 15 S.E.2d 246, 1941 Ga. App. LEXIS 261 (1941).

RESEARCH REFERENCES

Am. Jur. 2d.
8 Am. Jur. 2d, Bailments, § 3.

C.J.S.
8 C.J.S., Bailments, § 18.

44-12-112. Borrower's duty of extraordinary care.

The borrower is usually bound to exercise extraordinary care and diligence and is liable for slight neglect.

History.
Orig. Code 1863, § 2106; Code 1868, § 2101; Code 1873, § 2128; Code 1882, § 2128; Civil Code 1895, § 2947; Civil Code 1910, § 3519; Code 1933, § 12-504.

JUDICIAL DECISIONS

Borrower is liable for any neglect in failing to care for thing borrowed. Bulloch v. Hutcheson, 49 Ga. App. 171, 174 S.E. 645, 1934 Ga. App. LEXIS 315 (1934).

Exercise of extraordinary care required where benefit entirely for borrower. — In a loan entirely for the benefit of the borrower, the borrower is usually bound to exercise extraordinary care and diligence, and is liable for slight neglect concerning the thing borrowed. Warren v. Mitchell Motors, Inc., 52 Ga. App. 58, 182 S.E. 205, 1935 Ga. App. LEXIS 32 (1935).

Ordinary care required in mutual benefit bailment. — A borrower, where the bailment is for the mutual benefit of both the bailor and bailee, is bound to exercise ordinary care and diligence in regard to the article borrowed. Warren v. Mitchell Motors, Inc., 52 Ga. App. 58, 182 S.E. 205, 1935 Ga. App. LEXIS 32 (1935).

RESEARCH REFERENCES

Am. Jur. 2d.
8 Am. Jur. 2d, Bailments, § 161.

C.J.S.
8 C.J.S., Bailments, § 18.

ALR.
Duty and liability of fair association, or other bailee, as regards articles intrusted to it for exhibition or display, 139 A.L.R. 931.

Liability of bailee of airplane for damage thereto, 44 A.L.R.3d 862.

Validity and construction of contract exempting agricultural fair or similar bailee from liability for articles delivered for exhibition, 69 A.L.R.3d 1025.

44-12-113. Loan beneficiaries and responsibilities.

A loan is generally entirely for the benefit of the borrower, but sometimes it is for the joint benefit of the lender and the borrower and

occasionally it is for the exclusive benefit of the lender. Where the loan is for the joint benefit of the lender and the borrower or is for the exclusive benefit of the lender, the responsibility of the borrower is varied and less stringent according to the circumstances and purpose of the loan.

History.
Orig. Code 1863, § 2105; Code 1868, § 2100; Code 1873, § 2127; Code 1882, § 2127; Civil Code 1895, § 2946; Civil Code 1910, § 3518; Code 1933, § 12-503.

JUDICIAL DECISIONS

Exercise of extraordinary care required where benefit entirely for borrower. — In a loan entirely for the benefit of the borrower, the borrower is usually bound to exercise extraordinary care and diligence, and is liable for slight neglect concerning the thing borrowed. Warren v. Mitchell Motors, Inc., 52 Ga. App. 58, 182 S.E. 205, 1935 Ga. App. LEXIS 32 (1935).

Ordinary care required in mutual benefit bailment. — A borrower, where the bailment is for the mutual benefit of both the bailor and bailee, is bound to exercise ordinary care and diligence in regard to the article borrowed. Warren v. Mitchell Motors, Inc., 52 Ga. App. 58, 182 S.E. 205, 1935 Ga. App. LEXIS 32 (1935).

RESEARCH REFERENCES

Am. Jur. 2d.
8 Am. Jur. 2d, Bailments, §§ 6, 161.

C.J.S.
8 C.J.S., Bailments, § 46 et seq.

44-12-114. Right of borrower to possession; action for interference.

The borrower acquires no property right in the thing loaned but only the right to possess and use it. The borrower may bring an action for any interference with that right.

History.
Orig. Code 1863, § 2107; Code 1868, § 2102; Code 1873, § 2129; Code 1882, § 2129; Civil Code 1895, § 2948; Civil Code 1910, § 3520; Code 1933, § 12-505.

JUDICIAL DECISIONS

Borrower's actions against third persons for bailor's benefit. — Borrower may institute actions against third person interfering with borrower's right of possession but these actions are for the benefit of the bailor. United States v. One 1946 Mercury Sedan Auto., 100 F. Supp. 957, 1951 U.S. Dist. LEXIS 4017 (D. Ga. 1951), aff'd, 199 F.2d 499, 1952 U.S. App. LEXIS 3383 (5th Cir. 1952).

Bailor's assertion of rights prohibits gratuitous bailee's recovery. — A mere gratuitous bailee cannot recover against a third person for the conversion of bailed property where the bailor or owner has intervened and asserted rights

thereto. United States v. One 1946 Mercury Sedan Auto., 100 F. Supp. 957, 1951 U.S. Dist. LEXIS 4017 (D. Ga. 1951), aff'd, 199 F.2d 499, 1952 U.S. App. LEXIS 3383 (5th Cir. 1952); United States v. Frank Graham Co., 199 F.2d 499, 1952 U.S. App. LEXIS 3383 (5th Cir. 1952).

RESEARCH REFERENCES

Am. Jur. 2d.
8 Am. Jur. 2d, Bailments, § 60 et seq.

C.J.S.
8 C.J.S., Bailments, §§ 28, 29.

44-12-115. When borrower may transfer thing loaned; liability of article to levy and sale.

If a loan is for the personal benefit and use of the borrower, he cannot transfer the possession of the thing loaned to another without the consent, express or implied, of the lender. If the loan is for a definite time, the borrower has no such interest in the thing loaned as it may be subject to levy and sale.

History.
Orig. Code 1863, § 2108; Code 1868, § 2103; Code 1873, § 2130; Code 1882, § 2130; Civil Code 1895, § 2949; Civil Code 1910, § 3521; Code 1933, § 12-506.

RESEARCH REFERENCES

Am. Jur. 2d.
8 Am. Jur. 2d, Bailments, § 51.

C.J.S.
8 C.J.S., Bailments, § 36.

44-12-116. Revocability of loans.

The lender may not revoke a loan which is made for a definite time so long as the borrower meets fully his engagements with respect to such loan. A loan at will or a loan made for an indefinite time may be revoked at any time.

History.
Orig. Code 1863, § 2109; Code 1868, § 2104; Code 1873, § 2131; Code 1882, § 2131; Civil Code 1895, § 2950; Civil Code 1910, § 3522; Code 1933, § 12-507.

RESEARCH REFERENCES

Am. Jur. 2d.
8 Am. Jur. 2d, Bailments, § 230 et seq.

C.J.S.
8 C.J.S., Bailments, § 99 et seq.

44-12-117. Liability for necessary and extraordinary charges and expenses.

Since a loan is gratuitous, the borrower must pay all necessary charges and expenses in preserving and taking care of the property during the time of the loan. If, however, extraordinary expenses are

necessary to protect the property from destruction, the lender must reimburse the borrower for such expenses.

History.
Orig. Code 1863, § 2110; Code 1868, § 2105; Code 1873, § 2132; Code 1882, § 2132; Civil Code 1895, § 2951; Civil Code 1910, § 3523; Code 1933, § 12-508.

RESEARCH REFERENCES

Am. Jur. 2d.
8 Am. Jur. 2d, Bailments, § 117.

C.J.S.
8 C.J.S., Bailments, §§ 75, 79.

44-12-118. Ownership of increase in loaned property.

The increase of loaned property, except property loaned by special contract, belongs to the lender.

History.
Orig. Code 1863, § 2111; Code 1868, § 2106; Code 1873, § 2133; Code 1882, § 2133; Civil Code 1895, § 2952; Civil Code 1910, § 3524; Code 1933, § 12-509.

44-12-119. How loaned property used; acts considered as conversion.

The property loaned must be used strictly for the purpose and in the manner contemplated by the parties. A violation by the borrower is a conversion.

History.
Orig. Code 1863, § 2113; Code 1868, § 2108; Code 1873, § 2135; Code 1882, § 2135; Civil Code 1895, § 2953; Civil Code 1910, § 3525; Code 1933, § 12-510.

JUDICIAL DECISIONS

Applicability of O.C.G.A. § 44-12-119. — O.C.G.A. § 44-12-119 is applicable to money loaned for a specific purpose. Fischesser v. Heard, 42 Ga. 531, 1871 Ga. LEXIS 98 (1871).

RESEARCH REFERENCES

Am. Jur. 2d.
8 Am. Jur. 2d, Bailments, § 180 et seq.

C.J.S.
8 C.J.S., Bailments, § 35.

ALR.
Time and place with reference to which damages for conversion of chattel are to be determined as against one not a party to the original conversion, 80 A.L.R. 613.

Nature of property or rights other than tangible chattels which may be subject of conversion, 44 A.L.R.2d 927.

44-12-120. When death of parties terminates loans.

The death of the lender terminates all indefinite loans or loans at will or pleasure. It does not terminate a loan for a definite time. The death of the borrower terminates all loans to him.

History.
Orig. Code 1863, § 2114; Code 1868, § 2109; Code 1873, § 2136; Code 1882, § 2136; Civil Code 1895, § 2954; Civil Code 1910, § 3526; Code 1933, § 12-511.

PART 5

PAWNBROKERS

RESEARCH REFERENCES

ALR.
Duty of pledgee of chattels to sell them on failure of debtor to pay debt, 77 A.L.R. 379; 140 A.L.R. 1390.

Conversion by pledgee of subject of pledge as extinguishing pledgor's entire indebtedness to him, 87 A.L.R. 586.

Other debts or liabilities within contemplation of pledge to secure particular debt and other debts or liabilities to pledgee, 87 A.L.R. 615.

Rights and remedies as between pledgor and pledgee of choses in action as affected by latter's renewal, extension, or other modification thereof, 103 A.L.R. 1408.

Taking and pledging or pawning, another's property as larceny, 82 A.L.R.2d 863.

44-12-130. Definitions.

As used in this part, the term:

(1) "Month" means that period of time from one date in a calendar month to the corresponding date in the following calendar month, but if there is no such corresponding date, then the last day of such following month.

(2) "Pawnbroker" means any person engaged in whole or in part in the business of lending money on the security of pledged goods, or in the business of purchasing tangible personal property on the condition that it may be redeemed or repurchased by the seller for a fixed price within a fixed period of time, or in the business of purchasing tangible personal property from persons or sources other than manufacturers or licensed dealers as a part of or in conjunction with the business activities described in this paragraph.

(3) "Pawn transaction" means any loan on the security of pledged goods or any purchase of pledged goods on the condition that the pledged goods may be redeemed or repurchased by the pledgor or seller for a fixed price within a fixed period of time.

(4) "Person" means an individual, partnership, corporation, joint venture, trust, association, or any other legal entity however organized.

(5) "Pledged goods" means tangible personal property, including, without limitation, all types of motor vehicles or any motor vehicle certificate of title, which property is purchased by, deposited with, or otherwise actually delivered into the possession of a pawnbroker in

connection with a pawn transaction. However, for purposes of this Code section, possession of any motor vehicle certificate of title which has come into the possession of a pawnbroker through a pawn transaction made in accordance with law shall be conclusively deemed to be possession of the motor vehicle, and the pawnbroker shall retain physical possession of the motor vehicle certificate of title for the entire length of the pawn transaction but shall not be required in any way to retain physical possession of the motor vehicle at any time. "Pledged goods" shall not include choses in action, securities, or printed evidences of indebtedness.

History.

Ga. L. 1977, p. 1194, § 1; Ga. L. 1989, p. 819, § 1; Ga. L. 1992, p. 3245, §§ 1, 2.

Law reviews.

For note on 1992 amendment of this Code section, see 9 Ga. St. U.L. Rev. 323 (1992).

For annual survey of local government law, see 57 Mercer L. Rev. 289 (2005).

JUDICIAL DECISIONS

Construction with §§ 44-12-131 and 44-12-137. — In resolving a statutory conflict between O.C.G.A. §§ 44-12-130(1) and 44-12-137(a)(7) with respect to the one-month duration for a pawn transaction and O.C.G.A. § 44-12-131(a)(1) which required a duration of 30 days, it was determined that the criminal penalty in § 44-12-137(a)(7) was inapplicable to a customer's pawn transaction that satisfied the 30-day requirement of § 44-12-131(a)(1); the customer's action against the pawnbroker based on an illegal duration accordingly failed. Marshall v. Speedee Cash, 292 Ga. App. 790, 665 S.E.2d 888, 2008 Ga. App. LEXIS 861 (2008).

Pawnbroker's right to self-help. — Although O.C.G.A. §§ 44-12-130(5) and 44-12-131(a)(3) grant the pawnbroker the right to self-help repossession upon default without the necessity of filing a lien, this remedy is intended to apply to the defaulting pledgor, not a bona fide purchaser for value with no notice of the pawnbroker's claim. Cobb Ctr. Pawn & Jewelry Brokers, Inc. v. Gordon, 242 Ga. App. 73, 529 S.E.2d 138, 2000 Ga. App. LEXIS 93 (2000).

Debtor without interest in property not redeemed from pawnbroker. — The automatic stay did not apply to a pawnbroker as: (1) the debtor filed a 2016 case one day before the redemption period for a title pawn transaction expired, and the redemption period was extended to 60 days from the petition date; (2) the debtor failed to redeem the vehicle when the redemption period expired and on the redemption date, the vehicle belonged to the pawnbroker and the debtor's ownership interest in the vehicle was automatically extinguished; (3) the debtor had no interest in the vehicle when the 2018 bankruptcy case was filed that could become property of the bankruptcy estate; and (4) the 2018 Chapter 13 Plan's treatment of the vehicle as the debtor's property was immaterial as the redemption period had expired pre-petition and the vehicle belonged to the pawnbroker. TitleMax of Georgia, Inc. v. Thorpe (In re Thorpe), 612 B.R. 463, 2019 Bankr. LEXIS 950 (Bankr. S.D. Ga. 2019).

County ordinance not in conflict. — Since the stated purpose of Gwinnett County, Ga., Ord. No. 82-11 was to impede the sale of stolen property, and its requirements were designed to achieve that end, it was a proper use of the county's police power, and was not in conflict with O.C.G.A. § 44-12-130 et seq. Pawnmart, Inc. v. Gwinnett County, 279 Ga. 19, 608 S.E.2d 639, 2005 Ga. LEXIS 121 (2005).

RESEARCH REFERENCES

Am. Jur. 2d.
54 Am. Jur. 2d, Moneylenders and Pawnbrokers, §§ 6, 7.
C.J.S.
70 C.J.S., Pawnbrokers, § 2.

ALR.
Validity of statutes, ordinances, and regulations governing pawn shops, 16 A.L.R.6th 219.

44-12-131. Duration of pawn transactions; lease-back of motor vehicles prohibited; taking possession of motor vehicles; restrictions on interest, fees, or charges; action to recover excessive or undisclosed charges; consequences of excessive charges.

(a)(1) All pawn transactions shall be for 30 day periods but may be extended or continued for additional 30 day periods.

(2) A pawnbroker shall not lease back to the seller or pledgor any motor vehicle during a pawn transaction or during any extension or continuation of the pawn transaction.

(3) Unless otherwise agreed, a pawnbroker has upon default the right to take possession of the motor vehicle. In taking possession, the pawnbroker or his agent may proceed without judicial process if this can be done without breach of the peace or may proceed by action.

(4)(A) During the first 90 days of any pawn transaction or extension or continuation of the pawn transaction, a pawnbroker may charge for each 30 day period interest and pawnshop charges which together equal no more than 25 percent of the principal amount advanced, with a minimum charge of up to $10.00 per 30 day period.

(B) On any pawn transaction which is continued or extended beyond 90 days, a pawnbroker may charge for each 30 day period interest and pawnshop charges which together equal no more than 12.5 percent of the principal amount advanced, with a minimum charge of up to $5.00 per 30 day period.

(C) In addition to the charges provided for in subparagraphs (A) and (B) of this paragraph, in a pawn transaction or in any extension or continuation of a pawn transaction involving a motor vehicle or a motor vehicle certificate of title, a pawnbroker may charge the following:

(i) A fee equal to no more than any fee imposed by the appropriate state to register a lien upon a motor vehicle title, but only if the pawnbroker actually registers such a lien;

(ii) No more than $5.00 per day in storage fees, but only if an actual repossession pursuant to a default takes place on a vehicle

which was not already in the pawnbroker's possession and only for each day the pawnbroker must actually retain possession of the motor vehicle; and

(iii) A repossession fee of $50.00 within 50 miles of the office where the pawn originated, $100.00 within 51 to 100 miles, $150.00 within 101 to 300 miles and a fee of $250.00 beyond 300 miles, but only if an actual repossession pursuant to a default takes place on a vehicle which was not already in the pawnbroker's possession.

(D) If a pledgor or seller requests that the pawnbroker mail or ship the pledged item to the pledgor or seller, a pawnbroker may charge a fee for the actual shipping and mailing costs, plus a handling fee equal to not more than 50 percent of the actual shipping and mailing costs.

(E) In the event the pledgor or seller has lost or destroyed the original pawn ticket, a pawnbroker may, at the time of redemption, charge a fee equal to not more than $2.00.

(5) No other charge or fee of any kind by whatever name denominated, including but not limited to any other storage fee for a motor vehicle, shall be made by a pawnbroker except as set out in paragraph (4) of this subsection.

(6) No fee or charge provided for in this Code section may be imposed unless a disclosure regarding that fee or charge has been properly made as provided for in Code Section 44-12-138.

(7)(A) Any interest, fees, or charges collected which are undisclosed, improperly disclosed, or in excess of that allowed by this subsection may be recovered by the pledgor or seller in an action at law in any superior court of appropriate jurisdiction.

(B) In any such action in which the pledgor or seller prevails, the court shall also award reasonable attorneys' fees, court costs, and any expenses of litigation to the pledgor or seller.

(C) Before filing an action under this Code section, the pledgor or seller shall provide the pawnbroker with a written notice by certified mail or statutory overnight delivery, return receipt requested, that such an action is contemplated, identifying any fees or charges which the pledgor or seller contends are undisclosed, improperly disclosed, or in excess of the fees and charges allowed by this Code section. If the court finds that during the 30 days following receipt of this notice the pawnbroker made a good faith offer to return any excess, undisclosed, or improperly disclosed charges, the court shall award reasonable attorneys' fees, court costs, and expenses of litigation to the pawnbroker.

(D) No action shall be brought under this Code section more than two years after the pledgor or seller knew or should have known of the excess, undisclosed, or improperly disclosed charges.

(b) Any interest, charge, or fees contracted for or received, directly or indirectly, in excess of the amounts permitted under subsection (a) of this Code section shall be uncollectable and the pawn transaction shall be void. All interest and the pawnshop charge allowed under subsection (a) of this Code section shall be deemed earned, due, and owing as of the date of the pawn transaction and a like sum shall be deemed earned, due, and owing on the same day of the succeeding month.

History.

Code 1933, § 12-612, enacted by Ga. L. 1945, p. 189, § 1; Ga. L. 1989, p. 819, § 2; Ga. L. 1992, p. 3245, § 3; Ga. L. 2000, p. 1589, § 3.

Ga. L. 2000, p. 1589, § 16, not codified by the General Assembly, provides that the 2000 amendment is applicable to notices delivered on or after July 1, 2000.

The 2000 amendment, effective July 1, 2000, and applicable with respect to notices delivered on or after July 1, 2000, substituted "certified mail or statutory overnight delivery" for "certified mail" in the first sentence of subparagraph (a)(7)(C).

Cross references.

Criminal penalty for excessive interest, § 7-4-18.

Law reviews.

For note discussing transfer fees in home loan assumptions in reference to the Georgia usury laws, see 9 Ga. L. Rev. 454 (1975).

For note on 1992 amendment of this Code section, see 9 Ga. St. U.L. Rev. 323 (1992).

JUDICIAL DECISIONS

The terms "interest" and "pawnshop charges" are not synonymous or interchangeable, and both terms must be recognized as having individual importance within O.C.G.A. § 44-12-131. Fryer v. Easy Money Title Pawn, Inc., 183 B.R. 654, 1995 Bankr. LEXIS 886 (Bankr. S.D. Ga. 1995).

Construed with § 7-4-18. — There is no conflict between O.C.G.A. §§ 7-4-18 and 44-12-131 since what is authorized by the pawnshop statute is a combination of charges up to 25% per month, not the imposition of interest alone at a rate of 25% per month. Fryer v. Easy Money Title Pawn, Inc., 183 B.R. 654, 1995 Bankr. LEXIS 886 (Bankr. S.D. Ga. 1995).

O.C.G.A. § 44-12-131, not O.C.G.A. § 7-4-18, the criminal usury statute, governs pawnshop transactions. Glinton v. And R, Inc., 271 Ga. 864, 524 S.E.2d 481, 1999 Ga. LEXIS 1028 (1999).

O.C.G.A. §§ 7-4-18 and 44-12-131, the criminal usury statute, are in conflict and cannot be reconciled. Hooks v. Cobb Ctr. Pawn & Jewelry Brokers, Inc., 241 Ga. App. 305, 527 S.E.2d 566, 1999 Ga. App. LEXIS 1624 (1999), cert. denied, No. S00C0615, 2000 Ga. LEXIS 406 (Ga. May 5, 2000).

The amount of interest on a pawn transaction was regulated by O.C.G.A. § 44-12-131 and was not governed by the five percent limit imposed on general loans by the usury statute, O.C.G.A. § 7-4-18. Hooks v. Cobb Ctr. Pawn & Jewelry Brokers, Inc., 241 Ga. App. 305, 527 S.E.2d 566, 1999 Ga. App. LEXIS 1624 (1999), cert. denied, No. S00C0615, 2000 Ga. LEXIS 406 (Ga. May 5, 2000).

Construction with §§ 44-12-130 and 44-12-137. — In resolving a statutory conflict between O.C.G.A. §§ 44-12-130(1) and 44-12-137(a)(7) with respect to the one-month duration for a pawn transaction and O.C.G.A. § 44-12-131(a)(1) which required a duration of 30 days, it was determined that the criminal penalty in § 44-12-137(a)(7) was inapplicable to a customer's pawn transaction that satis-

fied the 30-day requirement of § 44-12-131(a)(1); the customer's action against the pawnbroker based on an illegal duration accordingly failed. Marshall v. Speedee Cash, 292 Ga. App. 790, 665 S.E.2d 888, 2008 Ga. App. LEXIS 861 (2008).

Pawnshop charges are expenses actually incurred by the pawnbroker in providing a service in connection with the transaction. Fryer v. Easy Money Title Pawn, Inc., 183 B.R. 322, 1995 Bankr. LEXIS 788 (Bankr. S.D. Ga. 1995).

Service charge constituting interest. — Pawnshop charge which included a 23% service charge for the customers use of the pawned automobile, the risk to the lender of that continued use, checking and processing the title to the automobile apparently in addition to an itemized title fee charged under the contract, verifying insurance on the automobile and making a log for the sheriff's department, constituted interest rather than pawnshop charges since it did not reimburse specific expenses actually incurred by the pawnbroker. Fryer v. Easy Money Title Pawn, Inc., 183 B.R. 322, 1995 Bankr. LEXIS 788 (Bankr. S.D. Ga. 1995).

Unit period determination. — In single advance, single payment transactions in which the term is less than a year and equal to a whole number of months, pawnbroker-creditors may make the unit period determination in the alternative, that is, on the basis of the term as a number of months or on the basis of the term as a number of days. Hooks v. Cobb Ctr. Pawn & Jewelry Brokers, Inc., 241 Ga. App. 305, 527 S.E.2d 566, 1999 Ga. App. LEXIS 1624 (1999), cert. denied, No. S00C0615, 2000 Ga. LEXIS 406 (Ga. May 5, 2000).

Pawnbroker's right to self-help. — Although O.C.G.A. §§ 44-12-130(5) and 44-12-131(a)(3) grant the pawnbroker the right to self-help repossession upon default without the necessity of filing a lien, this remedy is intended to apply to the defaulting pledgor, not a bona fide purchaser for value with no notice of the pawnbroker's claim. Cobb Ctr. Pawn & Jewelry Brokers, Inc. v. Gordon, 242 Ga. App. 73, 529 S.E.2d 138, 2000 Ga. App. LEXIS 93 (2000).

Motor vehicle as subject of pawn transaction. — Bankruptcy court found that the creditor was not entitled to summary judgment regarding the debtor's repossessed vehicle action where the pawnshop agreement in issue violated the statutory requirements for automobile title pawns under Georgia law, O.C.G.A. § 44-14-130. Johnson v. Speedee Cash of Columbus, Inc., 289 B.R. 251, 2002 Bankr. LEXIS 1445 (Bankr. M.D. Ga. 2002).

LLC that seized a Chapter 13 debtor's car 16 hours before the debtor declared bankruptcy, and sold the car without keeping records, was ordered to pay the debtor $6,579.57 for loss of the car, $300 for lost personal property that was in the car, $2,356.70 in emotional distress damages, and reasonable attorney's fees, pursuant to 11 U.S.C. § 362(k), because the evidence showed that the LLC knew the debtor declared bankruptcy before the LLC sold the car. Although the LLC claimed that the LLC was not liable under § 362 because the debtor forfeited rights in the car pursuant to the Georgia Pawnshop Act (GPA), O.C.G.A. § 44-14-403, when the debtor failed to repay a debt, the court rejected that argument because the LLC assessed interest rates over the course of the contract that exceeded the rates allowed by the GPA, such that a Motor Vehicle Pawn Contract the debtor signed was void from the contract's inception pursuant to O.C.G.A. § 44-12-131. Spinner v. Cash In A Hurry, LLC, 398 B.R. 84, 2008 Bankr. LEXIS 3620 (Bankr. N.D. Ga. 2008).

Creditor's motion for relief from automatic stay seeking permission to repossess a vehicle that the debtor pledged to the creditor pursuant to a title pawn transaction was granted because nothing in the Bankruptcy Code permitted a Chapter 13 debtor to modify a title pawn contract under Georgia law by treating a pawnbroker as a secured creditor where state-law redemption period, as extended by 11 U.S.C. § 108(b), had expired and the pawnbroker had adequately asserted the pawnbroker's rights pre-confirmation. TitleMax of Ga., Inc. v. Hamilton (In re Hamilton), 635 B.R. 877, 2022 Bankr. LEXIS 82 (Bankr. S.D. Ga. 2022).

Class action against pawn shop failed. — Pawnshop customer's action, alleging that a pawnshop failed to disclose

all of the interest and charges that it assessed against the customer and against purported class members who were similarly situated, as required by O.C.G.A. § 44-12-138(b)(6) and (8), failed upon a finding that the pawnshop had made a good faith offer to avoid litigation by tendering to the customer a check in the amount collected beyond the principal, as required by O.C.G.A. § 44-12-131(a)(7)(A); accordingly, the court found that the customer had not sufficiently complied with the ante litem notice provisions with respect to the other members of the class, who were not sufficiently identified in order to allow a good faith offer to be made to them. Mack v. Ga. Auto Pawn, Inc., 262 Ga. App. 277, 585 S.E.2d 661, 2003 Ga. App. LEXIS 882 (2003).

OPINIONS OF THE ATTORNEY GENERAL

Motor vehicle as subject of pawn transaction. — When a motor vehicle is the subject of a pawn transaction, O.C.G.A. § 44-12-131(a) as it existed prior to the 1992 amendment authorized pawnbrokers to receive interest up to the rate of two percent per month on the principal, a pawnshop charge not limited by the "one-fourth of the principal amount" ceiling applicable to other pawn transactions, and a motor vehicle storage fee not to exceed $30.00 per day. 1989 Op. Att'y Gen. No. U89-28.

RESEARCH REFERENCES

Am. Jur. 2d.
53A Am. Jur. 2d, Moneylenders and Pawnbrokers, § 46 et seq.

C.J.S.
70 C.J.S., Pawnbrokers, § 5.

44-12-132. Permanent records required; content.

Every pawnbroker shall maintain a permanent record book in which shall be entered in legible English at the time of each loan, purchase, or sale:

(1) The date of the transaction;

(2) The name of the person conducting the transaction;

(3) The name, age, and address of the customer; a description of the general appearance of the customer; and the distinctive number from the customer's driver's license or other similar identification card;

(4) An identification and description of the pledged or purchased goods, including, if reasonably available, the serial, model, or other number, and all identifying marks inscribed thereon;

(5) The number of the receipt or pawn ticket;

(6) The price paid or the amount loaned;

(7) If payment is made by check, the number of the check issued for the purchase price or loan;

(8) The maturity date of the transaction; and

(9) The signature of the customer.

History.
Ga. L. 1977, p. 1194, § 2.
Cross references.
Regulation of sales of used watches, O.C.G.A. § 43-49-1 et seq.

JUDICIAL DECISIONS

County ordinance not in conflict. — Since, inter alia, parts of Gwinnett County, Ga., Ord. No. 82-11 merely strengthened the requirements of O.C.G.A. § 44-12-132 as to the records that pawnbrokers were required to keep, the ordinance was not in conflict with O.C.G.A. § 44-12-130 et seq. Pawnmart, Inc. v. Gwinnett County, 279 Ga. 19, 608 S.E.2d 639, 2005 Ga. LEXIS 121 (2005).

RESEARCH REFERENCES

Am. Jur. 2d.
54 Am. Jur. 2d, Moneylenders and Pawnbrokers, §§ 6, 7.

C.J.S.
70 C.J.S., Pawnbrokers, § 2.

44-12-133. Manner of recording entry in permanent records; corrections; inspection.

Entries shall appear in ink and shall be in chronological order. No blank lines may be left between entries. No obliterations, alterations, or erasures may be made. Corrections shall be made by drawing a line of ink through the entry without destroying its legibility. The book shall be open to the inspection of any duly authorized law enforcement officer during the ordinary hours of business or at any reasonable time.

History.
Ga. L. 1977, p. 1194, § 3.

JUDICIAL DECISIONS

Constitutionality. — O.C.G.A. §§ 44-12-133 and 44-12-137, authorizing a warrantless inspection of pawnshop records, do not violate the fourth amendment. Howell v. Roberts, 656 F. Supp. 1150, 1987 U.S. Dist. LEXIS 3919 (N.D. Ga. 1987).

The law regulating pawnshops does not lack a rational basis. Howell v. Roberts, 656 F. Supp. 1150, 1987 U.S. Dist. LEXIS 3919 (N.D. Ga. 1987).

Due process is not violated simply because a local authority arguably misapplies or exceeds its authority under the relevant state statutes, as where a police officer from one county seeks to inspect a pawnshop record book in another county under O.C.G.A. §§ 44-12-133 and 44-12-137. Howell v. Roberts, 656 F. Supp. 1150, 1987 U.S. Dist. LEXIS 3919 (N.D. Ga. 1987).

RESEARCH REFERENCES

Am. Jur. 2d.
54 Am. Jur. 2d, Moneylenders and Pawnbrokers, §§ 6, 7.

C.J.S.
70 C.J.S., Pawnbrokers, § 2.

44-12-134. Maintenance of permanent records for four years.

The record of each pawn or purchase transaction provided for in Code Sections 44-12-132 and 44-12-133 shall be maintained for a period of not less than four years.

History.
Ga. L. 1977, p. 1194, § 5.

RESEARCH REFERENCES

Am. Jur. 2d.
54 Am. Jur. 2d, Moneylenders and Pawnbrokers, §§ 6, 7.

C.J.S.
70 C.J.S., Pawnbrokers, § 2.

44-12-135. Effect of part on local laws.

Nothing in this part shall supersede existing local laws nor relieve a pawnbroker from the necessity of complying with them. The requirements of local laws shall be construed as cumulative to this part.

History.
Ga. L. 1977, p. 1194, § 6.

Law reviews.
For annual survey of local government law, see 57 Mercer L. Rev. 289 (2005).

JUDICIAL DECISIONS

County ordinance not in conflict. — Since the stated purpose of Gwinnett County, Ga., Ord. No. 82-11 was to impede the sale of stolen property, and its requirements were designed to achieve that end, it was a proper use of the county's police power; further, by expressly preserving local laws in O.C.G.A. § 44-12-135, which included county ordinances, the legislature had in effect "authorized" them, and so Gwinnett County, Ga., Ord. No. 82-11 did not conflict with O.C.G.A. § 44-12-138. Pawnmart, Inc. v. Gwinnett County, 279 Ga. 19, 608 S.E.2d 639, 2005 Ga. LEXIS 121 (2005).

RESEARCH REFERENCES

Am. Jur. 2d.
54 Am. Jur. 2d, Moneylenders and Pawnbrokers, §§ 6, 7.

C.J.S.
70 C.J.S., Pawnbrokers, § 2.

44-12-136. Supervision of pawnbrokers by municipalities.

Municipal authorities may license pawnbrokers, define their powers

and privileges by ordinance, impose taxes upon them, revoke their licenses, and exercise such general supervision as will ensure fair dealing between the pawnbroker and his customers.

History.
Ga. L. 1868, p. 136, § 1; Code 1873, § 2137; Code 1882, § 2137; Civil Code 1895, §§ 755, 2955; Civil Code 1910, §§ 904, 3527; Code 1933, § 12-611.

JUDICIAL DECISIONS

Municipal corporation not empowered to allow pawnbrokers to charge usury. Lockwood v. Muhlberg, 124 Ga. 660, 53 S.E. 92, 1906 Ga. LEXIS 579 (1906).

RESEARCH REFERENCES

Am. Jur. 2d.
54 Am. Jur. 2d, Moneylenders and Pawnbrokers, § 5 et seq.
C.J.S.
70 C.J.S., Pawnbrokers, §§ 2-4.
ALR.
Necessity of dealer's license to authorize sale of articles taken as security for or to satisfy a debt, 36 A.L.R. 685.
Constitutionality of statutes regulating business of making small loans, 125 A.L.R. 743; 149 A.L.R. 1424.

44-12-137. Prohibited acts; penalties; presumption as to pledgor; replacement of lost or damaged goods.

(a) Any pawnbroker and any clerk, agent, or employee of such pawnbroker who shall:

(1) Fail to make an entry of any material matter in his permanent record book;

(2) Make any false entry therein;

(3) Falsify, obliterate, destroy, or remove from his place of business such permanent record book;

(4) Refuse to allow any duly authorized law enforcement officer who is certified by the Georgia Peace Officer Standards and Training Council or who is a federal officer to inspect his permanent record book or any goods in his possession during the ordinary hours of business or at any reasonable time;

(5) Fail to maintain a record of each pawn transaction for at least four years;

(6) Accept a pledge or purchase property from a person under the age of 18 years or who the pawnbroker knows is not the true owner of such property;

(7) Make any agreement requiring the personal liability of a pledgor or seller or waiving any of the provisions of this part or

providing for a maturity date less than one month after the date of the pawn transaction; or

(8) Fail to return or replace pledged goods to a pledgor or seller upon payment of the full amount due the pawnbroker unless the pledged goods have been taken into custody by a court or a law enforcement officer or agency,

shall be guilty of a misdemeanor.

(b) Any person properly identifying himself and presenting a pawn ticket to the pawnbroker shall be presumed to be the pledgor or seller and shall be entitled to redeem the pledged goods described in such ticket. In the event such pledged goods are lost or damaged while in the possession of the pawnbroker, it shall be the responsibility of the pawnbroker to replace the lost or damaged goods with like kinds of merchandise and proof of replacement shall be a defense to prosecution. For the purposes of this subsection, "lost" includes destroyed or having disappeared because of any cause, whether known or unknown, that results in the pledged goods being unavailable for return to the pledgor.

History.

Ga. L. 1977, p. 1194, § 4; Ga. L. 1989, p. 819, § 3.

Code Commission notes.

Pursuant to Code Section 28-9-5, in 1989, a comma was added following "subsection" in the last sentence of subsection (b).

JUDICIAL DECISIONS

Constitutionality. — O.C.G.A. §§ 44-12-133 and 44-12-137, authorizing a warrantless inspection of pawnshop records, do not violate the fourth amendment. Howell v. Roberts, 656 F. Supp. 1150, 1987 U.S. Dist. LEXIS 3919 (N.D. Ga. 1987).

The law regulating pawnshops does not lack a rational basis. Howell v. Roberts, 656 F. Supp. 1150, 1987 U.S. Dist. LEXIS 3919 (N.D. Ga. 1987).

Due process is not violated simply because a local authority arguably misapplies or exceeds its authority under the relevant state statutes, as where a police officer from one county seeks to inspect a pawnshop record book in another county under O.C.G.A. §§ 44-12-133 and 44-12-137. Howell v. Roberts, 656 F. Supp. 1150, 1987 U.S. Dist. LEXIS 3919 (N.D. Ga. 1987).

Construction with §§ 44-12-130 and 44-12-131. — In resolving a statutory conflict between O.C.G.A. §§ 44-12-130(1) and 44-12-137(a)(7) with respect to the one-month duration for a pawn transaction and O.C.G.A. § 44-12-131(a)(1) which required a duration of 30 days, it was determined that the criminal penalty in § 44-12-137(a)(7) was inapplicable to a customer's pawn transaction that satisfied the 30-day requirement of § 44-12-131(a)(1); the customer's action against the pawnbroker based on an illegal duration accordingly failed. Marshall v. Speedee Cash, 292 Ga. App. 790, 665 S.E.2d 888, 2008 Ga. App. LEXIS 861 (2008).

OPINIONS OF THE ATTORNEY GENERAL

Authority of law enforcement officer as to inspection and seizure of stolen property. 1996 Op. Att'y Gen. No. 96-24.

RESEARCH REFERENCES

Am. Jur. 2d.
54 Am. Jur. 2d, Moneylenders and Pawnbrokers, §§ 6, 7.

C.J.S.
70 C.J.S., Pawnbrokers, § 2.

44-12-138. Restrictions on advertising; disclosure tickets or statements.

(a)(1) Any pawnbroker as defined in paragraph (2) of Code Section 44-12-130 shall include most prominently in any and all types of advertisements the word "pawn" or the words "pawn transaction." A pawnbroker shall not use the term "loan" in any advertisements or in connection with any advertising of the business of the pawnbroker; provided, however, that the provisions of this sentence shall not apply to a pawnbroker in business on March 1, 1992, which uses the term "loan" in connection with the name of the business or with advertising of the business.

(2) On any sign advertising a pawnbroker's business, the words on such sign shall be in at least 24 inch high letters. On any other sign on the property where the pawnbroker's business is located which advertises any other activities or business engaged in by the person who is a pawnbroker, the words on such sign shall be in 12 inch high letters or smaller; provided, however, that the provisions of this paragraph shall not apply to signs of pawnbrokers which signs are in existence on March 1, 1992.

(b) Every pawnbroker in every pawn transaction shall present the pledgor or seller with a written disclosure ticket or statement in at least nine-point type, appropriately completed, with no other written or pictorial matter except as provided in subsection (c) of this Code section, containing the following information:

(1) Information identifying the pawnbroker by name and address;

(2) A statement as follows:

"This is a pawn transaction. Failure to make your payments as described in this document can result in the loss of the pawned item. The pawnbroker can sell or keep the item if you have not made all payments by the specified maturity date.";

(3) If the pawned item is a motor vehicle or motor vehicle certificate of title, a statement as follows:

"Failure to make your payment as described in this document can result in the loss of your motor vehicle. The pawnbroker can also charge you certain fees if he or she actually repossesses the motor vehicle.";

(4) A statement that the length of the pawn transaction is 30 days and that it can only be renewed with the agreement of both parties and only for 30 day incremental periods;

(5) The annual percentage rate, computed in accordance with the federal Truth in Lending Act and regulations under the federal Truth in Lending Act, for the first 30 days of the transaction, computed as if all interest and pawnshop charges were considered to be interest;

(6) The annual percentage rate, computed in accordance with the federal Truth in Lending Act and regulations under the federal Truth in Lending Act, for each 30 day period in which the pawn transaction might be continued or extended, computed as if all interest and pawnshop charges were considered to be interest. For purposes of identifying the annual percentage rate after the second continuation or extension, a single statement which identifies an annual percentage rate for each possible 30 day period thereafter shall meet the requirements of this Code section;

(7) A statement in dollar amounts of how much it will cost the seller or pledgor to redeem the merchandise in the first 30 day period of the transaction;

(8) A statement in dollar amounts of how much it will cost the seller or pledgor to redeem the merchandise in any 30 day period after the first 30 day period of the pawn transaction, provided that all fees and charges have been kept current;

(9) A statement of the specific maturity date of the pawn transaction;

(10) A statement of how long, the grace period, the pledged goods may be redeemed after the specific maturity date and the dollar amount which will be required to redeem the pledged goods after the specific maturity date;

(11) A statement that after the grace period the pledged goods become the property of the pawnbroker;

(12) If the pawn transaction involves a motor vehicle or motor vehicle certificate of title, a statement that the pawnbroker may not charge a storage fee for the motor vehicle unless the pawnbroker repossesses the motor vehicle pursuant to a default;

(13) If the pawn transaction involves a motor vehicle or motor vehicle certificate of title, a statement that the pawnbroker may

charge a storage fee for a repossessed motor vehicle not to exceed $5.00 per day, but only if the pawnbroker actually repossesses and actually must store the motor vehicle;

(14) If the pawn transaction involves a motor vehicle or motor vehicle certificate of title, a statement that the pawnbroker may charge a repossession fee, not to exceed $50.00, but only if the pawnbroker actually repossesses the motor vehicle;

(15) If the pawn transaction involves a motor vehicle or motor vehicle certificate of title, a statement that the pawnbroker may charge a fee to register a lien upon the motor vehicle certificate of title, not to exceed any fee actually charged by the appropriate state to register a lien upon a motor vehicle certificate of title, but only if the pawnbroker actually places such a lien upon the motor vehicle certificate of title;

(16) A statement that any costs to ship the pledged items to the pledgor or seller can be charged to the pledgor or seller, along with a handling fee to equal no more than 50 percent of the actual costs to ship the pledged items; and

(17) A statement that a fee of up to $2.00 can be charged for each lost or destroyed pawn ticket.

(c) In addition to the information required by subsection (b) of this Code section, the pawnbroker may, but is not required to, include the following information on the same disclosure ticket or statement, provided that such information is not used to obscure or obfuscate the information required by subsection (b) of this Code section:

(1) Information identifying the pledgor or seller;

(2) Any logo which the pawnbroker may desire to use;

(3) Any numbers or characters necessary for the pawnbroker to identify the merchandise or goods associated with the pawn transaction;

(4) Any other information required to be disclosed to consumers by any other law, rule, or regulation of the United States or of the State of Georgia;

(5) Information identifying or describing the pledged item;

(6) Information which is only for the internal business use of the pawnbroker;

(7) The hours of operation of the pawnbroker;

(8) The time of day of the pawn transaction; and

(9) Any agreement between the pledgor or seller and the pawnbroker which does not controvert the provisions of this part, of Part 5 of

Article 8 of Chapter 14 of this title, or of Part 2 of Article 15 of Chapter 1 of Title 10.

(d) The pawnbroker shall have the pledgor or seller sign the disclosure statement and shall furnish a completed copy to the pledgor or seller. The pawnbroker shall maintain a completed and signed copy of the disclosure statement on file for two years subsequent to the maturity date of the pawn transaction. Failure to maintain such a copy shall be conclusive proof that the pawnbroker did not furnish such a statement to the pledgor or seller.

(e) Notwithstanding anything to the contrary contained elsewhere in this Code section, no municipality or local government may impose any requirements upon a pawnbroker regarding the disclosures which must be made to a pledgor or seller or which must be made in the pawn ticket, other than those requirements contained in this Code section.

History.

Code 1981, § 44-12-138, enacted by Ga. L. 1992, p. 3245, § 4.

Law reviews.

For note on 1992 enactment of this Code section, see 9 Ga. St. U.L. Rev. 323 (1992).

For annual survey of local government law, see 57 Mercer L. Rev. 289 (2005).

JUDICIAL DECISIONS

Unit period determination. — In single advance, single payment transactions in which the term is less than a year and equal to a whole number of months, pawnbroker-creditors may make the unit period determination in the alternative, that is, on the basis of the term as a number of months or on the basis of the term as a number of days. Hooks v. Cobb Ctr. Pawn & Jewelry Brokers, Inc., 241 Ga. App. 305, 527 S.E.2d 566, 1999 Ga. App. LEXIS 1624 (1999), cert. denied, No. S00C0615, 2000 Ga. LEXIS 406 (Ga. May 5, 2000).

Registration of lien against automobile title. — O.C.G.A. § 44-12-138(b)(15) regulates the fees a pawnbroker may charge to register a lien against an automobile title and clearly evinces the legislature's intent to require pawnbrokers to record their liens in order to put innocent third parties on notice of their claims. Cobb Ctr. Pawn & Jewelry Brokers, Inc. v. Gordon, 242 Ga. App. 73, 529 S.E.2d 138, 2000 Ga. App. LEXIS 93 (2000).

Class action against pawn shop failed. — Pawnshop customer's action, alleging that a pawnshop failed to disclose all of the interest and charges that it assessed against the customer and against purported class members who were similarly situated, as required by O.C.G.A. § 44-12-138(b)(6) and (8), failed upon a finding that the pawnshop had made a good faith offer to avoid litigation by tendering to the customer a check in the amount collected beyond the principal, as required by O.C.G.A. § 44-12-131(a)(7)(A); accordingly, the court found that the customer had not sufficiently complied with the ante litem notice provisions with respect to the other members of the class, who were not sufficiently identified in order to allow a good faith offer to be made to them. Mack v. Ga. Auto Pawn,

Inc., 262 Ga. App. 277, 585 S.E.2d 661, 2003 Ga. App. LEXIS 882 (2003).

County ordinance not in conflict. — Since the stated purpose of Gwinnett County, Ga., Ord. No. 82-11 was to impede the sale of stolen property, and its requirements were designed to achieve that end, it was a proper use of the county's police power; further, by expressly preserving local laws in O.C.G.A. § 44-12-135, which included county ordinances, the legislature had in effect "authorized" them, and so Gwinnett County, Ga., Ord. No. 82-11 did not conflict with O.C.G.A. § 44-12-138. Pawnmart, Inc. v. Gwinnett County, 279 Ga. 19, 608 S.E.2d 639, 2005 Ga. LEXIS 121 (2005).

ARTICLE 4

TROVER

Cross references.

Form to be used in action for recovery of personal property, § 9-10-201.

PART 1

IN GENERAL

JUDICIAL DECISIONS

When action for trover lies. — An action for trover lies where there is an unauthorized assumption and exercise of the right of ownership over personal property belonging to another in hostility to the owner's rights — an act of dominion over the personal property of another inconsistent with the owner's rights, or an unauthorized appropriation. Boatright v. Padgett Motor Sales, Inc., 117 Ga. App. 578, 161 S.E.2d 402, 1968 Ga. App. LEXIS 1149 (1968).

Conversion is a tort for which the action in trover is maintainable. Carithers v. Maddox, 80 Ga. App. 230, 55 S.E.2d 775, 1949 Ga. App. LEXIS 811 (1949).

No trover action permitted against sheriff to recover illegal gambling devices. — Where a sheriff finds articles kept for the purpose of gambling, an action of trover by the owner against the sheriff for their recovery will not lie, since courts are created for the upholding of the law and of morals, and will therefore decline to allow their processes used to further the maintenance of crimes and public evils, by assisting or protecting such an owner in recovering the implements of crime or illegal paraphernalia. Elder v. Camp, 193 Ga. 320, 18 S.E.2d 622, 1942 Ga. LEXIS 393 (1942).

Regardless of where seized. — Regardless of the nature of the place where a portion of illegal instrumentalities is seized, a court does not err in granting the interlocutory injunction and in continuing in force the writ of prohibition, sought by the sheriff and the solicitor general (now district attorney) against the owner who is suing to regain possession of the seized devices, since the courts will not lend their aid to assist or protect an owner seeking to retain implements of crime such as gaming or lottery paraphernalia. Elder v. Camp, 193 Ga. 320, 18 S.E.2d 622, 1942 Ga. LEXIS 393 (1942).

Remedy where vendor repudiates executory agreement to sell. — Where the contract, which the plaintiff relied on to show title and right of possession personally, was a mere executory agreement to sell, not passing title to the personalty in question, and where the vendor, repudiating the contract, declined plaintiff's tender and refused delivery, trover would not lie against the vendor, but the plaintiff's remedy would be an action for dam-

ages for breach of the contract. McEntire v. Naylor, 47 Ga. App. 752, 171 S.E. 387, 1933 Ga. App. LEXIS 643 (1933).

Recipient of gift from intestate has right of possession which defeats trover action by administrator. — Where an intestate does in truth execute and deliver a gift, the recipient thereby obtains such a right of possession as would defeat the administrator's action of trover, regardless of whether the recipient may have acquired such legal title as would authorize the recipient to proceed by action in the recipient's own name against the obligors in the choses in action. Underwood v. Underwood, 43 Ga. App. 643, 159 S.E. 725, 1931 Ga. App. LEXIS 496 (1931).

Party who has right to bring action for personalty. — The right to sue in an action of trover is in the party in whom the title to the personalty was at the time of the conversion. And where such party sues in trover for the use of another, the name of the usee may be treated as surplusage. Poland Laundry Mach. Co. v. Pyle, 50 Ga. App. 453, 178 S.E. 474, 1935 Ga. App. LEXIS 172 (1935).

Person whose right was affected is proper plaintiff. — Trover is an action ex delicto. It is a suit brought for a tort; and the rule is that the proper person to bring an action ex delicto or for a tort is the person in whom the legal right or property was vested, and whose legal right has been affected by the injury complained of. Poland Laundry Mach. Co. v. Pyle, 50 Ga. App. 453, 178 S.E. 474, 1935 Ga. App. LEXIS 172 (1935).

Where property is subject to a security interest, an exercise of dominion or control over the property which is inconsistent with the rights of the secured party constitutes, as to him, a conversion of the property; and there may be conversion by a secured party where that party's acts are in defiance of the rights of others in the property. Trust Co. v. Associated Grocers Coop., 152 Ga. App. 701, 263 S.E.2d 676, 1979 Ga. App. LEXIS 3012 (1979).

Buyer and seller both liable where sale of collateral is conversion. — Where a sale of collateral is, with respect to the secured party, a conversion of the collateral, there is a conversion on the part of the one who sells, as well as on the part of the one who purchases, and the purchaser may be liable regardless of intent and regardless of lack of actual knowledge of the rights of the secured party. Trust Co. v. Associated Grocers Coop., 152 Ga. App. 701, 263 S.E.2d 676, 1979 Ga. App. LEXIS 3012 (1979).

Substitution of name of holder of legal title for holder of equitable title. — An action in trover instituted by the holder of the equitable title or the beneficial interest in personal property may not be amended by substituting the name of the holder of the legal title bringing an action for use. Poland Laundry Mach. Co. v. Pyle, 50 Ga. App. 453, 178 S.E. 474, 1935 Ga. App. LEXIS 172 (1935).

Sufficiency of "Jack Jones" forms, see Greenwood v. Stewart, 86 Ga. App. 764, 72 S.E.2d 539, 1952 Ga. App. LEXIS 1050 (1952).

Phrase "to which your petitioner claims title" is sufficient. — The phrase "to which your petitioner claims title" in a statutory trover form is a simple, direct statement of the ultimate fact which is determinative of the whole case, and is sufficient. Greenwood v. Stewart, 86 Ga. App. 764, 72 S.E.2d 539, 1952 Ga. App. LEXIS 1050 (1952).

Plaintiff in action of trover must show title or possession. — In order to recover in an action of trover, the plaintiff is required to show either title or right of possession in the plaintiff to the property sought to be recovered. Raines v. Graham, 85 Ga. App. 815, 70 S.E.2d 125, 1952 Ga. App. LEXIS 835 (1952).

The plaintiff in an action of trover must show title, either general or special, in the plaintiff at the time of the institution of the action, actual possession or right of immediate possession to the property sought to be recovered. Hise v. Morgan, 91 Ga. App. 555, 86 S.E.2d 374, 1955 Ga. App. LEXIS 807 (1955).

What bailor must show as condition precedent to recovery. — In a trover action against a bailee for hire it is a condition precedent to the bailor's right to recover, that it be shown that with the demand there was an offer to pay storage charges and surrender or account for any

negotiable receipt given by the bailee for the property. Steadham v. Baskin, 51 Ga. App. 36, 179 S.E. 636, 1935 Ga. App. LEXIS 536 (1935).

Plaintiff cannot recover in trover without proof of conversion. Funsten v. Muse, 86 Ga. App. 759, 72 S.E.2d 504, 1952 Ga. App. LEXIS 1047 (1952).

Description of property required. — In an action of trover, the complaint must definitely identify the property by a particular description, or by a general description coupled with such additional allegations as to the time and place or manner of the taking or conversion as plainly to isolate the thing or things sued for from the general class to which it belongs. Seaboard Sec. Co. v. Goodson, 51 Ga. App. 512, 180 S.E. 858, 1935 Ga. App. LEXIS 387 (1935).

Failure to describe goods with particularity. — In an action in trover with a bail proceeding for a money judgment, failure to describe the goods with particularity is harmless where there is no injury to the defendant. Teal v. Equitable Loan Co., 43 Ga. App. 673, 159 S.E. 904, 1931 Ga. App. LEXIS 505 (1931).

Defeat of trover and conversion claims. — Trial court erred by denying the used car dealer's motion for summary judgment on the dealer's counterclaims for trover and conversion because the undisputed evidence showed that the dealer held the title to the car but that the finance company was in possession and refused to return the car upon demand. Cars v. W. Funding II, 349 Ga. App. 517, 826 S.E.2d 370, 2019 Ga. App. LEXIS 192 (2019).

Sufficiency of allegation of value. — In complaint in trover action, where several articles of property are sought to be recovered and each article is described with sufficient particularity, an allegation as to the aggregate value of all the property is a sufficient allegation as to value. Seaboard Sec. Co. v. Goodson, 51 Ga. App. 512, 180 S.E. 858, 1935 Ga. App. LEXIS 387 (1935).

Reason for proof of demand and refusal. — Where the defendant is in possession of property sued for at the time of the institution of an action in trover, proof of demand and refusal is necessary only to save the plaintiff the costs of court in case the defendant should disclaim title to the property. Anchor Duck Mills v. Harp, 40 Ga. App. 563, 150 S.E. 572, 1929 Ga. App. LEXIS 654 (1929).

Discharge of defendant in bankruptcy pending proceeding is no defense. — In an action of trover the issue is one of title, and not of debt. Consequently, neither the defendant in such an action wherein bail is required nor the surety on the bond can set up as a defense the discharge of the defendant in bankruptcy pending the action. This is true although the plaintiff elected to take a money verdict for the damages alleged to have been sustained. Van Pelt v. Family Loan Soc'y, Inc., 179 Ga. 787, 177 S.E. 595, 1934 Ga. LEXIS 405 (1934).

Effect of judgment rendered on basis of plea of impending bankruptcy. — Where a plea to a trover action was filed, setting up pending bankruptcy of the debtor, and judgment was rendered and not excepted to, such judgment becomes the law of the case. On subsequent enforcement of the judgment by summons of garnishment, a complaint for injunction prohibiting the garnishment from proceeding is properly stricken on demurrer (now motion to dismiss). Van Pelt v. Family Loan Soc'y, Inc., 179 Ga. 787, 177 S.E. 595, 1934 Ga. LEXIS 405 (1934).

OPINIONS OF THE ATTORNEY GENERAL

Trover resembles common-law action except that plaintiff can make election of verdict during trial. — In this state, trover embraces the common-law sections of trover, replevin and detinue. It is therefore essentially a common-law action, differing only to the extent that under the law of this state, a plaintiff may bring an action and, by making an election of verdict on or before the trial and thereby cause the action to assume the character of one of the three common-law forms. Consequently, the only basic difference between the common-law practice and present practice is that under the former, the plaintiff was

required to make an election before bringing the action, and to frame the pleadings accordingly. 1957 Ga. Op. Att'y Gen. 72.

RESEARCH REFERENCES

ALR.

Appropriation by carrier for its own use of coal or other commodity shipped over its line, 29 A.L.R. 1241.

Deductions on account of labor or expenditures in fixing damages for conversion, 44 A.L.R. 1321.

Previous demand as a condition of replevin or trover against innocent purchaser of stolen chattels, 51 A.L.R. 1465.

Negative conduct as basis of claim of conversion, 116 A.L.R. 870.

What amounts to conversion of former tenant's goods by landlord not entitled to any lien or right in respect thereto, 148 A.L.R. 649.

Mere assertion of unfounded lien as constituting conversion, 169 A.L.R. 100.

Delivery of bailed property by bailee to third person for accomplishment of bailment purpose, as a conversion, 174 A.L.R. 1436.

Right of action for conversion as affected by assertion of rights or pursuit of remedies founded on continued ownership of the property, 3 A.L.R.2d 218.

44-12-150. Effect of defendant's possession on necessity of proof of conversion.

In actions to recover the possession of chattels, it shall not be necessary to prove any conversion of the property if the defendant is in possession when the action is brought.

History.

Orig. Code 1863, § 2967; Code 1868, § 2974; Code 1873, § 3028; Code 1882, § 3028; Civil Code 1895, § 3887; Civil Code 1910, § 4483; Code 1933, § 107-101.

JUDICIAL DECISIONS

Analysis

General Consideration
Prerequisites to Trover Action
1. Acts Constituting Conversion
2. Acts Not Constituting Conversion
Parties Against Whom Trover Action Maintainable
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General Consideration

Action of trover is for recovery of possession of chattels belonging to the plaintiff, not an action on account for a debt. Youngblood v. Duncan, 49 Ga. App. 300, 175 S.E. 411, 1934 Ga. App. LEXIS 370 (1934).

Statutory action of trover contains characteristics of common-law actions of replevin, detinue, and trover. Livingston v. Epsten-Roberts Co., 50 Ga. App. 25, 177 S.E. 79, 1934 Ga. App. LEXIS 608 (1934).

Conversion not prevented by acquisition in good faith. — The fact that possession of stolen property, unlawful as against the true owner, may have been acquired in good faith will not prevent such possession from operating as a conversion against the true owner. Lovinger v. Hix Green Buick Co., 110 Ga. App. 698, 140 S.E.2d 83, 1964 Ga. App. LEXIS 743 (1964).

Evidence of defendant's possession may be inferential when the action is brought and it need not be strong enough to prevent a nonsuit. Robson v. Rawlings, 79 Ga. 354, 7 S.E. 212, 1887 Ga. LEXIS 225 (1887).

Showing of possession. — Proof that the property, for which an action is brought, was at the home of the defendant is evidence of possession in the defendant. Mercier v. Mercier, 43 Ga. 323, 1871 Ga. LEXIS 231 (1871).

Whether facts support allegation of ownership is question of law. — Where the plaintiff in a trover action does allege facts upon which plaintiff bases title, it becomes a question of law whether or not the facts alleged support the allegation of ownership. Livingston v. Epsten-Roberts Co., 50 Ga. App. 25, 177 S.E. 79, 1934 Ga. App. LEXIS 608 (1934).

Jury instructions. — Where a plaintiff brought suit against an insurance company for conversion of an automobile and its contents after the car was involved in an accident with the insurance company's insured, and the insurance company moved it to a free storage location, the trial court did not err in giving a jury charge which tracked the provisions of O.C.G.A. § 44-12-150 but inserted the word "unlawful" in front of "possession." Connors v. Omni Ins. Co., 195 Ga. App. 607, 394 S.E.2d 402, 1990 Ga. App. LEXIS 615 (1990).

Prerequisites to Trover Action

In order to recover in a trover case it is essential that the plaintiff show either title or right of possession, and in some cases it is necessary to establish both; and, although title is presumed to follow possession of the property, such presumption is rebuttable. Kornegay v. Thompson, 157 Ga. App. 558, 278 S.E.2d 140, 1981 Ga. App. LEXIS 1911 (1981).

In order to prevail, where title is claimed, plaintiff must present proof of legal rather than equitable title. Kornegay v. Thompson, 157 Ga. App. 558, 278 S.E.2d 140, 1981 Ga. App. LEXIS 1911 (1981); Alpert v. Wickes Cos., 182 Ga. App. 51, 354 S.E.2d 674, 1987 Ga. App. LEXIS 1620 (1987).

In order to present a cause of action for conversion, an act of dominion over the personal property of another inconsistent with the owner's rights or by an unauthorized appropriation must be shown. Kornegay v. Thompson, 157 Ga. App. 558, 278 S.E.2d 140, 1981 Ga. App. LEXIS 1911 (1981); Alpert v. Wickes Cos., 182 Ga. App. 51, 354 S.E.2d 674, 1987 Ga. App. LEXIS 1620 (1987).

In order to be chargeable with conversion, technically it is not necessary that the defendant assert any right of ownership over the property; it is sufficient if the defendant wrongfully assumes dominion over the property inconsistent with the owner's right. Maryland Cas. Ins. Co. v. Welchel, 257 Ga. 259, 356 S.E.2d 877, 1987 Ga. LEXIS 780 (1987).

Mere possession of property will support trover action. — As against a wrongdoer, mere possession of property by one in own right (not merely as agent of another) will support an action of trover. Livingston v. Epsten-Roberts Co., 50 Ga. App. 25, 177 S.E. 79, 1934 Ga. App. LEXIS 608 (1934).

Plaintiff must show title personally at the time of the institution of the action either general or special and actual possession or a right of immediate possession. Livingston v. Epsten-Roberts Co., 50 Ga. App. 25, 177 S.E. 79, 1934 Ga. App. LEXIS 608 (1934).

Ordinarily plaintiff must show conversion in order to recover in trover. McDaniel v. White, 140 Ga. App. 118, 230 S.E.2d 500, 1976 Ga. App. LEXIS 1367 (1976).

Exception to conversion applies if defendant acquires possession of property lawfully. Brooks v. Fincher, 150 Ga. App. 201, 257 S.E.2d 326, 1979 Ga. App. LEXIS 2118 (1979).

Possession lawfully acquired. — While it is provided by O.C.G.A. § 44-12-150 that it shall not be necessary to prove a conversion of the property in an action of trover where the defendant is in possession when the action is brought, this rule does not apply where the defendant's possession is lawfully acquired. Wood v. Sanders, 87 Ga. App. 84, 73 S.E.2d 55, 1952 Ga. App. LEXIS 616 (1952).

If the defendant acquired possession of the property lawfully, then it is necessary to prove either actual conversion or a

Prerequisites to Trover Action (Cont'd)

demand for return of the property and defendant's failure or refusal to redeliver. McDaniel v. White, 140 Ga. App. 118, 230 S.E.2d 500, 1976 Ga. App. LEXIS 1367 (1976).

Where the defendants disclaimed title to the property sued for in their plea, and as they had lawfully acquired possession of the property as bailees, it is necessary for the plaintiff to prove an actual conversion of the goods or a demand for and a refusal to redeliver them. Wood v. Sanders, 87 Ga. App. 84, 73 S.E.2d 55, 1952 Ga. App. LEXIS 616 (1952).

It is necessary to prove either actual conversion or a demand for return of the property and defendant's failure or refusal to redeliver. Graham v. State St. Bank & Trust Co., 111 Ga. App. 416, 142 S.E.2d 99, 1965 Ga. App. LEXIS 987 (1965).

Unless actual conversion by bailee is shown, action of trover against the bailee will not lie, without a previous demand for the goods and failure to redeliver. Wood v. Sanders, 87 Ga. App. 84, 73 S.E.2d 55, 1952 Ga. App. LEXIS 616 (1952).

If actual conversion is shown no demand is necessary. Lovinger v. Hix Green Buick Co., 110 Ga. App. 698, 140 S.E.2d 83, 1964 Ga. App. LEXIS 743 (1964).

Section not applicable where property lawfully acquired by defendant. — While it would appear from O.C.G.A. § 44-12-150 that it would not be necessary to prove a conversion of property in a trover action where the defendant is in possession when the action is brought, that section has been held not applicable where the property has been lawfully acquired by the defendant. Kornegay v. Thompson, 157 Ga. App. 558, 278 S.E.2d 140, 1981 Ga. App. LEXIS 1911 (1981).

Issue as to who has legal title to property is for jury. — Although defendant is the possessor of the personal property in question, where plaintiff's testimony goes beyond presenting some suggestion of an equitable title in plaintiff but also presents an issue of material fact as to whether it was the intent of the parties at the time of the transfer of the personal property that the legal title to the personal property vest in defendant, the resolution of this conflict in the evidence, as to who has legal title to the property, is for the jury. Kornegay v. Thompson, 157 Ga. App. 558, 278 S.E.2d 140, 1981 Ga. App. LEXIS 1911 (1981).

Demand and wrongful refusal. — Since mere default in the payment of a debt does not alone constitute conversion, demand and refusal are conditions precedent to the institution of a trover action brought on property conveyed in a bill of sale to secure debt. Robbins v. Welfare Fin. Corp., 95 Ga. App. 90, 96 S.E.2d 892, 1957 Ga. App. LEXIS 724 (1957).

Proof of demand and refusal where required, is required only as evidence of a conversion; and where, a conversion has been shown by other evidence, such proof is not essential. James v. Newman, 73 Ga. App. 79, 35 S.E.2d 581, 1945 Ga. App. LEXIS 395 (1945); Lovinger v. Hix Green Buick Co., 110 Ga. App. 698, 140 S.E.2d 83, 1964 Ga. App. LEXIS 743 (1964).

Where there is an agreement and the plaintiff relinquishes lawful possession to the defendant, demand and a wrongful refusal are prerequisites to a trover action. Brooks v. Fincher, 150 Ga. App. 201, 257 S.E.2d 326, 1979 Ga. App. LEXIS 2118 (1979).

Only purpose of demand in trover action is to show conversion. Eubanks v. Hilliard, 88 Ga. App. 106, 76 S.E.2d 133, 1953 Ga. App. LEXIS 1022 (1953).

Demand and refusal is necessary only when defendant comes into possession of property lawfully. What is meant by defendant coming lawfully into possession of the property is, where defendant finds it and retains it for the true owner; or where defendant obtains the possession of the property, by the permission or consent of the plaintiff. In this latter class of cases, a demand and refusal would be necessary, unless it could be shown the defendant had appropriated the article so found to defendant's own use, or had disposed of the property bailed, contrary to the terms and stipulations of the contract of bailment. Lovinger v. Hix Green Buick Co., 110 Ga. App. 698,

140 S.E.2d 83, 1964 Ga. App. LEXIS 743 (1964).

Instances where proof of demand and refusal or conversion unnecessary. — Where a defendant in an action of trover admits in the plea or answer to possession of the property at the time of the action, under an adverse claim of title or right of possession, it is not necessary for the plaintiff to prove a demand and refusal or any other conversion of the property. C.I.T. Corp. v. Smith, 56 Ga. App. 544, 193 S.E. 261, 1937 Ga. App. LEXIS 163 (1937), aff'd, 186 Ga. 199, 197 S.E. 322, 1938 Ga. LEXIS 586 (1938).

No proof of demand is necessary where the defendant's answer admits the conversion. Coley v. Dortch & Co., 139 Ga. 239, 77 S.E. 77, 1913 Ga. LEXIS 391 (1913); Smith v. Commercial Credit Co., 28 Ga. App. 403, 111 S.E. 821, 1922 Ga. App. LEXIS 547 (1922); Whelchel v. Roark, 31 Ga. App. 75, 119 S.E. 451, 1923 Ga. App. LEXIS 732 (1923).

In a conditional sale of machinery where the defendant refuses to pay the entire purchase price, proof of demand and refusal or conversion is unnecessary. Carter v. American Slicing Mach. Co., 23 Ga. App. 422, 98 S.E. 365, 1919 Ga. App. LEXIS 146 (1919).

Where the defendant is in possession of the property sued for in a trover action and claims title thereto adversely to the plaintiff, it is unnecessary for the plaintiff to prove a conversion or a demand and refusal. Eubanks v. Hilliard, 88 Ga. App. 106, 76 S.E.2d 133, 1953 Ga. App. LEXIS 1022 (1953).

Proof of conversion unnecessary except to save plaintiff courts costs. — Where the defendant is in possession at the time the action is entered, proof of demand and refusal is necessary only to save the plaintiff the costs of court in case the defendant should disclaim title to the property. Pearson v. Jones, 18 Ga. App. 448, 89 S.E. 536, 1916 Ga. App. LEXIS 405 (1916); C.I.T. Corp. v. Smith, 56 Ga. App. 544, 193 S.E. 261, 1937 Ga. App. LEXIS 163 (1937), aff'd, 186 Ga. 199, 197 S.E. 322, 1938 Ga. LEXIS 586 (1938).

Defendant is liable for costs where he does not disclaim, although the plaintiff has relevied the property. Wall v. Johnson, 88 Ga. 524, 15 S.E. 15, 1892 Ga. LEXIS 59 (1892).

In addition to proof of demand and refusal or conversion, it is necessary for a plaintiff to prove title or right to possession in order to establish a prima facie trover case. McDaniel v. White, 140 Ga. App. 118, 230 S.E.2d 500, 1976 Ga. App. LEXIS 1367 (1976).

No contractual relationship between parties required. — There is no requirement that there be a contractual relationship between plaintiff and defendant before an action in trover can be maintained. Kelley v. Sheehan, 61 Ga. App. 714, 7 S.E.2d 298, 1940 Ga. App. LEXIS 232 (1940).

In a trover action against a neighbor for return of a cow and damages, award of return of the cow but denial of damages was proper where plaintiff did not prove that defendant obtained the cow by an unlawful method and that plaintiff made a demand for return of the cow. Simmons v. Bearden, 222 Ga. App. 430, 474 S.E.2d 250, 1996 Ga. App. LEXIS 829 (1996).

1. Acts Constituting Conversion

Possession of property with claim of title adverse to that of true owner constitutes conversion, and in such circumstances no demand is necessary to constitute conversion. Beaver v. Magid, 56 Ga. App. 272, 192 S.E. 497, 1937 Ga. App. LEXIS 333 (1937).

Any distinct act of dominion wrongfully asserted over one's property, in denial of right or inconsistent with it, is a conversion. James v. Newman, 73 Ga. App. 79, 35 S.E.2d 581, 1945 Ga. App. LEXIS 395 (1945); Lovinger v. Hix Green Buick Co., 110 Ga. App. 698, 140 S.E.2d 83, 1964 Ga. App. LEXIS 743 (1964).

Employee commits wrongful conversion where, without the consent of the assignee, the employee collects wages assigned and converts them to the employee's own use. Bell Fin. Co. v. Johnson, 51 Ga. App. 350, 180 S.E. 373, 1935 Ga. App. LEXIS 691 (1935).

Possession of stolen automobile constitutes conversion. — Acquiring possession of the plaintiff's automobile after it had been stolen was an act of domin-

Acts Constituting Conversion (Cont'd)

ion over the vehicle inconsistent with the right of the true owner, and the defendant's possession of the automobile constituted a conversion of the vehicle as against the plaintiff notwithstanding the issue of the defendant's good faith. Lovinger v. Hix Green Buick Co., 110 Ga. App. 698, 140 S.E.2d 83, 1964 Ga. App. LEXIS 743 (1964).

2. Acts Not Constituting Conversion

No conversion exists where defendant lawfully acquires possession of property, in the absence of demand and refusal. Colonial Credit Co. v. Williams, 95 Ga. App. 76, 97 S.E.2d 197, 1957 Ga. App. LEXIS 717 (1957); McDaniel v. White, 140 Ga. App. 118, 230 S.E.2d 500, 1976 Ga. App. LEXIS 1367 (1976).

Purchaser's default in payment of purchase money alone will not constitute conversion of the property. Colonial Credit Co. v. Williams, 95 Ga. App. 76, 97 S.E.2d 197, 1957 Ga. App. LEXIS 717 (1957).

Intervening, criminal act. — Where the defendant is chargeable with conversion by reason of the fact that defendant wrongfully assumed possession of the property and moved it from one location to another where it was stolen by a third party, the defendant's conversion of the property is not the proximate cause of the loss unless the intervening criminal act was reasonably foreseeable. Maryland Cas. Ins. Co. v. Welchel, 257 Ga. 259, 356 S.E.2d 877, 1987 Ga. LEXIS 780 (1987).

Parties Against Whom Trover Action Maintainable

Vendee in conditional sale contract may maintain trover against third person wrongfully depriving that third party of possession of such property. Livingston v. Epsten-Roberts Co., 50 Ga. App. 25, 177 S.E. 79, 1934 Ga. App. LEXIS 608 (1934).

Plaintiff may institute action of trover against administrator, where administrator wrongfully withholds property belonging to the plaintiff, before the expiration of 12 months. Byrd v. Riggs, 87 Ga. App. 7, 73 S.E.2d 35, 1952 Ga. App. LEXIS 597 (1952).

Trover lies against agent even though the agent does not purport to act personally, but wholly for another. Kelley v. Sheehan, 61 Ga. App. 714, 7 S.E.2d 298, 1940 Ga. App. LEXIS 232 (1940).

Remedies

Owner's election of remedies. — Where timber is wrongfully cut from land and carried away, the owner has an election of remedies: the owner may sue in trespass quare clausam fregit; or, since the trees become personalty when severed, the owner may maintain trover or any other form of action appropriate to the recovering of the possession of personalty; or for damages for the injury to or conversion of that class of property. Rowland v. Gardner, 79 Ga. App. 153, 53 S.E.2d 198, 1949 Ga. App. LEXIS 605 (1949).

Action of trespass to personalty is concurrent with action of trover and conversion, although the two actions are not entirely coextensive. Maryland Cas. Ins. Co. v. Welchel, 257 Ga. 259, 356 S.E.2d 877, 1987 Ga. LEXIS 780 (1987).

Defeat of action of trover. — The right of possession, through some special title in property, such as the legal impounding of cattle by the defendant, and the detention of property by the defendant for charges as depository for hire will defeat an action of trover by the holder of the legal title to such property. Livingston v. Epsten-Roberts Co., 50 Ga. App. 25, 177 S.E. 79, 1934 Ga. App. LEXIS 608 (1934).

RESEARCH REFERENCES

Am. Jur. 2d.

18 Am. Jur. 2d, Conversion, § 51.

C.J.S.

89 C.J.S., Trover and Conversion, § 117.

ALR.

May trover be predicated upon the mere act of purchasing property from someone other than the true owner, without taking actual possession, 38 A.L.R. 1096.

Mere detention of or failure to deliver chattels after demand as conversion, 61 A.L.R. 621; 129 A.L.R. 638.

Corporate stock or certificate thereof as subject of conversion, 83 A.L.R. 1199.

Mere possession in plaintiff as basis of action for wrongfully taking or damaging personal property, 150 A.L.R. 163.

Sufficiency of proof in replevin of defendant's possession at time of commencement of action, 2 A.L.R.2d 1043.

Identification of animals involved in conversion action, 51 A.L.R.2d 1154.

Replevin or claim-and-delivery: modern view as to validity of statute or contractual provision authorizing summary repossession of consumer goods sold under retail instalment sales contract, 45 A.L.R.3d 1233.

Garageman's lien for towing and storage of motor vehicle towed from private property on which vehicle was parked without permission, 85 A.L.R.3d 240.

44-12-151. Right of plaintiff to elect form of verdict.

In an action to recover personal property, the plaintiff may elect:

(1) To accept an alternative verdict for the property or for its value;

(2) To demand a verdict for the damages alone; or

(3) To demand a verdict for the property alone and its hire, if any.

It shall be the duty of the court to instruct the jury to render the verdict as the plaintiff elects.

History.

Ga. L. 1860, p. 43, § 1; Code 1863, § 5117; Code 1868, § 3506; Code 1873, § 3564; Code 1882, § 3564; Civil Code 1895, § 5335; Civil Code 1910, § 5930; Code 1933, § 107-105.

Cross references.

Right of action for injuries to personalty generally, O.C.G.A. § 51-10-1 et seq.

Law reviews.

For article surveying torts law, see 34 Mercer L. Rev. 271 (1982).

JUDICIAL DECISIONS

Analysis

General Consideration
Verdict for Property or for Its Value
Verdict for Damages Alone
Verdict for Property Alone and Its Hire

General Consideration

Absolute title is not essential to maintenance of action of trover. — An interest less than the whole title will be sufficient where it is coupled with lawful possession or an immediate right thereto. Groover v. Savannah Bank & Trust Co., 186 Ga. 476, 198 S.E. 217, 1938 Ga. LEXIS 627 (1938).

O.C.G.A. § 44-12-151 must be construed with O.C.G.A. § 44-12-153. Trammell v. Mallory Bros. & Co., 115 Ga. 748, 42 S.E. 62, 1902 Ga. LEXIS 563 (1902); Walton v. Henderson, 4 Ga. App. 173, 61 S.E. 28, 1908 Ga. App. LEXIS 239 (1908).

In construing O.C.G.A. § 44-12-151 with O.C.G.A. § 44-12-153, the plaintiff is limited to a recovery of the property under the tender, and is chargeable with the cost unless it is shown that a previous demand for the property had been made and refused. Downs Motor Co. v. Colbert, 34 Ga.

General Consideration (Cont'd)

App. 542, 130 S.E. 592, 1925 Ga. App. LEXIS 402 (1925).

O.C.G.A. § 44-12-151 not inconsistent with former O.C.G.A. §§ 53-6-34 and 53-7-93. — There is no inconsistency between O.C.G.A. § 44-12-151, requiring selection of remedies, and former O.C.G.A. §§ 53-6-34 and 53-7-93, requiring collection and preservation of assets of estate and just and timely payment of debts of estate. Howard v. Parker, 163 Ga. App. 159, 293 S.E.2d 548, 1982 Ga. App. LEXIS 2431 (1982) (decided under the pre-1998 Probate Code).

Defendant not liable where theft not foreseeable. — The plaintiff may not, by election of remedies, hold the defendant strictly liable for the loss, where the defendant is unable to return the property as a result of a theft of the property by a third party, if the theft was not reasonably foreseeable by the defendant. Maryland Cas. Ins. Co. v. Welchel, 257 Ga. 259, 356 S.E.2d 877, 1987 Ga. LEXIS 780 (1987).

Dividends. — A party entitled to dividend shares since a certain point in time is also entitled to any dividends attributable to those shares since that time. Drexel Burnham Lambert, Inc. v. Chapman, 174 Ga. App. 336, 329 S.E.2d 595, 1985 Ga. App. LEXIS 1809 (1985).

Where the property converted is money, the plaintiff must seek a money verdict; while money can earn interest, it is not personalty of a character for which hire may be recovered and, thus, a plaintiff suing for the conversion of money may recover the amount of money converted, plus interest from the date of conversion. Felker v. Chipley, 246 Ga. App. 296, 540 S.E.2d 285, 2000 Ga. App. LEXIS 1221 (2000).

O.C.G.A. § 44-12-151 entertains impartial reciprocity of protection as to rights of plaintiff and defendant in bail trover proceedings. McLaurin v. Henry, 90 Ga. App. 864, 84 S.E.2d 713, 1954 Ga. App. LEXIS 835 (1954).

Election of alternative verdict. — Where the plaintiff in trover elects to take an alternative verdict, the defendant has the right to rely upon such a verdict being rendered as may be discharged by the return of the property upon which the action is based. Tuller v. Carter, 59 Ga. 395, 1877 Ga. LEXIS 285 (1877).

Either party prevailing in trover proceedings has same right of election as to whether that party will recover damages, the value of the property, or the property and its hire. McLaurin v. Henry, 90 Ga. App. 864, 84 S.E.2d 713, 1954 Ga. App. LEXIS 835 (1954).

Plaintiff is not required to make election, before conclusion of introduction of evidence, of the kind of verdict which plaintiff will take; therefore, it is not error to permit a plaintiff, after the close of the introduction of evidence, to elect to take a verdict for the property alone. Brooks v. Hartsfield Co., 56 Ga. App. 184, 192 S.E. 459, 1937 Ga. App. LEXIS 316 (1937).

Plaintiff may elect verdict at any time before case is submitted to jury or before judgment is rendered by a judge without a jury. Where the plaintiff makes no such election, the judgment in trover is that the plaintiff shall have the property sued for. Phillips v. South Cobb Bank, 117 Ga. App. 137, 159 S.E.2d 495, 1968 Ga. App. LEXIS 1004 (1968).

Election of plaintiff is not required to be in writing. Livingston v. Berrien Wood Co., 228 Ga. 190, 184 S.E.2d 458, 1971 Ga. LEXIS 511 (1971).

Where plaintiff makes no election, the judgment in trover is that plaintiff shall have the property for which plaintiff sues. Phillips v. South Cobb Bank, 117 Ga. App. 137, 159 S.E.2d 495, 1968 Ga. App. LEXIS 1004 (1968).

Sole issue in action of trover is that of title to property in dispute; and the fact that the plaintiff may elect to take a money verdict in lieu of the specific personalty claimed can in no event alter that issue. Citizens Bank v. Mullis, 161 Ga. 371, 131 S.E. 44, 1925 Ga. LEXIS 357 (1925); Cook v. Pollard, 50 Ga. App. 752, 179 S.E. 264, 1935 Ga. App. LEXIS 278 (1935).

Order of court rendered void and of no effect where order dismissed the plaintiff's action, insofar as plaintiff's right to elect a judgment, without notice to the plaintiff and without giving plain-

tiff an opportunity to be heard. Zachos v. Rowland, 80 Ga. App. 31, 55 S.E.2d 166, 1949 Ga. App. LEXIS 763 (1949).

Verdict for Property or for Its Value

Right of election not lost by seizure of property. — In action to recover personal property, the plaintiff's right of election is not lost by suing out a bail process, pending the action, and causing the property to be seized. Hudson v. Goff, 77 Ga. 281, 3 S.E. 152, 1887 Ga. LEXIS 103 (1887).

In conditional sale, part paid less reasonable sum for rent must be returned where the vendors elect to take the property. Hays v. Jordan & Co., 85 Ga. 741, 11 S.E. 833, 1890 Ga. LEXIS 144 (1890).

Plaintiff cannot recover more than amount of debt standing as security for the converted property when plaintiff elects to take a money verdict. Durden v. Durden, 58 Ga. App. 46, 197 S.E. 493, 1938 Ga. App. LEXIS 182 (1938); Rose City Foods, Inc. v. Bank of Thomas County, 207 Ga. 477, 62 S.E.2d 145, 1950 Ga. LEXIS 618 (1950).

Plaintiff may elect to take highest proved value of property between the date of the conversion and the trial. Durden v. Durden, 58 Ga. App. 46, 197 S.E. 493, 1938 Ga. App. LEXIS 182 (1938).

Amount of recovery is limited to value laid in petition where the plaintiff chooses as the form of recovery the highest proved value of the property between the time of conversion and the date of the trial. Sappington v. Rimes, 21 Ga. App. 810, 95 S.E. 316, 1918 Ga. App. LEXIS 539 (1918).

Highest proved value of property means the highest value which the jury, from consideration of all the proof, finds that the property was worth during the period of time between the date of conversion and the trial, if during that period there was a change in its value. Durden v. Durden, 58 Ga. App. 46, 197 S.E. 493, 1938 Ga. App. LEXIS 182 (1938).

Agreed purchase price as stated in check is prima facie evidence of actual value of item at the time of the sale; and, where it appears that the conversion was committed within ten days thereafter, and there is no evidence showing a different value at the date of the conversion, the agreed purchase price should be taken as the value of the property at the time of the conversion. Stapleton v. Dismukes, 43 Ga. App. 611, 159 S.E. 768, 1931 Ga. App. LEXIS 489 (1931).

Property value at conversion time plus additional damages allowed. — Where the value of the property at the time of the conversion may be reasonably determined, and there is no evidence as to the value of the property after the conversion, its value at the time of the conversion may be allowed by the jury, together with interest thereon as additional damages. Beaver v. Magid, 56 Ga. App. 272, 192 S.E. 497, 1937 Ga. App. LEXIS 333 (1937).

Allowance of additional damages prohibited where the plaintiff elected to take a verdict for the highest proved value at any time between the date of the conversion and the trial. Beaver v. Magid, 56 Ga. App. 272, 192 S.E. 497, 1937 Ga. App. LEXIS 333 (1937).

Recovery of both highest proved value and hire prohibited. — In an action to recover personal property, the plaintiff is not entitled to recover both the highest proved value at any time between the conversion and the trial and also hire. Hayes v. O'Shield Buick Co., 94 Ga. App. 177, 94 S.E.2d 44, 1956 Ga. App. LEXIS 498 (1956).

Interest "eo nomine" is not recoverable in trover action. Beaver v. Magid, 56 Ga. App. 272, 192 S.E. 497, 1937 Ga. App. LEXIS 333 (1937).

Effect of defendant's failure to deliver property within specified time. — Where, by election of the plaintiff, the jury returned an alternative verdict for a specified amount of money, to be discharged by the delivery of property within 20 days, and the defendant failed to deliver it within the specified time, the verdict becomes absolute for money. Southern Express Co. v. Lynch, 65 Ga. 240, 1880 Ga. LEXIS 151 (1880).

Election for money verdict denied. — A vendor by conditional sale who brings an action of trover against a vendee, and receives from the executing officer the property by giving bond, and who thereaf-

Verdict for Property or for Its Value (Cont'd)

ter disposes of the property so as to put it beyond the vendor's power to produce, is not entitled to elect to take a money verdict. Mallary Bros. & Co. v. Moon, 130 Ga. 591, 61 S.E. 401, 1908 Ga. LEXIS 359 (1908).

Instructed jury's failure to return money verdict ground for new trial. — Where the plaintiffs elected to have a money verdict as to the personal property sought to be recovered, and the court instructed the jury to return a money verdict, the failure to do so is a ground for new trial. Reed v. Reed, 217 Ga. 303, 122 S.E.2d 253, 1961 Ga. LEXIS 435 (1961).

Verdict for Damages Alone

Plaintiff entitled to elect makeup of damages. — Having a right to elect between a verdict for damages and a verdict for the property, the plaintiff thus has a further right to elect the way damages shall be made up. O'Neill Mfg. Co. v. Woodley, 118 Ga. 114, 44 S.E. 980, 1903 Ga. LEXIS 468 (1903).

Recovery options where plaintiff elects to take money verdict. — Plaintiff may recover the value of the property at the date of the conversion, with interest from that date; or plaintiff may recover the value of the property at the date of the conversion with a reasonable hire from that date to the date of the trial, if the property is of a character that hire may be recovered. Douglas Motor Co. v. Watson, 68 Ga. App. 335, 22 S.E.2d 766, 1942 Ga. App. LEXIS 122 (1942); Rose City Foods, Inc. v. Bank of Thomas County, 207 Ga. 477, 62 S.E.2d 145, 1950 Ga. LEXIS 618 (1950).

Where a prevailing party elects to take a money verdict, that party may recover the value of the property at the date of the conversion, with interest from that date, or the party may recover the value of the property at the date of the conversion, with a reasonable hire from that date to the date of the trial, if the property is of a character that hire may be recovered. Before the appropriate amount of damages recoverable can be determined, however, the party must choose between interest or hire from the date of conversion as the measure of damages. Homac, Inc. v. Fort Wayne Mtg. Co., 577 F. Supp. 1065, 1983 U.S. Dist. LEXIS 16545 (N.D. Ga. 1983).

Rationale for allowance of additional damages where plaintiff elects to take money verdict, the equivalent of interest, is predicated on the ground that the plaintiff, having been unlawfully deprived of property, is entitled to be fully compensated for the wrong inflicted. Beaver v. Magid, 56 Ga. App. 272, 192 S.E. 497, 1937 Ga. App. LEXIS 333 (1937).

Measure of damages where plaintiff's property interest at time of conversion is less than that of absolute ownership will be the value of the plaintiff's interest therein, whatever it may be. Douglas Motor Co. v. Watson, 68 Ga. App. 335, 22 S.E.2d 766, 1942 Ga. App. LEXIS 122 (1942).

Commensuration between property value and purchase price for property not required. — In trover the property alone may be recovered, but if an alternative money verdict for damages is elected, the measure of damages is the value of the property, which need not be commensurate with the amount which the defendant may have paid to a third person as to purchase price. Cook v. Pollard, 50 Ga. App. 752, 179 S.E. 264, 1935 Ga. App. LEXIS 278 (1935).

Verdict for principal and interest in separate stated amounts illegal. — Verdict for principal and interest in two separate stated amounts, instead of a lump sum representing the two, is illegal insofar as the interest is concerned. Beaver v. Magid, 56 Ga. App. 272, 192 S.E. 497, 1937 Ga. App. LEXIS 333 (1937); Stephens v. Wilson, 58 Ga. App. 24, 197 S.E. 350, 1938 Ga. App. LEXIS 173 (1938).

Allowance of interest as additional damages improper absent evidence as to value after the date of conversion. Beaver v. Magid, 56 Ga. App. 272, 192 S.E. 497, 1937 Ga. App. LEXIS 333 (1937).

Verdict for Property Alone and Its Hire

Plaintiff can elect to take money verdict in an action for personal property and its hire. Twiggs v. Chambers, 56 Ga. 279, 1876 Ga. LEXIS 264 (1876).

Plaintiff must make known an election before court instructs jury. Wilson-Weesner-Wilkinson Co. v. Collier, 62 Ga. App. 457, 8 S.E.2d 171, 1940 Ga. App. LEXIS 302 (1940).

Plaintiff is entitled to receive hire during entire period between conversion and verdict, etc., including that period of time during which the property was in the hands of a sheriff. McLaurin v. Henry, 90 Ga. App. 864, 84 S.E.2d 713, 1954 Ga. App. LEXIS 835 (1954).

In a trover action where the bank wrongfully repossessed the injured party's trailer, there was evidence to support the trial court's award of hire damages under O.C.G.A. § 44-12-151(3), where the injured party's husband testified that, after the trailer was seized, they were required to lease a trailer and that a fair rental value of the trailer was $100 per week; the trailer was seized on August 17, 1999, and trial began on March 20, 2001. Gateway Bank & Trust v. Timms, 259 Ga. App. 299, 577 S.E.2d 15, 2003 Ga. App. LEXIS 82 (2003).

Defendant cannot restrict plaintiff's right of recovery. — A defendant in trover cannot, by a tender of the property to the plaintiff, together with reasonable hire as provided in O.C.G.A. § 44-12-153, restrict the plaintiff to the right to recover for the property alone and its hire, and thereby prevent the plaintiff from recovering a money verdict in the event it is established upon the trial that there has been a conversion. Hanner v. Trust Co., 49 Ga. App. 867, 176 S.E. 800, 1934 Ga. App. LEXIS 578 (1934).

Estoppel to claim hire. — Party to a trover action who actually had the property in possession would be estopped to claim hire during such period. McLaurin v. Henry, 90 Ga. App. 864, 84 S.E.2d 713, 1954 Ga. App. LEXIS 835 (1954).

RESEARCH REFERENCES

ALR.

Right to maintain a bill for accounting or discovery against one who has stolen or converted goods or received the same, 58 A.L.R. 184.

Time for exercise of option under a judgment in replevin for return of property or payment of specified sum, 67 A.L.R. 1497.

Judgment in replevin as bar to action by plaintiff for consequential damages for wrongful seizure or conversion of property, 69 A.L.R. 655.

Damages for wrongful removal or destruction of fixtures, 69 A.L.R. 914.

Waiver of tort and recovery in assumpsit for conversion as dependent on or affected by sale of the goods by the converter, 97 A.L.R. 250.

Judgment in action for conversion or to recover possession of personal property, resulting from defalcation or misappropriation, as res judicata of subsequent action for conversion or to recover possession, 106 A.L.R. 1425.

Right to satisfy judgment requiring return of property in defendant's possession by payment of damages, where return would subject defendant to loss, 159 A.L.R. 546.

Alternative judgment in replevin as giving option to either party in regard to payment of damages or return of property, 170 A.L.R. 122.

Conclusive election of remedies as predicated of commencement of action, or its prosecution short of judgment on the merits, 6 A.L.R.2d 10.

44-12-152. Determination of value of property.

For personalty unlawfully detained, the plaintiff may recover a sum in the amount of the highest value which he is able to prove existed between the time of the conversion and the trial.

History.

Orig. Code 1863, § 3010; Code 1868, § 3022; Code 1873, § 3077; Code 1882, § 3077; Civil Code 1895, § 3917; Civil

Code 1910, § 4514; Code 1933, § 107-103.

Law reviews.

For comment on Rowland v. Gardner, 79 Ga. App. 153, 53 S.E.2d 198 (1949), see 12 Ga. B. J. 79 (1949).

JUDICIAL DECISIONS

Applicability of section. — O.C.G.A. § 44-12-152 applies when the plaintiff elects under O.C.G.A. § 44-12-150 to demand a verdict for damages alone, where the proof shows a conversion, and where the plaintiff was the absolute owner of the property at the date of conversion. Dunn v. Young, 22 Ga. App. 17, 95 S.E. 374, 1918 Ga. App. LEXIS 107 (1918).

Evidence regarding the original purchase is relevant for the jury to consider in arriving at their final figure. Hudson Properties, Inc. v. Citizens & S. Nat'l Bank, 168 Ga. App. 331, 308 S.E.2d 708, 1983 Ga. App. LEXIS 2765 (1983).

Plaintiff may recover highest proven value between time of conversion and trial. Bedgood v. Karp's U-Drive-It Co., 80 Ga. App. 216, 55 S.E.2d 654, 1949 Ga. App. LEXIS 807 (1949).

Plaintiff may recover full value of property at date of conversion. Rowland v. Gardner, 79 Ga. App. 153, 53 S.E.2d 198, 1949 Ga. App. LEXIS 605 (1949) (For comment, see 12 Ga. B.J. 79 (1949)).

Recovery of both highest proved value and hire prohibited. — A plaintiff is not entitled to recover both the highest proved value at any time between the conversion and the trial and also hire. Hayes v. O'Shield Buick Co., 94 Ga. App. 177, 94 S.E.2d 44, 1956 Ga. App. LEXIS 498 (1956).

Term "highest proved value" means the highest value which the jury, from a consideration of all the proof, may fix. Sammons v. Copeland, 85 Ga. App. 318, 69 S.E.2d 617, 1952 Ga. App. LEXIS 725 (1952).

The term "highest proved value" does not mean the highest estimate given by any witness as to its value during that period. Elder v. Woodruff Hdwe. & Mfg. Co., 9 Ga. App. 484, 71 S.E. 806, 1911 Ga. App. LEXIS 194 (1911).

"Time of the conversion" is the time when the defendant converted another's property to own personal use. Woodham v. Cash, 15 Ga. App. 674, 84 S.E. 142, 1915 Ga. App. LEXIS 34 (1915).

It is competent to show quantity of plaintiff's interest. Zugar v. Glen Falls Indem. Co., 63 Ga. App. 660, 11 S.E.2d 839, 1940 Ga. App. LEXIS 520 (1940).

Amount of damages depends upon extent of right of possession. Zugar v. Glen Falls Indem. Co., 63 Ga. App. 660, 11 S.E.2d 839, 1940 Ga. App. LEXIS 520 (1940).

Agreed price of sale is prima facie evidence of value of converted property. Young v. Durham, 15 Ga. App. 678, 84 S.E. 165, 1915 Ga. App. LEXIS 35 (1915).

Corpse not subject to valuation. — In an action regarding the alleged removal of eye tissue from a corpse without permission, because plaintiff had no pecuniary interest in her husband's corpse, the corneal tissue was not subject to valuation in the context of O.C.G.A. § 44-12-152. Bauer v. North Fulton Med. Ctr., Inc., 241 Ga. App. 568, 527 S.E.2d 240, 1999 Ga. App. LEXIS 1673 (1999).

Recovery of money damages cannot exceed amount alleged as value of articles, without an amendment covering the excess. Sappington v. Rimes, 21 Ga. App. 810, 95 S.E. 316, 1918 Ga. App. LEXIS 539 (1918); Morris v. Sheppard, 22 Ga. App. 564, 96 S.E. 505, 1918 Ga. App. LEXIS 604 (1918).

Measure of damages where property returned to owner prior to trial. — In an action for conversion, a party who had elected to sue for damages was entitled to recover for the diminution in value of the property only for the time period between the alleged conversion and the property's return, where the property had been returned prior to trial. Campbell v. Bausch, 195 Ga. App. 791, 395 S.E.2d 267, 1990 Ga. App. LEXIS 718 (1990).

Proper damages calculus was applied based on the highest value between a conversion of a bank's security interest by a client of a securities broker and the trial since the bank did not regain the bank's

collateral, regardless of whether the broker retained the property until the commencement of trial. Amegy Bank Nat'l Ass'n v. Deutsche Bank Alex.Brown, 619 Fed. Appx. 923, 2015 U.S. App. LEXIS 13965 (11th Cir. 2015).

Measure of damage is value of special interest where the plaintiff has no title, only a special interest in the property. Zugar v. Glen Falls Indem. Co., 63 Ga. App. 839, 11 S.E.2d 839 (1940).

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 Ga. LEXIS 974 (2006).

Value to buyers when sellers resume operation of restaurants. — In an action by the buyer of a restaurant against the sellers, alleging trespass, conversion, and breach of contract when the sellers re-entered the premises three months after the sale, changed the locks, and began operating the restaurant as the sellers' own, there was some evidence supporting the jury's award of $360,675 damages to the buyer. Caldwell v. Church, 353 Ga. App. 141, 836 S.E.2d 594, 2019 Ga. App. LEXIS 647 (2019).

If plaintiff's property interest is less than that of absolute ownership, the measure of damages is the value of plaintiff's interest therein. Horne v. Guiser Mfg. Co., 74 Ga. 790, 1885 Ga. LEXIS 399 (1885); Bradley v. Burkett, 82 Ga. 255, 11 S.E. 492, 1888 Ga. LEXIS 408 (1888); Holmes v. Langston & Woodson, 110 Ga. 861, 36 S.E. 251, 1900 Ga. LEXIS 649 (1900).

One with qualified title recovers full value. — One having a right of possession may sue a stranger or mere wrongdoer in trover, and recover the full value of the property, though one's right of possession rests on only a qualified title. Chapes, Ltd. v. Anderson, 825 F.2d 357, 1987 U.S. App. LEXIS 11316 (11th Cir. 1987).

Where title to property is held as security for debt, the plaintiff is entitled to recover only the amount of the debt. Elder v. Woodruff Hdwe. & Mfg. Co., 9 Ga. App. 484, 71 S.E. 806, 1911 Ga. App. LEXIS 194 (1911).

Measure of damages where defendant recoups for conversion of property pledged to secure debt, in the absence of a special contract, is the actual value of the property at the time of the conversion with legal interest from the date of the conversion. Bennett v. Tucker & Pennington, 32 Ga. App. 288, 123 S.E. 165, 1924 Ga. App. LEXIS 356 (1924).

Accounting for collateral prerequisite to recovery in conditional sale. — A conditional vendor, who has taken a note for the purchase price of the property, is not entitled to a money verdict unless the vendor has accounted for the note. Smith v. Commercial Credit Co., 28 Ga. App. 403, 111 S.E. 821, 1922 Ga. App. LEXIS 547 (1922); Williams v. C.C. Baggs Auto Co., 32 Ga. App. 253, 122 S.E. 805, 1924 Ga. App. LEXIS 347 (1924).

Stipulation in bill of lading disallowed. — A carrier cannot invoke a stipulation in a bill of lading that in the event of loss, the measure of damages shall be the value of the property at the time and place of shipment. Merchants' & Miners' Transp. Co. v. Moore & Co., 124 Ga. 482, 52 S.E. 802, 1905 Ga. LEXIS 756 (1905).

Interest erroneously awarded written off verdict. — Where the plaintiff is not entitled to interest as part of his damages, the judgment will be reversed unless the plaintiff writes it off from the verdict. Barnett & Co. v. Thompson, 37 Ga. 335, 1867 Ga. LEXIS 168 (1867).

RESEARCH REFERENCES

Am. Jur. 2d.
18 Am. Jur. 2d, Conversion, § 138.
C.J.S.
89 C.J.S., Trover and Conversion, § 136.
ALR.
Deductions on account of labor or expenditures in fixing damages for conversion, 44 A.L.R. 1321.

Measure of damages for carrier's conversion of goods, 56 A.L.R. 1171.

Allowance as damages for conversion of commodities or chattels of fluctuating value, or increase in market value after the time of conversion, 87 A.L.R. 817.

Rights of owner of stolen money as against one who won it in gambling transaction from thief, 44 A.L.R.2d 1242.

Measure of damages for conversion or loss of commercial paper, 85 A.L.R.2d 1349.

Measure of damages for conversion of corporate stock or certificate, 31 A.L.R.3d 1286.

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 A.L.R.3d 816.

Elements and measure of damages recoverable from bailee for loss, destruction, or conversion of personal papers, photographs, or paintings, 9 A.L.R.4th 1245.

44-12-153. Tender of property and hire; effect on costs.

In actions for the recovery of personal property, if the defendant disclaims all title and tenders the property to the plaintiff when he files his answer, together with reasonable hire for the same since the conversion, the costs of the action shall be paid by the plaintiff unless he proves a previous demand of the defendant and a refusal to deliver.

History.
Orig. Code 1863, § 2989; Code 1868, § 3002; Code 1873, § 3057; Code 1882, § 3057; Civil Code 1895, § 3897; Civil Code 1910, § 4494; Code 1933, § 107-104.

JUDICIAL DECISIONS

Defendant has right to tender property at first term. Zachos v. Rowland, 80 Ga. App. 31, 55 S.E.2d 166, 1949 Ga. App. LEXIS 763 (1949).

If defendant makes valid tender, defendant is entitled to be discharged and not subjected to a judgment for any sum, either hire, value, or costs. Harris v. Barry Fin. Co., 76 Ga. App. 663, 47 S.E.2d 201, 1948 Ga. App. LEXIS 436 (1948).

Plaintiff's recovery rights unrestricted by tender after first term. — A defendant in trover cannot, after the first term, by a tender of the property to the plaintiff, together with reasonable hire, restrict the plaintiff to the right to recover for the property alone and its hire, and thereby prevent the plaintiff from recovering a money verdict in the event it is established upon trial that there has been a conversion. Hanner v. Trust Co., 49 Ga. App. 867, 176 S.E. 800, 1934 Ga. App. LEXIS 578 (1934).

The plaintiff in a trover case, where the defendant does not at the first term tender the property to the plaintiff, has at his option the right to demand a verdict for the property alone, and its hire, if any, or for damages alone. White v. Dalton, 55 Ga. App. 768, 191 S.E. 386, 1937 Ga. App. LEXIS 494 (1937).

An amendment after the first term, making a tender of the property, may be permitted, but it will not affect the payment of costs. Woodruff Mach. Mfg. Co. v. Griffin, 17 Ga. App. 529, 87 S.E. 808, 1916 Ga. App. LEXIS 755 (1916).

Elements of damages. — Damages may consist of the highest proved value of the property between the date of the conversion and the date of the trial without

hire or interest, or the value of the property at the date of the conversion with interest thereon from that date to the date of the trial. White v. Dalton, 55 Ga. App. 768, 191 S.E. 386, 1937 Ga. App. LEXIS 494 (1937).

Tender of hire unnecessary where unrequested. — In an action to recover a truck, it was not necessary for the defendant to tender reasonable hire for the truck since the date of the conversion in order to comply with requirements of O.C.G.A. § 44-12-153, since the plaintiff asked for no hire. Harris v. Barry Fin. Co., 76 Ga. App. 663, 47 S.E.2d 201, 1948 Ga. App. LEXIS 436 (1948).

Tender of less than all of property is insufficient and will not prevent the plaintiff from proceeding with the action and electing a money verdict. Hogan v. Maxey, 121 Ga. App. 490, 174 S.E.2d 208, 1970 Ga. App. LEXIS 1263 (1970).

The requirements of O.C.G.A. § 44-12-153 cannot be taken as having been met when the alleged tender of the automobile consisted of an offer to return it stripped of various parts of the machinery with which it was equipped when received by the defendant, and likewise stripped of the various portions of the equipment which had been substituted for the original equipment by the defendant mechanic. Chalker & Russell v. Savannah Motor Car Co., 37 Ga. App. 532, 140 S.E. 916, 1927 Ga. App. LEXIS 395 (1927).

Tender of property during closing argument too late. — Where, during the argument of the case by the plaintiff's counsel in conclusion, the defendant's attorney tendered back to plaintiff the property involved for the purpose of mitigating the damages, the tender was too late. Dugas Corp. v. Georgia Power Co., 43 Ga. App. 536, 159 S.E. 592, 1931 Ga. App. LEXIS 451 (1931).

Proof of demand and refusal to deliver unnecessary where defendant admitted possession in defendant's answer and denied plaintiff's right of possession, contending unconditionally that such right was solely in defendant. Smith v. C.I.T. Corp., 186 Ga. 199, 197 S.E. 322, 1938 Ga. LEXIS 586 (1938).

Money verdict denied where answer meets O.C.G.A. § 44-12-153's requirements. — Where an answer meets the requirements of O.C.G.A. § 44-12-153, the plaintiff cannot have a money verdict for the value of the property. Trammell v. Mallory Bros. & Co., 115 Ga. 748, 42 S.E. 62, 1902 Ga. LEXIS 563 (1902).

RESEARCH REFERENCES

Am. Jur. 2d.

18 Am. Jur. 2d, Conversion, § 93.

C.J.S.

89 C.J.S., Trover and Conversion, § 186.

ALR.

Mere detention of or failure to deliver chattels after demand as conversion, 129 A.L.R. 638.

44-12-154. Setoff and recoupment in action involving purchase money contract; judgment; lien of defendant.

When personal property is sold and the vendor retains the title until all the purchase money is paid, if the vendor or his assigns shall bring an action to recover the possession of such personal property, the defendant in the action may plead as a setoff any demand or claim that he may have against the plaintiff or may recoup any damages that he has sustained by reason of any failure of consideration, any defects in the personal property, or any breach of contract by the plaintiff whereby the defendant has in any way been injured or damaged. If the plaintiff elects to take a money judgment for the value of the property, the amount of the setoff or damages allowed the defendant by the jury shall be deducted from the value of the property and the amount allowed for

the hire or use thereof and the plaintiff shall only recover the excess; but, if the amount of the setoff or damages allowed the defendant shall exceed the value of the property and the hire thereof, the defendant shall have judgment against the plaintiff for such excess. If the plaintiff elects to take a judgment for the property, the amount allowed the defendant as the setoff or damages shall be a lien on such property superior to all other liens except liens for taxes.

History.
Ga. L. 1903, p. 84, § 1; Civil Code 1910, § 4484; Code 1933, § 107-102.

JUDICIAL DECISIONS

Analysis

General Consideration
Setoff or Recoupment
1. In General
2. Rights of Vendor
3. Rights of Vendee

General Consideration

Purpose of section. — O.C.G.A. § 44-12-154 seeks to establish a means of adjusting the equities between a purchaser and seller when goods are repossessed. Sizemore v. Beeler, 94 Ga. App. 414, 94 S.E.2d 773, 1956 Ga. App. LEXIS 561 (1956).

Scope of section. — O.C.G.A. § 44-12-154 is limited to suits brought to recover personal property where the vendor retains title. Powers v. Wren, 198 Ga. 316, 31 S.E.2d 713, 1944 Ga. LEXIS 413 (1944); Hayes v. O'Shield Buick Co., 94 Ga. App. 177, 94 S.E.2d 44, 1956 Ga. App. LEXIS 498 (1956); Wilkes v. Sheppard, 104 Ga. App. 710, 122 S.E.2d 534, 1961 Ga. App. LEXIS 778 (1961).

O.C.G.A. § 44-12-154 is sufficiently broad to include not only the immediate assignee of the vendor, but also the assignee of such assignee. Jordan v. Investment Corp., 39 Ga. App. 148, 146 S.E. 498 (1929).

Conditional sale is created where a written agreement to purchase a herd of cattle is selected by the vendee, providing for installment payments and for the retention of the title in the vendor until full payment of the purchase price, accompanied by delivery of the cattle selected and part payment of the purchase money. Sizemore v. Beeler, 94 Ga. App. 414, 94 S.E.2d 773, 1956 Ga. App. LEXIS 561 (1956).

Trover action maintainable upon default. — Where property is conveyed by a conditional sales contract the vendor retains title thereto until the purchase price is paid and, in case of default in the payment of the purchase price, the vendor, or the holder of the conditional sales contract, may maintain trover to obtain possession of the property from one in possession of the same. Stanfield v. Crawley, 74 Ga. App. 79, 39 S.E.2d 88, 1946 Ga. App. LEXIS 462 (1946).

Trover action based upon retention-of-title contract of sale amounts to rescission of the contract insofar as the plaintiff is concerned, and the defendant or purchaser may elect to treat the proceeding as a rescission and recover what plaintiff has paid on the purchase price less hire or plaintiff may elect to stand on the contract. Columbia Loan Co. v. Parks, 213 Ga. 723, 101 S.E.2d 720, 1958 Ga. LEXIS 259 (1958).

Rescission embraces accounting between parties. — A trover action based on rescission of a conditional sale contract necessarily embraces an accounting between the parties and is res judicata

as to the equities between them. Sizemore v. Beeler, 94 Ga. App. 414, 94 S.E.2d 773, 1956 Ga. App. LEXIS 561 (1956); J.G.T., Inc. v. Brunswick Corp., 119 Ga. App. 719, 168 S.E.2d 847, 1969 Ga. App. LEXIS 1221 (1969).

Issue in trover action is ordinarily one of title. J.G.T., Inc. v. Brunswick Corp., 119 Ga. App. 719, 168 S.E.2d 847, 1969 Ga. App. LEXIS 1221 (1969).

Setoff or Recoupment

1. In General

Procedure for pleading setoff is not limited to conditional vendees. J.G.T., Inc. v. Brunswick Corp., 119 Ga. App. 719, 168 S.E.2d 847, 1969 Ga. App. LEXIS 1221 (1969).

Condition of property relevant to setoff issue. — Testimony that cattle when repossessed were not as fat or in as good a condition as when they were sold to the defendants, is relevant on the issue made by the defendant in defendant's plea of setoff, as the plaintiff is entitled to credit for any extraordinary depreciation in the value of the herd. Sizemore v. Beeler, 94 Ga. App. 414, 94 S.E.2d 773, 1956 Ga. App. LEXIS 561 (1956).

Amount of damages allowed on sustaining plea of recoupment may be in an amount greater than the defendant has paid to plaintiff under the contract although less than the combined sums paid by defendant to plaintiff and plaintiff's assignor under the contract. Columbia Loan Co. v. Parks, 213 Ga. 723, 101 S.E.2d 720, 1958 Ga. LEXIS 259 (1958) (case decided prior to adoption of U.C.C.).

Measure of damages in retention-title contract. — In a suit in trover by the vendor to recover of the purchaser personalty sold to which the vendor has retained title, the measure of damages is the balance due on the contract, with interest, provided it does not exceed the value of the property at the time of the conversion, with interest or hire, or the highest proved value between the conversion and the trial. Dasher v. International Harvester Co. of Am., 42 Ga. App. 130, 155 S.E. 211, 1930 Ga. App. LEXIS 259 (1930).

Insufficient plea of payment. — A plea of payment which fails to allege with reasonable certainty when, how, and to whom the payment was made is insufficient. Williford v. Phillips, 49 Ga. App. 223, 174 S.E. 641, 1934 Ga. App. LEXIS 339 (1934).

Agreed purchase money expressed in contract is prima facie evidence of value of property. Dasher v. International Harvester Co. of Am., 42 Ga. App. 130, 155 S.E. 211, 1930 Ga. App. LEXIS 259 (1930).

Amount of deductions for vendee's use of property is within sound discretion of triers of fact. Sizemore v. Beeler, 94 Ga. App. 414, 94 S.E.2d 773, 1956 Ga. App. LEXIS 561 (1956).

Instruction proper absent plea of setoff or recoupment. — In trover action for value of automobile a charge to the effect that plaintiff might recover the highest value which plaintiff proves between the time of conversion and the trial is not erroneous as withdrawing from the consideration of the jury repairs made by a mechanic where no special plea of setoff or recoupment was filed by defendant. Meders v. Wirchball, 83 Ga. App. 408, 63 S.E.2d 674, 1951 Ga. App. LEXIS 877 (1951).

Judgment authorizing recovery of property is bar to subsequent action of an accounting for payments made in excess of the rental value of the property by a vendee. Cowart v. Brigman Motors Co., 32 Ga. App. 123, 122 S.E. 645, 1924 Ga. App. LEXIS 309 (1924).

2. Rights of Vendor

Vendor entitled to deduct property's rental value. — The vendor is entitled to deduct from installment payments the reasonable rental value while the property is in the hands of the vendee under the sale contract. Sizemore v. Beeler, 94 Ga. App. 414, 94 S.E.2d 773, 1956 Ga. App. LEXIS 561 (1956).

Plaintiff entitled to judgment for unpaid balance with interest. — Where the defendant merely pleads that defendant has made certain payments, the plaintiff is entitled to a judgment for the unpaid balance of the principal debt with interest thereon. Smith v. Commercial Credit Co., 28 Ga. App. 403, 111 S.E. 821, 1922 Ga. App. LEXIS 547 (1922).

Rights of Vendor (Cont'd)

Where the value of the property, as expressed in a contract, is uncontradicted by the evidence as to the value, the plaintiff is entitled to recover in an amount representing the balance due on the contract with interest. Dasher v. International Harvester Co. of Am., 42 Ga. App. 130, 155 S.E. 211, 1930 Ga. App. LEXIS 259 (1930).

3. Rights of Vendee

Vendee entitled to accounting for return of purchase money paid by him. — Where the vendor in a conditional sale contract upon default of the purchaser brings trover and either elects or is by operation of law forced into the position of electing to take a judgment for the property itself, the vendee is entitled under proper pleading to an accounting for the purchase money paid by the vendee, less amounts covering the reasonable value of the use of the property while in the vendee's possession and any depreciation over and above ordinary wear and tear. Sizemore v. Beeler, 94 Ga. App. 414, 94 S.E.2d 773, 1956 Ga. App. LEXIS 561 (1956).

Vendee must account for depreciation and the value of the property to vendee while it was in vendee's possession. Sizemore v. Beeler, 94 Ga. App. 414, 94 S.E.2d 773, 1956 Ga. App. LEXIS 561 (1956).

Burden on defendant to file equitable plea where the defendant seeks to recover payments made toward the purchase price. Sizemore v. Beeler, 94 Ga. App. 414, 94 S.E.2d 773, 1956 Ga. App. LEXIS 561 (1956).

Equity, once the defendant files a proper plea, will attempt to place the vendor and vendee in status quo by crediting the vendor with the rental value of the property and any damage sustained while in the vendee's hands, and crediting the vendee with payments made toward the purchase price. Sizemore v. Beeler, 94 Ga. App. 414, 94 S.E.2d 773, 1956 Ga. App. LEXIS 561 (1956).

The defendants, in response to a trover action for the recovery of a herd of cattle purchased by defendants and in which title was retained by the vendor, has a right to plead and prove that by reason of a partial failure of consideration due to the fact that certain of the cows were diseased and had to be destroyed, and that by reason of having made part payment on the purchase price stated in the contract, they had paid the full value of the property and were entitled to retain it. Sizemore v. Beeler, 94 Ga. App. 414, 94 S.E.2d 773, 1956 Ga. App. LEXIS 561 (1956).

Where the assignee of a purchase-money retention title contract and notes elects to rescind the contract and bring trover against the vendee upon the latter's failure to make the instalment payments, the defendant may plead and prove a failure of consideration as to the property purchased, and a partial failure of consideration will constitute a defense pro tanto to the action. Columbia Loan Co. v. Parks, 97 Ga. App. 76, 102 S.E.2d 46, 1958 Ga. App. LEXIS 707 (1958).

RESEARCH REFERENCES

Am. Jur. 2d.

18 Am. Jur. 2d, Conversion, § 89.

C.J.S.

89 C.J.S., Trover and Conversion, §§ 180, 189.

ALR.

Indebtedness of plaintiff to defendant or latter's claim of indebtedness as defense or mitigation of damages in civil action for conversion or replevin, 100 A.L.R. 1376.

Right of conditional buyer to maintain action for conversion and damages recoverable as affected by defendant's recognition conditional seller's title or rights, 116 A.L.R. 904.

44-12-155. Alternative verdict; effect as first lien pending payment of judgment.

An alternative verdict in an action of trover vests the title to the property in the plaintiff to the extent that until the judgment is paid by the defendant such judgment shall constitute the first lien on the property to the exclusion of all other claims whatsoever.

History.
Laws 1830, Cobb's 1851 Digest, p. 500; Code 1863, § 3012; Code 1868, § 3024; Code 1873, § 3079; Code 1882, § 3079; Civil Code 1895, § 3920; Civil Code 1910, § 4517; Code 1933, § 107-106.

JUDICIAL DECISIONS

Election of money judgment creates lien on property. — Where a money judgment is elected, this judgment becomes a special lien upon the property sued for, and a general lien upon all other property of the defendant. McWilliams v. Hemingway, 80 Ga. App. 843, 57 S.E.2d 623, 1950 Ga. App. LEXIS 795 (1950).

RESEARCH REFERENCES

ALR.
Judgment in replevin as implying a direction for return of property, 144 A.L.R. 1149.

44-12-156. Effect of judgment for damages in trover; priority.

When a verdict for damages is rendered in favor of a plaintiff in trover and a judgment is entered thereon, the verdict and judgment shall not have the effect of changing the property which is the subject matter of the action or of vesting the same in the defendant in the action until after the damages and costs recovered by the plaintiff in the action are paid off and discharged. However, the verdict and judgment shall subject the property to sale under and by virtue of an execution issuing upon the judgment in the action of trover and shall make the property liable to the payment of the damages and costs recovered in the action in preference to any other judgment, order, or decree against the defendant in such action.

History.
Laws 1830, Cobb's 1851 Digest, p. 499; Code 1863, § 3504; Code 1868, § 3527; Code 1873, § 3585; Code 1882, § 3585; Civil Code 1895, § 5358; Civil Code 1910, § 5953; Code 1933, § 110-514.

44-12-157. Effect of destruction of or injury to property on defendant's liability.

Pending a trover action, the death or destruction of or material injury to the property in dispute shall be no defense to a mere wrongdoer. If the defendant is a bona fide claimant and the injury arises from an act of God and is in no way the result of the defendant's conduct, the jury may take the death, destruction, or material injury of the property into

consideration; but in no case shall such an event cast the costs upon the plaintiff.

History.
Orig. Code 1863, § 3011; Code 1868, § 3023; Code 1882, § 3078; Civil Code 1895, § 3919; Civil Code 1910, § 4516; Code 1933, § 107-107.

JUDICIAL DECISIONS

Applicability of O.C.G.A. § 44-12-157. — O.C.G.A. § 44-12-157 applies where one takes possession of livestock under a conditional bill of sale. Moon v. Wright, 12 Ga. App. 659, 78 S.E. 141, 1913 Ga. App. LEXIS 689 (1913).

RESEARCH REFERENCES

Am. Jur. 2d.
18 Am. Jur. 2d, Conversion, § 55.

C.J.S.
89 C.J.S., Trover and Conversion, § 83.

44-12-158. Fees and costs when $100.00 or less is involved.

In an action of trover or bail trover where the principal amount is $100.00 or less or where the value of the property sought to be recovered is $100.00 or less, the costs in such an action of trover or bail trover in the trial court shall be $5.00 which shall be equally divided to cover the services of the clerk of the court and the sheriff; provided, however, that the sheriff may also collect the additional amount of costs as provided by law for serving subpoenas upon witnesses; and provided, further, that clerks of the superior courts shall be entitled to receive the same fees as in other civil cases for performing the duties required of them in cases of trover or bail trover regardless of the amount involved in such cases of trover or bail trover.

History.
Ga. L. 1924, p. 85, § 1; Code 1933, § 107-207; Ga. L. 1972, p. 664, § 3.

Part 2

Bail in Trover Proceedings

JUDICIAL DECISIONS

Purpose of bail trover is to recover specific property, or for its conversion by the defendant. Harper v. Jeffers, 139 Ga. 756, 78 S.E. 172, 1913 Ga. LEXIS 594 (1913).

Bail process is permitted in order that security may be had for the forthcoming of the property, or, in default thereof, that the specific property may be seized. Harper v. Jeffers, 139 Ga. 756, 78 S.E. 172, 1913 Ga. LEXIS 594 (1913).

Applicability of O.C.G.A. § 44-12-158. — Action of trover is not applicable to recovering a sum of money which may be

due and unpaid. Harper v. Jeffers, 139 Ga. 756, 78 S.E. 172, 1913 Ga. LEXIS 594 (1913).

Recovery of property sold where title retained as security. — One of the legal and legitimate purposes of a bail process in trover is to recover the property or its value, or, where the property has been sold by the plaintiff and title retained for security of the debt, recover the balance due on the debt, or where the property is not forthcoming, to arrest the defendant and incarcerate the defendant in jail. Powell v. E. Tris Napier Co., 50 Ga. App. 560, 178 S.E. 761, 1935 Ga. App. LEXIS 218 (1935).

Bail trover as to automobile sold under conditional sales contract. — When a plaintiff brings a bail trover proceeding against a defendant and takes possession of an automobile sold to the defendant under the conditional sale contract, it rescinds the contract of sale between its transferor and the defendant, and the defendant is entitled to have restored to the amount paid on the purchase price of the automobile, less its hire for the time defendant had the use and possession thereof and less any damage to the same or depreciation thereof in value. GMAC v. Coggins, 49 Ga. App. 23, 174 S.E. 260, 1934 Ga. App. LEXIS 244 (1934).

Malicious abuse of bail process in trover. — It is not a malicious abuse of bail process in trover that it was instituted and sued out for a purpose for which it was not lawfully and legitimately intended, where it was not put to such unlawful and unintended use. Powell v. E. Tris Napier Co., 50 Ga. App. 560, 178 S.E. 761, 1935 Ga. App. LEXIS 218 (1935).

44-12-170. Sale of perishable or other property in absence of replevy; amount of money verdict for plaintiff.

Whenever any officer has taken possession of any property under process in any case of trover and the property remains in the hands of the officer because neither the plaintiff nor the defendant replevies the property, if the property is of a perishable nature or liable to deterioration from keeping or if there is expense involved in keeping the property, the property may be sold under Code Section 9-13-163; provided, however, if the property is sold, the plaintiff, in case of recovery, shall be entitled only to a money verdict for the amount of the proceeds of such sale together with any hire or interest from the date of conversion to the date of seizure found by the jury.

History.
Ga. L. 1887, p. 59, § 1; Civil Code 1895, § 4607; Civil Code 1910, § 5153; Code 1933, § 107-204.

JUDICIAL DECISIONS

Applicability of O.C.G.A. § 44-12-170. — O.C.G.A. § 44-12-170 applies only where the property is not replevied. Phillips v. Taber, 83 Ga. 565, 10 S.E. 270, 1889 Ga. LEXIS 113 (1889).

Proceeds of sale stand in lien of property itself. Glissen v. Heggie Bros., 105 Ga. 30, 31 S.E. 118, 1898 Ga. LEXIS 440 (1898).

RESEARCH REFERENCES

C.J.S.
89 C.J.S., Trover and Conversion, § 222.

44-12-171. Recovery by defendant in trover action when plaintiff had replevied property.

When the plaintiff in a trover action has replevied the property and on the trial of the case fails to recover or dismisses his petition, the defendant may recover the property and its hire or the sworn value placed upon the property in the petition instead of suing on the replevy bond.

History.
Code 1933, § 107-209.
History of Section.
This Code section is derived from the decision in Marshall v. Livingston, 77 Ga. 21 (1886).

JUDICIAL DECISIONS

The law entertains an impartial reciprocity of protection as to the rights of the plaintiff and defendant. McLaurin v. Henry, 90 Ga. App. 864, 84 S.E.2d 713, 1954 Ga. App. LEXIS 835 (1954).

Under the doctrine of reciprocity of protection, a recognizance given by either party should not be deemed a substitute for the property, and the giving or not giving of a bail bond should not affect the rights of the parties as to other features of the case. McLaurin v. Henry, 90 Ga. App. 864, 84 S.E.2d 713, 1954 Ga. App. LEXIS 835 (1954).

Failure of plaintiff to recover means failure to recover on the merits of plaintiff's cause. Futch v. Automobile Fin., Inc., 89 Ga. App. 634, 80 S.E.2d 697, 1954 Ga. App. LEXIS 532 (1954).

Either party prevailing in bail trover proceedings has the same right of election as to whether the party will recover damages, the value of the property, or the property and its hire. McLaurin v. Henry, 90 Ga. App. 864, 84 S.E.2d 713, 1954 Ga. App. LEXIS 835 (1954).

Under O.C.G.A. § 44-12-171, when the plaintiff has replevied the property and on the trial of the case fails to recover or dismisses the petition, the defendant has the same remedy, that is, of recovering the property and its hire or the sworn value thereof according to the petition. McLaurin v. Henry, 90 Ga. App. 864, 84 S.E.2d 713, 1954 Ga. App. LEXIS 835 (1954).

If a defendant prevails and elects to take the property and its hire, defendant is entitled to hire during the time the property is in the sheriff's possession where it is levied upon under bail process and not replevied by either party. McLaurin v. Henry, 90 Ga. App. 864, 84 S.E.2d 713, 1954 Ga. App. LEXIS 835 (1954).

If plaintiff fails in proceeding, all rights acquired by virtue of proceeding must fall with it. Stewart v. Hasty, 77 Ga. App. 524, 48 S.E.2d 757, 1948 Ga. App. LEXIS 591 (1948).

Effect of dismissal of petition. — Although a dismissal may not preclude the plaintiff from gaining possession by another or from establishing a right to the property in some future proceeding, the necessary result is that the plaintiff is not entitled to hold the property under color of a process which no longer subsists. O.C.G.A. § 44-12-171 places the property back into the defendant's hands or requires the plaintiff to pay over its value. Stewart v. Hasty, 77 Ga. App. 524, 48 S.E.2d 757, 1948 Ga. App. LEXIS 591 (1948).

Dismissal obtained by fraud or mutual mistake of law. — Although the defendant in an instance of voluntary dismissal by the plaintiff is ordinarily entitled to a restitution judgment ipso facto, where the dismissal is obtained by fraud, or is due to a mutual mistake of law upon the part of the counsels for both parties as to its effect, the only effect of the dismissal would be a mere failure by the plaintiff to recover. Stewart v. Hasty, 77 Ga. App. 524, 48 S.E.2d 757, 1948 Ga. App. LEXIS 591 (1948).

Reinstatement of action. — If, as a result of fraud or a mutual mistake of law, the plaintiff makes a motion during the same term as the original action to reinstate the action for the purpose of having it tried upon its merits, the action will be reinstated. Stewart v. Hasty, 77 Ga. App. 524, 48 S.E.2d 757, 1948 Ga. App. LEXIS 591 (1948).

Court lacks authority to reinstate dismissed action. — In the absence of a showing of fraud or of a mutual mistake of law, when a plaintiff voluntarily dismisses a petition, whether for good or bad reason, the court has no authority or discretion, over objection by defendant, to reinstate the action. Stewart v. Hasty, 77 Ga. App. 524, 48 S.E.2d 757, 1948 Ga. App. LEXIS 591 (1948).

Judgment of dismissal is judgment for restoration of property. — When the plaintiff brings an action of bail trover and neither party replevies the property which remains in custodia legis, and the plaintiff dismisses the action, a judgment of dismissal is, in effect, a judgment for the restoration of the property. Household Fin. Corp. v. Pugmire Lincoln-Mercury, Inc., 123 Ga. App. 428, 181 S.E.2d 292, 1971 Ga. App. LEXIS 1252 (1971).

Petition, is fatally defective if it fails to allege that the plaintiff in the trover action had replevied the property, or that the plaintiff had dismissed the action or failed to recover on the merits. Futch v. Automobile Fin., Inc., 89 Ga. App. 634, 80 S.E.2d 697, 1954 Ga. App. LEXIS 532 (1954).

Even if the defendant elects to take a money verdict for the value of the property, defendant will not be entitled to it where, in defendant's sworn petition, the plaintiff did not allege the separate value of the property recovered by the defendant and the jury made no finding as to its value. Betts v. Mathews, 72 Ga. App. 678, 34 S.E.2d 729, 1945 Ga. App. LEXIS 670 (1945).

If the defendant fails to replevy the property when taken and seized by the sheriff, that officer is required to deliver it to the plaintiff, or the plaintiff's attorney or agent, upon the plaintiff's entering into like recognizance with security. Marshall v. Livingston, 77 Ga. 21, 1886 Ga. LEXIS 273 (1886).

Presumption created when defendant fails to take verdict for property value. — Where defendant did not elect to take a verdict for the sworn value placed upon the property in the petition, and the verdict was for the defendant for some of the property, the presumption is that defendant so elected to take the property, and if defendant did not so elect before judgment, defendant waives the right by not speaking and having the verdict corrected before the jury dispersed. Betts v. Mathews, 72 Ga. App. 678, 34 S.E.2d 729, 1945 Ga. App. LEXIS 670 (1945).

RESEARCH REFERENCES

ALR.

Previous demand as a condition of replevin or trover against innocent purchaser of stolen chattels, 51 A.L.R. 1465.

Judgment in replevin as implying a direction for return of property, 65 A.L.R. 1302; 144 A.L.R. 1149.

Right of one joint owner of personal property to maintain against third person replevin, detinue, trover, or other action recover possession or damages, 110 A.L.R. 353.

Setoff, counterclaim, and recoupment in replevin or other action for possession of personal property, 151 A.L.R. 519.

Voluntary dismissal of replevin action by plaintiff as affecting defendant's right to judgment for the return or value of the property, 24 A.L.R.3d 768.

ARTICLE 5

DISPOSITION OF UNCLAIMED PROPERTY

Cross references.

Archeological exploration, excavation, or surveying, § 12-3-52.

Submerged cultural resources, § 12-3-80.

Disposition of abandoned motor vehicles, § 40-11-1 et seq.

Editor's notes.

Ga. L. 1990, p. 1506, § 1, effective July 1, 1990, repealed the Code sections formerly codified in this article and enacted the current article. The former article consisted of Code Sections 44-12-190 through 44-12-222 and was based on Ga. L. 1972, p. 762, §§ 1 through 31 and § 33; Ga. L. 1976, p. 203, § 1; Ga. L. 1976, p. 556, § 1; Ga. L. 1981, p. 977, §§ 1 and 3; Ga. L. 1981, p. 1330, § 1; Ga. L. 1982, p. 3, § 44; Ga. L. 1982, p. 1787, §§ 1, 2; Ga. L. 1984, p. 517, § 1; Ga. L. 1984, p. 575, §§ 1 through 5; Ga. L. 1985, p. 149, § 44; Ga. L. 1985, p. 283, § 1; Ga. L. 1985, p. 912, § 1; Ga. L. 1985, p. 1097, §§ 1, 2; Ga. L. 1986, p. 10, § 44; Ga. L. 1987, p. 541, § 1; Ga. L. 1989, p. 14, § 44; Ga. L. 1989, p. 946, § 111, and Ga. L. 1989, p. 1115, §§ 1 through 3.

RESEARCH REFERENCES

Am. Jur. 2d.

1 Am. Jur. 2d, Abandoned, Lost, and Unclaimed Property, §§ 1 et seq., 6. 27 Am. Jur. 2d, Escheat, § 1 et seq.

C.J.S.

1 C.J.S., Abandonment, § 1 et seq. 30A C.J.S., Escheat, § 1 et seq.

ALR.

Constitutionality, construction, and application of statutes relating to disposition of old bank deposits, 151 A.L.R. 836.

Validity, construction, and application of lost or abandoned goods statutes, 23 A.L.R.4th 1025.

44-12-190. Short title.

This article shall be known and may be cited as the "Disposition of Unclaimed Property Act."

History.

Code 1981, § 44-12-190, enacted by Ga. L. 1990, p. 1506, § 1.

Law reviews.

For note analyzing Georgia's disposition of Unclaimed Property Act, see 24 Mercer L. Rev. 505 (1973).

For annual survey article discussing commercial and banking law, see 49 Mercer L. Rev. 95 (1997).

RESEARCH REFERENCES

Am. Jur. Pleading and Practice Forms.

1 Am. Jur. Pleading and Practice Forms, Abandoned, Lost, and Unclaimed Property, §§ 2, 18.

U.L.A.

Uniform Disposition of Unclaimed Property Act (U.L.A.) § 30.

ALR.

Rights in respect of lost, mislaid, or abandoned property as between finder and person upon whose property it is found, 170 A.L.R. 706.

Validity, construction, and application of state statutes implementing the uniform unclaimed property act or its predecessor — modern status, 29 A.L.R.6th 507.

44-12-191. Construction of article.

This article shall be so construed as to effectuate its general purpose to make uniform the law of those states which enact it.

History.
Code 1981, § 44-12-191, enacted by Ga. L. 1990, p. 1506, § 1.

44-12-192. Definitions.

As used in this article, the term:

(1) "Apparent owner" means the person whose name appears on the records of the holder as the person entitled to property held, issued, or owing by the holder.

(2) "Banking organization" means a bank, trust company, savings bank, industrial bank, land bank, safe-deposit company, private banker, or any other organization defined by federal law or the law of another state as a bank or banking organization.

(3) "Business association" means any corporation, other than a public corporation, a joint-stock company, an investment company, a business trust, or a partnership or association for business purposes of two or more individuals whether or not for profit, including a banking organization, financial organization, insurance company, or utility.

(4) "Commissioner" means the commissioner of revenue.

(5) "Domicile" means the state of incorporation, in the case of a corporation incorporated under the laws of a state, and the state of the principal place of business, in the case of a person not incorporated under the laws of a state.

(6) "Due diligence" means, but shall not be limited to, the mailing of a letter by first-class mail to the last known address of the owner as indicated on the records of the holder.

(7) "Financial organization" means any savings and loan association, cooperative bank, building and loan association, or credit union.

(8) "Holder" means a person, wherever organized or domiciled, who is:

(A) In possession of property belonging to another;

(B) A trustee in case of a trust; or

(C) Indebted to another on an obligation.

(9) "Insurance company" means an association, corporation, or fraternal or mutual benefit organization, whether or not for profit, which is engaged in providing insurance coverage of any type.

(10) "Intangible property" means and includes:

(A) Moneys, checks, drafts, deposits, interest, dividends, and income;

(B) Credit balances, customer overpayments, gift certificates, security deposits, refunds, credit memos, unpaid wages, and unidentified remittances;

(C) Stocks and other intangible ownership interests in business associations;

(D) Moneys deposited to redeem stocks, bonds, coupons, and other securities or to make distributions;

(E) Amounts due and payable under the terms of insurance policies; and

(F) Amounts distributable from a trust or custodial fund established under a plan to provide health, welfare, pension, vacation, severance, retirement, death, stock purchase, profit sharing, employee savings, supplemental unemployment insurance, or similar benefits.

(11) "Last known address" means a description of the location of the apparent owner sufficient for the purpose of the delivery of mail.

(12) "Owner" means a depositor in the case of a deposit, a beneficiary in the case of a trust other than a deposit in trust, a creditor, claimant, or payee in the case of other intangible property, or a person having a legal or equitable interest in property subject to this article or his legal representative.

(13) "Payable" means the earliest date upon which the owner of property could become entitled to the payments, possession, delivery, or distribution of such property from a holder.

(14) "Person" means an individual, business association, government, governmental subdivision or agency, public corporation, public authority, estate, trust, two or more persons having a joint or common interest, or any other legal or commercial entity.

(15) "State" means any state, district, commonwealth, territory, insular possession, or any other area subject to the authority of the United States.

(16) "Utility" means a person who owns or operates for public use any plant, equipment, property, franchise, or license for the transmission of communications or the production, storage, transmission, sale, delivery, or furnishing of electricity, water, steam, or gas.

History.
Code 1981, § 44-12-192, enacted by Ga. L. 1990, p. 1506, § 1.
Code Commission notes.
Pursuant to Code Section 28-9-5, in 1990, "safe-deposit" was substituted for "safe deposit" in paragraph (2).

RESEARCH REFERENCES

U.L.A.
Uniform Disposition of Unclaimed Property Act (U.L.A.) § 1.

JUDICIAL DECISIONS

Gift certificates. — Assessment of dormancy fees on gift cards and certificates and refusal to honor them after one year did not violate O.C.G.A. § 44-12-205 of the Georgia Disposition of Unclaimed Property Act (DUPA), O.C.G.A. § 44-12-190 et seq; as the cards and certificates had not been unclaimed by the plaintiffs for more than five years when the complaint was filed, they were not presumed abandoned, and DUPA did not apply. Simon Prop. Group, Inc. v. Benson, 278 Ga. App. 277, 628 S.E.2d 697, 2006 Ga. App. LEXIS 312 (2006), aff'd, 281 Ga. 744, 642 S.E.2d 687, 2007 Ga. LEXIS 238 (2007).

44-12-193. When property held, issued, or owing in ordinary course of holder's business presumed abandoned.

Except as provided in Article 17B of Title 10, all tangible and intangible property, including any income or increment thereon, less any lawful charges, that is held, issued, or owing in the ordinary course of the holder's business and has remained unclaimed by the owner for more than five years after it became payable or distributable is presumed abandoned, except as otherwise provided by this article. Property is payable or distributable for the purpose of this article notwithstanding the owner's failure to make demand or to present any instrument or document required to receive payment.

History.
Code 1981, § 44-12-193, enacted by Ga. L. 1990, p. 1506, § 1; Ga. L. 1992, p. 1237, § 1; Ga. L. 2006, p. 720, § 3/SB 195.

Cross references.
Disposition of property in safe-deposit vault or held for safekeeping, § 7-1-172.

JUDICIAL DECISIONS

"Lawful charges" against dormant checks, money order, and drafts. — O.C.G.A. § 7-1-358 and a related regulation do not allow assessment of service charges only against dormant deposit accounts; thus, charges against dormant checks, money orders, and drafts qualified as "lawful charges" and were properly withheld from the Department of Revenue when funds were remitted under the Unclaimed Property Act, O.C.G.A. § 44-12-190 et seq. First Union Nat'l Bank v. Collins, 221 Ga. App. 442, 471 S.E.2d 892, 1996 Ga. App. LEXIS 389 (1996), cert. denied, No. S96C1460, 1996 Ga. LEXIS 958 (Ga. Sept. 5, 1996).

Gift certificates not presumed abandoned. — Assessment of dormancy

fees on gift cards and certificates and refusal to honor them after one year did not violate O.C.G.A. § 44-12-205 of the Georgia Disposition of Unclaimed Property Act (DUPA), O.C.G.A. § 44-12-190 et seq; as the cards and certificates had not been unclaimed by the plaintiffs for more than five years when the complaint was filed, they were not presumed abandoned, and DUPA did not apply. Simon Prop. Group, Inc. v. Benson, 278 Ga. App. 277, 628 S.E.2d 697, 2006 Ga. App. LEXIS 312 (2006), aff'd, 281 Ga. 744, 642 S.E.2d 687, 2007 Ga. LEXIS 238 (2007).

44-12-194. Conditions under which intangible property subject to custody of state as unclaimed property.

Unless otherwise provided in this article or by any other provision of law, intangible property is subject to the custody of this state as unclaimed property if the conditions leading to a presumption of abandonment as described in Code Section 44-12-193 are satisfied and:

(1) The last known address, as shown on the records of the holder, of the apparent owner is in this state;

(2) The records of the holder do not reflect the identity of the person entitled to the property and it is established that the last known address of the person entitled to the property is in this state;

(3) The records of the holder do not reflect the last known address of the apparent owner, and it is established that:

(A) The last known address of the person entitled to the property is in this state; or

(B) The holder is a domiciliary or a government or governmental subdivision or agency of this state and has not previously paid the property to the state of the last known address of the apparent owner or other person entitled to the property;

(4) The last known address, as shown on the records of the holder, of the apparent owner or other person entitled to the property is in a state that does not provide by law for the escheat or custodial taking of the property or its escheat or unclaimed property law is not applicable to the property and the holder is a domiciliary or a government or governmental subdivision or agency of this state;

(5) The last known address, as shown on the records of the holder, of the apparent owner is in a foreign nation and the holder is a domiciliary or a government or governmental subdivision or agency of this state; or

(6) The transaction out of which the property arose occurred in this state and:

(A) The last known address of the apparent owner or other person entitled to the property is unknown; or

(B) The last known address of the apparent owner or other person entitled to the property is in a state that does not provide by

law for the escheat or custodial taking of the property or its escheat or unclaimed property law is not applicable to the property; and

(C) The holder is a domiciliary of a state that does not provide by law for the escheat or custodial taking of the property or its escheat or unclaimed property law is not applicable to the property.

History.
Code 1981, § 44-12-194, enacted by Ga. L. 1990, p. 1506, § 1.

JUDICIAL DECISIONS

No presumption of abandonment. — Assessment of dormancy fees on gift cards and certificates and refusal to honor them after one year did not violate O.C.G.A. § 44-12-205 of the Georgia Disposition of Unclaimed Property Act (DUPA), O.C.G.A. § 44-12-190 et seq; as the cards and certificates had not been unclaimed by the plaintiffs for more than five years when the complaint was filed, they were not presumed abandoned, and DUPA did not apply. Simon Prop. Group, Inc. v. Benson, 278 Ga. App. 277, 628 S.E.2d 697, 2006 Ga. App. LEXIS 312 (2006), aff'd, 281 Ga. 744, 642 S.E.2d 687, 2007 Ga. LEXIS 238 (2007).

44-12-195. When sums payable on traveler's checks or money orders deemed abandoned; conditions under which same may be subjected to custody of state as unclaimed property.

(a) Except as otherwise provided in this Code section, any sum payable on a traveler's check that has been outstanding for more than 15 years after its issuance is presumed abandoned unless the owner, within 15 years, has communicated in writing with the issuer concerning it or otherwise indicated an interest as evidenced by a memorandum or other record on file prepared by an employee of the issuer.

(b) Except as otherwise provided in this Code section, any sum payable on a money order or similar written instrument, other than a third-party bank check, that has been outstanding for more than seven years after its issuance is presumed abandoned unless the owner, within seven years, has communicated in writing with the issuer concerning it or otherwise indicated an interest as evidenced by a memorandum or other record on file prepared by an employee of the issuer.

(c) Any sum payable on a traveler's check, money order, or similar written instrument, other than a third-party bank check, described in this Code section may not be subjected to the custody of this state as unclaimed property unless:

(1) The records of the issuer show that the traveler's check, money order, or similar written instrument was purchased in this state;

(2) The issuer has its principal place of business in this state and the records of the issuer do not show the state in which the traveler's check, money order, or similar written instrument was purchased; or

(3) The issuer has its principal place of business in this state, the records of the issuer show the state in which the traveler's check, money order, or similar written instrument was purchased, and the laws of the state of purchase do not provide for the escheat or custodial taking of the property or its escheat or unclaimed property law is not applicable to the property.

(d) Notwithstanding any other provision of this article, the provisions of subsection (c) of this Code section relating to the requirements for subjecting certain written instruments to the custody of the state shall apply to sums payable on traveler's checks, money orders, and similar written instruments presumed abandoned on or after February 1, 1965, except to the extent that those sums have been paid over to a state prior to January 1, 1973.

History.
Code 1981, § 44-12-195, enacted by Ga. L. 1990, p. 1506, § 1.

44-12-196. When instruments on which banking or financial organization directly liable presumed abandoned; service charges.

Any sum payable on a check, draft, or similar instrument, except money orders, traveler's checks, and other similar instruments subject to Code Section 44-12-195, on which a banking or financial organization is directly liable, including but not limited to, cashier's checks and certified checks, which has been outstanding for more than five years after it was payable or after its issuance if payable on demand, is presumed abandoned unless the owner, within five years, has communicated in writing with the banking or financial organization concerning it or otherwise indicated an interest as evidenced by a memorandum or other record on file prepared by an employee of the banking or financial organization. Except for charges imposed with respect to issuance, no banking or financial organization shall deduct a service charge from, or otherwise impose a service charge on, any instrument described in this Code section unless such instrument is not presented for payment within two years of the date of issuance. Service charges may be imposed for each month of the 12 months following such two-year period.

History.
Code 1981, § 44-12-196, enacted by Ga. L. 1990, p. 1506, § 1; Ga. L. 1992, p. 1237, § 2; Ga. L. 1995, p. 1368, § 1.

JUDICIAL DECISIONS

"Lawful charges" against dormant checks, money order, and drafts. — O.C.G.A. § 7-1-358 and a related regulation do not allow assessment of service charges only against dormant deposit accounts; thus, charges against dormant checks, money orders, and drafts qualified as "lawful charges" and were properly withheld from the Department of Revenue when funds were remitted under the Unclaimed Property Act, O.C.G.A. § 44-12-190 et seq. First Union Nat'l Bank v. Collins, 221 Ga. App. 442, 471 S.E.2d 892, 1996 Ga. App. LEXIS 389 (1996), cert. denied, No. S96C1460, 1996 Ga. LEXIS 958 (Ga. Sept. 5, 1996).

44-12-197. When certain deposits or other interests in banking or financial organization presumed abandoned.

(a) Any demand, savings, or matured time deposit with a banking or financial organization, including deposits that are automatically renewable, and any funds paid toward the purchase of a share, a mutual investment certificate, or any other interest in a banking or financial organization is presumed abandoned unless the owner, within five years, has:

(1) In the case of a deposit, increased or decreased its amount or presented the passbook or other similar evidence of the deposit for the crediting of interest or negotiated a check in payment of interest on a time deposit;

(2) Communicated in writing with the banking or financial organization concerning the property;

(3) Otherwise indicated an interest in the property as evidenced by a memorandum or other record on file prepared by an employee of the banking or financial organization; for purposes of this paragraph, a record of the sending of a federal Internal Revenue Service Form 1099, or its equivalent, to the persons enumerated in this subsection and a record of its not being returned by the United States Postal Service or its successor shall be an indication of interest;

(4) Owned other property to which paragraph (1), (2), or (3) of this subsection is applicable if the banking or financial organization communicated in writing with the owner with regard to the property that would otherwise be presumed abandoned under this paragraph at the address to which communications regarding the other property regularly are sent;

(5) Had another relationship with the banking or financial organization concerning which the owner has communicated in writing with the banking or financial organization or has otherwise indicated an interest as evidenced by a memorandum or other record on file prepared by an employee of the banking or financial organization if the banking or financial organization communicates in writing with

the owner with regard to property that would otherwise be abandoned under this paragraph at the address to which communications regarding the other relationship regularly are sent; or

(6) A deposit made with a banking or financial organization by a court or by a guardian pursuant to order of a court or by any other person for the benefit of a person who was a minor at the time of the making of such deposit, which deposit is subject to withdrawal only upon the further order of such court or such guardian or other person, shall not be subject to the provisions of this article until one year after such minor attains the age of 18 years or until one year after the death of such minor, whichever occurs sooner. These accounts are not subject to dormant service charges.

(b) For purposes of this Code section, "property" includes any interest or dividends thereon. No banking or financial organization shall deduct a service charge from any account on which there has been no deposit or withdrawal for 12 or more months or otherwise impose a service charge on any such account. A service charge may be imposed for 12 months immediately following a deposit to or withdrawal from any such account.

(c) No banking or financial organization may cease to accrue interest on any account from the date the account is declared dormant or inactive by such organization except in conformity with cessation of interest generally assessed upon active accounts. With respect to any property described in this subsection, a holder may not impose any charges due to dormancy or inactivity which differ from those imposed on active accounts or cease to pay interest unless:

(1) For property in excess of $50.00, the holder, no more than three months before the initial imposition of those charges or cessation of interest, has given written notice to the owner of the amount of those charges at the last known address of the owner stating that those charges will be imposed or that interest will cease, but the notice provided in this paragraph need not be given with respect to charges imposed or interest ceased before July 1, 1990; and

(2) The holder regularly imposes such charges or ceases payment of interest and does not regularly reverse or otherwise cancel them or retroactively credit interest with respect to such property.

(d) Any automatically renewable property to which this Code section applies is matured upon the expiration of its initial time period. However, in the case of any renewal to which the owner consents at or about the time of renewal by communicating in writing with the banking or financial organization or otherwise indicates consent as specified in subsection (a) of this Code section, the property is matured upon the expiration of the last time period for which consent was given.

If, at the time provided for delivery in subsection (e) of Code Section 44-12-214, a penalty or forfeiture in the payment of interest would result from the delivery of the property, the time for delivery is extended until the time when no penalty or forfeiture would result.

History.

Code 1981, § 44-12-197, enacted by Ga. L. 1990, p. 1506, § 1; Ga. L. 1992, p. 1237, § 3.

Code Commission notes.

Pursuant to Code Section 28-9-5, in 1990, a comma was inserted following "years" near the end of the introductory language in subsection (a).

OPINIONS OF THE ATTORNEY GENERAL

Bank reporting requirements. — If any particular bank were doing business both in Georgia and another state and the last known address of the person owning the abandoned property was in the other state, the bank should report to the Commissioner of Revenue of the other state, but if the last known address of the owner of the abandoned property was in Georgia, the bank should report to the Commissioner of Banking and Finance in Georgia; if the last known address of the depositor is in neither state the answer would have to depend on the particular state involved and its laws as to unclaimed and abandoned property. 1974 Op. Att'y Gen. No. 74-68.

Intangible property held or owing is included. — In light of the broad scope of the omnibus section (O.C.G.A. § 44-12-200) and the uniform nature of the interpretation of the 1972 and 1990 Disposition of Unclaimed Property Acts, the omnibus section of each respective Act includes intangible property held or owing in the ordinary course of the holder's business. 1993 Op. Att'y Gen. No. 93-2.

Noncash property presumed abandoned under O.C.G.A. § 44-12-197 need not be placed in an interest bearing savings account. 1974 Op. Att'y Gen. No. 74-108.

pass to the custody of the Department of Banking and Finance for ultimate disbursement pursuant to the Disposition of Unclaimed Property Act, O.C.G.A. § 44-12-190 et seq. 1975 Op. Att'y Gen. No. 75-135 (decided under former Ga. L. 1972, p. 762, §§ 1 through 31 and § 33).

RESEARCH REFERENCES

Am. Jur. 2d.

1 Am. Jur. 2d, Abandoned, Lost, and Unclaimed Property, § 35. 30 Am. Jur. 2d, Escheat, § 5 et seq.

C.J.S.

1 C.J.S., Abandonment, § 8 et seq. 30A C.J.S., Escheat, § 4 et seq.

U.L.A.

Uniform Disposition of Unclaimed Property Act (U.L.A.) § 2.

44-12-198. When fund under life or endowment insurance policy or annuity contract presumed abandoned.

(a) Funds held or owing under any life or endowment insurance policy or annuity contract which has matured or terminated are presumed abandoned if unclaimed for more than five years after the funds became due and payable as established from the records of the insurance company holding or owing the funds, except that property

described in paragraph (2) of subsection (c) of this Code section is presumed abandoned if unclaimed for more than two years.

(b) If a person other than the insured or annuitant is entitled to the funds and no address of the person is known to the company or it is not definite and certain from the records of the company who is entitled to the funds, it is presumed that the last known address of the person entitled to the funds is the same as the last known address of the insured or annuitant according to the records of the company.

(c) For purposes of this Code section, a life or endowment insurance policy or annuity contract not matured by actual proof of the death of the insured or annuitant according to the records of the company is deemed matured and the proceeds due and payable if:

(1) The company knows that the insured or annuitant has died; or

(2) If all of the following conditions are met:

(A) The insured has attained, or would have attained if he were living, the limiting age under the mortality table on which the reserve is based;

(B) The policy was in force at the time the insured attained, or would have attained, the limiting age specified in subparagraph (A) of this paragraph; and

(C) Neither the insured nor any other person appearing to have an interest in the policy within the preceding two years, according to the records of the company concerning the policy or otherwise, indicated an interest as evidenced by a memorandum or other record on file prepared by an employee of the company.

(d) For purposes of this Code section, the application of an automatic premium loan provision or other nonforfeiture provision contained in an insurance policy does not prevent a policy from being matured or terminated under subsection (a) of this Code section if the insured has died or the insured or the beneficiaries of the policy otherwise have become entitled to the proceeds thereof before the depletion of the cash surrender value of a policy by the application of that provision.

(e) Notwithstanding any other provisions of law, if the company learns of the death of the insured or annuitant and the beneficiary has not communicated with the insurer within four months after the death, the company shall take reasonable steps to locate the beneficiary and pay the proceeds to the beneficiary.

(f) On and after January 1, 1991, every change of beneficiary form issued by an insurance company under any life or endowment insurance policy or annuity contract to an insured or owner who is a resident of this state must request the following information:

(1) The name of each beneficiary or, if a class of beneficiaries is named, the name of each current beneficiary in the class;

(2) The address of each beneficiary; and

(3) The relationship of each beneficiary to the insured.

History.
Code 1981, § 44-12-198, enacted by Ga. L. 1990, p. 1506, § 1; Ga. L. 1992, p. 1237, § 4.

OPINIONS OF THE ATTORNEY GENERAL

Intangible property held or owing is included. — In light of the broad scope of the omnibus section (O.C.G.A. § 44-12-200) and the uniform nature of the interpretation of the 1972 and 1990 Disposition of Unclaimed Property Acts, O.C.G.A. § 44-12-190 et seq., the omnibus section of each respective Act includes intangible property held or owing in the ordinary course of the holder's business. 1993 Op. Att'y Gen. No. 93-2.

RESEARCH REFERENCES

Am. Jur. 2d.
1 Am. Jur. 2d, Abandoned, Lost, and Unclaimed Property, § 38. 27 Am. Jur. 2d, Escheat, § 5 et seq.
C.J.S.
1 C.J.S., Abandonment, § 8 et seq. 30A C.J.S., Escheat, § 4 et seq.
U.L.A.
Uniform Disposition of Unclaimed Property Act (U.L.A.) § 3.

44-12-199. When funds held or owing by utility presumed abandoned.

The following funds held or owing by any utility are presumed abandoned:

(1) Any deposit made by a subscriber with a utility to secure payment for or any sum paid in advance for utility services to be furnished in this state, less any lawful deductions, that has remained unclaimed by the person appearing on the records of the utility entitled thereto for more than five years after the termination of the services for which the deposit or advance payment was made; and

(2) Any sum which a utility has been ordered to refund and which was received for utility services rendered in this state, together with any interest thereon, less any lawful deductions, that has remained unclaimed by the person appearing on the records of the utility entitled thereto for more than five years after the date it became payable in accordance with the final determination or order providing for the refund unless the regulatory body having jurisdiction over the utility has provided by order for a different disposition of such unclaimed funds.

History.
Code 1981, § 44-12-199, enacted by Ga. L. 1990, p. 1506, § 1; Ga. L. 1992, p. 1237, § 5.

OPINIONS OF THE ATTORNEY GENERAL

Intangible property held or owing is included. — In light of the broad scope of the omnibus section (O.C.G.A. § 44-12-200) and the uniform nature of the interpretation of the 1972 and 1990 Disposition of Unclaimed Property Acts, O.C.G.A. § 44-12-190 et seq., the omnibus section of each respective Act includes intangible property held or owing in the ordinary course of the holder's business. 1993 Op. Att'y Gen. No. 93-2.

RESEARCH REFERENCES

Am. Jur. 2d.
1 Am. Jur. 2d, Abandoned, Lost, and Unclaimed Property, § 39. 30 Am. Jur. 2d, Escheat, § 5 et seq.
C.J.S.
1 C.J.S., Abandonment, § 8 et seq. 30A C.J.S., Escheat, § 4 et seq.
U.L.A.
Uniform Disposition of Unclaimed Property Act (U.L.A.) § 4.
ALR.
Deposit required by public utility, 43 A.L.R.2d 1262.

44-12-200. When unclaimed court ordered refund from business association presumed abandoned.

Except to the extent otherwise ordered by a court or administrative agency of competent jurisdiction, any sum that a business association has been ordered to refund by a court or administrative agency which has remained unclaimed by the owner for more than five years after it became payable in accordance with the final determination or order providing for the refund, regardless of whether the final determination or order requires any person entitled to a refund to make a claim for it, is presumed abandoned.

History.
Code 1981, § 44-12-200, enacted by Ga. L. 1990, p. 1506, § 1; Ga. L. 1992, p. 1237, § 6.

OPINIONS OF THE ATTORNEY GENERAL

Intangible property held or owing is included. — In light of the broad scope of the omnibus section (O.C.G.A. § 44-12-200) and the uniform nature of the interpretation of the 1972 and 1990 Disposition of Unclaimed Property Acts, O.C.G.A. § 44-12-190 et seq., the omnibus section of each respective Act includes intangible property held or owing in the ordinary course of the holder's business. 1993 Op. Att'y Gen. No. 93-2.

44-12-201. When undistributed dividends and distributions of business associations presumed abandoned; when intangible interest in business associations presumed abandoned.

(a) Pursuant to Code Section 44-12-193, any dividend, profit, distri-

bution, interest, payment on principal, or other sum held or owing by a business association for or to its shareholder, certificate holder, member, bondholder, or other security holder, or a participating patron of a cooperative, who has not claimed it, corresponded in writing concerning it, or otherwise indicated an interest as evidenced by a memorandum or other record on file with the association within five years after the date prescribed for payment or delivery is presumed abandoned.

(b)(1) Pursuant to Code Section 44-12-193, any intangible interest in a business association, as evidenced by the stock records or membership records of the association, is presumed abandoned if the interest in the association is owned by a person who for more than five years has neither claimed a dividend or other sum referred to in subsection (a) of this Code section nor corresponded in writing with the association and the association does not know the location of the owner at the end of such five-year period. With respect to such interest, the business association shall be deemed the holder.

(2) All intangible property, including but not limited to securities, principal, interest, dividends, or other earnings thereon, less any lawful charges, held by a business association; federal, state, or local government or governmental subdivision, agency, or entity; or any other person or entity, regardless of where the holder may be found, if the owner has not claimed such property or corresponded in writing with the holder concerning the property within five years after the date prescribed for payment or delivery by the issuer unless the holder is a state that has taken custody pursuant to its own unclaimed property laws, in which case no additional period of holding beyond that of such state is necessary pursuant to this subsection, is presumed abandoned and subject to the custody of this state as unclaimed property if:

(A) The last known address of the owner is unknown; and

(B) The person or entity originating or issuing the intangible property is this state or any political subdivision of this state or is incorporated, organized, created, or otherwise located in this state.

(3) The provisions of paragraph (2) of this subsection shall not apply to property which is or may be presumed abandoned and subject to the custody of this state pursuant to any other provision of law containing a dormancy period different from that prescribed in paragraph (2) of this subsection.

(4) The provisions of this subsection shall apply to all property held on April 13, 1992, or at any time thereafter, regardless of when such property became or becomes presumptively abandoned.

(c) Pursuant to Code Section 44-12-193, any dividends or other distributions held for or owing to a person at the time the stock or other

security to which they attach are presumed abandoned also shall be presumed abandoned as of the same time.

(d) For the purposes of subsections (a) and (b) of this Code section, a record of the sending of a federal Internal Revenue Service Form 1099, or its equivalent, to the persons enumerated in those subsections and a record of its not being returned by the United States Postal Service, or its successor, shall be an indication of interest.

History.

Code 1981, § 44-12-201, enacted by Ga. L. 1990, p. 1506, § 1; Ga. L. 1992, p. 1237, § 7.

Code Commission notes.

Pursuant to Code Section 28-9-5, in 1992, "April 13, 1992," was substituted for "the effective date of this subsection" in paragraph (b)(4).

OPINIONS OF THE ATTORNEY GENERAL

Editor's notes. — In light of the similarity of the statutory provisions, opinions rendered under Ga. L. 1972, p. 762, §§ 1 through 31 and § 33 are included in the annotations for this Code section.

Bank reporting requirements. — See 1973 Op. Att'y Gen. No. 73-11 (decided under former Ga. L. 1972, p. 762, §§ 1 through 31 and § 33).

If any particular bank were doing business both in Georgia and another state and the last known address of the person owning the abandoned property was in the other state, the bank should report to the Commissioner of Revenue of the other state, but if the last known address of the owner of the abandoned property was in Georgia, the bank should report to the Commissioner of Banking and Finance in Georgia; if the last known address of the depositor is in neither state the answer would have to depend on the particular state involved and its laws as to unclaimed and abandoned property. 1974 Op. Att'y Gen. No. 74-68 (decided under former Ga. L. 1972, p. 762, §§ 1 through 31 and § 33).

RESEARCH REFERENCES

Am. Jur. 2d.

1 Am. Jur. 2d, Abandoned, Lost, and Unclaimed Property, § 37. 27 Am. Jur. 2d, Escheat, § 30.

C.J.S.

1 C.J.S., Abandonment, § 8 et seq. 30A C.J.S., Escheat § 4 et seq.

U.L.A.

Uniform Disposition of Unclaimed Property Act (U.L.A.) § 5.

44-12-202. When unclaimed property distributed in course of dissolution or liquidation of a person presumed abandoned.

All property distributable in the course of a voluntary or involuntary dissolution or liquidation of a person that remains unclaimed by the person entitled thereto, within one year after the date of final distribution or liquidation, shall be presumed abandoned.

History.
Code 1981, § 44-12-202, enacted by Ga. L. 1990, p. 1506, § 1; Ga. L. 1992, p. 1237, § 8.

OPINIONS OF THE ATTORNEY GENERAL

Editor's notes. — In light of the similarity of the statutory provisions, opinions rendered under Ga. L. 1972, p. 762, §§ 1 through 31 and § 33 are included in the annotations for this Code section.

Bank reporting requirements. — See 1973 Op. Att'y Gen. No. 73-11 (decided under former Ga. L. 1972, p. 762, §§ 1 through 31 and § 33).

If any particular bank were doing business both in Georgia and another state and the last known address of the person owning the abandoned property was in the other state, the bank should report to the Commissioner of Revenue of the other state, but if the last known address of the owner of the abandoned property was in Georgia, the bank should report to the Commissioner of Banking and Finance in Georgia; if the last known address of the depositor is in neither state the answer would have to depend on the particular state involved and its laws as to unclaimed and abandoned property. 1974 Op. Att'y Gen. No. 74-68 (decided under former Ga. L. 1972, p. 762, §§ 1 through 31 and § 33).

Proceeds of accounts not claimed during voluntary liquidation of a financial institution pass to the custody of the Department of Banking and Finance for ultimate disbursement pursuant to the Disposition of Unclaimed Property Act, O.C.G.A. § 44-12-190 et seq. 1975 Op. Att'y Gen. No. 75-135 (decided under former Ga. L. 1972, p. 762, §§ 1 through 31 and § 33).

RESEARCH REFERENCES

Am. Jur. 2d.
1 Am. Jur. 2d, Abandoned, Lost, and Unclaimed Property, § 37. 27 Am. Jur. 2d, Escheat, § 5 et seq.

C.J.S.
1 C.J.S., Abandonment, § 8 et seq. 7 C.J.S., Associations, §§ 9, 10. 9 C.J.S., Banks and Banking, §§ 201, 226.

U.L.A.
Uniform Disposition of Unclaimed Property Act (U.L.A.) § 6.

44-12-203. When intangible property held in fiduciary capacity for benefit of another, and income derived therefrom, presumed abandoned.

(a) Intangible property and any income or increment derived therefrom held in a fiduciary capacity for the benefit of another person is presumed abandoned unless the owner, within five years after it has become payable or distributable, has increased or decreased the principal, accepted payment of principal or income, communicated concerning the property, or otherwise indicated an interest as evidenced by a memorandum or other record on file prepared by the fiduciary.

(b) Funds in an individual retirement account or a retirement plan for self-employed individuals or similar account or plan established pursuant to the internal revenue laws of the United States are not payable or distributable within the meaning of subsection (a) of this Code section unless, under the terms of the account or plan, distribution of all or part of the funds would then be mandatory.

(c) For the purpose of this Code section, a person who holds property as an agent for a business association is deemed to hold the property in a fiduciary capacity for a business association alone, unless the agreement between him and the business association provides otherwise.

(d) For the purposes of this article, a person who is deemed to hold property in a fiduciary capacity for a business association alone is the holder of the property only insofar as the interest of the business association in the property is concerned, and the business association is the holder of the property insofar as the interest of any other person in the property is concerned.

History.
Code 1981, § 44-12-203, enacted by Ga. L. 1990, p. 1506, § 1; Ga. L. 1992, p. 1237, § 9.

OPINIONS OF THE ATTORNEY GENERAL

Editor's notes. — In light of the similarity of the statutory provisions, opinions rendered under Ga. L. 1972, p. 762, §§ 1 through 31 and § 33 are included in the annotations for this Code section.

Bank reporting requirements. — See 1973 Op. Att'y Gen. No. 73-11 (decided under former Ga. L. 1972, p. 762, §§ 1 through 31 and § 33).

If any particular bank were doing business both in Georgia and another state and the last known address of the person owning the abandoned property was in the other state, the bank should report to the Commissioner of Revenue of the other state, but if the last known address of the owner of the abandoned property was in Georgia, the bank should report to the Commissioner of Banking and Finance in Georgia; if the last known address of the depositor is in neither state the answer would have to depend on the particular state involved and its laws as to unclaimed and abandoned property. 1974 Op. Att'y Gen. No. 71-68 (decided under former Ga. L. 1972, p. 762, §§ 1 through 31 and § 33).

RESEARCH REFERENCES

Am. Jur. 2d.
1 Am. Jur. 2d, Abandoned, Lost and Unclaimed Property, § 2 et seq. 27 Am. Jur. 2d, Escheat, § 6.

C.J.S.
1 C.J.S., Abandonment, § 8 et seq. 1 C.J.S., Absentees, § 5 et seq.

U.L.A.
Uniform Disposition of Unclaimed Property Act (U.L.A.) § 7.

44-12-204. When intangible property held for owner by state or federal entity presumed abandoned.

All intangible property held for the owner by any state or federal court, government, governmental subdivision or agency, public corporation, or public authority which remains unclaimed by the owner for more than five years after becoming payable or distributable is presumed abandoned.

History.
Code 1981, § 44-12-204, enacted by Ga. L. 1990, p. 1506, § 1; Ga. L. 1992, p. 1237, § 10.

Cross references.
Escheat of property to state generally, O.C.G.A. § 53-2-50 et seq.

OPINIONS OF THE ATTORNEY GENERAL

Editor's notes. — In light of the similarity of the statutory provisions, opinions rendered under Ga. L. 1972, p. 762, §§ 1 through 31 and § 33 are included in the annotations for this Code section.

Bank reporting requirements. — See 1973 Op. Att'y Gen. No. 73-11 (decided under former Ga. L. 1972, p. 762, §§ 1 through 31 and § 33).

Disposition of restitution payments when victim cannot be located. — Restitution payments should not be returned to the probationer when the intended recipient cannot be located: instead, the funds should be retained for the benefit of the victim until the completion of the seven-year [now five-year] holding period, and at that point, the account should be reported and subsequently delivered to the State Revenue Commissioner in accordance with the laws of this state concerning disposition of unclaimed property. 1987 Op. Att'y Gen. No. U87-17.

RESEARCH REFERENCES

Am. Jur. 2d.
1 Am. Jur. 2d, Abandoned, Lost, and Unclaimed Property, § 40.

C.J.S.
1 C.J.S., Abandonment, § 8 et seq.

U.L.A.
Uniform Disposition of Unclaimed Property Act (U.L.A.) § 8.

44-12-205. When gift certificate or credit memo presumed abandoned.

(a) A gift certificate or a credit memo issued in the ordinary course of an issuer's business which remains unclaimed by the owner for more than five years after becoming payable or distributable is presumed abandoned.

(b) In the case of a gift certificate, the amount presumed abandoned is the price paid by the purchaser for the gift certificate. In the case of a credit memo, the amount presumed abandoned is the amount credited to the recipient of the memo.

History.
Code 1981, § 44-12-205, enacted by Ga. L. 1990, p. 1506, § 1; Ga. L. 1992, p. 1237, § 11.

Law reviews.
For comment, "Unwrapping Escheat: Unclaimed Property Laws and Gift Cards," see 60 Emory L. J. 971 (2011).

JUDICIAL DECISIONS

No presumption of abandonment. — Assessment of dormancy fees on gift cards and certificates and refusal to honor them after one year did not violate O.C.G.A. § 44-12-205 of the Georgia Disposition of Unclaimed Property Act (DUPA), O.C.G.A. § 44-12-190 et seq; as the cards and certificates had not been

unclaimed by the plaintiffs for more than five years when the complaint was filed, they were not presumed abandoned, and DUPA did not apply. Simon Prop. Group, Inc. v. Benson, 278 Ga. App. 277, 628 S.E.2d 697, 2006 Ga. App. LEXIS 312 (2006), aff'd, 281 Ga. 744, 642 S.E.2d 687, 2007 Ga. LEXIS 238 (2007).

Law governing claims by owners against property holders. — O.C.G.A. § 44-12-205(b), which simply provided that an amount equal to the price paid for an unclaimed card or certificate was to be paid to the state after five years, regardless of whether the card or certificate previously expired or otherwise lost value pursuant to contractual terms, did not provide a basis for the owners of certain gift cards and certificates to bring an action against the holder of the cards and certificates that claimed that the dormancy fees and expiration dates on the cards and certificates violated the Disposition of Unclaimed Property Act; the relationship between the owners and the holder was governed by Georgia contract law. Benson v. Simon Prop. Group, Inc., 281 Ga. 744, 642 S.E.2d 687, 2007 Ga. LEXIS 238 (2007).

44-12-206. When unpaid wages presumed abandoned.

Unpaid wages, including wages represented by unpresented payroll checks owing in the ordinary course of the holder's business, that have remained unclaimed by the owner for more than one year after becoming payable are presumed abandoned.

History.
Code 1981, § 44-12-206, enacted by Ga. L. 1990, p. 1506, § 1; Ga. L. 1992, p. 1237, § 12.

44-12-207. When employee benefit trust distributions and income thereon presumed abandoned; exceptions.

(a) All employee benefit trust distributions and any income or other increment thereon are abandoned to this state under the provisions of this article if the owner has not, within five years after it becomes payable or distributable, accepted such distribution, corresponded in writing concerning such distribution, or otherwise indicated an interest as evidenced by a memorandum or other record on file with the fiduciary of the trust or custodial fund or administrator of the plan under which such trust or fund is established.

(b) An employee benefit trust distribution and any income or other increment thereon shall not be presumed abandoned to this state under the provisions of this article if, at the time such distribution shall become payable to a participant in an employee benefit plan, such plan contains a provision for forfeiture, if the trustees of an employee benefit plan supported wholly or partially from public funds adopt a provision for forfeiture, or if such plan expressly authorizes the trustee to declare a forfeiture of a distribution to a beneficiary thereof who cannot be found after a period of time specified in such plan, and the trust or fund established under the plan has not terminated prior to the date on which such distribution would become forfeitable in accordance with such provision.

History. Code 1981, § 44-12-207, enacted by Ga. L. 1990, p. 1506, § 1; Ga. L. 1992, p. 1237, § 13.

44-12-208. When funds held or owing by insurer or hospital, medical, or dental service corporation presumed abandoned; when sums payable on negotiable instrument for payment of claim under insurance contract presumed abandoned.

(a) Any funds held or owing by a fire, casualty, or any other insurer or surety as defined in Title 33 or a hospital, medical, or dental service corporation organized under Title 31 that are due and payable, as established from the records of the insurer or surety either to an insured, a principal, or other claimant under any insurance policy or contract shall be presumed abandoned if they have not been claimed or paid within five years after becoming due or payable. Funds payable according to the insurer's or surety's records are deemed due and payable although the policy or contract has not been surrendered as required.

(b) If a person other than the insured, the principal, or the claimant is entitled to the funds and no address of the person is known to the insurer or surety or if it is not definite and certain from the records of the insurer or surety what person is entitled to the funds, it is presumed that the last known address of the person entitled to the funds is the same as the last known address of the insured, the principal, or the claimant according to the records of the insurer or surety.

(c) Any sum for the payment of a claim under an insurance policy or contract, which sum is payable on a negotiable instrument on which the insurer is the maker or drawer shall be presumed abandoned if, within five years from the date payable, or from the date of issuance, if payable on demand, the owner has not:

(1) Negotiated the instrument;

(2) Corresponded in writing with the insurer concerning it; or

(3) Otherwise indicated an interest by a writing on file with the insurer.

History. Code 1981, § 44-12-208, enacted by Ga. L. 1990, p. 1506, § 1; Ga. L. 1992, p. 1237, § 14.

RESEARCH REFERENCES

U.L.A.
Uniform Disposition of Unclaimed Property Act (U.L.A.) § 16.

44-12-209. Rent due on safe-deposit boxes; notice of opening of box and sealing of contents when contents deemed abandoned; delivery to commissioner.

(a) If the rental due on a safe-deposit box has not been paid for one year, the lessor shall send a notice by registered mail or statutory overnight delivery to the last known address of the lessee stating that the safe-deposit box will be opened and its contents stored at the expense of the lessee unless payment of the rental is made within 30 days. If the rental is not paid within 30 days from the mailing of the notice, the holder shall provide written notification to the commissioner of the drilling date not less than 30 days prior to this time. The commissioner may designate a representative to be present during the opening of the safe-deposit box. The safe-deposit box shall be opened in the presence of an officer of the lessor. The contents shall be sealed in a package by the officer who shall write on the outside the name of the lessee and the date of the opening. The officer shall execute a certificate reciting the name of the lessee, the date of the opening of the safe-deposit box, and a list of its contents. The certificate shall be included in the package and a copy of the certificate shall be sent by registered mail or statutory overnight delivery to the last known address of the lessee. The package shall then be placed in the general vaults of the lessor at a rental not exceeding the rental previously charged for the safe-deposit box.

(b) If the contents of the safe-deposit box have not been claimed within two years of the mailing of the certificate, the lessor may send a further notice to the last known address of the lessee stating that, unless the accumulated charges are paid within 30 days, the contents of the safe-deposit box will be delivered to the commissioner as abandoned property under the provisions of Code Section 44-12-214.

(c) The lessor shall submit to the commissioner a verified inventory of all of the contents of the safe-deposit box upon delivery of the contents of the safe-deposit box or such part thereof as shall be required by the commissioner under Code Section 44-12-214, but the lessor shall not deduct from any cash of the lessee in the safe-deposit box an amount equal to accumulated charges for rental but shall submit to the commissioner a verified statement of such charges and deductions. If there is no cash, or insufficient cash to pay accumulated charges, in the safe-deposit box, the commissioner shall remit to the lessor the charges or balance due, up to the value of the property in the safe-deposit box delivered to him, less any costs or expenses of sale; but, if the charges or balance due exceeds the value of such property, the commissioner shall remit only the value of the property, less costs or expenses of sale. Any accumulated charges for safe-deposit box rental paid by the commissioner to the lessor shall be deducted from the value of the property of the lessee delivered to the commissioner.

(d) On and after January 1, 1991, a copy of this Code section shall be printed on every contract for rental of a safe-deposit box.

History.
Code 1981, § 44-12-209, enacted by Ga. L. 1990, p. 1506, § 1; Ga. L. 2000, p. 1589, § 4.
Editor's notes.
Ga. L. 2000, p. 1589, § 16, not codified by the General Assembly, provided that the Act is applicable with respect to notices delivered on or after July 1, 2000.

44-12-210. Commencement of abandonment for certain property described in Code Section 44-12-197.

The abandonment period of any property described in Code Section 44-12-197 that is automatically renewable shall commence upon the expiration of its initial time period except that, in the case of any renewal to which the owner consents at or about the time of renewal by communicating in writing with the person holding the property or otherwise indicating such consent as evidenced by a memorandum on file prepared by an employee, the abandonment period shall commence upon the expiration of the last time period for which consent was given.

History.
Code 1981, § 44-12-210, enacted by Ga. L. 1990, p. 1506, § 1.

RESEARCH REFERENCES

Am. Jur. 2d.
27 Am. Jur. 2d, Escheat, § 43 et seq.
C.J.S.
30A C.J.S., Escheat, §§ 9, 22, 23. 81A C.J.S., States, § 228.
U.L.A.
Uniform Disposition of Unclaimed Property Act (U.L.A.) § 18.

44-12-211. When bequeathed property presumed abandoned; when person presumed dead without heirs or distributees and property presumed abandoned.

(a) Property which has been bequeathed to any person shall be presumed abandoned if not claimed by that person or his heirs, legatees, or distributees within five years after the death of the testator unless the will makes provision in case of a lapse, failure, or rejection of the bequest for the disposition of the property.

(b) When a person owning property is not known for five successive years to be living and neither the person named, his heirs, or distributees can be located or proved for five successive years to have been living, he shall be presumed to have died without heirs or distributees and his property shall be presumed abandoned.

History.
Code 1981, § 44-12-211, enacted by Ga. L. 1990, p. 1506, § 1; Ga. L. 1992, p. 1237, § 15.

44-12-211.1. Excess funds from sale of abandoned motor vehicle; claim for funds; definitions.

(a) Within 15 days of the sale of a motor vehicle pursuant to Article 1A of Chapter 11 of Title 40, "The Abandoned Motor Vehicle Act," and the satisfaction of the amounts owed for liens on such motor vehicle, any towing and storage firm, repair facility, or salvage dealer selling such motor vehicle shall provide to the commissioner any excess funds minus the allowable costs incurred for the public sale of such motor vehicle as set forth in subsection (b) of Code Section 40-11-19.2. The funds turned over to the department shall be accompanied by copies of the court order issued pursuant to Code Section 40-11-19.1, the bill of sale, and the receipt for the costs associated with the sale held pursuant to Code Section 40-11-19.2 on a form prescribed by the department for such purpose.

(b)(1) Any person claiming a property interest in the motor vehicle sold pursuant to Article 1A of Chapter 11 of Title 40, "The Abandoned Motor Vehicle Act," and the excess funds from such sale may make such claim to the department upon a form provided for such purpose through rule or regulation within six months of the sale.

(2) If such excess funds remain unclaimed for more than six months, any person authorized to make a claim under paragraph (1) of this subsection, or the towing and storage firm, repair facility, or salvage dealer selling such motor vehicle, may make a claim to the department for such excess funds. If more than one claim is made during this six-month period, the party first making a claim determined by the department as authorized shall be entitled to the excess funds. No claim shall be authorized after one year from the date excess funds are provided to the commissioner.

(c) For purposes of this Code section, the terms "repair facility," "salvage dealer," and "towing and storage firm" shall have the same meanings as provided for in Code Section 40-11-13.

History.
Code 1981, § 44-12-211.1, enacted by Ga. L. 2019, p. 872, § 6/HB 307; Ga. L. 2021, p. 922, § 44/HB 497.

The 2021 amendment, effective May 10, 2021, part of an Act to revise, modernize, and correct the Code, in paragraph (b)(2), inserted a comma following "motor vehicle" in the middle of the first sentence, and substituted "six-month period" for "six month period" in the second sentence.

Editor's notes.
Ga. L. 2019, p. 872, § 8/HB 307, not codified by the General Assembly, provides: "This Act shall become effective upon approval by the Governor or upon its becoming law without such approval for purposes of developing the required forms and shall become effective on September 1, 2019, for all other purposes." The Governor signed this Act on May 7, 2019.

44-12-212. When property described in Code Section 44-12-193 not subject to this article.

If specific property which is subject to the provisions of Code Section 44-12-193 is held for or owed or distributable to an owner whose last known address is in another state by a holder who is subject to the jurisdiction of that state, the specific property is not presumed abandoned in this state and subject to this article if:

(1) It may be claimed as abandoned or escheated under the laws of such other state; and

(2) The laws of such other state make reciprocal provision that similar specific property is not presumed abandoned or escheatable by such other state when held for or owed or distributable to an owner whose last known address is within this state by a holder who is subject to the jurisdiction of this state.

History.
Code 1981, § 44-12-212, enacted by Ga. L. 1990, p. 1506, § 1.

44-12-213. Cooperation with other states to audit or otherwise determine unclaimed property subject to claim; rules and procedure.

(a) The commissioner may enter into agreements with other states to exchange information needed to enable this or another state to audit or otherwise determine unclaimed property that is subject to a claim of custody. The commissioner by rule may require the reporting of information needed to enable compliance with agreements made pursuant to this Code section and may prescribe the form.

(b) To avoid conflicts between the commissioner's procedures and the procedures of administrators in other jurisdictions that enact the Uniform Unclaimed Property Act, the commissioner, so far as is consistent with the purposes, policies, and provisions of this article, before adopting, amending, or repealing rules, shall advise and consult with administrators in other jurisdictions that enact the Uniform Unclaimed Property Act and take into consideration the rules of administrators in other jurisdictions that enact the Uniform Unclaimed Property Act.

(c) The commissioner may join with other states to seek enforcement of this article against any person who is or may be holding property reportable under this article.

(d) At the request of another state, the Attorney General of this state may bring an action in the name of the administrator of the other state in any court of competent jurisdiction in this state to enforce the

unclaimed property laws of the other state against the holder in this state of property subject to escheat or a claim of abandonment by the other state, if the other state has agreed to pay expenses incurred by the Attorney General in bringing that action.

(e) The commissioner may request that the attorney general of another state or any other person bring an action in the name of the commissioner in the other state. This state shall pay all expenses including attorney's fees in any action under this subsection. The commissioner may agree to pay the person bringing the action attorney's fees based in whole or in part on a percentage of the value of any property recovered in the action. Any expenses paid pursuant to this subsection may not be deducted from the amount that is subject to the claim by the owner under this article.

History.
Code 1981, § 44-12-213, enacted by Ga. L. 1990, p. 1506, § 1.

44-12-214. Report and remittance of persons holding property presumed abandoned under this article.

(a) Except as provided in Article 17B of Title 10, every person holding funds or other property, tangible or intangible, presumed abandoned under this article shall report and remit to the commissioner with respect to the property as provided in this Code section.

(b) The report shall be verified and shall include:

(1) The name and social security or federal identification number, if known, and last known address, including ZIP Code, if any, of each person appearing from the records of the holder to be the owner of any property of the value of $50.00 or more presumed abandoned under this article;

(2) In case of unclaimed funds of insurance corporations, the full name of the insured or annuitant and any beneficiary, if known, and the last known address according to the insurance corporation's records;

(3) In the case of the contents of a safe-deposit box or other safekeeping repository or in the case of other tangible property, a description of the property and the place where it is held and may be inspected by the commissioner, and any amounts owing to the holder;

(4) The nature and identifying number, if any, or description of the property and the amount appearing from the records to be due, except that items of value under $50.00 each may be reported in aggregate;

(5) The date when the property became payable, demandable, or

returnable, and the date of the last transaction with the owner with respect to the property; and

(6) Other information which the commissioner prescribes by rule as necessary for the administration of this article.

(c) If the person holding property presumed abandoned is a successor to other persons who previously held the property for the owner or if the holder has changed his name while holding the property, he shall file with his report all prior known names and addresses of each holder of the property.

(d) The report and remittance shall be filed before November 1 of each year as of June 30 next preceding, but the report and remittance of insurance corporations shall be filed before May 1 of each year as of December 31 next preceding. When property is evidenced by certificate of ownership as set forth in Code Section 44-12-201, the holder shall deliver to the commissioner a duplicate of any such certificate registered in the name of the commissioner at the time of report and remittance. The commissioner may postpone the reporting and remittance date upon written request by any person required to file a report.

(e) If the holder of property presumed abandoned under this article knows the whereabouts of the owner, the holder shall, before filing the annual report, communicate with the owner and take necessary steps to prevent abandonment from being presumed. All holders shall exercise due diligence, as defined in Code Section 44-12-192, at least 60 days but no more than 120 days prior to the submission of the report to ascertain the whereabouts of the owner if the holder has in its records an address for the apparent owner which the holder's records do not disclose to be inaccurate and the property has a value of $50.00 or more.

(f) Verification, if made by a partnership, shall be executed by a partner; if made by an unincorporated association or private corporation, by an officer; and if made by a public corporation, by its chief fiscal officer.

(g) The initial report and remittance filed under this Code section shall include all items of property that would have been presumed abandoned if this article had been in effect during the 15 year period preceding January 1, 1973.

(h) Nothing in this Code section shall be construed to require a utility to include in its initial report any item of money or property as to which the name of the owner and his last known address do not appear in the records maintained by the utility in accordance with rules or practices sanctioned by any state or federal regulatory body having jurisdiction over the utility.

History.

Code 1981, § 44-12-214, enacted by Ga. L. 1990, p. 1506, § 1; Ga. L. 2006, p. 720, § 4/SB 195.

Cross references.

Disposition of property in safe-deposit vault or held for safekeeping, § 7-1-172.

Service charges on dormant accounts, § 7-1-358.

OPINIONS OF THE ATTORNEY GENERAL

Editor's notes. — In light of the similarity of the statutory provisions, opinions rendered under Ga. L. 1972, p. 762, §§ 1 through 31 and § 33 are included in the annotations for this Code section.

Bank reporting requirements. — See 1973 Op. Att'y Gen. No. 73-11 (decided under former Ga. L. 1972, p. 762, §§ 1 through 31 and § 33).

Disposal of monies paid into court in condemnation cases. — See 1985 Op. Att'y Gen. No. U85-23.

Proceeds of accounts not claimed during voluntary liquidation of a financial institution pass to the custody of the Department of Banking and Finance for ultimate disbursement pursuant to the Disposition of Unclaimed Property Act, O.C.G.A. § 44-12-190 et seq. 1975 Op. Att'y Gen. No. 75-135 (decided under former Ga. L. 1972, p. 762, §§ 1 through 31 and § 33).

Filing where records destroyed prior to Act. — Where, prior to the effective date of the Disposition of Unclaimed Property Act, O.C.G.A. § 44-12-190 et seq., a bank was allowed to destroy records containing information required by O.C.G.A. § 44-12-214, the bank is responsible for filing such information as it can make available. 1973 Op. Att'y Gen. No. 73-11.

Service charge on dormant bank accounts. — O.C.G.A. § 7-1-358 repealed by implication the prohibition against the imposition of service charge on dormant bank accounts contained in the Disposition of Unclaimed Property Act, O.C.G.A. § 44-12-190 et seq. 1975 Op. Att'y Gen. No. 75-128.

Preemption by federal regulation. — The conflict between a rule or regulation of the Federal Home Loan Bank Board and O.C.G.A. § 44-12-214, concerning the proper service charges which may be exacted from any inactive account, must be resolved in favor of the limitations imposed by the federal regulation, inasmuch as the state is prohibited from enacting legislation in areas preempted by federal law. 1974 Op. Att'y Gen. No. 74-30.

44-12-215. Publication of "Georgia Unclaimed Property List"; contents of notice.

(a) The commissioner shall electronically publish notice of the reports filed under Code Section 44-12-214 on the Department of Revenue's website.

(b) The published notice shall be entitled the "Georgia Unclaimed Property List" and shall contain the names in alphabetical order and the internal identification number of persons listed in the report and entitled to notice within the county as provided in Code Section 44-12-214.

(c) The notice shall contain a statement that information concerning the amount or description of the property and the name of the holder may be obtained by any persons possessing an interest in the property

by addressing an inquiry to the commissioner. In cases of property submitted pursuant to Code Section 44-12-211.1, the notice shall also contain the year, make, model, and vehicle identification number of the motor vehicle sold pursuant to Article 1A of Chapter 11 of Title 40, "The Abandoned Motor Vehicle Act."

(d) The commissioner shall not be required to publish in such notice any item with a value of less than $50.00 unless the commissioner deems such publication to be in the public interest.

History.
Code 1981, § 44-12-215, enacted by Ga. L. 1990, p. 1506, § 1; Ga. L. 2015, p. 30, § 2/SB 82; Ga. L. 2019, p. 872, § 7/HB 307.

Editor's notes.
Ga. L. 2019, p. 872, § 8/HB 307, not codified by the General Assembly, provides: "This Act shall become effective upon approval by the Governor or upon its becoming law without such approval for purposes of developing the required forms and shall become effective on September 1, 2019, for all other purposes." The Governor signed this Act on May 7, 2019.

RESEARCH REFERENCES

Am. Jur. 2d.
27 Am. Jur. 2d, Escheat, § 33.

C.J.S.
76 C.J.S., Records, §§ 60 et seq., 93 et seq.

U.L.A.
Uniform Disposition of Unclaimed Property Act (U.L.A.) §§ 12, 23.

44-12-216. Assumption of custody by state; legal proceedings instituted by other state; reimbursements for costs to safe-deposit box holders.

(a) Upon payment or delivery of abandoned property to the commissioner, the state shall assume custody and shall be responsible for the safekeeping of the property. Any person who pays or delivers abandoned property to the commissioner under this article is relieved of all liability, to the extent of the value of the property so paid or delivered, or for any claim which then exists or which thereafter may arise or be made with respect to the property. Any holder who has paid moneys to the commissioner pursuant to this article may reimburse any person appearing to such holder to be entitled thereto; and, upon proof of such payment and proof that the payee was entitled thereto, the commissioner shall forthwith reimburse the holder for the payment.

(b) In the event legal proceedings are instituted by any other state or states in any state or federal court with respect to unclaimed funds or abandoned property previously paid or delivered to the commissioner, the holder shall give written notification to the commissioner and the Attorney General of this state of such proceedings within ten days after service of process or at least ten days before the return date on which an answer or similar pleading is due or any extension thereof is secured by

the holder. The Attorney General may take such action as he deems necessary or expedient to protect the interest of this state. The Attorney General, by written notice prior to the return date on which an answer or similar pleading is due or any extension thereof is secured by the holder, but in any event in reasonably sufficient time for the holder to comply with the directions received, shall either direct the holder actively to defend in the proceedings or direct that no defense be entered into the proceedings. If a direction is received from the Attorney General that the holder need not make a defense, this shall not preclude the holder from entering a defense in his own name if he should so choose. However, any defense made by the holder on his own initiative shall not entitle the holder to reimbursement for legal fees, costs, and other expenses as is provided in this Code section with respect to defenses made pursuant to the direction of the Attorney General. After the holder has actively defended in the proceedings pursuant to the direction of the Attorney General or has been notified in writing by the Attorney General that no defense need be made with respect to such funds, if a judgment is entered against the holder for any amount paid to the commissioner under this article, the commissioner, upon being furnished either proof of payment or satisfaction of such judgment, shall reimburse the holder the amount so paid. The commissioner shall also reimburse the holder for any legal fees, costs, and other directly related expenses incurred in legal proceedings undertaken pursuant to the direction of the Attorney General.

(c) Property removed from a safe-deposit box or other safekeeping repository that is received by the commissioner shall be subject to the holder's right under this Code section to be reimbursed for the actual cost of the opening and to any valid lien or contract providing for the holder to be reimbursed for unpaid rent or storage charges. The commissioner shall make the reimbursement to the holder out of the proceeds remaining after the deduction of the commissioner's selling costs.

History.
Code 1981, § 44-12-216, enacted by Ga. L. 1990, p. 1506, § 1.

44-12-217. Sale or destruction of property.

(a) All abandoned property, other than money delivered to the commissioner under this article, shall, within three years after the delivery, be sold by him to the highest bidder at public sale in whatever city in the state affords, in his judgment, the most favorable market for the property involved. The commissioner may decline the highest bid and reoffer the property for sale if he considers the price bid insufficient. He need not offer any property for sale if, in his opinion, the probable cost of the sale exceeds the value of the property.

(b) Any sale held under this Code section shall be preceded by a single publication of notice thereof at least three weeks in advance of the sale in a newspaper of general circulation in the county where the property is to be sold.

(c) At any sale conducted by the commissioner pursuant to this article, the purchaser shall receive title to the property purchased free from all claims of the owner or prior holder thereof and of all persons claiming through or under them. The commissioner shall execute all documents necessary to complete the transfer of title.

(d) If the commissioner determines after investigation that any property delivered under this article has insubstantial commercial value of less than $100.00, he may destroy or otherwise dispose of the property at any time. No action or proceeding may be maintained against the state or any officer or against any holder for or on account of any action taken by the commissioner pursuant to this subsection.

History.
Code 1981, § 44-12-217, enacted by Ga. L. 1990, p. 1506, § 1.

OPINIONS OF THE ATTORNEY GENERAL

Editor's notes. — In light of the similarity of the statutory provisions, opinions rendered under Ga. L. 1972, p. 762, §§ 1 through 31 and § 33 are included in the annotations for this Code section.

Transfer of abandoned stock certificates. — Under the former Disposition of Unclaimed Property Act (see now O.C.G.A. § 44-12-190 et seq.) stock certificates deemed abandoned should be tendered to the Department of Revenue, registered in the name of the state revenue commissioner. 1983 Op. Att'y Gen. No. 83-77 (decided under former Ga. L. 1972, p. 762, §§ 1 through 31 and § 33).

RESEARCH REFERENCES

Am. Jur. 2d.
27 Am. Jur. 2d, Escheat, § 45.
C.J.S.
30A C.J.S., Escheat, §§ 9, 22, 23.
U.L.A.
Uniform Disposition of Unclaimed Property Act (U.L.A.) § 17.

44-12-218. Disposition of funds received under article.

All funds received under this article, including the proceeds from the sale of abandoned property under Code Section 44-12-217, shall be deposited by the commissioner in the general fund; provided, however, that the commissioner may deduct moneys necessary to cover the direct administrative expenses required to identify, locate, secure, and transmit abandoned property prior to depositing such funds. Before making a deposit he or she shall record the name and last known address of each person appearing from the holders' reports to be entitled to the abandoned property and of the name and last known address of each

insured person or annuitant and, with respect to each policy or contract listed in the report of an insurance corporation, its number, the name of the corporation, and the amount due.

History.
Code 1981, § 44-12-218, enacted by Ga. L. 1990, p. 1506, § 1; Ga. L. 2013, p. 636, § 2/HB 359; Ga. L. 2015, p. 30, § 3/SB 82.

RESEARCH REFERENCES

Am. Jur. 2d.
27 Am. Jur. 2d, Escheat, § 43 et seq.
C.J.S.
30A C.J.S., Escheat, §§ 9, 22, 23. 81A C.J.S., States, § 228.
U.L.A.
Uniform Disposition of Unclaimed Property Act (U.L.A.) §§ 18, 26.

44-12-219. When commissioner may decline to receive certain property.

The commissioner, after receiving reports of property deemed abandoned pursuant to this article, may decline to receive any property reported which he deems to have a value less than the cost of giving notice and holding sale, or he may, if he deems it desirable because of the small sum involved, postpone taking possession until a sufficient sum accumulates. Unless the holder of the property is notified to the contrary within 120 days after filing the report required under Code Section 44-12-214, the commissioner shall be deemed to have elected to receive the custody of the property.

History.
Code 1981, § 44-12-219, enacted by Ga. L. 1990, p. 1506, § 1.

RESEARCH REFERENCES

Am. Jur. 2d.
1 Am. Jur. 2d, Abandoned, Lost, and Unclaimed Property, §§ 30, 34. 27 Am. Jur. 2d, Escheat, § 46 et seq.
C.J.S.
1 C.J.S., Abandonment, § 12. 30A C.J.S., Escheat, § 9 et seq.
U.L.A.
Uniform Disposition of Unclaimed Property Act (U.L.A.) § 22.

44-12-220. Claims for property paid or delivered to commissioner; procedure; destruction of records after seven years.

(a) A person, excluding another state, claiming an interest in any property paid or delivered to the commissioner may file with him a claim on a form prescribed by him and verified by the claimant.

(b) The commissioner shall consider each claim within 90 days after

it is filed and give written notice to the claimant if the claim is denied in whole or in part. The notice may be given by mailing it to the last address, if any, stated in the claim as the address to which notices are to be sent. If no address for notices is stated in the claim, the notice may be mailed to the last address, if any, of the claimant as stated in the claim. No notice of denial need be given if the claim fails to state either the last address to which notices are to be sent or the address of the claimant.

(c) If a claim is allowed, the commissioner shall pay over or deliver to the claimant the property or the amount the commissioner actually received or the net proceeds if it has been sold by the commissioner. The owner is not entitled to receive income or other increments accruing after remittance to the commissioner.

(d) The commissioner may, after seven years following the receipt of property, destroy such records related to the property as deemed necessary; and after said seven-year period any claim relating to such property must be fully substantiated by a claimant, without recourse to such records.

History.
Code 1981, § 44-12-220, enacted by Ga. L. 1990, p. 1506, § 1.

RESEARCH REFERENCES

Am. Jur. 2d.
27 Am. Jur. 2d, Escheat, § 46 et seq.
C.J.S.
30A C.J.S., Escheat, §§ 22, 23. 81A C.J.S., States, § 269.
U.L.A.
Uniform Disposition of Unclaimed Property Act (U.L.A.) § 19.

44-12-221. Appeal of commissioner's decision.

Any person aggrieved by a decision of the commissioner or whose claim the commissioner has failed to act upon within 90 days after the filing of the claim may appeal such decision or lack of decision to the Superior Court of Fulton County. The proceeding shall be brought within 90 days after the decision of the commissioner or within 180 days of the filing of the claim if the commissioner fails to act. The appeal shall be tried de novo without a jury.

History.
Code 1981, § 44-12-221, enacted by Ga. L. 1990, p. 1506, § 1.

RESEARCH REFERENCES

Am. Jur. 2d.
27 Am. Jur. 2d, Escheat, § 46 et seq.
C.J.S.
30A C.J.S., Escheat, §§ 9, 10. 81A C.J.S., States, § 297.
U.L.A.
Uniform Disposition of Unclaimed Property Act (U.L.A.) § 21.

44-12-222. Determination of claim; hearing.

(a) The commissioner shall consider any claim filed under this article and may hold a hearing and receive evidence concerning it. If a hearing is held, he shall prepare a finding and a decision in writing on each claim filed, stating the substance of any evidence heard by him and the reasons for his decision. The decision shall be a public record.

(b) If the claim is allowed, the commissioner shall make payment forthwith. The claim shall be paid without deduction for costs of notice.

History.
Code 1981, § 44-12-222, enacted by Ga. L. 1990, p. 1506, § 1.

RESEARCH REFERENCES

Am. Jur. 2d.
27 Am. Jur. 2d, Escheat, § 46 et seq.
C.J.S.
30A C.J.S., Escheat, §§ 22, 23. 81A C.J.S., States, §§ 273, 278.
U.L.A.
Uniform Disposition of Unclaimed Property Act (U.L.A.) § 20.

44-12-223. Effect of periods of limitation.

The expiration of any period of time specified by statute or court order, during which an action or proceeding may be commenced or enforced to obtain payment of a claim for money or property, shall not prevent the money or property from being presumed abandoned property nor affect any duty to file a report required by this article or to pay or deliver abandoned property to the commissioner.

History.
Code 1981, § 44-12-223, enacted by Ga. L. 1990, p. 1506, § 1.

OPINIONS OF THE ATTORNEY GENERAL

Editor's notes. — In light of the similarity of the statutory provisions, opinions rendered under Ga. L. 1972, p. 762, §§ 1 through 31 and § 33 are included in the annotations for this Code section.

Outstanding checks not abandoned property. — Outstanding checks may be evidence of abandoned deposits, but the checks themselves would not be abandoned property. 1981 Op. Att'y Gen. No. 81-16.

44-12-224. Agreement and fees for recovery or assistance in recovery of property reported and delivered to commissioner.

(a) All agreements to pay compensation to recover or assist in the recovery of property reported and delivered to the commissioner under this article shall be unenforceable for 24 months after the date of payment or the delivery of property to the commissioner.

(b) The fees charged by any person, firm, or corporation to recover or assist in the recovery for and on behalf of a claimant of property reported and delivered to the commissioner under this article shall not exceed 10 percent of the value of the property recovered. All funds or property located by a person to be compensated by the payment of such a fee shall be paid or delivered directly to the owner and may not be paid or delivered to the person to receive the fee whether pursuant to a duly executed power of attorney or otherwise.

History.
Code 1981, § 44-12-224, enacted by Ga. L. 1990, p. 1506, § 1.

JUDICIAL DECISIONS

Cap on compensation. — Court capped asset recovery specialist's compensation at 10% of the $65,000 recovered by the bankruptcy trustee pursuant to O.C.G.A. § 44-12-224(b). Blocksom v. Brown (In re Brown), 555 B.R. 854, 2016 Bankr. LEXIS 2818 (Bankr. S.D. Ga. 2016).

44-12-225. Confidentiality of information or records required by this article.

Any information or records required to be furnished to the commissioner shall be confidential except as otherwise necessary in the proper administration of this article.

History.
Code 1981, § 44-12-225, enacted by Ga. L. 1990, p. 1506, § 1.

44-12-226. Expiration of limitation specified by contract, statute, or court order not to affect duties required by this article.

The expiration, before or after July 1, 1990, of any period of time specified by contract, statute, or court order during which a claim for money or property can be made or during which an action or proceeding

may be commenced or enforced to obtain payment of a claim for money or to recover property, does not prevent the money or property from being presumed abandoned nor affect any duty to file a report or to pay or deliver abandoned property to the commissioner as required by this article.

History.
Code 1981, § 44-12-226, enacted by Ga. L. 1990, p. 1506, § 1.

JUDICIAL DECISIONS

No presumption of abandonment. — Assessment of dormancy fees on gift cards and certificates and refusal to honor them after one year did not violate O.C.G.A. § 44-12-205 of the Georgia Disposition of Unclaimed Property Act (DUPA), O.C.G.A. § 44-12-190 et seq; as the cards and certificates had not been unclaimed by the plaintiffs for more than five years when the complaint was filed, they were not presumed abandoned, and DUPA did not apply. Simon Prop. Group, Inc. v. Benson, 278 Ga. App. 277, 628 S.E.2d 697, 2006 Ga. App. LEXIS 312 (2006), aff'd, 281 Ga. 744, 642 S.E.2d 687, 2007 Ga. LEXIS 238 (2007).

Law governing claims by owners against property holders. — O.C.G.A. § 44-12-226, which simply ensured that a holder was not relieved of its obligation to deliver abandoned property to the state revenue commissioner, even though an owner's claim for possession against a holder was barred by the statute of limitations, did not provide a basis for the owners of certain gift cards and certificates to bring an action against the holder of the cards and certificates that claimed that the dormancy fees and expiration dates on the cards and certificates violated the Disposition of Unclaimed Property Act, O.C.G.A. Art. 5, Ch. 12, T. 44; the relationship between the owners and the holder was governed by Georgia contract law. Benson v. Simon Prop. Group, Inc., 281 Ga. 744, 642 S.E.2d 687, 2007 Ga. LEXIS 238 (2007).

RESEARCH REFERENCES

ALR.
Regulation of pre-paid stored-value "gift cards", 46 A.L.R.6th 437.

44-12-227. Penalties.

(a) A person, firm, or corporation who willfully fails to render any report or perform other duties required under this article shall pay a civil penalty of $100.00 for each day the report is withheld or the duty is not performed, but not more than $5,000.00.

(b) A person, firm, or corporation who willfully fails to pay or deliver property to the commissioner as required under this article shall pay a civil penalty equal to 25 percent of the value of the property that should have been paid or delivered.

(c) A person, firm, or corporation who willfully refuses after written demand by the commissioner to pay or deliver as required by this

article is guilty of a misdemeanor and upon conviction shall be punished by a fine not to exceed $1,000.00 or by imprisonment not to exceed six months or by both such fine and imprisonment.

History.
Code 1981, § 44-12-227, enacted by Ga. L. 1990, p. 1506, § 1.

44-12-228. Maintenance and retention of records.

(a) Every financial institution, banking organization, and business association and all other holders required to file a report under Code Section 44-12-214 shall retain all books, records, and documents necessary to establish the accuracy and compliance of such report for ten years after the property becomes reportable, except to the extent that shorter time is provided in accordance with Article 5 of Chapter 18 of Title 50, the "Georgia Records Act," or in subsection (b) of this Code section or by rule of the commissioner. As to any property for which it has obtained the last known address of the owner, the holder shall maintain a record of the name and last known address of the owner for the same ten-year period.

(b) Any business associations that sell in this state their traveler's checks, money orders, or other similar written instruments, other than third-party bank checks on which the business association is directly liable, or that provides such instruments to others for sale in this state shall maintain a record of those instruments while they remain outstanding, indicating the state and date of issue for three years after the date the property is reportable.

History.
Code 1981, § 44-12-228, enacted by Ga. L. 1990, p. 1506, § 1.
Code Commission notes.
Pursuant to Code Section 28-9-5, in 1990, "their traveler's checks" was substituted for "its traveler's checks" near the beginning of subsection (b).

44-12-229. Commissioner may compel filing of report and may examine records; failure to maintain records.

(a) The commissioner may require any person who has not filed a report to file a verified report stating whether or not the person is holding any unclaimed property reportable or deliverable under this article.

(b) The commissioner may at reasonable times and upon reasonable notice examine the records of any person to determine whether the person has complied with the provisions of this article. The commissioner may conduct the examination even if the person believes it is not

in possession of any property reportable or deliverable under this article.

(c) If a holder fails to maintain the records required by Code Section 44-12-228 and the records of the holder available for the periods subject to this article are insufficient to permit the preparation of a report, the holder shall be required to report and pay such amounts as may reasonably be estimated from any available records.

History.
Code 1981, § 44-12-229, enacted by Ga. L. 1990, p. 1506, § 1.

44-12-230. Employment of independent consultant.

The commissioner may employ the services of such independent consultants, and other persons possessing specialized skills or knowledge as he shall deem necessary or appropriate for the administration of this article, including, but not limited to, valuation, maintenance, upkeep, management, sale and conveyance of property, and determination of sources of unreported abandoned property.

History.
Code 1981, § 44-12-230, enacted by Ga. L. 1990, p. 1506, § 1.

44-12-231. Enforcement of article; properties not paid over on a timely basis.

(a) The commissioner may bring an action in a court of competent jurisdiction to enforce this article. Notwithstanding the provisions of Code Section 44-12-214, the commissioner shall commence enforcement for the reporting, payment, or delivery of property presumed abandoned under this article, with the exception of property held in a fiduciary capacity, not later than seven years from the date the property is presumed abandoned.

(b) Properties due and owing under this Code section and not paid over to the commissioner on a timely basis shall be paid upon notice and demand by the commissioner or the commissioner's delegate and shall be assessed and collected in the manner provided for assessment and collection of state taxes in Chapters 2, 3, and 4 of Title 48. The commissioner is authorized to issue an execution for the amounts due as provided in Code Section 48-3-1. The remedies specified in this subsection shall be in addition to all other remedies provided for in this article.

History.
Code 1981, § 44-12-231, enacted by Ga. L. 1990, p. 1506, § 1; Ga. L. 1993, p. 1813, § 1.

44-12-232. Article does not relieve holder of duty that arose before July 1, 1990.

(a) This article does not relieve the holder of a duty that arose before July 1, 1990, to report, pay, or deliver property. A holder who did not comply with the law in effect before July 1, 1990, is subject to the applicable enforcement and penalty provisions that then existed and they are continued in effect for the purpose of this subsection, subject to Code Section 44-12-227.

(b) The initial report filed under this article for property that was not required to be reported before July 1, 1990, but which is subject to this article must include all items of property that would have been presumed abandoned during the ten-year period preceding July 1, 1990, as if this article had been in effect during that period.

History.
Code 1981, § 44-12-232, enacted by Ga. L. 1990, p. 1506, § 1.

44-12-233. Receipt of securities under this article.

Whenever the commissioner shall receive securities under this article in the name of the owner, he shall forthwith take appropriate action to transfer the record of ownership of said securities into the name of the commissioner.

History.
Code 1981, § 44-12-233, enacted by Ga. L. 1990, p. 1506, § 1.

44-12-234. Property in foreign country or arising out of foreign transaction.

This article does not apply to any property held, due, and owing in a foreign country and arising out of a foreign transaction.

History.
Code 1981, § 44-12-234, enacted by Ga. L. 1990, p. 1506, § 1.

44-12-235. Rules and regulations.

The commissioner may make necessary rules and regulations to carry out the provisions of this article.

History.
Code 1981, § 44-12-235, enacted by Ga. L. 1990, p. 1506, § 1.

44-12-236. Alternative method of disposition with respect to certain dividends or capital credits which are presumed abandoned; definitions; procedures.

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

(1) "Approved uses" means:

(A) Donated to an Internal Revenue Code Section 501(c)(3) organization serving in the electric membership corporation's service area;

(B) Used in support of education in the electric membership corporation's service area; or

(C) Used for economic development purposes in the electric membership corporation's service area.

(2) "Electric membership corporation's service area" means any county in which the electric membership corporation provides electric service and any county adjacent thereto.

(b) All patronage dividends or capital credits presumed abandoned pursuant to this article in a given calendar year that are held by an electric membership corporation organized and operating pursuant to Article 4 of Chapter 3 of Title 46 may, in lieu of payment of delivery to the commissioner pursuant to this article, be donated for approved uses if the electric membership corporation has:

(1) Maintained for at least six months on the electric membership corporation's website or on a public posting in the electric membership corporation's main office a list of the names and last known addresses of all owners of property held by the electric membership corporation which has been presumed abandoned, together with instructions on how to claim such property; and

(2) Published in the legal organ in the county in which the electric membership corporation's main office is located notice of the last date to claim property that has been presumed abandoned. Such notice shall be published within three to six months prior to the last date to claim the property and shall state that the names of the owners may be found at the electric membership corporation's website or the main office.

History.

Code 1981, § 44-12-236, enacted by Ga. L. 2005, p. 792, § 1/HB 431; Ga. L. 2020, p. 493, § 44/SB 429.

The 2020 amendment, effective July 29, 2020, part of an Act to revise, modernize, and correct the Code, substituted "this Code section" for "the Code section" in subsection (a).

44-12-236.1. Donation of abandoned dividends or capital credits by rural telephone cooperatives for certain purposes.

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

(1) "Area" means any county in which a telephone cooperative provides telephone service and any county adjacent thereto.

(2) "Telephone cooperative" shall have the same meaning as provided for the term "cooperative" in Code Section 46-5-62.

(3) "Telephone service" shall have the same meaning as provided for in Code Section 46-5-62.

(b) All patronage dividends or capital credits held by a telephone cooperative that are presumed abandoned pursuant to this article in a given calendar year may, in lieu of payment of delivery to the commissioner pursuant to this article, be donated to a nonprofit organization exempt from taxation under Section 501(c)(3) of the Internal Revenue Code that supports education or economic development in the area if the telephone cooperative has:

(1) Maintained for at least six months on the telephone cooperative's website or on a public posting in the telephone cooperative's main office, a list of the names and last known addresses of all owners of property held by the telephone cooperative that have been presumed abandoned, together with instructions on how to claim such property; and

(2) Published in the legal organ in the county in which the telephone cooperative's main office is located notice of the last date to claim property that has been presumed abandoned. Such notice shall be published within three to six months prior to the last date to claim the property and shall state that the names of the owners may be found at the telephone cooperative's website or main office.

History.
Code 1981, § 44-12-236.1, enacted by Ga. L. 2017, p. 352, § 6/SB 46.

44-12-237. Unclaimed United States Savings Bond.

(a) Notwithstanding the provisions of subsection (a) of Code Section 44-12-216, United States savings bonds which are unclaimed property and subject to the provisions of Code Section 44-12-190, et seq., the "Disposition of Unclaimed Property Act," shall escheat to the State of Georgia three years after becoming unclaimed property and subject to the provisions of Code Section 44-12-190, et seq., and all property rights

to such United States savings bonds or proceeds from such bonds shall vest solely in the State of Georgia.

(b) If, within 180 days after the passage of three years pursuant to subsection (a) of this Code section, no claim has been filed in accordance with the provisions of Code Section 44-12-190, et seq., for such United States savings bonds, the commissioner shall commence a civil action in the Superior Court of Fulton County for a determination that such United States savings bonds shall escheat to the state. The commissioner may postpone the bringing of such action until sufficient United States savings bonds have accumulated in the commissioner's custody to justify the expense of such proceedings.

(c) If no person shall file a claim or appear at the hearing to substantiate a claim or if the court shall determine that a claimant is not entitled to the property claimed, then the court, if satisfied by evidence that the commissioner has substantially complied with the laws of this state, shall enter a judgment that the subject United States savings bonds have escheated to the state.

(d) The commissioner shall redeem such United States savings bonds, and the proceeds shall be deposited in the state general fund in accordance with the provisions of Code Section 44-12-218.

History.
Code 1981, § 44-12-237, enacted by Ga. L. 2015, p. 937, § 2/HB 322.

44-12-238. Claim for United States savings bonds escheated to state.

Any person making a claim for the United States savings bonds escheated to the state under Code Section 44-12-237, or for the proceeds from such bonds, may file a claim in accordance with the provisions of Code Section 44-12-190, et seq., the "Disposition of Unclaimed Property Act." Upon providing sufficient proof of the validity of such person's claim, the commissioner may pay such claim in accordance with the provisions of Code Section 44-12-190, et seq.

History.
Code 1981, § 44-12-238, enacted by Ga. L. 2015, p. 937, § 2/HB 322.

ARTICLE 6
FALLING PECANS

RESEARCH REFERENCES

ALR.
Ungathered fruit as subject of conversion or action of trover, 63 A.L.R. 230.

JUDICIAL DECISIONS

Contract to harvest pecans anticipating future lease. — Contract for the harvest of pecans was enforceable, although the lessor had not yet purchased the orchard and the parties planned to sign a lease, because the contract identified the parties, the property, the consideration, and the lease term; the lessee therefore could not recover on theories of unjust enrichment or money had and received. Cook Pecan Co. v. McDaniel, 344 Ga. App. 370, 810 S.E.2d 186, 2018 Ga. App. LEXIS 36 (2018).

44-12-240. Definitions.

As used in this article, the term:

(1) "Harvesting season" means that portion of each calendar year beginning on October 1 and ending on December 31.

(2) "Owner" means the person, firm, or corporation owning the land on which pecan trees are growing or the person, firm, or corporation having legal possession of the land.

History.
Ga. L. 1976, p. 272, § 2.

RESEARCH REFERENCES

Am. Jur. 2d.
63 Am. Jur. 2d, Property, § 31.

C.J.S.
73 C.J.S., Property, § 24 et seq.

44-12-241. Pecans falling on public right of way; ownership during harvest season; picking pecans from tree limbs without permission; penalty.

(a) When pecan trees are grown on private property and the branches of the trees extend over public roads, streets, or highway rights of way, any pecans falling from any such pecan trees onto the public rights of way shall be the property of the owner of the pecan trees until the end of the harvesting season; and it shall be unlawful for any person to remove the pecans from any public rights of way during the harvesting season without the permission of the owner of the trees.

(b) It shall be unlawful for any person, without the permission of the

owner of pecan trees grown on private property, to pick or otherwise remove any pecans from the limbs or branches of the trees or to cause pecans to fall from the trees.

(c) Any person who violates this Code section shall be guilty of a misdemeanor.

History.
Ga. L. 1976, p. 272, §§ 1, 5; Ga. L. 1982, p. 3, § 44.

RESEARCH REFERENCES

Am. Jur. 2d.
63 Am. Jur. 2d, Property, § 1.

C.J.S.
73 C.J.S., Property, § 24 et seq.

44-12-242. Pecans on public right of way; removal out of harvest season.

Any pecans remaining on public roads, streets, or highway rights of way during any portion of the calendar year except the harvesting season shall be deemed to be abandoned by the owner of the pecans; and it shall not be unlawful for any person to remove such pecans from such public rights of way.

History.
Ga. L. 1976, p. 272, § 3.

RESEARCH REFERENCES

Am. Jur. 2d.
63 Am. Jur. 2d, Property, § 43.

C.J.S.
73 C.J.S., Property, § 31 et seq.

44-12-243. Effect of article on maintenance of public rights of way; harvest on limited access highways.

This article shall not be construed to prohibit employees of the Department of Transportation or the employees of a county or municipality from engaging in normal activities of maintenance on the rights of way of public roads, streets, or highways; nor shall this article be construed to grant the owner of any pecan trees the right to harvest pecans from the right of way of any interstate or other limited access highway.

History.
Ga. L. 1976, p. 272, § 4.

RESEARCH REFERENCES

Am. Jur. 2d.
73 Am. Jur. 2d, Statutes, § 60 et seq.

C.J.S.
82 C.J.S., Statutes, § 306 et seq.

ARTICLE 7

PROTECTION OF AMERICAN INDIAN HUMAN REMAINS AND BURIAL OBJECTS

Cross references.
Protection of archeological, aboriginal, prehistoric, and historic sites, § 12-3-620 et seq.

PART 1

AMERICAN INDIAN HUMAN REMAINS AND BURIAL OBJECTS HELD BY MUSEUMS

44-12-260. Definitions.

As used in this article, the term:

(1) "American Indian" means an individual who is a member of a nation, tribe, band, group, or community that was indigenous to Georgia; is a descendant of persons named as American Indians in the Georgia Senate Bill 89, enacted during the legislative session of 1839 (Ga. L. 1839, p. 374); or is a descendant of persons included in the United States Indian Claims Commission, Docket 21, 1962, and those sequel dockets pertaining to the Creek Nation east of the Mississippi River.

(2) "American Indian tribe" means any nation, tribe, band, group, or community that was indigenous to Georgia and is recognized as eligible for the special programs and services provided by the United States to Indians because of its status as Indian; or whose members are descendants of American Indians indigenous to Georgia.

(3) "Burial object" means an object that, as a part of the death rite or ceremony of a culture, is reasonably believed to have been placed with individual human remains either at the time of death or later. Such term includes any item defined in paragraph (4) of Code Section 36-72-2 and may also include but not be limited to urns; whole or broken ceramic, metal, or glass vessels; chipped stone tools; ground stone tools; worked bone and shell items; clothing; medals; buttons; jewelry; firearms; edged weapons; and the caskets or containers for the human remains.

(4) "Burial site" or "burial ground" means an area dedicated to and used for interment of human remains. The fact that the area was used for burial purposes shall be evidence that it was set aside for burial purposes. Such a site may be any natural or prepared physical location, whether originally below, on, or above the surface of the earth, into which, as a part of the death rite or ceremony of a culture, individual human remains are deposited. Such term does not include any cemetery required to be registered with the Secretary of State pursuant to Code Section 10-14-4.

(5) "Council" means the Council on American Indian Concerns established by Code Section 44-12-280.

(6) "Cultural affiliation" means that there is a relationship of shared group identity which can be reasonably traced historically or prehistorically between a present day Indian tribe and an identifiable earlier group.

(7) "Human remains" means the bodies of deceased human beings in any stage of decomposition, including cremated remains.

(8) "Inventory" means a simple itemized list that summarizes the information called for by this article.

(9) "Museum" means any institution or state or local government agency or any institution of higher learning that is not included in paragraph (8) of Section 2 of Public Law 101-601.

History.
Code 1981, § 44-12-260, enacted by Ga. L. 1992, p. 1790, § 6; Ga. L. 1993, p. 91, § 44; Ga. L. 2000, p. 882, § 6.

Code Commission notes.
Pursuant to Code Section 28-9-5, in 1992, a superfluous "the" was deleted preceding "special" in paragraph (2).

44-12-261. Inventory of American Indian human remains or burial objects in possession of museum; additional documentation upon request of American Indian tribe; construction of part; extension of time to complete inventory and identification; notification of affected tribes.

(a) Any museum having possession or control over holdings or collections of American Indian human remains or burial objects shall compile an inventory of such items and, to the extent possible based on information possessed by such museum, identify the geographical and cultural affiliation of such items.

(b) The inventory and identification required under subsection (a) of this Code section shall be:

(1) Completed in consultation with American Indian tribes;

(2) Completed by not later than July 1, 1997; and

(3) Made available to the Secretary of State and the council both during the time conducted and afterward.

(c) Upon the request of any American Indian tribe, a museum shall supply additional available documentation to supplement the information required by subsection (a) of this Code section. Such documentation shall consist of a summary of existing museum records, including inventories or catalogs, relevant studies, and other pertinent data for the limited purpose of determining the geographical origin, cultural

affiliation, and basic facts surrounding the acquisition and accession of American Indian human remains and burial objects subject to this Code section.

(d) This part shall not be construed to be an authorization for the initiation of new scientific studies of human remains and burial objects or the initiation of any other method of acquiring or preserving additional scientific information from such remains and objects.

(e) Any museum which has made a good faith effort to carry out an inventory and identification under this Code section, but which has been unable to complete the process, may appeal to the Secretary of State for an extension of the time requirement set forth in paragraph (2) of subsection (b) of this Code section. The Secretary of State may once grant an extension of up to one year for any such museum upon a finding of good faith effort. An indication of good faith shall include the development of a plan to carry out the inventory and identification process.

(f) If the cultural affiliation of any particular American Indian human remains or burial objects is determined pursuant to this Code section, the museum concerned shall not later than six months after the completion of the inventory notify the affected American Indian tribes. The notice shall include information:

(1) Which identifies or describes each American Indian human remains or burial object and the circumstances surrounding its acquisition;

(2) Which lists the human remains or burial objects that are clearly identifiable as to tribal origin; and

(3) Which lists the American Indian human remains and burial objects that are not clearly identifiable as being culturally affiliated with that Indian tribe, but which, given the totality of circumstances surrounding acquisition of the remains or objects, are determined by a reasonable belief to be remains or objects culturally affiliated with the Indian tribe.

A copy of each notice shall be sent to the Secretary of State and to the Council on American Indian Concerns.

History.
Code 1981, § 44-12-261, enacted by Ga. L. 1992, p. 1790, § 6.

44-12-262. Return of human remains and burial objects upon request of known lineal descendant or tribe; immunity of museum for returns made in good faith; private collections of artifacts not containing burial objects.

(a) Upon the request of a known lineal descendant of the particular American Indian or, if a cultural affiliation is established between a particular American Indian tribe and particular human remains or burial objects, the request of the tribe, and pursuant to subsections (d) and (e) of this Code section, the museum shall expeditiously return such remains and objects. However, no human remains or burial objects shall be repatriated outside of the State of Georgia unless claimed by a known lineal descendant of the deceased person, as proved by clear and convincing evidence.

(b) The return of human remains and burial objects covered by this part shall be in consultation with the requesting descendant or tribe to determine the place and manner of delivery of such items.

(c) Where cultural affiliation between an American Indian tribe and human remains or burial objects has not been established in an inventory prepared pursuant to Code Section 44-12-261, such American Indian tribe can establish cultural affiliation by a preponderance of the evidence based upon geographical, kinship, biological, archeological, anthropological, linguistic, folkloric, oral tradition, historical, or other relevant information or expert opinion.

(d) If either a lineal descendant of the deceased person or an American Indian tribe culturally affiliated with human remains or burial objects requests the return of such American Indian human remains or burial objects, the museum shall expeditiously return such items unless such items are indispensable for the completion of a specific scientific study, the outcome of which would be of major benefit to the State of Georgia, as determined by the Secretary of State and the council. Such items shall be returned by no later than 120 days after the date on which scientific study is completed. If the Secretary of State and the council cannot agree on the benefit of the scientific study, then they shall each appoint one representative to serve on a committee created and convened for the sole purpose of resolving the issue. The Governor shall appoint a person to chair the committee. Such person may not be an employee of the Secretary of State or a member of the council. The chairperson may vote to break a tie.

(e) When there are multiple requests for repatriation of any American Indian human remains or burial objects and after complying with the requirements of this part the museum cannot clearly determine which requesting party is the most appropriate claimant, the museum

may retain such item until the requesting parties agree upon its disposition or the dispute is resolved pursuant to the provisions of this article or in a court of competent jurisdiction.

(f) Any museum which repatriates any American Indian human remains or burial objects in good faith pursuant to this part shall not be liable for claims by an aggrieved party or for claims of breach of fiduciary duty or public trust.

(g) Nothing in this Code section shall require private citizens to surrender artifact collections that do not contain burial objects.

History.
Code 1981, § 44-12-262, enacted by Ga. L. 1992, p. 1790, § 6.

44-12-263. Monitoring and review of inventory, identification, and repatriation activities.

The council shall monitor and review the implementation of inventory and identification process and repatriation activities required under Code Sections 44-12-261 and 44-12-262 to ensure a fair, objective consideration and assessment of all available relevant information and evidence.

History.
Code 1981, § 44-12-263, enacted by Ga. L. 1992, p. 1790, § 6.

44-12-264. Penalties for violation of Code Sections 44-12-261 and 44-12-262.

(a) Any museum which fails to comply with the provisions of Code Section 44-12-261 or 44-12-262 shall be subject to a civil penalty to be imposed by the council. The amount of such penalty shall be based upon:

(1) The archeological, historical, or commercial value of the item involved;

(2) The damages suffered, both economic and noneconomic, by an aggrieved party; and

(3) The number of violations that have occurred

but in no event shall the aggregate amount of such civil penalty exceed $5,000.00.

(b) Whenever the council proposes to subject a person to the imposition of a civil penalty under this Code section, the council shall notify such person in writing:

(1) Setting forth the date, facts, and nature of each act or omission with which the person is charged;

(2) Specifically identifying the particular provision or provisions of the Code section, rule, regulation, order, license, or registration certificate involved in the violation; and

(3) Advising of each penalty which the council proposes to impose and its amount.

Such written notice shall be sent by registered or certified mail or statutory overnight delivery by the council to the last known address of such person. The person so notified shall be granted an opportunity to show in writing, within such reasonable period as the council shall by rule or regulation prescribe, why such penalty should not be imposed. The notice shall also advise such person that, upon failure to pay the civil penalty subsequently determined by the council, if any, the penalty may be collected by civil action. Any person upon whom a civil penalty is imposed may appeal such action pursuant to Chapter 13 of Title 50, the "Georgia Administrative Procedure Act."

(c) A civil penalty finally determined under this Code section may be collected by civil action in the event that such penalty is not paid as required. On the request of the council, the Attorney General is authorized to institute a civil action to collect a penalty imposed pursuant to this Code section. The Attorney General shall have the exclusive power to compromise, mitigate, or remit such civil penalties as are referred to the Attorney General for collection.

(d) All moneys collected from civil penalties shall be paid to the state for deposit in the general fund.

History.
Code 1981, § 44-12-264, enacted by Ga. L. 1992, p. 1790, § 6; Ga. L. 2000, p. 1589, § 3; Ga. L. 2002, p. 632, § 1.

Editor's notes.
Ga. L. 2000, p. 1589, § 16, not codified by the General Assembly, provided that the Act is applicable with respect to notices delivered on or after July 1, 2000.

Part 2

Council on American Indian Concerns

44-12-280. Council on American Indian Concerns created; membership; assignment for administrative purposes; terms of office; removal for failure to attend meetings.

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

(1) "Anthropologist" means a physical anthropologist who holds a

Ph.D. in physical anthropology with demonstrated experience in on-site identification of human skeletal remains and who is currently active in the profession.

(2) "Archeologist" means any person who:

(A) Is a member of or meets the criteria for membership in the Society of Professional Archaeologists and can demonstrate experience or formal training in the excavation and interpretation of human graves; or

(B) Was employed on July 1, 1992, by the state or by any county or municipal governing authority as an archeologist.

(b) There is created the Council on American Indian Concerns, which shall consist of nine members to be appointed by the Governor. Five members shall be American Indians. Three members shall represent the scientific community and shall include at least one archeologist and one anthropologist; provided, however, that if no anthropologist can be identified who is willing to serve, then the membership reserved to an anthropologist shall be filled by a person who holds a master's degree or a higher degree in the field of anthropology and is currently active in the profession. One member shall be selected from the general public at large. All members of the council shall be legal residents of the State of Georgia. The Governor shall consult the tribal groups located in the state recognized by general law, the Human Relations Commission, the Georgia Council of Professional Archaeologists, the Society for Georgia Archaeology, and the Department of Natural Resources for recommendations before appointing members of the council.

(c) The council is assigned to the Department of Natural Resources for administrative purposes only, as specified in Code Section 50-4-3.

(d) The terms of appointment for members of the council shall be as follows: two American Indians, one scientist, and one representative of the general public shall be appointed for an initial term of three years; two American Indians, one scientist, and one representative of the general public shall be appointed for an initial term of two years; and one scientist shall be appointed for an initial term of one year. The member who represents the general public and who has the least time left in his or her term on July 1, 2002, shall cease to be a member on that date, and a member who is an American Indian shall be appointed to take office on that day for a term of three years. The Governor shall specify the length of the initial term of the councilmembers in their initial appointments. After such initial terms, all councilmembers shall be appointed for terms of three years. Active and continued participation by members of the council is needed. The Governor may remove any member who fails to attend three regularly scheduled consecutive meetings. Councilmembers may succeed themselves.

History.
Code 1981, § 44-12-280, enacted by Ga. L. 1992, p. 1790, § 6; Ga. L. 2002, p. 632, § 2; Ga. L. 2017, p. 212, § 1/HB 153.

Law reviews.
For annual survey on administrative law, see 69 Mercer L. Rev. 15 (2017).

44-12-281. Compensation and expenses.

Councilmembers shall receive no compensation for their services but shall be reimbursed for their actual travel and expenses necessarily incurred in the performance of their duties for each day such member of the council is in attendance at a meeting of the council.

History.
Code 1981, § 44-12-281, enacted by Ga. L. 1992, p. 1790, § 6.

44-12-282. Chairperson; meetings; quorum.

Annually, the councilmembers shall elect a chairperson for a term of one year. The council shall meet as frequently as needed to perform its duties, upon the call of the council chairperson. Five councilmembers shall constitute a quorum to conduct business.

History.
Code 1981, § 44-12-282, enacted by Ga. L. 1992, p. 1790, § 6.

44-12-283. Powers and duties of council.

The council shall have the following powers and duties:

(1) To serve as a resource for the notification of relatives under paragraph (4) of Code Section 36-72-5, relating to notification of relatives pursuant to obtaining a permit for land use change or disturbance; provided, however, that failure of the council to respond within 30 days to a request to serve as a resource for the notification shall not prevent the notification process or any permit process from taking place;

(2) To receive notice of permits issued and contracts issued under subsection (c) of Code Section 12-3-52 that affect aboriginal, prehistoric, or American Indian burial sites;

(3) To monitor the inventory and identification process conducted under Code Section 44-12-261 to ensure a fair, objective consideration and assessment of all available relevant information and evidence;

(4) To facilitate the resolution of disputes among American Indian tribes, lineal descendants of American Indians, and museums relating to the return of American Indian remains and burial objects pursuant to Code Section 44-12-262, including convening the parties to the dispute;

(5) To advise the Department of Natural Resources, the General Assembly, the Human Relations Commission, the Secretary of State, local political subdivisions, state and local law enforcement agencies, and other appropriate agencies and individuals regarding policy matters relating to issues affecting American Indians;

(6) To apply for and receive grants, gifts, and direct appropriations from the federal government; the state government; any county, municipal, or local government; any board, bureau, commission, agency, or establishment of any such government; any other organization, public or private; and any individual or groups of individuals; and

(7) To preserve and foster the culture and heritage of Indians and Indian descendants in this state and to be the agency to deal with specific federal programs which are required to be dealt with only by an Indian agency or organization.

History.
Code 1981, § 44-12-283, enacted by Ga. L. 1992, p. 1790, § 6; Ga. L. 2002, p. 632, § 3.

44-12-283.1. Additional powers of council.

In addition to any other powers granted by law, the council may, in its discretion, study, consider, accumulate, compile, assemble, and disseminate information on any aspect of Indian affairs; investigate relief needs of Indians in Georgia and provide technical assistance in the preparation of plans for the alleviation of such needs; confer with appropriate officials of local, state, and federal governments, and agencies of these governments, and with such congressional committees that may be concerned with Indian affairs, in order to encourage and implement coordination of applicable resources to meet the needs of Indians in Georgia; cooperate with and secure the assistance of the local, state, and federal governments, or any agencies thereof, in formulating any such programs and coordinate such programs with any programs regarding Indian affairs adopted or planned by the federal government, to the end that the department secures the full benefit of such programs; review all proposed or pending state legislation and amendments to existing state legislation affecting Indians in Georgia; conduct public hearings on matters relating to Indian affairs; study the existing status of recognition of all Indian groups, tribes, and communities presently existing in the state; expend funds in compliance with state regulations; and make legislative recommendations.

History.
Code 1981, § 44-12-283.1, enacted by Ga. L. 2002, p. 632, § 3.

44-12-283.2. Council authorized to promulgate rules and regulations; notification requirement.

The council is authorized to promulgate rules and regulations to accomplish the provisions of this article in accordance with Chapter 13 of Title 50, the "Georgia Administrative Procedure Act." The council is expressly prohibited from engaging in any activity which would tend to assist the implementation of Indian gaming in this state, and the council shall immediately notify in writing the Governor, the President of the Senate, and the Speaker of the House of Representatives of any communication it may receive from any source relating to such subject.

History.
Code 1981, § 44-12-283.2, enacted by Ga. L. 2002, p. 632, § 3.

44-12-284. Delegation of duties; professional, technical, and clerical personnel.

The council may delegate duties to one or more councilmembers or agents. The council is authorized to obtain the services of such professional, technical, and clerical personnel as may be necessary to enable it to carry out its functions under this part and to contract for such services as may be necessary to enable the council to carry out its responsibilities.

History.
Code 1981, § 44-12-284, enacted by Ga. L. 1992, p. 1790, § 6.
Code Commission notes.
Pursuant to Code Section 28-9-5, in 1992, "its responsibilities" was substituted for "it responsibilities" at the end of the last sentence.

44-12-285. Annual report.

The council shall make an annual report of its activities to the Governor.

History.
Code 1981, § 44-12-285, enacted by Ga. L. 1992, p. 1790, § 6.

Part 3

Legitimate American Indian Tribes

Cross references.
Proceeding pertaining to Indian child exempted from Uniform Child Custody Jurisdiction and Enforcement Act, § 19-9-43.

Law reviews.
For comment, "Lawless by Design: Jurisdiction, Gender and Justice in Indian Country," see 59 Emory L. J. 1515 (2010).

RESEARCH REFERENCES

ALR.
Treaties Between United States and Indian Tribes — Supreme Court Jurisprudence, 51 A.L.R. Fed. 3d 4.

44-12-300. Tribes, bands, groups, or communities recognized by state as legitimate American Indian Tribes.

(a) The State of Georgia officially recognizes as legitimate American Indian tribes of Georgia the following tribes, bands, groups, or communities:

(1) The Georgia Tribe of Eastern Cherokee
P.O. Box 1993
Dahlonega, Georgia 30533;

(2) The Lower Muscogee Creek Tribe
Route 2, Box 370
Whigham, Georgia 31797; and

(3) The Cherokee of Georgia Tribal Council
Saint George, Georgia 31646.

(b) The General Assembly may recognize tribes, bands, groups, or communities other than those stated in subsection (a) of this Code section as the General Assembly deems appropriate.

History.
Code 1981, § 44-12-300, enacted by Ga. L. 1993, p. 1813, § 2.

Editor's notes.
By resolution, (Ga. L. 2022, p. 684/SR 504), provides that the Georgia Building Authority is authorized and directed to plant a Georgia red cedar tree upon state capitol grounds in recognition of Native American Honor Day and the three Native American tribes of Georgia.

Law reviews.
For comment, "Lawless by Design: Jurisdiction, Gender and Justice in Indian Country," see 59 Emory L. J. 1515 (2010).

OPINIONS OF THE ATTORNEY GENERAL

Indian tribe not public entity. — The Georgia Tribe of Eastern Cherokee Indians is not a "public agency, public corporation, or public authority" as the phrase is used in Ga. Const. 1983, Art. IX, Sec. III, Para. I. 1995 Op. Att'y Gen. No. U95-21.

ARTICLE 8

DIE, MOLDS, FORMS, AND PATTERNS

Editor's notes.
Ga. L. 1999, p. 862, § 4, not codified by the General Assembly, provided that the Act shall not impair the obligation of any contract entered into prior to July 1, 1999.

PART 1

IN GENERAL

44-12-310. Definitions.

As used in this article, the term:

(1) "Customer" means any individual or entity who causes or caused a molder to fabricate, cast, or otherwise make a die, mold, form, or pattern or who provides a molder with a die, mold, form, or pattern to manufacture, assemble, cast, fabricate, or otherwise make a product or products for a customer.

(2) "Molder" means any individual or entity who fabricates, casts, or otherwise makes or uses a die, mold, form, or pattern for the purpose of manufacturing, assembling, casting, fabricating, or otherwise making a product or products for a customer. "Molder" includes, but is not limited to, a tool or die maker.

(3) "Within three years following the last prior use" shall include any three-year period following the last prior use of a die, mold, form, or pattern regardless of whether or not any portion of such period precedes July 1, 1999.

History.
Code 1981, § 44-12-310, enacted by Ga. L. 1999, p. 862, § 1; Ga. L. 2000, p. 136, § 44.

Code Commission notes.
Pursuant to Code Section 28-9-5, in 1999, "July 1, 1999" was substituted for "the effective date of this article" in paragraph (3).

44-12-311. Rights and title; transfer to molder.

(a) In the absence of any agreement to the contrary, the customer shall have all rights and title to any die, mold, form, or pattern in the possession of the molder.

(b) If a customer does not claim possession from a molder of a die, mold, form, or pattern within three years following the last prior use, all rights and title to any die, mold, form, or pattern shall be transferred by operation of law to the molder for the purpose of destroying or otherwise disposing of such die, mold, form, or pattern, consistent with this Code section.

(c) If a molder chooses to have all rights and title to any die, mold, form, or pattern transferred to the molder by operation of law, the molder shall send written notice by registered mail or statutory overnight delivery to the chief executive officer of the customer or, if the customer is not a business entity, to the customer at the customer's last known address, indicating that the molder intends to terminate the

customer's rights and title by having all such rights and title transferred to the molder by operation of law pursuant to this Code section. Such notice shall include a statement of the customer's rights as set forth in subsection (d) of this Code section.

(d)(1) If a customer does not respond in person or by mail to claim possession of the particular die, mold, form, or pattern within 120 days following the date the notice was sent, or does not make other contractual arrangements with the molder for storage of the die, mold, form, or pattern, all rights and title of the customer, except patents and copyrights, shall transfer by operation of law to the molder. Thereafter, the molder may destroy or otherwise dispose of the particular die, mold, form, or pattern as the molder's own property without any risk of liability to the customer.

(2) This Code section shall not in any manner affect any right of the customer under federal patent or copyright law or federal law pertaining to unfair competition.

History.
Code 1981, § 44-12-311, enacted by Ga. L. 1999, p. 862, § 1; Ga. L. 2000, p. 1589, § 4.

Editor's notes.
Ga. L. 2000, p. 1589, § 16, not codified by the General Assembly, provided that the Act is applicable with respect to notices delivered on or after July 1, 2000.

Part 2

Molders' Liens

44-12-320. Lien created; notice; enforcement; public auction authorized.

(a) Molders shall have a lien, dependent on possession, on all dies, molds, forms, or patterns in their hands belonging to a customer, for the balance due them from such customer for any manufacturing or fabrication work related to the property on which the molder claims the lien. Such liens shall attach upon the commencement of work by the molder and shall be subject to any prior perfected security interest in such property as of the commencement date. The molder may retain possession of the die, mold, form, or pattern until the charges are paid or until repossessed by a creditor with a prior perfected security interest.

(b) Before enforcing such lien, notice in writing shall be given to the customer, whether delivered personally or sent by registered mail or statutory overnight delivery to the last known address of the customer. Such notice shall state that a lien is claimed for the damages set forth in or attached to such writing for manufacturing or fabrication work

contracted or performed for the customer. Such notice shall also include a demand for payment.

(c) A lien may not be enforced under this part if the customer, within the time period provided in subsection (d) of this Code section, notifies the molder that the products fail to meet an approved quality control plan, the products deviated from approved samples, or the products deviated from previously accepted parts and the customer returns the products within 60 days after the date on which the products are delivered to the customer.

(d) If the molder has not been paid the amount due within 60 days after the notice has been received by the customer as provided in subsection (b) of this Code section and the products have not been returned to the molder within 60 days after the date on which the products are delivered to the customer because of a defective condition as provided in subsection (c) of this Code section, the molder may sell the die, mold, form, or pattern at a public auction.

(e) In no event shall the amount of the lien established by this Code section exceed the contract price of services performed by the molder.

History.
Code 1981, § 44-12-320, enacted by Ga. L. 1999, p. 862, § 1; Ga. L. 2000, p. 1589, § 4.

Code Commission notes.
Pursuant to Code Section 28-9-5, in 1999, a comma was deleted in the last sentence of subsection (a).

Editor's notes.
Ga. L. 2000, p. 1589, § 16, not codified by the General Assembly, provided that the Act is applicable with respect to notices delivered on or after July 1, 2000.

44-12-321. Notice before sale of property; violation of certain rights prohibited.

(a) Before a molder may sell a die, mold, form, or pattern, pursuant to subsection (c) of Code Section 44-12-320, the molder shall notify the customer by registered mail or statutory overnight delivery, return receipt requested. The notice shall include the following information:

(1) The molder's intention to sell the die, mold, form, or pattern 30 days after the customer's receipt of the notice;

(2) A description of the die, mold, form, or pattern to be sold;

(3) The time and place of the sale; and

(4) An itemized statement for the amount due.

(b) If there is no return of the receipt of the mailing or if the postal service returns the notice as being nondeliverable, the molder shall publish notice of the molder's intention to sell the die, mold, form, or pattern in a newspaper of general circulation in the county of the

customer's last known place of business. The notice shall include a description of the die, mold, form, or pattern.

(c) A sale shall not be made under this Code section if such sale would violate any right of a customer under federal patent or copyright law.

History.
Code 1981, § 44-12-321, enacted by Ga. L. 1999, p. 862, § 1; Ga. L. 2000, p. 1589, § 4.
Editor's notes.
Ga. L. 2000, p. 1589, § 16, not codified by the General Assembly, provided that the Act is applicable with respect to notices delivered on or after July 1, 2000.

44-12-322. Effect of part on other laws of this state.

In the event of any conflict between the provisions of this part and the provisions of Articles 7 and 8 of Chapter 14 of this title, the provisions of this part shall control.

History.
Code 1981, § 44-12-322, enacted by Ga. L. 1999, p. 862, § 1.

CHAPTER 13

EXEMPTIONS FROM LEVY AND SALE

Article 1

Constitutional Exemptions

Part 1

In General

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44-13-1. Amount of exemption; who may claim exemption; what charges enforceable.

44-13-1.1. "Dependent" defined.

44-13-2. Application for exemption by spouse, minor children or representative of dependents upon debtor's refusal to apply.

44-13-3. Supplementation of exemption.

44-13-4. Application for exemptions; to whom made; contents; schedule of property and list of creditors; effect of failure to comply; survey.

44-13-5. Survey of lands in different county.

44-13-6. Duty to provide full schedule of property; effect of fraudulent omissions.

44-13-7. Publication of notice of application; form.

44-13-8. Written notice to creditors; how given.

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44-13-10. Survey of exempted real property; affidavit of surveyor; return to probate court; objection to survey; failure of surveyor to comply as contempt.

44-13-11. Approval of application; transmittal of copy of exempted real property to other counties; recordation.

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Sec.
tion of exempted real property from execution; levy and sale by officer; effect of debtor's counteraffidavit.
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44-13-63. Levy or sale of exempted real property as trespass; persons entitled to recovery.

PART 4

SALE OF EXCESS PROPERTY BY RECEIVER

44-13-80. Appointment of receiver to sell excess realty.
44-13-81. Delivery of excess personalty to receiver for disposition.
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Article 2

Statutory Exemptions

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44-13-101. Method of obtaining exemption.
44-13-102. Survey and plat of exempted land; return to probate court; recordation.
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44-13-104. Town property worth more than $500.00; sale and reinvestment.
44-13-105. Sale of property subject to encumbrance of homestead.
44-13-106. Use of exempted property.
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Article 3

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44-13-120. Rights of Georgia residents.

Cross references.

Exemptions from levy and sale, Ga. Const. 1983, Art. I, Sec. I, Para. XXVI.

Executions and judicial sales generally, T. 9, C. 13.

Exemption of homestead for ad valorem tax purposes, § 48-5-44 et seq.

Law reviews.

For article discussing homestead rights as a means of protecting decedent's surviving spouse and children, see 10 Ga. L. Rev. 447 (1976).

For article, "Georgia's New Bankruptcy Exemptions," see 17 Ga. St. B.J. 37 (1980).

RESEARCH REFERENCES

ALR.

Enlarged Homestead Acts of 1909 and 1910, 8 A.L.R. 635.

ARTICLE 1
CONSTITUTIONAL EXEMPTIONS

RESEARCH REFERENCES

Am. Jur. 2d.
31 Am. Jur. 2d, Exemptions, §§ 16-18, 33, 37-119, 142, 148 et seq., 153, 166, 175. 40 Am. Jur. 2d, Homestead, §§ 16, 19, 40-43, 82-85, 152, 168, 173-177.

C.J.S.
40 C.J.S., Homesteads, § 23 et seq.

PART 1
IN GENERAL

Editor's notes.
Ga. L. 1983, p. 1170, § 2, effective July 1, 1983, repealed former Code Section 44-13-2, renumbered former Code Sections 44-13-3 through 44-13-22, and made various amendments to the renumbered Code sections in this part. The specific renumberings and amendments in this part effected by the 1983 Act appear in the editor's notes of the affected Code sections. Ga. L. 1983, p. 1170, § 1, not codified by the General Assembly, provided: "It is the intent of this Act to implement certain changes required by Article I, Section I, Paragraph XXVI of the Constitution of the State of Georgia."

JUDICIAL DECISIONS

Protection from execution sale of land on grounds of age and infirmity. — A person who has applied for an injunction to enjoin the sale of the land under an execution against him, in which land he claims a homestead on the ground of age and infirmity, is protected by giving notice of his application for homestead, provided, of course, it should be determined that he is entitled to the homestead. The purchaser of such property would buy the same subject to the right of the claimant to have the homestead set apart to him. Adams v. Grizzard, 171 Ga. 780, 156 S.E. 689, 1931 Ga. LEXIS 464 (1931).

RESEARCH REFERENCES

ALR.
Exemption of proceeds of voluntary sale of homestead, 1 A.L.R. 483; 46 A.L.R. 814.

Right of individual partner to exemption in partnership property, 4 A.L.R. 300.

Imprisonment as effecting abandonment of homestead, 5 A.L.R. 259.

Agreement by husband that wife shall receive proceeds of sale of homestead as fraud on his creditors, 6 A.L.R. 574.

Loss of homestead rights by wife through absence enforced by act of husband, 42 A.L.R. 1162; 129 A.L.R. 305.

Rule as to marshaling assets as affected by homestead law, 44 A.L.R. 758; 77 A.L.R. 371.

Validity and effect of alienation or encumbrances of homestead without joinder or consent of wife, 45 A.L.R. 395.

Attempt to resist enforcement of judgment or execution against real property on ground that it is exempt, as involving title to real property within contemplation of jurisdictional provision, 75 A.L.R. 1230.

Homestead as subject to assessment for local improvements, 79 A.L.R. 712.

Debtor's exemption of personalty as attaching to proceeds of sale or exchange thereof, 119 A.L.R. 467.

Constitutionally permissible classification or discrimination in debtors' exemption statutes, 128 A.L.R. 107.

Validity and effect of waiver of right to complain of acts impairing value of homestead property, without joinder or consent of both husband and wife, 142 A.L.R. 532.

Rights of surviving spouse and children in proceeds of sale of homestead in decedent's estate, 6 A.L.R.2d 515.

Enforcement of claim for alimony, or support, or for attorneys' fees and costs incurred in connection therewith, against exemptions, 54 A.L.R.2d 1422.

44-13-1. Amount of exemption; who may claim exemption; what charges enforceable.

Except as otherwise provided in this article, there shall be exempt from levy and sale by virtue of any process whatever under the laws of this state any real or personal property or both of a debtor in the amount of $5,000.00 or $21,500.00 for real or personal property that is the debtor's primary residence. No court or ministerial officer in this state shall ever have jurisdiction or authority to enforce any judgment, execution, or decree against property set apart under this Code section, including such improvements as may be made thereon from time to time, except for taxes, for the purchase money of the property, for labor done on the property, for material furnished for the property, or for the removal of encumbrances on the property.

History.

Ga. L. 1868, p. 27, § 1; Code 1873, § 2002; Code 1882, § 2002; Civil Code 1895, § 2827; Civil Code 1910, § 3377; Code 1933, § 51-101; Ga. L. 1976, p. 346, § 1; Ga. L. 1983, p. 1170, § 2; Ga. L. 2012, p. 1030, § 1/SB 117.

Law reviews.

For comment on Roquemore v. Goldstein, 100 Ga. App. 591, 112 S.E.2d 24 (1959), see 12 Mercer L. Rev. 280 (1960).

For note discussing property exempt from execution, see 12 Ga. L. Rev. 814 (1978).

JUDICIAL DECISIONS

Analysis

General Consideration
What Constitutes Homestead Property
Who May Claim Exemption

General Consideration

Not question respecting title to land. — The title to the property in which a homestead is sought to be set is not directly involved, and therefore, the question raised by the application and objections urged by a creditor of the applicant is not one respecting title to land, so as to confer jurisdiction on the Supreme Court as provided in the Constitution of this state. Adams v. Bishop, 174 Ga. 262, 162 S.E. 531, 1932 Ga. LEXIS 34 (1932).

Effect of exemption on title. — When the exemption is set apart to the bankrupt by the bankruptcy court, the title is in the bankrupt precisely as it was before. Novak v. O'Neal, 201 F.2d 227, 1953 U.S. App. LEXIS 3480 (5th Cir. 1953).

Effect of setting apart homestead is not to change the title but only the use during the life of the wife and the minority of the children; where in such circumstances the husband dies intestate before termination of the homestead, the property will remain his estate and descend to his heirs by inheritance, with the right of possession postponed until termination of

General Consideration (Cont'd)

the homestead. Donalson v. Yeates, 173 Ga. 30, 159 S.E. 856, 1931 Ga. LEXIS 249 (1931).

Effect of assignment of homestead property. — When the property is set apart as exempt, the court of bankruptcy exhausts its jurisdiction over the property, and it remains the property of the bankrupt, unaffected by the bankruptcy proceedings and therefore an assignment thereof, whether before the bankrupt is adjudged a bankrupt, or pending the bankruptcy proceedings, will be unaffected by such proceedings. Novak v. O'Neal, 201 F.2d 227, 1953 U.S. App. LEXIS 3480 (5th Cir. 1953).

Homestead contained in deed to secure debt. — A deed made to secure a debt conveys the title to land, and a homestead therein will avail nothing as against such title. There is nothing in the debtor upon which a homestead can operate save the equity of redemption; if he never redeems, there is nothing to which it can attach. Rose v. Crane Heating Co., 198 Ga. 295, 31 S.E.2d 717, 1944 Ga. LEXIS 414 (1944).

Where bankrupt makes no claim to exemption, or claims only a partial exemption, there can be no proper basis for a determination by the court of bankruptcy which requires that the privilege of exemption be recognized and enforced where not claimed by the party for whose benefit the statute law establishes it. Novak v. O'Neal, 201 F.2d 227, 1953 U.S. App. LEXIS 3480 (5th Cir. 1953).

Waiver. — When the debtor waives the homestead and exemption, the debtor means that all of debtor's property shall be a security to the creditor for the payment of that debt; and the creditor has a legal right to rely upon all of the debtor's property for the payment of the debt. Rosenthal v. Langley, 180 Ga. 253, 179 S.E. 383, 1935 Ga. LEXIS 236 (1935).

Homestead terminated. — Where a constitutional homestead on certain property was granted on the application of one individual and, on her death, the property passed by will to her son, who married sister of present owner, following which present owner and her son came to live in the home, no homestead presently exists in the property. Martin v. Fulton County, 213 Ga. 761, 101 S.E.2d 716, 1958 Ga. LEXIS 274 (1958).

Jurisdiction of bankruptcy court. — The court of bankruptcy has jurisdiction to set apart, segregate, and deliver a homestead, but has no jurisdiction to adjudicate whether the property set apart is unencumbered or subject to liens, or to determine the respective priorities of liens, if any exist. Rosenthal v. Langley, 180 Ga. 253, 179 S.E. 383, 1935 Ga. LEXIS 236 (1935).

Sale for purchase price. — Where exempted property is sold under execution for the purchase price, a creditor not of the class expressly declared superior to homestead cannot claim the proceeds. Walker v. Johnson, 64 Ga. 363, 1879 Ga. LEXIS 74 (1879).

What Constitutes Homestead Property

Purchase money. — The specific property for which purchase money is due is liable to a judgment therefor, notwithstanding the same has been set apart under the homestead law; other property exempted is not subject thereto. Loyless & Griffin v. Collins, 55 Ga. 370, 1876 Ga. LEXIS 410 (1876).

Where purchase money due. — A claimant not having paid the purchase money and having no title when claimant applied for the homestead, any homestead set apart to the claimant in this land was not binding upon the original vendor. Blackwell v. Aiken, 73 Ga. 55, 1884 Ga. LEXIS 16 (1884); Perdue v. Fraley, 92 Ga. 780, 19 S.E. 40, 1893 Ga. LEXIS 251 (1893).

Property purchased with proceeds of homestead. — Where the property was purchased with the proceeds of a homestead, it was homestead property. Thornton v. Horton, 24 Ga. App. 92, 100 S.E. 41, 1919 Ga. App. LEXIS 424 (1919); Amerson v. Cox, 173 Ga. 477, 160 S.E. 506, 1931 Ga. LEXIS 343 (1931).

Money expended before exemption sought. — Though the exempted land is liable under O.C.G.A. § 44-13-1 for its purchase money, it is not liable for money expended, before any right of exemption

was asserted, in paying for improvements and for work and labor done upon the premises. Builders' Lumber Co. v. Hunt, 179 Ga. 367, 176 S.E. 11, 1934 Ga. LEXIS 290 (1934).

Improvements. — O.C.G.A. § 44-13-1 does not make improvements put upon property before the exemption is granted one of the exemptions, but expressly declares the improvements put upon the homestead shall not be subject to levy and sale. Builders' Lumber Co. v. Hunt, 179 Ga. 367, 176 S.E. 11, 1934 Ga. LEXIS 290 (1934).

Debts incurred in removing encumbrances. — Purchase money and debts incurred in removing encumbrances have the same status. McConnell v. Gregory, 146 Ga. 475, 91 S.E. 550, 1917 Ga. LEXIS 350 (1917).

The phrase "material furnished therefor," describing one class of debts for which a homestead may be liable, refers to material furnished for the homestead, that is, after the homestead has been set apart, and does not include material furnished to improve the property before it was set apart. Rose v. Crane Heating Co., 198 Ga. 295, 31 S.E.2d 717, 1944 Ga. LEXIS 414 (1944).

Necessities. — Neither an article of necessity furnished for the use of the family nor even stock feed furnished to feed horses, which has been set apart as part of a homestead, comes within the constitutional exceptions under which homestead property may be subjected to sale. McLamb & Co. v. Lambertson, 4 Ga. App. 552, 4 Ga. App. 553, 62 S.E. 107, 1908 Ga. App. LEXIS 475 (1908).

Exemption covering automobile. — The homestead exemption covering a "Ford automobile" can only have been allowed under the provisions of O.C.G.A. § 44-13-1 and could not be upheld as a statutory or "short" homestead. Gann v. McGee, 19 Ga. App. 13, 90 S.E. 976, 1916 Ga. App. LEXIS 6 (1916).

Who May Claim Exemption

Husband cannot take a homestead in land belonging to his wife; a homestead so set apart is invalid as against a judgment creditor of the wife. Jackson v. Williams, 129 Ga. 716, 59 S.E. 776, 1907 Ga. LEXIS 562 (1907).

Widow. — A widow may have set apart an exemption for herself and minor children from the property if her deceased husband devised to her for life and in trust for such minor children. Birdwell v. Birdwell, 76 Ga. 627, 1886 Ga. LEXIS 72 (1886).

A widow cannot as head of a family have land left by her husband set apart as homestead except as to her own interest therein. Madden v. Jones, 75 Ga. 680, 1885 Ga. LEXIS 203 (1885).

Aged and infirm person. — Land of an aged and infirm person set apart to him as a homestead under O.C.G.A. § 44-13-1 is not subject to levy and sale under an execution issued upon a general judgment for permanent alimony. Knox v. Knox, 148 Ga. 253, 96 S.E. 337, 1918 Ga. LEXIS 284 (1918).

Guardian of one minor child is the head of a family of minor children. Rountree v. Dennard, 59 Ga. 629, 1877 Ga. LEXIS 434 (1877).

Unmarried person without dependents is not the "head of a household." Rietz v. Butler, 322 F. Supp. 1029, 1971 U.S. Dist. LEXIS 14438 (N.D. Ga. 1971).

Bachelor, having no person depending on him for support and maintenance is not the head of a family, and not entitled to a homestead. Calhoun v. McLendon, 42 Ga. 405, 1871 Ga. LEXIS 76 (1871).

Partnership. — No individual exemption can be allowed out of the partnership estate at the expense of the joint creditors, in bankruptcy proceedings. In re Stewart, No. 13419, 23 F. Cas. 51, 1869 U.S. Dist. LEXIS 100 (W.D. Tex. 1869).

Where each partner has applied for and obtained a homestead in the partnership land, the same being assigned in separate parcels, a prior creditor of the partnership cannot enforce a judgment over the homestead right. Harris v. Visscher, 57 Ga. 229, 1876 Ga. LEXIS 86 (1876).

Abandoned family. — Property exempted under O.C.G.A. § 44-13-1 is for the use and benefit of the family of the debtor, to the extent that a member of the debtor's family may enjoy the benefit thereof even though he should abandon her. Rietz v. Butler, 322 F. Supp. 1029, 1971 U.S. Dist. LEXIS 14438 (N.D. Ga. 1971).

OPINIONS OF THE ATTORNEY GENERAL

Homestead exemption must be applied for and is not granted solely on basis of information contained in tax return. 1957 Ga. Op. Att'y Gen. 292.

Levy for delinquent motor vehicle ad valorem taxes can be executed against the homestead. 1968 Op. Att'y Gen. No. 68-146.

RESEARCH REFERENCES

Am. Jur. 2d.

31 Am. Jur. 2d, Exemptions, §§ 1-12, 16, 26-32. 40 Am. Jur. 2d, Homestead, §§ 1-21, 23-26, 170.

Am. Jur. Pleading and Practice Forms.

13A Am. Jur. Pleading and Practice Forms, Homestead, § 2.

C.J.S.

40 C.J.S., Homesteads, §§ 1 et seq., 11 et seq., 140 et seq.

ALR.

Exemption of proceeds of voluntary sale of homestead, 1 A.L.R. 483; 46 A.L.R. 814.

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

Right of individual partner to exemption in partnership property, 4 A.L.R. 300.

Action for damages against signing spouse for breach of contract to convey homestead signed by one spouse only, 4 A.L.R. 1272; 16 A.L.R. 1036.

Availability of judgment under which exempt property has been seized as a setoff or counterclaim against claim based on the wrongful seizure, 20 A.L.R. 276.

Lien of judgment on surplus in quantity or value of homestead, 32 A.L.R. 1333.

Failure of head of family to claim homestead exemption as affecting other members of the family, 33 A.L.R. 611.

Effect of divorce on homestead, 36 A.L.R. 431; 84 A.L.R.2d 703.

Loss of homestead rights by wife through absence enforced by act of husband, 42 A.L.R. 1162; 129 A.L.R. 305.

What are "tools," "implements," "instruments," "utensils," or "apparatus," with the meaning of debtor's exemption laws, 52 A.L.R. 826.

Right of creditor to attach bankrupt's exempt property after discharge in bankruptcy, 55 A.L.R. 303.

Debtor's exemption of proceeds of insurance on property itself exempt, 63 A.L.R. 1286.

Mechanic's or materialman's lien on homestead, 65 A.L.R. 1192.

Deposit of exempt funds as affecting debtor's exemption, 67 A.L.R. 1203.

Estate or interest in real property to which a homestead claim may attach, 89 A.L.R. 511; 74 A.L.R.2d 1355.

Availability of debtor's exemption to defeat counterclaim or setoff, 106 A.L.R. 1070.

Character of judgment as "debt" within exemption law as affected by nature of cause of action upon which it was recovered, 108 A.L.R. 1042.

Creation of homestead right in real estate as affecting existing judgment lien, 110 A.L.R. 883.

Creation of homestead right in real estate as affecting existing attachment lien, 110 A.L.R. 904.

Character of property as homestead as affected by its use for business as well as residence purposes, 114 A.L.R. 209.

Who are within constitutional or statutory provisions subjecting homestead to claims of laborers, servants, or the like, 114 A.L.R. 767.

One who supports (or is under a duty to support) in whole or part relatives who do not live with him as "head of family," "householder," etc., within homestead exemption statute, 118 A.L.R. 1386.

Creation of homestead right in real estate as affecting previous mortgage, trust deed, or purchase money or vendor's license, 123 A.L.R. 427.

Multiple dwelling house part of which is occupied by owner as subject of homestead, 128 A.L.R. 1431.

Dower and homestead rights as affecting partition proceedings, 159 A.L.R. 1129.

Purchase of homestead as fraud on creditors, 161 A.L.R. 1287.

State law or state court decisions as governing, or as rule of decision in federal

court, in passing upon question as to what property passes to trustee in bankruptcy under § 70(a)(5) of the Bankruptcy Act, 16 A.L.R.2d 839.

Operation and effect of antenuptial agreements to waive or bar surviving spouse's right to probate homestead or surviving family's homestead right or exemption, 65 A.L.R.2d 727.

Wife as head of family within homestead or other property exemption provision, 67 A.L.R.2d 779.

Validity of contractual stipulation or provision waiving debtor's exemption, 94 A.L.R.2d 967.

What is "necessary" furniture entitled to exemption from seizure for debt, 41 A.L.R.3d 607.

Recovery of damages for breach of contract to convey homestead where only one spouse signed contract, 5 A.L.R.4th 1310.

Lien of judgment on excess value of homestead, 41 A.L.R.4th 292.

What constitutes state or local law that is applicable on date of filing of bankruptcy petition for purposes of applying 11 U.S.C.A. § 522(b)(3)(A) or its predecessor in opt-out states, 76 A.L.R. Fed. 2d 333.

44-13-1.1. "Dependent" defined.

As used in this article, the term "dependent" means a person whom the debtor may claim as a dependent for income tax purposes pursuant to Code Section 48-7-26.

History.
Code 1981, § 44-13-1.1, enacted by Ga. L. 1986, p. 10, § 44.

JUDICIAL DECISIONS

Relationship to other provisions. — The Georgia Code does not define the term "dependent" for purposes of O.C.G.A. § 44-13-100(a)(11)(C), and although O.C.G.A. § 44-13-1.1 defines the term "dependent," that section is located in O.C.G.A. T. 44, Ch. 13, Art. 1, and defines the term "dependent" for purposes of "this article," and O.C.G.A. § 44-13-100(a)(11)(C) is not found in T. 44, Ch. 13, Art. 1; accordingly, the definition of "dependent" provided by O.C.G.A. § 44-13-1.1 is not applicable to O.C.G.A. § 44-13-100(a)(11)(C). In re Bright, No. 05-14093-WHD, 2007 Bankr. LEXIS 2971 (Bankr. N.D. Ga. July 16, 2007).

44-13-2. Application for exemption by spouse, minor children or representative of dependents upon debtor's refusal to apply.

Should a debtor refuse to apply for an exemption under this article, the debtor's spouse, any person acting on behalf of the minor children of the debtor, or any person acting on behalf of the dependents of the debtor may make such application; and it shall be as binding as if done by the debtor.

History.
Ga. L. 1868, p. 27, § 13; Code 1873, § 2022; Code 1882, § 2022; Civil Code 1895, § 2843; Civil Code 1910, § 3393; Code 1933, § 51-702; Code 1981, § 44-13-3; Code 1981, § 44-13-2, as redesignated by Ga. L. 1983, p. 1170, § 2; Ga. L. 1986, p. 10, § 44.

Editor's notes.
Ga. L. 1983, p. 1170, § 2, effective July 1, 1983, redesignated former Code Section 44-13-3 as this Code section and rewrote

the Code section. The 1983 Act also repealed former Code Section 44-13-2, which was based on Ga. L. 1870, p. 70, § 4; Code 1873, § 2019; Code 1882, § 2019; Civil Code 1895, § 2842; Civil Code 1910, § 3392; Code 1933, § 51-701; and which contained provisions concerning a wife's homestead when separated from her husband.

JUDICIAL DECISIONS

Sufficiency of allegations. — Allegations in an application for homestead in behalf of the applicant and her minor children, that she is a resident of the county in which the application is filed, and that her husband, who is a resident of the county, refuses to apply, are sufficient to give the ordinary (now probate judge) jurisdiction. Long v. Bullard, 59 Ga. 355, 1877 Ga. LEXIS 273 (1877); Gann v. McGee, 19 Ga. App. 13, 90 S.E. 976, 1916 Ga. App. LEXIS 6 (1916). See also Blacker v. Dunlop, 93 Ga. 819, 21 S.E. 135, 1894 Ga. LEXIS 426 (1894); Hughes v. Purcell, 135 Ga. 174, 68 S.E. 1111, 1910 Ga. LEXIS 467 (1910).

Alleging refusal of husband. — The wife must unequivocally allege that the husband had refused to make the application. It would not suffice to allege merely that the husband "neglected or refused." Hughes v. Purcell, 135 Ga. 174, 68 S.E. 1111, 1910 Ga. LEXIS 467 (1910).

Where husband declared voluntary bankruptcy prior to the application by his wife, the homestead did not protect the land. Smith v. Roberts, 61 Ga. 223, 1878 Ga. LEXIS 83 (1878).

When husband's assent presumed. — There being no evidence that the husband appeared before the ordinary (now probate judge) and objected to an application by his wife, by plea or otherwise, his assent thereto is presumed. Blacker v. Dunlop, 93 Ga. 819, 21 S.E. 135, 1894 Ga. LEXIS 426 (1894).

Former application of husband dismissed. — Where the ordinary (now probate judge) dismissed an application of a husband without stating any ground therefor, this did not estop the wife of the applicant from making another application for exemption of the same and other property at a later date, alleging that her husband refused to apply. S.G. Mozley & Co. v. Fontana, 124 Ga. 376, 52 S.E. 443, 1905 Ga. LEXIS 718 (1905).

RESEARCH REFERENCES

Am. Jur. 2d.

31 Am. Jur. 2d, Exemptions, § 30. 40 Am. Jur. 2d, Homestead, §§ 20, 21.

C.J.S.

40 C.J.S., Homesteads, §§ 153, 158.

ALR.

Homestead rights of wife as affected by the fact that she does not live in state, 92 A.L.R. 1054.

Loss of homestead rights by wife through absence enforced by act of husband, 129 A.L.R. 305.

Wife as head of family within homestead or other property exemption provision, 67 A.L.R.2d 779.

Recovery of damages for breach of contract to convey homestead where only one spouse signed contract, 5 A.L.R.4th 1310.

44-13-3. Supplementation of exemption.

It shall be the right of the applicant to supplement his exemption by adding to an amount already set apart, which amount is less than the whole amount of the exemption allowed by this article, enough to make his exemption equal to the whole amount allowed by resorting to the methods for setting apart and valuation of the exemptions provided in this chapter. The proceedings shall be in all respects the same.

History.
Ga. L. 1878-79, p. 99, § 2; Code 1882, § 2039c; Civil Code 1895, § 2865; Civil Code 1910, § 3415; Code 1933, § 51-1201; Code 1981, § 44-13-4; Code 1981, § 44-13-3, as redesignated by Ga. L. 1983, p. 1170, § 2.
Editor's notes.
Ga. L. 1983, p. 1170, § 2, effective July 1, 1983, redesignated former Code Section 44-13-4 as this Code section. The 1983 Act also redesignated former Code Section 44-13-3, relating to application for exemption by spouse, as present Code Section 44-13-2.

JUDICIAL DECISIONS

Definition. — A supplemental homestead is not realty after personalty, or personalty after realty, but both or either after both, or one after a previous one of like kind. Dickinson v. Haralson, 61 Ga. 526, 1878 Ga. LEXIS 174 (1878).
A second homestead is not valid as a supplemental exemption, under the provisions of O.C.G.A. § 44-13-3. First Nat'l Bank v. Massengill, 80 Ga. 333, 5 S.E. 100, 1887 Ga. LEXIS 395 (1887); Darlington v. Belt, 12 Ga. App. 522, 77 S.E. 653, 1913 Ga. App. LEXIS 621 (1913).

RESEARCH REFERENCES

Am. Jur. 2d.
31 Am. Jur. 2d, Exemptions, § 129.

44-13-4. Application for exemptions; to whom made; contents; schedule of property and list of creditors; effect of failure to comply; survey.

(a) Each person seeking the benefit of the exemptions provided in this article shall apply by petition to the judge of the probate court of the county in which he resides or in which the debtor's minor children or dependents reside when the application is made for their benefit. The petition shall state:

(1) The debtor for whom the exemption is claimed;

(2) The names and ages of minor children and dependents of the debtor; and

(3) Out of what and whose property exemptions are claimed.

The petition shall comply with all the requirements of the laws for the setting apart and valuation of the exemptions provided by this article.

(b) The applicant shall accompany his petition with a schedule containing a minute and accurate description of all real and personal property belonging to the person from whose estate the exemption is to be made so that persons interested may know exactly what is exempted and what is not and also with a list of his creditors and their post office addresses, if known, which must be sworn to by the applicant or his agent.

(c) For a failure to comply with this Code section either in the original petition which may be amended at any time prior to the final proceedings before the judge of the probate court or in the amended petition, the judge shall dismiss the petition.

(d) The applicant shall apply to the judge of the probate court for an order to the county surveyor or, if there is none, to some other surveyor to lay off any real property of the applicant and to make a plat of the same, which order the judge shall issue at once and give to the applicant.

History.

Ga. L. 1868, p. 27, § 2; Code 1873, § 2003; Ga. L. 1876, p. 48, § 1; Ga. L. 1878-79, p. 99, § 1; Code 1882, § 2003; Civil Code 1895, § 2828; Civil Code 1910, § 3378; Code 1933, § 51-201; Code 1981, § 44-13-5; Ga. L. 1982, p. 3, § 44; Code 1981, § 44-13-4, as redesignated by Ga. L. 1983, p. 1170, § 2.

Cross references.

Appointment of person to perform duties of county surveyor when no such office exists in county, § 36-7-13.

Editor's notes.

Ga. L. 1983, p. 1170, § 2, effective July 1, 1983, redesignated former Code Section 44-13-5 as this Code section. The 1983 Act also redesignated former Code Section 44-13-4, relating to supplementation of exemption, as present Code Section 44-13-3.

JUDICIAL DECISIONS

List of property. — Whether all or only a part of the estate is to be exempt, the schedule must contain a list of all the property owned by the decedent. Blackstone v. Kritzer, 120 Ga. 78, 47 S.E. 585, 1904 Ga. LEXIS 449 (1904).

No schedule. — Where there is no schedule of property, the homestead is void. Peterson v. Calhoun, 135 Ga. 103, 68 S.E. 1022, 1910 Ga. LEXIS 425 (1910).

Schedule amendable. — The schedule is a part of the pleadings, and is amendable at any time prior to judgment. Davis v. James, 145 Ga. 325, 89 S.E. 203, 1916 Ga. LEXIS 301 (1916).

Property included by mistake. — A petition for homestead may be amended by adding to the schedule something which has been omitted, but not by striking therefrom any article of property therein set forth. If the applicant has by mistake inserted property belonging not to the applicant but to another, the applicant should dismiss the application and file another one, omitting such articles of property not belonging to the applicant as were in the previous schedule. McWilliams v. Bones, 84 Ga. 199, 10 S.E. 723, 1889 Ga. LEXIS 223 (1889); Smith v. Exchange Bank, 25 Ga. App. 278, 103 S.E. 99, 1920 Ga. App. LEXIS 741 (1920).

Sale of article included in schedule. — The sale by the applicant, after making an application, of an article which the applicant had placed on the schedule, was sufficient to have defeated the application, unless the applicant accounted for the money and delivered up the same for the benefit of creditors. McWilliams v. Bones, 84 Ga. 199, 10 S.E. 723, 1889 Ga. LEXIS 223 (1889).

Statutory exemptions inapplicable in federal bankruptcy cases. — O.C.G.A. §§ 44-13-4(b) and 44-13-7 deal with constitutional exemptions from the levy and sale of property, and these statutory provisions simply do not apply in the context of federal bankruptcy cases. Caruthers v. Fleet Fin., Inc., 87 B.R. 723, 1988 Bankr. LEXIS 825 (Bankr. N.D. Ga. 1988).

Wife not head of family. — A wife having children by a former as well as by a present husband cannot be said to be the head of a family, consisting of herself and

her minor children by both husbands. Neal v. Sawyer, 62 Ga. 352, 1879 Ga. LEXIS 526 (1879).

Widow as head of family and guardian. — A widow in the character both of the head of a family and the guardian of her minor children, applied for and obtained homestead in the real estate of her husband. The effect of so doing was to obtain a homestead as the head of a family in her own undivided share, and a homestead as the guardian of her minor children in their undivided shares. Fountain v. Hendley, 82 Ga. 616, 9 S.E. 666, 1889 Ga. LEXIS 308 (1889).

Wife failing to attach schedule as to personalty. — Where a wife made an application to the ordinary (now probate judge)for an exemption of realty out of land belonging to the husband, but not praying therein for any exemption of personalty, the exemption of realty, after being duly set apart and approved by the ordinary (now probate judge), was not void because of the applicant's failure to attach to her application a schedule of personal property belonging to the husband. Atwater v. Respess, 97 Ga. 283, 22 S.E. 1000, 1895 Ga. LEXIS 364 (1895).

Dependent females. — O.C.G.A. § 44-13-4 does not contemplate a homestead or exemption for the benefit of dependent females, except in the property of the person upon whom they were dependent. Sutton v. Rosser, 109 Ga. 204, 34 S.E. 346, 1899 Ga. LEXIS 612 (1899).

Showing beneficiaries. — A petition which stated that the applicant claimed a homestead as head of a family, and then stated of whom that family consisted, was sufficiently explicit in showing who were the beneficiaries for whom the homestead was asked. Roberts v. Cook, 68 Ga. 324, 1882 Ga. LEXIS 4 (1882).

A collateral attack on a judgment setting aside a constitutional homestead under O.C.G.A. § 44-13-4 is not allowable, though allowable as to a "short homestead." Gann v. McGee, 19 Ga. App. 13, 90 S.E. 976, 1916 Ga. App. LEXIS 6 (1916).

After-acquired realty. — Where the head of a family asserts a homestead in personalty, not having any realty at that time, that person does not lose the right to a homestead in realty thereafter acquired. Dickinson v. Haralson, 61 Ga. 526, 1878 Ga. LEXIS 174 (1878).

The description of an automobile, in the application for homestead, as "one five-passenger Ford automobile," was sufficient to identify the property. Gann v. McGee, 19 Ga. App. 13, 90 S.E. 976, 1916 Ga. App. LEXIS 6 (1916).

Fixing valuation. — It is not incumbent on the applicant for a homestead to fix the valuation of the real estate sought to be set apart; this duty devolves upon the surveyor, the surveyor's valuation being subject to review by appraisers. Wood & Bro. v. Collins, 111 Ga. 32, 36 S.E. 423, 1900 Ga. LEXIS 478 (1900).

Signature to and verification of petition. — Where a petition for a homestead was signed by the attorney of the applicant, and verified by the affidavit of the latter, it was not void. Roberts v. Cook, 68 Ga. 324, 1882 Ga. LEXIS 4 (1882).

Alleging age of wife. — Where a homestead was asked for the benefit of a wife and children, a failure to allege the age of the wife did not render the proceeding void. Roberts v. Cook, 68 Ga. 324, 1882 Ga. LEXIS 4 (1882).

Approval of the schedule does not operate to set aside, as exempt, property described therein but omitted from that part of the petition stating out of what property the exemption is claimed. Blackstone v. Kritzer, 120 Ga. 78, 47 S.E. 585, 1904 Ga. LEXIS 449 (1904).

Proceeding under O.C.G.A. § 44-13-16. — A bankrupt debtor in perfecting an exemption of money, set aside to the debtor in a bankruptcy proceeding, in a proceeding before the ordinary (now probate judge) of the county of residence under the provisions of O.C.G.A. § 44-13-16 must comply with O.C.G.A. § 44-13-4 and §§ 44-13-7 through 44-13-9, relating to the schedule to be attached to the application, the notice to be published by the ordinary (now probate judge), and the notice to be given creditors by the applicant or the applicant's agent. Lou Hill Co. v. Bjoralt, 103 Ga. App. 564, 120 S.E.2d 39, 1961 Ga. App. LEXIS 1002 (1961).

Presumption that proper order given. — As against a creditor who was duly served with notice of an application

for a homestead, it will, though the homestead proceeding does not so disclose, be presumed that a proper order to the surveyor to lay off and plat the homestead was granted; nor as to such creditor will a homestead so approved be treated as invalid because the plats of two lots composing the same did not purport to be made by the county surveyor and were not sworn to, accompanied by an affidavit as the law requires. Dunagan v. Stadler, 101 Ga. 474, 29 S.E. 440, 1897 Ga. LEXIS 248 (1897).

Plats made by other than county surveyor. — When it is shown that the plats were made by other than the county surveyor, the law will presume there was no county surveyor. Dunagan v. Stadler, 101 Ga. 474, 29 S.E. 440, 1897 Ga. LEXIS 248 (1897).

Question for jury. — The sufficiency of identification of property in an application for homestead is a matter for the consideration of the jury. Gann v. McGee, 19 Ga. App. 13, 90 S.E. 976, 1916 Ga. App. LEXIS 6 (1916).

Appellate review. — Power to act under O.C.G.A. § 44-13-4 is conferred upon the ordinary (now probate judge) of the county in which the applicant resided; and the ordinary's action must be reviewed by certiorari and not by appeal. Cunningham v. United States Sav. & Loan Co., 109 Ga. 616, 34 S.E. 1024, 1900 Ga. LEXIS 271 (1900).

RESEARCH REFERENCES

Am. Jur. 2d.

31 Am. Jur. 2d, Exceptions, §§ 16-18, 33, 36-119, 152, 159-161, 164, 177, 186. 40 Am. Jur. 2d, Homesteads, §§ 16, 18, 40 et seq., 78 et seq., 146, 162, 167 et seq.

ALR.

Estate or interest in real property to which a homestead claim may attach, 74 A.L.R.2d 1355.

44-13-5. Survey of lands in different county.

Whenever the applicant does not possess a sufficient amount of realty located in the county of his residence, he may include in his application tracts of land located in counties other than that of his residence. In such case, the judge of the probate court before whom the application is made shall cause the survey, valuation, and plat of the lands lying in counties other than the residence of the applicant to be made by the county surveyor of the county where the lands are located.

History.

Ga. L. 1869, p. 25, § 1; Code 1873, § 2004; Code 1882, § 2004; Civil Code 1895, § 2829; Civil Code 1910, § 3379; Code 1933, § 51-202; Code 1981, § 44-13-6; Code 1981, § 44-13-5, as redesignated by Ga. L. 1983, p. 1170, § 2.

Editor's notes.

Ga. L. 1983, p. 1170, § 2, effective July 1, 1983, redesignated former Code Section 44-13-6 as this Code section. The 1983 Act also redesignated former Code Section 44-13-5, relating to application for exemptions, as present Code Section 44-13-4.

JUDICIAL DECISIONS

Personal property. — Where only personal property is set apart as a homestead under O.C.G.A. § 44-13-5, no record of the application is required in any county other than that of the applicant's residence when the applicant applies. McLamb & Co. v. Lambertson, 4 Ga. App. 552, 4 Ga. App. 553, 62 S.E. 107, 1908 Ga. App. LEXIS 475 (1908).

RESEARCH REFERENCES

C.J.S.
40 C.J.S., Homesteads, §§ 36, 40.

44-13-6. Duty to provide full schedule of property; effect of fraudulent omissions.

It shall be the duty of any person who shall claim the benefit of the exemption allowed in this article to act in perfect good faith. As it is in the power of the debtor claiming an exemption of personal property to conceal part of his property or money and to claim the balance as exempt, it shall be the duty of the debtor, when he shall take steps in the probate court to have an exemption of personal property set off to him, to make a full and fair disclosure of all the personal property, including money, stocks, and bonds, which he may possess at the time. All such money or property which he may hold in excess of the exemption shall be subject to levy and sale for the payment of his just debts. If the money or other personal property which the debtor possesses at the time of his application or at the time he obtains the order of court setting off exempt property shall be fraudulently concealed or shall not be delivered up for the benefit of his creditors, no exemption shall be made in his favor until it shall be so delivered up. All orders of the court obtained by the fraudulent concealment of property or obtained while the debtor had personal property, money, stocks, or bonds which he kept out of the reach of the levying officer or did not in good faith deliver up for the benefit of his creditors shall be null and void and of no effect. In such event, the property set off to the debtor by such order or judgment shall be subject to levy and sale as if no such order or judgment had been rendered; and all property in which the debtor shall have invested the money, stocks, bonds, or personal property fraudulently concealed by him or kept out of the reach of his creditors shall be subject to levy and sale and liable to be sold for the payment of any debt then in existence. The debtor who is guilty of willful fraud in the concealment of part of his property which he possessed when he sought the benefit of the exemption shall on account of his fraud lose the benefit of the exemption, and his property shall be subject to the payment of all just debts which he owed at the time such fraud was committed; but the property, when once set off to him by order of the court, shall be exempt as against all debts contracted after that time.

History.
Ga. L. 1869, p. 23, § 1; Code 1873, § 2005; Code 1882, § 2005; Civil Code 1895, § 2830; Civil Code 1910, § 3380; Code 1933, § 51-203; Code 1981, § 44-13-7; Code 1981, § 44-13-6, as redesignated by Ga. L. 1983, p. 1170, § 2.

Editor's notes.
Ga. L. 1983, p. 1170, § 2, effective July 1, 1983, redesignated former Code Section

44-13-7 as this Code section. The 1983 Act also redesignated former Code Section 44-13-6, relating to survey of lands in different counties, as present Code Section 44-13-5.

JUDICIAL DECISIONS

Section refers to constitutional homestead. — The provision of O.C.G.A. § 44-13-6, that "it shall be the duty of each and every person who claims the benefit of the exemption allowed in this article . . . to act in perfect good faith," and that the exemption shall not be allowed to a claimant who is guilty of fraud, has reference to the constitutional homestead exemption, and not to the statutory exemption. In re West, 116 F. 767, 1902 U.S. Dist. LEXIS 194 (D. Ga. 1902); In re Dobbs, 175 F. 319, 1909 U.S. Dist. LEXIS 63 (D. Ga. 1909).

Effect of fraud. — Under O.C.G.A. § 44-13-6 a bankrupt who does not make a full and fair disclosure of all the property owned by the bankrupt at the time of the filing of the petition in bankruptcy is not entitled to have any exemption set apart to the bankrupt by the trustee in bankruptcy. In re Waxelbaum, 101 F. 228, 1900 U.S. Dist. LEXIS 255 (D. Ga. 1900); In re Anderson, 224 F. 790, 1915 U.S. Dist. LEXIS 1414 (N.D. Ga. 1915).

Duty of bankrupt. — Under O.C.G.A. § 44-13-6 a bankrupt seeking an exemption must deal with perfect frankness with creditors and disclose and deliver all property except the exemption, and a failure to do so defeats the bankrupt's application, and a bankrupt, who just before and at the time of the bankruptcy sought to get property out of the reach of the creditors, was not entitled to the exemption. In re Cochran, 185 F. 913, 1911 U.S. Dist. LEXIS 346 (D. Ga. 1911).

Good faith requirement. — The good faith required of a debtor by O.C.G.A. § 44-13-6 is to make a full and fair disclosure of property, and a court of bankruptcy is not justified in denying an exemption because of the debtor's fraud in other respects. In re Castleberry, 143 F. 1018, 1905 U.S. Dist. LEXIS 30 (D. Ga. 1905).

Time of disclosure. — The full and fair disclosure and surrender of personalty, required by O.C.G.A. § 44-13-6, must be made at the time of the application, or at or before the order setting off the property exempt is granted. Any failure (until satisfactorily explained and accounted for, and the consequences repaired) is to be deemed intentional and, therefore, fraudulent. Torrance v. Boyd, 63 Ga. 22, 1879 Ga. LEXIS 118 (1879).

Prima facie case of concealment. — Where financial and schedule statements show a great depreciation in assets and increase in liabilities, the statements and schedules made a prima facie case of concealment on the part of the bankrupt under O.C.G.A. § 44-13-6, and cast upon the bankrupt the burden of showing that the statements were false when made, or of explaining what became of the bankrupt's assets, and in the absence of such explanation it would be conclusively presumed that the bankrupt was concealing a portion of assets. In re Powell, 230 F. 316, 1916 U.S. Dist. LEXIS 975 (D. Ga. 1916).

Accounting for depreciation of assets. — A bankrupt claiming an exemption under O.C.G.A. § 44-13-6 must give a better explanation than that the bankrupt "sold a great deal of goods, and sold some of them at less than cost, to try to meet obligations," where the bankrupt's schedule in bankruptcy shows a great reduction in assets. In re Stephens, 114 F. 192, 1902 U.S. Dist. LEXIS 291 (D. Ga. 1902).

Clean hands of party seeking exemption. — A bankrupt, whose business is carried on in the name of the son, as agent, without the bankrupt having anything to do with it, cannot claim an exemption therefrom allowed by law, which requires the person claiming it to come into court with clean hands, practically all the indebtedness having been contracted within the five months preceding the petition in bankruptcy, and all the best of the stock having been sold off at auction during the last of said months, leaving old stock, which, with fixtures, is worth less

than the amount of the exemption. In re Williamson, 114 F. 190, 1901 U.S. Dist. LEXIS 14 (D. Ga. 1901).

Reconveyance after evasive conveyance. — Under O.C.G.A. § 44-13-6 a bankrupt cannot be denied the right to a homestead exemption because he once conveyed the land claimed to his wife in a vain attempt to evade a debt, where it was reconveyed prior to the bankruptcy proceedings and was scheduled by him as his property. In re Thompson, 115 F. 924, 1902 U.S. Dist. LEXIS 253 (D. Ga. 1902).

Retention of money to pay fees and expenses. — A party seeking a homestead cannot retain any amount of money which the party may deem necessary and needful to employ attorneys, pay licenses, and carry on business, but instead the party must account for it. McNally v. Mulherin & Co., 79 Ga. 614, 4 S.E. 332, 1887 Ga. LEXIS 275 (1887); In re Waxelbaum, 101 F. 228, 1900 U.S. Dist. LEXIS 255 (D. Ga. 1900).

Omission of property from wife's schedule. — If any property be left out of the wife's schedule through the fraud of the husband, even though the wife was no party to the fraud and was ignorant of it, she will have to suffer the penalty which the law imposes upon the husband when he is the applicant. Kirtland, Babcock & Bronson v. Davis, 43 Ga. 318, 1871 Ga. LEXIS 230 (1871); Wood & Bro. v. Collins, 111 Ga. 32, 36 S.E. 423, 1900 Ga. LEXIS 478 (1900).

Gift to wife by insolvent. — Though a gift of money or other property by an insolvent to his wife would be void as to creditors, it would be good as to the wife; and if she had actually disposed of such money or property before applying for an exemption out of the husband's property, her failure to include what was given her in the schedule would not vitiate her application, when it did not appear that the gift was made in anticipation of the application and for the purpose of concealing the property. Wood & Bro. v. Collins, 111 Ga. 32, 36 S.E. 423, 1900 Ga. LEXIS 478 (1900).

Person representing self to be head of family. — Where one is not entitled to the homestead, but represents himself to be the head of a family consisting of himself and daughter, when in fact he has no such family, this is a probable fraud, and he loses the benefit of the homestead. Walker v. Thomason, 77 Ga. 682, 1886 Ga. LEXIS 384 (1886).

Attack of exemption by creditor's executor. — Executors of a creditor may attack the exemption of a debtor as fraudulent, and they will not be estopped by the fact that, pending probate and qualification, they did not resist the application. Killen v. Marshall, 55 Ga. 340, 1875 Ga. LEXIS 426 (1875).

Collateral attack for insufficient description. — The schedule filed by the applicant for homestead and exemption, should describe the personal property with reasonable certainty, but if the creditor failed to appear and object, on the ground that the schedule was insufficient, and it gives a general description of the property, and no fraud or unfairness is alleged or shown, the creditor will not be permitted to attack the judgment. Bartlett v. Russell, 41 Ga. 196, 1870 Ga. LEXIS 59 (1870).

Ruling of referee as res judicata against discharge. — Ruling of referee in bankruptcy, on objections to allowance of homestead exemption, that bankrupt had concealed property is not res judicata against the bankrupt's right to discharge. In re Frosteg, 252 F. 199, 1918 U.S. Dist. LEXIS 921 (D. Ga. 1918).

RESEARCH REFERENCES

ALR.

Character of judgment as "debt" within exemption law as affected by nature of cause of action upon which it was recovered, 108 A.L.R. 1042.

44-13-7. Publication of notice of application; form.

When the schedule has been filed and the application has been made,

the judge of the probate court, in order that all persons may know when action will be taken on the petition, shall publish in the newspaper in which the legal advertisements of the county are published, not more than twice, a notice as follows:

"A.B. has applied for exemption of personalty, and setting apart and valuation of realty exempt from levy and sale under Article 1 of Chapter 13 of Title 44 of the Official Code of Georgia Annotated, and I will pass upon the same at ____ M., on the ____ day of _____, _____, at my office. C.D., Judge of the Probate Court."

History.

Ga. L. 1868, p. 27, § 3; Ga. L. 1871-72, p. 53, § 1; Code 1873, § 2006; Code 1882, § 2006; Civil Code 1895, § 2831; Civil Code 1910, § 3381; Code 1933, § 51-301; Code 1981, § 44-13-8; Code 1981, § 44-13-7, as redesignated by Ga. L. 1983, p. 1170, § 2; Ga. L. 1999, p. 81, § 44.

Editor's notes.

Ga. L. 1983, p. 1170, § 2, effective July 1, 1983, redesignated former Code Section 44-13-8 as this Code section. The 1983 Act also redesignated former Code Section 44-13-7, relating to the duty to provide full schedule of property, as present Code Section 44-13-6.

JUDICIAL DECISIONS

Presumption. — The presumption is that the ordinary (now probate judge) has done all that is required by law before granting a homestead, and this presumption extends to the giving of notice of the application, where nothing appears to show absence thereof. Groover, Stubbs & Co. v. Brown, 69 Ga. 60, 1882 Ga. LEXIS 178 (1882).

Statutory exemptions inapplicable in federal bankruptcy cases. — O.C.G.A. §§ 44-13-4(b) and 44-13-7 deal with constitutional exemptions from the levy and sale of property, and these statutory provisions simply do not apply in the context of federal bankruptcy cases. Caruthers v. Fleet Fin., Inc., 87 B.R. 723, 1988 Bankr. LEXIS 825 (Bankr. N.D. Ga. 1988).

Notice for benefit of creditors. — The requirement as to notice is intended for the benefit of the creditors of the person out of whose estate the homestead is to be set apart, and a defect in the advertisement would not avail one for whose benefit the publication was not made. Gann v. McGee, 19 Ga. App. 13, 90 S.E. 976, 1916 Ga. App. LEXIS 6 (1916).

Waiver of notice. — The mere presence of an attorney when the ordinary (now probate judge) acted upon and approved an application, was no waiver of notice or of legal publication as to client. Smith v. Lord & Dixon, 60 Ga. 462, 1878 Ga. LEXIS 506 (1878).

Misnomer. — Where there is a misnomer in the printed notice, a judgment granting a homestead is of no force as against a creditor. Smith v. Lord & Dixon, 60 Ga. 462, 1878 Ga. LEXIS 506 (1878); Gann v. McGee, 19 Ga. App. 13, 90 S.E. 976, 1916 Ga. App. LEXIS 6 (1916).

Proceeding under O.C.G.A. § 44-13-16. — A bankrupt debtor in perfecting an exemption of money, set aside to the debtor in a bankruptcy proceeding, in a proceeding before the ordinary (now probate judge) of the county of residence under the provisions of O.C.G.A. § 44-13-16 must comply with O.C.G.A. §§ 44-13-4 and 44-13-7 through 44-13-9 relating to the schedule to be attached to the application, the notice to be published by the ordinary (now probate judge), and the notice to be given creditors by the applicant or the applicant's agent. Lou Hill Co. v. Bjoralt, 103 Ga. App. 564, 120 S.E.2d 39, 1961 Ga. App. LEXIS 1002 (1961).

RESEARCH REFERENCES

C.J.S.
40 C.J.S., Homesteads, § 144.

44-13-8. Written notice to creditors; how given.

In addition to the notice by publication required to be given by Code Section 44-13-7, the applicant or his agent shall give notice in writing of the filing of the application and of the day of hearing the same to each of his creditors residing in the county. Such notice shall be given at least five days before the hearing and shall be served personally or by leaving a copy at the residence or place of business of his creditor; and the fact that such notice has been given shall be verified by oath of the applicant or his agent. The applicant shall also notify creditors residing outside of the county of his application by preparing written notices of his application and the day of hearing, which notices shall be delivered by him to the judge of the probate court together with stamped envelopes and, if the residence of the creditors shall be known to the petitioner, shall be directed by the judge and mailed to the persons residing out of the county at least 15 days before the day of the hearing.

History.
Ga. L. 1876, p. 48, § 2; Code 1882, § 2006a; Civil Code 1895, § 2832; Civil Code 1910, § 3382; Code 1933, § 51-302; Code 1981, § 44-13-9; Code 1981, § 44-13-8, as redesignated by Ga. L. 1983, p. 1170, § 2.

Editor's notes.
Ga. L. 1983, p. 1170, § 2, effective July 1, 1983, redesignated former Code Section 44-13-9 as this Code section. The 1983 Act also redesignated former Code Section 44-13-8, relating to publication of notice of application, as present Code Section 44-13-7.

JUDICIAL DECISIONS

Service by officer not required. — Service of notice by an officer is not required or contemplated by O.C.G.A. § 44-13-8. Weekes & Son v. Edwards, 101 Ga. 314, 28 S.E. 853, 1897 Ga. LEXIS 224 (1897).

Presumption. — If the record of a homestead proceeding shows that a nonresident creditor's name and address were returned by the applicant to the ordinary (now probate judge), and in proper time a notice with stamped envelope was delivered to the ordinary (now probate judge) for mailing, notice is sufficiently shown. The presumption is that the ordinary (now probate judge) did the ordinary's duty. Roberts v. Cook, 68 Ga. 324, 1882 Ga. LEXIS 4 (1882).

Service on partner. — Where the debtor of a firm sought to obtain a homestead, but instead of naming the firm in the schedule, named one of the partners as an individual creditor and served that partner alone with notice, such statement and notice did not include the firm upon the grant of the homestead. Boroughs v. White & Stone, 69 Ga. 841, 1883 Ga. LEXIS 126 (1883).

Time. — Where a homestead was applied for on December 4, 1877, and the return of the county surveyor laying off the homestead was made on December 14, 1877, the ordinary (now probate judge) was without authority of law to approve the homestead on December 15, 1877. A homestead thus approved was illegal and

void. West v. McWhorter, 141 Ga. 590, 81 S.E. 859, 1914 Ga. LEXIS 61 (1914).

Proceeding under O.C.G.A. § 44-13-16. — A bankrupt debtor in perfecting an exemption of money, set aside to the debtor in a bankruptcy proceeding, in a proceeding under O.C.G.A. § 44-13-16 must comply with O.C.G.A. §§ 44-13-4 and 44-13-7 through 44-13-9, relating to the schedule to be attached to his application, the notice to be published, and the notice to be given creditors by the applicant or his agent. Lou Hill Co. v. Bjoralt, 103 Ga. App. 564, 120 S.E.2d 39, 1961 Ga. App. LEXIS 1002 (1961).

RESEARCH REFERENCES

C.J.S.
40 C.J.S., Homesteads, § 144 et seq.

44-13-9. Time fixed by notice for hearing.

The time fixed by the notice given pursuant to Code Sections 44-13-7 and 44-13-8 shall not be less than 20 nor more than 30 days from the date of the filing of the application and schedule.

History.
Ga. L. 1868, p. 27, § 4; Code 1873, § 2007; Ga. L. 1876, p. 48, § 2; Code 1882, § 2007; Civil Code 1895, § 2833; Civil Code 1910, § 3383; Code 1933, § 51-303; Code 1981, § 44-13-10; Code 1981, § 44-13-9, as redesignated by Ga. L. 1983, p. 1170, § 2.

Editor's notes.
Ga. L. 1983, p. 1170, § 2, effective July 1, 1983, redesignated former Code Section 44-13-10 as this Code section. The 1983 Act also redesignated former Code Section 44-13-9, relating to written notice to creditors, as present Code Section 44-13-8.

JUDICIAL DECISIONS

Homestead void. — If more than 30 days intervene between the date of the order of the ordinary (now probate judge) to the surveyor and the time fixed in the notice, the homestead is void. Roberts v. Atlanta Cem. Ass'n, 146 Ga. 490, 91 S.E. 675, 1917 Ga. LEXIS 358 (1917).

Proceeding under O.C.G.A. § 44-13-16. — A bankrupt debtor in perfecting an exemption of money, set aside to the debtor in a bankruptcy proceeding, in a proceeding under O.C.G.A. § 44-13-16 must comply with O.C.G.A. §§ 44-13-4 and 44-13-7 through 44-13-9 relating to the schedule to be attached to his application, the notice to be published, and the notice to be given creditors by the applicant or his agent. Lou Hill Co. v. Bjoralt, 103 Ga. App. 564, 120 S.E.2d 39, 1961 Ga. App. LEXIS 1002 (1961).

44-13-10. Survey of exempted real property; affidavit of surveyor; return to probate court; objection to survey; failure of surveyor to comply as contempt.

(a) The surveyor to whom the applicant delivers the order pursuant to subsection (d) of Code Section 44-13-4 shall lay off the exempted real property on or out of the land claimed by the applicant and make a plat of the same and shall make an affidavit that the exempted real property is correctly platted and laid off and setting out its value. He shall return

the affidavit to the judge of the probate court at least five days before the day appointed in the order for passing upon the application.

(b) It shall be a valid ground of objection to the propriety of any survey that it has been so made as to injure unjustly or needlessly the value of any land left unexempted by a disregard of the shape and location of the entire tract.

(c) Should any county surveyor fail to comply with his duty as prescribed by this Code section, he shall be punished for a contempt of court by the judge of the probate court.

History.

Ga. L. 1868, p. 27, § 4; Code 1873, § 2008; Ga. L. 1878-79, p. 99, § 3; Code 1882, §§ 2008, 2010a; Civil Code 1895, §§ 2834, 2837; Civil Code 1910, §§ 3384, 3387; Code 1933, §§ 51-401, 51-404; Code 1981, § 44-13-11; Code 1981, § 44-13-10, as redesignated by Ga. L. 1983, p. 1170, § 2.

Cross references.

Authority of county surveyor to establish fees for making plat of homestead, affidavit, and return, § 36-7-9.

Editor's notes.

Ga. L. 1983, p. 1170, § 2, effective July 1, 1983, redesignated former Code Section 44-13-11 as this Code section. The 1983 Act also redesignated former Code Section 44-13-10, relating to time fixed by notice for hearing, as present Code Section 44-13-9.

JUDICIAL DECISIONS

Sufficiency of affidavit. — The surveyor's affidavit that the plat "is a correct plat" means, in substance, that the land is correctly platted and laid off, and is a sufficient affidavit under O.C.G.A. § 44-13-10. Timothy v. Chambers, 85 Ga. 267, 11 S.E. 598, 1890 Ga. LEXIS 39 (1890).

Presumption that affidavit made. — When it is shown that no affidavit of the surveyor was attached, the law will presume nevertheless that the proper affidavit was made. Dunagan v. Stadler, 101 Ga. 474, 29 S.E. 440, 1897 Ga. LEXIS 248 (1897).

Supplying affidavit by amendment. — The omission of the surveyor to make affidavit to the correctness of the plat and the value of the premises may be supplied by amendment. Burns v. Chandler, 61 Ga. 385, 1878 Ga. LEXIS 132 (1878).

Clerical error in affidavit. — A mere clerical error in the surveyor's affidavit will not invalidate the homestead papers. Baldwin Fertilizer Co. v. Merritt, 101 Ga. 387, 29 S.E. 18, 1897 Ga. LEXIS 237 (1897).

Homestead granted before return made. — Where a bill was brought to recover certain property as being a homestead, and the proceedings exhibited thereto showed that the ordinary (now probate judge) had set apart the lands as a homestead before the surveyor had made the return and before the surveyor had sworn to the same, the bill was properly dismissed on demurrer (now motion to dismiss). Falls v. Crawford, 76 Ga. 35, 1885 Ga. LEXIS 15 (1885), overruled, Dunagan v. Stadler, 101 Ga. 474, 29 S.E. 440, 1897 Ga. LEXIS 248 (1897).

Return on day of hearing. — That the return of the surveyor on an application for homestead appeared to be on the day set for the hearing would have been good ground for allowing time to investigate the return, but did not render the proceeding void. Roberts v. Cook, 68 Ga. 324, 1882 Ga. LEXIS 4 (1882).

Purchaser having knowledge of homestead. — A defendant having purchased, with the approval of the ordinary (now probate judge) and knowledge of the homestead title which defendant bought, will not be heard to attack the homestead papers for want of regularity in the petition or plat, or in regard to the surveyor

who acted in laying off and returning the homestead. Brown v. Driggers, 62 Ga. 354, 1879 Ga. LEXIS 527 (1879).

Fixing valuation. — It is not incumbent on the applicant for a homestead to fix the valuation of the real estate sought to be set apart. This duty devolves upon the surveyor, the surveyor's valuation being subject to review by appraisers. Wood & Bro. v. Collins, 111 Ga. 32, 36 S.E. 423, 1900 Ga. LEXIS 478 (1900).

Proper order presumed. — As against a creditor who was duly served with notice of an application for a homestead, it will, though the homestead proceeding does not so disclose, be presumed that a proper order to the surveyor to lay off and plat the homestead was granted; nor as to such creditor will a homestead so approved be treated as invalid because the plats of two lots composing the same "did not purport to be made by the county surveyor and were not sworn to, accompanied by an affidavit as the law requires." Dunagan v. Stadler, 101 Ga. 474, 29 S.E. 440, 1897 Ga. LEXIS 248 (1897).

RESEARCH REFERENCES

C.J.S.

40 C.J.S., Homesteads, §§ 37, 146 et seq.

44-13-11. Approval of application; transmittal of copy of exempted real property to other counties; recordation.

If, at the time and place appointed for passing upon the application, no objection is raised by any creditor of the applicant, the judge of the probate court shall endorse upon the schedule and upon the plat: "Approved this the ____ day of _____, _____," filling the blanks, and shall sign the schedule and plat officially and hand such application to the clerk of the superior court of the clerk's county; and, when land out of the clerk's county is exempted, the judge shall transmit a certified copy of the exempted real property to the clerk of the superior court of each county in which exempted land is located. Each clerk of the superior court of a county in which exempted land is located shall record the exempted real property in a book to be kept for that purpose.

History.

Ga. L. 1868, p. 27, § 5; Code 1873, § 2009; Ga. L. 1877, p. 18, § 1; Code 1882, § 2009; Civil Code 1895, § 2835; Ga. L. 1898, p. 51, § 1; Civil Code 1910, § 3385; Code 1933, § 51-402; Code 1981, § 44-13-12; Ga. L. 1982, p. 3, § 44; Code 1981, § 44-13-11, as redesignated by Ga. L. 1983, p. 1170, § 2; Ga. L. 1999, p. 81, § 44; Ga. L. 2011, p. 99, § 83/HB 24.

Editor's notes.

Ga. L. 1983, p. 1170, § 2, effective July 1, 1983, redesignated former Code Section 44-13-12 as this Code section. The 1983 Act also redesignated former Code Section 44-13-11, relating to survey of exempted real property, as present Code Section 44-13-10.

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

Law reviews.

For article, "Evidence," see 27 Ga. St. U. L. Rev. 1 (2011).

For article on the 2011 amendment of this Code section, see 28 Ga. St. U.L. Rev. 1 (2011).

JUDICIAL DECISIONS

In general. — Among other requisites to constitute a valid judgment setting aside a homestead to the head of a family, the ordinary (now probate judge) shall endorse the approval upon the schedule of property, and upon the plat of the surveyor. Larey v. Baker, 85 Ga. 687, 11 S.E. 800, 1890 Ga. LEXIS 134 (1890); West v. McWhorter, 141 Ga. 590, 81 S.E. 859, 1914 Ga. LEXIS 61 (1914); King v. King, 143 Ga. 385, 85 S.E. 95, 1915 Ga. LEXIS 450 (1915); Cook v. Hendricks, 146 Ga. 63, 90 S.E. 383, 1916 Ga. LEXIS 580 (1916).

Application itself need not be approved. Larey v. Baker, 85 Ga. 687, 11 S.E. 800, 1890 Ga. LEXIS 134 (1890).

Presumptions. — Liberal presumptions are indulged in favor of the regularity of homestead proceedings. A proper order to the surveyor will be presumed where the ordinary has approved the plat returned; and approval of the "homestead" means substantially approval of the plat and the schedule conformably to O.C.G.A. § 44-13-11. Timothy v. Chambers, 85 Ga. 267, 11 S.E. 598, 1890 Ga. LEXIS 39 (1890).

Original papers as evidence. — The original homestead papers, not the record of them from the clerk's office, were proper evidence. Larey v. Baker, 85 Ga. 687, 11 S.E. 800, 1890 Ga. LEXIS 134 (1890).

Proof of lost papers. — Proof being made by complainants of the loss of the original homestead papers by depositions of the head of the family, and of the clerk of the superior court and ordinary (now probate judge), a certified copy from the clerk's office was properly admitted. Brown v. Driggers, 62 Ga. 354, 1879 Ga. LEXIS 527 (1879).

Establishing lost papers. — The original schedule and plat are private papers and, if lost, may be established by the superior court where they had been approved and recorded. Paschal v. Turner, 116 Ga. 736, 42 S.E. 1010, 1902 Ga. LEXIS 239 (1902).

Recordation required. — Homestead papers do not become muniments of title of those interested in the homestead until they have been duly recorded in the office of the clerk of the superior court. Paschal v. Hutchinson, 119 Ga. 243, 46 S.E. 103, 1903 Ga. LEXIS 773 (1903).

Record by clerk. — Under O.C.G.A. § 44-13-11 the application as well as the schedule is to be recorded by the clerk. Paschal v. Hutchinson, 119 Ga. 243, 46 S.E. 103, 1903 Ga. LEXIS 773 (1903).

RESEARCH REFERENCES

C.J.S.

40 C.J.S., Homesteads, §§ 149, 150.

ALR.

Estate or interest in real property to which a homestead claim may attach, 89 A.L.R. 511; 74 A.L.R.2d 1355.

44-13-12. Objections to schedule.

Should any creditor of the applicant desire to object to the schedule for want of sufficiency and fullness or for fraud of any kind or to dispute the valuation of the personalty, the propriety of the survey, or the value of the premises so platted as the exempted real property, he shall specify his objections in writing at the time and place appointed for the hearing.

History.

Ga. L. 1868, p. 27, § 6; Code 1873, § 2010; Code 1882, § 2010; Civil Code 1895, § 2836; Civil Code 1910, § 3386; Code 1933, § 51-403; Code 1981, § 44-13-13; Code 1981, § 44-13-12, as redesignated by Ga. L. 1983, p. 1170, § 2.

Editor's notes.

Ga. L. 1983, p. 1170, § 2, effective July 1, 1983, redesignated former Code Section

44-13-13 as this Code section. The 1983 Act also redesignated former Code Section 44-13-12, relating to approval of application and recordation of exempted real property, as present Code Section 44-13-11.

JUDICIAL DECISIONS

Purpose of objection to schedule for want of sufficiency and fullness is to prevent the allowance of the homestead, and it does not fail as an objection under O.C.G.A. § 44-13-12 merely because it may be described as an "objection to the homestead." Alday v. Spooner, 35 Ga. App. 614, 134 S.E. 343, 1926 Ga. App. LEXIS 1032 (1926).

Objection must be specific. — An amendment to objections, which in general terms alleged that the head of the family owned property not scheduled, some of which consisted of debts owing to that individual by persons unknown to the objector, without further specifying or describing the property charged to have been omitted, was properly disallowed for want of fullness and certainty in these respects. Wood & Bro. v. Collins, 111 Ga. 32, 36 S.E. 423, 1900 Ga. LEXIS 478 (1900).

Objection that articles omitted from schedule. — A creditor who files objections to the allowance of an exemption on the ground that specified articles of personalty were omitted from the schedule, should on the trial be confined to the articles mentioned in the objections, and should not be allowed to show by evidence that other articles of personalty were omitted from the schedule. Wood & Bro. v. Collins, 111 Ga. 32, 36 S.E. 423, 1900 Ga. LEXIS 478 (1900).

Objectors entitled to opening and conclusion. — Where an application for an exemption of personalty was made, and creditors of the applicant objected thereto on the ground of fraud, and the case was carried to the superior court by appeal, on the trial, the objectors were entitled to the opening and conclusion. McNally v. Mulherin & Co., 79 Ga. 614, 4 S.E. 332, 1887 Ga. LEXIS 275 (1887).

Creditor bound by judgment. — A creditor is not obliged to contest the right of a debtor to a homestead on any other grounds then those stated in O.C.G.A. § 44-13-12, but if the creditor appears voluntarily and raises questions which the ordinary (now probate judge) would not otherwise have power to pass upon, and they are passed upon, the creditor will be bound by the judgment. Patterson v. Wallace, 47 Ga. 452, 1872 Ga. LEXIS 358 (1872). See also Harris v. Colquitt & Baggs, 44 Ga. 663, 1872 Ga. LEXIS 405 (1872).

If the creditor failed to appear and object that the schedule was insufficient, and it gives a general description of the property, and no fraud or unfairness is alleged or shown, the creditor will not be permitted to attack the judgment of the ordinary (now probate judge) setting it apart, collaterally, in a claim case, on the ground that the schedule was not sufficiently descriptive. Bartlett v. Russell, 41 Ga. 196, 1870 Ga. LEXIS 59 (1870).

Effect in bankruptcy of failure to set aside exemption. — The fact that the bankrupts, as residents of Georgia, did not set apart exemptions in the manner provided did not preclude the allowance of exemptions in bankruptcy proceedings. Clark v. Nirenbaum, 8 F.2d 451, 1925 U.S. App. LEXIS 3291 (5th Cir. 1925), cert. denied, 270 U.S. 649, 46 S. Ct. 349, 70 L. Ed. 780, 1926 U.S. LEXIS 943 (1926).

Appeal. — Where a creditor filed objections, one of which was to the schedule for want of sufficiency and fullness in that the applicant had omitted certain personalty, appeal to the superior court lies. Alday v. Spooner, 35 Ga. App. 614, 134 S.E. 343, 1926 Ga. App. LEXIS 1032 (1926).

Appeal and certiorari. — An appeal to the superior court from the judgment of the ordinary (now probate judge), in setting apart or refusing to set apart a homestead, lies only where the objections interposed by creditors of the applicant are those provided for in O.C.G.A. § 44-13-12. When objections other than those specified in O.C.G.A. § 44-13-12 are filed, the judgment of the ordinary (now probate judge) is reviewable by certiorari, an ap-

peal is not the remedy. Fontano v. Mozley & Co., 121 Ga. 46, 48 S.E. 707, 1904 Ga. LEXIS 8 (1904).

RESEARCH REFERENCES

C.J.S.
40 C.J.S., Homesteads, § 149 et seq.

44-13-13. Appointment of appraisers upon filing of objections; examination and valuation of property; alterations in plat and schedule; approval and recordation; appeal.

Upon an objection being made as provided for in Code Section 44-13-12, unless the applicant shall so alter the schedule or plat or both as to remove the objections, the judge of the probate court shall appoint three disinterested appraisers to examine the property concerning which the objections are made and to value the same. On the appraisers' return under oath, if either the schedule or the plat shall be found to be too large, such alterations shall be made in the schedule and in the plat as the judge may deem proper to bring them within the limits of the value allowed by this article. Thereafter, the judge shall approve the schedule and the plat as required by Code Section 44-13-11 and shall cause the same to be delivered to the clerk of superior court of his or her county who shall record the schedule and plat as required by Code Section 44-13-11. Either party dissatisfied with the judgment shall have the right to appeal under the same rules, regulations, and restrictions as are provided by law in cases of appeals from the probate court.

History.
Ga. L. 1868, p. 27, § 6; Code 1873, § 2011; Code 1882, § 2011; Civil Code 1895, § 2838; Civil Code 1910, § 3388; Code 1933, § 51-405; Code 1981, § 44-13-14; Code 1981, § 44-13-13, as redesignated by Ga. L. 1983, p. 1170, § 2; Ga. L. 2016, p. 193, § 10/HB 1004.

Editor's notes.
Ga. L. 1983, p. 1170, § 2, effective July 1, 1983, redesignated former Code Section 44-13-14 as this Code section. The 1983 Act also redesignated former Code Section 44-13-13, relating to objections to schedule, as present Code Section 44-13-12.

JUDICIAL DECISIONS

Objections not limited to schedule. — O.C.G.A. § 44-13-13 does not provide exclusively for objections to the schedule. The creditor is not required to object to the schedule, if the creditor desires to dispute "the propriety of the survey, or the value of the premises so platted as the homestead." Alday v. Spooner, 35 Ga. App. 614, 134 S.E. 343, 1926 Ga. App. LEXIS 1032 (1926).

Conclusiveness of return and approval. — A return of appraisers and approval of the ordinary (now probate judge) unappealed from, is conclusive upon the applicant. Thrasher v. Bettis, 53 Ga. 407, 1874 Ga. LEXIS 496 (1874).

An appeal does not lie to the superior court from a judgment sustaining a demurrer (now motion to dismiss) to an application for a homestead. In such a case the exclusive remedy for reviewing the judgment is by certiorari. Cunningham v. United States Sav. & Loan Co., 109 Ga. 616, 34 S.E. 1024, 1900 Ga. LEXIS 271 (1900).

Certiorari. — The superior court has jurisdiction to correct errors by a writ of certiorari to the judgment of the ordinary (now probate judge), allowing a homestead. Lathrop v. Soldiers' Loan & Bldg. Ass'n, 45 Ga. 483, 1872 Ga. LEXIS 262 (1872).

Amending petition on appeal. — The applicant may amend the petition by inserting a new right on appeal to the superior court. Young v. N.B. Brown & Co., 45 Ga. 552, 1872 Ga. LEXIS 282 (1872).

De novo investigation on appeal. — When an appeal is taken from the judgment of the ordinary (now probate judge) in allowing or refusing a homestead under O.C.G.A. § 44-13-13, the whole cause is brought up by the appeal, and either party may, in the appellate court, raise any objections or make any motion in relation thereto. Lynch v. Pace, 40 Ga. 173, 1869 Ga. LEXIS 51 (1869); Kirtland, Babcock & Bronson v. Davis, 43 Ga. 318, 1871 Ga. LEXIS 230 (1871).

Value or number of acres. — On appeal, it is discretionary with the jury to sustain the ordinary (now probate judge) in value or number of acres for homestead. Crawford v. Ward, 49 Ga. 40, 1873 Ga. LEXIS 303 (1873).

RESEARCH REFERENCES

C.J.S.
40 C.J.S., Homesteads, § 146 et seq.

44-13-14. Procedure for exempting town realty valued in excess of exemption; order of probate court; reinvestment of sale proceeds; liability of judge or officer.

(a) If an applicant seeks to have an exemption set apart out of real property located in town which exceeds in value the amount of the exemption which he claims and to which he is entitled to complete his legal exemption and such realty cannot be so divided as to give an exemption of that value, the judge of the probate court may pass an order that, should such property be thereafter sold by virtue of any order, judgment, or decree of any court in this state, so much of the proceeds of the sale as may be necessary to make up, when added to the other exempted property of the applicant, if any, the full amount of the exemption allowed by law shall be paid over to the judge of the probate court by the officer making the sale to be invested in property selected by the applicant by some proper person appointed by such judge, which property shall constitute the exemption of the applicant or a part thereof, as the case may be, after the order of the probate court and the deed of reinvestment have been recorded by the clerk of the superior court.

(b) Should any ministerial officer of this state, upon being shown a certified copy of the order of the judge of the probate court provided for in subsection (a) of this Code section, fail to retain and pay over to such

judge the proceeds as required or should any such judge receiving the proceeds fail to appoint the person required to have the proceeds invested and fail to turn over the proceeds to the person so appointed, such officer or judge and his sureties shall be liable to the applicant for the full amount of the money and 20 percent interest thereon for the period of time he wrongfully withholds the money or any part thereof.

History.
Ga. L. 1868, p. 27, §§ 7, 8; Code 1873, §§ 2012, 2013; Code 1882, §§ 2012, 2013; Civil Code 1895, §§ 2839, 2840; Civil Code 1910, §§ 3389, 3390; Code 1933, §§ 51-501, 51-502; Code 1981, § 44-13-15; Code 1981, § 44-13-14, as redesignated by Ga. L. 1983, p. 1170, § 2.

Editor's notes.
Ga. L. 1983, p. 1170, § 2, effective July 1, 1983, redesignated former Code Section 44-13-15 as this Code section. The 1983 Act also redesignated former Code Section 44-13-14, relating to examination and valuation of property by appraisers, as present Code Section 44-13-13.

JUDICIAL DECISIONS

Certiorari is the remedy to correct errors in proceedings under O.C.G.A. § 44-13-14. Lathrop v. Soldiers' Loan & Bldg. Ass'n, 45 Ga. 483, 1872 Ga. LEXIS 262 (1872).

RESEARCH REFERENCES

Am. Jur. 2d.
40 Am. Jur. 2d, Homesteads, § 30.

C.J.S.
40 C.J.S., Homesteads, § 31 et seq.

44-13-15. How cash exempted; investment in personalty.

When any person applies for an exemption of personalty and the personalty sought to be exempted consists of cash in whole or in part, before the cash shall be allowed as an exemption, it shall, under the direction of the judge of the probate court, be invested in such articles of personal property as the applicant may desire; when so invested and returned by schedule with or without other property as required by this article, such property shall constitute the exemption of personalty. In no case shall the allowance of cash without such investment be a valid exemption.

History.
Ga. L. 1870, p. 70, § 1; Code 1873, § 2016a; Code 1882, § 2016a; Civil Code 1895, § 2841; Civil Code 1910, § 3391; Code 1933, § 51-601; Code 1981, § 44-13-16; Ga. L. 1982, p. 3, § 44; Code 1981, § 44-13-15, as redesignated by Ga. L. 1983, p. 1170, § 2.

Editor's notes.
Ga. L. 1983, p. 1170, § 2, effective July 1, 1983, redesignated former Code Section 44-13-16 as this Code section. The 1983 Act also redesignated former Code Section 44-13-15, relating to procedure for exempting town realty valued in excess of exemption, as present Code Section 44-13-14.

Law reviews.
For comment on Roquemore v. Goldstein, 100 Ga. App. 591, 112 S.E.2d 24 (1959) see 12 Mercer L. Rev. 280 (1960).

JUDICIAL DECISIONS

Interest in judgment. — O.C.G.A. § 44-13-15 is not applicable in a case where the property exempted was an interest owned and held by the debtor in a judgment. Such an interest is not cash. Johnson v. Redwine, 105 Ga. 449, 33 S.E. 676, 1898 Ga. LEXIS 532 (1898).

Creditor holding waiver. — O.C.G.A. § 44-13-15 does not deal with, and does not affect, the rights of creditors under homestead exemptions holding a waiver. Posey v. Rome Oil & Fertilizer Co., 157 Ga. 44, 121 S.E. 205, 1923 Ga. LEXIS 363 (1923).

Share of partner in money in the hands of a receiver of the partnership cannot be exempted for such partner until receivership expenses are paid. Hahn & Co. v. Allen, 93 Ga. 612, 20 S.E. 74, 1894 Ga. LEXIS 370 (1894).

Partnership money in receiver's hands. — No member of a partnership is entitled to an exemption out of money arising from a sale of personal property by a duly appointed receiver, as against a judgment or decree founded on a firm waiver note. Hahn & Co. v. Allen, 93 Ga. 612, 20 S.E. 74, 1894 Ga. LEXIS 370 (1894).

Cash proceeds from sale. — If indivisible town realty must be sold in order to sever the homestead, the cash arising from the sale must be invested. Roquemore v. Goldstein, 100 Ga. App. 591, 112 S.E.2d 24, 1959 Ga. App. LEXIS 670 (1959).

Damages recovered for conversion of exempt personalty. — A converting creditor has no right to demand the investment of damages recovered for the conversion of exempt personalty. They should be paid to the beneficiaries of the homestead. Harrell v. Harrell, 77 Ga. 130, 3 S.E. 457, 1887 Ga. LEXIS 86 (1887).

Bankruptcy court. — It is probable that the bankruptcy court would not feel bound to superintend the investment provided for by O.C.G.A. § 44-13-15, but, without it, would allow an exemption of money on hand. In re Friend, 9 F. Cas. 821, 1877 U.S. App. LEXIS 1947 (C.C.S.D. Ga. Apr. 1, 1877).

Bankrupt debtor perfecting exemption of money set aside to debtor in a bankruptcy proceeding must comply with O.C.G.A. §§ 44-13-5, 44-13-8, and 44-13-9, relating to the schedule to be attached to the application, the notice to be published by the ordinary (now probate judge), and the notice to be given creditors by the applicant or the applicant's agent. Lou Hill Co. v. Bjoralt, 103 Ga. App. 564, 120 S.E.2d 39, 1961 Ga. App. LEXIS 1002 (1961).

RESEARCH REFERENCES

Am. Jur. 2d.

31 Am. Jur. 2d, Exemptions, §§ 36, 105. 40 Am. Jur. 2d, Homesteads, § 169.

C.J.S.

35 C.J.S., Exemptions, §§ 1, 41. 40 C.J.S., Homesteads, § 1.

ALR.

Debtor's exemption of proceeds of insurance on property itself exempt, 63 A.L.R. 1286.

Deposit of exempt funds as affecting debtor's exemption, 67 A.L.R. 1203.

44-13-16. Sale of exempted property for reinvestment; procedure; effect.

(a) Whenever the debtor shall desire the exempted property, whether real or personal, to be sold for reinvestment, an application for the sale of the property must be made to the judge of the superior court of the county where the debtor resides or the property is situated unless the judge is disqualified, in which case application may be made to the judge of the superior court of an adjoining circuit. Upon proper showing,

the judge may order a sale of the property; and the proceeds shall be reinvested upon the same uses.

(b) A sale ordered pursuant to subsection (a) of this Code section shall operate to pass to the purchaser the entire interest and title of the beneficiaries in the exempted property and also the entire interest and title owned, before the exemption was made, by the party out of whose estate the property was so exempted.

(c) The purchaser shall receive the property sold and shall hold the same, as to all liens thereon against the original debtor and with the same exemption therefrom, for the same length of time as was allowed to the original debtor before the sale; and, by consent of all lien creditors, the liens of such creditors may be divested and transferred to the newly acquired property by the order of the court pursuant to subsection (a) of this Code section.

(d) An applicant who has obtained an exemption for the spouse, minor children, or dependents of the debtor may apply for an order of sale under subsections (a) through (c) of this Code section. All persons interested shall be parties to the proceeding.

(e) The judge of the superior court shall order the entire proceedings recorded in the minutes by the clerk of the superior court of the county in which the parties applying for the order of sale reside and, when land is to be sold, in the county where the land is located; and the judge shall provide the means and mode of sale and reinvestment as provided in this Code section.

(f) This Code section shall apply to the sale of any real or personal property set apart under this article.

History.

Ga. L. 1876, p. 48, § 7; Ga. L. 1878-79, p. 99, § 5; Code 1882, § 2025; Civil Code 1895, § 2847; Civil Code 1910, § 3397; Code 1933, § 51-801; Code 1981, § 44-13-17; Code 1981, § 44-13-16, as redesignated by Ga. L. 1983, p. 1170, § 2.

Editor's notes.

Ga. L. 1983, p. 1170, § 2, effective July 1, 1983, redesignated former Code Section 44-13-17 as this Code section. The 1983 Act also redesignated former Code Section 44-13-16, relating to how cash was exempted, as present Code Section 44-13-15.

JUDICIAL DECISIONS

Applicability. — O.C.G.A. § 44-13-16 applies to all homesteads, and in holding off creditors until the homestead term expires, it carries out the true intent of the constitution. Van Horn v. McNeill, 79 Ga. 121, 4 S.E. 111, 1887 Ga. LEXIS 174 (1887).

Strict construction. — The policy of our law is not to alienate homesteads, and the statutes relating thereto including O.C.G.A. § 44-13-16 will be strictly construed, and the rights of the purchaser will be closely watched and never enlarged. Whittle v. Samuels, 54 Ga. 548, 1875 Ga. LEXIS 253 (1875).

Order of court required. — The head of the family cannot legally sell or dispose of the exempted property without first obtaining an order of court as prescribed by O.C.G.A. § 44-13-16. Powers v. Rosen-

blatt & Co., 113 Ga. 559, 38 S.E. 969, 1901 Ga. LEXIS 299 (1901).

Sale not in accord with order. — Where the sale was not in accord with the terms of the order, the purchaser did not acquire a valid title to the homestead property, and it was the right of the beneficiaries of the homestead to recover the same, together with mesne profits; but subject in equity to the right of the purchaser to offset against the same so much of the purchase money paid to the head of the family; and also to set off against such mesne profits any additional value to the homestead property brought about by reason of permanent improvements by the purchaser. Taylor v. James, 109 Ga. 327, 34 S.E. 674, 1899 Ga. LEXIS 646 (1899).

Purchaser charged with notice. — An order having been granted by the judge of the superior court authorizing a sale of the homestead for reinvestment and distinctly providing that it would be sold at a designated price, one who undertook to purchase such homestead or a part thereof was chargeable with notice of the terms embraced in the judge's order. Taylor v. James, 109 Ga. 327, 34 S.E. 674, 1899 Ga. LEXIS 646 (1899).

Liens not transferred to property purchased. — Where a homestead was sold for reinvestment under O.C.G.A. § 44-13-16, under an order of the chancellor for that purpose, but the liens of creditors were not transferred to the property purchased, the purchaser of the homestead took it, as to lien creditors thereon against the original debtor, with the same exemption therefrom, and for the same length of time, as was allowed to the original debtor before such sale. Therefore, after the sale, a judgment creditor could not levy on and bring to sale the property, subject to the homestead charge or encumbrance, the object being to sell the reversionary interest in the hands of the purchaser before the termination of the homestead estate. Stephenson v. Eberhart & Son, 79 Ga. 116, 3 S.E. 641, 1887 Ga. LEXIS 173 (1887).

Collateral understanding between parties. — Where the head of a family and his wife, being the sole remaining beneficiaries of a homestead apply for authority to sell the homestead property at private sale, for the purpose of reinvestment in other specified real estate, they will be estopped thereafter from moving to set aside the deeds executed between the parties on the ground that there was a collateral understanding between them, not disclosed to the judge, that the exchange of the property would be made merely for convenience to enable the grantee of the homestead property to sell it at a higher price, and, if he failed to make a sale, that the deeds should be canceled. Vaughn v. Vaughn, 152 Ga. 160, 108 S.E. 541, 1921 Ga. LEXIS 28 (1921).

Upon removal of debtor from state, the debtor's homestead terminated, and a levy on and sale of the reversion would carry the entire title. City Bank v. Smisson, 73 Ga. 422, 1884 Ga. LEXIS 141 (1884).

Alienation by husband to wife. — A homestead set apart for the benefit of a wife and minor children was not subject to alienation by the husband to the wife any more than to anyone else without an order of the judge of the superior court for reinvestment, as prescribed in O.C.G.A. § 44-13-16, even though at the time of the attempted alienation the wife was the sole beneficiary of the homestead, the minor children having then attained their majority. Love v. Anderson, 89 Ga. 612, 16 S.E. 68, 1892 Ga. LEXIS 413 (1892).

Application by widow. — A widow, who is the head of a family, can make application under O.C.G.A. § 44-13-16 without joining her children therein. Deyton v. Bell, 81 Ga. 370, 8 S.E. 620, 1888 Ga. LEXIS 134 (1888).

Application by trustee or guardian. — If the application is by a trustee or guardian for minors, to whom as such the homestead has been set apart, it is necessary to make the children parties. Deyton v. Bell, 81 Ga. 370, 8 S.E. 620, 1888 Ga. LEXIS 134 (1888).

Joining wife in application. — It seems that where the head of a family applies under O.C.G.A. § 44-13-16, it is necessary for his wife, if he has one, to join with him in the application. If he has no wife, he can make the application alone. Deyton v. Bell, 81 Ga. 370, 8 S.E. 620, 1888 Ga. LEXIS 134 (1888).

Adult heirs acquiescing in setting apart homestead. — A widow as the head of a family consisting of herself and a

minor child, having had a homestead set apart to her out of the lands of her deceased husband's estate, and the adult heirs having acquiesced in the same, and the lands so set apart having been subsequently sold by order of the judge in conformity to O.C.G.A. § 44-13-16, the purchaser at such sale acquired, not only the title of the beneficiaries, but that of the estate, so as to bar the rights of the adult heirs and all persons claiming under them, their rights being transferred to the property in which the proceeds of the sale were invested. Fleetwood v. Lord, 87 Ga. 592, 13 S.E. 574, 1891 Ga. LEXIS 237 (1891).

Pony homestead. — A pony homestead, by the provisions of O.C.G.A. § 44-13-16 may be sold by an order of the judge of the superior court; but the law does not contemplate the pledging of a homestead to secure a prospective loan. Powell v. Powell, 159 Ga. 837, 127 S.E. 117, 1925 Ga. LEXIS 64 (1925).

Sale by wife after husband's death. — A wife may not sell the homestead after the husband's death, though the executor of the husband joins in the deed and is authorized by will to do so. VanDyke v. Kilgo, 54 Ga. 551, 1875 Ga. LEXIS 254 (1875).

Service where children parties. — Where widow's children were parties plaintiff in proceedings to sell a homestead under O.C.G.A. § 44-13-16, no service on them was necessary. Deyton v. Bell, 81 Ga. 370, 8 S.E. 620, 1888 Ga. LEXIS 134 (1888).

RESEARCH REFERENCES

C.J.S.

40 C.J.S., Homesteads, §§ 55, 68, 95, 153, 158, 176.

ALR.

Debtor's exemption of proceeds of insurance on property itself exempt, 63 A.L.R. 1286.

Time as of which, and extent to which, homestead exemption attaches to property received in exchange for homestead, 83 A.L.R. 54.

44-13-17. Sale for reinvestment when application made for debtor's children or dependents or by divorced spouse.

Whenever any property has been set apart for the debtor's minor children or dependents and they desire the same to be sold for reinvestment but the debtor fails or refuses to join with them in the application to have such property sold for reinvestment or whenever a divorce has been granted to the spouse of the debtor and the property exempted by this article and sought to be sold for reinvestment has been awarded to that spouse, the proceedings for reinvestment shall be in all respects as binding upon all parties as if the debtor had joined with the minor children, dependents, or spouse, respectively, in the application.

History.

Ga. L. 1894, p. 93, § 1; Civil Code 1895, § 2844; Civil Code 1910, § 3394; Code 1933, § 51-703; Code 1981, § 44-13-18; Code 1981, § 44-13-17, as redesignated by Ga. L. 1983, p. 1170, § 2.

Editor's notes.

Ga. L. 1983, p. 1170, § 2, effective July 1, 1983, redesignated former Code Section 44-13-18 as this Code section. The 1983 Act also redesignated former Code Section 44-13-17, relating to sale of exempted

property for reinvestment, as present Code Section 44-13-16.

RESEARCH REFERENCES

Am. Jur. 2d.

40 Am. Jur. 2d, Homesteads, §§ 114, 148, 166, 188.

ALR.

Effect of divorce on homestead, 36 A.L.R. 431; 84 A.L.R.2d 703.

Debtor's exemption of proceeds of insurance on property itself exempt, 63 A.L.R. 1286.

Time as of which, and extent to which, homestead exemption attaches to property received in exchange for homestead, 83 A.L.R. 54.

44-13-18. Disposition of rents and profits arising from exempted property.

All produce, rents, or profits arising from property in this state which is exempted under this article shall be for the support of those persons allowed such exemption and shall be exempt from levy and sale except as otherwise provided in this article.

History.

Ga. L. 1869, p. 23, § 1; Code 1873, § 2026; Code 1882, § 2026; Civil Code 1895, § 2848; Civil Code 1910, § 3398; Code 1933, § 51-802; Code 1981, § 44-13-19; Code 1981, § 44-13-18, as redesignated by Ga. L. 1983, p. 1170, § 2.

Editor's notes.

Ga. L. 1983, p. 1170, § 2, effective July 1, 1983, redesignated former Code Section 44-13-19 as this Code section. The 1983 Act also redesignated former Code Section 44-13-18, relating to sale for reinvestment when application made for debtor's children or dependents or by divorced spouse, as present Code Section 44-13-17.

JUDICIAL DECISIONS

Short homestead. — The provisions of O.C.G.A. § 44-13-18 apply to the statutory or "short" homestead as well as to the constitutional homestead. Russell v. Gilliland, 19 Ga. App. 676, 91 S.E. 1065, 1917 Ga. App. LEXIS 303 (1917).

Exempted personalty. — Inasmuch as exempted personalty stands in all respects on the same footing as a homestead, and by O.C.G.A. § 44-13-18 seems to be included in the latter term, the declaration of the statute applies directly to property which has been set aside as exempt. Brand v. Clements, 116 Ga. 392, 42 S.E. 711, 1902 Ga. LEXIS 112 (1902).

The accretions of homestead property are exempt from levy and sale under O.C.G.A. § 44-13-18. Powers v. Rosenblatt & Co., 113 Ga. 559, 38 S.E. 969, 1901 Ga. LEXIS 299 (1901); Russell v. Gilliland, 19 Ga. App. 676, 91 S.E. 1065, 1917 Ga. App. LEXIS 303 (1917).

Crop produced by use of exempted personalty and supplies. — When cotton has been produced by the conjoint use of exempted property and supplies furnished by the head of the family and not connected with such property, the whole crop so produced is not subject to an individual debt of the head of the family. Brand v. Clements, 116 Ga. 392, 42 S.E. 711, 1902 Ga. LEXIS 112 (1902).

Mortgaging crops for supplies. — Where a person, after a homestead in land has been set apart to that person, individually mortgages growing crops thereon in order to obtain supplies to be used in making such crops, the holder of this mortgage can by foreclosing it against the mortgagor as an individual, after the ma-

turity of these crops, subject the same to the satisfaction of the mortgage execution. Under such circumstances, the crops are not subject to such execution. Martin v. Davis & Co., 104 Ga. 633, 30 S.E. 753, 1898 Ga. LEXIS 385 (1898).

Forfeiture. — Where a portion of the land set apart as a homestead was leased by the head of the family with the stipulation that if the lessee failed to work it, such lessee should pay a certain forfeiture, such forfeiture was part of the profits of the homestead estate under O.C.G.A. § 44-13-18. Larey v. Baker, 85 Ga. 687, 11 S.E. 800, 1890 Ga. LEXIS 134 (1890).

Debts due physician. — Debts due a physician in the earning of which the physician's skill was the principal factor, and the use of exempted property, such as the living in a house set apart as a homestead and riding an exempted horse in paying the physician's calls, were merely incidents, were not exempt from garnishment on the ground that they were the proceeds of a homestead and exemption set apart to the physician as head of a family. Staples v. Keister, 81 Ga. 772, 8 S.E. 421, 1888 Ga. LEXIS 345 (1888).

RESEARCH REFERENCES

Am. Jur. 2d.
40 Am. Jur. 2d, Homesteads, §§ 41, 75, 76, 178.

C.J.S.
40 C.J.S., Homesteads, §§ 44, 173.

44-13-19. Costs of proceedings.

Before the approval of the judge of the probate court may be demanded as provided in this article, the applicant shall pay to such judge the cost of the proceedings, including the clerk's cost for recording the same. The applicant shall be bound for such costs if the judge approves the application. If any person filing objections to the schedule or plat fails to have the same sustained, he shall pay the cost of the proceedings.

History.
Ga. L. 1868, p. 27, § 9; Ga. L. 1870, p. 70, § 6; Code 1873, § 2023; Code 1882, § 2023; Civil Code 1895, § 2845; Civil Code 1910, § 3395; Code 1933, § 51-704; Code 1981, § 44-13-20; Code 1981, § 44-13-19, as redesignated by Ga. L. 1983, p. 1170, § 2.

Editor's notes.
Ga. L. 1983, p. 1170, § 2, effective July 1, 1983, redesignated former Code Section 44-13-20 as this Code section. The 1983 Act also redesignated former Code Section 44-13-19, relating to disposition of rents and profits arising from exempted property, as present Code Section 44-13-18.

44-13-20. Reversion of property set apart for spouse, children, or dependents.

Property set apart pursuant to Code Section 44-13-2 for a spouse, for a spouse and minor children, for minor children alone, or for dependents of a debtor (1) upon the death of the spouse or the spouse's remarriage, when set apart to the spouse alone, (2) upon the attaining of the age of 18 by the minor children or their emancipation during minority, when set apart for the minor children, (3) upon the death or remarriage of the spouse and the attaining of the age of 18 by the minor children or the emancipation of the minor children, when set apart to

the spouse and minor children, and (4) upon a former dependent person's no longer being eligible to be claimed by the debtor as a dependent for income tax purposes pursuant to Code Section 48-7-26, shall revert to the estate from which it was set apart unless it was sold or reinvested pursuant to this article, in which case this Code section shall apply to and follow all the reinvestments unless the fee simple has been sold as provided in this article.

History.

Ga. L. 1868, p. 27, § 10; Ga. L. 1869, p. 25, § 1; Code 1873, § 2024; Ga. L. 1876, p. 48, § 6; Code 1882, § 2024; Civil Code 1895, § 2846; Civil Code 1910, § 3396; Code 1933, § 51-705; Code 1981, § 44-13-21; Code 1981, § 44-13-20, as redesignated by Ga. L. 1983, p. 1170, § 2; Ga. L. 2006, p. 141, § 8/HB 847.

Cross references.

Emancipation of minors, T. 15, C. 11, Art. 6.

Editor's notes.

Ga. L. 1983, p. 1170, § 2, effective July 1, 1983, redesignated former Code Section 44-13-21 as this Code section. The 1983 Act also redesignated former Code Section 44-13-20, relating to costs of proceedings, as present Code Section 44-13-19.

Law reviews.

For article on 2006 amendment of this Code section, see 23 Ga. St. U. L. Rev. 79 (2006).

JUDICIAL DECISIONS

In general. — Homestead property set apart to a wife, or wife and minor children, etc., upon the termination of the homestead estate reverts to the estate from which it was set apart unless it is sold or reinvested in pursuance of the provisions of O.C.G.A. § 44-13-20. Griffin v. Griffin, 153 Ga. 547, 113 S.E. 161, 1922 Ga. LEXIS 121 (1922).

Public policy favors support of minor children by the father's estate after his death. Russell v. Fulton Nat'l Bank, 247 Ga. 556, 276 S.E.2d 641, 1981 Ga. LEXIS 744 (1981).

Homestead did not terminate so long as the daughters of the person who procured it and who were considered as beneficiaries of it, continued indigent and dependent, and remained with the homesteader, having no other home, and deriving support from the homesteader. Torrance v. Boyd, 63 Ga. 22, 1879 Ga. LEXIS 118 (1879).

Dependent females. — Where a man as the head of a family had set apart to himself as a homestead certain land, his family at that time consisting of a wife and several children, male and female, and where subsequently all of the children became of age, and all married except one daughter, who continued to live upon the land and to derive a support therefrom, upon the death of the man and his wife the homestead terminated, and the land was subject to be sold by his administrator for purposes of administration. Towns v. Mathews, 91 Ga. 546, 17 S.E. 955, 1893 Ga. LEXIS 280 (1893); Haynes v. Schaefer, 96 Ga. 743, 22 S.E. 327, 1895 Ga. LEXIS 163 (1895); Jones v. McCrary, 123 Ga. 282, 51 S.E. 349, 1905 Ga. LEXIS 444 (1905); Bell v. Carter, 138 Ga. 530, 75 S.E. 638, 1912 Ga. LEXIS 598 (1912); Vaughn v. Wheaton, 145 Ga. 311, 89 S.E. 210, 1916 Ga. LEXIS 293 (1916).

Minor beneficiary ignoring homestead. — The mere fact that a minor who is the sole beneficiary of a homestead estate does not live upon the property, and leaves the head of the family to use the proceeds of the same in such a way as the minor desires for a period of ten years, without calling the minor to account, does not cause the homestead estate to terminate and become subject to levy and sale as the property of the head of the family. Sigman v. Austin, 112 Ga. 570, 37 S.E. 894, 1901 Ga. LEXIS 13 (1901).

Death of second wife leaving no issue. — The wife, after the death of the husband, having continued to enjoy the benefit of the homestead up to the time of

her own death was neither entitled to dower nor to a child's part, and at her death the property reverted to the husband's estate. Love v. Anderson, 89 Ga. 612, 16 S.E. 68, 1892 Ga. LEXIS 413 (1892).

RESEARCH REFERENCES

C.J.S.
40 C.J.S., Homesteads, §§ 105, 170 et seq.

44-13-21. Effect of article on other exemptions.

Nothing contained in this article shall be construed to prevent any debtor who does not wish to avail himself of the benefits of this article from claiming the exemptions allowed by Code Section 44-13-100. No person who is allowed the exemptions under Code Section 44-13-100 shall take any benefit under this article; nor shall any person who is allowed the exemptions under this article be allowed the exemptions under Code Section 44-13-100 unless the exempted property so elected is lost by virtue of a sale under an outstanding claim, in which event the election shall not bar an application for an exemption under this article not liable to the outstanding claim.

History.
Ga. L. 1868, p. 27, § 14; Code 1873, § 2032; Ga. L. 1876, p. 48, § 8; Code 1882, § 2032; Civil Code 1895, § 2854; Civil Code 1910, § 3404; Code 1933, § 51-906; Code 1981, § 44-13-22; Code 1981, § 44-13-21, as redesignated by Ga. L. 1983, p. 1170, § 1.

Editor's notes.
Ga. L. 1983, p. 1170, § 2, effective July 1, 1983, redesignated former Code Section 44-13-22 as this Code section. The 1983 Act also redesignated former Code Section 44-13-21, relating to reversion of property set aside for spouse, children, or dependents, as present Code Section 44-13-20.

JUDICIAL DECISIONS

Option as to homestead. — The insolvent debtor has an option, under the provisions of O.C.G.A. § 44-13-21, to take the benefit of the constitutional homestead or to utilize the pony homestead. Powell v. Powell, 159 Ga. 837, 127 S.E. 117, 1925 Ga. LEXIS 64 (1925). See also Connally v. Hardwick, 61 Ga. 501, 1878 Ga. LEXIS 169 (1878).

RESEARCH REFERENCES

C.J.S.
35 C.J.S., Exemptions, § 1. 40 C.J.S., Homesteads, § 1.

ALR.
Availability of judgment under which exempt property has been seized as a set-off or counterclaim against claim based on wrongful seizure, 20 A.L.R. 276.

PART 2

WAIVER OF EXEMPTIONS

Editor's notes.

Ga. L. 1983, p. 1170, § 1, which amended Code Sections 44-13-40 through 44-13-42 and enacted Code Section 44-14-43 in this part, provided in § 1, not codified by the General Assembly, that: "It is the intent of this Act to implement certain changes required by Article I, Section I, Paragraph XXVI of the Constitution of the State of Georgia."

RESEARCH REFERENCES

Am. Jur. 2d.

31 Am. Jur. 2d, Exemptions, § 143 et seq. 40 Am. Jur. 2d, Homesteads, §§ 20, 22, 66, 79, 119, 150, 158-161, 165, 166, 174, 178-180 et seq., 184-186, 188, 189, 206.

ALR.

Direction in will for payment of debts and expenses as subjecting exempt homestead to their payment, 103 A.L.R. 257.

Validity and effect of waiver of right to complain of acts impairing value of homestead property, without joinder or consent of both husband and wife, 142 A.L.R. 532.

Recovery of damages for breach of contract to convey homestead where only one spouse signed contract, 5 A.L.R.4th 1310.

44-13-40. Right of debtor to waive exemption.

Any debtor may, except as to wearing apparel and $300.00 worth of household and kitchen furniture and provisions, waive or renounce his right to the benefit of the exemption provided for by this article by a waiver, either general or specific, in writing simply stating that he does so waive or renounce such right, which waiver may be stated in the contract of indebtedness or may be made contemporaneously therewith or may be made subsequent to the execution of the contract of indebtedness in a separate paper.

History.

Ga. L. 1878-79, p. 99, § 6; Code 1882, § 2039a; Civil Code 1895, § 2863; Civil Code 1910, § 3413; Code 1933, § 51-1101; Ga. L. 1983, p. 1170, § 2.

JUDICIAL DECISIONS

The policy behind O.C.G.A. § 44-13-40 is to permit a hard pressed debtor to use an exemption to obtain credit which in the debtor's extremity, may save the debtor. Mims v. Dixie Fin. Corp., 426 F. Supp. 627, 1976 U.S. Dist. LEXIS 15209 (N.D. Ga. 1976).

Benefit must be set apart. — In order for an exemption of the $300.00 of personal property allowed to a debtor under the provisions of the Constitution and O.C.G.A. § 44-13-40 to be effectual as against a waiver thereof, the debtor must have such personal property set apart to the debtor as exempt, in the same manner that the homestead allowed by the Constitution is set apart. Sasser v. Roberts, 68 Ga. 252, 1881 Ga. LEXIS 361 (1881); Miller v. Almon, 123 Ga. 104, 50 S.E. 993, 1905 Ga. LEXIS 387 (1905).

The word "provisions" means something in condition to be consumed as food, such as meal, flour, lard, meat, and other articles of that kind. Cochran v. Harvey, 88 Ga. 352, 14 S.E. 580, 1892 Ga. LEXIS 29 (1892); Hines v. Sam Weichselbaum

Co., 18 Ga. App. 606, 89 S.E. 1095, 1916 Ga. App. LEXIS 1135 (1916).

Cotton is not "provisions" within the meaning of O.C.G.A. § 44-13-40. Posey v. Rome Oil & Fertilizer Co., 157 Ga. 44, 121 S.E. 205, 1923 Ga. LEXIS 363 (1923). See also Butler & Heath v. Shiver, 79 Ga. 172, 4 S.E. 115, 1887 Ga. LEXIS 190 (1887).

Money. — Money, though less in amount than $300.00 which might be readily converted into any one of the classes of property mentioned in the Constitution and laws as exempt, does not belong to either of them, and is not protected against the waiver. Posey v. Rome Oil & Fertilizer Co., 157 Ga. 44, 121 S.E. 205, 1923 Ga. LEXIS 363 (1923). See also Arnwine v. Beaver, 134 Ga. 377, 67 S.E. 937, 1910 Ga. LEXIS 210 (1910).

Waiver in application for credit. — A general waiver of homestead under O.C.G.A. § 44-13-40 only operates in favor of the specific liability referred to in the waiver of obligation containing the waiver; a waiver of all homestead rights, in an application for a general line of credit, is not effectual to bar the debtor's right to homestead as against a debt thereafter contracted. Ragan, Malone & Co. v. Taff, 134 Ga. 835, 68 S.E. 579, 1910 Ga. LEXIS 365 (1910); Frank & Co. v. Weiner, 167 Ga. 892, 147 S.E. 51, 1929 Ga. LEXIS 57 (1929).

Waiver in financial statement. — A waiver of homestead in a requested statement as to the financial condition of the head of the family was made contemporaneously with the offer to buy and its acceptance, and was a valid contract of waiver. Pincus v. S. H. Meinhard & Bro., 139 Ga. 365, 77 S.E. 82, 1913 Ga. LEXIS 436 (1913).

Waiver in promissory note. — The right to a homestead exemption may be waived by a provision in a promissory note; and if a judgment based on a homestead waiver note is rendered at any time prior to an adjudication in bankruptcy, the lien of such judgment attaches to the homestead exemption and the bankruptcy proceedings do not divest or affect the lien of such judgment. Bell v. Allied Fin. Co., 215 Ga. 631, 112 S.E.2d 609, 1960 Ga. LEXIS 284 (1960).

Where homestead already set apart. — A homestead which has been regularly set apart can neither be waived nor renounced by the head of the family. Russell v. Gilliland, 19 Ga. App. 676, 91 S.E. 1065, 1917 Ga. App. LEXIS 303 (1917).

Waiver binds family. — A husband may waive the right of homestead in his property as against a certain debt, and his waiver will bind his family, although an application for homestead may at the time be pending. Jackson v. Parrott, 67 Ga. 210, 1881 Ga. LEXIS 154 (1881).

Waiver of exemptions is not void but voidable, and therefore a defendant's disclosure statement disclosed a valid, enforceable security interest in the debtor's homestead exemption. Caldwell v. Dixie Fin. Corp., 15 B.R. 811, 1981 Bankr. LEXIS 2430 (Bankr. N.D. Ga. 1981).

No estate conveyed. — The waiver of homestead does not convey an estate. Norris v. Aikens, 155 Ga. 488, 117 S.E. 248, 1923 Ga. LEXIS 104 (1923).

The waiver of an exemption is somewhat akin to conveying property. However, a waiver of exemption although in the nature of a conveyance does not convey title or create a lien. Mims v. Dixie Fin. Corp., 426 F. Supp. 627, 1976 U.S. Dist. LEXIS 15209 (N.D. Ga. 1976).

Disposal of money by trustee in bankruptcy. — Where a trustee in bankruptcy paid to the bankrupt the amount set apart as exempt under O.C.G.A. § 44-13-40, as soon as set apart by the referee, creditors could not require the trustee to deposit all moneys received as trustee in a bankruptcy depository, though, where an exemption is set apart and money is ordered paid, it ought to remain long enough in the hands of the trustee to allow claimants an opportunity to be heard. In re Barnett, 214 F. 263, 1914 U.S. Dist. LEXIS 1801 (D. Ga. 1914).

Written waiver of exemption and homestead is good inter se without having the same alleged in the declaration or summons, judgment or execution, and is, after judgment, provable, aliunde, whether the lien of the judgment be general or special, and whether the waiver be written on the contract or obligation, or on a separate paper. Flemister v. Phillips, 65 Ga. 676, 1880 Ga. LEXIS 294 (1880).

Validity of waiver of exemptions and security interest prior to filing for bankruptcy. — Until such time as a

debtor files a petition in bankruptcy and takes active steps to avoid a lien which impairs an exemption of the debtor, a waiver of exemptions is valid and a security interest in those exemptions is also valid. Caldwell v. Dixie Fin. Corp., 15 B.R. 811, 1981 Bankr. LEXIS 2430 (Bankr. N.D. Ga. 1981).

Priority. — An assignment of an exemption, before an adjudication in bankruptcy, prevails over a sale after it is set apart. J. Saul & Co. v. Bowers, 155 Ga. 456, 117 S.E. 86 (1923).

A waiver of the homestead and exemption allows the creditor to be preferred over general creditors. An assignment may allow the creditor to be preferred over both creditors holding homestead waivers and creditors with subsequent assignment. Elzea v. National Bank, 570 F.2d 1248, 1978 U.S. App. LEXIS 11787 (5th Cir. 1978).

While pending the bankruptcy proceeding the creditor cannot maintain a suit at law against the debtor to obtain a judgment against the debtor in personam, but where claim of a creditor is evidenced by a promissory note in which the debtor waives the exemption of homestead, the debtor is estopped by the waiver to claim an exemption as against the creditor, and the latter has an equitable remedy to obtain a judgment in rem against the exempted property, subjecting it to the claim; and where the property is of personalty of a perishable nature, or such that it will be destroyed in the use, the court may enjoin the debtor from disposing of the property, and appoint a receiver to take charge of it until a judgment in rem can be obtained. Nelson v. Brannon, 182 Ga. 195, 184 S.E. 870, 1936 Ga. LEXIS 314 (1936).

The creditor has no rights unless the debtor goes into bankruptcy and requests that the homestead and exemption be set aside. Elzea v. National Bank, 570 F.2d 1248, 1978 U.S. App. LEXIS 11787 (5th Cir. 1978).

RESEARCH REFERENCES

Am. Jur. 2d.

31 Am. Jur. 2d, Exemptions, § 143 et seq. 40 Am. Jur. 2d, Homesteads, § 187 et seq.

C.J.S.

40 C.J.S., Homesteads, §§ 108, 119 et seq.

ALR.

Estoppel to claim, or waiver of, homestead by direction of judgment debtor to levy on real estate, 101 A.L.R. 851.

Recital in deed or mortgage disclaiming homestead as respects property described or affirming homestead in other property, 128 A.L.R. 414.

44-13-41. Selection of property as to which exemption not waived; affidavit as to valuation; jury trial; penalty for harassment of debtor.

In case of a waiver and the levy of an execution, the debtor may select and set apart $300.00 worth of household and kitchen furniture and provisions as free from levy and sale. If, when such selection is made, the plaintiff in fi. fa. shall be of the opinion that said property is of greater value than $300.00, he may indemnify the levying officer and require him to proceed with the levy upon some part of the property or all if it be incapable of division. It shall then be the right of the debtor to make and deliver to the levying officer an affidavit stating substantially that the property selected is not of greater value than $300.00. The levy and affidavit shall be returned to the next term of the superior court of the county of the residence of the debtor and shall be tried as

cases of illegality, the only issue being the value of the property selected. The jury may find generally for the defendant in fi. fa., in which case the levy shall be dismissed, or may find specifically what portion of the property is of the value of $300.00, which portion shall be exempted, and the balance shall be sold; provided, however, that the jury or other tribunal trying the issue made by the levy and affidavit may assess damages, not exceeding 25 percent of the value of the property levied upon, against the plaintiff in execution for any levy made not in good faith for the collection of the execution but for the purpose of harassing the debtor.

History.

Ga. L. 1878-79, p. 99, § 7; Code 1882, § 2039b; Civil Code 1895, § 2864; Civil Code 1910, § 3414; Code 1933, § 51-1102; Ga. L. 1983, p. 1170, § 2.

JUDICIAL DECISIONS

Limitation of exemption. — The exemption is limited by amount rather than by the nature of the articles, except under the general term "household and kitchen furniture." Kemp v. Swainsboro Ice & Fuel Co., 47 Ga. App. 99, 169 S.E. 700, 1933 Ga. App. LEXIS 303 (1933).

Option. — It is optional to take either the exemption provided by O.C.G.A. § 44-13-100 or the exemption declared in O.C.G.A. § 44-13-41, but one cannot take both the exemptions. McFarlin v. Reeves, 10 Ga. App. 581, 73 S.E. 862, 1912 Ga. App. LEXIS 619 (1912), overruled, Spooner v. Coachman, 18 Ga. App. 705, 90 S.E. 373, 1914 Ga. App. LEXIS 482 (1914); Wilbanks v. Wardlaw, 50 Ga. App. 495, 178 S.E. 466, 1935 Ga. App. LEXIS 189 (1935).

Two exemptions distinguished. — It is optional to take either the exemption provided by O.C.G.A. § 44-13-100, the exemption declared in O.C.G.A. § 44-13-41, but the two exemptions are distinct; as to the $300.00 worth of household and kitchen furniture and provisions allowed by O.C.G.A. §§ 44-13-40 and 44-13-41 when properly claimed and set apart in the manner provided by O.C.G.A. § 44-13-42, no waiver of exemption will prevail, but under O.C.G.A. § 44-13-100 a waiver will be effective against any other benefit "provided for by the Constitution and laws of this state." Wilbanks v. Wardlaw, 50 Ga. App. 495, 178 S.E. 466, 1935 Ga. App. LEXIS 189 (1935).

A constitutional homestead set aside only as provided in O.C.G.A. § 44-13-41, and not as provided in O.C.G.A. § 44-13-5, has not been set aside as provided by law. Brown v. Scarborough, 158 Ga. 301, 123 S.E. 605, 1924 Ga. LEXIS 136 (1924).

Waiver not necessary. — In order for a debtor and his wife to avail themselves of the exemption provided by O.C.G.A. § 44-13-41, it is not essential that the debtor should have waived his homestead and exemption rights with reference to the debt in question. Kemp v. Swainsboro Ice & Fuel Co., 47 Ga. App. 99, 169 S.E. 700, 1933 Ga. App. LEXIS 303 (1933).

In cases of waiver. — O.C.G.A. § 44-13-41 does make use of the language "in case of such waiver, and the levy of an execution by an officer of this state, it shall be right," but the reasonable meaning of this phrase must be taken to be that "even in" cases where there has been such a waiver. Kemp v. Swainsboro Ice & Fuel Co., 47 Ga. App. 99, 169 S.E. 700, 1933 Ga. App. LEXIS 303 (1933).

Piano. — The exemption of a piano is permissible. Kemp v. Swainsboro Ice & Fuel Co., 47 Ga. App. 99, 169 S.E. 700, 1933 Ga. App. LEXIS 303 (1933).

RESEARCH REFERENCES

Am. Jur. 2d.
21 Am. Jur. 2d, Exemptions, §§ 72 et seq., 143, 177. 40 Am. Jur. 2d, Homesteads, §§ 187, 188.

ALR.
Estoppel to claim, or waiver of, homestead by direction of judgment debtor to levy on real estate, 101 A.L.R. 851.

44-13-42. Mode of setting apart household and kitchen furniture and provisions; schedule; recordation; fee.

Every debtor seeking the benefit of Code Section 44-13-41 shall make out a schedule of the debtor's household and kitchen furniture and provisions which shall set out the items and value thereof claimed to be exempt and shall return the schedule to the judge of the probate court of the county in which the applicant resides. It shall not be necessary to make any application for such exemption or to publish the schedule in a newspaper. The judge shall record the schedule in a book to be kept by him for that purpose.

History.
Ga. L. 1924, p. 57, § 1; Code 1933, § 51-1103; Ga. L. 1983, p. 1170, § 2.

JUDICIAL DECISIONS

Limitation of exemption. — The exemption is limited by amount rather than by the nature of the articles, except under the general term "household and kitchen furniture." Kemp v. Swainsboro Ice & Fuel Co., 47 Ga. App. 99, 169 S.E. 700, 1933 Ga. App. LEXIS 303 (1933).

Summary nature of proceeding. — Under O.C.G.A. § 44-13-42 a debtor may obtain the benefit of O.C.G.A. §§ 44-13-40 and 44-13-41 by merely proceeding in a summary and ex parte manner. Wilbanks v. Wardlaw, 50 Ga. App. 495, 178 S.E. 466, 1935 Ga. App. LEXIS 189 (1935).

Effect of waiver. — Where a debtor has not set aside household and kitchen furniture as prescribed in O.C.G.A. § 44-13-42, and where the debtor has executed a note to a creditor waiving this exemption, the creditor may seek to have the exempted property subjected to the payment of the debtor's note. Turner v. Caudill, 175 Ga. 170, 165 S.E. 24, 1932 Ga. LEXIS 216 (1932).

Waiver unnecessary. — In order for a debtor and his wife to avail themselves of the exemption provided by O.C.G.A. § 44-13-42, it is not essential that the debtor should have waived his homestead and exemption rights with reference to the debt in question. Kemp v. Swainsboro Ice & Fuel Co., 47 Ga. App. 99, 169 S.E. 700, 1933 Ga. App. LEXIS 303 (1933).

Piano. — The exemption of a piano is permissible. Kemp v. Swainsboro Ice & Fuel Co., 47 Ga. App. 99, 169 S.E. 700, 1933 Ga. App. LEXIS 303 (1933).

RESEARCH REFERENCES

ALR.
What are "tools," "implements," "instruments," "utensils," or "apparatus," within the meaning of Debtor's Exemption Laws, 2 A.L.R. 818; 9 A.L.R. 1020; 36 A.L.R. 669; 52 A.L.R. 826.

Debtor's exemption of proceeds of insurance on property itself exempt, 63 A.L.R. 1286.

44-13-43. Spouse or dependent claiming exemption for debtor may not claim own exemption.

A person eligible under Code Section 44-13-2 to claim a debtor's exemption as a spouse or dependent of the debtor may not, during the time the debtor's exemption is allowed that person as spouse or dependent, be granted an exemption in that person's own right under this article.

History.
Code 1981, § 44-13-43, enacted by Ga. L. 1983, p. 1170, § 2.

Part 3

Levy on and Sale of Exempted Real Property

Editor's notes.
Section 1 of Ga. L. 1983, p. 1170, which amended Code Sections 44-13-60, 44-13-62, and 44-13-63 and reenacted Code Section 44-13-61 without change, provided in § 1, not codified by the General Assembly, that: "It is the intent of this Act to implement certain changes required by Article I, Section I, Paragraph XXVI of the Constitution of the State of Georgia."

OPINIONS OF THE ATTORNEY GENERAL

Levy for delinquent motor vehicle ad valorem taxes can be executed against homestead. 1968 Op. Att'y Gen. No. 68-146.

RESEARCH REFERENCES

ALR.
Right of creditor to attach bankrupt's exempt property after discharge in bankruptcy, 55 A.L.R. 303.

44-13-60. Affidavit disputing exemption of exempted real property from execution; levy and sale by officer; effect of debtor's counteraffidavit.

(a) When an exemption under this article of realty and personalty or either has been applied for and set apart out of the property of a defendant in execution and the defendant in execution has no property except the real property on which the defendant resides on which to levy, if the plaintiff in execution seeks to have that real property levied on upon the ground that his debt falls within some or one of the classes for which the real property is bound under this article, such plaintiff, his agent, or his attorney may make an affidavit before any officer authorized to administer oaths that to the best of his knowledge and belief the debt upon which the execution is founded is one from which that real property is not exempt. Thereafter, it shall be the duty of the officer into whose hands the execution and the affidavit are placed to

proceed at once to levy and sell as though the property had never been set apart.

(b) The defendant in execution may deny the truth of the plaintiff's affidavit by filing a counteraffidavit with the levying officer. If a counteraffidavit is filed, it shall be the duty of the levying officer to suspend further proceedings under the execution and to return the same together with the two affidavits to the court from which the execution issued.

History.

Ga. L. 1871-72, p. 43, §§ 1, 2; Code 1873, §§ 2028, 2029; Code 1882, §§ 2028, 2029; Civil Code 1895, §§ 2850, 2851; Civil Code 1910, §§ 3400, 3401; Code 1933, §§ 51-902, 51-903; Ga. L. 1983, p. 1170, § 2.

JUDICIAL DECISIONS

Methods of bringing homestead to sale. — Whenever it is sought to bring any part of a homestead to sale under a claim or debt for which it is contended the homestead is liable, such must be done in the manner provided by O.C.G.A. § 44-13-60. Martin v. Davis & Co., 104 Ga. 633, 30 S.E. 753, 1898 Ga. LEXIS 385 (1898).

Section not applicable to short homestead. — The affidavit required by O.C.G.A. § 44-13-60 applies only to homesteads set apart under the provisions of O.C.G.A. § 44-13-5 and not to property sought otherwise to be exempted. Marcrum v. Washington, 109 Ga. 296, 34 S.E. 585, 1899 Ga. LEXIS 640 (1899).

Section inapplicable to distraint for rent. — O.C.G.A. § 44-13-60 does not apply to arresting and stopping the process of distraints for rent. Huckaby v. Brooks, 75 Ga. 678, 1885 Ga. LEXIS 202 (1885).

Necessity for affidavit. — In order to show that a sale was legal, it is necessary to prove affirmatively that affidavit under O.C.G.A. § 44-13-60 was in fact filed with the sheriff before the sale was made. Davis v. Jones, 95 Ga. 788, 23 S.E. 79, 1895 Ga. LEXIS 280 (1895); Smith & Hollis v. Youngblood, 23 Ga. App. 640, 99 S.E. 143, 1919 Ga. App. LEXIS 252 (1919).

Contests of affidavit. — Before a homestead can be levied on under O.C.G.A. § 44-13-60 the plaintiff, plaintiff's agent, or attorney, should swear that "there is no property except the homestead on which to levy," and that plaintiff's "debt falls within some one of the classes (specifying which class) for which the homestead is bound under the constitution." Brantley v. Stephens, 77 Ga. 467, 1886 Ga. LEXIS 346 (1886); Davis v. Jones, 95 Ga. 788, 23 S.E. 79, 1895 Ga. LEXIS 280 (1895).

Where affidavit unnecessary. — Where the mortgage, the rule nisi, and the rule absolute all showed that the debt was within the exceptional class which could subject a homestead, and was for purchase money, an affidavit to that effect was unnecessary. McDaniel v. Westberry, 74 Ga. 380, 1884 Ga. LEXIS 401 (1884).

Schedule as evidence. — In an affidavit made under O.C.G.A. § 44-13-60 in order to procure a levy upon exempted realty, it was not harmful to the plaintiff in the execution levied to allow the defendant to introduce, for the purpose of showing that the property levied upon had been so set apart, a schedule of exempted personalty and realty which did not sufficiently describe the latter. Moore v. Penn, 115 Ga. 796, 42 S.E. 57, 1902 Ga. LEXIS 603 (1902).

Debts for purchase money. — A homestead is subject to an execution founded upon a debt contracted for the purchase money, and the fact that the debt has been transferred to a third person does not change that liability. Chambliss v. Phelps, 39 Ga. 386, 1869 Ga. LEXIS 222 (1869).

Admission that judgment was for purchase money of the land levied on

was fatal to the affidavit of illegality under O.C.G.A. § 44-13-60. Blackwell v. Aiken, 73 Ga. 55, 1884 Ga. LEXIS 16 (1884).

Sale pending application. — Where land was sold at sheriff's sale pending application for homestead, the purchaser at such sale, with notice that such application was pending, took the property subject to the encumbrance of the homestead. Kilgore v. Beck, 40 Ga. 293, 1869 Ga. LEXIS 88 (1869).

Consent verdict. — The omission to file an affidavit as provided by O.C.G.A. § 44-13-60 did not render void the consent verdict and judgment and sale under execution of part of land in controversy. Mobley v. Belcher, 144 Ga. 442, 87 S.E. 470, 1915 Ga. LEXIS 230 (1915).

Making affidavit after levy and claim. — Where the only evidence of the making of an affidavit prior to the levy was that the sheriff's entry of levy stated that it was made "by reason of an affidavit of plaintiff's attorney that the homestead is subject," this was not sufficient; nor was this cured by the making of an affidavit after the levy and interposition of a claim, that, to the best of the knowledge and belief of plaintiff's attorney, the debt for which the execution issued "is one from which the homestead is not exempt." In such a case, claim was a proper remedy to contest the levy and sale of the homestead. Brantley v. Stephens, 77 Ga. 467, 1886 Ga. LEXIS 346 (1886); Smith & Hollis v. Youngblood, 23 Ga. App. 640, 99 S.E. 143, 1919 Ga. App. LEXIS 252 (1919).

Verdict declaring realty subject. — Where a verdict declares in terms that certain realty was subject thereto, and the judgment directs the sale of this realty, the affidavit prescribed by O.C.G.A. § 44-13-60 is not essential before the levy is made. Davis v. Taylor, 103 Ga. 366, 30 S.E. 50, 1898 Ga. LEXIS 125 (1898).

Fi. fa. not showing superior lien. — Where a homestead is being levied on, and the fi. fa. fails to show upon its face a lien superior to the homestead, and where the plaintiff in fi. fa. has not filed the affidavit required by O.C.G.A. § 44-13-60, the levy is proceeding illegally. Murphey v. Smith, 16 Ga. App. 472, 85 S.E. 791, 1915 Ga. App. LEXIS 87 (1915).

Giving bonds for title. — Where the vendor of land takes promissory notes from the vendee for its purchase, giving to the latter a bond for titles, sues the notes to judgment and then makes and files a deed to the vendee for the purpose of effecting a sale of the land for the purchase money under an execution issued from the judgment, the sale cannot be defeated by the vendee having the land set apart as a homestead; nor is it necessary for the plaintiff to file an affidavit under the provisions of O.C.G.A. § 44-13-60 in order to have the execution proceed. Perdue v. Fraley, 92 Ga. 780, 19 S.E. 40, 1893 Ga. LEXIS 251 (1893).

Dismissal of counter-affidavit. — Under O.C.G.A. § 44-13-60 an order dismissing a counter-affidavit renders a forthcoming bond obligator, where the property was not forthcoming, the sheriff could maintain in sheriff's own name an action upon the bond for a breach of the same. Clark v. Horn, 99 Ga. 165, 25 S.E. 203, 1896 Ga. LEXIS 267 (1896).

Liability of officer. — Any officer knowingly levying upon property which has been made exempt from the process by either of the methods provided by law shall be guilty of a trespass, except that, in case of the constitutional homestead, a levy is permissible where the plaintiff, plaintiff's agent, or attorney, makes and places in the hands of the officer the affidavit prescribed by law. Personal Fin. Co. v. Evans, 45 Ga. App. 53, 163 S.E. 250, 1932 Ga. App. LEXIS 157 (1932).

Burden of proof on sheriff. — Where a sheriff, upon being sued for failure to levy an execution upon certain personalty pleads, as an excuse for not having made the levy, that such personalty had been set apart to the judgment debtor as homestead property, the burden is upon the sheriff to show that the homestead exemption in question was a valid one. Johns v. Robinson, 119 Ga. 59, 45 S.E. 727, 1903 Ga. LEXIS 28 (1903).

Bankruptcy court has no jurisdiction to protect or enforce against the bankrupt's exemption rights of creditors not having judgment or other lien, whose obligations to pay contain waiver of homestead authorized by state laws. Lockwood v. Exchange Bank, 190 U.S. 294, 23 S. Ct. 751, 47 L. Ed. 1061, 1903 U.S. LEXIS 1549 (1903) (decided under prior bankruptcy law).

RESEARCH REFERENCES

Am. Jur. 2d.
31 Am. Jur. 2d, Exemptions, §§ 136, 142. 40 Am. Jur. 2d, Homesteads, §§ 83, 90.
C.J.S.
40 C.J.S., Homesteads, § 135.
ALR.
Lien of tax collector's bond, 54 A.L.R. 1285.

44-13-61. When and how issue tried.

At the first term of the court to which the execution and the affidavits have been returned, an issue shall be formed upon the same and tried as in cases of illegality.

History.
Ga. L. 1871-72, p. 43, § 3; Code 1873, § 2030; Code 1882, § 2030; Civil Code 1895, § 2852; Civil Code 1910, § 3402; Code 1933, § 51-904; Ga. L. 1983, p. 1170, § 2.

44-13-62. Findings upon the trial; effect.

When the finding upon the trial provided for in Code Section 44-13-61 is in favor of the plaintiff in execution, it shall be the duty of the levying officer to proceed immediately with the collection of the debt by the sale of the real property upon which the defendant in execution resides, if necessary. When the finding upon such issue is in favor of the defendant in execution, it shall operate to release that real property without prejudicing any other right of the plaintiff.

History.
Ga. L. 1871-72, p. 43, § 4; Code 1873, § 2031; Code 1882, § 2031; Civil Code 1895, § 2853; Civil Code 1910, § 3403; Code 1933, § 51-905; Ga. L. 1982, p. 3, § 44; Ga. L. 1983, p. 1170, § 2.

RESEARCH REFERENCES

Am. Jur. 2d.
31 Am. Jur. 2d, Exemptions, § 142.

44-13-63. Levy or sale of exempted real property as trespass; persons entitled to recovery.

Except as provided in Code Section 44-13-60, any officer knowingly levying on or selling property made exempt from sale shall be guilty of trespass; and any person allowed such exemption may recover for such trespass for their exclusive use.

History.
Ga. L. 1868, p. 27, § 10; Code 1873, § 2027; Code 1882, § 2027; Civil Code 1895, § 2849; Civil Code 1910, § 3399; Code 1933, § 51-901; Ga. L. 1983, p. 1170, § 2.
Law reviews.
For note discussing legal and equitable

relief from execution available to debtors, see 12 Ga. L. Rev. 814 (1978).

JUDICIAL DECISIONS

Suit by wife or family. — Under O.C.G.A. § 44-13-63 trespass against an officer for wrongful levy on homestead property may be maintained by the wife or family of the debtor without making the debtor himself a party plaintiff. McWilliams v. Anderson, 68 Ga. 772, 1882 Ga. LEXIS 103 (1882).

Husband's right to sue. — The right to use is not limited to the wife or family, but the husband as the head of the family can maintain the action, and will hold the recovery for their use. Personal Fin. Co. v. Evans, 45 Ga. App. 53, 163 S.E. 250, 1932 Ga. App. LEXIS 157 (1932).

Joinder of defendants. — Where an officer makes an unauthorized and wrongful levy upon the property of another, the officer and any others who procure such a seizure are liable as joint trespassers, in which event the aggrieved party may bring suit against any one or all of such wrongdoers, according to the aggrieved party's election. Personal Fin. Co. v. Evans, 45 Ga. App. 53, 163 S.E. 250, 1932 Ga. App. LEXIS 157 (1932); Alexander v. Holmes, 85 Ga. App. 124, 68 S.E.2d 242, 1951 Ga. App. LEXIS 1014 (1951).

Affidavit of nonexemption. — Any officer knowingly levying upon property which has been made exempt from the process by either the methods provided by law shall be guilty of a trespass, except that, in case of the constitutional homestead, a levy is permissible where the plaintiff, plaintiff's agent or attorney, makes and places in the hands of the officer the affidavit prescribed by law. Personal Fin. Co. v. Evans, 45 Ga. App. 53, 163 S.E. 250, 1932 Ga. App. LEXIS 157 (1932).

Action against true owner. — The fact that one who does not own land has had it set apart as a homestead would give that person no right as against the real owner, nor would that person therefore be entitled to recover against another for entering and taking possession of the land. Scott v. Mathis, 72 Ga. 119, 1883 Ga. LEXIS 29 (1883).

Evidence of valid exemption. — A petition under O.C.G.A. § 44-13-63 may constitute an adequate basis for the admission of evidence of the fact of a valid exemption if the allegations imply a valid homestead even though it may not appear which kind of homestead has been obtained. Personal Fin. Co. v. Evans, 45 Ga. App. 53, 163 S.E. 250, 1932 Ga. App. LEXIS 157 (1932).

Claim may be interposed. — Trespass is not the only remedy. Bartlett v. Russell, 41 Ga. 196, 1870 Ga. LEXIS 59 (1870).

Trover may be brought. — See Greaves v. Middlebrooks, 59 Ga. 240, 1877 Ga. LEXIS 242 (1877).

RESEARCH REFERENCES

Am. Jur. 2d.

31 Am. Jur. 2d, Exemptions, §§ 136, 142, 167.

C.J.S.

40 C.J.S., Homesteads, §§ 134, 153.

ALR.

Availability of judgment under which exempt property has been seized as a set-off or counterclaim against claim based on wrongful seizure, 20 A.L.R. 276.

PART 4

SALE OF EXCESS PROPERTY BY RECEIVER

Editor's notes.

Ga. L. 1983, p. 1170, which amended Code Sections 44-13-80 and 44-13-87 and reenacted Code Sections 44-13-81 through

44-13-86 without change, provided in § 1, not codified by the General Assembly, that: "It is the intent of this Act to implement certain changes required by Article I, Section I, Paragraph XXVI of the Constitution of the State of Georgia."

RESEARCH REFERENCES

ALR.
Lien of judgment on excess value of homestead, 41 A.L.R.4th 292.

44-13-80. Appointment of receiver to sell excess realty.

Whenever any person makes an application for an exemption of realty under this article and it appears by the return of the surveyor that the applicant is the owner of more real estate than is allowed to be exempt under this article, it shall be the duty of the judge of the probate court to appoint a receiver to take charge of the excess and to sell the same for the benefit of the creditors of the applicant under regulations set forth in this part.

History.
Ga. L. 1872, p. 44, § 1; Code 1873, § 2033; Code 1882, § 2033; Civil Code 1895, § 2855; Civil Code 1910, § 3405; Code 1933, § 51-1001; Ga. L. 1983, p. 1170, § 2.

JUDICIAL DECISIONS

Wife applying. — Where the wife applies, with the consent of the husband, in the reason and spirit of O.C.G.A. § 44-13-80, he is the applicant, and the power to appoint a receiver of the excess of his property is therein given. Landrum v. Chamberlin, Boynton & Co., 73 Ga. 727, 1884 Ga. LEXIS 210 (1884).

Appointment by court. — The receiver contemplated by O.C.G.A. § 44-13-80 should be appointed by the court, though there be no motion therefor. McWilliams v. Bones, 84 Ga. 199, 10 S.E. 723, 1889 Ga. LEXIS 223 (1889).

Time of appointment. — It is upon the application for homestead, and not upon its final adjudication, that the receiver may be appointed, and the creditors are not to be delayed until the homestead and exemption are finally set apart. Landrum v. Chamberlin, Boynton & Co., 73 Ga. 727, 1884 Ga. LEXIS 210 (1884).

RESEARCH REFERENCES

Am. Jur. 2d.
31 Am. Jur. 2d, Exemptions, § 37. 40 Am. Jur. 2d, Homesteads, §§ 85, 86.
C.J.S.
40 C.J.S., Homesteads, §§ 148, 153.
ALR.
Lien of judgment on excess value of homestead, 41 A.L.R.4th 292.

44-13-81. Delivery of excess personalty to receiver for disposition.

Whenever any person makes an application for an exemption of personalty as provided for by this article and the schedule filed by the person discloses that the person has and is the owner of personal

property in excess of that to which he is entitled to have as exempt, the excess shall be delivered by the judge of the probate court to a receiver who shall dispose of the excess for the benefit of the creditors of the applicant.

History.
Ga. L. 1872, p. 43, § 2; Code 1873, § 2034; Code 1882, § 2034; Civil Code 1895, § 2856; Civil Code 1910, § 3406; Code 1933, § 51-1002; Ga. L. 1983, p. 1170, § 2.

RESEARCH REFERENCES

Am. Jur. 2d.
40 Am. Jur. 2d, Homesteads, § 87.
ALR.
Lien of judgment on excess value of homestead, 41 A.L.R.4th 292.

44-13-82. Sale of realty and distribution of proceeds; priorities.

When a receiver is appointed as provided in Code Section 44-13-80, he shall proceed to advertise the real estate once a week for four weeks in the public newspaper in which the sheriff's sales of the county are advertised. On the first Tuesday of the month immediately following the last advertisement, the receiver shall expose the same for sale at public auction and the money arising from the sale of the property shall be delivered to the judge of the probate court for distribution among the several creditors of the applicant, such distribution to be made according to the dignity of the claims of the several creditors.

History.
Ga. L. 1872, p. 44, § 3; Code 1873, § 2035; Code 1882, § 2035; Civil Code 1895, § 2857; Civil Code 1910, § 3407; Code 1933, § 51-1003; Ga. L. 1983, p. 1170, § 2.

RESEARCH REFERENCES

Am. Jur. 2d.
40 Am. Jur. 2d, Homesteads, §§ 84, 89, 90.
C.J.S.
40 C.J.S., Homesteads, § 68.
ALR.
Discretion of court or receiver as to whether receiver's sale shall be made for cash or on credit, 100 A.L.R. 937.
Lien of judgment on excess value of homestead, 41 A.L.R.4th 292.

44-13-83. Procedure for sale of personalty.

Personal property shall be disposed of in the manner provided in Code Section 44-13-82, except that the receiver shall advertise the same in three of the most public places of the county for 30 days and shall not be required to advertise the same in a public newspaper.

History.
Ga. L. 1872, p. 43, § 4; Code 1873, § 2036; Code 1882, § 2036; Civil Code 1895, § 2858; Civil Code 1910, § 3408; Code 1933, § 51-1004; Ga. L. 1983, p. 1170, § 2.

44-13-84. Only one receiver authorized.

Nothing in this part shall be construed to authorize the appointment of more than one receiver.

History.
Ga. L. 1872, p. 43, § 5; Code 1873, § 2037; Code 1882, § 2037; Civil Code 1895, § 2859; Civil Code 1910, § 3409; Code 1933, § 51-1005; Ga. L. 1983, p. 1170, § 2.

44-13-85. Cancellation of sale upon failure of any creditor to appear and file claim.

If no creditors appear and file their claims before the day set apart for the sale of the property, the sale shall not take place; and the property in excess shall be turned over to the applicant.

History.
Ga. L. 1872, p. 43, § 6; Code 1873, § 2038; Code 1882, § 2038; Civil Code 1895, § 2860; Civil Code 1910, § 3410; Code 1933, § 51-1006; Ga. L. 1983, p. 1170, § 2.

RESEARCH REFERENCES

Am. Jur. 2d.
40 Am. Jur. 2d, Homesteads, § 82.

44-13-86. Bond required of receiver; power of superior court over receiver; settling of conflicts; disposition of excess.

When a receiver is appointed under Code Section 44-13-80, good bond and security shall be required of him by the judge of the probate court for the performance of his duty. The receiver shall be subject to rule in the superior court of the county where he was appointed, as sheriffs are, and shall, under rule of the superior court and not under the order of the judge of the probate court, pay out moneys received by him as sheriffs do when there are conflicting claims to moneys in his hands. When there are no conflicting claims, the receiver shall settle all the claims and turn over any excess to the party legally entitled to the same.

History.
Ga. L. 1876, p. 48, § 9; Code 1882, § 2038a; Civil Code 1895, § 2861; Civil Code 1910, § 3411; Code 1933, § 51-1007; Ga. L. 1983, p. 1170, § 2.

44-13-87. Right of applicant to select exempt property.

The applicant for exemption from levy and sale of property under this

article shall be permitted to select the property to be exempted but not to exceed the amount allowed by law.

History.
Ga. L. 1872, p. 43, § 7; Code 1873, § 2039; Code 1882, § 2039; Civil Code 1895, § 2862; Civil Code 1910, § 3412; Code 1933, § 51-1008; Ga. L. 1983, p. 1170, § 2.

RESEARCH REFERENCES

Am. Jur. 2d.
31 Am. Jur. 2d, Exemptions, §§ 135, 137 et seq. 40 Am. Jur. 2d, Homesteads, § 77 et seq.

ARTICLE 2

STATUTORY EXEMPTIONS

OPINIONS OF THE ATTORNEY GENERAL

Levy for delinquent motor vehicle ad valorem taxes can be executed against homestead. 1968 Op. Att'y Gen. No. 68-146.

RESEARCH REFERENCES

ALR.
Exemption of proceeds of voluntary sale of homestead, 1 A.L.R. 483; 46 A.L.R. 814.
Right of individual partner to exemption in partnership property, 4 A.L.R. 300.
Action for damages against signing spouse for breach of contract to convey homestead signed by one spouse only, 4 A.L.R. 1272; 16 A.L.R. 1036.
What are "tools," "implements," "instruments," "utensils," or "apparatus," within the meaning of debtor's exemption laws, 52 A.L.R. 826.
Attempt to resist enforcement of judgment or execution against real property on ground that it is exempt, as involving title to real property within contemplation of jurisdictional provision, 75 A.L.R. 1230.
Homestead right of cotenant as affecting partition, 140 A.L.R. 1170.
Exemption of insurance proceeds as available to assignee of policy, 1 A.L.R.2d 1031.
Recovery of damages for breach of contract to convey homestead where only one spouse signed contract, 3 A.L.R.5th 370.

44-13-100. Exemptions for purposes of bankruptcy and intestate insolvent estates.

(a) In lieu of the exemption provided in Code Section 44-13-1, any debtor who is a natural person may exempt, pursuant to this article, for purposes of bankruptcy, the following property:

(1) The debtor's aggregate interest, not to exceed $21,500.00 in value, in real property or personal property that the debtor or a dependent of the debtor uses as a residence, in a cooperative that owns property that the debtor or a dependent of the debtor uses as a residence, or in a burial plot for the debtor or a dependent of the debtor. In the event title to property used for the exemption provided under this paragraph is in one of two spouses who is a debtor, the amount of the exemption hereunder shall be $43,000.00;

(2) The debtor's right to receive:

(A) A social security benefit, unemployment compensation, or a local public assistance benefit;

(B) A veteran's benefit;

(C) A disability, illness, or unemployment benefit;

(D) Alimony, support, or separate maintenance, to the extent reasonably necessary for the support of the debtor and any dependent of the debtor;

(E) A payment under a pension, annuity, or similar plan or contract on account of illness, disability, death, age, or length of service, to the extent reasonably necessary for the support of the debtor and any dependent of the debtor;

(F) A payment from an individual retirement account within the meaning of Title 26 U.S.C. Section 408 to the extent reasonably necessary for the support of the debtor and any dependent of the debtor; and

(G) Moneys paid into or out of, the assets of, and the income of a health savings account or medical savings account authorized under Chapter 51 of Title 33 or Sections 220 and 223 of the Internal Revenue Code of 1986.

(2.1) The debtor's aggregate interest in any funds or property held on behalf of the debtor, and not yet distributed to the debtor, under any retirement or pension plan or system:

(A) Which is: (i) maintained for public officers or employees or both by the State of Georgia or a political subdivision of the State of Georgia or both; and (ii) financially supported in whole or in part by public funds of the State of Georgia or a political subdivision of the State of Georgia or both;

(B) Which is: (i) maintained by a nonprofit corporation which is qualified as an exempt organization under Code Section 48-7-25 for its officers or employees or both; and (ii) financially supported in whole or in part by funds of the nonprofit corporation;

(C) To the extent permitted by the bankruptcy laws of the United States, similar benefits from the private sector of such debtor shall be entitled to the same treatment as those specified in subparagraphs (A) and (B) of this paragraph,

provided that the exempt or nonexempt status of periodic payments from such a retirement or pension plan or system shall be as provided under subparagraph (E) of paragraph (2) of this subsection; or

(D) An individual retirement account within the meaning of Title 26 U.S.C. Section 408;

(3) The debtor's interest, not to exceed the total of $5,000.00 in value, in all motor vehicles;

(4) The debtor's interest, not to exceed $300.00 in value in any particular item, in household furnishings, household goods, wearing apparel, appliances, books, animals, crops, or musical instruments that are held primarily for the personal, family, or household use of the debtor or a dependent of the debtor. The exemption of the debtor's interest in the items contained in this paragraph shall not exceed $5,000.00 in total value;

(5) The debtor's aggregate interest, not to exceed $500.00 in value, in jewelry held primarily for the personal, family, or household use of the debtor or a dependent of the debtor;

(6) The debtor's aggregate interest, not to exceed $1,200.00 in value plus any unused amount of the exemption, not to exceed $10,000.00, provided under paragraph (1) of this subsection, in any property;

(7) The debtor's aggregate interest, not to exceed $1,500.00 in value, in any implements, professional books, or tools of the trade of the debtor or the trade of a dependent of the debtor;

(8) Any unmatured life insurance contract owned by the debtor, other than a credit life insurance contract;

(9) The debtor's aggregate interest, not to exceed $2,000.00 in value, less any amount of property of the estate transferred in the manner specified in Section 542(d) of U.S. Code Title 11, in any accrued dividend or interest under, or loan or cash value of, any unmatured life insurance contract owned by the debtor under which the insured is the debtor or an individual of whom the debtor is a dependent;

(10) Professionally prescribed health aids for the debtor or a dependent of the debtor; and

(11) The debtor's right to receive, or property that is traceable to:

(A) An award under a crime victim's reparation law;

(B) A payment on account of the wrongful death of an individual of whom the debtor was a dependent, to the extent reasonably necessary for the support of the debtor and any dependent of the debtor;

(C) A payment under a life insurance contract that insured the life of an individual of whom the debtor was a dependent on the

date of such individual's death, to the extent reasonably necessary for the support of the debtor and any dependent of the debtor;

(D) A payment, not to exceed $10,000.00, on account of personal bodily injury, not including pain and suffering or compensation for actual pecuniary loss, of the debtor or an individual of whom the debtor is a dependent; or

(E) A payment in compensation of loss of future earnings of the debtor or an individual of whom the debtor is or was a dependent, to the extent reasonably necessary for the support of the debtor and any dependent of the debtor.

(b) Pursuant to 11 U.S.C. Section 522(b)(1), an individual debtor whose domicile is in Georgia is prohibited from applying or utilizing 11 U.S.C. Section 522(d) in connection with exempting property from his or her estate; and such individual debtor may exempt from property of his or her estate only such property as may be exempted from the estate pursuant to 11 U.S.C. Section 522(b)(2)(A) and (B). For the purposes of this subsection, an "individual debtor whose domicile is in Georgia" means an individual whose domicile has been located in Georgia for the 180 days immediately preceding the date of the filing of the bankruptcy petition or for a longer portion of such 180 day period than in any other place.

(c) The exemptions and protections contained in this article are extended to intestate insolvent estates in all cases where there is a living widow or child of the intestate.

(d)(1) At any time after closing of a case filed pursuant to an act of Congress relating to bankruptcy, the debtor, his or her receiver or trustee, or any interested party may file with a clerk of court where a judgment lien is recorded an affidavit of lien release and shall attach thereto a certified copy of the discharge of such bankrupt or debtor and a lien avoidance order, or a certified copy of the order of confirmation of a plan and the plan as confirmed, together with a copy of the portions of the schedules filed by the debtor in the bankruptcy case listing the judgment creditor and identifying property as exempt. In addition, the filer shall certify that no order has been entered in the bankruptcy limiting the discharge as to the judgment or retaining the judgment lien.

(2) Upon filing such affidavit, the lien of such judgment shall be deemed cancelled as to:

(A) Any property which was:

(i) Identified as exempt and for which a lien avoidance order was issued; or

(ii) Re-vested in the debtor without lien retention under a plan; and

(B) Any other property acquired by the debtor after the filing of the bankruptcy petition.

(3) The clerk of court shall file such affidavit in the deed records and index the recording information as to the affidavit of lien release on the judgment lien in the appropriate lien record.

History.

Ga. L. 1865-66, p. 29, § 1; Code 1868, § 2022; Code 1873, § 2049; Code 1882, § 2049; Civil Code 1895, § 2875; Civil Code 1910, § 3425; Code 1933, § 51-1504; Code 1933, § 51-1301.1, enacted by Ga. L. 1980, p. 952, § 2; Code 1933, § 51-1601, enacted by Ga. L. 1980, p. 952, § 3; Ga. L. 1981, p. 626, §§ 2, 3; Ga. L. 1988, p. 1756, § 1; Ga. L. 1989, p. 14, § 44; Ga. L. 1995, p. 347, § 1; Ga. L. 2001, p. 745, § 1; Ga. L. 2012, p. 1030, § 2/SB 117; Ga. L. 2013, p. 141, § 44/HB 79; Ga. L. 2013, p. 1045, § 2/SB 105; Ga. L. 2015, p. 996, § 6-1/SB 65; Ga. L. 2017, p. 620, § 1/SB 87.

Code Commission notes.

Pursuant to Code Section 28-9-5, in 1988, "subparagraphs (A) and (B) of this paragraph" was substituted for "(A) and (B)" at the end of subparagraph (a)(2.1)(C) of this Code section.

Pursuant to Code Section 28-9-5, in 1989, a comma was added to the end of subparagraph (a)(2.1)(C).

Editor's notes.

Ga. L. 2015, p. 996, § 1-1/SB 65, not codified by the General Assembly, provides that: "(a) This Act shall be known and may be cited as the 'Debtor Creditor Uniform Law Modernization Act of 2015.'

"(b) To promote consistency among the states, it is the intent of the General Assembly to modernize certain existing uniform laws promulgated by the Uniform Law Commission affecting debtor and creditor rights, responsibilities, and relationships and other federally recognized laws affecting such rights, responsibilities, and relationships."

Law reviews.

For article, "Preparing the Georgia Farmer (or Other Small Entrepreneur) for Bankruptcy," see 22 Ga. State Bar J. 186 (1986).

For survey of 1985 Eleventh Circuit cases on bankruptcy, see 37 Mercer L. Rev. 1233 (1986).

For survey of 1986 Eleventh Circuit cases on bankruptcy, see 38 Mercer L. Rev. 1097 (1987).

For article, "Avoidance of Liens: Section 522(f)," see 4 Bank. Dev. J. 95 (1987).

For article, "Retirement Benefits: Protection from Creditors' Claims," see 24 Ga. St. B.J. 118 (1988).

For survey of 1995 Eleventh Circuit cases on bankruptcy law, see 47 Mercer L. Rev. 717 (1996).

For note on the 2001 amendment to this Code section, see 18 Ga. St. U. L. Rev. 263 (2001).

For Eleventh Circuit survey article on bankruptcy decisions in 2003, see 55 Mercer L. Rev. 1101 (2004).

For article, "Noticing the Bankruptcy Sale: The Purchased Property May Not Be as 'Free and Clear of All Liens, Claims and Encumberances' as You Think," see 15 (No. 5) Ga. St. B.J. 12 (2010).

For article, "Consumer Bankruptcy Panel: Hot Consumer Bankruptcy Plan Issues," see 28 Emory Bankr. Dev. J. 333 (2012).

For annual survey on bankruptcy law, see 64 Mercer L. Rev. 849 (2013).

For article, "Eleventh Circuit Survey: January 1, 2014 - December 31, 2014: Bankruptcy," see 66 Mercer L. Rev. 881 (2015).

For annual survey of bankruptcy law, see 67 Mercer L. Rev. 819 (2016).

For annual survey on bankruptcy, see 68 Mercer L. Rev. 929 (2017).

For note on the 2001 amendment to this Code section, see 18 Ga. St. U. L. Rev. 263 (2001).

JUDICIAL DECISIONS

Analysis

General Consideration
Effect of Liens
Applicability of Exemption to Particular Property, Persons, and Situations

General Consideration

The legislative history to O.C.G.A. § 44-13-100 clearly states that its purpose is to keep the exemption statute from discriminating unfairly in favor of the homeowner. In re Harrison, 13 B.R. 293, 1981 Bankr. LEXIS 3163 (Bankr. N.D. Ga. 1981).

Constitutionality. — Constitutionality of O.C.G.A. § 44-13-100(a)(9) is upheld because the statute does not violate the uniformity provision of the Bankruptcy Clause, the Supremacy Clause, or the Equal Protection Clause of the U.S. Constitution. In re Joyner, 489 B.R. 292, 2012 Bankr. LEXIS 3691 (Bankr. S.D. Ga. 2012).

Limiting debtors to the $2,000 exemption for the cash value of life insurance did not violate the Supremacy Clause of the United States Constitution because Georgia law and federal law were not in conflict since Congress expressly granted states the power to opt-out of the federal exemptions and provide for exemptions under state laws. Furthermore, the statute applied uniformly to all debtors in bankruptcy. McFarland v. Wallace, 516 B.R. 665, 2014 U.S. Dist. LEXIS 126866 (S.D. Ga. 2014), aff'd, 790 F.3d 1182, 2015 U.S. App. LEXIS 10451 (11th Cir. 2015).

Limiting bankruptcy debtors to the $2,000 exemption for the cash value of life insurance, while permitting non-bankruptcy debtors to exempt the full cash surrender value of a life insurance policy under O.C.G.A. § 33-25-11, did not violate the Equal Protection Clause of the Georgia Constitution because bankruptcy debtors and non-bankruptcy debtors were not in similar circumstances and, therefore, the Georgia Constitution did not require that they receive equal treatment. McFarland v. Wallace, 516 B.R. 665, 2014 U.S. Dist. LEXIS 126866 (S.D. Ga. 2014), aff'd, 790 F.3d 1182, 2015 U.S. App. LEXIS 10451 (11th Cir. 2015).

O.C.G.A. § 44-13-100(a)(9) did not violate U.S. Const., Art. I, Sec. VIII, Para. IV, as the Constitution's call for bankruptcy uniformity did not somehow require states to treat bankruptcy and non-bankruptcy debtors exactly alike. McFarland v. Wallace (In re McFarland), 790 F.3d 1182, 2015 U.S. App. LEXIS 10451 (11th Cir. 2015).

O.C.G.A. § 44-13-100(a)(9) did not violate Ga. Const. 1983, Art. I, Sec. I, Para. II, when the legislature rationally balanced the needs of creditors and bankruptcy debtors in requiring the debtors to sacrifice more of their penumbral property in order to obtain greater relief on property more central to a fresh start. McFarland v. Wallace (In re McFarland), 790 F.3d 1182, 2015 U.S. App. LEXIS 10451 (11th Cir. 2015).

O.C.G.A. § 44-13-100, by the statute's express terms, applies to bankruptcy debtors. By contrast, nothing in the history or language of O.C.G.A. § 33-25-11(c) indicates the legislature intended the statute to apply in bankruptcy; therefore, O.C.G.A. § 33-25-11(c) is unavailable for purposes of exempting property from a debtor's bankruptcy estate. In re Dean, 470 B.R. 643, 2012 Bankr. LEXIS 1220 (Bankr. M.D. Ga. 2012).

Debtor's exemption in the cash surrender value of a life insurance policy received from a fraternal benefit society was limited to the amount in O.C.G.A. § 44-13-100(a)(9), and O.C.G.A. § 33-15-62 did not apply. Section 44-13-100(a)(9) does not distinguish between policies provided by a fraternal benefit society and those that were not. Walton v. Gay (In re Gay), No. 11-60817, 2012 Bankr. LEXIS 3671 (Bankr. S.D. Ga. Aug. 9, 2012).

Debtors were not entitled to reconsideration of an order finding that applicable vehicle exemption value allowed for debtors was the amount under the law on the date the debtors filed the debtors' petition,

not the increased amount as of the conversion date, because the applicable law was the law as of the petition date. Dey v. Peoples Cmty Nat'l Bank, N.A. (In re Dey), No. 11-13465-WHD, 2013 Bankr. LEXIS 5060 (Bankr. N.D. Ga. Nov. 1, 2013).

Judgment creditor's objection to the debtor's claim of a homestead exemption as excessive was not warranted because the $43,000 exemption limit was applicable based on the fact that the property was titled solely in the debtor's name, the debtor used the property as the debtor's residence, and the debtor's spouse was not a codebtor in the bankruptcy case. In re Mixon, No. 13-41420, 2014 Bankr. LEXIS 6 (Bankr. S.D. Ga. Jan. 2, 2014).

Georgia has opted out of the federal bankruptcy exemptions in favor of exemptions under state law; consequently, for debtors who are residents of Georgia, the applicable exemptions are those set forth in O.C.G.A. § 44-13-100(a). Mooney v. Webster, 300 Ga. 283, 794 S.E.2d 31, 2016 Ga. LEXIS 775 (2016).

Debtor could not claim an exemption for the segregated proceeds created by the pre-petition sale of the debtor's residence because, under the plain language of O.C.G.A. § 44-13-100, the debtor did not own any property that would constitute a homestead on the petition date. Lubin v. Mason, No. 7, 607 B.R. 360, 2019 Bankr. LEXIS 2720 (Bankr. N.D. Ga. 2019).

Roth IRAs are excluded from a Georgia debtor's bankruptcy estate pursuant to federal law. In re Hoffman, 22 F.4th 1341, 2022 U.S. App. LEXIS 2119 (11th Cir. 2022).

Purpose. — O.C.G.A. § 44-13-100 was passed with the specific purpose of determining what property shall be eligible for exemption from the bankruptcy estate. Additionally: (i) O.C.G.A. § 44-13-100(9) applies only to the cash surrender value of insurance policies and limits that exemption expressly to $2,000; (ii) O.C.G.A. § 33-25-11, on the other hand, protects all cash surrender value of an insurance policy but only from certain creditor remedies; it does not attempt to characterize cash surrender value as "exempt"; and, (iii) without clear direction from the Georgia legislature that it intended to do so, the court would not read § 33-25-11 to effectively eliminate § 44-13-100(a)(9). Roach v. Ryan (In re Ryan), No. 11-40712, 2012 Bankr. LEXIS 784 (Bankr. S.D. Ga. Jan. 17, 2012).

Bankruptcy court did not err in concluding that O.C.G.A. § 33-25-11 did not provide the bankruptcy debtor an exemption from the bankruptcy estate because O.C.G.A. § 44-13-100 prevailed over the more general provisions of O.C.G.A. § 33-25-11. McFarland v. Wallace, 516 B.R. 665, 2014 U.S. Dist. LEXIS 126866 (S.D. Ga. 2014), aff'd, 790 F.3d 1182, 2015 U.S. App. LEXIS 10451 (11th Cir. 2015).

Some of Georgia's state exemptions are found in O.C.G.A. § 44-13-100; however, in short, not all of Georgia's exemptions are contained within the four corners of O.C.G.A. § 44-13-100. Debtor's workers' compensation claims were beyond the reach of creditors in bankruptcy. In re Fullwood, 446 B.R. 634, 2010 Bankr. LEXIS 3655 (Bankr. S.D. Ga. 2010).

Exemption for both spouses filing jointly even though property titled only in husband's name. — Based on both the language and the legislative history of O.C.G.A. § 44-13-100(a)(1), the debtors could claim a $20,000.00 exemption, $10,000.00 for each spouse, for equity in their residence even though the property was titled only in the husband's name; there was no logical reason that the Georgia Assembly would give less protection to a couple filing jointly than to a debtor/non-debtor couple, and it appeared that a change in the language from a proposed amendment that clearly applied to jointly-filing spouses was changed to the current version to expand, not limit, the reach of the statute. In re Hartley, No. 01-13332-WHD, 2002 Bankr. LEXIS 1884 (Bankr. N.D. Ga. July 18, 2002).

Exemption applies to debtor's "aggregate interest". — Under Georgia law, an exemption applies to the "debtor's aggregate interest" in property, O.C.G.A. § 44-13-100(a), and the property may appreciate in value after the debtor has become entitled to the exemption. Mullis v. Aggeorgia Farm Credit, ACA, 357 B.R. 888, 2005 Bankr. LEXIS 3137 (Bankr. M.D. Ga. 2005).

Construction. — Use of the word "may" in O.C.G.A. § 44-13-100 denotes

General Consideration (Cont'd)

the fact that when a debtor files bankruptcy the debtor is not required to exempt any property; however, once the debtor chooses to exempt property, the debtor is limited to exemptions set forth in O.C.G.A. § 44-13-100. When two statutes conflict, a specific statute will prevail over a general statute, absent any indication of a contrary legislative intent. In re Sapp, No. 11-30468, 2012 Bankr. LEXIS 2773 (Bankr. S.D. Ga. June 15, 2012).

The phrase "any property" in O.C.G.A. § 44-13-100(a)(6) should be given a liberal construction so as to include property which is partially exempt under other provisions of the statute. McGuire v. Landmark Fin. Servs., 132 B.R. 803, 1987 Bankr. LEXIS 2435 (Bankr. M.D. Ga. 1987), aff'd, 132 B.R. 807, 1989 U.S. Dist. LEXIS 17530 (M.D. Ga. 1989).

Similarity to federal and other states' law. — Although Georgia, by enactment of O.C.G.A. § 44-13-100(b), has "opted out" of the federal list of exemptions found at 11 U.S.C. § 522(d) of the Bankruptcy Code, the exemption for part of a personal injury claim provided by O.C.G.A. § 44-13-100 is identical to the federal exemption provided by § 522(d)(11)(D) and to the exemption provided by statutes of other states. In re Geis, 66 B.R. 563, 1986 Bankr. LEXIS 5048 (Bankr. N.D. Ga. 1986).

Exemptions set forth in O.C.G.A. § 44-13-100(a)(11)(A) were identical to those set forth in 11 U.S.C. § 522(d)(11)(A) and debtors were not permitted to exempt from the bankruptcy estate money that was ordered paid to them for restitution of a wrongful conversion of their property; debtors had not shown that the court ordered restitution was being made to compensate them for future loss of earnings or for personal injury. In re Seymour, 285 B.R. 57, 2002 Bankr. LEXIS 1301 (Bankr. N.D. Ga. 2002).

Federal judicial precedent interpreting 11 U.S.C. § 522(d)(1) also determined what the Georgia General Assembly meant when it used the same words in O.C.G.A. § 44-13-100(a)(2)(E) because the state statute was modeled after the federal statute, the state statute had not changed since its original enactment, and any amendments were clearly intended to broaden the availability of exemptions. Goodman v. Bramlette (In re Bramlette), 333 B.R. 911, 2005 Bankr. LEXIS 2364 (Bankr. N.D. Ga. 2005).

Privately funded annuity that the debtor claimed was exempt from the bankruptcy estate under O.C.G.A. § 44-13-100(a)(2.1), was analyzed under the requirements set forth in 11 U.S.C. § 522(d)(10) because the state statute closely patterned the federal scheme and referenced that the annuity would be exempt to the extent permitted by the bankruptcy laws of the United States. In re Michael, 339 B.R. 798, 2005 Bankr. LEXIS 1919 (Bankr. N.D. Ga. 2005).

Exemptions not preempted by federal exemptions. — Georgia's exemptions were not preempted by the federal exemptions, on the basis that the Georgia exemptions were below the federal exemptions, because nothing in 11 U.S.C. § 522(b) (or elsewhere in the Bankruptcy Code) limited a state's power to restrict the scope of the state's exemption; the state could theoretically accord no exemptions at all. Coleman v. Harris (In re Harris), No. 99-10241, 1999 Bankr. LEXIS 2111 (Bankr. S.D. Ga. Oct. 21, 1999).

Georgia opted out of federal exemption scheme. — Argument that Georgia had not effectively opted out of the federal exemptions following the 1994 amendments to the Bankruptcy Code was rejected because states did not have to reenact opt-out legislation following the 1994 amendments to the Bankruptcy Code. Coleman v. Harris (In re Harris), No. 99-10241, 1999 Bankr. LEXIS 2111 (Bankr. S.D. Ga. Oct. 21, 1999).

Debtor could only assert a claim of $10,000 for a real property homestead exemption, pursuant to O.C.G.A. § 44-13-100 and could not claim more under the federal statutes because Georgia had opted out of the federal exemption scheme. In re Vaughn, 2008 Bankr. LEXIS 3880 (Bankr. N.D. Ga. Nov. 25, 2008).

Construction with Insurance Code. — There is no indication that the Georgia General Assembly intended to amend or

supplement the bankruptcy specific exemptions found in O.C.G.A. § 44-13-100 by way of the more general Georgia Insurance Code provisions. Rather, it appears that the General Assembly intended the Georgia Insurance Code to apply to non-bankruptcy situations with the bankruptcy specific exemptions in § 44-13-100 applying in bankruptcy cases. In re Allen, No. 10-50827 JPS, 2010 Bankr. LEXIS 3563 (Bankr. M.D. Ga. Oct. 4, 2010).

O.C.G.A. § 44-13-100(a)(6) is designed to prevent the exemption statute from discriminating unfairly against nonhomeowners. McGuire v. Landmark Fin. Servs., 132 B.R. 803, 1987 Bankr. LEXIS 2435 (Bankr. M.D. Ga. 1987), aff'd, 132 B.R. 807, 1989 U.S. Dist. LEXIS 17530 (M.D. Ga. 1989).

Debtors, who owned a stereo worth $600, were entitled to exempt their interest in the stereo up to $200 under O.C.G.A. § 44-13-100(a)(4) and could exempt the remaining $400 value of the stereo under the "catch all" provisions of O.C.G.A. § 44-13-100(a)(6). McGuire v. Landmark Fin. Servs., 132 B.R. 803, 1987 Bankr. LEXIS 2435 (Bankr. M.D. Ga. 1987), aff'd, 132 B.R. 807, 1989 U.S. Dist. LEXIS 17530 (M.D. Ga. 1989).

O.C.G.A. § 44-13-100 prevails over O.C.G.A. § 33-25-11. — O.C.G.A. § 44-13-100 is the statute specific to bankruptcy exemptions and therefore it prevails over the more general provisions of O.C.G.A. § 33-25-11; the Georgia legislature drafted the exemption statute, § 44-13-100, specifically with bankruptcy in mind. In doing so, it struck the intended balance between allowing a debtor in bankruptcy to exempt a limited amount of property in exchange for receiving a bankruptcy discharge; in striking this balance, the legislature limited the aggregate exemption in such policies to $2,000. In re Sapp, No. 11-30468, 2012 Bankr. LEXIS 2773 (Bankr. S.D. Ga. June 15, 2012).

Venue. — The bankruptcy court for the Northern District of Georgia retained venue, even though the debtor had moved to New Jersey, since the evidence relating to the bodily injury claims, as well as how the claims should be allocated, was present in the state of Georgia, where the accident occurred. In re Geis, 66 B.R. 563, 1986 Bankr. LEXIS 5048 (Bankr. N.D. Ga. 1986).

Effect of Liens

Effect of lien on exempted property. — Under 11 U.S.C. § 522, the debtor may exempt certain property even if the property is subject to a lien; however, property claimed as exempt remains subject to an otherwise unavoided lien. United States v. Wood, 28 B.R. 383, 1983 U.S. Dist. LEXIS 19000 (N.D. Ga. 1983).

Even though it was assumed that debtors' claimed homestead exemption was valid under Georgia law, although they had no monetary interest in their residence, the exemption was not impaired by a judgment lien as required by 11 U.S.C. 522(f), and the lien on the residence could not be avoided. Holloway v. John Hancock Mut. Life Ins. Co., 81 F.3d 1062, 1996 U.S. App. LEXIS 9559 (11th Cir. 1996).

Proper method for calculating the avoidability of a judicial lien where debtor and the debtor's spouse jointly owed a first mortgage on their jointly owned home which was also subject to a second priority judicial lien owed solely by the debtor was to first deduct the mortgage from the total value of the home to establish the net equity which was divided equally between debtor and the debtor's spouse, and then apply the mathematical formula provided in 11 U.S.C. § 522(f)(2)(A) to debtor's one-half equity interest. To the extent the judicial lien would not permit the debtor to take an exemption in the property, the judicial lien impairs the debtor's exemption and is avoidable; however, a creditor retains its judicial lien on any unencumbered, nonexempt portion of debtor's equity in the property. Schupp v. Bearson, 304 B.R. 906, 2004 Bankr. LEXIS 104 (Bankr. N.D. Ga. 2004).

Chapter 7 debtor's use of the debtor's vehicle with regard to the debtor's trade as a law clerk and tutor was solely limited to commuting purposes and, thus, the vehicle was not a tool of the trade under Georgia's exemption statute. As a result, the debtor could not avoid a creditor's title lien. Mitchell v. First Franklin Corp. (In re Mitchell), No. 17-68428-PMB, 2018 Bankr. LEXIS 805 (Bankr. N.D. Ga. Mar. 21, 2018).

Effect of Liens (Cont'd)

Lien avoided. — Lien against personal property impaired the exemptions to which debtor was entitled under Georgia law and therefore the lien was avoided under Bankruptcy Code. Williams v. Finance One, 45 B.R. 789, 1985 Bankr. LEXIS 6859 (Bankr. N.D. Ga. 1985).

Debtors in bankruptcy whose property exemptions are defined by O.C.G.A. § 44-13-100 may use 11 U.S.C. § 522(f) to avoid liens that encumber the property they seek to exempt. Hall v. Finance One of Ga. Inc., 752 F.2d 582, 1985 U.S. App. LEXIS 27932 (11th Cir. 1985), overruled in part as stated in Gamble v. Brown (In re Gamble), 168 F.3d 442, 1999 U.S. App. LEXIS 2769 (11th Cir. 1999).

The 11 U.S.C. § 522(f) lien avoidance provision is available to debtors claiming under O.C.G.A. § 44-13-100, and debtors may avoid a nonpossessory, nonpurchase-money security interest in a television and stereo system. Caruthers v. Fleet Fin., Inc., 87 B.R. 723, 1988 Bankr. LEXIS 825 (Bankr. N.D. Ga. 1988).

Judgment lienor's objection that Chapter 7 debtor undervalued the debtor's home in order to avoid the lien was overruled because the drive-by appraisal of the home performed by the lienor's appraiser was not credible compared with the complete appraisal performed by debtor's appraiser, which cited defects in the home, including a settlement problem. Schupp v. Bearson, 304 B.R. 906, 2004 Bankr. LEXIS 104 (Bankr. N.D. Ga. 2004).

Because a debtor's total equity of $14,000 was less than the maximum allowed exemption in real property of $20,000.00 and her spouse did not file for bankruptcy, the debtor was entitled to avoid a judicial lien held by a creditor in its entirety with respect to the real property, a residence, pursuant to O.C.G.A. § 44-13-100(a)(1). Barnes v. Cavalry Invs. LLC (In re Barnes), No. G04-23195-REB, No. G04-23195-REB, 2005 Bankr. LEXIS 1213 (Bankr. N.D. Ga. May 13, 2005).

When the bankruptcy court concluded that an Internal Revenue Service tax lien, which was junior to the creditor's judicial lien on the debtor's home, should be included in the calculation under 11 U.S.C. § 522(f)(2)(A), and the sum of liens and the state exemption under O.C.G.A. § 44-13-100 greatly exceeded the debtor's interest in the property, the bankruptcy court correctly concluded that the creditor's judicial lien could be avoided in its entirety. Cadle Co. v. Taras (In re Taras), 131 Fed. Appx. 167, 2005 U.S. App. LEXIS 7666 (11th Cir. 2005).

Because a creditor's qualifying judicial lien would impair an exemption of the debtors if they amended their schedules to claim the exemption under O.C.G.A. § 44-13-100(1)(a), (6), the judicial lien was avoidable in its entirety under 11 U.S.C. § 522(f), as the amounts two non-avoidable mortgage liens plus the amount of the judicial lien exceeded the value of the real property. In re Smith, No. 05-60736 JTL, 2006 Bankr. LEXIS 877 (Bankr. M.D. Ga. May 16, 2006).

Debtor's aggregate interest in property is not limited to equity, but also includes the right to possession, the equity of redemption and the right to create future equity by making mortgage payments. Cravey v. L'Eggs Prods., Inc., 100 B.R. 119, 1989 Bankr. LEXIS 810 (Bankr. S.D. Ga. 1989).

Phrase "debtor's interest" in O.C.G.A. § 44-13-100(a)(4) does not mean only "equitable interest." Debtors have an interest even in their fully-encumbered property. Maddox v. Southern Disct. Co., 34 B.R. 801, 1982 Bankr. LEXIS 3952 (Bankr. N.D. Ga. 1982); Moyer v. Fleet Fin., 39 B.R. 211, 1984 Bankr. LEXIS 5665 (Bankr. N.D. Ga.), aff'd, 746 F.2d 814, 1984 U.S. App. LEXIS 17781 (11th Cir. 1984).

Priority of judgment creditor. — The rights of the judgment creditor, based upon a homestead waiver note, are superior to the rights of the holders of homestead waiver notes which had not been reduced to judgment, upon the principle that the law favors the diligent, not the slothful. Rosenthal v. Langley, 180 Ga. 253, 179 S.E. 383, 1935 Ga. LEXIS 236 (1935).

Resort to equity not necessary. — Where the widow of an insolvent intestate proceeds to obtain an exemption of personal property, there is no necessity to resort to equity to prevent the property

from being seized and sold by a creditor of the intestate pending the filing and record of the widow's schedule, or after such filing and record. The widow's remedy to recover the property from one having unlawful possession is by possessory warrant in a proper case, or by trover. Morgan v. Community Loan & Inv. Co., 195 Ga. 675, 25 S.E.2d 413, 1943 Ga. LEXIS 550 (1943).

A debtor has an "interest" in property encumbered by a nonpossessory, nonpurchase-money security interest. Finance One v. Bland, 793 F.2d 1172, 1986 U.S. App. LEXIS 26596 (11th Cir. 1986).

Applicability of Exemption to Particular Property, Persons, and Situations

Aggregation of exemptions. — Debtors may add the "wildcard" exemption of O.C.G.A. § 44-13-100(a)(6) to their $200.00 per item exemption under O.C.G.A. § 44-13-100(a)(4), and thereby fully exempt certain of their household items that exceed $200.00 in value. In re Ambrose, 179 B.R. 982, 1995 Bankr. LEXIS 396 (Bankr. S.D. Ga. 1995).

Because a Chapter 7 debtor could have claimed an additional exemption of $ 500 under Georgia's "wildcard" exemption, O.C.G.A. § 44-13-100(a)(6), instead of just the § 44-13-100(a)(4) exemption, which was limited to $ 300, the debtor was given time to amend the Schedule C to exempt the debtor's laptop up to its full value. First Franklin Fin. v. Yawn (In re Yawn), No. 09-21472, 2010 Bankr. LEXIS 486 (Bankr. S.D. Ga. Feb. 5, 2010).

Life insurance beneficiary rights. — 11 U.S.C. § 522(d)(7) exempts only the life insurance contract itself and not any beneficiary rights; O.C.G.A. § 44-13-100(a)(8) exempts the same. Life insurance proceeds a debtor receives within 180 days after filing bankruptcy are property of the estate; § 44-13-100(a)(8) does not exempt these proceeds because that section does not apply to beneficiary rights. In re Gonzalez, No. 12-70650 JTL, 2012 Bankr. LEXIS 5369 (Bankr. M.D. Ga. Nov. 8, 2012).

In a Chapter 13 case when the debtor sought to retain life insurance proceeds that the debtor received due to the debtor's spouse/joint debtor's death, while the proceeds were the property of the estate, a calculation that assumed declining commission income for the 68-year-old debtor resulted in most of the insurance proceeds determined to be reasonably necessary for the debtor's support and therefore exempt. In re Taylor, 523 B.R. 915, 2014 Bankr. LEXIS 5099 (Bankr. S.D. Ga. 2014).

Court denied a Chapter 7 debtor's motion for an order rescinding an order the court issued in 2013 which required the debtor to turn over two life insurance policies to the Chapter 7 trustee, and which allowed the trustee to liquidate both policies if the debtor lost an appeal the debtor filed from the court's ruling that the debtor was not entitled under O.C.G.A. § 44-13-100 to exempt proceeds of a third policy from creditors' claims; there was no merit to the debtor's claims that the court lacked jurisdiction to enter the court's 2013 turnover order, and that the order was void because the relief the court provided required the filing of an adversary proceeding and could not be resolved pursuant to a contested matter. In re McFarland, No. 11-10218, 2016 Bankr. LEXIS 729 (Bankr. S.D. Ga. Mar. 7, 2016).

Life insurance exemptions under § 44-13-100(a)(8). — O.C.G.A. § 44-13-100(a)(8) allows a debtor to exempt the unmatured life insurance policy itself, but this does not permit the debtor to exempt the cash value of the life insurance policy. Flatau v. Waggoner, 244 B.R. 492, 2000 Bankr. LEXIS 86 (Bankr. M.D. Ga. 2000).

Life insurance exemptions under § 44-13-100(a)(11)(C). — Bankruptcy court found that a wife who filed a joint petition with her husband under Chapter 7 of the Bankruptcy Code three months before her husband died was dependent on her husband's ability to run a company they owned together, and it allowed the wife to exempt $84,588 out of almost $105,000 in life insurance proceeds she received, pursuant to O.C.G.A. § 44-13-100(a)(11)(C); although the court refused to assume that the state legislature intended to permit spouses to exempt life insurance proceeds simply because lan-

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guage which appeared in § 44-13-100(a)(11)(C) was similar to language which appeared in 11 U.S.C. § 522(d)(11)(C), it found that the wife was a "dependent" for purposes of § 44-13-100(a)(11)(C). In re Bright, No. 05-14093-WHD, 2007 Bankr. LEXIS 2971 (Bankr. N.D. Ga. July 16, 2007).

Chapter 7 trustee's objection was sustained and a debtor was denied an exemption under O.C.G.A. § 44-13-100(a)(11)(C) in the liquidated life insurance proceeds from the debtor's late spouse because the debtor voluntarily transferred the funds to the executor of the late spouse's estate under 11 U.S.C. § 522(g) in the belief that the law required such turnover, and the debtor failed to show that the debtor was subject to any great pressure to transfer the funds or that the debtor would not have turned the funds over if the debtor had known that the funds were not property of the spouse's estate. In re Sumner, No. 05-14243-WHD, 2007 Bankr. LEXIS 4406 (Bankr. N.D. Ga. Nov. 26, 2007).

Life insurance cap. — Lower courts properly limited the exemption of a life insurance policy to $2,000 under O.C.G.A. § 44-13-100(a)(9) when the specific language of that statute governed over the more general debtor language in O.C.G.A. § 33-25-11(c) and § 44-13-100(a)(9) required such a result. McFarland v. Wallace (In re McFarland), 790 F.3d 1182, 2015 U.S. App. LEXIS 10451 (11th Cir. 2015).

Homestead limited to unencumbered portion of property. — A bankrupt is entitled to claim a homestead exemption only from the "aggregate interest" in real property under O.C.G.A. § 44-13-100(a), which means that only the unencumbered portion of the property is to be counted in computing the "value" of the property for the purposes of determining the exemption. Wallis v. Clerk, Superior Court, 166 Ga. App. 775, 305 S.E.2d 639, 1983 Ga. App. LEXIS 2325 (1983).

Entitlement to spousal homestead exemption. — If a residence is titled only in the name of a married debtor, the debtor is entitled to a $20,000.00 homestead exemption to protect the equitable interest of the non-debtor spouse; however, if a residence is jointly titled in the names of the debtor and the non-debtor spouse, the debtor is limited to a $10,000.00 exemption. Wright v. Taylor (In re Taylor), No. 04-691 85-CRM, 2005 Bankr. LEXIS 269 (Bankr. N.D. Ga. Jan. 27, 2005).

Chapter 7 debtor was entitled to a $10,000.00 exemption, not a $20,000.00 exemption, under O.C.G.A. § 44-13-100(a)(1) because, although the debtor's residence was titled in the names of both the debtor and the spouse, the spouse was not a debtor in the bankruptcy case. Wright v. Taylor (In re Taylor), No. 04-691 85-CRM, 2005 Bankr. LEXIS 269 (Bankr. N.D. Ga. Jan. 27, 2005).

Enhanced exemption for married debtors pursuant to O.C.G.A. § 44-13-100(a)(1) applied only where the residence was titled in only one spouse and that spouse was a bankruptcy debtor; accordingly, because the property in the instant case was jointly owned, the debtor's homestead exemption was limited to $10,000.00. In re Hiers, No. 03-51446-JDW, 2005 Bankr. LEXIS 3143 (Bankr. S.D. Ga. Sept. 26, 2005).

As a debtor owned only 50 percent of the debtor's residence, with the remaining 50 percent held by a living trust established for the benefit of the debtor's non-filing spouse, the debtor was not entitled to double the exemption provided for under Georgia's homestead exemption. Since the debtor had claimed value over and above the amount provided under that section, there was no "unused" portion of that exemption that trickled down to the debtor's wildcard exemption. Mann v. Burroughs (In re Burroughs), No. 14-12573-WHD, 2015 Bankr. LEXIS 1167 (Bankr. N.D. Ga. Apr. 1, 2015).

When case pending, no homestead exemptions. — The homestead exemptions of O.C.G.A. § 44-13-100(a)(1) and (a)(6) are available only to an individual who is in bankruptcy or who was a dependent of an insolvent intestate, and may not be realized so long as the case is pending and payments are still due to be made under the terms of a confirmed plan.

In re Deeble, 169 B.R. 240, 1994 Bankr. LEXIS 956 (Bankr. S.D. Ga. 1994).

Homestead exemption waived. — By the terms of the settlement agreement with the bankruptcy trustee, debtor waived any claim held against the estate, including a claim for an amended homestead exemption, in exchange for settlement of the estate's claim against the debtor. Moore v. Harrell, 212 B.R. 174, 1997 Bankr. LEXIS 1043 (Bankr. S.D. Ga. 1997).

Applicability to separated spouse. — Chapter 7 trustee's objection to a debtor's claim for a $20,000.00 exemption in the debtor's residence under the Georgia homestead exemption statute, O.C.G.A. § 44-13-100(a)(1), was overruled because: (1) O.C.G.A. § 1-3-1 did not invite a court to usurp the power of the General Assembly by legislating from the bench each time the exemption statute created an unusual result; (2) the duration of the debtor's separation from the debtor's spouse, while indicative of a desire to discontinue the traditional role of spouse, was not determinative of a circumstance that would authorize the court to consider such a person as an entity other than a "spouse" as used in the homestead exemption statute; and (3) there was no basis for inferring legislative intent to allow married couples, whether they lived together or separately, to spread a $20,000.00 exemption across multiple residences. In re Green, 319 B.R. 913, 2004 Bankr. LEXIS 2197 (Bankr. M.D. Ga. 2004).

Exemption of veteran's benefits. — Allowing a debtor to use debtor's exempt naval benefits to attain Chapter 13's broad discharge, without the corollary requirement to use it to pay creditors as much as debtor is able, would contravene the express purpose of O.C.G.A. § 44-13-100—namely, that the debtor make payments under a plan—and thus would constitute "substantial abuse" of the bankruptcy process under 11 U.S.C. § 707(b). In re Rogers, 168 B.R. 806, 1993 Bankr. LEXIS 2186 (Bankr. M.D. Ga. 1993).

Social Security benefits. — Bankruptcy court did not have jurisdiction under 28 U.S.C. § 1334(b) to hear an adversary proceeding a Chapter 7 debtor filed against the Social Security Administration (SSA) seeking an order requiring the SSA to waive recovery of overpayments of Social Security disability benefits the debtor received. The debtor's claims did not arise under the Bankruptcy Code and there was no nexus between the debtor's claims and the administration of the debtor's bankruptcy estate because the disability benefits were exempt property under 11 U.S.C. § 522(d)(10) and O.C.G.A. § 44-13-100. Rodriquez v. United States (In re Rodriquez), No. 09-93431-JB, No. 10-9006-JB, 2010 Bankr. LEXIS 955 (Bankr. N.D. Ga. Mar. 23, 2010).

Health savings account does not constitute a right to receive a disability, illness, or unemployment benefit for the purposes of O.C.G.A. § 44-13-100(a)(2)(C), nor does it constitute a right to receive a payment under a pension, annuity, or similar plan or contract for the purposes of O.C.G.A. § 44-13-100(a)(2)(E). Mooney v. Webster, 300 Ga. 283, 794 S.E.2d 31, 2016 Ga. LEXIS 775 (2016).

Debtor's health savings account did not constitute a right to receive a disability, illness, or unemployment benefit nor a right to receive a payment under a pension, annuity, or similar plan or contract for the purposes of O.C.G.A. § 44-13-100 because it was not a substitute for wages, thus, the exemptions provided in § 44-13-100(a)(2)(C) and (a)(2)(E) did not apply. Mooney v. Webster, 300 Ga. 283, 794 S.E.2d 31, 2016 Ga. LEXIS 775 (2016).

Exemption of health savings accounts. — Bankruptcy court did not err in sustaining the trustee's objection to a Chapter 7 debtor's exemption of a health savings account (HSA) because HSA funds were not specifically set out as exempt under the Georgia Code and were not clearly identified with or clearly analogous to exempted funds. Mooney v. Webster (In re Mooney), No., No. 1:14-CV-54, 2015 U.S. Dist. LEXIS 22964 (M.D. Ga. Feb. 26, 2015), aff'd, 854 F.3d 1260, 2017 U.S. App. LEXIS 1509 (11th Cir. 2017).

Insurance proceeds from loss of exempt property. — Debtor could not use the Georgia motor vehicle exemption under O.C.G.A. § 44-13-100(a)(3) to exempt proceeds from a property damage settle-

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ment that resulted from a car accident in which her vehicle was destroyed; the proceeds that the debtor sought to exempt were compensation for the loss of a car and were not protected by the exemption statute either as a motor vehicle or as proceeds of a motor vehicle. In re Carelock, No. 05-51431-JDW, 2006 Bankr. LEXIS 3415 (Bankr. S.D. Ga. Jan. 13, 2006).

Income from exempted property. — Where the head of a family rented land set apart as an exemption under O.C.G.A. § 44-13-100, after having abandoned his wife and moved away from the exempted land, his wife was allowed to collect the rent, and neither the tenant nor the wife was liable to the husband therefor. Wood v. Wood, 171 Ga. 389, 155 S.E. 678, 1930 Ga. LEXIS 361 (1930).

Exempt property turned over to debtors. — Debtors were entitled to have property exempted from their Chapter 13 bankruptcy petition turned over to them prior to the conclusion of the bankruptcy plan. Gamble v. Brown, 168 F.3d 442, 1999 U.S. App. LEXIS 2769 (11th Cir. 1999).

Farmer-debtor. — A farmer-debtor will be permitted to exempt and avoid the lien on large items of farm equipment and to combine the farmer's $500.00 exemption for tools of the trade in O.C.G.A. § 44-13-100(a)(7) with the "wild card" exemption in O.C.G.A. § 44-13-100(a)(6) of $5,400.00. South Atl. Prod. Credit Ass'n v. Jones, 87 B.R. 738, 1988 Bankr. LEXIS 830 (Bankr. M.D. Ga. 1988).

The debtor, a farmer for 35 years, stated an intention to resume farming. Those items of equipment claimed exempt were essential to the debtor if the debtor was to resume farming. The debtor was a farmer for the purpose of claiming an exemption in farm implements and tools of the trade under O.C.G.A. § 44-13-100(a)(7) and for the purpose of avoiding a creditor's lien under 11 U.S.C. § 522(f)(2)(B). South Atl. Prod. Credit Ass'n v. Jones, 87 B.R. 738, 1988 Bankr. LEXIS 830 (Bankr. M.D. Ga. 1988).

Bankruptcy court sustained a trustee's objection to a Chapter 7 debtor's claim that an interest in a tractor was exempt from creditors' claims up to $3,500 under O.C.G.A. § 44-13-100(a)(3) because the tractor was a motor vehicle. The tractor was not a "motor vehicle" under § 44-13-100(a)(3) because the tractor was not designed to be used, nor ordinarily used, to transport people or property on roads. In re Matthews, No. JPS, 449 B.R. 833, 2011 Bankr. LEXIS 2070 (Bankr. M.D. Ga. 2011).

"Tools of the trade" defined. — In Georgia, a tool of the trade is an implement used by a person in that person's work. Curry v. Dial Fin. Corp., 18 B.R. 358, 1982 Bankr. LEXIS 4561 (Bankr. N.D. Ga. 1982).

The term "tool of the trade" contemplates that the person uses the tool with his hands, and that the person's work requires some degree of manual skill. Curry v. Dial Fin. Corp., 18 B.R. 358, 1982 Bankr. LEXIS 4561 (Bankr. N.D. Ga. 1982).

Tools of tile setter. — The tools used by a debtor in work as a tile setter might well be classified as tools of the trade for bankruptcy purposes. Curry v. Dial Fin. Corp., 18 B.R. 358, 1982 Bankr. LEXIS 4561 (Bankr. N.D. Ga. 1982).

A pickup truck used for transportation to work is not a tool of the trade of the debtor and the lien may not be avoided. Curry v. Dial Fin. Corp., 18 B.R. 358, 1982 Bankr. LEXIS 4561 (Bankr. N.D. Ga. 1982).

Tractor as tool of trade of farmer. — Bankruptcy court allowed a Chapter 7 debtor's claim that a tractor the debtor owned was exempt from creditors' claims up to $1,500 under O.C.G.A. § 44-13-100(a)(7) because the debtor used the tractor to farm real property he owned with his wife, and it was a "tool of his trade." However, the court sustained a trustee's objection to the wife's claim that she was also entitled to claim an exemption under § 44-13-100(a)(7) because she did not drive the tractor and had not used the tractor to conduct farming operations. In re Matthews, No. JPS, 449 B.R. 833, 2011 Bankr. LEXIS 2070 (Bankr. M.D. Ga. 2011).

Exemption of personal injury payments. — Exemption for bodily injury claim can be based only on the exemption

statute, not on the assignability of the claim, and therefore the maximum amount which a debtor can claim as exempt under O.C.G.A. § 44-13-100 is $7,500.00. In re Geis, 66 B.R. 563, 1986 Bankr. LEXIS 5048 (Bankr. N.D. Ga. 1986).

Even though a debtor's interest in a personal injury claim was considered exempt property pursuant to O.C.G.A. § 44-13-100(a)(11)(D), it had to be included in her Chapter 13 plan as "disposable income" for use by the trustees to pay creditors, pursuant to 11 U.S.C. § 1325, because the debtor's regular income was sufficient to cover her monthly expenses. In re Springer, 338 B.R. 515, 2005 Bankr. LEXIS 760 (Bankr. N.D. Ga. 2005).

Court had authority under 11 U.S.C. § 329 over an attorney's fees because the personal injury case in which the attorney represented the Chapter 13 debtor was connected to the bankruptcy case; the debtor filed for bankruptcy due to lost wages following the accident, and any claim in excess of the debtor's exemption under O.C.G.A. § 44-13-100(a)(11)(D) would be property of the estate. In re Thornton, No. 04-51703-JDW, 2005 Bankr. LEXIS 3145 (Bankr. S.D. Ga. Aug. 8, 2005).

Under O.C.G.A. § 44-13-100(a)(11)(E), a debtor could exempt compensation for lost future wages, notwithstanding the fact that the claim for lost future wages arose from a personal bodily injury. This was analogous to permitting an exemption of a portion of a personal injury settlement or award under 11 U.S.C. § 522(d)(11)(D) and a portion under 11 U.S.C. § 522(d)(11)(E). In re Lowery, No. 05-13536-WHD, 2007 Bankr. LEXIS 3729 (Bankr. N.D. Ga. Sept. 24, 2007).

It was undisputed that debtor had suffered serious injuries due to a 1996 collision, including injuries to the neck, back, and shoulder, and the debtor testified that the debtor still required physical therapy, experienced back pain, and suffered from memory loss. In light of these circumstances, a portion of the $25,000 payment was intended to compensate debtor for the actual bodily injuries that were suffered in the collision. Wasden v. Nationwide Mutual Ins. Co. (In re Weaver), No. 04-4118, 2006 Bankr. LEXIS 4654 (Bankr. S.D. Ga. July 19, 2006).

Due to injuries suffered in a 1996 collision, it was undisputed that the debtor could neither continue in the debtor's job as a clerical assistant nor continue studies to become an x-ray technician, and the debtor testified that the debtor had not had full-time employment since the collision and that the debtor's primary income had been in the form of payments from Social Security and pension. In light of debtor's circumstances, a portion of the $25,000 payment was reasonably necessary to support the debtor and was intended to compensate the debtor for loss of future earnings due to the collision. Wasden v. Nationwide Mutual Ins. Co. (In re Weaver), No. 04-4118, 2006 Bankr. LEXIS 4654 (Bankr. S.D. Ga. July 19, 2006).

Allowance of $7,500.00 for debtor's actual bodily injury was not unreasonable, where evidence showed debtor had a five percent permanent impairment to debtor's shoulder. In re Howard, 169 B.R. 77, 1994 Bankr. LEXIS 961 (Bankr. S.D. Ga. 1994).

$15,000.00 loss-of-future-earnings exemption unreasonable. — Where a debtor's current family income exceeded current expenses by approximately $500.00 per month, and the debtor's prospects for the future suggested debtor's income was likely to increase, and there was no showing that the debtor or a dependent of the debtor was dependent on the exemption to provide for their support, an exemption of $15,000.00 was unreasonable and was disallowed. In re Howard, 169 B.R. 77, 1994 Bankr. LEXIS 961 (Bankr. S.D. Ga. 1994).

Award in age-discrimination action. — An award in favor of a bankruptcy debtor in an action under the federal Age Discrimination in Employment Act, 29 U.S.C. § 621 et seq., was not "compensation of loss of future earnings" and was not exempt under O.C.G.A. § 44-13-100. In re Williams, 197 B.R. 398, 1996 Bankr. LEXIS 713 (Bankr. M.D. Ga. 1996).

Workers' compensation benefits are exempt in their entirety under the federal bankruptcy statute (11 U.S.C. § 522(d)(10)(C)), which provides for exemption,

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regardless of amount, of disability, illness or unemployment benefits. In re Cain, 91 B.R. 182, 1988 Bankr. LEXIS 1824 (Bankr. N.D. Ga. 1988).

Exempt status of workers' compensation awards. — O.C.G.A. § 44-13-100 did not need to address the exempt status of Workers' Compensation awards again because there was a broad exemption already in place; the statute did carve out the cash surrender values of life insurance policies, which were not already exempt, but placed a cap on the policies. Debtor's life insurance cash surrender value exemption here was limited to the $2,000 set by § 44-13-100(a)(9). Roach v. Ryan (In re Ryan), No. 11-40712, 2012 Bankr. LEXIS 784 (Bankr. S.D. Ga. Jan. 17, 2012).

Denial of recoupment of disability benefits would not benefit other creditors because post-petition disability benefits are exempt under O.C.G.A. § 44-13-100(a)(2)(C); therefore, barring recoupment was not necessary to treat similarly situated creditors alike, because in no event would creditors have shared in the stream of benefit payments. Anthem Life Ins. Co. v. Izaguirre, 166 B.R. 484, 1994 Bankr. LEXIS 548 (Bankr. N.D. Ga. 1994).

Wrongful death annuity. — Annuity based upon a structured settlement for the wrongful death of debtor's minor son qualified for exemption, where the annuity was created in consideration of debtor's age and, under the terms of the annuity, debtor was not entitled to cash in the annuity and could not invade the principal in any manner. In re Wommack, 80 B.R. 578, 1987 Bankr. LEXIS 1892 (Bankr. M.D. Ga. 1987).

Age as factor in annuity. — Supreme Court of Georgia holds that a debtor's right to receive payments from an annuity is on account of age if there exists a causal connection between the right to payment and the debtor's age; the requisite connection may be established in a myriad of ways, proof of which is limited only by the circumstances under which the annuity is created and the terms and conditions of the annuity itself. Silliman v. Cassell, 292 Ga. 464, 738 S.E.2d 606, 2013 Ga. LEXIS 157 (2013).

For purposes of O.C.G.A. § 44-13-100(a)(2)(E), when determining whether a right to receive payment is on account of age, courts should focus on whether the right to payment is causally connected to the payee's age, not on the payee's intent in purchasing the annuity. Silliman v. Cassell, 292 Ga. 464, 738 S.E.2d 606, 2013 Ga. LEXIS 157 (2013).

Exemption of annuity contract. — Chapter 7 debtor's interest in an annuity contract from a life insurance company was not exempt under O.C.G.A. § 44-13-100(a)(2) as it was not a contract to provide benefits in lieu of earnings after retirement or a plan created to fill or supplement a wage or salary void and although the debtor had purchased the annuity in contemplation of retirement, the debtor had made only one contribution shortly before the filing of the bankruptcy case, had discretion to withdraw from the corpus, and had the option to decide at a later time to receive a fixed return on the investment. Goodman v. Bramlette (In re Bramlette), 333 B.R. 911, 2005 Bankr. LEXIS 2364 (Bankr. N.D. Ga. 2005).

Annuity purchased by the debtor was exemptible under O.C.G.A. § 44-13-100(a)(2)(E) because: (i) the debtor intended the annuity to be a wage substitute and evidenced the debtor's intent, not only in testimony, but by the payment option the debtor selected; (ii) the payment option reflected no real return on the debtor's investment but instead an intent to obtain income for the debtor's life; (iii) there was no persuasive evidence that the purchase of the annuity was part of prebankruptcy planning; and (iv) the debtor did not have inappropriate control over the annuity. Silliman v. Cassell (In re Cassell), 443 B.R. 200, 2010 Bankr. LEXIS 4568 (Bankr. N.D. Ga. 2010), aff'd, 713 F.3d 81, 2013 U.S. App. LEXIS 5811 (11th Cir. 2013).

Supreme Court of Georgia concludes that in deciding whether a particular annuity is of the type intended to come within the § 44-13-100(a)(2)(E) exemption, the pertinent question is whether the annuity provides income as a substitute for wages and to make that determina-

tion, courts must consider the nature of the contract giving rise to the annuity, as well as the facts and circumstances surrounding the purchase of the annuity. Silliman v. Cassell, 292 Ga. 464, 738 S.E.2d 606, 2013 Ga. LEXIS 157 (2013).

Debtor's ability to choose among several different plans for investment at the time the debtor purchased the annuity is not significant for exemption purposes under 11 U.S.C. § 522(d)(10)(E), rather, what is relevant and legally significant in that analysis is the nature of the plan actually selected and the level of control a payee retains over the funds and payments thereafter. Silliman v. Cassell, 292 Ga. 464, 738 S.E.2d 606, 2013 Ga. LEXIS 157 (2013).

Annuity did not fit within the scope of O.C.G.A. § 44-13-100 (a)(2)(E). The Annuity was not intended or designed to be a wage substitute; the nature of the annuity and the debtor's control over the annuity aligned the annuity outside the scope of the Georgia exemptions. Wallace v. McFarland (In re McFarland), 500 B.R. 279, 2013 Bankr. LEXIS 4133 (Bankr. S.D. Ga. 2013), aff'd, 516 B.R. 665, 2014 U.S. Dist. LEXIS 126866 (S.D. Ga. 2014).

While the debtor may have intended the annuity to provide security for the debtor's wife upon the debtor's death, O.C.G.A. § 44-13-100(a)(2)(E) made clear that the exemption was limited to a debtor's right to receive payment. Wallace v. McFarland (In re McFarland), 500 B.R. 279, 2013 Bankr. LEXIS 4133 (Bankr. S.D. Ga. 2013), aff'd, 516 B.R. 665, 2014 U.S. Dist. LEXIS 126866 (S.D. Ga. 2014).

Annuity at issue fell outside the scope of "annuity" for purposes of O.C.G.A. § 44-13-100(a)(2) because it did not provide income as a substitute for wages. In re Sheffield, 507 B.R. 400, 2014 Bankr. LEXIS 900 (Bankr. S.D. Ga. 2014).

Bankruptcy court did not clearly err in concluding that the bankruptcy debtor's annuity was not an annuity within the meaning of the annuity exemption because the annuity more closely resembled a nonexempt investment rather than a substitute for wages. McFarland v. Wallace, 516 B.R. 665, 2014 U.S. Dist. LEXIS 126866 (S.D. Ga. 2014), aff'd, 790 F.3d 1182, 2015 U.S. App. LEXIS 10451 (11th Cir. 2015).

Debtor's annuity did not qualify for exemption under O.C.G.A. § 44-13-100(a)(2)(E) when the annuity was structured more like a future investment than a substitute for wages, and the debtor conceded as much. McFarland v. Wallace (In re McFarland), 790 F.3d 1182, 2015 U.S. App. LEXIS 10451 (11th Cir. 2015).

Annuity payment reasonably necessary for living expenses. — Pension payments were found to be reasonably necessary for the support of the debtors and the debtors' dependents in accordance with O.C.G.A. § 44-13-100(a)(2)(E) under the following circumstances: (i) the debtors documented in the debtors' schedules that the debtors current average monthly income was $4,376; (ii) the debtors' total monthly income included the debtors half of the annuity proceeds in the amount of $1,621; (iii) the debtors listed $4,318 as the average monthly expenses, leaving $58 as the average monthly net income; and (iv) the debtors also had three dependent daughters, and the debtors' schedules showed that the pension payments were relied upon in order to pay the debtors' reasonable and necessary living expenses. Baker v. Penton (In re Penton), No. 12-12167-WHD, 2013 Bankr. LEXIS 1079 (Bankr. N.D. Ga. Feb. 15, 2013).

Stock bonus and profitsharing plans not exempt. — The Georgia legislature intended that stock bonus and profitsharing plans were not to be included as exempt under O.C.G.A. § 44-13-100(a)(2)(E) and that the words "or similar plan" were not to be extended to cover such plans. In re Gillespie, 63 B.R. 124, 1985 Bankr. LEXIS 4964 (Bankr. N.D. Ga. 1985).

An unretired employee-debtor's interest in an Employee Retirement Income Security Act-qualified pension plan is not entitled to exemption under O.C.G.A. § 44-13-100(a)(2)(E), which only exempts payments under such a plan. In re Craddock, 62 B.R. 583, 1986 Bankr. LEXIS 5775 (Bankr. N.D. Ga. 1986), rev'd, No. C86-1815A, 1986 U.S. Dist. LEXIS 15816 (N.D. Ga. Dec. 30, 1986).

Tax shelter annuity. — Debtor's tax shelter annuity did not meet the requirements of O.C.G.A. § 44-13-100(a)(2.1), where the annuity plan was maintained

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by an insurance company which was not a nonprofit corporation, and not by the state, its political subdivision, or the debtor's employer. In re Herndon, 102 B.R. 893, 1989 Bankr. LEXIS 1301 (Bankr. M.D. Ga. 1989).

Debtor's tax shelter annuity failed to meet the exemption requirements of O.C.G.A. § 44-13-100(a)(2)(E), where the debtor was not receiving payments from the annuity which were necessary for debtors or debtor's dependent's support. In re Herndon, 102 B.R. 893, 1989 Bankr. LEXIS 1301 (Bankr. M.D. Ga. 1989).

Exemption of Roth IRAs. — Chapter 7 debtor was permitted to exempt the corpus of her Roth individual retirement account (IRA) under O.C.G.A. § 44-13-100(a)(2)(E) because federal judicial precedent interpreting 11 U.S.C. § 522(d)(10) concluded that the corpus was exempt, that precedent was instructional in determining the Georgia General Assembly's intent at the time the state statute was enacted, the amendments to the state statute regarding traditional IRAs did not preclude a conclusion of exemption as the Roth IRA was not in existence at the time the state statute was amended, and the Roth IRA was clearly a retirement vehicle. Goodman v. Bramlette (In re Bramlette), 333 B.R. 911, 2005 Bankr. LEXIS 2364 (Bankr. N.D. Ga. 2005).

Repayment of retirement loan. — While the retirement account balance on the loan date of filing for bankruptcy is exempt, pursuant to O.C.G.A. § 44-13-100(a)(2.1)(C), only the equity in the account is protected, not voluntary payments to augment that equity. In re Aliffi, 285 B.R. 550, 2002 Bankr. LEXIS 1528 (Bankr. S.D. Ga. 2002).

Exemption denied for Health Savings Account. — Debtor was not entitled to claim the debtor's health savings account (HSA) as exempt because the debtor's HSA was not a substitute for wages, and it was not the type of illness benefit or right to receive payment on account of illness contemplated by O.C.G.A. § 44-13-100(a)(2)(C) and (E). In re Mooney, 503 B.R. 916, 2014 Bankr. LEXIS 29 (Bankr. M.D. Ga. 2014), aff'd, No. 1:14-CV-54, 2015 U.S. Dist. LEXIS 22964 (M.D. Ga. Feb. 26, 2015).

Exemption denied in former residence in which debtor retained a security interest. — Debtor was denied an exemption in the debtor's former residence under O.C.G.A. § 44-13-100(a)(1), since the debtor had sold the property and moved from it, retaining a security interest and receiving monthly payments, as it was no longer the debtor's residence. In re Page, 289 B.R. 484, 2003 Bankr. LEXIS 93 (Bankr. S.D. Ga. 2003).

Requirement of title ownership in bankruptcy. — Debtor was entitled to claim the $20,000.00 exemption under O.C.G.A. § 44-13-100(a)(1) where the debtor's spouse did not have title to the home and did not file bankruptcy with the debtor; the statute imposed no requirement that the non-titled spouse also be in bankruptcy. In re Burnett, 303 B.R. 684, 2003 Bankr. LEXIS 1721 (Bankr. M.D. Ga. 2003).

Exemption limited where non-resident spouse made no claim to the property. — Trustee's objection to a debtor spouse's Georgia homestead exemption claim under O.C.G.A. § 44-13-100(a)(1) for $17,000.00 was granted because the spouse's exemption was limited to $10,000.00 since: (1) the legislative intent was to protect the resident non-debtor spouse's interest in property where only one spouse filed for bankruptcy and property was titled only in the debtor-spouse, which was not the case in the instant matter; (2) the interpretation urged by the spouse would have allowed each of two debtor spouses to claim a full $20,000.00 exemption in two separate residences so long as they filed two separate bankruptcy cases; and (3) the non-debtor spouse made no claim on the residence. In re Neary, No. 03-97808, 2004 Bankr. LEXIS 617 (Bankr. N.D. Ga. Apr. 21, 2004).

Bankruptcy debtor not entitled to exemption in note inherited by wife. — Chapter 7 debtor husband was not entitled to an exemption under O.C.G.A. § 44-13-100(a)(6) in a promissory note that the debtor wife inherited from her

father because the debtor wife did not by her actions show an intent to convert the note into joint marital property. In re Malia, No. 09-42273-MGD, 2012 Bankr. LEXIS 1104 (Bankr. N.D. Ga. Feb. 7, 2012).

Wife without legal interest in inherited property. — Intention expressed by a husband who was joint debtor, with his wife, in a bankruptcy case under Chapter 13, to convert the proceeds to be received by him upon the sale of real estate in which he had inherited an interest, was an insufficient basis on which to find that the wife was entitled to claim an exemption in those proceeds under O.C.G.A. § 44-13-100(a)(6) (Georgia) and 11 U.S.C. § 522(b) because the nature of the wife's interest therein was fixed as of the date of the Chapter 13 bankruptcy per 11 U.S.C. § 348(f)(1) and on that date, the wife had no legal interest in the inherited property. In re Garner, No. G12-20065-REB, No. G12-20065-REB, 2012 Bankr. LEXIS 4420 (Bankr. N.D. Ga. July 23, 2012).

Payments to disabled adult in Chapter 13. — Trustee's objection to a debtor's exemption claim per 11 U.S.C. § 522 and O.C.G.A. § 44-13-100(a)(2)(D) (2002) as to payments received from the debtor's deceased father's business interests was sustained because the trustee met the trustee's burden of proof per Fed. R. Bankr. P. 4003, to show that the payments, even if properly deemed, at their inception, to constitute "support" arising from a "domestic relations" order in effect when the debtor was 16 years old, such payments could no longer be considered "support" given that the debtor was 56 years old and the purported obligor was dead. Webster v. Aldrich, 403 B.R. 766, 2009 Bankr. LEXIS 702 (Bankr. M.D. Ga. 2009).

Household goods exemption under O.C.G.A. § 44-13-100(a)(4) limited by 11 U.S.C. § 544(f)(4)(A). — Although a debtor's two televisions and two computers both were household goods that could be exempted under O.C.G.A. § 44-13-100(a)(4), a creditor's lien could be avoided only against one television and one computer pursuant to 11 U.S.C. § 544(f)(4)(A). A lawnmower qualified as a household good under state law and federal law, but a camera, while a household good under state law, did not qualify under § 544(f)(4)(A). First Franklin Fin. v. Yawn (In re Yawn), No. 09-21472, 2010 Bankr. LEXIS 486 (Bankr. S.D. Ga. Feb. 5, 2010).

Exemptions exceeding cap. — Chapter 13 trustee's objection to the claimed exemptions in the debtor's checking account, savings account, and three future federal tax refunds was sustained where the amount exceeded the O.C.G.A. § 44-13-100(a)(6) cap by $50.00. In re Myles, No. 05-92125-MHM, 2006 Bankr. LEXIS 863 (Bankr. N.D. Ga. Mar. 8, 2006).

Pursuant to Fed. R. Bankr. P. 1009, a Chapter 7 debtor was not permitted to amend her claim of exemption under O.C.G.A. § 44-13-100(b)(6) after the Chapter 7 trustee had filed an objection and after certain property the debtor claimed was destroyed because to do so would have been inequitable and would have hindered the diligent administration of the bankruptcy estate by the trustee. In re Price, No. 06-62721-MGD, 2006 Bankr. LEXIS 3247 (Bankr. N.D. Ga. Sept. 20, 2006).

When husband and wife debtors sought to exempt their income tax refunds, pursuant to O.C.G.A. § 44-13-100(a)(6), the procedure set forth in In re Crowson, 431 B.R. 484, 489 (10th Cir. B.A.P. 2010) was to be followed. Each debtor was treated separately under 11 U.S.C. § 522(m), and Georgia law had no presumption of equal ownership of property between spouses under O.C.G.A. § 19-3-9. In re Evans, 449 B.R. 827, 2010 Bankr. LEXIS 5367 (Bankr. N.D. Ga. 2010).

Amendment of exemption. — Debtor was allowed to amend debtor's schedules, after a delay of more than one year, to claim an exemption in a checking account pursuant to O.C.G.A. § 44-13-100(a)(6) and which would have resulted in avoiding a judicial lien where the initial error in reporting the correct balance in the checking account was the attorney's fault, and thus there was no bad faith on the debtor's part; the creditor would not have been prejudiced as the debtor would have reaped the same benefit from amending the schedules that the debtor would have received had the debtor filed the amend-

Applicability of Exemption to Particular Property, Persons, and Situations (Cont'd)

ments a year ago. In re Spice, No. 03-43255-JDW, 2005 Bankr. LEXIS 3144 (Bankr. M.D. Ga. July 11, 2005).

Bankruptcy debtors entitled to exemption in property. — See Orsburn v. Diners Club, Inc., 35 B.R. 217, 1983 Bankr. LEXIS 5047 (Bankr. N.D. Ga. 1983).

After considering various dictionary definitions of the word "dependent" and Fed. R. Bankr. P. 4003(c), a court concluded that a Chapter 7 trustee failed to carry the burden of proving that the debtors' 22 year-old daughter and grandson were not their "dependents" at the time of the bankruptcy filing to qualify for a residential exemption under O.C.G.A. § 44-13-100(a)(1); the debtors had the presumption of validity in their favor, and the limited evidence on dependency, including the fact that the debtors claimed them as dependents on their income tax return and that the daughter did not have steady employment, supported the conclusion that the daughter and grandson were dependents. In re Holt, 357 B.R. 917, 2006 Bankr. LEXIS 3512 (Bankr. M.D. Ga. 2006).

Chapter 7 debtor was entitled to claim that funds the debtor's employer withheld from the debtor's wages and remitted to a Georgia court were exempt from creditors' claims under O.C.G.A. § 44-13-100(a)(6) because the debtor still had the right at the time the debtor declared bankruptcy to file a traverse under O.C.G.A. § 18-4-93 to an affidavit a creditor filed when the creditor garnished the debtor's wages. Because the debtor retained an interest in the funds, the funds became the property of the debtor's bankruptcy estate under 11 U.S.C. § 541(a)(1) and could be exempted from the creditors' claims, and a lien the creditor held on the funds could be avoided under 11 U.S.C. § 522(f). In re Williams, 460 B.R. 915, 2011 Bankr. LEXIS 5193 (Bankr. N.D. Ga. 2011).

Creditor failed to meet the creditor's burden of proof with respect to the creditor's objection to a debtor's IRA exemptions as the debtor had funds in a pension plan that were exemptible under the Bankruptcy Code and Georgia law before the debtor's fraudulent acts that gave rise to a nondischargeable debt and, while the debtor subsequently converted the pension funds to IRA accounts, the debtor did not convert non-exempt assets to exempt assets. Santa Ana Unified Sch. Dist. v. Montgomery (In re Montgomery), No. 11-82598-MGD, 2013 Bankr. LEXIS 4295 (Bankr. N.D. Ga. Sept. 18, 2013).

Chapter 7 debtor's cluster of cash withdrawals and checks written to cash immediately preceding the debtor's bankruptcy filing and the debtor's evasive testimony about what the debtor did with the cash strongly implied that the debtor was emptying the debtor's account and hiding cash in anticipation of filing the debtor's case and that the debtor was still in possession of the cash. Thus, the debtor was ordered to turn over the cash, less the debtor's $300 Georgia exemption in money in the debtor's checking account, to the trustee. Overstreet v. Ricks (In re Ricks), No. 13-60100, 2013 Bankr. LEXIS 3355 (Bankr. S.D. Ga. July 15, 2013).

Chapter 13 debtors who purchased a 7.5-acre tract of unimproved land and subsequently gave a creditor a security interest in part of the property were allowed under O.C.G.A. § 44-13-100 to claim both the portion of the property that was encumbered and the portion of the property that was unencumbered as their homestead because the debtors lived in a manufactured home the debtors installed on the property and treated the entire 7.5 acres as the debtors' residence; Georgia bankruptcy courts that had discussed a method for determining whether adjoined parcels of land were part of a debtor's residence had focused on how debtors used the property. Goodman v. Vaughn (In re Vaughn), No. 13-13062-WHD, 2014 Bankr. LEXIS 2189 (Bankr. N.D. Ga. Apr. 30, 2014).

Bankruptcy debtors not entitled to exemption in property. — Court sustained a Chapter 7 trustee's objection to an exemption in real and personal property for the debtors' block house property after finding no authority in the language of O.C.G.A. § 44-13-100(a)(1) or in case law that allowed them to exempt equity in

a property adjacent to their residence that was leased to a residential tenant; clearly, the block house property was not used by the debtors or their dependents as a residence as required by the statute. In re Holt, 357 B.R. 917, 2006 Bankr. LEXIS 3512 (Bankr. M.D. Ga. 2006).

Chapter 7 trustee and a junior lienholder's carve-out agreement provided that the latter would receive some of the proceeds from the 11 U.S.C. § 363 sale of the debtors' home and that the trustee would receive the remainder after paying the first-priority lien; the debtors' state-law exemptions did not apply to the funds received by the estate under the carve-out agreement as the exemptions could not have attached to the property as of the petition date because it was wholly underwater, and the trustee's carve-out represented the value added from the trustee's efforts and powers, not the value of the property itself. In re Diener, No. 11-83085 - MHM, 2015 Bankr. LEXIS 2235 (Bankr. N.D. Ga. July 1, 2015).

Although a profit-sharing plan a Chapter 7 debtor established while the debtor owned a home-building company was not covered by ERISA because the debtor was the only trustee and beneficiary of the plan, money in the plan could still be exempted from creditors' claims under 11 U.S.C. § 541 if the plan was a qualified plan under 26 U.S.C. § 401; however, the evidence did not support the debtor's claim that even assuming that money in the plan was property of the debtor's bankruptcy estate, the debtor could exempt plan funds from the creditors' claims pursuant to O.C.G.A. § 44-13-100 and 11 U.S.C. § 522 because the debtor was not able to show the debtor had obtained a favorable opinion letter from the IRS. RES-GA Dawson, LLC v. Rogers (In re Rogers), 538 B.R. 158, 2015 Bankr. LEXIS 3228 (Bankr. N.D. Ga. 2015).

OPINIONS OF THE ATTORNEY GENERAL

Homestead exemption in former law. — A taxpayer's assertion of the statutory homestead exemption contained in a former law would not prevent the Revenue Department from levying upon the taxpayer's personal automobile to satisfy delinquent state taxes. 1983 Op. Att'y Gen. No. 83-14.

RESEARCH REFERENCES

Am. Jur. 2d.

40 Am. Jur. 2d, Homestead, § 150 et seq.

C.J.S.

40 C.J.S., Homesteads, § 170.

ALR.

Jewelry and clothing as within debtor's exemptions under state statutes, 44 A.L.R.6th 481.

Construction and application of exemption for firearms under state law, 46 A.L.R.6th 401.

Constitutionality of state bankruptcy-specific exemptions under supremacy clause and bankruptcy clause of U.S. Constitution (U.S. Const., Art. VI, cl. 2 and Art. I, § 8, cl. 4), 77 A.L.R.6th 273.

Validity, construction, and application of state exemption statutes for proceeds of personal injury or wrongful death lawsuits, 99 A.L.R.6th 481.

Construction and application of state exemptions for health aids, 100 A.L.R.6th 251.

What constitutes state or local law that is applicable on date of filing of bankruptcy petition for purposes of applying 11 U.S.C.A. § 522(b)(3)(A) or its predecessor in opt-out states, 76 A.L.R. Fed. 2d 333.

Nonspousal inherited individual retirement account as exempt property in bankruptcy, 83 A.L.R. Fed. 2d 193.

Individual retirement accounts as exempt property in bankruptcy, 133 A.L.R. Fed. 1.

44-13-101. Method of obtaining exemption.

Every debtor seeking the benefit of Code Section 44-13-100 or, if he

refuses, his wife or any person acting as her next friend shall make out a schedule of the property claimed to be exempt and shall return the schedule to the judge of the probate court of the county without making any application for homestead; and it shall not be necessary to publish the schedule in a newspaper. The judge shall record the schedule in a book to be kept by him for that purpose; and, when land out of his county is exempted, he shall transmit the schedule to the judge of the probate court of the county in which the land is located for recording in like manner.

History.

Laws 1822, Cobb's 1851 Digest, p. 385; Code 1863, § 2014; Code 1868, § 2014; Ga. L. 1870, p. 74, § 1; Code 1873, § 2041; Code 1882, § 2041; Civil Code 1895, § 2867; Ga. L. 1898, p. 52, § 1; Civil Code 1910, p. 3417; Code 1933, § 51-1401.

JUDICIAL DECISIONS

Duty of probate court. — O.C.G.A. § 44-13-101 does not require the probate judge to enter approval on the schedule of property filed by a debtor seeking its benefit. Carrie v. Carnes, 145 Ga. 184, 88 S.E. 949, 1916 Ga. LEXIS 229 (1916).

Federal bankruptcy debtors exempt from O.C.G.A. § 44-13-101. — The federal Bankruptcy Code, rules, and official forms, rather than Georgia law, apply and control in prescribing the procedure whereby exemptions are to be claimed in a bankruptcy case, and, as a result, debtors in bankruptcy are not required to comply with O.C.G.A. § 44-13-101. Caruthers v. Fleet Fin., Inc., 87 B.R. 723, 1988 Bankr. LEXIS 825 (Bankr. N.D. Ga. 1988).

Where land lies in more than one county, the record must be made in each of the counties where the land set apart is situated. McLamb & Co. v. Lambertson, 4 Ga. App. 552, 4 Ga. App. 553, 62 S.E. 107, 1908 Ga. App. LEXIS 475 (1908).

Contents of schedule. — The schedule filed by an insolvent debtor should contain a list of the property which the debtor owned at the time of filing the same. Johnson v. Martin, 25 Ga. 268, 1858 Ga. LEXIS 66 (1858).

Sufficiency of description. — In a statutory homestead the description of the property should be sufficiently definite to impart notice of the property homesteaded. Arnold v. Faulk, 19 Ga. App. 797, 92 S.E. 294, 1917 Ga. App. LEXIS 364 (1917); Worley v. Arnold, 74 Ga. App. 772, 41 S.E.2d 568, 1947 Ga. App. LEXIS 695 (1947).

Owner of property must be disclosed. — The schedule of exempt property must, on its face, disclose in express terms or by reasonable implication, whose property it is that the schedule is meant to comprehend and secure. Mapp v. Long, 62 Ga. 568, 1879 Ga. LEXIS 574 (1879).

Property within specified classes. — A schedule of property returned to the ordinary (now probate judge) as required by O.C.G.A. § 44-13-101 must be of particular property falling within the classes specified in the statute. Kendall v. Parker, 146 Ga. 260, 91 S.E. 31, 1916 Ga. LEXIS 699 (1916).

Taking both homesteads prohibited. — An applicant for a homestead is not authorized to take both the statutory and the constitutional homesteads. Worley v. Arnold, 74 Ga. App. 772, 41 S.E.2d 568, 1947 Ga. App. LEXIS 695 (1947).

Wife obtaining exemption. — The wife may obtain an exemption under O.C.G.A. § 44-13-101 where the husband refuses. Connally v. Hardwick, 61 Ga. 501, 1878 Ga. LEXIS 169 (1878).

Refusal of husband essential. — It is essential to the validity of a schedule filed by the wife for the purpose of having the property of the husband set apart as exempt that it shall affirmatively appear in the schedule that the husband refused to file the same; and if this fact does not so appear, the schedule, though recorded, is

void, and may be collaterally attacked in any court of competent jurisdiction in which the creditors of the husband are seeking to subject the property embraced in the schedule to the payment of the husband's debts. Mutual Benefit Bldg. Ass'n v. Tanner, 96 Ga. 338, 23 S.E. 403, 1895 Ga. LEXIS 76 (1895); Davis v. Lumpkin, 106 Ga. 582, 32 S.E. 626, 1899 Ga. LEXIS 730 (1899); Marcrum v. Washington, 109 Ga. 296, 34 S.E. 585, 1899 Ga. LEXIS 640 (1899); Hirsch Bros. & Co. v. Stinson, 112 Ga. 348, 37 S.E. 365, 1900 Ga. LEXIS 154 (1900). See also Sheppard v. Davis, 22 Ga. App. 733, 97 S.E. 262, 1918 Ga. App. LEXIS 722 (1918).

Resort to equity unnecessary. — Where the widow of an insolvent intestate proceeds to obtain an exemption of personal property, there is no necessity to resort to equity to prevent the property from being seized and sold by a creditor of the intestate pending the filing and record of her schedule, or after such filing and record. Her remedy to recover the property from one having unlawful possession is by possessory warrant in a proper case, or by trover. Morgan v. Community Loan & Inv. Co., 195 Ga. 675, 25 S.E.2d 413, 1943 Ga. LEXIS 550 (1943).

Amendment of schedule. — If the applicant fails to describe the property with sufficient certainty to identify it the applicant may amend the schedule by giving a sufficiently accurate and definite description. Redding v. Lennon, 112 Ga. 491, 37 S.E. 711, 1900 Ga. LEXIS 214 (1900).

A void schedule may be disregarded by an officer, and the property therein set forth be levied on. Kendall v. Parker, 146 Ga. 260, 91 S.E. 31, 1916 Ga. LEXIS 699 (1916).

Fullness of schedule question for jury. — See Mims v. Lockett, 20 Ga. 474, 1856 Ga. LEXIS 86 (1856).

Description held sufficient. — See McNair v. Fortner, 149 Ga. 354, 149 Ga. 654, 101 S.E. 772, 1920 Ga. LEXIS 357 (1920).

Description held insufficient. — See Barfield v. Reynolds Banking Co., 40 Ga. App. 305, 40 Ga. App. 335, 149 S.E. 302, 1929 Ga. App. LEXIS 142 (1929).

RESEARCH REFERENCES

Am. Jur. 2d.

31 Am. Jur. 2d, Exemptions, § 128 et seq. 40 Am. Jur. 2d, Homesteads, § 77 et seq.

ALR.

Homestead right of cotenant as affecting partition, 140 A.L.R. 1170.

44-13-102. Survey and plat of exempted land; return to probate court; recordation.

Upon an application by a debtor, it shall be the duty of the county surveyor or any other surveyor if there shall be no county surveyor to lay off the land allowed to the debtor's family under this article and make a plat of the same, which plat shall be returned to the judge of the probate court within 15 days after the application is made to the surveyor by the debtor, and recorded as provided for in Code Section 44-13-101.

History.

Laws 1841, Cobb's 1851 Digest, p. 389; Laws 1843, Cobb's 1851 Digest, p. 390; Code 1863, § 2015; Code 1868, § 2015; Code 1873, § 2042; Ga. L. 1878-79, p. 69, § 1; Code 1882, § 2042; Civil Code 1895, § 2868; Civil Code 1910, § 3418; Code 1933, § 51-1402; Ga. L. 1982, p. 3, § 44.

Cross references.

Authority of county surveyor to establish fees for making plat of homestead, affidavit, and return, § 36-7-9.

Appointment of person to perform duties of county surveyor when no such office exists in county, § 36-7-13.

JUDICIAL DECISIONS

Quantity of land. — O.C.G.A. § 44-13-102 does not apply to a case where the quantity of land owned by the defendant is less than that exempted. Rogers v. Hawkins, 20 Ga. 200, 1856 Ga. LEXIS 37 (1856); Connally v. Hardwick, 61 Ga. 501, 1878 Ga. LEXIS 169 (1878); Pritchard v. Ward, 64 Ga. 446, 1879 Ga. LEXIS 102 (1879); Clark v. Kinney, 177 Ga. 864, 171 S.E. 763, 1933 Ga. LEXIS 449 (1933).

Plats made by another than county surveyor. — Under O.C.G.A. § 44-13-102, when it is shown that the plats were made by another than the county surveyor, the law will presume there was no county surveyor. Dunagan v. Stadler, 101 Ga. 474, 29 S.E. 440, 1897 Ga. LEXIS 248 (1897).

RESEARCH REFERENCES

Am. Jur. 2d.
31 Am. Jur. 2d, Exemptions, § 79 et seq.
40 Am. Jur. 2d, Homesteads, § 140 et seq.

44-13-103. Objections to survey or to valuation of improvements; application to probate court; appointment of appraisers; alterations in survey.

Should any creditor, for any cause, desire to dispute the propriety of the survey or the value of the improvements, he may make application to the judge of the probate court and give notice to the debtor thereof. Thereafter, the judge may appoint three appraisers to view the survey and to value the improvements; and, on their return, the judge may direct the surveyor to make such alterations as shall, in his judgment, be conformable to law. It shall be a valid ground of objection to the propriety of any survey that the same has been so made by a disregard of the shape and location of the entire tract as to injure unjustly or needlessly the value of any land left unexempted.

History.
Orig. Code 1863, § 2016; Code 1868, § 2016; Code 1873, § 2043; Ga. L. 1878-79, p. 69, § 2; Code 1882, § 2043; Civil Code 1895, § 2869; Civil Code 1910, § 3419; Code 1933, § 51-1403.

JUDICIAL DECISIONS

Appointment of appraisers. — The appointment of appraisers to view the survey and value the improvements of realty claimed as exempt is but preliminary to judicial action, and is not the subject of appeal to the superior court. Bangs v. McLeod, 63 Ga. 162, 63 Ga. 163, 1879 Ga. LEXIS 149 (1879).

RESEARCH REFERENCES

Am. Jur. 2d.
31 Am. Jur. 2d, Exemptions, §§ 135, 137. 40 Am. Jur. 2d, Homesteads, § 83.

44-13-104. Town property worth more than $500.00; sale and reinvestment.

If the debtor in value owns real property in town which exceeds the sum of $500.00 and it cannot be so divided as to give that amount to his family, he may give notice to the officer levying thereon. When the proceeds of the sale are distributed, the court shall order $500.00 of the same to be invested by some proper person in a home for the family of the debtor, which home shall be exempt as if laid off under this article.

History.
Orig. Code 1863, § 2017; Code 1868, § 2017; Code 1873, § 2044; Code 1882, § 2044; Civil Code 1895, § 2870; Civil Code 1910, § 3420; Code 1933, § 51-1404.

JUDICIAL DECISIONS

Time of notice. — The notice may be after the levy, but before the sheriff pays out the money. Ragland v. Moore, Trimble & Co., 51 Ga. 476, 1874 Ga. LEXIS 169 (1874).

Sale under security deed. — When town property set apart as a homestead is about to be sold under a security deed given by a husband, the debtor's wife cannot by giving notice have proceeds of the sale held up to be invested in other realty for a statutory homestead. Evans v. Piedmont Nat'l Bldg. & Loan Ass'n, 118 Ga. 880, 45 S.E. 693, 1903 Ga. LEXIS 751 (1903).

Prior judgments. — Where prior judgments were obtained against a husband, the wife was later entitled to $500.00 in proceeds of town property sold under the judgments. Maxey, Jordan & Co. v. Loyal, 38 Ga. 531, 1868 Ga. LEXIS 116 (1868).

Time of improvements. — Improvements upon a homestead, to become or to partake of the nature of purchase money, must be made after the homestead has been set apart; for from the very nature of the case there can be no improvement of a homestead until there has actually been a homestead granted. Wright v. Carolina Portland Cement Co., 177 Ga. 564, 170 S.E. 795, 1933 Ga. LEXIS 357 (1933).

RESEARCH REFERENCES

Am. Jur. 2d.
40 Am. Jur. 2d, Homesteads, §§ 30, 32, 37.

C.J.S.
40 C.J.S., Homesteads, § 33.

44-13-105. Sale of property subject to encumbrance of homestead.

If, from any cause, the exempt land has not been laid off when the remainder of the land is offered for sale, the purchaser shall buy subject to the encumbrance of the homestead if he was given notice of the exemption.

History.
Orig. Code 1863, § 2018; Code 1868, § 2018; Code 1873, § 2045; Code 1882, § 2045; Civil Code 1895, § 2871; Civil Code 1910, § 3421; Code 1933, § 51-1405.

JUDICIAL DECISIONS

Pending application. — If, at the time of the sale of land by the sheriff, an application is pending for a homestead in favor of the family of the defendant, and notice thereof is given at the sale, the purchaser buys under O.C.G.A. § 44-13-105 subject to the homestead. Kilgore v. Beck, 40 Ga. 293, 1869 Ga. LEXIS 88 (1869); Faircloth v. St. Johns, 44 Ga. 603, 1872 Ga. LEXIS 376 (1872); Rogers v. Kimsey, 163 Ga. 146, 135 S.E. 497, 1926 Ga. LEXIS 43 (1926).

Notice of application. — A person who has applied for an injunction to enjoin the sale of the land under an execution against that person, in which land the person claims a homestead on the ground of age and infirmity, is protected by giving notice of an application for homestead, provided, of course, it should be determined that the person is entitled to the homestead. Adams v. Grizzard, 171 Ga. 780, 156 S.E. 689, 1931 Ga. LEXIS 464 (1931).

Illegal sale of a homestead does not divest property of its character as such. Evans v. Piedmont Nat'l Bldg. & Loan Ass'n, 118 Ga. 880, 45 S.E. 693, 1903 Ga. LEXIS 751 (1903).

RESEARCH REFERENCES

Am. Jur. 2d.
31 Am. Jur. 2d, Exemptions, §§ 13, 134, 138, 146. 40 Am. Jur. 2d, Homesteads, §§ 83 et seq., 110 et seq.

C.J.S.
40 C.J.S., Homesteads, §§ 95 et seq., 148, 154.

44-13-106. Use of exempted property.

The property exempt under this article shall be for the use and benefit of the family of the debtor from whose estate the property has been exempted and allowed. Upon the death of the wife or her subsequent marriage, the property shall remain for the support and benefit of the minor children of the debtor during their minority.

History.
Orig. Code 1863, § 2021; Ga. L. 1865-66, p. 29, § 2; Code 1868, § 2021; Code 1873, § 2048; Ga. L. 1880-81, p. 69, § 1; Code 1882, § 2048a; Civil Code 1895, § 2874; Civil Code 1910, § 3424; Code 1933, § 51-1503; Ga. L. 1982, p. 3, § 44.

JUDICIAL DECISIONS

Termination of homestead. — The exemption of land taken by a father for the benefit of his minor son ceases when the son reaches majority. Blalock v. Denham, 85 Ga. 646, 11 S.E. 1038, 1890 Ga. LEXIS 123 (1890); Rogers v. Kimsey, 177 Ga. 839, 171 S.E. 707, 1933 Ga. LEXIS 442 (1933).

Exemption for family as a whole. — Where it appeared from a plat in the record that the exemption consisted of 50 acres of land to the head of a family, and six adjacent tracts of five acres each to six named children, the homestead was nevertheless to be considered as a tract of 80 acres of land claimed and set apart for the use and benefit of the family as a whole, and not as consisting of seven distinct homesteads. Rogers v. Kimsey, 177 Ga. 839, 171 S.E. 707, 1933 Ga. LEXIS 442 (1933).

Possessory warrant. — The possession of the head of the family is for the use of the wife and children, and the wife can recover by possessory warrant property which is taken from him. Tucker v. Edwards, 71 Ga. 602, 1883 Ga. LEXIS 231 (1883).

Enjoining interference with possession. — A proceeding to enjoin an interference with the right of possession by the beneficiaries of property set apart as homestead may properly be instituted directly by them. Pritchett v. Davis, 101 Ga. 236, 28 S.E. 666, 1897 Ga. LEXIS 204 (1897).

RESEARCH REFERENCES

Am. Jur. 2d.
31 Am. Jur. 2d, Exemptions, §§ 32, 132. 40 Am. Jur. 2d, Homestead, §§ 148, 155, 156, 166, 167.

C.J.S.
40 C.J.S., Homesteads, § 167 et seq.

44-13-107. Exempted property subject to levy and sale for purchase money and taxes.

Property exempted from levy and sale as provided for in this article shall not be exempt from levy and sale for the purchase money or for the state and county or municipal taxes.

History.
Ga. L. 1874, p. 19, § 1; Code 1882, § 2046a; Civil Code 1895, § 2873; Civil Code 1910, § 3423; Code 1933, § 51-1502.

JUDICIAL DECISIONS

Personalty set apart is not subject to levy and sale except for purchase money and taxes under O.C.G.A. § 44-13-107. Gray Bros. v. Higgs, 18 Ga. App. 22, 88 S.E. 709, 1916 Ga. App. LEXIS 85 (1916). See also Moseman v. Comer, 160 Ga. 106, 127 S.E. 406, 1925 Ga. LEXIS 96 (1925).

O.C.G.A. § 44-13-107 limits the right of a creditor to claim the security of after-acquired property only if such property is acquired within ten days of the execution of the promissory note. Smathers v. Fulton Fed. Sav. & Loan Ass'n, 653 F.2d 977, 1981 U.S. App. LEXIS 18429 (5th Cir. 1981).

Consumer goods may not be made subject to a deed to secure debt unless they are acquired within ten days of the execution of the deed. Smathers v. Fulton Fed. Sav. & Loan Ass'n, 653 F.2d 977, 1981 U.S. App. LEXIS 18429 (5th Cir. 1981).

Lender not required to include as security interest anything of no value to borrower. — The law does not require that a lender include as a security interest on the disclosure statement anything which has no value to the borrower. Smathers v. Fulton Fed. Sav. & Loan Ass'n, 653 F.2d 977, 1981 U.S. App. LEXIS 18429 (5th Cir. 1981).

A borrower may not claim a homestead exemption against a purchase money security deed holder. Smathers v. Fulton Fed. Sav. & Loan Ass'n, 653 F.2d 977, 1981 U.S. App. LEXIS 18429 (5th Cir. 1981).

Mortgage. — O.C.G.A. § 44-13-107 applies to a mortgage executed for the purchase money of land prior to its passage. Harris v. Glenn, 56 Ga. 94, 1876 Ga. LEXIS 215 (1876).

Mortgage lien. — A mortgage lien given to a merchant for supplies, fertilizer, etc., to enable the mortgagor to make a crop, is not superior to the statutory exemption, and the personal property so set apart as exempt is not subject to be seized and sold under an execution issued on a foreclosure of the mortgage. Jones v. Spill-

ers, 9 Ga. App. 473, 71 S.E. 777, 1911 Ga. App. LEXIS 187 (1911).

Lien survives discharge. — When a debtor filed the debtor's 2008 state income tax return four days after the filing of the debtor's Chapter 7 case, the debtor's tax liability for that year was excepted from discharge under 11 U.S.C. § 523(a)(1)(B)(i). Even though the debtor's liability for the year 2007 was subject to discharge, the Georgia Department of Revenue's tax lien survived the discharge and attached to any exempt property of the debtor. Wellborn v. Ga. Dep't of Revenue (In re Wellborn), No. G12-20748-REB, 2012 Bankr. LEXIS 4632 (Bankr. N.D. Ga. Aug. 20, 2012).

Landlord's lien for rent. — The landlord's special lien for rent upon the crops raised on the rented premises is superior to an exemption set apart in such crops under the provisions of O.C.G.A. § 44-13-107. Shirling v. Kennon, 119 Ga. 501, 46 S.E. 630, 1904 Ga. LEXIS 252 (1904).

A landlord's lien for supplies is superior to an exemption in the crops, being in the nature of purchase money. Moseman v. Comer, 160 Ga. 106, 127 S.E. 406, 1925 Ga. LEXIS 96 (1925).

Debt for fertilizers. — Land exempted is not subject to a debt for fertilizers used thereon. Wilcox, Ives & Co. v. Cowart, 110 Ga. 320, 35 S.E. 283, 1900 Ga. LEXIS 417 (1900). See also Watson v. Williams, 110 Ga. 321, 35 S.E. 344, 1900 Ga. LEXIS 418 (1900).

Lien for keep of horse. — A horse upon which a livery stable keeper claimed a lien for its keep, but which was subsequently set apart to the claimant as the head of a family, was exempt from levy and sale under the lien. Gray Bros. v. Higgs, 18 Ga. App. 22, 88 S.E. 709, 1916 Ga. App. LEXIS 85 (1916).

OPINIONS OF THE ATTORNEY GENERAL

Motor vehicle taxes. — The levy for delinquent motor vehicle ad valorem taxes can be executed against the homestead. 1968 Op. Att'y Gen. No. 68-146.

RESEARCH REFERENCES

Am. Jur. 2d.
31 Am. Jur. 2d, Exemptions, §§ 120 et seq., 122, 125, 147. 40 Am. Jur. 2d, Homesteads, §§ 98-102, 110, 166.

C.J.S.
40 C.J.S., Homesteads, §§ 1, 6, 57 et seq., 174.

44-13-108. Levy or sale of exempt property as trespass; cause of action.

Any officer who knowingly levies on or sells any property of a debtor which is exempt under this article, a schedule of which shall have been returned as required, shall be guilty of a trespass. An action may be brought therefor in the name of the wife or family of the debtor, and the recovery shall be for their exclusive use.

History.
Orig. Code 1863, § 2019; Code 1868, § 2019; Code 1873, § 2046; Code 1882, § 2046; Civil Code 1895, § 2872; Civil Code 1910, § 3422; Code 1933, § 51-1501.

JUDICIAL DECISIONS

Husband's right to sue. — The right to sue is not limited to the wife or family, but the husband as the head of the family can maintain the action, and will hold the

recovery, if any, for their use. Personal Fin. Co. v. Evans, 45 Ga. App. 53, 163 S.E. 250, 1932 Ga. App. LEXIS 157 (1932).

Joinder of defendants. — Where an officer makes an unauthorized and wrongful levy upon the property of another, the officer and any others who procure such a seizure are liable as joint trespassers, in which event the aggrieved party may bring suit against any one or all of such wrongdoers, according to the aggrieved party's election. Personal Fin. Co. v. Evans, 45 Ga. App. 53, 163 S.E. 250, 1932 Ga. App. LEXIS 157 (1932).

Failure to allege type of homestead. — A petition under O.C.G.A. § 44-13-108 may constitute an adequate basis for the admission of evidence of the fact of a valid exemption if the allegations imply a valid homestead even though it may not appear which kind of homestead has been obtained. Personal Fin. Co. v. Evans, 45 Ga. App. 53, 163 S.E. 250, 1932 Ga. App. LEXIS 157 (1932).

Collateral attack. — Under O.C.G.A. § 44-13-108 where property levied on is claimed to be exempt as a "pony homestead," the validity of the exemption may be collaterally attacked. Marcrum v. Washington, 109 Ga. 296, 34 S.E. 585, 1899 Ga. LEXIS 640 (1899).

RESEARCH REFERENCES

Am. Jur. 2d.

31 Am. Jur. 2d, Exemptions, § 141. 40 Am. Jur. 2d, Homesteads, § 104.

C.J.S.

40 C.J.S., Homesteads, § 139.

ALR.

Availability of judgment under which exempt property has been seized as a set-off or counterclaim against claim based on wrongful seizure, 20 A.L.R. 276.

ARTICLE 3

DOMESTICATED JUDGMENT

44-13-120. Rights of Georgia residents.

As against a domesticated judgment from another state, a judgment debtor resident in Georgia shall be entitled to assert, in addition to any other exemption under Georgia law, an exemption from levy and sale and any other process equal to the exemption which would be provided to the judgment debtor by the law of the state in which the judgment was entered if the judgment debtor were a resident of that state.

History.

Code 1981, § 44-13-120, enacted by Ga. L. 2004, p. 451, § 1.

CHAPTER 14

MORTGAGES, CONVEYANCES TO SECURE DEBT, AND LIENS

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44-14-1. Operation of "open-end" clauses; limited to ex contractu obligations between parties.

44-14-2. What advances secured by mortgage or conveyance to secure debt; effect of recorded transfer of property subject to "open-end" clause; notice of transfer.

44-14-3. Furnishing of cancellation by grantee or holder upon payment; liability for failure to comply; cancellation of instrument after failure to comply; liability of agents.

44-14-4. Procedure for recording cancellation of mortgage.

44-14-5. Practices prohibited in connection with certain residential real estate transactions.

44-14-6. Wrongful sale or removal of mortgaged property; penalty.

44-14-7. Selling or disposing of motor vehicle securing bill of sale with intent to defraud; penalty.

44-14-8. Removal or other disposal of encumbered property in order to hinder levy; penalty; venue.

44-14-9. Aiding and abetting removal or other disposal; venue; conviction not dependent upon principal's conviction.

44-14-10. Search for property where defendant has no permanent abode; venue of prosecution.

44-14-11. Entry of nulla bona; shifting of burden of proof.

44-14-12. Deceiving as to existence of lien; making second deed of conveyance; penalty.

44-14-13. Disbursement of settlement proceeds; delivery of loan funds to settlement agent by lender; damages.

44-14-14. Vacant and foreclosed real property registries; definitions; fees and penalties for registration.

44-14-15. Fee for a future conveyance; limited circumstances.

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44-14-31. Form and contents of mortgage.

44-14-32. Use of parol evidence to prove apparent deed a mortgage.

44-14-33. Attestation or acknowledgment of mortgage; additional witness in case of land; constructive notice.

44-14-34. Signing of mortgages executed outside state.

44-14-35. Recording of mortgages on realty; effect of renewed mortgage as lien absent recordation.

44-14-35.1. Property covered by mortgage or bill of sale to secure debt; mortgage or bill given to secure bond issue.

44-14-36. Registry of mortgages on property of railroads and other utilities.

44-14-37. Effect of failure to record [Repealed].

44-14-38. Admission of mortgages into evidence [Repealed].

44-14-39. Effect of defective record as notice.

44-14-40. Probate of mortgages.

44-14-41. Tacking of mortgages.

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44-14-42. Mortgages to sureties and guarantors.
44-14-42.1. Redemption of property by mortgagor.
44-14-43. Foreclosure of mortgage after note barred by limitations.
44-14-44. Sale of mortgaged land under other process; claiming proceeds of sale.
44-14-45. Forthcoming bond by purchaser of mortgaged personalty; affidavit of mortgagee.
44-14-46. When mortgage fi. fa. may claim proceeds of sale.
44-14-47. Sale of mortgaged property without foreclosure and claim by mortgagee.
44-14-48. Foreclosure by one of several mortgagees; control and distribution of proceeds by court.
44-14-49. Right of holder of mortgage to foreclose in equity.

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44-14-61. Signing of deeds to secure debt and bills of sale.
44-14-62. Out-of-state deeds to secure debt and bills of sale.
44-14-63. [Effective until July 1, 2023. See note.] Recording of deeds to secure debt and bills of sale to secure debt; effect of failure to record.
44-14-63. [Effective July 1, 2023. See note.] Recording of deeds to secure debt and bills of sale to secure debt; effect of failure to record.
44-14-64. Transfers of deeds to secure debt; execution; partial transfers; transfers by certain financial institutions; requirements for recording; payoff balance.
44-14-65. Fees for transfer of real property covered by deed to secure debt [Repealed].
44-14-66. Effect of liens against grantee on grantor's right to reconvey; effect of reconveyance in event of grantor's prior death.
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44-14-121. Defense by maker; when and how made; affidavit.
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44-14-162.2. Mailing or delivery of notice to debtor; procedure.
44-14-162.3. Waiver or release of notice requirement.
44-14-162.4. Recitals in deeds as to meeting of notice requirement.
44-14-163. Vacation of certain judgments prior to sale; jurisdiction, power, and authority.
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Foreclosure on Mortgages

44-14-180. Manner of foreclosing; petition; rule; venue.
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44-14-345. Special lien for rent in favor of transferee of rent contract; foreclosure by transferee.
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44-14-361.3. Preliminary notice of lien; form; notice to contractor; filing; necessity of preliminary notice.
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44-14-515. Liens for articles furnished to sawmills; priorities.
44-14-516. Liens on merchandise because of bad checks or stop payment orders.
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44-14-611. Lis pendens docket; indexing; recording fees.
44-14-612. Entry of dismissal, settlement, or final judgment.
44-14-613. Effect of article on other laws.

Cross references.

Secured transactions generally, Art. 9, T. 11.

Priority of tax liens, § 48-2-56.

Editor's notes.

Ga. L. 1963, p. 188, § 39 provides that Chs. 1, 11, 13, and 14 of Code 1933, T. 67 (now codified primarily at this chapter) shall yield to and be superseded by any conflicting provisions of Code 1933, T. 109A (codified at Code 1981, T. 11).

Law reviews.

For article discussing 1976 to 1977 developments in mortgage law, see 29 Mercer L. Rev. 219 (1977).

JUDICIAL DECISIONS

Foreclosure by bondholder notwithstanding contrary trust indenture provisions. — Where, under a trust indenture to secure certain bonds, the exclusive right to accelerate and declare the bond issue due on account of defaults is vested in the trustee, and where it is further provided in the trust indentures that the bonds cannot be declared due by the bondholders thereof except upon a written request by the holders of an interest of at least 25 percent of the bonds outstanding, the holder of bonds of less than this amount cannot proceed in the bondholder's own name to foreclose the bonds personally held. Varner v. Atlanta Laundries, Inc., 182 Ga. 148, 184 S.E. 877, 1936 Ga. LEXIS 302 (1936).

Foreclosure of lien on mare. — Trial court properly granted summary judgment pursuant to O.C.G.A. § 9-11-56 to colt possessors in a tortious interference with a contract claim by a horse trainer, wherein the trainer alleged that the trainer had a contract to keep the recently born colt in exchange for continued services to the mare's owner; the court found that there was no showing that the possessors were aware of a contract regarding the ownership of the colt, the possessors had followed the necessary procedures for filing a financing statement under

O.C.G.A. § 11-9-501 et seq., they had allegedly foreclosed on their lien on the mare by the time that they became aware of the trainer's claim, pursuant to O.C.G.A. § 44-14-490, and the trainer did not record a lien against the colt pursuant to O.C.G.A. § 44-14-511. Medlin v. Morganstern, 268 Ga. App. 116, 601 S.E.2d 359, 2004 Ga. App. LEXIS 737 (2004).

RESEARCH REFERENCES

Am. Jur. Proof of Facts.

Warranty Deed Intended as Mortgage, 4 POF2d 567.

Proof That Grantor Intended Deed as Mortgage, 79 POF3d 109.

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.

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Duty to notify mortgagor who has parted with title to mortgaged real property of proceedings to enforce prior lien, 6 A.L.R. 499.

Rights and duties as between owner of land and owner of timber or of minerals in place as regards liens covering both interests, 26 A.L.R. 1031.

Protection of mortgagor or owner of mortgaged property, on foreclosure sale, by fixing upset or minimum price, requiring credit of specified amount on mortgage debt, or denying or limiting amount of deficiency judgment, 85 A.L.R. 1480.

Admissibility of admissions against title to tangible personal property made by one subsequent to executing chattel mortgage thereon, 106 A.L.R. 1296.

Attachment, garnishment, execution, or similar process in action on note or bond, not resulting in sale of mortgaged property, as precluding foreclosure of real-estate mortgage, 37 A.L.R.2d 959.

Necessity and sufficiency of tender of payment by one seeking to redeem property from mortgage foreclosure, 80 A.L.R.2d 1317.

ARTICLE 1

IN GENERAL

44-14-1. Operation of "open-end" clauses; limited to ex contractu obligations between parties.

(a) As used in this Code section, the term "original party" means, without limitation, any bank, trust company, or other corporation into which the grantee of any real estate mortgage or deed conveying realty as security for a debt shall be merged or consolidated. In addition to the foregoing, the term "original party," as used in this Code section, shall also include, without limitation, any bank, trust company, or other corporation, whether organized and existing under the laws of the United States or this state, into which the grantee of any real estate mortgage or deed conveying realty as security for a debt shall be converted.

(b) Except as provided in subsection (c) of this Code section, the operation of "open-end" clauses contained in real estate mortgages or deeds conveying realty as security for a debt, which clauses provide that, in addition to securing the debt named or described in the

instrument, such instruments or the property thereby conveyed shall also secure any other debt or obligation that may be or become owing by the mortgagor or grantor, is limited to other debts or obligations arising ex contractu, as distinguished from those arising ex delicto, between the original parties to the security instrument.

(c) A transferee or assignee of an original party to a home equity line of credit agreement or contract who makes additional advances or disbursements on a home equity line of credit shall have the benefit of the security under the deed if the disbursements, made after the assignment, were authorized by the original parties to the home equity line of credit agreement or contract.

History.

Ga. L. 1958, p. 655, § 1; Ga. L. 1978, p. 1705, § 4; Ga. L. 1980, p. 1550, § 1; Ga. L. 1980, p. 1765, § 1; Ga. L. 1997, p. 712, § 1; Ga. L. 1998, p. 128, § 44.

Cross references.

Rules of construction to promote purposes and policies, § 11-1-103.

Strict construction of powers of sale in deeds of trust, mortgages, and other instruments, § 23-2-114.

Editor's notes.

Ga. L. 1962, p. 156, § 1, provides that any provision of Code Sections 44-14-1, 44-14-2, 44-14-4, 44-14-7 through 44-14-12, 44-14-100, and 44-14-160, and Arts. 2 and 3, Ch. 14, of this title which conflicts with T. 11 shall yield to and be superseded by T. 11. See Code Section 11-10-103.

Law reviews.

For note discussing how an open-end or dragnet clause within a deed to secure debt ensnares subsequent purchasers of real property, in light of Commercial Bank v. Readd, 240 Ga. 519, 242 S.E.2d 25 (1978), see 30 Mercer L. Rev. 363 (1978).

JUDICIAL DECISIONS

Federal tax liens. — Since a federal tax lien is wholly a creature of federal law, the consequences of a lien that attaches to property interests, e.g., priority determinations, are matters of federal law; consequently, it is federal law which provides for the priority and validity of federal tax liens, not Georgia law. United States ex rel. IRS v. Georgia Bank & Trust Co. (In re Littleton), 177 B.R. 407, 1995 Bankr. LEXIS 2178 (Bankr. S.D. Ga. 1995).

O.C.G.A. § 44-14-1 is not vague, uncertain or indefinite. — O.C.G.A. § 44-14-1 is not so vague, indefinite and uncertain as to be null, void and of no effect. The purpose and meaning of the words employed are neither vague, indefinite or uncertain. Hill v. Perkins, 218 Ga. 354, 127 S.E.2d 909, 1962 Ga. LEXIS 499 (1962).

Variance between title and subject matter of Ga. L. 1958, p. 655 not unconstitutional. — O.C.G.A. § 44-14-1 is not unconstitutional under Ga. Const. 1945, Art. III, Sec. VII, Para. VIII (see, now, Ga. Const. 1983, Art. III, Sec. V, Para. III) because the title of Ga. L. 1958, p. 655 is broader than the body of subject matter. Hill v. Perkins, 218 Ga. 354, 127 S.E.2d 909, 1962 Ga. LEXIS 499 (1962).

Section does not grant unconstitutional privileges and immunities to mortgagors. — O.C.G.A. § 44-14-1 is not unconstitutional under Ga. Const. 1945, Art. I, Sec. III, Para. II (see, now, Ga. Const. 1983, Art. I, Sec. I, Para. X) and Ga. Const. 1945, Art. I, Sec. I, Para. II, (see, now, Ga. Const. 1983, Art. I, Sec. I, Para. II) as granting special privileges and immunities to mortgagors at the expense of mortgagees. Hill v. Perkins, 218 Ga. 354, 127 S.E.2d 909, 1962 Ga. LEXIS 499 (1962).

Limitation on dragnet clauses. — O.C.G.A. § 44-14-1 authorizes dragnet clauses but limits their effectiveness to ex contractu debts between original parties to such security instrument. Willis v.

Rabun County Bank, 249 Ga. 493, 291 S.E.2d 715, 1982 Ga. LEXIS 858 (1982).

Dragnet clause contained in the deed to secure debt did not secure subsequent individual debts of debtors. In re Felker, 181 B.R. 1017, 1995 Bankr. LEXIS 714 (Bankr. M.D. Ga. 1995).

In distributing insurance proceeds following the postpetition destruction of Chapter 13 debtors' home, a dragnet clause in the security agreement did not preclude the bank from retaining amounts owed on the debtors' prior notes under O.C.G.A. § 44-14-1(b). The security deed demonstrated a clear intent for the real estate to secure the individual liabilities of the debtors. In re Ryles, No. JTL, 457 B.R. 138, 2011 Bankr. LEXIS 2301 (Bankr. M.D. Ga. 2011).

Section inapplicable to security deeds executed before March 25, 1958. — The provisions of O.C.G.A. § 44-14-1 confining the operation of open-end clauses do not apply to a security deed executed before March 25, 1958. Poole v. Smith, 226 Ga. 259, 174 S.E.2d 430, 1970 Ga. LEXIS 499 (1970).

Phrase "original parties" simply means that dragnet clause in security deed limits operation of security deed to debts of parties to security deed. Willis v. Rabun County Bank, 249 Ga. 493, 291 S.E.2d 715, 1982 Ga. LEXIS 858 (1982).

Bank resulting from a merger is an original party, within the meaning of O.C.G.A. § 44-14-1, to a security deed executed to one of the merging banks and, accordingly, can enforce an open-end clause in such a deed. Georgia R.R. Bank & Trust Co. v. McCullough, 241 Ga. 456, 246 S.E.2d 313, 1978 Ga. LEXIS 1019 (1978).

A merged bank is considered an original party to the security instruments of its constituent banks; they do not lose their existences in the merger, merely their identities. Guthrie v. Bank S., 195 Ga. App. 123, 393 S.E.2d 60, 1990 Ga. App. LEXIS 424 (1990), cert. denied, No. S90C0984, 1990 Ga. LEXIS 850 (Ga. May 9, 1990).

Merged bank cannot retroactively secure loan. — Although O.C.G.A. § 44-14-1(a) provides that the term "original party" includes merged banks, a merger following a loan will not operate to secure that loan with the open end provisions of an earlier instrument granted to one of the predessor banks, and the merged bank cannot use the later merger to retroactively secure a loan it has already made. United States ex rel. IRS v. Georgia Bank & Trust Co. (In re Littleton), 177 B.R. 407, 1995 Bankr. LEXIS 2178 (Bankr. S.D. Ga. 1995).

Duration of deeds with open-end or dragnet clauses. — Deeds to secure debt with open-end or dragnet clauses continue to be effective so long as there exists indebtedness between the grantor and the grantee. Citizens & S. DeKalb Bank v. Hicks, 232 Ga. 244, 206 S.E.2d 22, 1974 Ga. LEXIS 921 (1974).

A security deed containing an open-end or dragnet clause will continue to be effective so long as an indebtedness arising out of contract between the original parties to the deed continuously exists from the deed's date. Brinson v. McMillan, 263 Ga. 802, 440 S.E.2d 22, 1994 Ga. LEXIS 97 (1994).

Determination that a payment was intended to satisfy the total debt of debtors required a determination that a security deed was satisfied upon the bank's loan closing and, although the security deed remained of record, the dragnet clause did not remain effective when the complete debt amount was satisfied. Regions Bank v. Wachovia Bank, 248 B.R. 201, 2000 Bankr. LEXIS 444 (Bankr. S.D. Ga. 2000).

Lack of intent, at time of execution, to tack contract onto lien. — It is immaterial whether or not the parties to a contract of guaranty intended at the time of its execution that it be tacked onto the original lien, since this can be legally done under O.C.G.A. § 44-14-1. Citizens & S. Nat'l Bank v. Gilbert, 130 Ga. App. 219, 202 S.E.2d 718, 1973 Ga. App. LEXIS 1280 (1973).

Extension of deed to cover other debts where it identifies a particular debt. — Where the deed to secure debt identifies a particular debt, it cannot be extended to cover other debts except by a new agreement between the parties, subject to the rules governing recording and

priorities. Bob Parrott, Inc. v. First Palmetto Bank, 133 Ga. App. 447, 211 S.E.2d 401, 1974 Ga. App. LEXIS 1107 (1974).

Effect of provision in open-end clause applying security to subsequent parties. — Even if deed to secure debt contained an open-end clause which applied the security to subsequent debts, such a provision would operate only between original parties. FDIC v. Willis, 497 F. Supp. 272, 1980 U.S. Dist. LEXIS 17238 (S.D. Ga. 1980).

Failure to satisfy untacked judgment from proceeds of foreclosure sale of security deed not a "deficiency" under O.C.G.A. § 44-14-161. — When defendant-assignee was assigned a note that was in default and a security deed by defendant-assignor, the assignee's judgment, not being a contractual obligation, did not tack on to the note and become one obligation; since the judgment does not tack, the failure to satisfy the judgment from the proceeds of a foreclosure sale of the security deed under a power of sale contained therein does not constitute a "deficiency" within the meaning of O.C.G.A. § 44-14-161. Cook v. F & M Bank, 247 Ga. 661, 279 S.E.2d 199, 1981 Ga. LEXIS 831 (1981).

Indebtedness to transferees. — A transferee may not enforce under an open-end clause a new indebtedness between the transferee and an original party to the deed. FDIC v. Willis, 497 F. Supp. 272, 1980 U.S. Dist. LEXIS 17238 (S.D. Ga. 1980).

A transferee of a security deed with an open-end provision cannot have the benefit of the security under the deed for prior indebtedness owing to the transferee or for additional advances to the maker beyond those provided in O.C.G.A. § 44-14-2. Bowen v. Kicklighter, 124 Ga. App. 82, 183 S.E.2d 10, 1971 Ga. App. LEXIS 822 (1971).

Open-end clauses regarding future advances valid. — Open-end or "dragnet" clauses regarding future advances in deeds to secure debt are valid and enforceable. Tedesco v. CDC Fed. Credit Union, 167 Ga. App. 337, 306 S.E.2d 397, 1983 Ga. App. LEXIS 2451 (1983).

Additional debt of one creditor cannot operate as a hook to grab a dragnet which carries with it property interests of party other than creditor in separate transaction. Willis v. Rabun County Bank, 249 Ga. 493, 291 S.E.2d 715, 1982 Ga. LEXIS 858 (1982).

Individual debt of one of parties executing deed. — Where the "grantor" consisted of three individuals who executed the security deed, a note signed by only one of them for a personal debt was not an indebtedness of the grantor within the meaning of the security deed. Americus Fin. Co. v. Wilson, 189 Ga. 635, 7 S.E.2d 259, 1940 Ga. LEXIS 363 (1940).

Where "first parties" as used in a security deed referred to two individuals, a promissory note signed by one of them and a third party was not an indebtedness of the "first parties" within the meaning of the deed to secure debt. Bank of LaFayette v. Giles, 208 Ga. 674, 69 S.E.2d 78, 1952 Ga. LEXIS 310 (1952).

Where both the husband and wife were designated in a deed to secure debt by singular number as "party of the first part," the individual debt owed to the bank by the husband alone was not the debt of the "party of the first part," which fell within the operation of the deed's dragnet clause. Cordele Banking Co. v. Powers, 217 Ga. 616, 124 S.E.2d 275, 1962 Ga. LEXIS 343 (1962).

Where in security deed two parties were designated as "party of the first part" and the open-end clause provided that the deed was to secure not only the debt stated in the deed but any other debt thereafter owing to the defendant "by party of first part," the individual indebtedness of one of the parties to the defendant was not the debt of the "party of the first part," the two parties, and did not fall within the open-end clause of the security deed. Hill v. Perkins, 218 Ga. 354, 127 S.E.2d 909, 1962 Ga. LEXIS 499 (1962).

Individual loan to one of several grantors is included under dragnet clause of original deed to secure debt where it is clear from the language of the deed that "grantor" included either the plural or the singular grantors, and where it is established that all the parties to the contract at all times intended that any later obligations incurred by one of the grantors alone would be fully secured by

the original jointly and severally executed instrument. Sutton v. Atlantic Bank & Trust Co., 167 Ga. App. 861, 307 S.E.2d 746, 1983 Ga. App. LEXIS 2644 (1983).

Successor corporation. — Dragnet clause in security agreement on house that husband and wife executed to third party to secure loan to husband's corporation was effective to bring debt of successor corporation, which both assumed prior debt and obtained new debt, within security agreement where wife signed hypothecation agreement with third party authorizing corporation to pledge house as collateral and even though wife was never personally liable for a debt to the third party. Fleming v. First Am. Bank & Trust Co., 171 Ga. App. 295, 319 S.E.2d 119, 1984 Ga. App. LEXIS 2172 (1984).

Cancellation of open-end clausedeeds. — A deed to secure debt with an "open-end" clause is not cancelled immediately upon payment of the initial debt. Tedesco v. CDC Fed. Credit Union, 167 Ga. App. 337, 306 S.E.2d 397, 1983 Ga. App. LEXIS 2451 (1983).

Effectiveness of "open-end" clause. — Plaintiff's failure to provide actual notice of plaintiff's own subsequent security deed to the defendant sustained the effectiveness of the "open-end" clause contained in defendant's first security deed, blocking plaintiff's efforts to limit defendant's recovery to the original debt. First Nat'l Bank v. Charuhas, 207 Ga. App. 333, 427 S.E.2d 831, 1993 Ga. App. LEXIS 159 (1993).

Merger of debts. — The open end or dragnet clause in the first note effectively merged the two debts into one debt for foreclosure; such a clause merges the debt secured by the second note into the debt secured by the first note to the extent that it satisfies the requirements of O.C.G.A. § 44-14-1 and the notes were secured by the same property. Oakvale Rd. Assocs. v. Mortgage Recovery, 231 Ga. App. 414, 499 S.E.2d 404, 1998 Ga. App. LEXIS 486 (1998), cert. denied, No. S98C1087, 1998 Ga. LEXIS 853 (Ga. Sept. 11, 1998).

No evidence of intent for perpetual and indefinite security interest. — Given the fixed maturity date in the deed, with a loan for a sum certain rather than a revolving line of credit, the deed lacked an affirmative statement of intent to create a perpetual and indefinite security interest in the property and, so, under O.C.G.A. § 44-14-80(a)(1), the seven-year reversionary period applied. Griggs v. Miller, 363 Ga. App. 82, 870 S.E.2d 578, 2022 Ga. App. LEXIS 126 (2022).

RESEARCH REFERENCES

Am. Jur. 2d.

55 Am. Jur. 2d, Mortgages, § 69 et seq.

C.J.S.

59 C.J.S., Mortgages, § 157 et seq.

ALR.

Debts included in provision of mortgage purporting to cover all future and existing debts (dragnet clause) — modern status, 3 A.L.R.4th 690.

44-14-2. What advances secured by mortgage or conveyance to secure debt; effect of recorded transfer of property subject to "open-end" clause; notice of transfer.

(a) Whether or not it contains clauses providing therefor, a real estate mortgage or deed conveying realty as security for a debt shall secure advances made:

(1) To pay taxes;

(2) To pay premiums on insurance on the property;

(3) To pay sums due to the holder of a deed to secure debt or lien on

the property without which payment the secured position of the holder of the mortgage or deed to secure debt advancing such payment would be jeopardized;

(4) To repair, maintain, or preserve the property; and

(5) To complete improvements on the property,

whether such advances were made by the original owner or by any subsequent owner of the mortgage or deed to secure debt and whether the property is still owned by the original mortgagor or grantor or is owned by a subsequent purchaser of such property. Such mortgage or deed to secure debt shall secure all expenses incident to the collection of the debt thereby secured and the foreclosure thereof by an action in any court or by the exercise of the power of sale therein contained.

(b) Except for the advances set out in subsection (a) of this Code section, any extension of credit to the mortgagor or grantor after July 1, 1980, as to any debt or obligation arising subsequent to the actual notice of transfer of property or any valuable interest therein as provided in this subsection shall not be secured by virtue of the operation of an "open-end" clause described in Code Section 44-14-1 if the grantor of the instrument containing the "open-end" clause has transferred the property subject to such instrument or has transferred any valuable interest in such property and if the instrument effecting such transfer has been filed for record and actual notice of such transfer has been given to the holder of such instrument. In addition to other means of furnishing actual notice and for the purpose of this subsection, actual notice shall be deemed to have been given to the holder of such instrument upon evidence that:

(1) A properly stamped envelope which contained a copy of the recorded transfer and was addressed to the holder at its principal office was placed in the United States mail for registered or certified delivery and that the holder or an officer, agent, employee, or representative of the holder acknowledged receipt thereof on a United States Postal Service return receipt form for registered or certified mail delivery; or

(2) The recorded transfer was sent to the holder at its principal office by statutory overnight delivery and a receipt therefor obtained as provided in Code Section 9-10-12.

(c) Notwithstanding subsections (a) and (b) of this Code section and the occurrence of any of the events, acts, or conditions described therein, a real estate mortgage or deed conveying realty as security for a debt shall continue to secure any debt or obligation named or described therein and any advance permitted by this Code section.

History.

Ga. L. 1980, p. 1550, § 2; Ga. L. 1982, p. 3, § 44; Ga. L. 2000, p. 1589, § 12.

Editor's notes.

Ga. L. 1962, p. 156, § 1, provides that any provision of Code Sections 44-14-1, 44-14-2, 44-14-4, 44-14-7 through 44-14-12, 44-14-100, and 44-14-160, and Arts. 2 and 3, Ch. 14, of this title which conflict with T. 11 shall yield to and be superseded by T. 11. See Code Section 11-10-103.

Ga. L. 2000, p. 1589, § 16, not codified by the General Assembly, provided that the Act is applicable with respect to notices delivered on or after July 1, 2000.

JUDICIAL DECISIONS

Advances made by the assignee of a junior security deed to the holder of a senior security deed, in order to protect the assignee's secured position, are secured by the junior security deed. Mason v. Bates, 251 Ga. 241, 304 S.E.2d 724, 1983 Ga. LEXIS 781 (1983).

O.C.G.A. § 44-14-2 extends to costs incidental to foreclosure, but which do not grow out of a suit on the foreclosure proceeding itself. Tobler v. Yoder & Frey Auctioneers, Inc., 462 F. Supp. 788, 1978 U.S. Dist. LEXIS 7207 (S.D. Ga. 1978), aff'd, 620 F.2d 508, 1980 U.S. App. LEXIS 16023 (5th Cir. 1980).

Advertising costs of foreclosure sales are ordinarily recoverable. Tobler v. Yoder & Frey Auctioneers, Inc., 462 F. Supp. 788, 1978 U.S. Dist. LEXIS 7207 (S.D. Ga. 1978), aff'd, 620 F.2d 508, 1980 U.S. App. LEXIS 16023 (5th Cir. 1980).

Notice required for collection of attorney's fees. — A provision in a security deed in respect to collection of attorney's fees does not dispense with the notice required by O.C.G.A. § 13-1-11 to collect such fees. Tobler v. Yoder & Frey Auctioneers, Inc., 462 F. Supp. 788, 1978 U.S. Dist. LEXIS 7207 (S.D. Ga. 1978), aff'd, 620 F.2d 508, 1980 U.S. App. LEXIS 16023 (5th Cir. 1980).

Cost of removal of a complaint to federal district court is not taxable against a mortgagee, under O.C.G.A. § 44-14-2. Tobler v. Yoder & Frey Auctioneers, Inc., 462 F. Supp. 788, 1978 U.S. Dist. LEXIS 7207 (S.D. Ga. 1978), aff'd, 620 F.2d 508, 1980 U.S. App. LEXIS 16023 (5th Cir. 1980).

Costs of bankruptcy proceedings filed with intent to hinder or delay. — An award of costs and expenses by the court is allowed in a case where an insolvent mortgagor files a bankruptcy proceeding with the intent to hinder and delay the mortgagee in foreclosing the security deed. The mortgagee must appear therein to protect the mortgagee's right to the exercise of the power of sale. Tobler v. Yoder & Frey Auctioneers, Inc., 462 F. Supp. 788, 1978 U.S. Dist. LEXIS 7207 (S.D. Ga. 1978), aff'd, 620 F.2d 508, 1980 U.S. App. LEXIS 16023 (5th Cir. 1980).

Duty to keep expenses of sale within reason. — It is the duty of a mortgagee in conducting sale under a power contained in a security deed or mortgage to keep the expenses of collection within reasonable bounds. Tobler v. Yoder & Frey Auctioneers, Inc., 462 F. Supp. 788, 1978 U.S. Dist. LEXIS 7207 (S.D. Ga. 1978), aff'd, 620 F.2d 508, 1980 U.S. App. LEXIS 16023 (5th Cir. 1980).

Burden of showing actual notice received not met. — Debtors failed to carry their burden of demonstrating that the debt fell within the scope of O.C.G.A. § 44-14-2(b) where there was no evidence that any debt was incurred after the bank received notice of insurance coverage showing the existence of a second mortgage. In re Felker, 181 B.R. 1017, 1995 Bankr. LEXIS 714 (Bankr. M.D. Ga. 1995).

OPINIONS OF THE ATTORNEY GENERAL

Application of O.C.G.A. § 44-14-2(b) to "open-end" clauses in security deeds executed prior to July 1, 1980, cannot be assured, because such application arguably would impair obligation of contracts in violation of constitutional

guarantees. 1981 Op. Att'y Gen. No. 81-98.

Application of phrase "transfer of property or any valuable interest therein." — Phrase "transfer of property or any valuable interest therein" seems clearly to refer to situation where equity owner of encumbered property transfers some or all of the equity owner's interest subject to first security deed. In this situation, O.C.G.A. § 44-14-2(b) protects purchaser of equity from loss in event original owner borrows more money from first security deed holder. 1981 Op. Att'y Gen. No. 81-98.

Phrase "transfer of property or any valuable interest therein" would appear also to refer to a secondary security deed conveyance, because a secondary security deed unquestionably conveys a valuable interest in property. 1981 Op. Att'y Gen. No. 81-98.

Department of Banking and Finance in its examinations should not regard debt secured by secondary security deed as being senior to debts under "open-end" clause in first security deed executed prior to July 1, 1980, unless holder of first security deed has agreed that subsequent advances will not be senior to secondary security deed indebtedness. 1981 Op. Att'y Gen. No. 81-98.

RESEARCH REFERENCES

Am. Jur. 2d.

55 Am. Jur. 2d, Mortgages, §§ 65 et seq., 83 et seq.

C.J.S.

59 C.J.S., Mortgages, § 154 et seq.

ALR.

Application of insurance moneys received by mortgagee, 11 A.L.R. 1295.

Duty of mortgagee, or one holding title as security, to protect the interests of third persons in respect to insurance, 41 A.L.R. 1283; 130 A.L.R. 598.

Right of mortgagee to benefit of insurance taken out by purchaser of equity of redemption, 47 A.L.R. 1011.

Liability of mortgagee under mortgage clause for insurance premium, 47 A.L.R. 1126; 56 A.L.R. 679; 83 A.L.R. 105.

Right of mortgagee to be reimbursed for, or credited with, amount of taxes paid by him after judgment, but before sale, 60 A.L.R. 425.

Validity, construction, applicability, and effect of provision in real estate mortgage regarding payment of taxes or assessments by mortgagee, 74 A.L.R. 506.

Adjustment of loss by agreement between mortgagor and insurer as affecting mortgagee under loss-payable clause, 111 A.L.R. 697.

Independent contract theory or creditor-beneficiary theory as regards status of mortgagee under mortgage clause in policy fire insurance, 124 A.L.R. 1034.

Optional advance under mortgage as subject to lien intervening between giving of the mortgage and making the advance, 138 A.L.R. 566.

Limit of amount specified in mortgage for future advances as affected by repayment of part of the advances, 152 A.L.R. 566.

Priority between mechanics' liens and advances made under previously executed mortgage, 80 A.L.R.2d 179.

Rights in funds representing "escrow" payments made by mortgagor in advance to cover taxes or insurance, 50 A.L.R.3d 697.

Failure to keep up insurance as justifying foreclosure under acceleration provision in mortgage or deed of trust, 69 A.L.R.3d 774.

Debts included in provision of mortgage purporting to cover all future and existing debts (dragnet clause) — modern status, 3 A.L.R.4th 690.

44-14-3. Furnishing of cancellation by grantee or holder upon payment; liability for failure to comply; cancellation of instrument after failure to comply; liability of agents.

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

(1) "Account" means the loan, note, or other such agreement executed by the parties.

(2) "Finance charge" means interest and other charges agreed to by the parties.

(3) "Grantee" means heirs, devisees, executors, administrators, successors, transferees or assigns, and any servicing agent or any person or entity to whom indebtedness is paid on behalf of or by any grantor.

(4) "Grantor" means heirs, devisees, executors, administrators, successors, transferees, or assigns.

(5) "Instrument" means a deed to secure debt, a security instrument, a purchase money mortgage, a financing statement, a personalty mortgage, a loan contract, or other instrument executed in connection with any loan.

(6) "Revolving loan account" means an arrangement between a lender and a debtor for the creation of debt pursuant to an agreement secured by an instrument and under which:

(A) The lender may permit the debtor to create debt from time to time;

(B) The unpaid balances of principal of such debt and the loan finance and other appropriate charges are debited to an account;

(C) A loan finance charge is computed on the outstanding balances of the debtor's account from time to time;

(D) The debtor agrees to repay the debt and accrued finance charges in accordance with the written agreement with the lender; and

(E) The limitation on the maximum amount which the debtor is entitled to become indebted under said arrangement between the lender and debtor is stated on the face of the instrument, and said amount shall be deemed to be notice of the maximum amount secured by the instrument.

(b)(1) Whenever the indebtedness secured by any instrument is paid in full, the grantee or holder of the instrument, within 60 days of the date of the full payment, shall cause to be mailed to the grantor, at the grantor's last known address as shown on the records of the grantee or holder of the instrument, written notice of the grantee's or holder of the instrument's transmittal of notice of satisfaction or cancellation as required by this subsection and notice of the grantor's right to demand payment of $500.00 in liquidated damages from the grantee or holder of the instrument if such obligation is not timely met.

(2) Whenever the indebtedness secured by any instrument is paid in full, the grantee or holder of the instrument, within 60 days of the date of the full payment, shall cause to be furnished to the clerk of the superior court of the county or counties in which the instrument is recorded a legally sufficient satisfaction or cancellation to authorize and direct the clerk or clerks to cancel the instrument of record. The grantee or holder of the instrument shall further direct the clerk of the court to transmit to the grantor the original cancellation or satisfaction document at the grantor's last known address as shown on the records of the grantee or holder of the instrument. In the case of a revolving loan account, the debt shall be considered to be "paid in full" only when the entire indebtedness including accrued finance charges has been paid and the lender or debtor has notified the other party to the agreement in writing that he or she wishes to terminate the agreement pursuant to its terms.

(3) Notwithstanding paragraph (2) of this subsection, if an attorney at law remits the pay-off balance of an instrument to a grantee or holder of the instrument on behalf of a grantor, the grantee or holder of the instrument may direct the clerk of the court to transmit to such attorney the original cancellation or satisfaction document.

(4) A grantee or holder of the instrument shall be authorized to add to the pay-off amount the costs of recording a cancellation or satisfaction of an instrument.

(c)(1) Upon the failure of the grantee or holder of the instrument to transmit a legally sufficient satisfaction or cancellation as required by subsection (b) of this Code section, the grantee or holder of the instrument shall be liable to the grantor for the sum of $500.00 as liquidated damages and such additional sums for any loss caused to the grantor, plus reasonable attorney's fees if the grantor makes a written demand for liquidated damages to the grantee or holder of the instrument before transmittal, but not less than 61 days after the instrument is paid in full, and prior to filing a civil action.

(2) The grantee or holder of the instrument shall not be liable to the grantor if he or she demonstrates reasonable inability to comply with subsection (b) of this Code section; and the grantee or holder shall not be liable to the grantor unless and until a written demand for the liquidated damages as provided in subsection (b) of this Code section is made. No settlement agent or attorney may take an assignment of the right to the $500.00 in liquidated damages.

(3) Except as provided in paragraph (1) of subsection (b) and paragraph (2) of subsection (c) of this Code section, no other provision of this Code section shall be construed so as to affect the obligation of the grantee or holder of the instrument to pay the liquidated damages provided for in this subsection.

(4) At least 15 business days prior to filing a civil action to recover liquidated damages, the grantor shall provide notice in writing to the grantee or holder of the instrument at the address where the grantee or holder of the instrument directs payments to be mailed with respect to the indebtedness secured by the instrument or, if such address is not available, at the address of the grantee or holder of the instrument's registered agent for service of process in Georgia stating that the grantee or holder of the instrument:

(A) Has failed to comply with the obligation required by this Code section;

(B) Owes the grantor liquidated damages in the amount of $500.00; and

(C) May be sued by the grantor for the failure to comply with the provisions of this Code section.

(5) If the grantee or holder of the instrument fails to provide written notice to the grantor regarding the grantee's or holder of the instrument's obligation for transmittal as provided in paragraph (1) of subsection (b) of this Code section, the grantor may file a civil action at any time more than 60 days after the grantee's or holder of the instrument's receipt of full payment.

(c.1) In the event that a grantee or holder of record has failed to transmit properly a legally sufficient satisfaction or cancellation to authorize and direct the clerk or clerks to cancel the instrument of record within 60 days after a written notice mailed to such grantee or holder of record by registered or certified mail or statutory overnight delivery, return receipt requested, the clerk or clerks are authorized and directed to cancel the instrument upon recording an affidavit by an attorney who has caused the secured indebtedness to be paid in full or by an officer of a regulated or chartered financial institution whose deposits are federally insured if that financial institution has paid the secured indebtedness in full. The notice to be mailed to the grantee or holder of record shall identify the indebtedness and include a recital or explanation of this subsection. The affidavit shall include a recital of actions taken to comply with this subsection. Such affidavit shall include as attachments the following items:

(1) A written verification which was given at the time of payment by the grantee or holder of record of the amount necessary to pay off such loan; and

(2)(A) Copies of the front and back of a canceled check to the grantee or holder of record paying off such loan.

(B) Confirmation of a wire transfer to the grantee or holder of record paying off such loan.

(C) A bank receipt showing payment to the grantee or holder of record of such loan.

Any person who files an affidavit in accordance with this subsection which affidavit is fraudulent shall be guilty of a felony and shall be punished by imprisonment for not less than one year nor more than three years or by a fine of not less than $1,000.00 nor more than $5,000.00, or both.

(d) In all cases, any servicing agent or any person or entity to whom the indebtedness is paid on behalf of any grantee shall be responsible for notifying the holder thereof upon payment in full and for securing the satisfaction or cancellation as provided in this Code section; and, upon failure to do so, the servicing agent or payee shall be subject to the same liability as provided in this Code section.

History.

Ga. L. 1975, p. 1134, §§ 1, 2; Ga. L. 1983, p. 677, § 1; Ga. L. 1984, p. 22, § 44; Ga. L. 1986, p. 754, § 1; Ga. L. 1987, p. 3, § 44; Ga. L. 1991, p. 413, §§ 1, 2; Ga. L. 1998, p. 545, § 1; Ga. L. 1999, p. 862, §§ 2, 3; Ga. L. 2000, p. 136, § 44; Ga. L. 2000, p. 1589, § 3; Ga. L. 2008, p. 352, § 1/HB 1093.

Editor's notes.

Ga. L. 1991, p. 413, § 3, not codified by the General Assembly, provides: "This Act shall become effective on July 1, 1991, and shall be applicable to any written demand for the transmittal of a cancellation or satisfaction made pursuant to the provisions of Code Section 44-14-3 of the Official Code of Georgia Annotated occurring on or after July 1, 1991."

Ga. L. 2000, p. 1589, § 16, not codified by the General Assembly, provided that the Act is applicable with respect to notices delivered on or after July 1, 2000.

Ga. L. 2008, p. 352, § 2/HB 1093, not codified by the General Assembly, provides, in part, that a demand for liquidated damages made before May 12, 2008 shall be governed by the provisions of former Code Section 44-14-3.

Law reviews.

For annual survey of law of real property, see 38 Mercer L. Rev. 319 (1986).

For annual survey of real property law, see 57 Mercer L. Rev. 331 (2005).

For survey article on trial practice and procedure, see 60 Mercer L. Rev. 397 (2008).

For note, "The Great Escape: How One Plaintiff's Sidestep of a Mandatory Arbitration Clause Was Applied to a Class in Bickerstaff v. SunTrust Bank," see 68 Mercer L. Rev. 539 (2017).

JUDICIAL DECISIONS

Statutory obligation to cancel satisfied notes. — Trial court correctly ordered that security deed be satisfied and canceled of record as the uncontroverted evidence was that the different former property owner paid the different former property owner's debt to the security deed holder but the security deed holder never canceled the security deed; however, once the security deed was satisfied, the security deed holder had a statutory obligation to cancel that instrument. Lebbos v. Davis, 256 Ga. App. 1, 567 S.E.2d 345, 2002 Ga. App. LEXIS 800 (2002).

The trial court, having found a debt to have been forgiven upon a decedent's death, did not err in ordering the decedent's administrator to cancel a deed to secure debt. The litigation did not give notice to the public that the deed had been cancelled; under O.C.G.A. §§ 44-14-3(b) and 44-14-60, a grantee of a security deed had the duty to cancel the deed of record when the obligation was satisfied. Mize v.

Woodall, 291 Ga. App. 349, 662 S.E.2d 178, 2008 Ga. App. LEXIS 496 (2008).

Lender improperly removed a borrower's action under 28 U.S.C. §§ 1446(b) and 1453(a) because the lender failed to meet its burden to establish that the number of borrowers who paid off their loans and whose security deeds were not timely cancelled under former O.C.G.A. § 44-14-3(b) met the requirements of the Class Action Fairness Act of 2005, making remand necessary under 28 U.S.C. § 1447(c). Stroh v. Colonial Bank, N.A., No. 4:08-CV-73, 2008 U.S. Dist. LEXIS 89540 (M.D. Ga. Nov. 4, 2008).

In a dispute between two siblings and their brother's widow, arising out of the brother's purchase and mortgage of a home for a third sibling, the title of which was in the names of the two siblings and the brother, the trial court erred in ruling that the siblings were not entitled to cancellation or satisfaction of the loan documents after the widow paid the amounts due on the mortgage because the estate had a duty to pay the amount due as the brother was the only obligor on the mortgage. Roberts v. Smith, 341 Ga. App. 823, 801 S.E.2d 915, 2017 Ga. App. LEXIS 291 (2017).

Application of definition of grantee. — After Chapter 7 debtor executed a note to a lender and also executed a security deed to a grantee, as lender's nominee, to secure the debt, the grantee was not a grantee, within the meaning of O.C.G.A. § 44-14-3(a), because the definition of "grantee" in § 44-14-3(a) did not apply to any other Code section. Drake v. Citizens Bank (In re Corley), 447 B.R. 375, 2011 Bankr. LEXIS 807 (Bankr. S.D. Ga. 2011).

Standing was in new purchaser of property. — Former property owner lacked standing to bring an action for statutory damages and attorney fees under O.C.G.A. § 44-14-3(c) against a lender that failed to cancel the lender's security deed on the property after receiving a payoff of the loan as the owner no longer had an interest in the property at the time that the complaint was filed and, accordingly, the owner was not the real party in interest under O.C.G.A. § 9-11-17(a); the new purchaser of the property became "the grantor" that had the capacity to prosecute the claim pursuant to § 44-14-3(a)(4). Associated Credit Union v. Pinto, 297 Ga. App. 605, 677 S.E.2d 789, 2009 Ga. App. LEXIS 489 (2009).

Duty to inform grantee of manner by which debt satisfied. — Although no particular form of words is necessary when phrasing a demand under O.C.G.A. § 44-14-3(c), when grantor relies upon payment of the debt in a manner other than that prescribed by the terms of the debt instrument, it is incumbent upon that grantor to inform the grantee of the exact manner by which the grantor claims the debt has been satisfied. Mitchell v. Oliver, 254 Ga. 112, 327 S.E.2d 216, 1985 Ga. LEXIS 648 (1985).

Notice. — When a debtor paid a promissory note and demanded that the creditor record the note's satisfaction, the creditor's failure to do so fell squarely under O.C.G.A. § 44-14-3(c), and the notice requirements found in O.C.G.A. § 44-14-3(c.1) had no application, as (1) the two sections concerned different matters, (2) each had a distinct notice requirement, and (3) O.C.G.A. § 44-14-3(c) specifically provided that no other provision of O.C.G.A. § 44-14-3 was to be construed to limit a creditor's obligation to pay a debtor liquidated damages for violating O.C.G.A. § 44-14-3(c). Franklin Credit Mgmt. Corp. v. Friedenberg, 275 Ga. App. 236, 620 S.E.2d 463, 2005 Ga. App. LEXIS 937 (2005).

"Honest doubt" concerning payment of debt. — Trial court properly granted creditor's motion for summary judgment upon debtor's claim for statutory penalties under O.C.G.A. § 44-14-3(c), where creditor submitted facts demonstrating that it did not cancel the security deed within the 45-day time period because of an "honest doubt" concerning payment of the debt, and debtor presented no specific facts raising a genuine issue in this regard. Edenfield v. Trust Co. Mtg., 185 Ga. App. 678, 365 S.E.2d 520, 1988 Ga. App. LEXIS 209 (1988).

Borrower waived and released its claim for violation. — Although a lender had failed to timely release two subdivision lots from its deed to secure debt as required by O.C.G.A. § 44-14-3, the lender was not liable to the borrower

because, after the lots sold, the borrower signed loan modification agreements releasing and waiving any claims it might have against the lender. Heritage Creek Dev. Corp. v. Colonial Bank, 268 Ga. App. 369, 601 S.E.2d 842, 2004 Ga. App. LEXIS 920 (2004).

Demand for liquidated damages. — Because the borrower never specifically demanded liquidated damages, the borrower was not entitled to statutory damages for the lender's failure to timely cancel a security deed. Shree Annpurna, Inc. v. Udhwani, 255 Ga. App. 799, 567 S.E.2d 42, 2002 Ga. App. LEXIS 778 (2002).

In an action for damages, O.C.G.A. § 9-11-8(a)(2)(B), part of the Civil Practice Act (CPA), requires a written demand in the complaint for the damages requested; thus, if a court were to interpret O.C.G.A. § 44-14-3(c) as permitting a demand for liquidated damages to be made in the complaint, the section would have no real meaning because the CPA already imposes such a requirement. Accordingly, if O.C.G.A. § 44-14-3(c) is to serve any real purpose, it must be construed as a requirement that a grantor make a written demand on the grantee for the liquidated damages as a condition precedent to creating the liability that serves as the basis for a lawsuit. SunTrust Bank v. Hightower, 291 Ga. App. 62, 660 S.E.2d 745, 2008 Ga. App. LEXIS 271 (2008), cert. denied, No. S08C1387, 2008 Ga. LEXIS 706 (Ga. Sept. 8, 2008).

A complaint by a borrower against a lender for liquidated damages under O.C.G.A. § 44-14-3(c) should have been dismissed because the borrower failed to make a written demand for such damages before filing suit. If the statute was to serve any real purpose, the statute had to be construed as imposing such a requirement. SunTrust Bank v. Hightower, 291 Ga. App. 62, 660 S.E.2d 745, 2008 Ga. App. LEXIS 271 (2008), cert. denied, No. S08C1387, 2008 Ga. LEXIS 706 (Ga. Sept. 8, 2008).

Penalties were appropriate where no justification existed for a bank's refusal to cancel a security deed on property. Regions Bank v. Wachovia Bank, 248 B.R. 201, 2000 Bankr. LEXIS 444 (Bankr. S.D. Ga. 2000).

Attorney fees. — When a debtor paid a promissory note and demanded that the creditor record the note's satisfaction, but the creditor sued the debtor on the note four years later, the debtor was entitled to attorney fees, including fees incurred in defending against the creditor's action, which was directly related to the creditor's failure to comply with O.C.G.A. § 44-14-3(c). Franklin Credit Mgmt. Corp. v. Friedenberg, 275 Ga. App. 236, 620 S.E.2d 463, 2005 Ga. App. LEXIS 937 (2005).

Because the debtor and the investment company's defense of the creditor's action to quiet title was directly related to the creditor's refusal to comply with the creditor's obligation under O.C.G.A. § 44-14-3 to have the security deed cancelled, the trial court did not err when the court awarded the debtor attorney fees under the statute. CB Lending, LLC v. Strategic Property Consulting Group, LLC, 353 Ga. App. 114, 834 S.E.2d 618, 2019 Ga. App. LEXIS 576 (2019), cert. denied, No. S20C0586, 2020 Ga. LEXIS 567 (Ga. July 15, 2020).

Penalties were appropriate. — When a debtor paid a promissory note and gave the creditor a written demand to record the note's satisfaction, but, instead, the creditor sued the debtor on the note four years later, the creditor's actions and omissions fell squarely within O.C.G.A. § 44-14-3(c), and it was liable to the debtor for statutory damages under that section. Franklin Credit Mgmt. Corp. v. Friedenberg, 275 Ga. App. 236, 620 S.E.2d 463, 2005 Ga. App. LEXIS 937 (2005).

Failure to create a perpetual and indefinite security interest. — Given the fixed maturity date in the deed, with a loan for a sum certain rather than a revolving line of credit, the deed lacked an affirmative statement of intent to create a perpetual and indefinite security interest in the property and, so, under O.C.G.A. § 44-14-80(a)(1), the seven-year reversionary period applied. Griggs v. Miller, 363 Ga. App. 82, 870 S.E.2d 578, 2022 Ga. App. LEXIS 126 (2022).

OPINIONS OF THE ATTORNEY GENERAL

Sufficiency of deed cancellation. — Under Ga. L. 1986, p. 754, amending O.C.G.A. §§ 44-14-3 and 44-14-67 dealing with deeds to secure debt and their cancellation, the release of corporate security interests in real property or security interests under the UCC, signed by an officer or delegated agent, as provided in O.C.G.A. § 14-5-7(b), will continue to constitute conclusive evidence of corporate authorization for the release, and when the clerk is presented with such a release apparently so signed, in the absence of overt signs of impropriety, it should be accepted for recording. 1986 Op. Att'y Gen. No. 86-17.

RESEARCH REFERENCES

Am. Jur. 2d.

55 Am. Jur. 2d, Mortgages, § 475 et seq. 69 Am. Jur. 2d, Secured Transactions, § 426 et seq.

C.J.S.

59 C.J.S., Mortgages, §§ 479, 483, 484.

ALR.

Requiring security as condition of canceling of record mortgage or lien, or of recording payment, 2 A.L.R.2d 1064.

Damages recoverable for real-estate mortgagee's refusal to discharge mortgage or give partial release therefrom, 8 A.L.R.4th 853.

44-14-4. Procedure for recording cancellation of mortgage.

Any mortgagor who has paid off his or her mortgage may present the paid mortgage to the clerk of the superior court of the county or counties in which the mortgage instrument is recorded, together with the order of the mortgagee or transferee directing that the mortgage be canceled. After payment of the fee authorized by law, the clerk shall index and record, in the same manner as the original mortgage instrument is recorded, the canceled and satisfied mortgage instrument or such portion thereof as bears the order of the mortgagee or transferee directing that the mortgage be canceled, together with any order of the mortgagee or transferee directing that the mortgage be canceled. The clerk shall show on the index of the cancellation and on the cancellation document the deed book and page number where the original mortgage instrument is recorded. The clerk shall manually or through electronic means record across the face of the mortgage instrument the words "satisfied" and "canceled" and the date of the entry and shall sign his or her name thereto officially. The clerk shall also manually or electronically make a notation on the record of the mortgage to indicate where the order of the cancellation is recorded.

History.

Ga. L. 1884-85, p. 129, §§ 1, 2; Civil Code 1895, §§ 2737, 2738; Civil Code 1910, §§ 3270, 3271; Code 1933, § 67-117; Ga. L. 1963, p. 276, § 1; Ga. L. 1989, p. 498, § 1; Ga. L. 2012, p. 173, § 1-36/HB 665.

Editor's notes.

Ga. L. 1962, p. 156, § 1, provides that any provision of Code Sections 44-14-1, 44-14-2, 44-14-4, 44-14-7 through 44-14-12, 44-14-100, and 44-14-160, and Arts. 2 and 3, Ch. 14, of this title which conflicts with T. 11 shall yield to and be superseded by T. 11. See Code Section 11-10-103.

JUDICIAL DECISIONS

Cancellation need not be under seal. — There is no requirement that a cancellation of a mortgage should be under seal. Sims v. Scheussler, 5 Ga. App. 850, 64 S.E. 99, 1909 Ga. App. LEXIS 152 (1909).

Priority of new security taken by mortgagee who surrenders original note and mortgage. — Where the mortgagee takes new security and enters upon the note and mortgage the word "satisfied," and surrenders them to the mortgagor, and the mortgage is duly canceled on the record, this amounts to an extinguishment of the mortgage, and the new security is inferior to an intervening mortgage on the same property, of which the first mortgagee had notice at the time the mortgagee canceled the mortgage and accepted the new security. Farkas v. Third Nat'l Bank, 133 Ga. 755, 66 S.E. 926, 1910 Ga. LEXIS 52 (1910).

Cancellation under mistake of fact, see Woodside v. Lippold, 113 Ga. 877, 39 S.E. 400, 1901 Ga. LEXIS 403 (1901).

Good faith purchase at sale under power without notice of satisfaction of debt. — While a power of sale in a mortgage is extinguished by the payment of the debt the mortgage was given to secure, if the mortgagor fails to have the satisfaction of the debt entered of record and a sale is thereafter had under the power, one who purchases in good faith and for value at such sale, without notice of the fact of the satisfaction of the debt, will be protected in title. Garrett v. Crawford, 128 Ga. 519, 57 S.E. 792, 1907 Ga. LEXIS 156 (1907).

Effect of forged entry of satisfaction. — Where the mortgagor fraudulently substitutes a copy for the original, and forges an entry of satisfaction thereon and has it cancelled of record, it does not affect the mortgagee, even as to a bona fide purchaser. Luther v. Clay, 100 Ga. 236, 28 S.E. 46, 1897 Ga. LEXIS 33 (1897).

Liability of clerk for recording forged cancellation order. — When a mortgagor presents to a clerk an original mortgage of record and an order to the clerk, purporting to have been signed by the mortgagee, to cancel such mortgage on the record, and the clerk has no knowledge of the invalidity of the order, nor any reason to suspect the same, the act of recording the order does not render the clerk and the sureties on the clerk's official bond liable to a person injured by such entry, notwithstanding the order was forged. Luther v. Banks, 111 Ga. 374, 36 S.E. 826, 1900 Ga. LEXIS 546 (1900).

Instrument containing no defeasance clause is a deed or bill of sale to secure debt. — A written instrument which by its terms passes title from the vendor to the vendee as security for a debt, and which contains no defeasance clause, is a deed or bill of sale to secure a debt, and is not a mortgage. The title conveyed thereunder does not automatically revert to the vendor upon the payment of the debt, but continues thereafter in the vendee, and is not divested until the performance of some act, as a reconveyance from the vendee to the vendor, or the cancellation and surrender of the instrument by the vendee as required by statute. Grady v. T.I. Harris, Inc., 41 Ga. App. 111, 151 S.E. 829, 1930 Ga. App. LEXIS 474 (1930).

OPINIONS OF THE ATTORNEY GENERAL

Recordation requirements. — When a paid mortgage or security deed is filed with an order of cancellation upon it, clerks of superior court may record the canceled instrument or only the part which bears the order; the part recorded should be sufficient to identify the transaction; clerks should index cancellations of security instruments with the name of the borrower (mortgagor) in the "grantee" index, make all notations required by statute in the indices and on the record-

ings, and charge a fee of $3.50, unless the cancellation is by new deed, in which case the fee for recording a deed should also be charged. 1989 Op. Att'y Gen. U89-19.

Cancellation of security deeds and writs of execution from record, see 1972 Op. Att'y Gen. No. U72-79.

RESEARCH REFERENCES

Am. Jur. 2d.

55 Am. Jur. 2d, Mortgages, § 430.

C.J.S.

59 C.J.S., Mortgages, § 479.

ALR.

Rights in mortgage security, of mortgagor or intermediate grantee who pays the mortgage debt after conveying the property, 2 A.L.R. 242.

Release of mortgagor (or intermediate grantee who has assumed the mortgage) by subsequent dealings between the mortgagor's grantee and mortgagee, 41 A.L.R. 277; 72 A.L.R. 389; 81 A.L.R. 1016; 112 A.L.R. 1324.

Doctrine by inverse order of alienation as affected by release or part of property covered by mortgage or other lien, 110 A.L.R. 65; 131 A.L.R.4th 108.

Reacquisition by mortgagor, or his grantee, of the title through foreclosure of first mortgage as affecting rights under second mortgage to which the property was subject before the foreclosure, 111 A.L.R. 1285.

Requiring security as condition of canceling of record mortgage or lien, or of recording payment, 2 A.L.R.2d 1064.

Construction and effect of real-estate mortgage clause providing for payment of a premium or additional sum if mortgagor prepays principal debt, 70 A.L.R.2d 1334.

Construction of provision in real-estate mortgage, land contract, or other security instrument for release of separate parcels of land as payments are made, 41 A.L.R.3d 7.

Damages recoverable for real-estate mortgagee's refusal to discharge mortgage or give partial release therefrom, 8 A.L.R.4th 853.

44-14-5. Practices prohibited in connection with certain residential real estate transactions.

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

(1) "Borrower" means a person who has secured an indebtedness with a security interest in real property or a person who has taken an interest in real property subject to an outstanding security interest in the real property and has notified the holder of the security interest that he has taken the real property and assumed the indebtedness secured by the real property.

(2) "Lender" means a person who has a security interest in real property, which interest is evidenced by a security deed, a mortgage, a trust deed, a bond for title, or other security document granting a security interest in real property to secure an indebtedness owed to the lender.

(3) "Person" means any individual, firm, partnership, corporation, joint venture, association, company, agency, syndicate, estate, trust, business trust, receiver, fiduciary, or other group or combination or any other entity whatsoever.

(b) Subject to the limitations and exceptions provided in this Code

section, any lender with a security interest in real estate shall not, directly or indirectly:

(1) Accelerate or mature the indebtedness secured by the real estate on account of the sale or transfer of the real estate or on account of the assumption of the indebtedness, except as provided in paragraph (5) of this subsection. This paragraph shall not apply if the person to whom the real estate would be sold or transferred does not intend to occupy the property as the person's principal residence, if such occupancy is a requirement imposed by federal regulatory authorities upon the lender;

(2) Increase the interest rate above the existing interest rate of the indebtedness unless:

(A) The borrower who is primarily liable for the repayment of the indebtedness shall make a request in writing to the lender at the time of the making of the application to the lender for approval of the transfer or, at any time prior to the granting or denying of approval of the transfer by the lender, a request that the borrower desires to be relieved of liability under the terms of the security instrument and the note secured thereby; and

(B) The lender furnishes written evidence to the borrower that the borrower has been relieved of liability under the terms of the security instrument and the note secured thereby. In the event the lender so relieves the borrower of liability after having been requested to do so by the borrower, the lender may increase the interest rate on the indebtedness; provided, however, that the lender shall not escalate the interest in excess of 1 percent per annum above the existing interest rate at the time of the transfer nor shall the lender be entitled to escalate the interest rate at any time other than at the transfer of title and then not more often than once in any 24 month period. Any subsequent transfer of the property after 24 months from the time of the last escalation of interest shall likewise be limited to a 1 percent per annum increase above the interest rate of the indebtedness existing at the time of the subsequent transfer;

(3) Charge, collect, or attempt to collect any transfer fee on account of the sale or transfer of such real estate or on account of the assumption of such indebtedness in excess of:

(A) One-half of 1 percent of the principal amount of the indebtedness outstanding on the date of the transfer or $150.00, whichever is greater, in the event the lender does not relieve the borrower of liability for the repayment of the indebtedness;

(B) One percent of the principal amount of the indebtedness outstanding on the date of the transfer, in the event the lender does

not escalate the interest rate but does relieve the borrower of liability for the repayment of the indebtedness; or

(C) One-half of 1 percent of the principal amount of the indebtedness outstanding on the date of such transfer or $250.00, whichever is greater, in the event the lender escalates the interest rate and relieves the borrower of liability for the repayment of the indebtedness.

Any borrower who has been relieved of liability for the repayment of the indebtedness may submit his affidavit of such fact to the clerk of the superior court in the county where the security instrument is recorded, which clerk shall enter a notation on the recorded security instrument to the effect that the borrower has been relieved of liability under the terms of the security instrument and the note secured thereby. Any such transfer fee shall not be considered interest and shall not be taken into account in the calculation of interest and shall not be considered a "rate of charge" as that term is defined in Code Section 7-4-30;

(4) Enforce or attempt to enforce the provisions of any mortgage, deed of trust, or other real estate security instrument executed on or after July 1, 1979, which provisions are contrary to this Code section;

(5) Withhold approval or disapproval of the sale or transfer of the real estate and the assumption of the indebtedness beyond 50 days after receipt by the lender of the completed written application for same on such form as may be required by the lender (a copy of which shall be furnished to the applicant) to determine the financial ability to retire the indebtedness of the applicant according to the lender's terms; otherwise, the sale or transfer and the assumption shall be approved; provided, however, that the parties by mutual agreement may extend the aforesaid period of time for a period not to exceed 30 days. The lender shall have the right, if permitted under the security instrument, to accelerate the indebtedness if the borrower transfers the property to a person if:

(A) The lender has reasonably determined, based upon the standards provided in this Code section, that such person is financially incapable of retiring the indebtedness according to the terms of the security instrument; or

(B) The lender is entitled under this Code section and the security instrument to increase the interest rate on the indebtedness, and the person to whom the real estate is transferred declines to agree to such increase.

Such acceleration shall be permitted only within a 60 day period after the lender acquires actual knowledge of the sale or transfer to such person; and

(6) Disapprove the sale or transfer of the real estate and the assumption of the indebtedness for any reason other than the credit worthiness of the person to whom the real estate would be sold or transferred, which disapproval is based upon standards normally used by persons in the business of making loans on real estate in the same or similar circumstances; otherwise, any due-on-sale clause or similar provision in the security instrument shall be deemed to be against public policy and shall be void.

(c) The maximum increase allowed in paragraph (2) of subsection (b) of this Code section and the maximum fee allowed in paragraph (3) of subsection (b) of this Code section shall not be deemed to be required, minimum, or ordinary; but the interest increase and fee may, in any case, be less than the amount allowed.

(d) This Code section shall be applicable only to a security interest in real property utilized as residential dwelling units other than apartments, motels, hotels, and nursing homes and only if the original amount of the loan is less than $100,000.00.

(e) This Code section shall not be applicable in those cases in which the secretary of housing and urban development, or his successor, matures the indebtedness on multiple-family housing projects pursuant to the current law and regulations of the Federal Housing Administration.

(f) This Code section shall not be applicable to a person with a security interest in real estate, which person is not regularly engaged in the business of making real estate loans.

(g) In the event that the party assuming the indebtedness declines to agree to an increase in the interest rate as provided in paragraph (2) of subsection (b) of this Code section, the indebtedness may be prepaid without penalty or increased interest at any time within 60 days after the assumption; but if the party does not make the prepayment within the 60 day period, the party shall be liable for the increased interest rate from the date of the assumption; and any prepayment penalty provided for in the security instrument shall thereafter be in effect. Any law to the contrary notwithstanding, such increased interest and the outstanding indebtedness shall be secured by the security instrument securing the indebtedness with the same priority as if the increased interest rate were originally set forth in the note evidencing the indebtedness.

(h) Nothing contained in this Code section shall be construed so as to permit a lender to increase the interest rate beyond applicable usury laws.

(i) Nothing in this Code section shall be construed to limit the right of the Federal Land Bank to increase or decrease the interest rate of

any loan so long as the increase or decrease is pursuant to the terms of the variable interest rate provision of the security instrument or the note secured thereby and the increase or decrease is not the result of the transfer of the property serving the loan.

(j) This Code section shall not be applicable to loans made by the Farmers Home Administration, which loans provide for interest subsidies or variable interest rates based on the income of the borrower, or to loans made by the Georgia Housing and Finance Authority, the Urban Residential Finance Authority of the City of Atlanta, or other similar state or local authorities.

(k) This Code section shall not be applicable to loans on or secured by real property utilized as residential dwelling units as that term is used in subsection (d) of this Code section, which loans are made by an employer to an employee as an employment benefit.

(l) In addition to the fee authorized by paragraph (3) of subsection (b) of this Code section, a lender may charge and collect a fee to recover the actual costs incurred by the lender in obtaining a credit report on the person to whom the real estate would be sold or transferred in instances where the borrower has requested to be relieved from liability for the indebtedness as well as in instances where the borrower has not made such request, but no investigation by the lender to determine credit worthiness shall authorize the lender to withhold approval or disapproval of the sale or transfer of the real estate beyond the time limitation specified in paragraph (5) of subsection (b) of this Code section.

(m) Nothing in this Code section shall be construed to limit the right of a lender to increase or decrease the interest rate on the indebtedness so long as such increase or decrease is effected pursuant to the terms contained in the security instrument or the note secured thereby or by mutual agreement between borrower and lender, provided that such increase or decrease is not the result of the sale or transfer of the property securing such indebtedness or the assumption of the indebtedness, unless such increase upon a sale or transfer of such property or assumption of the indebtedness is otherwise permitted by this Code section.

History.

Ga. L. 1979, p. 345, §§ 1, 2; Ga. L. 1980, p. 585, § 1; Ga. L. 1981, p. 480, §§ 1-9; Ga. L. 1991, p. 1653, §§ 2-3.

Editor's notes.

Ga. L. 1981, p. 480, § 10, not codified by the General Assembly, provided as follows: "This Act shall become effective upon its approval by the Governor or upon its becoming law without his approval; and the provisions of the Act shall apply to any transfer or sale of real estate and the assumption of indebtedness in connection therewith which is accomplished on or after the effective date of this Act; but the Act and this amendatory Act shall not affect or impair the rights, duties, or interests arising out of or flowing from in-

struments executed prior to the effective date of this amended Act." This Act became effective March 24, 1981.

Law reviews.

For article surveying 1979 legislative developments in commercial law, see 31 Mercer L. Rev. 13 (1979).

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

For article surveying developments in Georgia real property law from mid-1980 through mid-1981, see 33 Mercer L. Rev. 219 (1981).

JUDICIAL DECISIONS

State law preempted by federal law. — Georgia laws restricting the enforcement of "due-on-sale" provisions have been preempted by the Garn-St. Germain Depository Institutions Act of 1982 (P.L. 97-320, 96 Stat. 1469) which expressly permits a lender to "enforce a contract containing a due-on-sale clause with respect to a real property loan." Aetna Cas. & Sur. Co. v. Valdosta Fed. Sav. & Loan Ass'n, 175 Ga. App. 614, 333 S.E.2d 849, 1985 Ga. App. LEXIS 2129 (1985).

O.C.G.A. § 44-14-5 does not conflict with Georgia's long-standing policy of adjusting usury laws and other regulatory policies to promote a stable and active residential mortgage lending industry. The scheme under O.C.G.A. § 44-14-5 that attempts to restrict loan modifications made in connection with due-on-sale clauses and thereby blocks a traditional method of adjusting mortgage pool rates; however, it does not necessarily limit a lender's ability to adjust market-pool spreads because it was: totally prospective in operation; coupled with a floating usury rate; and accompanied by changes in the traditional long term, fixed rate lending practices. Lindenberg v. First Fed. Sav. & Loan Ass'n, 528 F. Supp. 440, 1981 U.S. Dist. LEXIS 16202 (N.D. Ga. 1981), aff'd, 691 F.2d 974, 1982 U.S. App. LEXIS 24143 (11th Cir. 1982).

In the plan of the General Assembly, O.C.G.A. § 44-14-5(b)(1) through (3), (5), and (6) provide the substantive provisions of the Act and O.C.G.A. § 44-14-5(b)(4) provides for its operation. Lindenberg v. First Fed. Sav. & Loan Ass'n, 90 F.R.D. 255, 1981 U.S. Dist. LEXIS 14340 (N.D. Ga. 1981).

O.C.G.A. § 44-14-5(b)(4) is the provision that makes that section's prohibitions operative; by itself, it has no meaning. Rather, it takes on meaning in the context of O.C.G.A. § 44-14-5(b)(1) through (3), (5), and (6) ; these are the paragraphs that determine what provisions and practices are contrary to that section and cannot be enforced pursuant to O.C.G.A. § 44-14-5(b)(4). Lindenberg v. First Fed. Sav. & Loan Ass'n, 90 F.R.D. 255, 1981 U.S. Dist. LEXIS 14340 (N.D. Ga. 1981).

Where three parties are involved, release of the original borrower and acceptance of a purchaser-grantee is valid consideration for a new contract at new interest rates, even before expiration of the original loan term. Lindenberg v. First Fed. Sav. & Loan Ass'n, 528 F. Supp. 440, 1981 U.S. Dist. LEXIS 16202 (N.D. Ga. 1981), aff'd, 691 F.2d 974, 1982 U.S. App. LEXIS 24143 (11th Cir. 1982).

Contracts entered into under one usury statute remain enforceable on their original terms even if the statute changes, whereas any contract entered into after changing the law is to be governed by the new law even if the new contract concerns a preexisting debt, such that even if an original loan contract was void for usury, a new promise to pay the loan after an increase in the usury limits was binding under the new limits. Therefore, the plaintiffs' promise to pay the remaining portion of their grantors' debt must be judged at the time of their promise. Lindenberg v. First Fed. Sav. & Loan Ass'n, 528 F. Supp. 440, 1981 U.S. Dist. LEXIS 16202 (N.D. Ga. 1981), aff'd, 691 F.2d 974, 1982 U.S. App. LEXIS 24143 (11th Cir. 1982).

OPINIONS OF THE ATTORNEY GENERAL

O.C.G.A. § 44-14-5 is binding on federally chartered savings and loan associations. 1979 Op. Att'y Gen. No. U79-17.

Effect on instruments executed prior to effective date of section. — While O.C.G.A. § 44-14-5 applies to transactions involving instruments executed prior to its effective date, the exact effect of that section on these transactions must be resolved after the instruments and the transactions are studied on a case by case basis. 1979 Op. Att'y Gen. No. U79-17.

RESEARCH REFERENCES

ALR.

Validity and enforceability of due-on-sale real-estate mortgage provisions, 61 A.L.R.4th 1070.

Validity and construction of provision of mortgage or other real-estate financing contract prohibiting prepayment for a fixed period of time, 81 A.L.R.4th 423.

44-14-6. Wrongful sale or removal of mortgaged property; penalty.

After having made a mortgage deed to personal property or a bill of sale to secure debt, any person who sells or otherwise disposes of the property or causes the property to be moved outside of the state before the payment of the mortgage debt or the debt secured by the bill of sale without the consent of and with intent to defraud the mortgagee shall be guilty of a misdemeanor if loss is thereby sustained by the holder of the mortgage or bill of sale.

History.

Ga. L. 1871-72, p. 71, §§ 1, 2; Code 1873, § 4600; Ga. L. 1875, p. 26, § 1; Code 1882, § 4600; Ga. L. 1887, p. 37, § 1; Penal Code 1895, § 671; Ga. L. 1910, p. 59, § 1; Penal Code 1910, § 720; Ga. L. 1921, p. 123, § 1; Code 1933, § 67-9901; Ga. L. 1982, p. 3, § 44.

JUDICIAL DECISIONS

"Or otherwise disposes of". — The words "or otherwise disposes of," must be construed to mean a disposition of the property in the nature of a sale and not in any other manner. Stenson v. State, 43 Ga. App. 582, 159 S.E. 777, 1931 Ga. App. LEXIS 473 (1931).

What constitutes loss generally. — The loss mentioned in O.C.G.A. § 44-14-6 does not necessarily refer to a loss of the debt, or any part of it, nor will the solvency of the mortgaged property, of itself, prevent such a sale or disposition from being a violation of that section. Coleman v. Allen, 79 Ga. 637, 5 S.E. 204, 1888 Ga. LEXIS 25 (1888).

Loss is shown by statement of value of property sold to accused. — Where the prosecutor testifies about loss of a certain sum, the value of the property sold by the accused, this is a statement of fact and shows loss as contemplated by O.C.G.A. § 44-14-6. Farmer v. State, 18 Ga. App. 307, 89 S.E. 382, 1916 Ga. App. LEXIS 316 (1916).

Loss is not shown by general statement of prosecutor about lost valuable time, and employment of a lawyer to foreclose mortgage. Denney v. State, 2 Ga. App. 146, 58 S.E. 318, 1907 Ga. App. LEXIS 298 (1907).

Section inapplicable where debtor has express permission to sell property. — Where, by the terms of a bill of sale to secure debt it is provided that any property sold must be replaced in kind or

the revenue from the sale thereof placed in position for payment on the note which the instrument secures, the fact that the defendant sold stock to another dealer, but failed to apply the proceeds from such sale toward the payment of the bill of sale to secure debt and such failure to apply the proceeds resulted in a loss to the holder of the bill of sale to secure debt, will not authorize the defendant's conviction under O.C.G.A. § 44-14-6 for the reason that the holder of the bill of sale to secure debt has expressly agreed and consented in the bill of sale itself that the defendant might sell the property on condition and while the evidence shows a failure to comply with the condition of the contract, such failure will not render criminal a sale of the property made under such permission. Carter v. State, 90 Ga. App. 417, 83 S.E.2d 246, 1954 Ga. App. LEXIS 726 (1954).

Implied permission. — In a prosecution for the fraudulent sale of personal property on which there is a mortgage or bill of sale to secure a debt under O.C.G.A. § 44-14-6, where the evidence discloses that the holder of the bill of sale impliedly consented to the sale of the property by the defendant to the party to whom defendant did actually sell it, a conviction is not warranted. In such case, two elements of the offense are lacking: absence of consent, and an intent on the part of the defendant to defraud the holder of the bill of sale to secure a debt. Wallace v. State, 55 Ga. App. 872, 192 S.E. 81, 1937 Ga. App. LEXIS 535 (1937).

Where defendant had nothing to do with a sale of the property by the sheriff a conviction of the offense set forth in O.C.G.A. § 44-14-6 is unauthorized. Tatom v. State, 27 Ga. App. 779, 109 S.E. 917, 1921 Ga. App. LEXIS 420 (1921).

One aiding in sale of the property is a principal. Wyatt v. State, 16 Ga. App. 817, 81 S.E. 802, 1914 Ga. App. LEXIS 477 (1914).

Disposal of property by killing and eating it, see Linder v. State, 17 Ga. App. 520, 87 S.E. 703, 1916 Ga. App. LEXIS 747 (1916), overruled, Stenson v. State, 43 Ga. App. 582, 159 S.E. 777, 1931 Ga. App. LEXIS 473 (1931); Stenson v. State, 43 Ga. App. 582, 159 S.E. 777, 1931 Ga. App. LEXIS 473 (1931).

What constitutes probable cause under O.C.G.A. § 44-14-6. — The mere act of a mortgagor in disposing of the mortgaged property, without the consent of the mortgagee and without applying the proceeds to the mortgage, constitutes probable cause for instituting a criminal prosecution against the mortgagor. Sirmans v. Peterson, 42 Ga. App. 707, 157 S.E. 341, 1931 Ga. App. LEXIS 114 (1931).

Sufficiency of description of property mortgaged and disposed of, and demurrer thereto, see Brown v. State, 60 Ga. App. 646, 4 S.E.2d 676, 1939 Ga. App. LEXIS 127 (1939).

Sufficiency of affidavit and warrant charging offense. — Where an affidavit upon which a criminal warrant is founded states that the accused did commit the offense of a misdemeanor by disposing of property upon which another held mortgage, and the warrant states that the accused did commit the offense of misdemeanor, the affidavit and warrant are sufficient to charge a crime. Cain v. Kendrick, 199 Ga. 147, 33 S.E.2d 417, 1945 Ga. LEXIS 272 (1945).

Elements of proof. — To sustain a conviction under O.C.G.A. § 44-14-6, the evidence must show that the defendant sold or otherwise disposed of property after having made a mortgage deed thereto, or bill of sale to secure a debt, and that the sale was without the consent of the mortgagee or person holding the bill of sale to secure a debt, that it was with the intent to defraud the mortgagee or person holding the bill of sale to secure a debt, and that the mortgagee or holder of the bill of sale to secure a debt suffered loss thereby. Wallace v. State, 55 Ga. App. 872, 192 S.E. 81, 1937 Ga. App. LEXIS 535 (1937); Carter v. State, 90 Ga. App. 417, 83 S.E.2d 246, 1954 Ga. App. LEXIS 726 (1954).

Essential elements of offense, see Barclay v. State, 55 Ga. 179, 1875 Ga. LEXIS 369 (1875); Wright v. State, 9 Ga. App. 442, 71 S.E. 500, 1911 Ga. App. LEXIS 597 (1911); Farmer v. State, 18 Ga. App. 307, 89 S.E. 382, 1916 Ga. App. LEXIS 316 (1916).

Evidence must show the property sold was the mortgaged property. Gibson v. State, 16 Ga. App. 265, 85 S.E. 199, 1915 Ga. App. LEXIS 579 (1915).

Evidence of other transactions which tend to establish the existence

of fraudulent intent which is the gist of the offense for which the accused is being tried is admissible in illustration of the accused's intent and motives in the transaction under investigation. Wyatt v. State, 16 Ga. App. 817, 81 S.E. 802, 1914 Ga. App. LEXIS 477 (1914).

RESEARCH REFERENCES

Am. Jur. 2d.
37 Am. Jur. 2d, Fraudulent Conveyances, § 83.
C.J.S.
37 C.J.S., Fraudulent Conveyances, § 50.
ALR.
Duty and liability of trustee under mortgage, deed of trust, or other trust instrument, to holders of bonds or other obligations secured thereby, 90 A.L.R.2d 501.

44-14-7. Selling or disposing of motor vehicle securing bill of sale with intent to defraud; penalty.

After having given a bill of sale to secure debt or other security instrument to any motor vehicle, it shall be unlawful for any person to sell or otherwise dispose of the motor vehicle or to cause the motor vehicle to be moved outside of the state before the payment of the debt secured by the security instrument if the sale, disposition, or removal is without the consent of and with the intent to defraud the holder of the security instrument and if loss is thereby sustained by the holder of the security instrument. Any person who is convicted of violating this Code section shall be imprisoned for not less than one year nor more than three years.

History.
Code 1933, § 67-9901.1, enacted by Ga. L. 1976, p. 637, § 1.
Cross references.
Security interests in and liens on motor vehicles generally, § 40-3-50 et seq.
Editor's notes.
Ga. L. 1962, p. 156, § 1, provides that any provision of Code Sections 44-14-1, 44-14-2, 44-14-4, 44-14-7 through 44-14-12, 44-14-100, and 44-14-160, and Arts. 2 and 3, Ch. 14, of this title which conflicts with T. 11 shall yield to and be superseded by T. 11. See Code Section 11-10-103.

RESEARCH REFERENCES

Am. Jur. 2d.
37 Am. Jur. 2d, Fraudulent Conveyances, § 83.
C.J.S.
37 C.J.S., Fraudulent Conveyances, § 50.

44-14-8. Removal or other disposal of encumbered property in order to hinder levy; penalty; venue.

Any mortgagor, any giver of a purchase money lien, a lien for rent, or any lien created by contract between the parties, or the holder or possessor of any property under such mortgage or liens who runs off, removes, hides, or in any way disposes of the property under the mortgage or lien so as to hinder, delay, or prevent the levying officer of

the county of the defendant's bona fide residence from levying on the property covered by the mortgage or lien by virtue of the foreclosure of the mortgage or lien shall be guilty of a misdemeanor. The venue shall be in the county of the defendant's bona fide residence where the search is made.

History.

Ga. L. 1918, p. 262, § 1; Code 1933, § 67-9902.

Editor's notes.

Ga. L. 1962, p. 156, § 1, provides that any provision of Code Sections 44-14-1, 44-14-2, 44-14-4, 44-14-7 through 44-14-12, 44-14-100, and 44-14-160, and Arts. 2 and 3, Ch. 14, of this title which conflicts with T. 11 shall yield to and be superseded by T. 11. See Code Section 11-10-103.

JUDICIAL DECISIONS

Criminal statutes must be construed strictly. Waldroup v. State, 198 Ga. 144, 30 S.E.2d 896, 1944 Ga. LEXIS 350 (1944).

What constitutes property covered by lien. — Where one holds personal property under a conditional contract of purchase and sale, and where, by the terms of the purchase, the title to the property is retained by the vendor until the purchase price is paid, the property, under such facts, is covered by a "lien" within the meaning of the word as employed in O.C.G.A. § 44-14-8. Waldroup v. State, 198 Ga. 144, 30 S.E.2d 896, 1944 Ga. LEXIS 350 (1944).

Variance between date alleged and proved. — Though a day and year must be alleged in every indictment, time is not material, and a day different from the one laid may generally be proved, provided it is within the period prescribed by the statute of limitations. Nelson v. State, 51 Ga. App. 207, 180 S.E. 16, 1935 Ga. App. LEXIS 632 (1935).

Verdict under O.C.G.A. § 44-14-8 is not contrary to law and without evidence to support it merely because the crime was alleged to have been committed upon the date of the execution of the retention of title contract, while the proof showed that the offense was committed at a subsequent date prior to the filing of the accusation and within the period of the statute of limitations. Nelson v. State, 51 Ga. App. 207, 180 S.E. 16, 1935 Ga. App. LEXIS 632 (1935).

Fraud may be proved by wide range of circumstances. — Where fraud is alleged, a wide range is given in proof of circumstances tending to establish it, it being generally a matter of secrecy, and it is often only by collecting together numerous circumstances that it can be brought to light and exposed. Nelson v. State, 51 Ga. App. 207, 180 S.E. 16, 1935 Ga. App. LEXIS 632 (1935).

RESEARCH REFERENCES

ALR.

Right of chattel mortgagee in respect of proceeds of sale of mortgaged property by mortgagor, 36 A.L.R. 1379.

Validity, construction, and application of criminal provisions of statute relating expressly to conditional or installment sales of personal property, 129 A.L.R. 1077.

Mortgagor's interference with property subject to order of foreclosure and sale as contempt of court, 54 A.L.R.3d 1242.

44-14-9. Aiding and abetting removal or other disposal; venue; conviction not dependent upon principal's conviction.

Any person who intentionally aids or abets in any violation of Code

Section 44-14-8 shall be guilty of a misdemeanor as principal in the county where he aided and abetted in the offense, and his trial and conviction shall not be dependent on the trial and conviction of any other person connected therewith.

History.
Ga. L. 1918, p. 262, § 2; Code 1933, § 67-9903.
Editor's notes.
Ga. L. 1962, p. 156, § 1, provides that any provision of Code Sections 44-14-1, 44-14-2, 44-14-4, 44-14-7 through 44-14-12, 44-14-100, and 44-14-160, and Arts. 2 and 3, Ch. 14, of this title which conflicts with T. 11 shall yield to and be superseded by T. 11. See Code Section 11-10-103.

RESEARCH REFERENCES

Am. Jur. 2d.
21 Am. Jur. 2d, Criminal Law, § 117.
C.J.S.
22 C.J.S., Criminal Law, § 132.
ALR.
Validity, construction, and application of criminal provisions of statute relating expressly to conditional or installment sales of personal property, 129 A.L.R. 1077.

44-14-10. Search for property where defendant has no permanent abode; venue of prosecution.

When any person who violates Code Section 44-14-8, 44-14-9, or 44-14-11 has no permanent place of abode in this state, search may be made in any county into which or through which the property has been carried. Upon the failure to find the property upon which to levy, prosecution may be had against such person in any such county; and such person shall be guilty of a misdemeanor.

History.
Ga. L. 1918, p. 262, § 3; Code 1933, § 67-9904.
Editor's notes.
Ga. L. 1962, p. 156, § 1, provides that any provision of Code Sections 44-14-1, 44-14-2, 44-14-4, 44-14-7 through 44-14-12, 44-14-100, and 44-14-160, and Arts. 2 and 3, Ch. 14, of this title which conflicts with T. 11 shall yield to and be superseded by T. 11. See Code Section 11-10-103.

RESEARCH REFERENCES

Am. Jur. 2d.
21 Am. Jur. 2d, Criminal Law, § 542.
C.J.S.
92A C.J.S., Venue, § 91.
ALR.
Validity, construction, and application of criminal provisions of statute relating expressly to conditional or installment sales of personal property, 129 A.L.R. 1077.

44-14-11. Entry of nulla bona; shifting of burden of proof.

When a search has been made in any of the cases provided by Code Sections 44-14-8 through 44-14-10 by the levying officer for the purpose of levying the execution and the property described therein is not found

at the defendant's home, if the defendant fails or refuses to direct the levying officer to the property, the officer shall enter a nulla bona; and the testimony of the officer or the entry of a nulla bona when properly proven shall shift the burden of proof to defendant.

History.
Ga. L. 1918, p. 262, § 4; Code 1933, § 67-9905.
Editor's notes.
Ga. L. 1962, p. 156, § 1, provides that any provision of Code Sections 44-14-1, 44-14-2, 44-14-4, 44-14-7 through 44-14-12, 44-14-100, and 44-14-160, and Arts. 2 and 3, Ch. 14, of this title which conflicts with T. 11 shall yield to and be superseded by T. 11. See Code Section 11-10-103.

JUDICIAL DECISIONS

If defendant is completely unavailable, defendant cannot refuse or fail to direct levying officers. — Where a defendant cannot have refused or failed to have directed the levying officers to the property, since defendant was completely unavailable, the court errs in giving the substance of O.C.G.A. § 44-14-11 in its charge. Smith v. State, 124 Ga. App. 581, 184 S.E.2d 681, 1971 Ga. App. LEXIS 1032 (1971).

RESEARCH REFERENCES

ALR.
Validity, construction, and application of criminal provisions of statute relating expressly to conditional or installment sales of personal property, 129 A.L.R. 1077.

44-14-12. Deceiving as to existence of lien; making second deed of conveyance; penalty.

Any person who defrauds another in the sale or disposition of any property, either real or personal, by falsely representing that the property is not subject to any lien while knowing that the property is subject to a lien or any person who fraudulently makes a second deed of conveyance to any land or real estate shall be guilty of a misdemeanor.

History.
Laws 1755, Cobb's 1851 Digest, p. 160; Ga. L. 1859, p. 59, § 1; Code 1863, § 4467; Ga. L. 1865-66, p. 235, § 1; Code 1868, § 4511; Code 1873, § 4599; Code 1882, § 4599; Penal Code 1895, § 669; Penal Code 1910, § 714; Code 1933, § 67-9909.
Editor's notes.
Ga. L. 1962, p. 156, § 1, provides that any provision of Code Sections 44-14-1, 44-14-2, 44-14-4, 44-14-7 through 44-14-12, 44-14-100, and 44-14-160, and Arts. 2 and 3, Ch. 14, of this title which conflicts with T. 11 shall yield to and be superseded by T. 11. See Code Section 11-10-103.

JUDICIAL DECISIONS

Consent of the holder of the prior lien will not prevent a violation of O.C.G.A. § 44-14-12. Mathis v. State, 14 Ga. App. 241, 80 S.E. 695, 1914 Ga. App. LEXIS 192 (1914).

Proof of false representation and damage to prosecutor authorizes guilty verdict. — Where the state introduces evidence from which the jury is authorized to find that the defendant knowingly sold the prosecutor property upon which there was a prior recorded chattel mortgage, falsely representing to the prosecutor that there were no prior liens on the property, and the prosecutor was forced to pay the chattel mortgage off in order to regain possession of the property, a verdict finding the defendant guilty as charged is authorized by the evidence. Beaty v. State, 89 Ga. App. 478, 79 S.E.2d 831, 1954 Ga. App. LEXIS 487 (1954).

Damage is assumed upon proof of lien. French v. State, 4 Ga. App. 462, 61 S.E. 836, 1908 Ga. App. LEXIS 444 (1908).

Where prior lien not proved, conviction unauthorized. Connor v. State, 8 Ga. App. 688, 70 S.E. 45, 1911 Ga. App. LEXIS 103 (1911).

Indictment under O.C.G.A. § 44-14-12 as evidence of merger of mortgage into warranty deed. Pitts Banking Co. v. Fenn, 160 Ga. 854, 129 S.E. 105, 1925 Ga. LEXIS 281 (1925).

No fraud shown on part of developer. — In an action brought by the purchasers of a lot seeking to cancel the developer's security deed based upon alleged fraud, the trial court properly granted summary judgment to the developer as, even if the developer knew of the sale of the lot to the purchasers, such sale did not estop the developer from the developer's claim against the lot pursuant to the developer's security deed; however, the trial court did err by denying the equitable subrogation claim asserted by the purchasers' lender since exercising subrogation did not prejudice the developer in any manner. Byers v. McGuire Props., 285 Ga. 530, 679 S.E.2d 1, 2009 Ga. LEXIS 243 (2009), overruled, SRM Group, Inc. v. Travelers Prop. Cas. Co. of Am., 308 Ga. 404, 841 S.E.2d 729, 2020 Ga. LEXIS 235 (2020).

Court is not required to instruct as to what is a valid lien. Portwood v. State, 18 Ga. App. 502, 89 S.E. 591, 1916 Ga. App. LEXIS 1058 (1916).

RESEARCH REFERENCES

Am. Jur. 2d.

37 Am. Jur. 2d, Fraud and Deceit, §§ 52, 53, 222.

C.J.S.

77 C.J.S., Sales, § 43. 91 C.J.S., Vendor and Purchaser, § 63.

44-14-13. Disbursement of settlement proceeds; delivery of loan funds to settlement agent by lender; damages.

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

(1) "Borrower" means the maker of the promissory note evidencing the loan to be delivered at the loan closing.

(2) "Collected funds" means funds deposited, finally settled, and credited to the settlement agent's escrow account.

(3) "Disbursement of settlement proceeds" means the payment of all proceeds of the transaction by the settlement agent to the persons entitled thereto.

(4) "Lender" means any person or entity regularly engaged in

making loans secured by mortgages or deeds to secure debt on real estate.

(5) "Loan closing" means the time agreed upon by the borrower and the lender when the execution and delivery of loan documents by the borrower occurs.

(6) "Loan documents" means the note evidencing the debt due to the lender, the deed to secure debt or mortgage securing the debt due to the lender, and any other documents required by the lender to be executed by the borrower as part of the transaction.

(7) "Loan funds" means the gross or net proceeds of the loan to be disbursed by or on behalf of the lender at the loan closing.

(8) "Party" or "parties" means the seller, purchaser, borrower, lender, and settlement agent, as applicable to the subject transaction.

(9) "Settlement" means the time when the settlement agent has received the duly executed deed to secure debt and other loan documents and funds required to carry out the terms of the contracts between the parties.

(10) "Settlement agent" means the lender or an active member of the State Bar of Georgia responsible for conducting the settlement and disbursement of the settlement proceeds.

(b) This Code section shall apply only to transactions involving purchase money loans made by a lender, or refinance loans made by the current or a new lender, which loans will be secured by deeds to secure debt or mortgages on real estate within the State of Georgia containing not more than four residential dwelling units, whether or not such deeds to secure debt or mortgages have a first-priority status.

(c) Except as otherwise provided in this Code section, a settlement agent shall not cause a disbursement of settlement proceeds unless such settlement proceeds are collected funds. A settlement agent may disburse settlement proceeds from its escrow account after receipt of any of the following negotiable instruments even though the same are not collected funds:

(1) A cashier's check, as defined in subsection (g) of Code Section 11-3-104, from a federally insured bank, savings bank, savings and loan association, or credit union and issued by a lender for a closing or loan transaction, provided that such funds are immediately available and cannot be dishonored or refused when negotiated or presented for payment;

(2) A check drawn on the escrow account of an attorney licensed to practice law in the State of Georgia or on the escrow account of a real estate broker licensed under Chapter 40 of Title 43, if the settlement

agent has reasonable and prudent grounds to believe that the check will constitute collected funds in the settlement agent's escrow account within a reasonable period;

(3) A check issued by the United States of America or any agency thereof or the State of Georgia or any agency or political subdivision, as such term is defined in Code Section 50-15-1, of the State of Georgia; or

(4) A check or checks in an aggregate amount not exceeding $5,000.00 per loan closing.

For purposes of this Code section, the instruments described in paragraphs (1) through (4) of this subsection are negotiable instruments if they are negotiable in accordance with the provisions of Code Section 11-3-104.

(d) The lender shall at or before the loan closing deliver loan funds to the settlement agent in the form of collected funds or in the form of a negotiable instrument described in subsection (c) of this Code section; provided, however, that in the case of refinancing, or any other loan where a right of rescission applies, the lender shall, prior to the disbursement of the settlement proceeds and no later than 11:00 A.M. eastern standard time or eastern daylight time, whichever is applicable, of the next business day following the expiration of the rescission period required under the federal Truth in Lending Act (15 U.S.C. Section 1601, et seq.), deliver loan funds to the settlement agent in one or more of the forms set forth in this Code section.

(e) Any party violating this Code section shall be liable to any other party suffering a loss due to such violation for such other party's actual damages plus reasonable attorneys' fees. In addition, any party violating this Code section shall pay to the party suffering the loss an amount of money equal to $1,000.00 or double the amount of interest payable on the loan for the first 60 days after the loan closing, whichever is greater.

(f) Any individual, corporation, partnership, or other entity conducting the settlement and disbursement of loan funds, when he, she, or it is not the settlement agent, shall be guilty of a misdemeanor.

(g) Nothing contained in this Code section shall prevent a real estate broker or real estate salesperson from exercising the rights and providing the duties and services specified by Chapter 40 of Title 43.

History.

Code 1981, § 44-14-13, enacted by Ga. L. 1990, p. 1653, § 1; Ga. L. 2008, p. 796, § 1/SB 355; Ga. L. 2012, p. 1099, § 15/SB 365.

Editor's notes.

Ga. L. 1990, p. 1653, § 3, not codified by the General Assembly, provides that this Act shall not be construed to repeal or modify any provisions of law relative to the utterance or delivery of a worthless check and the provisions of this Act shall be cumulative of such other provisions.

Ga. L. 2008, p. 796, § 2/SB 355, not

codified by the General Assembly, provides, in part, that the amendment to this Code section shall apply to all loans closed on or after July 1, 2008.

Law reviews.

For survey article on real property law, see 60 Mercer L. Rev. 345 (2008).

For annual survey on real property, see 64 Mercer L. Rev. 255 (2012).

For annual survey on real property, see 66 Mercer L. Rev. 151 (2014).

JUDICIAL DECISIONS

Real estate closings. — If a lawyer receives funds at a real estate closing on behalf of a client or in any other fiduciary capacity the lawyer must deposit the funds into, and administer the funds from, a trust account in accordance with Ga. St. Bar R. 4-102(d):1.15(II). Georgia law also allows the lender to disburse funds, O.C.G.A. § 44-14-13(a)(10), but a lawyer may not deliver closing proceeds to a title company or a third party settlement company for disbursement instead of disbursing the funds from an attorney escrow account. In re Formal Advisory Opinion No. 13-1, 295 Ga. 749, 763 S.E.2d 875, 2014 Ga. LEXIS 734 (2014).

44-14-14. Vacant and foreclosed real property registries; definitions; fees and penalties for registration.

(a) For purposes of this Code section, the term:

(1) "Agent" means an individual with a place of business in this state at which he or she is authorized to accept inquiries, notices, and service of process on behalf of a vacant or foreclosed real property owner.

(2) "Department" means the Department of Community Affairs.

(3) "Foreclosed real property" means improved or unimproved real property held pursuant to a judicial or nonjudicial foreclosure of a mortgage, deed of trust, security deed, deed to secure debt, or other security instrument securing a debt or obligation owed to a creditor or a deed in lieu of foreclosure in full or partial satisfaction of a debt or obligation owed to a creditor.

(4) "Street address" means the street or route address. Such term shall not mean or include a post office box.

(5) "Vacant real property" means real property that:

(A) Is intended for habitation, has not been lawfully inhabited for at least 60 days, and has no evidence of utility usage within the past 60 days; or

(B) Is partially constructed or incomplete, without a valid building permit.

Such term shall not include a building or structure containing multiple units with common ownership that has at least one unit occupied with evidence of utility usage.

(b) Effective July 1, 2012:

(1) A county or municipal corporation may establish by ordinance or resolution for the requirement of registration of vacant or foreclosed real property as provided in this Code section;

(2) Notwithstanding county or municipal ordinances or resolutions that require registration for repeated ordinance violations that remain uncorrected for at least 90 days, no county or municipal corporation shall require registration of vacant property or real property that is unoccupied, uninhabited, abandoned, foreclosed, or advertised for foreclosure on any basis other than as set forth in this Code section or as may be otherwise authorized by general law; and

(3) No county or municipal corporation shall require for purposes of a vacant or foreclosed real property registry established pursuant to this Code section any information or documentation other than as set forth in this Code section.

Any requirements of a vacant or foreclosed real property registry established by a county or municipal ordinance or resolution in effect as of July 1, 2012, that are in conflict with the requirements of this Code section shall be hereby preempted.

(c) Each registrant shall be required to file with a specifically identified office or officer a registration form, in paper or electronic format, as required by the county or municipal corporation, requiring submission of only the following information:

(1) The real property owner's name, street address, mailing address, phone number, facsimile number, and e-mail address;

(2) The agent's name, street address, mailing address, phone number, facsimile number, and e-mail address;

(3) The real property's street address and tax parcel number;

(4) The transfer date of the instrument conveying the real property to the owner; and

(5) At such time as it becomes available, recording information, including deed book and page numbers, of the instrument conveying the real property to the owner.

(d) The department may promulgate a standard vacant or foreclosed real property registry form that requires only the information set forth in subsection (c) of this Code section, in paper and electronic format. If such form is promulgated by the department, all counties and municipal corporations with a vacant or foreclosed real property registry shall use such form.

(e)(1) When any real property is acquired by foreclosure under power

of sale pursuant to Code Section 44-14-160 or acquired pursuant to a deed in lieu of foreclosure and:

(A) The deed under power of sale or deed in lieu of foreclosure contains the information specified in paragraphs (1) through (5) of subsection (c) of this Code section;

(B) The deed is filed with the clerk of superior court within 60 days of the foreclosure sale or transfer of the deed in lieu of foreclosure; and

(C) Proof of the following is provided to the office or officer in charge of the county or municipal foreclosed real property registry:

(i) A filing date stamp or a receipt showing payment of the applicable filing fees; and

(ii) The entire deed under power of sale or entire deed in lieu of foreclosure,

a county or municipal corporation shall not require the transferee to register such foreclosed real property pursuant to this Code section or the payment of any administrative fees pursuant to subsection (h) of this Code section.

(2) No county or municipal corporation may require registration of vacant or foreclosed real property pursuant to this Code section within 90 days of such real property's transfer:

(A) Pursuant to a deed under power of sale or deed in lieu of foreclosure; or

(B) To the first subsequent transferee after the vacant real property has been acquired by foreclosure under power of sale pursuant to Code Section 44-14-160 or acquired pursuant to a deed in lieu of foreclosure.

(f) An ordinance or resolution establishing a registry pursuant to this Code section may require a vacant or foreclosed real property owner to update the information specified in paragraphs (1) through (5) of subsection (c) of this Code section within 30 days after any change in such required information regardless of whether the information provided to the registry was in the deed under power of sale or deed in lieu of foreclosure.

(g) A vacant or foreclosed real property owner, or the agent of such owner, may apply to remove such vacant or foreclosed real property from the registry at such time as the real property no longer constitutes vacant or foreclosed real property. The county or municipal corporation shall grant or deny such application within 30 days, and if no such determination is made within 30 days, the application shall be deemed granted.

(h) An ordinance or resolution establishing a vacant or foreclosed real property registry may require the payment of administrative fees for registration which shall reasonably approximate the cost to the county or municipal corporation of the establishment, maintenance, operation, and administration of the registry. Such fees shall not exceed $100.00 per registration.

(i) An ordinance or resolution establishing a vacant or foreclosed real property registry may require penalties for failure to register or failure to update the information specified in paragraphs (1) through (5) of subsection (c) of this Code section, provided that such penalties shall not exceed $1,000.00.

(j) A county or municipal ordinance or resolution requiring the registration of vacant or foreclosed real property shall provide for administrative procedures. The administrative procedures shall include the right to appeal to the municipal or recorder's court in the city where the vacant or foreclosed real property is located or to the magistrate or recorder's court of the county in which the vacant or foreclosed real property is located, subject to applicable jurisdictional requirements. Any vacant or foreclosed real property owner affected by a county or municipal ordinance or resolution requiring vacant or foreclosed real property registration may challenge any determination made pursuant to such ordinance or resolution.

(k) An ordinance or resolution adopted by the governing authority of a county to establish a registry pursuant to this Code section may, subject to and in accordance with the requirements of this Code section, require registration of vacant or foreclosed real property within the entire territory of the county, except territory located within the boundaries of any municipal corporation, unless otherwise allowed by intergovernmental agreement between the county and municipal corporation.

(l) Nothing in this Code section shall be construed to prohibit a county or municipal ordinance or resolution requiring the registration of vacant or foreclosed real property from providing for exemptions from such registration.

(m) Nothing in this Code section shall be construed to impair, limit, or preempt in any way the power of a county or municipal corporation to enforce any applicable codes, as defined in Code Section 42-2-8, or to define or declare nuisances and to cause their removal or abatement by summary proceedings or otherwise.

(n) Notwithstanding Code Section 36-74-30, an ordinance or resolution establishing a vacant or foreclosed real property registry may require the registration of residential rental property if such property is vacant or foreclosed real property.

History.
Code 1981, § 44-14-14, enacted by Ga. L. 2012, p. 656, § 1/HB 110; Ga. L. 2013, p. 634, § 2/HB 160.

Law reviews.
For annual survey on real property, see 65 Mercer L. Rev. 233 (2013).

44-14-15. Fee for a future conveyance; limited circumstances.

(a) As used in this Code section, the term "conveyance of real property" means a conveyance or other transfer of an interest or estate in real property.

(b) A restriction or covenant running with the land applicable to the conveyance of real property that requires a transferee or transferor of real property, or the transferee's or transferor's heirs, successors, or assigns, to pay a declarant, other person imposing the restriction or covenant on the property, or a third party designated by such declarant or other person, or a successor, assignee, or designee of such declarant, third party, or other person, a fee in connection with a future transfer of the property shall be prohibited. A restriction or covenant running with the land that violates this Code section or a lien purporting to encumber the land to secure a right under a restriction or covenant running with the land that violates this Code section shall be void and unenforceable.

(c) This Code section shall not apply to a restriction or covenant that requires a fee associated with the conveyance of real property to be paid to:

(1) An association formed for the purposes of exercising the powers of the association of any condominium created pursuant to Article 3 of Chapter 3 of this title, the "Georgia Condominium Act";

(2) A property owners' association formed for the purposes of exercising the powers of the property owners' association pursuant to Article 6 of Chapter 3 of this title, the "Georgia Property Owners' Association Act";

(3) A property owners' association formed for the purposes of exercising the powers of an association of property owners that has not been formed pursuant to or which has not adopted the provisions of Article 6 of Chapter 3 of this title, the "Georgia Property Owners' Association Act," provided that such association shall comply with subsection (d) of Code Section 44-3-232;

(4) A person or entity under the general supervision of the Public Service Commission as provided for in subsection (a) of Code Section 46-2-20, provided that such fee is charged for expenses incurred in the administration of ongoing services or rights provided to the property interest conveyed;

(5) A community land trust or community development corpora-

tion that is tax-exempt under Section 501(c)(3) or 501(c)(4) of the federal Internal Revenue Code, provided that such fee is charged for and applied to expenses incurred in the administration of ongoing community program services or rights provided to shared equity property interests within, as applicable, the land subject to the community land trust or the geographic area served by the community development corporation; or

(6) A party to a purchase contract, option, real property listing agreement, or other agreement which obligates one party to the agreement to pay the other, as full or partial consideration for the agreement or for a waiver of rights under the agreement, an amount determined by the agreement if such amount constitutes a fee or commission paid to a licensed real estate broker for brokerage services rendered in connection with the transfer of the property for which such fee or commission is paid.

History.

Code 1981, § 44-14-15, enacted by Ga. L. 2013, p. 634, § 3/HB 160.

Editor's notes.

Ga. L. 2013, p. 634, § 4/HB 160, not codified by the General Assembly, provides, in part, that this Code section shall apply to covenants recorded on or after July 1, 2013.

Law reviews.

For annual survey on real property, see 65 Mercer L. Rev. 233 (2013).

ARTICLE 2

MORTGAGES

Editor's notes.

Ga. L. 1962, p. 156, § 1, provides that any provision of Code Sections 44-14-1, 44-14-2, 44-14-4, 44-14-7 through 44-14-12, 44-14-100, and 44-14-160, and Arts. 2 and 3, Ch. 14, of this title which conflicts with T. 11 shall yield to and be superseded by T. 11. See Code Section 11-10-103.

JUDICIAL DECISIONS

Provisions of O.C.G.A. Art. 2, Ch. 14, T. 44, where conflicting, must yield to those of O.C.G.A. T. 11. Mack Trucks, Inc. v. Ryder Truck Rental, Inc., 110 Ga. App. 68, 137 S.E.2d 718, 1964 Ga. App. LEXIS 547 (1964).

Where land is conveyed by vendor to purchaser who simultaneously conveys it to another as security for a loan of money for the purpose of discharging the purchase price of the land, and the money is so used by the concurrence of all parties concerned, and the conveyances are parts of a single transaction, the title passes through the borrower without being affected, as against the lender, by the lien of a judgment against the borrower which would have attached to the property if title had remained in the borrower. Cherokee Fertilizer Co. v. Federal Land Bank, 179 Ga. 712, 177 S.E. 570, 1934 Ga. LEXIS 383 (1934).

Buyer unable to obtain mortgage. — In a potential home purchaser's action to recover earnest money, the seller was entitled to a directed verdict under O.C.G.A. § 9-11-50(a) on the basis that the contract was unenforceable because the contract did not list the loan amount or the interest rate on the loan; however, because the contract was unenforceable, the purchaser was not estopped from recovering the earnest money when the purchaser was unable to qualify for the mort-

gage. Parks v. Thompson Builders, Inc., 296 Ga. App. 704, 675 S.E.2d 583, 2009 Ga. App. LEXIS 315 (2009).

Failure to properly attest security deed failed to provide notice of security interest. — Security deed in favor of a bank was not attested by an unofficial witness as required by Georgia law and was patently defective and, thus, the deed did not provide constructive or actual notice of any security interest. As an unattested security deed was equivalent to an unrecorded deed under Georgia law, a Chapter 7 trustee, in the trustee's position as a hypothetical bona fide purchaser of real estate, had the power to avoid the transfer of the improperly attested deed, and the avoided lien was preserved for the benefit of the estate. Flatau v. Ga. Bank & Trust Co. of Augusta (In re Davis), No. 14-30349-JPS, No. 14-3033, 2014 Bankr. LEXIS 4588 (Bankr. M.D. Ga. Oct. 29, 2014).

RESEARCH REFERENCES

ALR.

Actions for Damages for Wrongful Foreclosure—Limitations Periods, 65 A.L.R.7th 6.

Prorating provisions as applying to mortgagee, 1 A.L.R. 498; 72 A.L.R. 278.

Effect of designating grantee in deed or mortgage by firm name, 1 A.L.R. 564; 8 A.L.R. 493.

Release of vendee as endorser of note as waiver of vendor's lien, 1 A.L.R. 1638.

Validity, construction, and effect of provision in real estate mortgage as to rents and profits, 4 A.L.R. 1405; 55 A.L.R. 1020; 87 A.L.R. 625; 91 A.L.R. 1217.

Power of court to authorize discontinuance of public service corporation upon foreclosing a mortgage on its plant, 8 A.L.R. 238.

Right to receive rent as between mortgagor and mortgagee of leased premises, 14 A.L.R. 640; 105 A.L.R. 744.

Contracts requiring vendor or mortgagee to look to property alone for payment, 17 A.L.R. 714.

Insurance: effect of provision declaring loss, in case of mortgagee's interest, subject to all the terms and conditions of the policy, 19 A.L.R. 1449; 56 A.L.R. 850.

Bankruptcy: mortgage executed within four months' period pursuant to executory agreement antedating that period, as a voidable preference, 22 A.L.R. 1378.

Purchase-money mortgagee as beneficiary of rule that after-acquired title inures to the benefit of mortgagee, 26 A.L.R. 173.

Ignorance of, or mistake as to, terms of existing mortgage upon the property as ground for relief from a contract for the purchase of real property, 26 A.L.R. 528.

Remedy of mortgagee or other holder of lien on real property against third person for damage to or trespass on property, 37 A.L.R. 1120.

Rights in receivership proceeding as between mortgagee and creditor furnishing supplies required or used for operation, maintenance, and upkeep, of railroad or street railway, where there has been diversion of current earnings to benefit of mortgagee, 40 A.L.R. 8.

Remedies in respect of mortgage on real property in another state or the debt secured thereby, 42 A.L.R. 470.

Rights and liabilities of junior chattel mortgagee with respect to mortgaged property, 43 A.L.R. 388.

Remedy of mortgagee in forged or unauthorized mortgage where proceeds are used to discharge valid lien, 43 A.L.R. 1393; 151 A.L.R. 407.

Acceleration clause as affected by cross indebtedness or obligation, 51 A.L.R. 1256; 151 A.L.R. 896.

Validity and construction of statute allowing penalty and damages against mortgagee refusing to discharge mortgage on real property, 56 A.L.R. 335.

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

Mortgagee's loss of right as against grantee assuming mortgage, as affecting right of mortgagor, not released, as against grantee, 73 A.L.R. 1177.

Rule that instruments are to be construed together as applicable to question of negotiability of note or bond secured by mortgage, 75 A.L.R. 1210.

Rights in respect of rents and profits as between mortgagee and trustee in bankruptcy of mortgagor, 75 A.L.R. 1526.

Effect of infant's disaffirmance of purchase-money mortgage or judgment, 77 A.L.R. 987.

Requisites and sufficiency of change of possession under an unrecorded chattel mortgage, 79 A.L.R. 1018.

Right and remedy of mortgagee who for the protection of his security pays taxes on, or redeems from tax sale of, mortgaged property, 84 A.L.R. 1366; 123 A.L.R. 1248.

Trust receipts, 87 A.L.R. 302; 101 A.L.R. 454; 168 A.L.R. 359.

Settlement or compromise by one of the parties to a chattel mortgage with a third person on account of conversion of or damage to property as affecting other party, 92 A.L.R. 205.

Right to demand assignment of mortgage on paying or tendering amount due thereon, 93 A.L.R. 89.

Transaction between chattel mortgagee and purchaser of mortgaged chattels as affecting liability of mortgagor, 93 A.L.R. 1203.

Deed or mortgage of real estate as affecting right to oil and gas or royalty interest under existing lease, 94 A.L.R. 660; 140 A.L.R. 1280.

Transaction or agreement between mortgagee and purchaser of property who did not assume mortgage as imposing personal obligation on latter for mortgage debt, 94 A.L.R. 1329.

Financial depression as justification of moratorium or other relief to mortgagor (including decisions under statutes in that regard), 94 A.L.R. 1352; 96 A.L.R. 853; 97 A.L.R. 1123; 104 A.L.R. 375.

Right of mortgagee to benefit of insurance taken out by, or in name of, receiver, trustee, or assignee for creditors of owner of equity of redemption, 94 A.L.R. 1387.

Union of title to mortgage and fee in the same person as affecting right to personal judgment for mortgage debt, 95 A.L.R. 89.

Implied power of trustee under mortgage or deed of trust who purchases property in behalf of bondholders at foreclosure sale, to give new mortgage, 95 A.L.R. 527.

Deed from mortgagor to mortgagee as merger of real estate mortgage as regards intervening liens, 95 A.L.R. 628; 148 A.L.R. 816.

Power of court or guardian as to mortgaging infant's real property, 95 A.L.R. 839.

Exploitation of oil or gas resources of land by mortgagor, or purchaser or lessee subsequently to mortgage, as waste as against mortgagee, 95 A.L.R. 957.

Right of subordinate lienor (mortgagee) as regards rents collected by receiver or assignee as further security for prior mortgage, 95 A.L.R. 1037.

Rights of senior mortgagee in respect of rents and profits collected by receiver appointed at instance of junior mortgagee, 95 A.L.R. 1051.

Trustee in mortgage securing bonds as agent of obligor or holder of bonds as regards deposit or payment in respect of principal or interest, 96 A.L.R. 1233.

Liability of grantee assuming mortgage debt, to grantor, 97 A.L.R. 1076.

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 A.L.R. 216.

Discharge of mortgage and taking back of new mortgage as affecting lien intervening between old and new mortgages, 98 A.L.R. 843.

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 A.L.R. 981.

Power of court to sell property in mortgage enforcement suit, or propriety of sale, as affected by opposition of mortgagee or trustee on whom mortgage or deed of trust confers discretion, 103 A.L.R. 1440.

Rescission as essential to cancellation of instrument or lien voidable for fraud or failure of consideration, 109 A.L.R. 1032.

Release of mortgagor (or intermediate grantee who has assumed the mortgage) by subsequent dealings between his grantee and mortgagee, 112 A.L.R. 1324.

Lien of real estate mortgage, or right of subrogation thereto, as extinguished by sale of mortgaged property on attachment or execution on mortgage debt or debt on account of which right of subrogation is claimed, 122 A.L.R. 485.

Right to deficiency or personal judgment under mortgage notwithstanding bar of limitation against action on personal debt, 124 A.L.R. 640.

Duty of mortgagee, or one holding title as security, to protect the interests of third persons in respect to insurance, 130 A.L.R. 598.

Statutes affecting mortgagee's rights and remedies in respect of deficiency as unconstitutional impairment of obligation of contract, 133 A.L.R. 1473.

Validity, construction, application, and effect, in case of failure to maintain insurance, of acceleration provision in mortgage or deed of trust, 142 A.L.R. 1120.

Variance from statute of wording of affidavit required by it to accompany chattel mortgage, 143 A.L.R. 1254.

Omission of amount of debt in mortgage or in record thereof (including general description without stating amount) as affecting validity of mortgage, its operation as notice, or its coverage with respect to debts secured, 145 A.L.R. 369.

Right of purchaser or junior encumbrancer who discharges prior lien to be subrogated to additional security held by senior lienor, 145 A.L.R. 738.

Limit of amount specified in mortgage for future advances as affected by repayment of part of the advances, 152 A.L.R. 1182.

Rule which protects mortgagor against effect of his release of equity of redemption to mortgagee as applicable to release by purchaser, to vendor, or rights under executory contract for purchase of land, 156 A.L.R. 1138.

Delivery of deed or mortgage by one or more but not all of the grantors or mortgagors, 162 A.L.R. 892.

Rights as between specific devisee and residuary devisees in respect of blanket mortgage or other lien on the real estate covered by those devises, 168 A.L.R. 701.

Right of mortgagee in possession to compensation or credit for supervision or other services, 170 A.L.R. 181.

Right of holder of mortgage or lien to proceeds of property insurance payable to owner not bound to carry insurance for former's benefit, 9 A.L.R.2d 299.

Conflict of laws as to chattel mortgages and conditional sales of chattels, 13 A.L.R.2d 1312.

Sufficiency of chattel mortgagee's affidavit as to statement of consideration, 45 A.L.R.2d 629.

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 A.L.R.2d 1116.

Power of mortgagor to dedicate land or interest therein, 63 A.L.R.2d 1160.

Real-estate mortgage executed by one of joint tenants as enforceable after his death, 67 A.L.R.2d 999.

Validity of chattel mortgage on stock of goods which mortgagor has right to sell, where mortgagee takes possession of goods before third person's rights attach, 71 A.L.R.2d 1416.

Liability of mortgagee or lienholder of a lease with respect to rents or covenants therein, 73 A.L.R.2d 1118.

Acceptance of past-due interest as waiver of acceleration clause in note or mortgage, 97 A.L.R.2d 997.

Right of mortgage broker to commission where principal violated conditions of agreement, 45 A.L.R.3d 1326.

Right of junior mortgagee whose mortgage covers only a part of land subject to first mortgage to redeem pro tanto, where he was not bound by foreclosure sale, 46 A.L.R.3d 1362.

Validity, construction, and application of provision entitling mortgagee to increase interest rate on transfer of mortgaged property, 92 A.L.R.3d 822.

Right of mortgagee, who acquires title to mortgaged premises in satisfaction of mortgage, to recover, under fire insurance policy covering him as "mortgagee," for loss or injury to property thereafter damaged or destroyed by fire, 19 A.L.R.4th 778.

Vendor and purchaser: recovery for increased mortgage interest costs where vendor fails or refuses to convey, 28 A.L.R.4th 1078.

Mortgagee-lender's duty, in disbursing funds, to protect mortgagor against outstanding or potential mechanics' liens against the mortgaged property, 30 A.L.R.4th 134.

Mortgage foreclosure forbearance statutes — modern status, 83 A.L.R.4th 243.

Discharge of mortgage and taking back of new mortgage as affecting lien intervening between old and new mortgages, 43 A.L.R.5th 519.

Federal and State Copyright in Pre-1972 Sound Recordings, 38 A.L.R. Fed. 3d Art. 4.

Application of Clayton Act or Sherman Act to Merger or Acquisition of Television, Radio, News, or Internet Media Company, 38 A.L.R. Fed. 3d Art. 7.

Controlling Effect of United States Department of Housing and Urban Development (HUD) Regulations upon Mortgages, 38 A.L.R. Fed. 3d Art. 9.

44-14-30. Mortgage as security only; effect on title.

A mortgage in this state is only security for a debt and passes no title.

History.

Orig. Code 1863, § 1956; Code 1868, § 1944; Code 1873, § 1954; Code 1882, § 1954; Civil Code 1895, § 2723; Ga. L. 1899, p. 32, § 1; Civil Code 1910, § 3256; Code 1933, § 67-101.

Law reviews.

For article comparing rights of grantees holding deeds to secure debts against a bankrupt debtor to those rights of the mortgagee, and lienor, see 10 Ga. B.J. 5 (1947).

JUDICIAL DECISIONS

A mortgage or an assignment for security purposes creates a lien only and does not pass title. Walter E. Heller & Co. v. Aetna Bus. Credit, Inc., 158 Ga. App. 249, 280 S.E.2d 144, 1981 Ga. App. LEXIS 2151 (1981).

Rule at common law. — At common law the legal estate vested in the mortgage and was forfeited by default. The title passed to the mortgagee by the deed. Ward v. Lord, 100 Ga. 407, 28 S.E. 446, 1897 Ga. LEXIS 74 (1897).

Mortgage used both to refer to creating of lien and passing of title. — Under law of this state, the word "mortgage" is used in a double sense. Sometimes it refers to a conveyance which creates a lien, and at others to one which passes title as security for a debt. Denton Bros. v. Shields, 120 Ga. 1076, 48 S.E. 423, 1904 Ga. LEXIS 802 (1904).

Instrument intended as security passes no title. — An instrument containing a defeasance clause, describing the debt, and showing on its face that it is intended as security, is a mortgage, and passes no title under O.C.G.A. § 44-14-30. Lane v. Smart, 21 Ga. App. 292, 94 S.E. 325, 1917 Ga. App. LEXIS 564 (1917).

Trust deeds to be considered as mortgages. — In equity, however it might be at law, it makes no substantial difference that mortgages are trust deeds in form and convey absolutely. They ought, in this forum and on a question of priority to be considered as mortgages pure and simple. So considered, they pass no title but are only securities for debts, under O.C.G.A. § 44-14-30. Green v. Coast Line R.R., 97 Ga. 15, 24 S.E. 814, 1895 Ga. LEXIS 293 (1895).

Deeds and bills of sale to secure debt treated as equitable mortgages. — The objects of a mortgage and security deed and a bill of sale to personalty are identical — security for debt. While recognizing the technical difference between a mortgage and security deed, deeds to secure debts, and bills of sale to secure debts are treated as equitable mortgages. Merchants' & Mechanics' Bank v. Beard, 162 Ga. 446, 134 S.E. 107, 1926 Ga. LEXIS 215 (1926).

Mortgages and conditional sales distinguished. — If the relation of debtor and creditor remains, and a debt still subsists, it is a mortgage; but if the debt be extinguished by the agreement of the parties, or the money advanced was not by way of loan, and the grantor has the privilege of refunding, if the grantor pleases, by a given time, and thereby entitled grantor to a reconveyance, it is a

conditional sale. Galt v. Jackson, 9 Ga. 151, 1850 Ga. LEXIS 130 (1850).

Mortgages and deeds to secure debt distinguished. — A deed to secure a debt is not the same as a mortgage. Such a deed conveys title, while a mortgage is only a lien. Cole v. Cates, 110 Ga. App. 820, 140 S.E.2d 36, 1964 Ga. App. LEXIS 768 (1964).

A statutory mortgage in this state does not convey title, but only creates a lien on property. A statutory security deed conveys title to property as security, and is expressly declared to be not a mortgage. The latter has been declared to be in effect an equitable mortgage, but vastly different rights arise from the effect of the two classes of security. Merchants' & Mechanics' Bank v. Beard, 162 Ga. 446, 134 S.E. 107, 1926 Ga. LEXIS 215 (1926); Carmichael v. Citizens & S. Bank, 162 Ga. 735, 134 S.E. 771, 1926 Ga. LEXIS 272 (1926).

Instruments held to be mortgages despite provisions. — A conveyance of real property, which recites that it is given for the purpose of indemnifying the grantee against loss resulting from an outstanding "mortgage" upon other property which the same grantor had conveyed to the same grantee, which contains no habendum clause, and which provides that when the mortgage referred to is paid, "then this deed shall be null and void," and which further provides that when this mortgage is paid "this deed shall become null and void and canceled on the record and surrendered to" the grantor, is not a security deed passing title to the grantee, but is a mortgage only. Camp v. Teal, 44 Ga. App. 829, 163 S.E. 233, 1932 Ga. App. LEXIS 543 (1932).

Instruments held to be security deeds despite provisions. — An instrument otherwise in the form of a security deed is not a mortgage merely because it recites that it was given to secure an endorser upon a described note. The relationship of the parties does not make it a mortgage, nor is such recital a defeasance clause whereby the instrument should be treated as a mortgage and not as a security deed. Richey v. First Nat'l Bank, 180 Ga. 751, 180 S.E. 740, 1935 Ga. LEXIS 550 (1935).

Title reservation note for the price of property sold cannot by agreement be treated as a mortgage under O.C.G.A. § 44-14-30. Wynn & Robinson v. Tyner, 139 Ga. 765, 78 S.E. 185, 1913 Ga. LEXIS 596 (1913).

Deposit of deeds as collateral security for a debt does not create such a lien on the land as can be foreclosed at law. English v. McElroy, 62 Ga. 413, 1879 Ga. LEXIS 546 (1879).

Mortgage as basis of claim to property or proceeds. — A mortgage does not pass title under O.C.G.A. § 44-14-30 and therefore cannot be made the basis of a claim to the mortgaged property; nor can the holder of an unforeclosed mortgage claim the proceeds of such property without showing equitable reasons entitling the holder to do so. Ennis v. Harralson Bros. & Co., 101 Ga. 282, 28 S.E. 839, 1897 Ga. LEXIS 212 (1897).

Parties cannot by agreement make the instrument one both retaining title and not retaining title. Wynn & Robinson v. Tyner, 139 Ga. 765, 78 S.E. 185, 1913 Ga. LEXIS 596 (1913).

Effect of conveyance to creditor of mortgaged property. — Where a creditor, whose debt is secured by mortgage, takes a conveyance of the property mortgaged in satisfaction of such debt, such conveyance is not effectual to vest in the creditor a title which would prevail upon the trial of a claim afterwards filed by such creditor to prevent the sale of such property under an execution issued from a judgment, junior to the mortgage, but older than the deed. MacIntyre & Co. v. Ferst's Sons & Co., 101 Ga. 682, 28 S.E. 989, 1897 Ga. LEXIS 298 (1897).

Effect of mortgage where title in third person when executed. — Where, according to the express recitals contained in a mortgage, the property described in the mortgage was not in the possession of the mortgagor at the time the instrument was executed, and the title thereto was vested in another person, the mortgage did not take effect then or thereafter as a valid, subsisting lien upon the property it purported to cover. Hogg v. Fuller, 17 Ga. App. 442, 87 S.E. 760, 1916 Ga. App. LEXIS 1001 (1916).

Power of mortgagor to sell property named in mortgage. — A contract by a mortgagee, made on receiving the

mortgage, that the mortgagee will hold the securities, and that the mortgagor may sell the property named in said deeds and make titles thereto, the proceeds of the sale to go to the credit of the mortgagee, gives to the mortgagor power to sell for cash, free from the mortgage, but not to exchange for other lands. It does not cast upon the purchaser for cash the duty of seeing that the mortgagor appropriates the proceeds according to the agreement. Woodward v. Jewell, 140 U.S. 247, 11 S. Ct. 784, 35 L. Ed. 478, 1891 U.S. LEXIS 2460 (1891).

Mortgagee cannot, by purchase of mortgaged property, divest an intervening title of which notice is had. MacIntyre & Co. v. Ferst's Sons & Co., 101 Ga. 682, 28 S.E. 989, 1897 Ga. LEXIS 298 (1897); Booze v. Neal, 6 Ga. App. 279, 64 S.E. 1104, 1909 Ga. App. LEXIS 260 (1909); Hudson v. Gunn, 20 Ga. App. 95, 92 S.E. 546, 1917 Ga. App. LEXIS 733 (1917).

Acquisition of rights adverse to mortgagor by one holding title under mortgagor. — One holding title under mortgagor cannot acquire interest in the property adverse to rights of the mortgagee of which that person had previous notice. Hudson v. Gunn, 20 Ga. App. 95, 92 S.E. 546, 1917 Ga. App. LEXIS 733 (1917).

Power of sale given by mortgage is revoked by mortgagors' death before the note fell due. Wilkins v. McGehee, 86 Ga. 764, 13 S.E. 84, 1891 Ga. LEXIS 60 (1891).

Power of sale in a security deed, being coupled with an interest, is not revoked by grantor's death. Roland v. Coleman & Co., 76 Ga. 652, 1886 Ga. LEXIS 79 (1886).

Reversion to grantor upon payment of indebtedness. — Where the title, if any, conveyed by the terms of a deed amounting to a mortgage would terminate, by the terms of the deed, upon the deed's becoming null and void on payment of the mortgage indebtedness referred to therein, the title then, by the terms of the deed, would revert to the grantor, notwithstanding that a clause in the deed, that upon the payment of the mortgage debt "this deed shall become null and void and canceled on the record and surrendered to" the grantor, may not amount to a defeasance. Camp v. Teal, 44 Ga. App. 829, 163 S.E. 233, 1932 Ga. App. LEXIS 543 (1932).

Possession under mortgage as defense to ejectment. — A mortgage in this state is only a lien, and conveys no title. Possession by virtue of it, therefore, furnishes no defense against an action of ejectment by the holder of the title. Phillips v. Bond, 132 Ga. 413, 64 S.E. 456, 1909 Ga. LEXIS 124 (1909).

RESEARCH REFERENCES

Am. Jur. 2d.

55 Am. Jur. 2d, Mortgages, § 1.

C.J.S.

59 C.J.S., Mortgages, § 1.

ALR.

Provision in land contract against removal of buildings as affecting rights of third person under chattel mortgage or conditional sale, 30 A.L.R. 542.

Mortgagor's statutory right to redeem or his right to possession after foreclosure as subject of levy and seizure by creditors, 42 A.L.R. 884; 57 A.L.R. 1128.

Rights in abstract of title held by mortgagee, 44 A.L.R. 1332.

Right to receive rent as between mortgagor and mortgagee of leased premises, 105 A.L.R. 744.

Lien as estate or interest in land within venue statute, 2 A.L.R.2d 1261.

Assumption of mortgage as consideration for conveyance attacked as in fraud of creditors, 6 A.L.R.2d 270.

Recovery by chattel mortgagee or mortgagor, or person standing in his shoes, against third person for damage or destruction of property, 67 A.L.R.2d 1599.

Validity and construction of provision of mortgage or other real-estate financing contract prohibiting prepayment for a fixed period of time, 81 A.L.R.4th 423.

44-14-31. Form and contents of mortgage.

No particular form is necessary to constitute a mortgage. However, a mortgage must clearly indicate the creation of a lien and must specify the debt for which it is given and the property upon which it is to take effect.

History.

Orig. Code 1863, § 1957; Code 1868, § 1945; Code 1873, § 1955; Ga. L. 1876, p. 34, § 1; Code 1882, § 1955; Civil Code 1895, § 2724; Civil Code 1910, § 3257; Code 1933, § 67-102.

Law reviews.

For note discussing how an open end or dragnet clause within a deed to secure debt ensnares subsequent purchasers of real property in light of Commercial Bank v. Readd, 240 Ga. 519, 242 S.E.2d 25 (1978), see 30 Mercer L. Rev. 363 (1978).

JUDICIAL DECISIONS

Analysis

General Consideration
Particular Instruments
Description of Property

General Consideration

Construction of section. — O.C.G.A. § 44-14-31 is to have a reasonable construction, and is to be construed to facilitate and not to hamper and restrict mortgage liens. It requires that the debt or duty of the mortgagor shall be specified; it does not say that such duty shall be specific and precise. It may be indefinite, as to indemnify a surety for whatever the surety may pay in a certain event, or to hold one harmless for whatever may happen under certain circumstances. The paper must point out what the parties intend. Allen v. J.W. Lathrop & Co., 46 Ga. 133, 1872 Ga. LEXIS 22 (1872).

Section requires no more than common law. — O.C.G.A. § 44-14-31 is nothing more than what the common law required, and amounts only to saying that the form of the undertaking is immaterial. If the material elements of a mortgage are there — sufficient certainty as to what the parties intend — the paper is good as a mortgage though there be no words of conveyance or any other of the usual forms of a mortgage. Allen v. J.W. Lathrop & Co., 47 Ga. 133, 1872 Ga. LEXIS 313 (1872).

No particular form is necessary to constitute a mortgage as long as the instrument clearly indicates the creation of a lien, and specifies the debt for which it is given, and the property upon which it is to take effect. Ray v. Atkins, 205 Ga. App. 85, 421 S.E.2d 317, 1992 Ga. App. LEXIS 1076 (1992), cert. denied, No. S92C1393, 1992 Ga. LEXIS 924 (Ga. Nov. 5, 1992).

Section dispenses with formalities in the execution of mortgages. — Matters of forms are no longer, under O.C.G.A. § 44-14-31 considered of any consequence in determining whether or not a given instrument amounts to a mortgage. Mason v. Parker, 101 Ga. 659, 28 S.E. 985, 1897 Ga. LEXIS 292 (1897); Hopkins v. West Publishing Co., 106 Ga. App. 596, 127 S.E.2d 849, 1962 Ga. App. LEXIS 782 (1962).

Intention of parties. — There is no general rule for determining whether a particular transaction is a mortgage or a conditional sale and every case must be decided on its own circumstances. The legal aspect of the contract in this respect depends upon the intention of the parties, to be ascertained by a consideration of the entire instrument and the surrounding circumstances, and not upon the form of the instrument or the name which the parties may have given to it. Valdosta Plywoods, Inc. v. Belote, 75 Ga. App. 616,

General Consideration (Cont'd)

44 S.E.2d 128, 1947 Ga. App. LEXIS 594 (1947).

Intent to mortgage. — Any language to show an intent to mortgage (creation of a lien) is sufficient. Daniel v. State, 63 Ga. App. 12, 10 S.E.2d 80, 1940 Ga. App. LEXIS 2 (1940).

Mortgage must be in writing. — A mortgage must necessarily be in writing and be duly executed by the party to be bound thereby. Printup v. Barrett, 46 Ga. 407, 1872 Ga. LEXIS 79 (1872); Duke v. Culpepper, 72 Ga. 842, 1884 Ga. LEXIS 330 (1884); Pierce v. Parrish, 111 Ga. 725, 37 S.E. 79, 1900 Ga. LEXIS 702 (1900).

Language necessary. — There must be proper words used in order to create a lien; it is not necessary to use "grant," "bargain," or other technical words. Any language showing an intent to convey or mortgage is sufficient. Horton v. Murden, 117 Ga. 72, 43 S.E. 786, 1903 Ga. LEXIS 154 (1903).

Paper must point out what parties intend. — If this is done, the mortgage is sufficient. Moultrie Banking Co. v. Mobley, 170 Ga. 402, 152 S.E. 903, 1930 Ga. LEXIS 466 (1930).

A seal is not necessary to the validity of a mortgage, even upon real estate, under O.C.G.A. § 44-14-31, and a mortgage is valid, as between the parties thereto, without any attesting witness and without being recorded. Hawes v. Glover, 126 Ga. 305, 55 S.E. 62, 1906 Ga. LEXIS 376 (1906).

Ambiguity may be determined from the nature of the property conveyed. Valdosta Plywoods, Inc. v. Belote, 75 Ga. App. 616, 44 S.E.2d 128, 1947 Ga. App. LEXIS 594 (1947).

Mortgage takes effect upon execution. — A paper containing all the requisites of a mortgage of personal property, is a mortgage from the date of its execution, under O.C.G.A. § 44-14-31, even though it be not attested by an officer. Nichols v. Hampton, 46 Ga. 253, 1872 Ga. LEXIS 46 (1872).

Questions of law and fact. — It is only when the terms descriptive of property intended to be conveyed by a written instrument are manifestly too meager, imperfect, or uncertain to serve as adequate means of identification that the court can, as a matter of law, adjudge the description to be insufficient. "Whether such terms will serve to identify the premises is a question of fact, and not of law." Balchin v. Jones, 10 Ga. App. 434, 73 S.E. 613, 1912 Ga. App. LEXIS 550 (1912).

The question of the sufficiency of description of property in a mortgage is one of law, for the court; that of the identity of the property mortgaged is one of fact, to be decided by the jury. Thomas Ford Tractor, Inc. v. North Ga. Prod. Credit Ass'n, 153 Ga. App. 820, 266 S.E.2d 571, 1980 Ga. App. LEXIS 1994 (1980); Chapman v. Bank of Cumming, 154 Ga. App. 739, 270 S.E.2d 4, 1980 Ga. App. LEXIS 2367 (1980).

Whether or not a description in a mortgage, of mares, by name, age, and color was sufficient to put the purchaser on notice, was a question for the jury. Reynolds v. Jones, 7 Ga. App. 123, 66 S.E. 395, 1909 Ga. App. LEXIS 556 (1909).

Notes payable in specifics. — It makes no difference, under O.C.G.A. § 44-14-31, that notes, to secure which the mortgage was given, are payable in specifics. The value of the specifics may be recovered. Hatcher v. Chancey, 71 Ga. 689, 1883 Ga. LEXIS 249 (1883).

Rule as to deed to secure debt. — While, under the provisions of O.C.G.A. § 44-14-31, one of the requisites to the validity of a mortgage is that the debt which it is given to secure shall be therein specified, a different rule obtains as to a deed given to secure a debt, and it is not necessary that such a conveyance shall specify the amount of the indebtedness that it is given to secure. McClure v. Smith, 115 Ga. 709, 42 S.E. 53, 1902 Ga. LEXIS 542 (1902); Troup Co. v. Speer, 23 Ga. App. 750, 99 S.E. 541, 1919 Ga. App. LEXIS 333 (1919).

Particular Instruments

In general. — Any instrument creating a lien, specifying the debt to secure which it is given and the property upon which it is to take effect, is to be construed as a mortgage under O.C.G.A. § 44-14-31, notwithstanding that there may be some language in the instrument which would in-

dicate an intention to convey the legal title. Powers & Co. v. Georgia-Florida Grocery Co., 7 Ga. App. 592, 67 S.E. 685, 1910 Ga. App. LEXIS 406 (1910).

A deed of bargain and sale, absolute in its terms, and purporting to convey the fee in consideration of $90.00 in hand paid, passes title; and an entry endorsed upon it and signed by the grantee to the effect that the deed is to be returned to the grantor cancelled, on condition that the grantor shall pay to the grantee $90.00 by a specified time, with interest, does not convert the instrument into a mere mortgage. Jay v. Welchel, 78 Ga. 786, 3 S.E. 906, 1887 Ga. LEXIS 78 (1887).

Purchase-money notes. — Promissory notes, reciting that they were given for the purchase-money of certain described chattels, but neither reserving title in the property sold nor containing a mortgage to secure the purchase-money, evidence no lien upon such chattels and confer no right upon the holder to have the holder's debt paid out of funds, in the hands of the sheriff, arising from the sale of such chattels. Bush v. Kimbrell, 25 Ga. App. 424, 103 S.E. 686, 1920 Ga. App. LEXIS 855 (1920).

So-called "security deed" from purchaser to vendor and assumption agreement between bank, vendor, and purchaser met the requirements of O.C.G.A. § 44-14-31 as to the contents of a mortgage. Cherokee Ins. Co. v. Gravitt, 187 Ga. App. 179, 369 S.E.2d 779, 1988 Ga. App. LEXIS 674 (1988).

Bank was not entitled to lien based on note promising to repay debt in full upon sale of debtor's house, as this note did not clearly indicate the creation of a lien, and it did not specify the debt for which it was given and the property upon which it was to take effect, as mortgages must do pursuant to O.C.G.A. § 44-14-31. First Nat'l Bank v. Blackburn, 254 Ga. 379, 329 S.E.2d 897, 1985 Ga. LEXIS 701 (1985).

Trust indenture. — Language in a trust indenture stating that the debtor "pledged and assigned" the debtor's interest in real property to a bond trustee as security for payment of bonds was sufficient under Georgia law to create a lien, and the indenture granted the bond trustee a mortgage under Georgia law even though it was not in recordable form since it specified the debt owed, accurately described the real property, and evidenced a clear intent to create a lien on the real property. Detention Mgmt., LLC v. UMB Bank, NA (In re Mun. Corr., LLC), 501 B.R. 119, 2013 Bankr. LEXIS 4269 (Bankr. N.D. Ga. 2013).

Mortgage to secure note and future advances. — A mortgage which recites that it is given to secure the payment of a promissory note for a specified amount and "such future advances in money, stock, merchandise and plantation supplies" as may be made to the mortgagor by the mortgagee during a given year, is valid only as a mortgage to secure the payment of the note, under O.C.G.A. § 44-14-31. Any indebtedness above the amount of the note is to be treated as an indebtedness on open account. Benton-Shingler Co. v. Mills, 13 Ga. App. 632, 79 S.E. 755, 1913 Ga. App. LEXIS 284 (1913).

A mortgage to secure a note due, as well as any general or special balance due from the mortgagor up to the value of the property, which was described as being of the value of $5,000, is sufficiently definite to be valid as a mortgage for future advances up to $5,000. In re Corbitt, 248 F. 988, 1918 U.S. Dist. LEXIS 1219 (D. Ga. 1918).

Bill of sale. — An instrument denominated a "bill of sale" may really be a mortgage, if it contains a defeasance clause. Daniels v. State, 43 Ga. App. 779, 159 S.E. 903, 1931 Ga. App. LEXIS 553 (1931).

Where an instrument was executed by a party in the nature of a bill of sale, but the language used showed the intent of the parties to be the execution of a mortgage, it was held to be a mortgage. Stokes v. Hollis, 43 Ga. 262, 1871 Ga. LEXIS 211 (1871).

Conditional lien does not become operative where the contingent balance of indebtedness, for the security of which the lien is given, never comes into existence, according to the plain and unambiguous stipulations set forth in the instrument creating the lien. Dingfelder v. Georgia Peach Growers Exch., 184 Ga. 569, 192 S.E. 188, 1937 Ga. LEXIS 583 (1937).

Particular Instruments (Cont'd)

Assignment of a bond for title as security for a debt, which clearly expresses its purpose and specifies the debt and the property, is in legal effect a mortgage, and, to be effective against subsequent liens, must be recorded. Fuller v. Atlanta Nat'l Bank, 254 F. 278, 1918 U.S. App. LEXIS 1300 (3d Cir. 1918), cert. denied, 249 U.S. 599, 39 S. Ct. 257, 63 L. Ed. 796, 1919 U.S. LEXIS 2253 (1919).

A retention title contract signed by the purchaser in the trade name by the purchaser in the purchaser's individual name is entitled to record where it otherwise meets the requirements of O.C.G.A. § 44-14-31, and after being duly recorded constitutes constructive notice of the right and interest of the vendor therein as against the purchase of the property at a judicial sale on execution issued against the purchaser in an individual capacity. NCR Co. v. Sikes, 94 Ga. App. 391, 94 S.E.2d 782, 1956 Ga. App. LEXIS 553 (1956).

After-acquired property. — Subject only to the statutory exceptions, it has long been the general rule in this state that any mortgage on after-acquired personal property is invalid; this general rule, with only the statutory exceptions, is applicable even though it is sought by an express provision of the instrument to include after-acquired property. Dupriest v. Bennett Bros., 61 Ga. App. 704, 7 S.E.2d 293, 1940 Ga. App. LEXIS 228 (1940).

Instrument indicating that title should pass. — An instrument, after reciting that the makers were indebted to F. in an amount named, for which a note had been given, conveyed to F. certain personalty, specifying that it was intended that the title should pass. It provided further, that if the note was not paid when due, F. should take possession of said property, and after advertising, sell it, and apply the proceeds to the debt; that if the note was met as maturity, F. should reconvey by quit-claim deed. The instrument was a mortgage, under O.C.G.A. § 44-14-31, and might be foreclosed as such. Frost v. Allen, 57 Ga. 326, 1876 Ga. LEXIS 109 (1876).

The term "pledge," used in an instrument whereby a sawmill and accessories are conveyed to a creditor to secure a debt, is ambiguous and subject to explanation since the pledge of such property to secure a debt is most unusual and practically unheard of; therefore, the testimony of the creditor to the effect that the intention was to create a mortgage is relevant and material and should not be excluded. Valdosta Plywoods, Inc. v. Belote, 75 Ga. App. 616, 44 S.E.2d 128, 1947 Ga. App. LEXIS 594 (1947).

Livestock. — A writing which purports to create a mortgage lien upon property described as "seven head of mules and horses" is void under O.C.G.A. § 44-14-31 as against one claiming the proceeds of a sale thereof under a subsequently acquired lien by attachment. Reynolds v. Tifton Guano Co., 20 Ga. App. 49, 92 S.E. 389, 1917 Ga. App. LEXIS 707 (1917).

Second agreement written on mortgage. — See Howard v. Rumble, 4 Ga. App. 327, 61 S.E. 297, 1908 Ga. App. LEXIS 284 (1908).

Description of Property

The words "to specify" means "to point out, to particularize, to designate by words one thing or another." Morris & Eckels Co. v. Fulton Nat'l Bank, 208 Ga. 222, 65 S.E.2d 815, 1951 Ga. LEXIS 321 (1951).

Meaning of "bounded." — In a mortgage description of land, the words, "bounded — by F. M. S." will be construed as meaning "bounded by lands of F. M. S." Smith v. Downing Co., 21 Ga. App. 741, 95 S.E. 19, 1918 Ga. App. LEXIS 505 (1918).

Exactness not required. — No formal or exact description of the debt is essential, provided there is a debt between the parties capable of being enforced against the mortgagor or the property mortgaged. Literal exactness is not required. Moultrie Banking Co. v. Mobley, 170 Ga. 402, 152 S.E. 903, 1930 Ga. LEXIS 466 (1930).

General descriptions, such as "all the estate, both real and personal, of the grantor," "all my land in a certain town, county, and State," and "all my land, wherever situated," have been held good and sufficient under O.C.G.A. § 44-14-31.

Bennett v. Green, 156 Ga. 572, 156 Ga. 573, 119 S.E. 620, 1923 Ga. LEXIS 275 (1923).

Where property not distinguishable. — If the description is altogether general, such that the mortgaged property cannot be separated from the general mass of similar articles, the requirement of the law is not met. Morris & Eckels Co. v. Fulton Nat'l Bank, 208 Ga. 222, 65 S.E.2d 815, 1951 Ga. LEXIS 321 (1951).

Description must give record notice. — In a case where one claims the proceeds of a sale of mortgaged property, under a subsequently acquired lien, the sufficiency of the mortgage description is not governed by the rule which would obtain between the parties to the writing, but such a degree of definiteness is required as would be sufficient to impart record notice to third parties. Reynolds v. Tifton Guano Co., 20 Ga. App. 49, 92 S.E. 389, 1917 Ga. App. LEXIS 707 (1917).

Description not imparting notice. — The words of description in a mortgage may be sufficient to create a lien, and yet be insufficient of themselves to impart notice of the lien which they create. Nussbaum v. Waterman & Co., 9 Ga. App. 56, 70 S.E. 259, 1911 Ga. App. LEXIS 416 (1911); Reynolds v. Tifton Guano Co., 20 Ga. App. 49, 92 S.E. 389, 1917 Ga. App. LEXIS 707 (1917).

Description which is partially untrue does not render the mortgage void, if the part which is correct does not apply generally to other like property and reasonably identifies the property in controversy; but where the part of the description that is true is not so distinctive as reasonably to identify the property mortgaged, a purchaser may be justified in assuming that the property is not covered by the mortgage. Pinson-Brunson Motor Co. v. Bank of Danielsville, 40 Ga. App. 793, 151 S.E. 549, 1930 Ga. App. LEXIS 701 (1930).

Parol evidence to aid description. — In providing that a mortgage or a conditional bill of sale shall specify the property on which it is to take effect under O.C.G.A. § 44-14-31, the law does not require such a description as will serve to identify the property without aid of parol evidence. A.S. Thomas Furn. Co. v. T. & C. Furn. Co., 120 Ga. 879, 48 S.E. 333, 1904 Ga. LEXIS 734 (1904); Hester v. Gairdner, 128 Ga. 531, 58 S.E. 165, 1907 Ga. LEXIS 160 (1907); Georgia Novelty Mach. Co. v. Mount, 96 Ga. App. 704, 101 S.E.2d 104, 1957 Ga. App. LEXIS 667 (1957).

Description of chattels. — Chattel mortgages were insufficient to impart notice to third parties, where the description of the chattels was too general to specify the exact chattels and no information was given as to their location. Morris & Eckels Co. v. Fulton Nat'l Bank, 208 Ga. 222, 65 S.E.2d 815, 1951 Ga. LEXIS 321 (1951).

Boundaries of land. — A mortgage which described the land as having a frontage of a certain number of feet and extending back a stated distance, and which set out the boundaries on each side, and further described the property as being the same which was conveyed to the mortgagor by a deed of certain date and recorded on a specified date, fully identified the land. In re Corbitt, 248 F. 988, 1918 U.S. Dist. LEXIS 1219 (D. Ga. 1918).

Tract capable of being located. — As to the matter of descriptive averments of the land intended to be mortgaged, if the descriptive recitals are so definite as to render the tract capable of being located, the averments are sufficient. Daniel v. State, 63 Ga. App. 12, 10 S.E.2d 80, 1940 Ga. App. LEXIS 2 (1940).

Securing promissory notes. — Where a chattel mortgage is executed which describes the debt intended to be secured as the "aforesaid promissory notes," and it appears that two papers in the form of promissory notes, the one duly executed and attached to and preceding the mortgage, and the other written on the same paper with and immediately preceding the mortgage but unsigned by the maker, such mortgage sufficiently describes the debt intended to be secured to create a lien for the sum of the notes in favor of the mortgagee upon the mortgaged property. Mason v. Parker, 101 Ga. 659, 28 S.E. 985, 1897 Ga. LEXIS 292 (1897).

Securing advances. — A mortgage upon real estate given to secure "advances" to be made by the mortgagee to the mortgagor, for the purpose of carrying on the farm of the mortgagor, is not in-

Description of Property (Cont'd)

valid for want of a sufficient description of the debt intended to be secured. Allen v. J.W. Lathrop & Co., 46 Ga. 133, 1872 Ga. LEXIS 22 (1872).

Misdescription of bond. — Under O.C.G.A. § 44-14-31, where a mortgage is given to indemnify one who becomes a surety upon a bond in which the mortgagor is principal, a misdescription of the particular bond may be corrected by parol testimony so as to identify the bond described in the mortgage with the one upon which the mortgagee became surety. And the mere misdescription of the bond will not have the effect to render the mortgage invalid as a lien upon the property described, either as to the mortgagor personally or the mortgagor's vendees. Emerson v. Knight, 130 Ga. 100, 60 S.E. 255, 1908 Ga. LEXIS 237 (1908).

Bill of sale. — As is the case with a mortgage, an instrument creating a lien by bill of sale to secure a debt must specify the debt sought to be secured. Dingfelder v. Georgia Peach Growers Exch., 184 Ga. 569, 192 S.E. 188, 1937 Ga. LEXIS 583 (1937).

Stock of goods in store. — Considering the caption and body together, the mortgage in this case covers goods in the brick store of the mortgagor in a certain place on the street named, and between two other stores named. It included all the merchandise in that store and to be in it to supply the place of old goods sold; and the description was sufficient. Welsh v. Lewis & Son, 71 Ga. 387, 1883 Ga. LEXIS 191 (1883).

The following description: "Our entire stock of dry goods, boots, shoes, hats, clothing, and notions, and such other goods as are usually kept in a first-class country store," (without any location of the goods, or without any other language of identification), is not a sufficient description under O.C.G.A. § 44-14-31. Jaffrey v. Brown, 29 F. 476, 1886 U.S. App. LEXIS 2488 (C.C.D. Ga. 1886).

Mares. — A paper, providing for a lien on a "bay mare," and showing that the mare was purchased by the mortgagor from the mortgagee, is a sufficient description of the property mortgaged under O.C.G.A. § 44-14-31. Nichols v. Hampton, 46 Ga. 253, 1872 Ga. LEXIS 46 (1872).

Describing cotton. — See Stephens v. Tucker, 55 Ga. 543, 1875 Ga. LEXIS 460 (1875).

Descriptions found insufficient. — A description of land in a mortgage in these terms: "Two hundred and sixty-one acres of land off of lots numbers five, twenty-seven and twenty-eight, in the ninth district of Randolph County," is fatally defective for want of sufficiently definite description, under O.C.G.A. § 44-14-31. Atkins v. Paul, 67 Ga. 97, 1881 Ga. LEXIS 139 (1881).

A mortgage on "twelve acres of cotton," without any further description, does not sufficiently specify the property upon which it is to take effect under O.C.G.A. § 44-14-31. Hampton v. State, 124 Ga. 3, 52 S.E. 19, 1905 Ga. LEXIS 624 (1905).

RESEARCH REFERENCES

Am. Jur. 2d.

55 Am. Jur. 2d, Mortgages, § 12.

C.J.S.

59 C.J.S., Mortgages, § 93.

ALR.

Trust receipt, or instrument purporting to be such, as a chattel mortgage within filing statutes, 25 A.L.R. 332; 49 A.L.R. 309; 87 A.L.R. 316; 101 A.L.R. 463; 168 A.L.R. 359.

Liability of mortgagee under mortgage clause for insurance premiums, 56 A.L.R. 679; 83 A.L.R. 105.

Requisites and sufficiency of description of property in conditional sales contract, 65 A.L.R. 714.

Sufficiency of description of property in mortgage on animals, 124 A.L.R. 944.

Validity, construction, and application of insecurity clause in chattel mortgage, 125 A.L.R. 313.

Inconsistency between description of land in instruments conveying same or affecting title thereto and description in another instrument referred to therein, 134 A.L.R. 1041.

Deed or mortgage as affected by uncertainty of description of excepted area, 162 A.L.R. 288.

Sufficiency of description of property, as against third persons, in chattel mortgage on farm equipment, machinery, implements, and the like, 32 A.L.R.2d 929.

Uncertainty as to terms of mortgage or of accompanying note or bond contemplated by real-estate sales contract as affecting right to specific performance, 60 A.L.R.2d 251.

Validity and effect of "wraparound" mortgages whereby purchaser incorporates into agreed payments to grantor latter's obligation on initial mortgage, 36 A.L.R.4th 144.

44-14-32. Use of parol evidence to prove apparent deed a mortgage.

A deed or bill of sale which is absolute on its face and which is accompanied with possession of the property shall not be proved, at the instance of the parties, by parol evidence to be a mortgage only unless fraud in its procurement is the issue to be tried.

History.

Laws 1837, Cobb's 1851 Digest, p. 274; Code 1863, § 3732; Code 1868, § 3756; Code 1873, § 3809; Code 1882, § 3809; Civil Code 1895, § 2725; Civil Code 1910, § 3258; Code 1933, § 67-104.

Law reviews.

For comment on Brown v. Carmichael, 149 Ga. 548, 101 S.E. 124 (1919), and Wilkes v. Carter, 149 Ga. 240, 99 S.E. 860 (1919), see 10 Ga. B.J. 338 (1948).

For article, "The Parol Evidence Rule in Georgia," see 17 Ga. B.J. 49 (1954).

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

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General Consideration

In general. — O.C.G.A. § 44-14-32 merely prohibits the use of parol evidence for the purpose of reducing a deed, absolute in form and accompanied by the possession of the property conveyed, to a mortgage only. Manget Realty Co. v. Carolina Realty Co., 169 Ga. 495, 150 S.E. 828, 1929 Ga. LEXIS 388 (1929); Hutchinson v. King, 192 Ga. 402, 15 S.E.2d 523, 1941 Ga. LEXIS 487 (1941); Haynes v. Blackwell, 232 Ga. 430, 207 S.E.2d 66, 1974 Ga. LEXIS 975 (1974).

Grantee not in possession. — Under O.C.G.A. § 44-14-32, a deed absolute on its face may be shown by parol evidence to have been intended to convey title only for the purpose of securing a debt, where the grantee has not taken possession of the property. Askew v. Thompson, 129 Ga. 325, 58 S.E. 854, 1907 Ga. LEXIS 373 (1907); Spencer v. Schuman, 132 Ga. 515, 64 S.E. 466, 1909 Ga. LEXIS 347 (1909); Mercer v. Morgan, 136 Ga. 632, 71 S.E. 1075, 1911 Ga. LEXIS 162 (1911); Lowe v. Findley, 141 Ga. 380, 81 S.E. 230, 1914 Ga. LEXIS 212 (1914); Berry v. Williams, 141 Ga. 642, 81 S.E. 881, 1914 Ga. LEXIS 88 (1914); Renitz v. Williamson, 149 Ga. 241, 99 S.E. 869, 1919 Ga. LEXIS 214 (1919); Daniel v. Charping, 151 Ga. 34, 105 S.E. 465, 1921 Ga. LEXIS 138 (1921); Copelin v. Williams, 152 Ga. 692, 111 S.E. 186, 1922 Ga. LEXIS 258 (1922); Paulk v. Dorminey, 154 Ga. 785, 115 S.E. 488, 1923 Ga. LEXIS 392 (1923); Sykes v. Porter, 31 Ga. App. 86, 119 S.E. 455, 1923 Ga. App. LEXIS 736 (1923); Pitts v. Cox, 167 Ga. 228, 145 S.E. 61, 1928 Ga. LEXIS 129

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(1928); Hutchinson v. King, 192 Ga. 402, 15 S.E.2d 523, 1941 Ga. LEXIS 487 (1941); Hobbs v. Houston, 195 Ga. 571, 24 S.E.2d 884, 1943 Ga. LEXIS 537 (1943); Haynes v. Blackwell, 232 Ga. 430, 207 S.E.2d 66, 1974 Ga. LEXIS 975 (1974); Haire v. Cook, 237 Ga. 639, 229 S.E.2d 436, 1976 Ga. LEXIS 1338 (1976).

Possession in vendor. — Where a paper, on its face, indicated that the possession remained with the vendor, the case does not come within the provisions of O.C.G.A. § 44-14-32, prohibiting parol evidence. Denton Bros. v. Shields, 120 Ga. 1076, 48 S.E. 423, 1904 Ga. LEXIS 802 (1904); Sims v. Sims, 162 Ga. 523, 134 S.E. 308, 1926 Ga. LEXIS 231 (1926).

Inapplicable to implied trust. — O.C.G.A. § 44-14-32 is not applicable to a case seeking to set up an implied trust. Jenkins v. Lane, 154 Ga. 454, 115 S.E. 126, 1922 Ga. LEXIS 393 (1922); Stern v. Howell, 160 Ga. 261, 127 S.E. 776, 1925 Ga. LEXIS 132 (1925); Manget Realty Co. v. Carolina Realty Co., 169 Ga. 495, 150 S.E. 828, 1929 Ga. LEXIS 388 (1929).

Meaning of "possession." — Possession of the property means an actual possession, and not that sort of possession which consists in agreeing to hold possession for the grantee in the deed; the formal change of possession is an act indicating on the part of the grantor in the deed, by the deliberate abandonment of grantor's own possession, that grantor's agreement is fully expressed in the deed. Spence v. Steadman, 49 Ga. 133, 1873 Ga. LEXIS 321 (1873).

The word "possession" as used in O.C.G.A. § 44-14-32 necessarily means possession under a complete and full title. Johnson v. Sherrer, 197 Ga. 392, 29 S.E.2d 581, 1944 Ga. LEXIS 278 (1944).

Cardinal rule for testing intent of parties to establish either a mortgage or an absolute deed of conveyance seems to be whether or not the relation of debtor and creditor was intended to exist between the parties — whether the property was taken in satisfaction and discharge of the sum due or advanced — or whether, notwithstanding the words of the conveyance, the relation of debtor and creditor was still to exist, to wit: the right of the one to demand, and the obligation of the other to pay. Haire v. Cook, 237 Ga. 639, 229 S.E.2d 436, 1976 Ga. LEXIS 1338 (1976).

The inquiry in every case must be whether the contract in the specific case is a security for the repayment of money or a conditional sale. If the writings which were signed by both parties correctly set forth the agreement between them, then these writings evidence a sale and conveyance of the land, with an option to the vendor to repurchase it within a designated period. Manget Realty Co. v. Carolina Realty Co., 169 Ga. 495, 150 S.E. 828, 1929 Ga. LEXIS 388 (1929).

No conclusive test can be suggested to determine whether transactions are mortgages or conditional sales, because the question arises under such varieties of circumstances that slight differences in these would make it inapplicable. Manget Realty Co. v. Carolina Realty Co., 169 Ga. 495, 150 S.E. 828, 1929 Ga. LEXIS 388 (1929).

Construction of unambiguous contracts. — While the issue as to what was the true intent of the parties in the execution of a written instrument is frequently for the determination of a jury, who, upon consideration of all the facts and circumstances, are to determine whether a certain writing evidences an absolute conveyance or a mere security for the payment of a loan, nevertheless, the construction of unambiguous contracts in writing is for the court, and in the state of the pleadings in this case the contracts attached as a part of the petition were so plain and unambiguous as not to require the intervention of a jury. Durden-Powers Co. v. O'Brien, 165 Ga. 728, 142 S.E. 90, 1928 Ga. LEXIS 57 (1928).

Cancellation of security deed. — A grantor in a deed absolute in form but made to secure a debt, who remains in possession of the land conveyed, may, upon the payment of the debt, have the deed canceled as a cloud on grantor's title. Blankenship v. Cochran, 151 Ga. 581, 107 S.E. 770, 1921 Ga. LEXIS 335 (1921); Hobbs v. Houston, 195 Ga. 571, 24 S.E.2d 884, 1943 Ga. LEXIS 537 (1943).

Presumption of absolute conveyance. — The presumption, of course, is that an instrument is what it purports on

its face to be, an absolute conveyance; and the burden is on the grantor to show otherwise. Hobbs v. Houston, 195 Ga. 571, 24 S.E.2d 884, 1943 Ga. LEXIS 537 (1943).

Resolution in doubtful cases. — In doubtful cases the court leans to the conclusion that the transaction is in reality a mortgage and not a sale. Manget Realty Co. v. Carolina Realty Co., 169 Ga. 495, 150 S.E. 828, 1929 Ga. LEXIS 388 (1929).

Assignee of grantee. — There is nothing in O.C.G.A. § 44-14-32 which will prevent an assignee of the grantee who in an absolute deed conveyed to his wife the land thereby conveyed from treating it as a deed to secure debt, and, upon payment of the money thereby secured, reconveying the land to the grantor. Pitts v. Cox, 167 Ga. 228, 145 S.E. 61, 1928 Ga. LEXIS 129 (1928).

Evasion of usury laws. — Whether a transaction was a bona fide sale with a right in the vendor to repurchase, or whether it was a ruse devised to evade the usury laws and to take security for the loan of money, can be shown by parol evidence. Jackson v. Commercial Credit Corp., 90 Ga. App. 352, 83 S.E.2d 76, 1954 Ga. App. LEXIS 711 (1954).

Motion to dismiss. — A petition to have a warranty deed declared a security deed in which it is not alleged that the petitioner could not read, or that any fraud was practiced which excused petitioner from reading the instrument which petitioner signed, is subject to a motion to dismiss. Burns v. Washington, 149 Ga. 42, 99 S.E. 115, 1919 Ga. LEXIS 109 (1919).

No showing of fraud. — Where it was not alleged in the petition that the plaintiff could not read, and no fraud was shown to have been practiced which excused plaintiff from reading the instrument which plaintiff signed, that instrument being a deed of conveyance absolute upon its face, and accompanied with possession of the property, such deed could not be shown by parol evidence to be merely a security deed; nor was the plaintiff entitled to have the deed in question treated as a mortgage or security deed, so as to recover a judgment for the sums which plaintiff seeks to recover in this case. Wynn v. First Nat'l Bank, 176 Ga. 218, 167 S.E. 513, 1933 Ga. LEXIS 49 (1933).

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Deed to secure debts. — Where a deed absolute on its face is made to secure a debt, the legal title will vest in the grantee and the equitable title, or right to have the property reconveyed on payment of the debt, will remain in the grantor. Hester v. Gairdner, 128 Ga. 531, 58 S.E. 165, 1907 Ga. LEXIS 160 (1907); Waller v. Dunn, 151 Ga. 181, 106 S.E. 93, 1921 Ga. LEXIS 197 (1921); Copelin v. Williams, 152 Ga. 692, 111 S.E. 186, 1922 Ga. LEXIS 258 (1922); Paulk v. Dorminey, 154 Ga. 785, 115 S.E. 488, 1923 Ga. LEXIS 392 (1923).

Quitclaim deed. — Where tenants in common of a tract of land conveyed the same by quitclaim deed to a third person, but remained in possession of the land, and the grantee in such security deed was never in possession thereof, the rule of O.C.G.A. § 44-14-32 applies, and it can be shown by parol evidence, by the heir of one of the tenants in common, that the deed was made only to secure a debt for money borrowed. Southern Ry. v. Williams, 160 Ga. 541, 128 S.E. 681, 1925 Ga. LEXIS 204 (1925).

Deed in trust for benefit of grantor. — A deed absolute in form may be shown by parol evidence to have been made in trust for the benefit of the grantor, where the maker remains in possession of the land. Chandler v. Georgia Chem. Works, 182 Ga. 419, 185 S.E. 787, 1936 Ga. LEXIS 376 (1936).

Bond for title. — Under O.C.G.A. § 44-14-32 a transfer of a bond for title to land, absolute in form, may be shown to have been made for the purpose of securing a loan, where the transferor retains the possession of the land. Renitz v. Williamson, 149 Ga. 241, 99 S.E. 869, 1919 Ga. LEXIS 214 (1919).

Bill of sale to secure debt. — A writing in the form of an absolute bill of sale, but in fact intended only as security for a debt, conveys title, but is treated as an equitable mortgage, under O.C.G.A. § 44-14-32. Denton Bros. v. Shields, 120 Ga. 1076, 48 S.E. 423, 1904 Ga. LEXIS 802 (1904); Farmer v. State, 18 Ga. App. 307,

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89 S.E. 382, 1916 Ga. App. LEXIS 316 (1916). See also, Ellison & Chew v. Wilson, 7 Ga. App. 214, 66 S.E. 631, 1909 Ga. App. LEXIS 598 (1909).

A sale on agreement to repurchase is nearly allied to a mortgage. In cases of sales and agreements to repurchase, the papers are open to contradiction by parol. Manget Realty Co. v. Carolina Realty Co., 169 Ga. 495, 150 S.E. 828, 1929 Ga. LEXIS 388 (1929).

Parol agreement to reconvey. — When a party contracts on the purchase of a property in payment of a debt, to reconvey on the payment of the amount at which the party was taken in a settlement, and agrees to reduce it to writing, but does not, and refuses to comply, it is not a case in which parol evidence cannot be admitted. Henderson v. Touchstone, 22 Ga. 1, 1857 Ga. LEXIS 99 (1857).

Use of parol evidence to proof deed. — A deed absolute in form may be shown to have been made to secure a debt where the maker remains in possession of the land conveyed. But where there is no fraud in the procurement of the deed, and the possession is surrendered to the grantee contemporaneously with the execution of the deed, it is not competent to show by parol that the deed absolute in form was in fact a deed to secure a debt. Wilkes v. Carter, 149 Ga. 240, 99 S.E. 860, 1919 Ga. LEXIS 213 (1919).

A deed absolute on its face, and accompanied with possession of the property, shall not be proved (at the instance of the parties), by parol evidence, to be a mortgage only, unless fraud in its procurement is the issue to be tried. Brown v. Carmichael, 149 Ga. 548, 101 S.E. 124, 1919 Ga. LEXIS 317 (1919).

RESEARCH REFERENCES

Am. Jur. 2d.

55 Am. Jur. 2d, Mortgages, § 109 et seq.

C.J.S.

59 C.J.S., Mortgages, §§ 44, 50 et seq.

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Lapse of time as affecting rights and remedies of parties to absolute deed intended as mortgage, 28 A.L.R. 554.

Deed placed in escrow to be delivered to grantee upon failure to pay debt due him as a mortgage, 65 A.L.R. 120.

Change of deed intended as mortgage by subsequent agreement into an absolute deed, 65 A.L.R. 771.

Deed absolute on its face, with contemporaneous agreement or portion for repurchase by grantor, as a mortgage vel non, 79 A.L.R. 937; 155 A.L.R. 1104.

Value of property as factor in determining whether deed intended as mortgage, 90 A.L.R. 953; 89 A.L.R.2d 1040.

Admissibility of parol evidence to show whether particular word or phrase was intended to connote a chattel mortgage or conditional sale, 101 A.L.R. 625.

Parol evidence in relation to assumption of mortgage debt by grantee of mortgaged property, 143 A.L.R. 548.

Remedy of mortgagee in forged or unauthorized mortgage where proceeds are used to discharge valid lien, 151 A.L.R. 407.

Bill of sale, absolute on its face, as a chattel mortgage, 33 A.L.R.2d 364.

44-14-33. Attestation or acknowledgment of mortgage; additional witness in case of land; constructive notice.

In order to admit a mortgage to record, it shall be signed by the maker, attested by an officer as provided in Code Section 44-2-15, and attested by one other witness. In the absence of fraud, if a mortgage is duly signed, witnessed, filed, recorded, and indexed on the appropriate county land records, such recordation shall be deemed constructive notice to subsequent bona fide purchasers.

History.

Orig. Code 1863, § 1957; Code 1868, § 1945; Code 1873, § 1955; Ga. L. 1876, p. 34, § 1; Code 1882, § 1955; Civil Code 1895, § 2724; Civil Code 1910, § 3257; Ga. L. 1931, p. 153, § 1; Code 1933, § 67-105; Ga. L. 1995, p. 1076, § 1; Ga. L. 2015, p. 937, § 3/HB 322.

Law reviews.

For annual survey on real property, see 65 Mercer L. Rev. 233 (2013).

For article, "Eleventh Circuit Survey: January 1, 2013 — December 31, 2013: Casenote: The Decline and Fall of Constructive Notice," see 65 Mercer L. Rev. 1203 (2014).

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General Consideration

Necessity for official witness. — Notwithstanding the employment of the word "must," under O.C.G.A. § 44-14-33 it has never been held that a mortgage was totally void for want of an official witness; it is surely safe to say that a duly executed reservation of title should not, for such a reason, be held wholly invalid. The contract containing it cannot be lawfully recorded unless the same be attested by "or proved before" one of the designated officials; nor can the holder get the protection which would result from the constructive notice to others given by the record; but surely the holder ought to be protected in rights as against one who takes with actual notice of the fact that the title has been reserved. Hill v. Ludden & Bates S. Music House, 113 Ga. 320, 38 S.E. 752, 1901 Ga. LEXIS 242 (1901).

Attestation. — Attestation is not the act of subscribing one's name as a witness to the fact that a given paper was executed, but is instead the act of subscribing one's name as a witness to the fact that one witnessed the execution of a paper. Thus, the language of the affidavit did not make it clear that the closing attorney attested to execution of the Security Deed by the debtor or the debtor's ex-husband. Gordon v. Wells Fargo Bank, N.A., 504 B.R. 668, 2014 Bankr. LEXIS 183 (Bankr. N.D. Ga. 2014).

Effect of unattested mortgage. — An unattested mortgage is good as between the parties thereto, or as between the maker and a transferee. The requirement relative to attestation, as prescribed by O.C.G.A. § 44-14-33 pertains to the prerequisite necessary to its record, and has application only so far as the intervening rights of third persons without notice are concerned. Futch v. Taylor, 22 Ga. App. 441, 96 S.E. 183, 1918 Ga. App. LEXIS 380 (1918). See also, Jacobs v. State, 4 Ga. App. 509, 61 S.E. 924, 1908 Ga. App. LEXIS 457 (1908); Donalson v. Thomason, 137 Ga. 848, 74 S.E. 762, 1912 Ga. LEXIS 169 (1912); Bank of Ringgold v. West Publishing Co., 61 Ga. App. 426, 6 S.E.2d 598, 1939 Ga. App. LEXIS 310 (1939); Central Bank & Trust Co. v. Creede, 103 Ga. App. 203, 118 S.E.2d 844, 1961 Ga. App. LEXIS 909 (1961).

Security deed to real property that lacked the signature of a witness did not provide constructive notice of the lender's lien against the property since O.C.G.A. § 44-14-33 provided for constructive notice only if the deed was duly recorded, and a duly recorded security deed was one that was attested by the requisite number of witnesses. Gordon v. Wells Fargo Bank, N.A. (In re Codrington), 430 B.R. 287, 2009 Bankr. LEXIS 4158 (Bankr. N.D. Ga. 2009), aff'd, 716 F.3d 1344, 2013 U.S. App. LEXIS 10276 (11th Cir. 2013).

Chapter 7 trustee put the material fact of the form of a security deed at the time of recordation in dispute, thus precluding summary judgment in favor of the lender on the trustee's complaint to avoid the lender's security deed under the trustee's strong arm powers by submitting a certified copy of the deed on file with a state court that did not include a notary stamp or seal as required under Georgia law

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when the official witness was a notary. Rainwater v. Chase Home Finance, LLC (In re Rainwater), No. 08-71489-MGD, No. 09-6711, 2013 Bankr. LEXIS 4294 (Bankr. N.D. Ga. Sept. 18, 2013).

Memorandum of trust indenture could not provide constructive notice of the existence of a mortgage and could not give rise to inquiry notice since the debtor did not sign the memorandum, the memorandum did not fall into any of the recognized categories of documents that could be recorded under the Georgia Code, and the memorandum was not properly attested. Detention Mgmt., LLC v. UMB Bank, NA (In re Mun. Corr., LLC), 501 B.R. 119, 2013 Bankr. LEXIS 4269 (Bankr. N.D. Ga. 2013).

Provisions of rider incorporated by reference. — Although the provisions of a rider or attached document may be incorporated into a security deed, the signatures attesting to execution of the rider or attached document do not suffice as an attestation of the security deed itself unless the language clearly states as such. Gordon v. Wells Fargo Bank, N.A., 504 B.R. 668, 2014 Bankr. LEXIS 183 (Bankr. N.D. Ga. 2014).

Defendant purchasers were entitled to summary judgment on the trustee's avoidance action under 11 U.S.C. § 544(a)(3) because the deed at issue did not have any defects on the deed's face and was properly filed and recorded, thereby meeting the requirements necessary to provide constructive notice to the subsequent bona fide purchasers. Kelley v. Goforth (In re Brownlee), 606 B.R. 508, 2019 Bankr. LEXIS 2867 (Bankr. M.D. Ga. 2019).

Properly attested adjustable rate rider did not validate improperly attested deed to secure debt; even though rider was incorporated into the terms of the deed, the deed itself remained improperly attested and ineligible for recordation. Stone v. Decatur Fed. Sav. & Loan Ass'n (In re Fleeman), 81 B.R. 160, 1987 Bankr. LEXIS 1958 (Bankr. M.D. Ga. 1987).

Actual notice of prior mortgage. — A mortgage of real estate attested by but one witness is not void under O.C.G.A. § 44-14-33, and, if a subsequent mortgagee or purchaser buys or takes a mortgage with actual notice of a prior mortgage, the buyer takes subject to it, even though it have but one witness. Gardner, Dexter & Co. v. Moore, Trimble & Co., 51 Ga. 268, 1874 Ga. LEXIS 114 (1874); Donalson v. Thomason, 137 Ga. 848, 74 S.E. 762, 1912 Ga. LEXIS 169 (1912).

Certificate of acknowledgment. — Under O.C.G.A. § 44-14-33 which requires a mortgage to be attested before a notary public or justice of a court, it is not necessary that the notary should attach a formal certificate of acknowledgment. In re Virgin, 224 F. 128, 1915 U.S. Dist. LEXIS 1338 (D. Ga. 1915).

Sufficiency of certificate. — A certificate, under O.C.G.A. § 44-14-33, which merely stated "sworn to and subscribed before me," shows that the same one who subscribed the instrument swore to it, and is sufficient, whether it refers to the grantor or to the attesting witnesses since probate by either would be sufficient. In re Hammett, 286 F. 392, 1923 U.S. Dist. LEXIS 1788 (D. Ga. 1923).

Signing acknowledgment. — The subsequent signing of an acknowledgment of an original signature before a notary public, who attests the last signature, to a previously executed contract of conditional sale, is in effect a re-execution. Saranac Mach. Co. v. Heyward, 293 F. 499, 1923 U.S. App. LEXIS 1633 (5th Cir. 1923).

Affidavit of execution as substitute for attestations. — Under O.C.G.A. § 44-14-33, an affidavit of the execution of a bill of sale, given as security, made before a notary public by one who was not an attesting witness, was insufficient as "proof" to substitute due attestation, and did not render the instrument eligible to record. In re Smith, 281 F. 574, 1922 U.S. Dist. LEXIS 1504 (D. Ga. 1922).

Attestation incorporated by reference. — Chapter 7 trustee could avoid, pursuant to 11 U.S.C. § 544(a), a security deed for real property that did not contain an attestation because the deed, which incorporated the terms of another document by reference, did not also incorporate the attestations to that document and did not meet the requirements for con-

structive notice under O.C.G.A. § 44-14-33. Gordon v. Terrace Mortg. Co. (In re Hong Ju Kim), No. 06-66024-CRM, No. 06-06593-CRM, 2007 Bankr. LEXIS 4398 (Bankr. N.D. Ga. Nov. 28, 2007), rev'd, No. 1:08-CV-0079-RWS, 2009 U.S. Dist. LEXIS 131004 (N.D. Ga. Oct. 2, 2009).

Questions were certified to the Georgia Supreme Court as to whether proper attestation of a rider whose provisions were incorporated into a security deed could satisfy the requirements of O.C.G.A. § 44-14-33 for the deed itself or could create inquiry notice, such that a bankruptcy trustee could not avoid the deed under 11 U.S.C. § 544(a)(3). Wells Fargo Bank, N.A. v. Gordon (In re Codrington), 691 F.3d 1336, 2012 U.S. App. LEXIS 18033 (11th Cir. 2012).

Affidavit signed by a notary testified to both execution and attestation of a security deed and, thus, substantially complied with the requirements of O.C.G.A. § 44-2-18 to cure any defect in attestation under O.C.G.A. §§ 44-14-33 and 44-14-61 caused by the notary's signature appearing under the term "acknowledgement." As the affidavit cured the defect, the security deed was eligible for recordation under Georgia law, and its recordation provided constructive notice to a subsequent bona fide purchasers and, thus, a bankruptcy trustee could not use the trustee's strong-arm powers to avoid the security deed. Kelley v. Wells Fargo Bank, N.A. (In re Perry), 565 B.R. 442, 2017 Bankr. LEXIS 256 (Bankr. M.D. Ga. 2017).

Signature of notary to the acknowledgment or probate can be construed as an attestation, under O.C.G.A. § 44-14-33. Saranac Mach. Co. v. Heyward, 293 F. 499, 1923 U.S. App. LEXIS 1633 (5th Cir. 1923).

No signature of unofficial witness. — Security deed did not contain the requisite signature of an unofficial witness. The defect in the deed was patent and, under Georgia law, the deed did not provide constructive notice to a bona fide purchaser, and thus, the trustee was entitled to avoid the security deed pursuant to 11 U.S.C. § 544. Gordon v. Wells Fargo Bank, N.A., 504 B.R. 668, 2014 Bankr. LEXIS 183 (Bankr. N.D. Ga. 2014).

Place of execution. — A mortgage on real estate, which contains no recital as to its place of execution, except the caption, "Georgia, Washington County," and the attesting clause wherein the official witness signs his name with the addition, "J. P., Bartow, Jefferson County, Georgia," is to be construed as showing upon its face that it was attested by the official witness in Jefferson County, and, if otherwise entitled to record, may be recorded in that county. If the word Bartow had been omitted, it would be presumed to have been attested in Washington County. Bryant v. Davis, 145 Ga. 531, 89 S.E. 512, 1916 Ga. LEXIS 388 (1916).

Husband signing wife's name. — Under O.C.G.A. § 44-14-33 where a husband signs his wife's name to a mortgage purporting to be executed by her, in her immediate presence and by her express request and direction, the effect of such signature is the same as if she had signed the mortgage herself. Hawes v. Glover, 126 Ga. 305, 55 S.E. 62, 1906 Ga. LEXIS 376 (1906).

Particular Transactions

Mortgages on realty. — In order to be entitled to record, mortgages on realty must be attested by two witnesses under O.C.G.A. § 44-14-33. Bryant v. Davis, 145 Ga. 531, 89 S.E. 512, 1916 Ga. LEXIS 388 (1916).

Contract for conditional sale of personalty. — Though attestation of a written contract for the conditional sale of personalty in compliance with O.C.G.A. § 44-14-33 is necessary to its being legally recorded, yet it is not essential that the attesting witness be an official, if proper probate is made. Burgsteiner v. Street-Overland Co., 30 Ga. App. 140, 117 S.E. 268, 1923 Ga. App. LEXIS 317 (1923).

Crops of cotton and corn. — Crops of cotton and corn being realty, in order to be entitled to record, a mortgage of the same must have been attested by two witnesses, one an official, under O.C.G.A. § 44-14-33. Farmers Whse. Co. v. First Nat'l Bank, 152 Ga. 262, 109 S.E. 900, 1921 Ga. LEXIS 67 (1921); Whatley v. Virginia-Carolina Chem. Co., 31 Ga. App. 226, 120 S.E. 436, 1923 Ga. App. LEXIS 860 (1923).

Bill of sale with reservation of title. — To be valid as against third persons, an instrument purporting to be a bill of sale

Particular Transactions (Cont'd)

with reservation of title must be executed in the presence of and attested by and approved before one of the officials named in O.C.G.A. § 44-14-33. E.E. Forbes Piano Co. v. Oliver, 11 Ga. App. 65, 74 S.E. 713, 1912 Ga. App. LEXIS 255 (1912).

Judge of superior courts. — A judge of the superior court of this state is authorized to attest mortgages. Strauss v. Maddox, 109 Ga. 223, 34 S.E. 355, 1899 Ga. LEXIS 616 (1899).

Stockholder of a corporation bears such financial relation to it that the stockholder is disqualified from attesting, as a notary, a mortgage to which the corporation is a party. Southern Iron & Equip. Co. v. Voyles, 138 Ga. 258, 75 S.E. 248, 1913D Am. Ann. Cas. 369 (1912); Peagler v. Davis, 143 Ga. 11, 84 S.E. 59, 1917A Am. Ann. Cas. 232 (1915).

Employee of bank. — A mortgage to a bank attested by an employee of the bank as a notary public does not render it invalid under O.C.G.A. § 44-14-33. In re Virgin, 224 F. 128, 1915 U.S. Dist. LEXIS 1338 (D. Ga. 1915).

Probate. — The attesting witness of a deed of mortgage swore that the attesting witness was "a subscribing witness to the mortgage; that he saw the maker of the same assign it: and also saw the other subscribing witnesses assign it." Thus, the court held that the probate was insufficient to admit the mortgage to record. Stanley v. Suggs, 23 Ga. 137, 1857 Ga. LEXIS 226 (1857).

Admissibility of parol evidence. — Parol evidence of the facts attending the execution of a security deed cannot be considered to aid it, but the validity of the record must be established by the face of the record, and of the recorded instrument, since O.C.G.A. § 44-14-33 requires not only the execution of such a deed in the officer's presence but also the attestation by the officer, or the subsequent probate before the officer, and that fact must appear by official certificate and not otherwise. In re Hammett, 286 F. 392, 1923 U.S. Dist. LEXIS 1788 (D. Ga. 1923).

Attestation of security deed. — First sentence of O.C.G.A. § 44-14-33 and the statutory recording scheme indicate that the word "duly" in the second sentence of § 44-14-33 should be understood to mean that a security deed is "duly filed, recorded, and indexed" only if the clerk responsible for recording determines, from the face of the document, that it is in the proper form for recording, meaning that it is attested or acknowledged by a proper officer and (in the case of real property) an additional witness; the General Assembly chose to enact the 1995 amendment to O.C.G.A. § 44-14-33 not as a freestanding Code provision but as an addition to a Code provision clearly referenced by O.C.G.A. § 44-14-61, and the General Assembly is presumed to have been aware of the existing state of the law when the legislature enacted the 1995 amendment so the placement of the amendment makes complete sense. United States Bank Nat'l Ass'n v. Gordon, 289 Ga. 12, 709 S.E.2d 258, 2011 Ga. LEXIS 271 (2011).

Because an eight-paged security deed lacked the signature of an unofficial witness, the deed was not in recordable form as required by O.C.G.A. § 44-14-33 and did not provide constructive notice, therefore, the security deed was avoidable under 11 U.S.C. § 544 with regard to a debtor's bankruptcy. Wells Fargo Bank, N.A. v. Gordon, 292 Ga. 474, 749 S.E.2d 368, 2013 Ga. LEXIS 158 (2013).

Bankruptcy trustee was entitled to avoid a security deed, pursuant to 11 U.S.C. § 544, because the security deed was not duly recorded as the security deed did not appear to have two signatures and, therefore, did not appear to comply with all statutory requirements under O.C.G.A. §§ 44-2-15 and 44-14-33. Gordon v. Ameritrust Mortg. Co. LLC (In re Nesbitt), No. 09-72233-WLH, No. 11-5251, 2013 Bankr. LEXIS 3979 (Bankr. N.D. Ga. Sept. 13, 2013).

Trustee was entitled to avoid a creditor's security interest under the strong arm powers because it was not validly perfected under Georgia law; a security deed did not contain the requisite signature of an unofficial witness. One affidavit failed to meet the incorporation requirement set out in security deed, and an attorney's affidavits did not properly show that the attorney witnessed a debtor's execution of the security deed; rather, they were merely an affirmation that the

attorney's explanations preceded the debtor's execution. Gordon v. OneWest Bank FSB, (In re Blackmon), 509 B.R. 415, 2014 Bankr. LEXIS 1518 (Bankr. N.D. Ga. 2014).

Affidavit accompanying deed constituted substantial compliance. — Even assuming that a creditor's security deed was defective under O.C.G.A. § 44-14-33 by its 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., 571 F.3d 1342, 2009 U.S. App. LEXIS 13208 (11th Cir. 2009).

Default judgment when security deeds lacked signatures. — Facts in a trustee's complaint were sufficient to support the entry of default judgment against a bank as the subject security deeds lacked the requisite signatures to constitute constructive notice under O.C.G.A. 44-14-33; thus, the deeds were unenforceable against a subsequent bona fide purchaser. Gordon v. Wells Fargo Bank, N.A. (In re Lawton), No. 08-71494-MGD, No. 13-05261, 2014 Bankr. LEXIS 1179 (Bankr. N.D. Ga. Feb. 16, 2014).

RESEARCH REFERENCES

Am. Jur. 2d.

55 Am. Jur. 2d, Mortgages, § 89 et seq.

C.J.S.

59 C.J.S., Mortgages, § 110.

ALR.

Imputation to attesting witness of notice of contents of instrument, 4 A.L.R. 716.

Effect of purported subscribing witness's denial or forgetfulness of signature by mark, 17 A.L.R. 1267.

Sufficiency of certificate of acknowledgment, 29 A.L.R. 919.

Statute of frauds: doctrine of part performance as applied to advance of money on oral agreement for mortgage on real estate, 30 A.L.R. 1403.

Validity of mortgage executed by entryman on public land before patent, 41 A.L.R. 938.

Formal acknowledgment of instrument by one whose name is signed thereto by another as an adoption of the signature, 57 A.L.R. 525.

Variance from statute of wording of affidavit required by it to accompany chattel mortgage, 143 A.L.R. 1254.

Sufficiency of certificate of acknowledgment, 25 A.L.R.2d 1124.

44-14-34. Signing of mortgages executed outside state.

When executed outside this state, mortgages shall be signed by the maker, attested by an officer as provided in Code Section 44-2-15, and attested by one other witness.

History.

Ga. L. 1931, p. 153, § 1; Code 1933, § 67-106; Ga. L. 2015, p. 937, § 4/HB 322.

JUDICIAL DECISIONS

Bill of sale executed out of this state, probated before a notary public, is not entitled to record in Georgia where the seal of the notary is not attached and where 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 Ga. App. LEXIS 971 (1962).

RESEARCH REFERENCES

Am. Jur. 2d.
55 Am. Jur. 2d, Mortgages, § 89 et seq.
C.J.S.
59 C.J.S., Mortgages, § 110.
ALR.
Variance from statute of wording of affidavit required by it to accompany chattel mortgage, 143 A.L.R. 1254.
Sufficiency of certificate of acknowledgment, 25 A.L.R.2d 1124.

44-14-35. Recording of mortgages on realty; effect of renewed mortgage as lien absent recordation.

Mortgages on realty shall be recorded in the county where the land is located. Where a mortgage upon realty is executed to secure the payment of money or other thing of value and the same is not recorded as provided by law but the mortgage is renewed or reexecuted, the mortgage shall operate as a lien upon the property of the mortgagor only against the mortgagor himself and those having actual notice of the mortgage except from the date of the record of such mortgage.

History.
Laws 1755, Cobb's 1851 Digest, p. 159; Laws 1768, Cobb's 1851 Digest, p. 162; Laws 1827, Cobb's 1851 Digest, pp. 171, 172; Code 1863, § 1958; Code 1868, § 1946; Code 1873, § 1956; Ga. L. 1876, p. 34, § 1; Ga. L. 1878-79, p. 139, § 1; Code 1882, § 1956; Civil Code 1895, § 2726; Civil Code 1910, § 3259; Code 1933, § 67-108.

Cross references.
Imposition, rate, collection, and assessment of taxes, § 48-6-60 et seq.
Law reviews.
For comment on Nalley Chevrolet, Inc. v. California Bank, 100 Ga. App. 197, 110 S.E.2d 577 (1959), appearing below, see 12 Mercer L. Rev. 283 (1960).

JUDICIAL DECISIONS

Section repealed English statute. — O.C.G.A. § 44-14-35 is repugnant to the Statute 32 Henry VIII, Chapter 9, and therefore the Act repealed the statute, if it was ever in force in Georgia. Doe v. Roe, 23 Ga. 82, 1857 Ga. LEXIS 222 (1857).

Mortgages effective from time of record as to third persons. — Mortgages, as against the interest of third parties acting in good faith and without notice, who may have acquired a transfer or lien binding the same property, take effect from the time they are filed for record, under O.C.G.A. § 44-14-35. Hays v. Reynolds, 53 Ga. 328, 1874 Ga. LEXIS 478 (1874); W.A. Patterson Co. v. Peoples Loan & Sav. Co., 158 Ga. 503, 123 S.E. 704, 1924 Ga. LEXIS 287 (1924). See also, Albany Nat'l Bank v. Georgia Banking Co., 137 Ga. 776, 74 S.E. 267, 1912 Ga. LEXIS 144 (1912).

Re-recordation required. — The record of a mortgage defectively attested or probated amounts to no record of it. If the mortgage afterwards be attested so as to entitle it to record, it must be recorded anew in order for it to be constructive notice. The entry of the name of the new attesting official upon the old record is improper and will not suffice. Donalson v. Thomason, 137 Ga. 848, 74 S.E. 762, 1912 Ga. LEXIS 169 (1912); Nalley Chevrolet, Inc. v. California Bank, 100 Ga. App. 197, 110 S.E.2d 577, 1959 Ga. App. LEXIS 572 (1959).

If a mortgage containing a power of sale is duly recorded, it may be exercised as against the mortgagor and those claiming under the mortgagor, either by deed, or as purchasers at a judicial sale, under process to which the mortgage is superior

in its lien. Calloway v. People's Bank, 54 Ga. 572, 1875 Ga. LEXIS 264 (1875).

Record as between parties. — Generally, as among themselves, the priority of mortgage liens is fixed by the date of the record, in the absence of the elements of notice. Durden v. Aycock Bros., 13 Ga. App. 420, 79 S.E. 213, 1913 Ga. App. LEXIS 183 (1913).

OPINIONS OF THE ATTORNEY GENERAL

Purpose of section. — The purpose of O.C.G.A. § 44-14-35 is to provide protection against third parties. 1950-51 Ga. Op. Att'y Gen. 113.

RESEARCH REFERENCES

C.J.S.

59 C.J.S., Mortgages, § 192 et seq.

ALR.

Priority as between judgment lien and unrecorded mortgage, 4 A.L.R. 434.

Priority were senior instrument affecting real property is recorded after execution but before recording of junior instrument, 32 A.L.R. 344.

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

Who may take advantage of failure to renew real estate mortgage as provided by statute, 97 A.L.R. 739.

Mortgagee's release of mortgagor's personal liability by dealings with purchaser of part of mortgaged property who had assumed mortgage debt as affecting lien of mortgage upon other which has been conveyed by mortgagor to third person, 101 A.L.R. 618.

Constitutionality of retroactive statute limiting time for duration or enforcement of existing mortgage, or other real estate lien, or ground rent, 158 A.L.R. 1043.

Statutes precluding enforcement of real-estate mortgage after prescribed period unless holder complies with certain conditions respecting record of amount remaining unpaid, 174 A.L.R. 652.

Necessity that mortgage covering oil and gas lease be recorded as real-estate mortgage, and/or filed or recorded as chattel mortgage, 34 A.L.R.2d 902.

Reinstatement and restoration of mortgages released or discharged without authorization, as against subsequent purchasers, lienholders, judgment creditors, and the like, without notice, 35 A.L.R.2d 948.

44-14-35.1. Property covered by mortgage or bill of sale to secure debt; mortgage or bill given to secure bond issue.

A mortgage or bill of sale to secure debt may embrace all property in possession, or to which the mortgagor or grantor has the right of possession at the time. A mortgage or bill of sale to secure debt given by a person or a corporation to a trustee or trustees to secure an issue of bonds shall, when it is expressly so stipulated therein, embrace, cover, and convey title to after-acquired property of such person or corporation. Provided, however, any public utility company, whether or not incorporated, including, without limitation, any corporation organized under or governed by the provisions of Article 4 of Chapter 3 of Title 46, may by mortgage, bill of sale to secure debt, deed to secure debt, or deed of trust, embrace, cover, convey, pledge, and encumber after-acquired property of such company, wherever located, when the instrument expressly so stipulates therein; and any such instrument when re-

corded as provided by law shall constitute notice from the time it is filed for record and shall have priority (subject to purchase money encumbrances) as against the interests of third parties with respect to after-acquired property from the time such property is acquired.

History.

Ga. L. 1899, p. 32, § 1; Civil Code 1910, § 3256; Code 1933, § 67-103; Ga. L. 1947, p. 529, § 1; Ga. L. 1961, p. 468, § 1; Code 1981, § 44-14-35.1, enacted by Ga. L. 1983, p. 3, § 33; Ga. L. 1990, p. 256, § 1; Ga. L. 1991, p. 94, § 44.

Code Commission notes.

Pursuant to Code Section 28-9-5, in 1990, "encumbrances" was substituted for "incumbrances" near the end of the third sentence.

Editor's notes.

Ga. L. 1962, p. 156, § 1, provides that any provision of Code Sections 44-14-1, 44-14-2, 44-14-4, 44-14-7 through 44-14-12, 44-14-100, and 44-14-160, and Arts. 2 and 3, Ch. 14, of this title which conflicts with T. 11 shall yield to and be superseded by T. 11. See Code Section 11-10-103.

This Code section, which is derived from the Acts listed in the historical citation, was not codified as part of the original Code enactment.

44-14-36. Registry of mortgages on property of railroads and other utilities.

(a) A mortgage, deed to secure debt, indenture, deed of trust, or other security agreement or any supplement or amendment thereto relating to real property made by a railroad corporation, electric or gas corporation, other public utility corporation, or any corporation or other entities engaged in the furnishing of telephone service or the production, transmission, or distribution of electricity or made by any receivers, trustees, or other legal officers in possession of or operating any such corporation or other entity shall be recorded on the real property records in the office of the clerk of the superior court in each county in this state in which any of the property is located. Any such security agreement or any supplement or amendment thereto shall be valid only from the time it is filed for record against subsequent creditors, grantees, purchasers, and mortgagees acting in good faith and without notice. Such instruments need not otherwise be filed or refiled except as may be provided by Chapter 3 of Title 40. To the extent that any mortgage, deed to secure debt, indenture, deed of trust, or other security agreement or any supplement or amendment thereto executed before April 8, 1968, has been filed or recorded as provided in this Code section, it need not be refiled or rerecorded under this Code section; and nothing in this Code section shall be deemed to impair the lien or effect of any such instrument executed prior to April 8, 1968, which instrument has been recorded or filed in accordance with the laws of this state applicable thereto prior to April 8, 1968.

(b) A security interest relating to fixtures and personal property of such a corporation shall be perfected as provided in Code Sections 11-9-501 through 11-9-504. Any such prior filing or recording that has been entered on the Uniform Commercial Code index for secured

transactions, where no notice of conflict of lien or notice of creditor priority has been given, shall be valid and any such instruments need not otherwise be refiled, rerecorded, or reindexed.

History.
Code 1933, § 67-108.1, enacted by Ga. L. 1964, p. 368, § 1; Ga. L. 1968, p. 1150, § 1; Ga. L. 1997, p. 970, § 1; Ga. L. 2001, p. 362, § 34.

RESEARCH REFERENCES

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

Right to enforce contractual lien or reservation of title against property owned by or purchased by municipality, 76 A.L.R. 695.

44-14-37. [Reserved] Effect of failure to record.

History.
Ga. L. 1931, p. 153, § 1; Code 1933, § 67-109; repealed by Ga. L. 2015, p. 937, § 5/HB 322, effective July 1, 2015.

Editor's notes.
Ga. L. 2015, p. 937, § 5/HB 322 repealed and reserved this Code section, effective July 1, 2015.

44-14-38. [Reserved] Admission of mortgages into evidence.

History.
Orig. Code 1863, § 1960; Code 1868, § 1948; Code 1873, § 1958; Code 1882, § 1958; Civil Code 1895, § 2782; Civil Code 1910, § 3261; Code 1933, § 67-110; repealed by Ga. L. 2011, p. 99, § 84/HB 24, effective January 1, 2013.

Editor's notes.
Ga. L. 2011, p. 99, § 84/HB 24, repealed and reserved this Code section, effective July 1, 2013.

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

44-14-39. Effect of defective record as notice.

A mortgage which is recorded in an improper office or without due attestation or probate or which is so defectively recorded as not to give notice to a prudent inquirer shall not be held to be notice to subsequent bona fide purchasers. A mere formal mistake in the record shall not vitiate it.

History.
Orig. Code 1863, § 1961; Code 1868, § 1949; Code 1873, § 1959; Code 1882, § 1959; Civil Code 1895, § 2729; Civil Code 1910, § 3262; Code 1933, § 67-111.

Law reviews.
For article, "Eleventh Circuit Survey: January 1, 2013 - December 31, 2013: Casenote: The Decline and Fall of Constructive Notice," see 65 Mercer L. Rev. 1203 (2014).

JUDICIAL DECISIONS

Duty of mortgagee. — O.C.G.A. § 44-14-39 makes it the duty of a mortgagee to see that the mortgage is duly attested for record; and if the mortgagee fails in this regard, then the mortgage is postponed to younger liens. Andrews v. Mathews, 59 Ga. 466, 1877 Ga. LEXIS 305 (1877); Richards & Bro. v. Myers & Marcus, 63 Ga. 762, 1897 Ga. LEXIS 5 (1897); New England Mtg. Security v. Ober & Sons, 84 Ga. 294, 10 S.E. 625, 1889 Ga. LEXIS 249 (1889); Cottrell & Sons v. Merchants' & Mechanics' Bank, 89 Ga. 508, 15 S.E. 944, 1892 Ga. LEXIS 399 (1892); Southern Iron & Equip. Co. v. Voyles, 138 Ga. 258, 75 S.E. 248, 1913D Am. Ann. Cas. 369 (1912).

Takes effect upon filing. — Where a deed which appears on its 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 O.C.G.A. § 44-14-39 does not contemplate that an erroneous performance shall operate to defeat the grantee who has properly filed the deed. Thomas v. Hudson, 190 Ga. 622, 10 S.E.2d 396, 1940 Ga. LEXIS 555 (1940).

Apparent defect. — Although a mortgage on realty may have been properly attested by two witnesses, yet where it is so imperfectly recorded as to show attestation by one witness only, such record is no record and is no notice to third persons without notice, under O.C.G.A. § 44-14-39. Brown v. Aaron, 20 Ga. App. 592, 93 S.E. 258, 1917 Ga. App. LEXIS 980 (1917).

Not constructive notice. — The record of a mortgage, made without due attestation or probate, will not be held to be constructive notice to a subsequent bona fide purchaser under O.C.G.A. § 44-14-39. Donalson v. Thomason, 137 Ga. 848, 74 S.E. 762, 1912 Ga. LEXIS 169 (1912); Winn v. Herring-Hall-Marvin Safe Co., 33 Ga. App. 419, 126 S.E. 879, 1925 Ga. App. LEXIS 801 (1925).

Memorandum of trust indenture could not provide constructive notice of the existence of a mortgage and could not give rise to inquiry notice since the debtor did not sign the memorandum, the memorandum did not fall into any of the recognized categories of documents that could be recorded under the Georgia Code, and the memorandum was not properly attested. Detention Mgmt., LLC v. UMB Bank, NA (In re Mun. Corr., LLC), 501 B.R. 119, 2013 Bankr. LEXIS 4269 (Bankr. N.D. Ga. 2013).

Evidence did not demand a finding of actual notice. — After a jury entered a special verdict finding that the corporation had notice of an earlier deed securing property in the corporation's declaratory judgment action to determine the priority of its deed over the earlier deed, the corporation's motion for a new trial was properly granted on the ground that the recordation of the earlier deed was so defective as to provide no notice under O.C.G.A. § 44-14-39; the trial court did not abuse its discretion in granting a new trial, even though its grant of judgment notwithstanding the verdict was improper on the ground that evidence supported the jury's verdict, because the evidence, construed in the corporation's favor as required under O.C.G.A. § 5-5-20, did not absolutely demand a verdict that the corporation had actual notice of the earlier deed. Page v. McKnight Constr., 282 Ga. App. 571, 639 S.E.2d 381, 2006 Ga. App. LEXIS 1469 (2006).

Purchaser giving notes. — Where a purchaser buys land without notice of any mortgage thereon, and gives negotiable notes therefor, which are negotiated by the payee, so as to cut off any defense, before the purchaser receives notice of the prior lien, and the price paid is a full and fair consideration, such person will be deemed to be a bona fide purchaser, and as such entitled to protection, under O.C.G.A. § 44-14-39. Donalson v. Thomason, 137 Ga. 848, 74 S.E. 762, 1912 Ga. LEXIS 169 (1912).

Purchaser paying purchase money. — Actual payment of the purchase money, or what is equivalent thereto, before notice of a defectively recorded mortgage, is necessary to the protection of a subsequent purchaser under O.C.G.A. § 44-14-39. If there has

been a partial payment (or what is equivalent) of the purchase money before notice, the purchaser will be entitled to protection to that extent; but appropriate equitable pleadings are necessary for this purpose. Donalson v. Thomason, 137 Ga. 848, 74 S.E. 762, 1912 Ga. LEXIS 169 (1912).

Erroneous indexing or entry of record. — Due filing for record of a valid mortgage affords good constructive notice of the instrument as to subsequent purchasers even though the entry is erroneously indexed and the record erroneously made on the wrong books. NCR Co. v. Sikes, 94 Ga. App. 391, 94 S.E.2d 782, 1956 Ga. App. LEXIS 553 (1956).

Erroneous performance by clerk. — The actual recording is the duty of the clerk, and O.C.G.A. § 44-14-39 does not contemplate that an erroneous performance of such duty shall operate to defeat the grantee who has properly filed the deed, and this is true even though it be assumed, as alleged by the petition, that the prudent inquiry and search by the attorney for the purchaser of the record books would not have disclosed the record of the mortgage. NCR Co. v. Sikes, 94 Ga. App. 391, 94 S.E.2d 782, 1956 Ga. App. LEXIS 553 (1956).

Liability of clerk. — The theory of the rule is that if any injury is done by a failure to record a paper, or by the improper recording of it, the clerk will be liable to the injured party for a breach of duty, and the filing puts the world on notice as to the contents of papers filed for record, whether they are recorded or not. This law, however, can only apply where there is a proper filing of the paper to be recorded and a filing under circumstances where an improper filing and indexing, and an improper recording could be charged to be 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 Ga. App. LEXIS 463 (1939).

Recording in wrong court. — The recording of bills of sale in a court other than in the residence of the maker at the time of its execution is equivalent to no record. It will remain valid against persons executing it, but will be postponed to all liens, created or obtained or purchased, made prior to legal record thereof. Commercial Bank v. Pharr, 75 Ga. App. 364, 43 S.E.2d 439, 1947 Ga. App. LEXIS 544 (1947).

Valid between parties. — A 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 Ga. App. LEXIS 909 (1961).

Re-recording required. — The record of a mortgage defectively attested or probated amounts to no record of it. If the mortgage afterwards be attested so as to entitle it to record, it must be recorded anew in order for it to be constructive notice under O.C.G.A. § 44-14-39. The entry of the name of the new attesting official upon the old record is improper and will not suffice. Donalson v. Thomason, 137 Ga. 848, 74 S.E. 762, 1912 Ga. LEXIS 169 (1912).

Attestation by mortgagee's attorney. — An affidavit, probating a mortgage, taken before the attorney of the mortgagee, who is a Notary Public, is not a legal affidavit, and a mortgage recorded on such probate is not legally recorded. Nichols v. Hampton, 46 Ga. 253, 1872 Ga. LEXIS 46 (1872).

Attestation by officer of corporation mortgagee. — A mortgage attested by a notary public, who is an officer of the corporation to which it is given, is not properly executed, and therefore not admissible for record; and a record of such a mortgage is not constructive notice to persons dealing with the mortgagor. Barrow v. E. Tris Napier Co., 16 Ga. App. 309, 85 S.E. 267, 1915 Ga. App. LEXIS 601 (1915).

Mortgage filed with superior court clerk. — The lien of a mortgage filed in the office of the clerk of the superior court of the county where the land lies, 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 Ga. App. LEXIS 416 (1913).

Security deed. — The record of a security deed on insufficient attestation or probate is equal to no record at all, under

O.C.G.A. § 44-14-39. In re Hammett, 286 F. 392, 1923 U.S. Dist. LEXIS 1788 (D. Ga. 1923).

Conditional sales. — The same rules govern the priority of conditional bills of sale, as affected by registration under O.C.G.A. § 44-14-39, as govern the registration of mortgages. Phillips & Crew Co. v. Drake, 13 Ga. App. 764, 79 S.E. 952, 1913 Ga. App. LEXIS 351 (1913).

A retention title contract signed by the purchaser in the purchaser's trade name personally and in own individual name is entitled to record where it otherwise meets the requirements of O.C.G.A. § 44-14-39, and after being duly recorded constitutes constructive notice of the right and interest of the vendor therein as against the purchase of the property at a judicial sale on execution issued against the purchaser in the individual capacity. NCR Co. v. Sikes, 94 Ga. App. 391, 94 S.E.2d 782, 1956 Ga. App. LEXIS 553 (1956).

An 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 Ga. App. LEXIS 510 (1937).

Effect on admissibility. — Fact that the records were perhaps not indexed or otherwise set up so that one could thereby locate the record of retention title transaction under the name of the individual signing the instrument did not amount to a defective recording of an otherwise valid instrument so as to allow the same to be excluded from evidence. NCR Co. v. Sikes, 94 Ga. App. 391, 94 S.E.2d 782, 1956 Ga. App. LEXIS 553 (1956).

Partial repeal. — O.C.G.A. § 44-14-39, as it appeared prior to 1889, was necessarily repealed insofar as it conflicted with the Act of 1889 (Ga. L. 1889, p. 106), O.C.G.A. § 44-2-2. Buchanan v. Georgia Acceptance Co., 61 Ga. App. 476, 6 S.E.2d 162, 1939 Ga. App. LEXIS 463 (1939).

RESEARCH REFERENCES

C.J.S.

59 C.J.S., Mortgages, § 197.

ALR.

Effect of purported subscribing witness's denial or forgetfulness of signature by mark, 17 A.L.R. 1267.

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

Right of one claiming through heir, devisee, or personal representative to protection against unrecorded conveyance or mortgage by ancestor or testator, 65 A.L.R. 360.

Right of executor or administrator of insolvent estate to take advantage of failure to record, or file, or refile a conveyance or mortgage executed by his decedent, 91 A.L.R. 299.

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

Inconsistency between description of land in instruments conveying same or affecting title thereto and description in another instrument referred to therein, 134 A.L.R. 1041.

Omission of amount of debt in mortgage or in record thereof (including general description without stating amount) as affecting validity of mortgage, its operation as notice, or its coverage respect to debts secured, 145 A.L.R. 369.

Statutes regarding filing or refiling of chattel mortgage as requiring disclosure of assignment of mortgage, 152 A.L.R. 1097.

Sufficiency of certificate of acknowledgment, 25 A.L.R.2d 1124.

Reinstatement and restoration of mortgages released or discharged without authorization, as against subsequent purchasers, lienholders, judgment creditors, and the like, without notice, 35 A.L.R.2d 948.

44-14-40. Probate of mortgages.

All the rules prescribed for the probate of deeds to land when the

witnesses are dead, insane, or removed from the state and all the rules prescribed for the acknowledgment before or attestation by consuls or commissioners shall apply to the probate of mortgages.

History.
Orig. Code 1863, § 1963; Code 1868, § 1951; Code 1873, § 1961; Code 1882, § 1961; Civil Code 1895, § 2731; Civil Code 1910, § 3264; Code 1933, § 67-112.

RESEARCH REFERENCES

ALR.
Sufficiency of certificate of acknowledgment, 29 A.L.R. 919.

Right of one claiming through heir, devisee, or personal representative to protection against unrecorded conveyance or mortgage by ancestor or testator, 65 A.L.R. 360.

Right of executor or administrator of insolvent estate to take advantage of failure to record, or file, or refile a conveyance or mortgage executed by his decedent, 91 A.L.R. 299.

Sufficiency of certificate of acknowledgment, 25 A.L.R.2d 1124.

44-14-41. Tacking of mortgages.

There shall be no tacking of mortgages.

History.
Orig. Code 1863, § 1964; Code 1868, § 1952; Code 1873, § 1962; Code 1882, § 1962; Civil Code 1895, § 2732; Civil Code 1910, § 3265; Code 1933, § 67-113.

RESEARCH REFERENCES

Am. Jur. 2d.
55 Am. Jur. 2d, Mortgages, § 458.

44-14-42. Mortgages to sureties and guarantors.

Mortgages may be taken by sureties and guarantors to indemnify them against loss.

History.
Orig. Code 1863, § 1965; Code 1868, § 1953; Code 1873, § 1963; Code 1882, § 1963; Civil Code 1895, § 2733; Civil Code 1910, § 3266; Code 1933, § 67-114.

JUDICIAL DECISIONS

O.C.G.A. § 44-14-42 is not a limitation, and it does not prevent a surety or endorser from taking other security. Richey v. First Nat'l Bank, 180 Ga. 751, 180 S.E. 740, 1935 Ga. LEXIS 550 (1935).

RESEARCH REFERENCES

ALR.
Liability of grantee assuming mortgage debt to mortgagee or one in privity with him, 21 A.L.R. 439; 47 A.L.R. 339.

Liability of grantee assuming mortgage debt, to grantor, 21 A.L.R. 504; 76 A.L.R. 1191; 97 A.L.R. 1076.

Liability to mortgagee of insurer which

pays loss to mortgagor, in absence of loss-payable clause, 21 A.L.R. 1464.

Valuation of "security" which must be deducted from claim of holder of mortgage, or interest in mortgage, to determine amount allowable on liquidation of mortgage guaranty company, 115 A.L.R. 621.

Mortgages effect upon obligation of guarantor or surety of statute forbidden, or restricting deficiency judgment, 49 A.L.R.3d 554.

44-14-42.1. Redemption of property by mortgagor.

If the possession of real property shall be given to the mortgagee, the mortgagor may redeem at any time within ten years from the last recognition by the mortgagee of such right of redemption.

History.

Code 1863, § 1966; Code 1868, § 1954; Code 1873, § 1964; Code 1882, § 1964; Civil Code 1895, § 2734; Civil Code 1910, § 3267; Code 1933, § 67-115; Code 1981, § 44-14-42.1, enacted by Ga. L. 1984, p. 22, § 44.

History of Section.

The provisions of this Code section were previously enacted in substantially similar form by the Acts and codes listed in the historical citation. However, those provisions were not originally enacted as part of the O.C.G.A. by the Code enactment Act (Ga. L. 1981, Ex. Sess., p. 8).

RESEARCH REFERENCES

Am. Jur. Pleading and Practice Forms.

18 Am. Jur. Pleading and Practice Forms, Mortgages, § 250.

ALR.

Mortgages: effect on subordinate lien of redemption by owner or assignee from sale under prior lien, 56 A.L.R.4th 703.

44-14-43. Foreclosure of mortgage after note barred by limitations.

The fact that a note or other evidence of debt is barred does not prevent a creditor from thereafter availing himself of the mortgage or other security unless the mortgage or other security itself is barred.

History.

Civil Code 1895, § 2735; Civil Code 1910, § 3268; Code 1933, § 67-116.

History of Section.

This Code section is derived from the decisions in Elkins v. Edwards, 8 Ga. 325 (1849) and Reid v. Flippen, 47 Ga. 273 (1872).

JUDICIAL DECISIONS

Purchase-money notes. — The fact that notes given by a vendee to a vendor for the purchase-money of land have become barred does not extinguish the title of the vendor; and the latter can, although the purchase-money notes are barred, assert title by claim to the land until the purchase-money is paid in full. Myers v. Warrenfells, 153 Ga. 648, 113 S.E. 180, 1922 Ga. LEXIS 141 (1922).

Transfer of insurance policy as security. — Where a policy of insurance was transferred as security for a debt, the fact that the remedy on the latter was barred did not destroy the debt itself, nor did it prevent the holder of the collateral from

enforcing rights thereunder. Conway v. Caswell, 121 Ga. 254, 48 S.E. 956, 1904 Ga. LEXIS 101 (1904).

Unsealed promissory note. — Even though remedies upon an unsealed promissory note may have been barred, the debtor might still proceed under a mortgage or other security for the debt, executed under seal, until after the lapse of 20 years; and this is applicable to a foreclosure as an equitable mortgage of a deed to secure debt. Sammons v. Nabers, 186 Ga. 161, 197 S.E. 284, 1938 Ga. LEXIS 583 (1938).

Rights under security deed. — Provided the right to foreclose or otherwise recover land conveyed by a security deed is not barred by the provisions of O.C.G.A. § 44-14-43, even if the evidence at trial revealed that an action to collect the debt was barred by the statute of limitations, such would not prevent the grantee from exercising rights under the security deeds. Brinson v. McMillan, 263 Ga. 802, 440 S.E.2d 22, 1994 Ga. LEXIS 97 (1994).

Security deed not referring to debt. — A security deed which does not refer in any way to the debt to secure which it was given, or furnish any evidence of its existence, cannot be foreclosed as an equitable mortgage, and a money judgment obtained thereon, if the obligation secured by the deed is barred by the statute of limitations. Duke v. Story, 116 Ga. 388, 42 S.E. 722, 1902 Ga. LEXIS 111 (1902).

Bar of action on account was applied though the account was for goods sold under sealed contract retaining title in seller until payment. Hinson v. Davis, 30 Ga. App. 356, 118 S.E. 481, 1923 Ga. App. LEXIS 455 (1923).

Enforcing equitable lien arising from absolute conveyance. See Story v. Doris, 110 Ga. 65, 35 S.E. 314, 1900 Ga. LEXIS 326 (1900).

RESEARCH REFERENCES

Am. Jur. 2d.
55 Am. Jur. 2d, Mortgages, § 687.

44-14-44. Sale of mortgaged land under other process; claiming proceeds of sale.

Subject to the lien of the mortgage, mortgaged property may be sold under other process. If the mortgage is foreclosed, the mortgagee may place his execution in the hands of the officer making the sale, may cause the unencumbered title to be sold, and may claim the proceeds according to the date of his lien.

History.
Orig. Code 1863, § 1969; Code 1868, § 1957; Code 1873, § 1967; Code 1882, § 1967; Civil Code 1895, § 2741; Civil Code 1910, § 3274; Code 1933, § 67-118.

JUDICIAL DECISIONS

O.C.G.A. § 44-14-44 does not apply in case of two mortgages, unless both mortgages are given by the same person on the same property. Pasley v. Beland, 111 Ga. 828, 36 S.E. 296, 1900 Ga. LEXIS 771 (1900); Crawford County Bank v. Britt-Hightower Co., 17 Ga. App. 804, 88 S.E. 691, 1916 Ga. App. LEXIS 939 (1916); Stanton v. Hargett, 93 Ga. App. 508, 92 S.E.2d 328, 1956 Ga. App. LEXIS 783 (1956).

Option of holder of mortgage. — Under O.C.G.A. § 44-14-44 the holder of the mortgage has the option to place mortgage fi. fa. in the hands of the officer, cause the title unincumbered to be sold, and claim the proceeds, according to the date of the lien, or else the mortgagor may

simply allow the sale to proceed subject to the lien of mortgage. Kirby v. Reese, 69 Ga. 452, 1882 Ga. LEXIS 243 (1882). See also Toney v. Puckett, 18 Ga. App. 514, 89 S.E. 1102, 1916 Ga. App. LEXIS 1076 (1916).

Rights of holder of unforeclosed mortgage. — The holder of an unforeclosed mortgage cannot claim at law the balance of a fund arising from the sale of the property covered by the mortgage, after paying the judgment under which it was sold, and which was older than the mortgage, but the holder can make such a claim in equity, and this could be done on a money rule, with proper allegations. Baker & Hall v. Gladden, 72 Ga. 469, 1884 Ga. LEXIS 281 (1884).

The holder of an unforeclosed mortgage on property brought to sale under a general judgment junior to the mortgage, could not, without the consent of the mortgagor and the plaintiff in execution, cause the entire estate to be sold and afterwards claim the fund in the sheriff's hands. Hynds Mfg. Co. v. Oglesby & Meador Grocery Co., 93 Ga. 542, 21 S.E. 63, 1893 Ga. LEXIS 476 (1893).

An unforeclosed mortgage cannot be the basis of a claim for money on a rule to distribute, unless it be shown that the holder of the mortgage would otherwise be remediless. De Vaughn v. Byrom, 110 Ga. 904, 36 S.E. 267, 1900 Ga. LEXIS 657 (1900).

Lien of mortgage superior to subsequent judgment. — The lien of a mortgage was superior to a subsequent judgment, in a distribution of proceeds of the sale under O.C.G.A. § 44-14-44. Ragan v. Coley & Bro., 4 Ga. App. 421, 61 S.E. 862, 1908 Ga. App. LEXIS 321 (1908).

Illegal foreclosure. — A fi. fa. based on an illegal foreclosure has no standing in court and cannot take proceeds of the sale. Rich v. Colquitt, 65 Ga. 113, 1880 Ga. LEXIS 113 (1880).

Setting up outstanding title in third person. — One claiming property under levy cannot defeat the plaintiff in execution by setting up outstanding title in a third person; and it is equally true that one claiming funds by intervention in a rule to distribute money, derived from the sale of property under execution, cannot support such a claim by showing that title to the property was vested in some person other than the defendant in execution. Crawford County Bank v. Britt-Hightower Co., 17 Ga. App. 804, 88 S.E. 691, 1916 Ga. App. LEXIS 939 (1916).

Lien of older judgments divested by sale on foreclosure. — The sale of property under an execution issued upon the foreclosure of a mortgage thereon, will divest the lien of a judgment against the mortgagor of older date than such mortgage, and will pass to the purchaser at such sale the title to the mortgaged property freed from the encumbrance of the lien imposed by the older judgment. Brunswick Sav. & Trust Co. v. National Bank, 102 Ga. 766, 29 S.E. 688 (1898).

Sale of equity of redemption. — The equity of redemption in mortgaged property in this state is subject to levy and sale. Winter v. Garrard, 7 Ga. 183, 1849 Ga. LEXIS 120 (1849); Harwell v. Fitts, 20 Ga. 723, 1856 Ga. LEXIS 138 (1856); Tarver v. Ellison, 57 Ga. 54, 1876 Ga. LEXIS 19 (1876); Sims v. Jones, 158 Ga. 384, 123 S.E. 614, 1924 Ga. LEXIS 160 (1924).

When the cost fi. fa. was levied upon land to the decedent in order to satisfy that fi. fa., only the equity of redemption could be sold. Johnson v. Goins, 157 Ga. 430, 121 S.E. 830, 1924 Ga. LEXIS 67 (1924).

Tax sale. — Where property is sold under a tax fi. fa., upon which there is a preexisting mortgage, only the equity of redemption can be sold. Doane v. S.B. Chittenden & Co., 25 Ga. 103, 1858 Ga. LEXIS 24 (1858); Johnson v. Goins, 157 Ga. 430, 121 S.E. 830, 1924 Ga. LEXIS 67 (1924).

Sale under junior general judgment. — Where it is undisputed that before and at the time of sale of property the attorney for the mortgagee gave all prospective and actual bidders upon the property, which was being sold under a junior general judgment, public notice that the property was being sold subject to the lien of a senior mortgage fi. fa. which the mortgagee held, the purchaser at the sale acquired only the equity of redemption held by the defendant in the junior fi. fa. Garrett v. Fields, 22 Ga. App. 381, 95

S.E. 1014, 1918 Ga. App. LEXIS 349 (1918).

Effect of sale of unrecorded senior mortgage. — If a senior unrecorded mortgage is foreclosed, and the mortgagees become the purchasers at the sale thereunder, they obtained only the equity of redemption under a junior recorded mortgage, and the holder of such junior mortgage could thereafter foreclose it and subject the property to levy and sale thereunder; the junior mortgagee is not compelled to look to the proceeds of the sale under the senior mortgage fi. fa. Kelly & Bros. v. Shepherd, 79 Ga. 706, 4 S.E. 880, 1888 Ga. LEXIS 34 (1888).

Equitable pleadings to foreclose as amendment to claim. — The claimant of property levied on under a judgment cannot, by equitable pleading offered as an amendment to the claim, foreclose a mortgage against the defendant in execution and thereupon obtain a decree for the satisfaction of such mortgage out of the proceeds of the property when sold under O.C.G.A. § 44-14-44. Cabot v. Armstrong, 100 Ga. 438, 28 S.E. 123, 1897 Ga. LEXIS 80 (1897).

RESEARCH REFERENCES

Am. Jur. 2d.

55 Am. Jur. 2d, Mortgages, § 778.

C.J.S.

59 C.J.S., Mortgages, § 457.

ALR.

Right of chattel mortgagee in respect of proceeds of sale of mortgaged property by mortgagor, 36 A.L.R. 1379.

Liability of grantee assuming mortgage debt, to grantor, 76 A.L.R. 1191; 97 A.L.R. 1076.

Chattel mortgagee's consent to sale of mortgaged property as waiver of lien, 97 A.L.R. 646.

Personal liability to mortgagor, as distinguished from mortgagee, of vendee of mortgaged premises who does not in terms assume or agree to pay mortgage, 111 A.L.R. 1114.

Sale in inverse order of alienation, 131 A.L.R. 4.

Right of true owner to recover proceeds of sale or lease of real property made by another in the belief that he was the owner of the property, 133 A.L.R. 1443.

Right to attack voidable sale under power in mortgage, as personal to mortgagor (or owner of equity of redemption), or as exercisable by his heir, grantee, creditor, or other person claiming under or through him, 143 A.L.R. 528.

Extent of exemption of proceeds of voluntary sale of homestead as affected by lien or encumbrance, 161 A.L.R. 1256.

44-14-45. Forthcoming bond by purchaser of mortgaged personalty; affidavit of mortgagee.

Purchasers at public sales of personal property subject to the lien of a mortgage shall give bond and security in double the value of the property to the officer making the sale and conditioned not to remove the property from the state and for its forthcoming answer to the lien; provided, however, that prior to the sale the mortgagee or his or her agent shall file with the officer an affidavit stating the amount due on the mortgage and that he or she expects the loss of the property unless the bond is taken. On failure to give the bond, the property shall be resold at the risk of the purchaser.

History.

Laws 1830, Cobb's 1851 Digest, p. 513; Code 1863, § 1970; Code 1868, § 1958; Code 1873, § 1968; Code 1882, § 1968; Civil Code 1895, § 2742; Civil Code 1910, § 3275; Code 1933, § 67-119; Ga. L. 2002, p. 415, § 44.

RESEARCH REFERENCES

ALR.
Personal liability to mortgagor, as distinguished from mortgagee, of vendee of mortgaged premises who does not in term assume or agree to pay mortgage, 111 A.L.R. 1114.

44-14-46. When mortgage fi. fa. may claim proceeds of sale.

If other writs of fieri facias are levied on mortgaged property and the property is sold, the mortgage fi. fa. may nevertheless claim the proceeds of the sale if its lien is superior.

History.
Orig. Code 1863, § 3877; Code 1868, § 3897; Code 1873, § 3973; Code 1882, § 3973; Civil Code 1895, § 2758; Civil Code 1910, § 3291; Code 1933, § 67-120.

RESEARCH REFERENCES

ALR.
Validity of chattel mortgage where mortgagor is given right to sell, 73 A.L.R. 236.
Personal liability to mortgagor, as distinguished from mortgagee, of vendee of mortgaged premises who does not in term assume or agree to pay mortgage, 111 A.L.R. 1114.
Extent of exemption of proceeds of voluntary sale of homestead as affected by lien or encumbrance, 161 A.L.R. 1256.

44-14-47. Sale of mortgaged property without foreclosure and claim by mortgagee.

If a mortgage on realty or personalty is not foreclosed and the equity of redemption is levied on by other writs of fieri facias by consent of the mortgagor and mortgagee and the plaintiff in the fi. fa. levied, the entire estate may be sold and the mortgagee may claim under his lien in the same manner as if his mortgage were foreclosed.

History.
Orig. Code 1863, § 3878; Code 1868, § 3898; Code 1873, § 3974; Code 1882, § 3974; Civil Code 1895, § 2759; Civil Code 1910, § 3292; Code 1933, § 67-121.

JUDICIAL DECISIONS

Necessity for consent. — Where the equity of redemption is levied on, it requires the consent of the mortgagor, mortgagee, and plaintiff in fi. fa. under O.C.G.A. § 44-14-47, to sell the entire interest in the property so as to free the same from the lien of the mortgage. Milner v. I.H. Pitts & Son, 117 Ga. 794, 45 S.E. 67, 1903 Ga. LEXIS 338 (1903). See also Hynds Mfg. Co. v. Oglesby & Meador Grocery Co., 93 Ga. 542, 21 S.E. 63, 1893 Ga. LEXIS 476 (1893); De Vaughn v. Byrom, 110 Ga. 904, 36 S.E. 267, 1900 Ga. LEXIS 657 (1900).

Reason for rule. — The reason for the consent rule is patent. In the first place, the mortgage creditor with an unforeclosed mortgage is not in a position to assert a claim to the fund. Generally, a creditor cannot claim the proceeds of a sale, when the creditor has not the power personally to enforce a sale. Again, the debtor has the right under the law to insist upon a foreclosure before the prop-

erty can be seized to satisfy the mortgage, and has the privilege of redeeming the property at any time pending the proceedings to foreclose and to sell. Hence, O.C.G.A. § 44-14-47 requires the debtor's consent, as well as the mortgagee's, before a sale can divest this special lien. Brunswick Sav. & Trust Co. v. National Bank, 102 Ga. 776, 29 S.E. 688, 1898 Ga. LEXIS 757 (1898).

Consent need not be in writing. — It is not necessary, under O.C.G.A. § 44-14-47, that the consent of the mortgagor, mortgagee and plaintiff in fi. fa., levied, to sell the entire fee in the land levied on, should be in writing. D. Goode & Son v. Rawlings, 44 Ga. 593, 1872 Ga. LEXIS 371 (1872).

Inapplicable to sales by receivers. — O.C.G.A. § 44-14-47 does not apply to sales by receivers, the statute being restricted in its operations to sales where the equity of redemption is levied on under an execution. McLaughlin v. Taylor, 115 Ga. 671, 42 S.E. 30, 1902 Ga. LEXIS 525 (1902).

Mortgagee abandoning lien and claiming proceeds. — Until foreclosed, a younger fi. fa. can sell only the equity of redemption, unless the mortgagee abandons the lien and suffers the entire property to be sold, coming in for distribution of the proceeds. Except by agreement, the mortgagee cannot claim the proceeds of such sale. Harwell v. Fitts, 20 Ga. 723, 1856 Ga. LEXIS 138 (1856).

Claiming money arising from sale of property not mortgaged. — Mortgagees may waive the lien of their mortgages and claim the money with consent of mortgagor, without foreclosure, but they cannot claim, against the rights of other judgment creditors, even with the consent of the defendant, money arising from the sale of property not mortgaged. Byars v. Bancroft, Betts & Marshall, 22 Ga. 34, 1857 Ga. LEXIS 105 (1857).

Sale of entire estate after sale of equity of redemption. — Under O.C.G.A. § 44-14-47, the mortgagor cannot, after a sale of the equity of redemption by joining in a consent with the mortgagee, lawfully cause the entire estate in the land to be sold and conveyed under another common-law judgment in favor of the mortgagee against the mortgagor. Hitch v. Bailey, 115 Ga. 891, 42 S.E. 252, 1902 Ga. LEXIS 639 (1902).

Sale by virtue of execution on older judgment. — If there be not money enough raised from the sale of the equity of redemption, or interest in the land subject to the mortgage, to pay off the judgment which is older than the mortgage, an execution issued upon such older judgment may be levied upon the residue of the estate in the land, and being older than the mortgage, it will sell the land free from its incumbrance, and the title of the purchaser will be good against the mortgage. Tarver v. Ellison, 57 Ga. 54, 1876 Ga. LEXIS 19 (1876).

Lien of mortgage older than judgment. — A mortgagee sued the mortgage notes to judgment and had the execution levied on the premises covered by the mortgage. By virtue of an agreement between the mortgagor and mortgagee, who was also plaintiff in fi. fa., the entire estate was sold; and it brought full value. Just prior to the sale a third person lodged with the sheriff a general common-law judgment against the mortgagor, of date younger than the mortgage but older than the judgment based on the mortgage debt, and ordered the sheriff to hold up the fund arising from the sale. It was held, that on a rule brought against the sheriff for a distribution of the fund, the mortgage should first be paid and the residue applied to judgment of the intervenor. Both judgment creditors have liens, but the lien of the mortgage is older, and is therefore entitled to priority. Hughes v. Mount Vernon Bank, 4 Ga. App. 23, 60 S.E. 809, 1908 Ga. App. LEXIS 186 (1908).

Estoppel to deny consent. — Where the holder of the subsequent mortgage failed to question the legal right of the other holder to intervene in a proceeding for distribution of process from a foreclosure without foreclosing the holder's mortgage, and where the jury found against the holder of the subsequent mortgage, and judgment was entered in favor of the other holder, the holder of the subsequent mortgage will not be heard to insist for the first time that it is illegal because the earlier mortgage had not been foreclosed and no equitable reason for

claiming the fund derived from a sale under the subsequent mortgage was set out in the intervention. Bank of Cumming v. Goolsby, 34 Ga. App. 217, 129 S.E. 8, 1925 Ga. App. LEXIS 156 (1925).

Sale by virtue of execution on junior judgment. — The sale of land by virtue of execution issued on a judgment junior to a mortgage, not foreclosed, conveys to the purchaser only the property sold, which, in this state, is the equity of redemption, or its equivalent, which is the estate in the land subject to the mortgage debt, and such sale divests the lien of a judgment older than the mortgage, only upon that interest or estate in the land which is sold. Tarver v. Ellison, 57 Ga. 54, 1876 Ga. LEXIS 19 (1876).

Retention of title note. — Where a firm bought certain mules, and gave to the vendors a purchase-money note in which it was provided that the title should remain in the latter until payment and the mules were sold under later common-law executions, the facts do not make a case falling within O.C.G.A. § 44-14-47. Browder, Manget & Co. v. Blake & Madden, 135 Ga. 71, 68 S.E. 837, 1910 Ga. LEXIS 412 (1910).

To deprive mortgagees of the priority acquired at a sale by consent, the other creditors must show clearly a superior equity. Baker & Wilcox v. Wimpee, 22 Ga. 69, 1857 Ga. LEXIS 114 (1857).

RESEARCH REFERENCES

ALR.

Chattel annexed to realty as subject to prior mortgage, 41 A.L.R. 601; 88 A.L.R. 1114; 99 A.L.R. 144.

Validity of chattel mortgage where mortgagor is given right to sell, 73 A.L.R. 236.

Sale in inverse order of alienation, 131 A.L.R. 4.

44-14-48. Foreclosure by one of several mortgagees; control and distribution of proceeds by court.

If there are several mortgages of equal rank or if separate amounts due to distinct persons are embraced in the same mortgage and one mortgagee forecloses, the court will control the proceeds of the sale for distribution to the several mortgagees according to their claims.

History.

Orig. Code 1863, § 1968; Code 1868, § 1956; Code 1873, § 1966; Code 1882, § 1966; Civil Code 1895, § 2740; Civil Code 1910, § 3273; Code 1933, § 67-122.

History of Section.

This Code section is derived in part from the decision in Bass v. West Point Whsle. Grocery Co., 5 Ga. App. 746, 62 S.E. 1004 (1908).

JUDICIAL DECISIONS

Evidence showing single mortgage in fact several. — Where a single mortgage is taken for two separate amounts due to two distinct parties, in legal effect it is equivalent to two mortgages taken contemporaneously upon the same property; and upon a suit by one of the parties secured thereunder against the other, it is permissible to show that the mortgage was collected as to only one of the amounts secured, and not as to the other. Bass v. West Point Whsle. Grocery Co., 5 Ga. App. 746, 62 S.E. 1004, 1908 Ga. App. LEXIS 141 (1908).

RESEARCH REFERENCES

ALR.

Foreclosure of one mortgage as affecting another mortgage on the property held by the same party, 39 A.L.R. 1485.

Priority as between holders of different notes or obligations secured by the same mortgage or mortgages executed contemporaneously, 108 A.L.R. 485; 115 A.L.R. 40.

Sale in inverse order of alienation, 131 A.L.R. 4.

Mortgages: effect on subordinate lien of redemption by owner or assignee from sale under prior lien, 56 A.L.R.4th 703.

44-14-49. Right of holder of mortgage to foreclose in equity.

The holder of any mortgage of real or personal property or both, whether as original mortgagee or as executor, administrator, or assignee of the original mortgagee, may foreclose the mortgage in equity according to the practice of the courts in equitable proceedings as well as by the methods prescribed in this chapter.

History.

Ga. L. 1880-81, p. 127, § 1; Code 1882, § 3979a; Civil Code 1895, § 2770; Civil Code 1910, § 3305; Code 1933, § 67-601.

Law reviews.

For note discussing enforcement of security agreements in equity in light of Article 9, Part 5 of the Uniform Commercial Code, see 3 Ga. L. Rev. 198 (1968).

JUDICIAL DECISIONS

History of equitable foreclosures. — Formerly the process of foreclosure of a mortgage in England was by bill in chancery. Bailey v. Lumpkin, 1 Ga. 392, 1846 Ga. LEXIS 89 (1846); Mahone v. Elliott, 141 Ga. 214, 80 S.E. 713, 1914 Ga. LEXIS 177 (1914).

Holders of mortgages may now resort to equity for their foreclosure, without alleging any special grounds of equitable interference. DeLay v. Latimer, 155 Ga. 463, 117 S.E. 446, 1923 Ga. LEXIS 94 (1923).

Courts have fuller power by this section. — O.C.G.A. § 44-14-49 allowing mortgages to be foreclosed in equity conferred fuller powers upon the court by this mode of procedure than it had at law; and in addition to the foreclosure, a personal decree may be rendered against the mortgagor. Clay v. Banks, 71 Ga. 363, 1883 Ga. LEXIS 187 (1883).

Where foreclosure already had at law. — Where the creditor has an honest mortgage on personalty, and has foreclosed the same at law, the creditor has no occasion, either as a substitute for, or in aid of the foreclosure proceeding, to file a bill in a court of equity under O.C.G.A. § 44-14-49 in order to realize the fruits of the foreclosure as against fraudulent mortgages of prior date on the same property, which are also foreclosed, and under which the property has been seized and is about to be sold. Manheim v. Claflin & Co., 81 Ga. 129, 7 S.E. 284, 1888 Ga. LEXIS 75 (1888).

Foreclosure in connection with contempt action not authorized. — Contempt proceeding against former husband to enforce the terms of a divorce decree granting former wife an equitable lien on property conveyed to husband was merely ancillary to the divorce action and the court was not authorized to permit foreclosure upon the property. Harris v. U.S. Dev. Corp., 269 Ga. 659, 502 S.E.2d 721, 1998 Ga. LEXIS 749 (1998).

Court of Appeals denied jurisdiction. — Since an action to enforce an equitable foreclosure is in equity, 1983 Const., Art. VI, Sec. VI, Para. III operates to deny jurisdiction of the Court of Appeals to hear a case arising under O.C.G.A. § 44-14-49. Arnold v. Hickey,

169 Ga. App. 750, 315 S.E.2d 273, 1984 Ga. App. LEXIS 1697 (1984).

Personal judgment against debtor becoming barred. — Under O.C.G.A. § 44-14-49 the fact that a personal judgment against the debtor had become barred did not render dormant that part of the decree which declared that the creditor held a valid legal title to the policy to the extent specified. Conway v. Caswell, 121 Ga. 254, 48 S.E. 956, 1904 Ga. LEXIS 101 (1904).

Payment to purchaser from mortgagor before foreclosure. — Where A, the owner of land, borrows money from B and gives a security deed, taking a bond for titles, and subsequently mortgages the land to C to secure the payment of money borrowed, and then sells and transfers the bond for titles to D, who has notice of the mortgage, and D pays off the claims of B, C cannot in equity foreclose the mortgage on the land and have it sold without first paying or tendering to D the amount paid by the latter to B. Crawford v. Maddox, 117 Ga. 135, 43 S.E. 421, 1903 Ga. LEXIS 172 (1903).

County of foreclosure of mortgage on realty. — A mortgage on land cannot be foreclosed in a county other than where the land lies under a legal proceeding, but it might be otherwise if the foreclosure were sought in equity under O.C.G.A. § 44-14-49. Allen v. Glenn, 87 Ga. 414, 13 S.E. 565, 1891 Ga. LEXIS 177 (1891).

Action for damages for breach of bond with a prayer of foreclosure. — An action of an equitable nature under O.C.G.A. § 44-14-49 by a building and loan association for damages resulting from the breach of a bond given to it by a member to whom it had made an advance upon the member's stock, with a prayer for the foreclosure of a mortgage which the member had executed to secure the payment of such damages, was well brought. Morgan v. Interstate Bldg. & Loan Ass'n, 108 Ga. 185, 33 S.E. 964, 1899 Ga. LEXIS 210 (1899).

Failure to issue execution on judgment. — Where upon a petition to foreclose a mortgage in equity under O.C.G.A. § 44-14-49 a judgment was rendered foreclosing the mortgage, while, so far as the same may purport to be a general personal judgment, it is dormant because of failure to issue an execution thereon in terms of the statute relating to dormancy of judgments, it is valid and enforceable as a decree foreclosing a mortgage. Conway v. Caswell, 121 Ga. 254, 48 S.E. 956, 1904 Ga. LEXIS 101 (1904); Lindsey v. Porter & Garrett, 140 Ga. 249, 78 S.E. 848, 1913 Ga. LEXIS 96 (1913).

Holder of one of several notes secured by same mortgage may foreclose the mortgage in equity. The holder of the other notes is a proper, even if not a necessary, party to the proceeding. Willingham & Cone v. Huguenin, 129 Ga. 835, 60 S.E. 186, 1908 Ga. LEXIS 205 (1908).

Sufficiency of petition. Ford v. Tifton Guano Co., 144 Ga. 353, 87 S.E. 274, 1915 Ga. LEXIS 200 (1915).

RESEARCH REFERENCES

Am. Jur. 2d.

55 Am. Jur. 2d, Mortgages, § 633 et seq.

C.J.S.

59 C.J.S., Mortgages, § 490 et seq.

ALR.

Personal representatives, or nonlien creditors, of deceased mortgagor or of deceased grantee of premises subject to mortgage (with or without assumption of mortgage debt), as necessary or proper parties to foreclosure suit, 124 A.L.R. 784.

Remedy of mortgagee in forged or unauthorized mortgage where proceeds are used to discharge valid lien, 151 A.L.R. 407.

Right, after foreclosure, to reformation on ground of erroneous description originating in mortgage, 172 A.L.R. 655.

ARTICLE 3

CONVEYANCES TO SECURE DEBT AND BILLS OF SALE

Editor's notes.

Ga. L. 1962, p. 156, § 1, provides that any provision of Code Sections 44-14-1, 44-14-2, 44-14-4, 44-14-7 through 44-14-12, 44-14-100, and 44-14-160, and Arts. 2 and 3, Ch. 14, of this title which conflicts with T. 11 shall yield to and be superseded by T. 11. See Code Section 11-10-103.

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

Recorded deed constitutes notice. — A duly filed and recorded deed to secure debt is notice of all the rights which the grantee has thereunder. Cummings v. Johnson, 218 Ga. 559, 129 S.E.2d 762, 1963 Ga. LEXIS 261 (1963).

Creditor reliance on judicial determination justified. — Creditors were entitled to rely upon a previous judicial determination that their secured property had not been transferred and to proceed with their foreclosure sale, following the filing of a bankruptcy petition by the alleged transferee, on the assumption that the property was not part of the bankruptcy estate. Albany Partners, Ltd. v. Westbrook, 749 F.2d 670, 1984 U.S. App. LEXIS 15686 (11th Cir. 1984).

Part 1

In General

44-14-60. Deed to secure debt as absolute deed; necessity of bond of title or to reconvey.

Whenever any person in this state conveys any real property by deed to secure any debt to any person loaning or advancing the grantor any money or to secure any other debt and takes a bond for title back to the grantor upon the payment of the debt or debts or in like manner conveys any personal property by bill of sale and takes an obligation binding the person to whom the property is conveyed to reconvey the property upon the payment of the debt or debts, the conveyance of real or personal property shall pass the title of the property to the grantee until the debt or debts which the conveyance was made to secure shall be fully paid. Such conveyance shall be held by the courts to be an absolute conveyance, with the right reserved by the grantor to have the property reconveyed to him upon the payment of the debt or debts intended to be secured agreeably to the terms of the contract, and shall not be held to be a mortgage. No bond for title or to reconvey shall be necessary where the deed shows upon its face that it is given to secure a debt.

History.

Ga. L. 1871-72, p. 44, § 1; Ga. L. 1872, p. 47, § 1; Code 1873, § 1969; Code 1882, § 1969; Ga. L. 1884-85, p. 57, § 1; Civil

Code 1895, § 2771; Civil Code 1910, § 3306; Ga. L. 1924, p. 56, § 1; Code 1933, § 67-1301.

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).

For article comparing rights of grantees holding deeds to secure debts against a bankrupt debtor to those rights of the mortgagee and lienor, see 10 Ga. B.J. 5 (1947).

For comment on Hertz Driv-Ur-Self Stations, Inc. v. Arnold, 85 Ga. App. 175, 68 S.E.2d 182 (1952), holding that where a lender takes a bill of sale on personal property to secure debt but authorizes borrower to sell property upon certain conditions, a purchaser without knowledge of the conditions takes free of lender's lien, see 14 Ga. B.J. 472 (1952).

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).

For comment on Ruff v. Lee, 230 Ga. 426, 197 S.E.2d 376 (1973), see 8 Ga. L. Rev. 264 (1973).

JUDICIAL DECISIONS

Analysis

General Consideration
Form and Requisites
Determining Nature of Instrument
Rights of Grantor
Rights of Grantee
Priorities
Transfer or Assignment
Foreclosure

General Consideration

Constitutionality. — O.C.G.A. § 44-14-60 is constitutional, and a foreclosure pursuant to it does not violate procedural due process rights. National Community Bldrs., Inc. v. Citizens & S. Nat'l Bank, 232 Ga. 594, 207 S.E.2d 510, 1974 Ga. LEXIS 1007 (1974).

In general. — The rights of a creditor whose debt is secured by deed from the debtor are fixed by a statute, which, while declaring that such conveyances pass the title to the vendee, evidently intended them to be treated as mere liens, except as between the contracting parties, when the right of third persons only are to be affected. A deed executed under the provisions of O.C.G.A. § 44-14-60 is absolute in the sense that nothing can intervene to prevent the creditor from collecting the debt if the property really belonged to the vendor and is sufficient for that purpose, and in the sense that the vendor is entitled, upon payment of the debt to have title reconveyed to the vendor. But while deeds executed under that section are expressly declared not to be mortgages, it is plain that the legislature, by declaring that they pass absolute title, intended to create a lien of high dignity. Dixon v. Bond, 18 Ga. App. 45, 88 S.E. 825, 1916 Ga. App. LEXIS 110 (1916).

The holder of a secondary deed to secure debt is not entitled to any notice beyond that called for by the contract, and a subsequent purchaser is not denied due process of law where the notice required by the contract was given. Ruff v. Lee, 230 Ga. 426, 197 S.E.2d 376, 1973 Ga. LEXIS 936 (1973).

A purchase-money security deed operates as an absolute conveyance of title until the secured indebtedness is fully paid. It generally takes precedence over simultaneous or prior liens against the purchaser, but not prior liens against the property. Connolly v. State, 199 Ga. App. 887, 406 S.E.2d 222, 1991 Ga. App. LEXIS 712 (1991).

History of security deeds. — See In re Lookout Mt. Hotel Co., 50 F.2d 421, 1931 U.S. Dist. LEXIS 1402 (D. Ga.),

rev'd, 53 F.2d 463, 1931 U.S. App. LEXIS 2691 (5th Cir. 1931).

Subsequent conveyances of real property remain subject to security deed. — Because legal title remains in the grantee until satisfaction of the terms of a security deed, all subsequent conveyances of the real property remain subject to the security deed, unless the grantee releases the property by conveyance or contractually subordinates grantee's rights. Rhodes v. Anchor Rode Condominium Homeowner's Ass'n, 270 Ga. 139, 508 S.E.2d 648, 1998 Ga. LEXIS 1056 (1998).

Similar to deed with subsequent mortgage. — Under O.C.G.A. § 44-14-60, the situation is the same as that which would arise if a vendor made a deed to the vendee and then took a mortgage back to secure the indebtedness. Guin v. Hilton & Dodge Lumber Co., 6 Ga. App. 484, 65 S.E. 330, 1909 Ga. App. LEXIS 348 (1909).

Vesting title. — Generally in Georgia the mortgage passes no title to lands; yet landed securities made in a particular way by O.C.G.A. § 44-14-60, which were once held to be equitable mortgages, do pass title now. Thomas v. Morrisett, 76 Ga. 384, 1886 Ga. LEXIS 46 (1886).

Section does not divest title. — O.C.G.A. § 44-14-60 cannot be construed as operating, on the mere payment of the debt, to divest the title which, by a bill of sale as provided by O.C.G.A. § 44-14-60, has passed from the vendor to the vendee, with the right reserved in the vendor to a reconveyance of the title to vendor on the vendee's payment of the debt, but must necessarily be construed as giving to the vendee only the right to retain the title as security for the debt until the debt is paid, and as operating to terminate this right and to cast on the vendee the obligation, after the debt has been paid, to reconvey the property to the vendor. Grady v. T.I. Harris, Inc., 41 Ga. App. 111, 151 S.E. 829, 1930 Ga. App. LEXIS 474 (1930).

Title revests by operation of law. — A security deed is automatically released and satisfied by full payment of the secured indebtedness, and title passes by operation of law back to the grantor or to those claiming under the grantor; the title which thus revests upon payment is in no way affected by liens, encumbrances, or rights which would otherwise attach by virtue of title having been vested in the grantee. Commercial Bank v. Stafford, 149 Ga. App. 736, 256 S.E.2d 69, 1979 Ga. App. LEXIS 2007 (1979).

Applies to both realty and personalty. — A bill of sale of personalty to secure a debt stands on the same footing as a deed to realty to secure a debt. The status of each is provided for in O.C.G.A. § 44-14-60. Merchants' & Mechanics' Bank v. Beard, 162 Ga. 446, 134 S.E. 107, 1926 Ga. LEXIS 215 (1926).

Legal title takes precedence over mechanic's lien. — A clear distinction between a lien and a legal title is uniformly recognized throughout Georgia case decisions, and the import of these decisions is that a bill of sale to secure debt conveys an outright legal title, as distinguished from a mortgage lien, under Georgia law, so as to place such legal title beyond the reach of any lien, statutory or otherwise, in the absence of a recording act treating such as an equitable mortgage. To the same effect, former Code 1933, § 67-1301 (see now O.C.G.A. § 44-14-60), in which it is expressly made mandatory that a bill of sale to secure debt shall be held by the courts to be an absolute conveyance. The conclusion is that there is nothing contained or implied in former Code 1933, § 67-2003 (see now O.C.G.A. § 44-14-363), or the decisions thereunder, that would indicate that a mechanic's lien, any more than any other lien, was intended to operate, or by any possible construction could be made to operate, in such a manner as to exert priority over an outstanding and valid legal title. Manchester Motors, Inc. v. F & M Bank, 91 Ga. App. 811, 87 S.E.2d 342, 1955 Ga. App. LEXIS 870 (1955).

Disposition of condemnation award. — Grantee of security deed is not entitled to receive entire proceeds of condemnation award for partial, involuntary taking of property conveyed by the security deed, inasmuch as both grantor and grantee have an interest in property conveyed by security deed, and hence a right to compensation upon condemnation. Harwell v. Georgia Power Co., 250 Ga. 435, 298 S.E.2d 498, 1983 Ga. LEXIS 546 (1983).

Open-end clauses regarding future advances valid. — Open-end or "drag-

General Consideration (Cont'd)

net" clauses regarding future advances in deeds to secure debt are valid and enforceable. Tedesco v. CDC Fed. Credit Union, 167 Ga. App. 337, 306 S.E.2d 397, 1983 Ga. App. LEXIS 2451 (1983).

A deed to secure debt with an "open-end" clause is not cancelled immediately upon payment of the initial debt. Tedesco v. CDC Fed. Credit Union, 167 Ga. App. 337, 306 S.E.2d 397, 1983 Ga. App. LEXIS 2451 (1983).

Tobacco allotment. — Where debtor executed several deeds to secure debt on the 1,357 acres of farmland, since the tobacco allotment on the acres would pass to the lender if that acreage was sold to the lender, unless specifically reserved, it necessarily follows that debtor's interest in the allotment was conveyed to the lender by virtue of the deeds to secure debt. In re Flanders, 45 B.R. 222, 1984 Bankr. LEXIS 4399 (Bankr. M.D. Ga. 1984).

The expression "personal property," as used in O.C.G.A. § 44-14-60 includes choses in action as well as visible, tangible personal property. Garrard v. Milledgeville Banking Co., 168 Ga. 339, 147 S.E. 766, 1929 Ga. LEXIS 137 (1929).

Deed securing debt of another. — The plain language of O.C.G.A. § 44-14-60, although not clear, seems to establish that a deed to secure debt is not limited solely to securing debts of the grantor but may secure the debt of another. In re Am. Ventures, Inc., 340 F. Supp. 279, 1971 U.S. Dist. LEXIS 11826 (N.D. Ga. 1971), aff'd, 457 F.2d 974, 1972 U.S. App. LEXIS 10281 (5th Cir. 1972).

Attaches to after-acquired property. — Where a bill of sale on an ordinary stock of merchandise is executed merely to secure a debt, the bill of sale will attach to after-acquired portions of the stock as in case of mortgages, whether or not the bill of sale makes express reference to such after-acquired property. Merchants' & Mechanics' Bank v. Beard, 162 Ga. 446, 134 S.E. 107, 1926 Ga. LEXIS 215 (1926).

Crops not included. — A security deed executed to convey cultivated farm land as security for debt, does not ordinarily comprehend crops matured or unmatured on the land. Penn Mut. Life Ins. Co. v. Larsen, 178 Ga. 255, 173 S.E. 125, 1934 Ga. LEXIS 26 (1934).

Recording. — While the language in O.C.G.A. § 44-2-1 "every deed conveying lands," standing alone, is broad enough to embrace security deeds, it is not applicable to security deeds. Randall v. Hamilton, 156 Ga. 661, 119 S.E. 595, 1923 Ga. LEXIS 301 (1923).

Effect of payment on power of sale. — Payment in full of the debt renders the trust deed functus officio, and ipso facto extinguishes the power of sale. Thurman v. Lee, 181 Ga. 408, 182 S.E. 609, 1935 Ga. LEXIS 102 (1935).

Sale of land under fi. Fa. Against holder of equity. — By virtue of O.C.G.A. § 44-14-60 the sale of land under a fi. fa. against the holder of an equity therein, who has conveyed the legal title to another to secure a debt, and while the legal title is thus held, is void. Dickenson v. Williams, 151 Ga. 71, 105 S.E. 841, 1921 Ga. LEXIS 153 (1921).

Power of general agent to execute security deed. — A mere general agency to conduct the business of farming will not include the power to execute a security deed. Hargrove v. Armour Fertilizer Works, 31 Ga. App. 465, 120 S.E. 800, 1923 Ga. App. LEXIS 986 (1923).

Separate deeds as security for two notes. — Where separate deeds executed under O.C.G.A. § 44-14-60 securing separate promissory notes, but by collateral contract the debtor agrees that each deed shall operate as security for the note described in the other, title to all the realty described in both notes passes, as between the debtor and the creditor, to the creditor, and the security is effectual against other creditors who obtain no lien. Johnson v. Gordon, 102 Ga. 350, 30 S.E. 507, 1897 Ga. LEXIS 508 (1897).

Wife may be creditor of her husband and may take from him a deed to land to secure the debt under O.C.G.A. § 44-14-60. Turner v. Woodward, 133 Ga. 467, 66 S.E. 160, 1909 Ga. LEXIS 245 (1909).

Effect on insurance coverage. — A stipulation in an insurance policy that change of title or possession will render the policy void, does not cover a change

effected by taking a security deed under O.C.G.A. § 44-14-60. Nussbaum v. Northern Ins. Co., 37 F. 524, 1889 U.S. App. LEXIS 2721 (C.C.D. Ga. 1889).

Where a policy of insurance covering a building on the premises is issued, containing a condition that the policy shall be void if the property should be sold, or the title or possession of the property, or any part thereof, transferred or changed, the holder of the policy conveys under O.C.G.A. § 44-14-60 the property insured, the policy is thereby rendered void. Phoenix Ins. Co. v. Asberry, 95 Ga. 792, 22 S.E. 717, 1895 Ga. LEXIS 282 (1895).

Effect of execution of deed to nominee of lender. — After Chapter 7 debtor executed a note to a lender and also executed a security deed to a grantee, as the lender's nominee, to secure the debt, the Chapter 7 trustee could not avoid the deed because the note and deed were executed together and remained linked via language in the documents that contemplated the agency relationship formed by the designation of the grantee as nominee. Drake v. Citizens Bank (In re Corley), 447 B.R. 375, 2011 Bankr. LEXIS 807 (Bankr. S.D. Ga. 2011).

Taxation based on beneficial ownership. — In this state, in matters of taxation, the law looks to the substantial, beneficial ownership of property conveyed under O.C.G.A. § 44-14-60, rather than to the shadowy, technical ownership of the legal title. Central of Ga. Ry. v. Wright, 124 Ga. 630, 53 S.E. 207, 1906 Ga. LEXIS 566 (1906), rev'd, 207 U.S. 127, 28 S. Ct. 47, 52 L. Ed. 134, 1907 U.S. LEXIS 1209 (1907).

Merger of tax executions. — Where a grantee who had previously paid tax executions on property purchases the property after exercising the power of sale in a security deed, any claim for money for the tax executions is merged into the grantee's legal title. Branch v. Grubb, 177 Ga. 663, 170 S.E. 799, 1933 Ga. LEXIS 384 (1933).

Evidence. — In the absence of an attack on a properly witnessed and recorded bill of sale placing upon a party the burden of proving its execution, it was not error to admit the bill of sale without proof of its execution. Watkins v. Muse, 78 Ga. App. 17, 50 S.E.2d 90, 1948 Ga. App. LEXIS 669 (1948).

Summary judgment proper once security deed paid in full. — In an action to remove a cloud from title, the trial court properly granted summary judgment to a bank and cancelled a recorded deed in favor of a holder, as: (1) the holder could no longer claim any legal title to the subject property once the underlying debt thereto was paid; (2) no evidence of valid renewal or extension of the note existed; and (3) the holder lacked standing to challenge any foreclosure on the debt. Northwest Carpets, Inc. v. First Nat'l Bank, 280 Ga. 535, 630 S.E.2d 407, 2006 Ga. LEXIS 341 (2006).

Measure of damages under title insurance policy. — In a breach of contract and bad faith refusal to pay claim under a policy of lender's title insurance, the court reversed the judgment in favor of the insured and held that the issued date for the purpose of measuring any loss by the insured was the date the insured foreclosed on the subject property, not the date the bank closed on the subject loan. Old Republic Nat'l Title Ins. Co. v. RM Kids, LLC, 337 Ga. App. 638, 788 S.E.2d 542, 2016 Ga. App. LEXIS 385 (2016), cert. denied, No. S16C1843, 2017 Ga. LEXIS 117 (Ga. Feb. 27, 2017).

Form and Requisites

Instrument cannot be of two natures. — The parties cannot by an agreement make an instrument both retaining title and not retaining title; nor can they by such agreement make a summary statutory proceeding applicable by law to one character of instruments applicable by agreement to another. Wynn & Robinson v. Tyner, 139 Ga. 765, 78 S.E. 185, 1913 Ga. LEXIS 596 (1913).

Sufficiency of description. — Where a security deed conveys a certain lease from the lessor to the grantor in such deed, which deed fully describes the lease and the leased premises and contains this provision: "including also all the machinery, equipment, stock in trade and all other assets" of the grantor, the description of such personal property is sufficient. Bennett v. Green, 156 Ga. 572, 156 Ga. 573, 119 S.E. 620, 1923 Ga. LEXIS 275 (1923).

Form and Requisites (Cont'd)

Specifying amount of debt. — It is not necessary that a deed to secure debt shall specify the amount of the indebtedness that it is given to secure. Troup Co. v. Speer, 23 Ga. App. 750, 99 S.E. 541, 1919 Ga. App. LEXIS 333 (1919).

Statutory obligation to cancel satisfied notes. — The trial court, having found a debt to have been forgiven upon a decedent's death, did not err in ordering the decedent's administrator to cancel a deed to secure debt. The litigation did not give notice to the public that the deed had been cancelled; under O.C.G.A. §§ 44-14-3(b) and 44-14-60, a grantee of a security deed had the duty to cancel the deed of record when the obligation was satisfied. Mize v. Woodall, 291 Ga. App. 349, 662 S.E.2d 178, 2008 Ga. App. LEXIS 496 (2008).

Debt infected with usury. — A deed executed by a borrower under O.C.G.A. § 44-14-60 to secure a debt infected with usury, and purporting not only to convey title to the lender, but also to confer upon the latter a power of sale, is void. Pottle v. Lowe, 99 Ga. 576, 27 S.E. 145, 1896 Ga. LEXIS 449 (1896). See also McLaren v. Clark, 80 Ga. 423, 7 S.E. 230, 1888 Ga. LEXIS 153 (1888); Liles v. Bank of Camden County, 151 Ga. 483, 107 S.E. 490, 1921 Ga. LEXIS 304 (1921).

Under the Federal Farm Loan Act of 1916, as amended (former 12 U.S.C. §§ 771, 781, now repealed), a Federal Land Bank has authority and "jurisdiction" to lend money to members of national farm loan associations on security of mortgages on farm lands within its district, and it may in the State of Georgia take as security a deed to secure debt instead of a mortgage, and one who has obtained a loan from such a bank, and others holding under that person, will be estopped to deny the bank's authority. Smith v. Federal Land Bank, 56 Ga. App. 526, 193 S.E. 257, 1937 Ga. App. LEXIS 157 (1937).

Determining Nature of Instrument

Mortgage and deed to secure debt distinguished. — A deed to secure a debt is not the same as a mortgage. Such a deed conveys title; a mortgage is only a lien. Cole v. Cates, 110 Ga. App. 820, 140 S.E.2d 36, 1964 Ga. App. LEXIS 768 (1964).

Mortgage and bill of sale distinguished. — If the title becomes divested from the vendee upon the mere payment of the debt, the instrument created is only a mortgage, and is not a bill of sale to secure a debt and an instrument passing title as provided under O.C.G.A. § 44-14-60. Grady v. T.I. Harris, Inc., 41 Ga. App. 111, 151 S.E. 829, 1930 Ga. App. LEXIS 474 (1930).

A bill of sale to secure debt conveys an outright legal title, as distinguished from a mortgage lien, so as to place such legal title beyond the reach of any lien, statutory or otherwise, in the absence of a recording act treating such as an equitable mortgage. Manchester Motors, Inc. v. F & M Bank, 91 Ga. App. 811, 87 S.E.2d 342, 1955 Ga. App. LEXIS 870 (1955).

Security deeds and trust deeds distinguished. See In re Lookout Mt. Hotel Co., 50 F.2d 421, 1931 U.S. Dist. LEXIS 1402 (D. Ga.), rev'd, 53 F.2d 463, 1931 U.S. App. LEXIS 2691 (5th Cir. 1931).

Bill of sale not pledge. — A bill of sale transferring title to a discount company of certain household furniture of the plaintiff as collateral security for a loan is not a mere pledge, but legal title is in the creditor subject to the right of the debtor to a reconveyance upon the debtor's payment of the debt in compliance with the terms of the contract. Jones v. Brown, 108 Ga. App. 776, 134 S.E.2d 440, 1963 Ga. App. LEXIS 770 (1963).

Absolute deed cannot be shown to be mortgage. — A deed absolute on its face and accompanied with possession of property by defendant, could not, under the state of the pleadings, be proved by parol to be only a mortgage given for the purpose of securing a debt. Mitchell v. Fullington, 83 Ga. 301, 9 S.E. 1083, 1889 Ga. LEXIS 52 (1889).

Creation of trust to pay note. — The creation of a trust for the purpose of paying a note is the same in effect as the insertion of a defeasance clause in the instrument; and this being true, such instrument is a mortgage, and not a bill of

sale. Ward v. Lord, 100 Ga. 407, 28 S.E. 446, 1897 Ga. LEXIS 74 (1897).

Mortgage in form of security deed. — An instrument in the usual form of a security deed under O.C.G.A. § 44-14-60, but containing a clause providing that should the grantor "faithfully perform and keep all the covenants and agreements herein set out, this conveyance shall cease, determine, and be void," is a mortgage, and not a deed. Massillon Engine & Thresher Co. v. Burnett, 19 Ga. App. 487, 91 S.E. 786, 1917 Ga. App. LEXIS 183 (1917).

O.C.G.A. § 44-14-60 not exclusive for conveyance of absolute title to a creditor to secure a debt. Roland v. Coleman & Co., 76 Ga. 652, 1886 Ga. LEXIS 79 (1886); Ward v. Lord, 100 Ga. 407, 28 S.E. 446, 1897 Ga. LEXIS 74 (1897).

Compliance with section. — A failure to comply strictly with the provisions of O.C.G.A. § 44-14-60 does not necessarily make a conveyance given to secure a debt a mortgage. Williamson v. Orient Ins. Co., 100 Ga. 791, 28 S.E. 914, 1897 Ga. LEXIS 144 (1897).

Equitable mortgages. — If a deed is not made under O.C.G.A. § 44-14-60, but is made for the purpose of securing a debt, it would be what was known before the passage of the Act embodied in O.C.G.A. § 44-14-60, as an equitable mortgage, conveying the title of the land with the equitable right of redemption. Mitchell v. Fullington, 83 Ga. 301, 9 S.E. 1083, 1889 Ga. LEXIS 52 (1889).

Effect of defeasance clause. — Where a written instrument which purports to be a bill of sale passing the title as security for a debt contains a defeasance clause, the instrument is a mortgage, and the title, which under the language of the instrument purports to pass, does not pass to the vendee. Grady v. T.I. Harris, Inc., 41 Ga. App. 111, 151 S.E. 829, 1930 Ga. App. LEXIS 474 (1930); Personal Fin. Co. v. Bailie, 43 Ga. App. 245, 158 S.E. 436, 1931 Ga. App. LEXIS 283 (1931).

Effect of referring to "this mortgage." — Where an instrument was described as "this mortgage," it was the intention of the parties that the instrument be construed to be a mortgage. Massillon Engine & Thresher Co. v. Burnett, 19 Ga. App. 487, 91 S.E. 786, 1917 Ga. App. LEXIS 183 (1917).

Effect of reciting that "this is a deed." — A bill of sale of personalty to secure the payment of a debt, which recites that "this is a deed conveying title, and a bond to reconvey is this day given," is not a mortgage, but a conveyance under O.C.G.A. § 44-14-60. Watts v. Wight Inv. Co., 25 Ga. App. 291, 103 S.E. 184, 1920 Ga. App. LEXIS 747 (1920).

Instrument securing endorser. — An instrument otherwise in the form of a security deed is not a mortgage merely because it recites that it was given to secure an endorser upon a described note. The relationship of the parties does not make it a mortgage, nor is such recital a defeasance clause whereby the instrument should be treated as a mortgage and not as a security deed. Richey v. First Nat'l Bank, 180 Ga. 751, 180 S.E. 740, 1935 Ga. LEXIS 550 (1935).

Title not placed in grantor. — Where a warranty deed to secure a debt contains no defeasance clause, and no bond to reconvey is executed contemporaneously therewith — the grantee being given the power to sell the land at public outcry upon default in the payment of the debt — it is not necessary that title be again placed in the grantor in order to bring the property to sale. Penn Mut. Life Ins. Co. v. Donalson, 177 Ga. 84, 169 S.E. 337, 1933 Ga. LEXIS 122 (1933).

Conveyance for indemnification. — A conveyance of real property, which recites that it is given for the purpose of indemnifying the grantee against loss resulting from an outstanding "mortgage" upon other property which the same grantor had conveyed to the same grantee, which contains no habendum clause and which provides that when the mortgage referred to is paid, "then this deed shall be null and void," and which further provides that when this mortgage is paid "this deed shall become null and void and cancelled on the record and surrendered to" the grantor, is not a security deed passing title to the grantee, but is a mortgage only. Camp v. Teal, 44 Ga. App. 829, 163 S.E. 233, 1932 Ga. App. LEXIS 543 (1932).

Reversion of title. — Where an instrument was denominated a bill of sale

Determining Nature of Instrument (Cont'd)

for personalty and was given to secure a debt, as provided in O.C.G.A. § 44-14-60, yet where it contained a stipulation that the title to the personalty was put into the vendee until the debt was paid in full, this stipulation, by its terms, terminated the title to the vendee on the payment of the debt, and, when the debt was paid, the title reverted to the vendor; the instrument, therefore, was a mortgage only, and created only a lien upon the personalty, and passed no title thereto. Hix v. Williams, 42 Ga. App. 143, 155 S.E. 355, 1930 Ga. App. LEXIS 264 (1930).

Because a security deed did not specify a fixed period for repayment or state that the security interest was perpetual under O.C.G.A. § 44-14-80(a), title to the property reverted to the grantor after seven years and the grantee's security interest in the property was lost. Vineville Capital Group, LLC v. McCook, 329 Ga. App. 790, 766 S.E.2d 156, 2014 Ga. App. LEXIS 781 (2014).

Estoppel after allegation that instrument is deed. — Where the holder of a promissory note, secured by an instrument purporting to be a deed, obtains a judgment thereon, stating in the holder's declaration that the instrument is a deed, the holder will not afterwards be heard to allege that the instrument is a mortgage and not a deed passing title. McCandless v. Yorkshire Guarantee & Sec. Corp., 101 Ga. 180, 28 S.E. 663, 1897 Ga. LEXIS 189 (1897).

Illustrations. — Under O.C.G.A. § 44-14-60 a bill of sale of personalty to secure a debt, although it contains a clause to reconvey the property upon the payment of the debt, is not a mortgage, but is an absolute conveyance of the property, and passes title to the same until the debt is fully paid. Hill v. Marshall, 18 Ga. App. 652, 90 S.E. 175, 1916 Ga. App. LEXIS 1169 (1916).

Where an instrument recited that, whereas, the subscriber bargained, sold, transferred, and conveyed to C. all the stock of goods in a certain store, etc., that delivery was dispensed with, and that the goods were to remain in the subscriber's possession until default in the payment of the note and interest, during which time the subscriber was to be a bailee for hire, and on default was to deliver the property to C., it was a deed to secure a debt under O.C.G.A. § 44-14-60, and not a chattel mortgage. In re Caldwell, 178 F. 377, 1910 U.S. Dist. LEXIS 337 (D. Ga. 1910).

Rights of Grantor

In general. — While deeds to secure debt do pass title to the property by which the debt is secured, such a deed does not divest the grantor in such deed of all the grantor's rights and interest in the property. Barnard v. Barnard, 91 Ga. App. 502, 86 S.E.2d 533, 1955 Ga. App. LEXIS 787 (1955).

Right of possession and redemption. — The grantor in a deed under O.C.G.A. § 44-14-60 retains the right of possession and the right of redemption by payment of the debt, and consequently an equitable estate in the land which may be assigned or subjected to payment of grantor's debts. Citizens' Bank v. Taylor, 155 Ga. 416, 117 S.E. 247, 1923 Ga. LEXIS 85 (1923); Uvalda Naval Stores Co. v. Cullen, 165 Ga. 115, 139 S.E. 810, 1927 Ga. LEXIS 316 (1927); Citizens & S. Bank v. Realty Sav. & Trust Co., 167 Ga. 170, 144 S.E. 893, 1928 Ga. LEXIS 120 (1928); Federal Land Bank v. St. Clair Lumber Co., 58 Ga. App. 532, 199 S.E. 337, 1938 Ga. App. LEXIS 42 (1938); Bell v. Allied Fin. Co., 215 Ga. 631, 112 S.E.2d 609, 1960 Ga. LEXIS 284 (1960).

Possession. — O.C.G.A. § 44-14-60 contemplates that the grantor might remain in possession of the property. Tift & Co. v. Dunn, 80 Ga. 14, 5 S.E. 256, 1887 Ga. LEXIS 311 (1887).

Grantor remaining in possession. — Where one executes a security deed and remains in possession of the land described in the deed, that person's possession is under the grantee in the security deed and is not adverse to the title, and neither prescription nor the statute of limitations is available as a defense to an action in ejectment founded on the security deed. Thomas v. Stedham, 208 Ga. 603, 68 S.E.2d 560, 1952 Ga. LEXIS 273 (1952).

Right of redemption. — When one has borrowed a sum of money and con-

veyed land to the lender as security for the payment of the debt, and received from the grantee a bond conditioned to reconvey on the payment of the debt, the interest pertaining to such land which the grantor thereafter possesses, until the debt is paid, is the right to redeem. Williams & Bessinger v. Foy Mfg. Co., 111 Ga. 856, 36 S.E. 927, 1900 Ga. LEXIS 835 (1900).

Nature of right to redeem. — The right to redeem is an equitable estate in the land, and may be sold and conveyed, subject to the paramount right of the original grantee to have all of the land appropriated to the payment of grantee's debt. Williams & Bessinger v. Foy Mfg. Co., 111 Ga. 856, 36 S.E. 927, 1900 Ga. LEXIS 835 (1900).

How land redeemed. — To redeem land, held by absolute legal title as security for a debt under O.C.G.A. § 44-14-60, the debt must be paid or tendered; and, generally, a tender will be effective, though delayed till after the creditor has recovered possession of the premises by action. Broach v. Barfield, 57 Ga. 601, 1876 Ga. LEXIS 177 (1876).

No leviable interest. — A security deed leaves the grantor no interest in land which can be subjected to levy and sale by a creditor whose judgment was obtained after the deed was executed. Shumate v. McLendon, 120 Ga. 396, 48 S.E. 10, 1904 Ga. LEXIS 565 (1904); Bennett Lumber Co. v. Martin, 132 Ga. 491, 64 S.E. 484, 1909 Ga. LEXIS 340 (1909); Penn Mut. Life Ins. Co. v. Donalson, 177 Ga. 84, 169 S.E. 337, 1933 Ga. LEXIS 122 (1933); Dean v. Andrews, 236 Ga. 643, 225 S.E.2d 38, 1976 Ga. LEXIS 972 (1976).

Equitable interest. — A security deed to land conveys the legal title to the vendee, and the rights of the vendee cannot be affected by subsequent acts of conveyance by the vendor to third parties. But the vendor has such an equitable interest in the premises conveyed as that the vendor may create a valid second security deed, or lien, subject to the paramount right of the original grantee to have all the land appropriated to the payment of grantee's debt. Cook v. Georgia Fertilizer & Oil Co., 154 Ga. 41, 113 S.E. 145, 1922 Ga. LEXIS 302 (1922).

Condition precedent to equitable relief by grantor. — Before a borrower who has executed a deed under O.C.G.A. § 44-14-60 can have affirmative equitable relief, such as injunction to prevent exercise of the power of sale by the grantee in such security deed, the borrower must pay or tender to such grantee the principal and lawful interest due. Liles v. Bank of Camden County, 151 Ga. 483, 107 S.E. 490, 1921 Ga. LEXIS 304 (1921).

Judgment against grantor. — An absolute deed, though made as a security for a debt, passes title under O.C.G.A. § 44-14-60, and a judgment subsequently rendered against the grantor, has no lien on the land which can be enforced by levy and sale until the title can become reinvested by redemption. Groves v. Williams, 69 Ga. 614, 1882 Ga. LEXIS 276 (1882).

Effect of sale. — A sale under the powers contained in a deed to secure debt divests the grantor of all title, and right of equity of redemption, to the lands described in the deed. Cummings v. Johnson, 218 Ga. 559, 129 S.E.2d 762, 1963 Ga. LEXIS 261 (1963).

Effect of bankruptcy. — Title by virtue of a deed under O.C.G.A. § 44-14-60 was not divested by the subsequent voluntary bankruptcy of the grantor, and grantor's consequent discharge from all debts. Broach v. Barfield, 57 Ga. 601, 1876 Ga. LEXIS 177 (1876); Thomas v. Stedham, 208 Ga. 603, 68 S.E.2d 560, 1952 Ga. LEXIS 273 (1952).

Effect of homestead on title. — Title under O.C.G.A. § 44-14-60 was not divested by the bankrupt causing the land to be set apart in bankruptcy as the bankrupt's homestead exemption. Broach v. Barfield, 57 Ga. 601, 1876 Ga. LEXIS 177 (1876).

Right to homestead. — A conveyance to secure a debt, made under O.C.G.A. § 44-14-60, passes title, and defeats all right to homestead in the land covered by such a deed. Isaacs v. Tinley, 58 Ga. 457, 1877 Ga. LEXIS 142 (1877). See also, Johnson v. Griffin Banking & Trust Co., 55 Ga. 691, 1876 Ga. LEXIS 459 (1876); Christopher v. Williams, 59 Ga. 779, 1877 Ga. LEXIS 393 (1877); Kirby v. Reese, 69 Ga. 452, 1882 Ga. LEXIS 243 (1882); Morgan v. Community Loan & Inv. Co., 195 Ga. 675, 25 S.E.2d 413, 1943 Ga. LEXIS 550 (1943).

Rights of Grantor (Cont'd)

Right to contest deed. — The right to contest the validity of a security deed on the ground that the notes secured by the deed contain usury is personal to the maker of the security deed, the maker's representatives and privies. A stranger in interest will not be heard in an attack on a title claimed to be void for usury. Dickenson v. Williams, 151 Ga. 71, 105 S.E. 841, 1921 Ga. LEXIS 153 (1921).

Rights of grantor's lessee. — Where the leasehold of the plaintiff is under one who, by making a security deed to a creditor under O.C.G.A. § 44-14-60, has divested himself of the legal title, and the plaintiff has no more than a mere possession of the land upon which the trespass is alleged to have been committed, plaintiff cannot maintain an action for damages to the realty. Flowers Lumber Co. v. Bush, 18 Ga. App. 269, 89 S.E. 344, 1916 Ga. App. LEXIS 278 (1916).

Rights of Grantee

In general. — The interest which a grantee takes under a deed executed under this law is not absolute in its broadest sense, but is restricted to holding title as security for the debt. For that purpose it places legal title out of the grantor, but on payment of the debt the right of the grantee to hold it ceases. It is a species of security effective from the date of the instrument when duly recorded, and is enforceable against the property by levy and sale under proceedings elsewhere provided for in the Code. Harvard v. Davis, 145 Ga. 580, 89 S.E. 740, 1916 Ga. LEXIS 408 (1916); Trust Co. v. Mobley, 40 Ga. App. 468, 150 S.E. 169, 1929 Ga. App. LEXIS 589 (1929).

Options of holder of deed. — One holding a deed to secure debt under O.C.G.A. § 44-14-60 has the option of pursuing the statutory method of suing on the indebtedness, obtaining a judgment, executing a quitclaim deed to the debtor and filing the same for record for purposes of levy, and having the land sold under the judgment or the security deed may be foreclosed as an equitable mortgage. Ryals v. Lindsay, 176 Ga. 7, 167 S.E. 284, 1932 Ga. LEXIS 369 (1932).

Grantee has leviable interest. — The holder of a subsisting security deed has the legal title to the property, and such title may be levied on as the holder's property to satisfy an execution against the holder. Parrott v. Baker, 82 Ga. 364, 9 S.E. 1068, 1889 Ga. LEXIS 384 (1889); Richey v. First Nat'l Bank, 180 Ga. 751, 180 S.E. 740, 1935 Ga. LEXIS 550 (1935).

A grantee has standing to enforce restrictive covenants against an outsider, and there is no need for the grantee to show actual benefit or injury to enforce this right. Turner Adv. Co. v. Garcia, 252 Ga. 101, 311 S.E.2d 466, 1984 Ga. LEXIS 598, cert. denied, 469 U.S. 824, 105 S. Ct. 101, 83 L. Ed. 2d 46, 1984 U.S. LEXIS 3146 (1984).

Fee simple. — Unlike a mortgagee, who acquires only a lien, the grantee, or holder of a security deed in Georgia acquires the fee simple title to the property, subject to the right of the grantor, who is known as the equity owner, to reacquire the fee simple title upon satisfying the terms of the security deed. Sayers v. Forsyth Bldg. Corp., 417 F.2d 65, 1969 U.S. App. LEXIS 10696 (5th Cir. 1969).

Right of trover action. — The grantee in a bill of sale, given for the purpose of securing a present, past or future indebtedness, has an interest in the pledged property which will support an action of trover against any one who wrongfully converts the same to the grantee's use, and in a proceeding instituted for that purpose the grantee may elect to take a money verdict, and in such a case where an election to take a money verdict is made, the measure of damages is either the highest proved value of the pledged property between the date of conversion and the trial, or the value of the property at the time of conversion, with interest or hire thereon; but subject, however, to the condition that under neither choice can a recovery be had for more than the amount of the debt for which the property stands as security. Rose City Foods, Inc. v. Bank of Thomas County, 207 Ga. 477, 62 S.E.2d 145, 1950 Ga. LEXIS 618 (1950).

Allegation of default. — While a bill of sale to secure debt will support an action in trover it is necessary to allege in the petition a default by the maker giving

the holder the right of possession, and in the absence of such an allegation, the petition is subject to general demurrer. American Nat'l Bank & Trust Co. v. Davis, 104 Ga. App. 586, 122 S.E.2d 477, 1961 Ga. App. LEXIS 742 (1961).

Right to recovery in ejectment. — A deed to secure a debt passes the legal title under O.C.G.A. § 44-14-60 and will authorize a recovery in ejectment. Dykes v. McVay, 67 Ga. 502, 1881 Ga. LEXIS 212 (1881); Todd v. Morgan, 215 Ga. 220, 109 S.E.2d 803, 1959 Ga. LEXIS 550 (1959).

Ejectment after debt matures. — The vendee in a security deed, after the debt matures, can bring ejectment against the vendor upon the title put in the vendee by such deed. Carswell v. Hartridge, 55 Ga. 412, 1875 Ga. LEXIS 441 (1875); Biggers v. Bird, 55 Ga. 650, 1876 Ga. LEXIS 447 (1876); Dykes v. McVay, 67 Ga. 502, 1881 Ga. LEXIS 212 (1881); Bennett v. Green, 156 Ga. 572, 156 Ga. 573, 119 S.E. 620, 1923 Ga. LEXIS 275 (1923).

Title as defense to ejectment. — A deed under O.C.G.A. § 44-14-60 passing title to the grantee therein named, for the purpose of securing a debt, can, after the maturity of the debt, be set up as outstanding title to defeat an action of ejectment brought by one claiming under the grantor, if the possession of the defendant is connected with such title. Ashley v. Cook, 109 Ga. 653, 35 S.E. 89, 1900 Ga. LEXIS 279 (1900).

Upon failure of debtor to pay debt at maturity. — The creditor may institute action thereon and may pray for and obtain a special judgment subjecting the property described in the deed to the payment of the debt. Jewell v. Walker, 109 Ga. 241, 34 S.E. 337, 1899 Ga. LEXIS 620 (1899).

Failure to accept tender. — Where creditor has collateral, mortgage, or other form of security upon property of the debtor, failure to accept a lawful tender discharges the lien which was intended to secure payment. Thurman v. Lee, 181 Ga. 408, 182 S.E. 609, 1935 Ga. LEXIS 102 (1935).

Condition precedent to levy. — In order for a creditor to levy an execution upon property covered by a valid bill of sale made to secure a debt under O.C.G.A. § 44-14-60, the creditor must first redeem the property by paying off in full the security debt, and a levy made without a compliance with such condition precedent is void. Bank of La Grange v. Rutland, 27 Ga. App. 442, 108 S.E. 821, 1921 Ga. App. LEXIS 952 (1921).

Chattel attached to realty. — Where furnace was a chattel attached to the realty of the grantee in the security deed as an "irremovable fixture," and where, after the execution of the security deed, it is detached and carried away by the grantor in said deed, an action will lie for its recovery and 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 innocent or ignorant of the plaintiff's ownership. Burpee v. Athens Prod. Credit Ass'n, 65 Ga. App. 102, 15 S.E.2d 526, 1941 Ga. App. LEXIS 267 (1941).

Timber rights. — A deed under O.C.G.A. § 44-14-60 passes the title to the land and the timber growing thereon to the vendee. G. H. Ponder & Co. v. Mutual Benefit Life Ins. Co., 165 Ga. 366, 140 S.E. 761, 1927 Ga. LEXIS 399 (1927); Federal Land Bank v. St. Clair Lumber Co., 58 Ga. App. 532, 199 S.E. 337, 1938 Ga. App. LEXIS 42 (1938).

Effect of recording. — A duly filed and recorded deed to secure debt is notice of all the rights which the grantee has thereunder. Cummings v. Johnson, 218 Ga. 559, 129 S.E.2d 762, 1963 Ga. LEXIS 261 (1963).

Land located in two counties. — Where a large body of land divided by a county line was conveyed as a whole to secure a debt, with bond for reconveyance, the creditor, after obtaining judgment, could have the entire tract levied on and sold in either county, neither being the county of the residence of the defendant in execution. Cade v. Larned, 99 Ga. 588, 27 S.E. 166, 1896 Ga. LEXIS 452 (1896).

Priorities

In general. — An unrecorded bill of sale to secure debt is uniformly superior to

Priorities (Cont'd)

any lien arising by operation of law. Manchester Motors, Inc. v. F & M Bank, 91 Ga. App. 811, 87 S.E.2d 342, 1955 Ga. App. LEXIS 870 (1955).

Contractor's lien. — Where the owner of property incumbered it with a security deed and a contractor's lien, and thereafter leased a portion of it to a third person for a term of years, 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 Ga. LEXIS 339 (1922).

Materialman's lien. — Where title to real estate is conveyed by a duly recorded deed to secure a debt under O.C.G.A. § 44-14-60, and the grantee takes the deed and advances the money loaned, without notice and before the record of the materialman's lien upon the property, the title thus acquired is superior to such lien. Bennett Lumber Co. v. Martin, 132 Ga. 491, 64 S.E. 484, 1909 Ga. LEXIS 340 (1909); Milner v. Wellhouse, 148 Ga. 275, 96 S.E. 566, 1918 Ga. LEXIS 295 (1918); Guaranty Inv. & Loan Co. v. Athens Eng'g Co., 152 Ga. 596, 110 S.E. 873, 1922 Ga. LEXIS 225 (1922); Rivers v. Williams Bros. Lumber Co., 174 Ga. 262, 162 S.E. 699, 1932 Ga. LEXIS 35 (1932).

Laborers' lien. — A security deed under O.C.G.A. § 44-14-60 is such a conveyance of title as will defeat laborers' liens upon the property embraced therein, if their creation was junior to this instrument, or if such deed was taken bona fide by the grantee and without notice of such liens. Bennett v. Green, 156 Ga. 572, 156 Ga. 573, 119 S.E. 620, 1923 Ga. LEXIS 275 (1923).

Lease. — When property has been conveyed by a grantor to secure a debt, and the grantee in the security deed reduces debt to judgment and files a quitclaim deed for the purpose of levy and sale, and the property is sold by the sheriff under the levy of the execution issued on such judgment, the lessee from the grantor under a lease junior to the security deed can at law be dispossessed by the sheriff for the purpose of placing in possession the purchaser of the property at such sale; and this may be done notwithstanding the fact that the lease is older than the judgment, when it is junior to the security deed. Mattlage v. Mulherin's Sons & Co., 106 Ga. 834, 32 S.E. 940, 1899 Ga. LEXIS 763 (1899).

Year's support and dower. — The title acquired under a deed under O.C.G.A. § 44-14-60 is superior to the right to a year's support, or dower, though such right to a year's support and dower are superior to the lien of a mortgage. When a judgment has been obtained on any indebtedness secured by the deed, before the property can be levied upon and sold, there must be a reconveyance by the grantee to the grantor. Bennett Lumber Co. v. Martin, 132 Ga. 491, 64 S.E. 484, 1909 Ga. LEXIS 340 (1909).

Levy of fi. fa. — A fi. fa. issued upon a judgment rendered for a debt secured by a deed made under O.C.G.A. § 44-14-60 cannot be levied upon the realty conveyed as security until after the creditor has executed, filed, and had recorded a deed reconveying the property to the debtor; and a sale by the sheriff to the creditor, the levy having been made after the execution of such deed, but before it was either filed or recorded, is utterly void. National Bank v. Danforth, 80 Ga. 55, 7 S.E. 546, 1887 Ga. LEXIS 322 (1887).

Where the plaintiff in fi. fa. has filed a deed under O.C.G.A. § 44-14-60 for the purpose of having the land levied upon which had been conveyed to plaintiff by plaintiff's debtor as security for the debt, the sheriff, though the fi. fa. issued from a justice's court, may make the levy without making a search for personal property or making an entry upon the fi. fa. that no such property can be found. Bennett v. McConnell, 88 Ga. 177, 14 S.E. 208, 1891 Ga. LEXIS 320 (1891).

Lien of secured creditor attaching to proceeds of sale. — Where a creditor, whose debt was secured by a conveyance of land under O.C.G.A. § 44-14-60, obtained judgment, reconveyed the land to the debtor, and subsequently acquiesced in a sale of the land under an execution in favor of another creditor, and claimed the proceeds of such sale in the sheriff's

hands, the lien of the secured creditor attached to such proceeds, and the purchaser at the sheriff's sale acquired an unencumbered title. Marshall v. Hodgkins, 99 Ga. 592, 27 S.E. 748, 1896 Ga. LEXIS 455 (1896).

Specifying lien on face of pleadings. — While it is the better practice, it is not essential, in suits upon notes secured by deed under O.C.G.A. § 44-14-60, to specify or declare a lien on the face of the pleadings or the judgment therein, in order to sell the land under execution by filing a deed reconveying the land, and to subject it to the special contract lien. The proof of the special lien may be made aliunde the face of the judgment or the pleadings on the note sued. Spradlin v. Kramer, 146 Ga. 396, 91 S.E. 409, 1917 Ga. LEXIS 322 (1917).

Effect of failure to record. — The court does not err in awarding money to a judgment creditor, upon a levy, where it does not appear that the defendant repaid any of the money borrowed, or that the lender conveyed back the land and filed the deed in the clerk's office. Osborne v. Hill, 91 Ga. 137, 16 S.E. 965, 1892 Ga. LEXIS 535 (1892).

Status of surety. — The surety cannot sustain a claim to the property where it is levied on as that of the principal under an execution against the principal in favor of another creditor. Bank of Trion v. Parker, 43 Ga. App. 686, 160 S.E. 128, 1931 Ga. App. LEXIS 513 (1931).

No judgment lien shown. — Trial court erred by granting summary judgment to a judgment lienholder because the lienholder did not establish as a matter of law that the lienholder had any legal or equitable interest in the property at any time after a quitclaim deed was executed; because the record did not establish that the lienholder had any ownership interest in the property upon which the right to seize assets could attach, the trial court erred in finding that the lienholder held a judgment lien against the property. Wells Fargo Bank, N.A. v. Twenty Six Properties, LLC, 325 Ga. App. 662, 754 S.E.2d 630, 2014 Ga. App. LEXIS 46 (2014).

Transfer or Assignment

Rights of transferee. — A transferee of the grantee named in the security deed occupies the position of such grantee as against the grantor and those claiming under the grantor. Gilliard v. Johnston & Miller, 161 Ga. 17, 129 S.E. 434, 1925 Ga. LEXIS 293 (1925).

Assignee of a security deed has legal title to the property, subject to the right of the grantor to have the realty reconveyed to the grantor upon payment of the debt. Regante v. Reliable-Triple Cee of N.J., Inc., 251 Ga. 629, 308 S.E.2d 372, 1983 Ga. LEXIS 944 (1983); Leathers v. McClain, 255 Ga. 378, 338 S.E.2d 666, 1986 Ga. LEXIS 510 (1986).

Equitable interest of assignee. — While an assignment of a promissory note, or other evidence of indebtedness, secured by a deed to land executed under the provisions of O.C.G.A. § 44-14-60, does not pass to the assignee a legal title to the land itself, such assignee has an equitable interest in the security effectuated by the deed. Van Pelt v. Hurt, 97 Ga. 660, 25 S.E. 489, 1895 Ga. LEXIS 548 (1895).

Enforcement of transferee's lien. — Where the transferee of the debt secured by a deed reduces the same to judgment, all that is essential to the enforcement of a special lien in the transferee's favor is the rendition of a general judgment thereon, the conveyance by the vendee in the security deed to the defendant of the lands embraced therein, and proof aliunde that such judgment was rendered upon the secured debt. Lively v. Oberdorfer, 216 Ga. 673, 119 S.E.2d 27, 1961 Ga. LEXIS 308 (1961).

Bad faith acted to lift automatic stay of bankruptcy. — Because a debtor filed a second bankruptcy petition for the express purpose of delaying and frustrating the legitimate efforts of a secured creditor to enforce its right of foreclosure, the debtor was found to have not acted in good faith under 11 U.S.C. § 362(g); thus, cause existed to annul or lift the automatic stay pursuant to 11 U.S.C. § 362(d). GRP Fin. Servs. Corp. v. Olsen (In re Olsen), No. 06-66198-MGD, 2007 Bankr. LEXIS 614 (Bankr. N.D. Ga. Jan. 8, 2007).

Written transfer of deed itself and rights of grantee. — While the transfer of negotiable promissory notes secured by an absolute conveyance of land made un-

Transfer or Assignment (Cont'd)

der O.C.G.A. § 44-14-60, although the transfer be made by endorsement of the payee without recourse upon the payee, will not discharge the land from the incumbrance placed upon it by the deed, yet a mere written transfer, endorsed upon the deed, of the deed itself and the rights of the grantee therein (the payee of the note) will not pass title to the land out of the grantee and into the endorsee of the notes, as to enable the latter to convey the land back to the debtor who executed the deed to secure the notes. Henry v. McAllister, 93 Ga. 667, 20 S.E. 66, 1894 Ga. LEXIS 382 (1894).

Transfer of negotiable notes. — Where a vendor of land takes notes for the purchase money, securing their payment by reservation of title personally, which notes the vendor afterwards transfers without recourse and without any transfer of the reserve title to a third party, this operates as a payment of the purchase money, the vendee's equity becomes complete, and the vendor ceases to hold any interest in the land. Cade v. Jenkins, 88 Ga. 791, 15 S.E. 292, 1892 Ga. LEXIS 103 (1892); Henry v. McAllister, 93 Ga. 667, 20 S.E. 66, 1894 Ga. LEXIS 382 (1894).

Where a deed was given under the provisions of O.C.G.A. § 44-14-60 to secure the payment of a promissory note, and the original payee afterwards transferred the note without recourse, at the same time conveying to the assignee the title to the land described in the security deed, the latter was entitled to all the rights of the original payee of the note, and all the remedies for enforcing the same. Hunt v. New England Mtg. Sec. Co., 92 Ga. 720, 19 S.E. 27, 1893 Ga. LEXIS 238 (1893); Henry v. McAllister, 93 Ga. 667, 20 S.E. 66, 1894 Ga. LEXIS 382 (1894); Gillispie v. Hunt, 145 Ga. 490, 89 S.E. 519, 1916 Ga. LEXIS 373 (1916).

The transfer of a negotiable promissory note secured by a deed under the provisions of O.C.G.A. § 44-14-60 although the transfer be made by endorsement of the payee on the note without recourse upon the payee, will not discharge the land from the encumbrance placed upon it by the deed. Henry v. McAllister, 93 Ga. 667, 20 S.E. 66, 1894 Ga. LEXIS 382 (1894); Milner v. Wellhouse, 148 Ga. 275, 96 S.E. 566, 1918 Ga. LEXIS 295 (1918).

Where transferee accepts bond as security for an additional loan subject to that specified in the loan deed, the transferee acquires such an equitable interest in the land as will entitle the transferee on sale of the property under the loan deed to a sufficient amount of the proceeds after discharge of the debt secured by the loan deed to satisfy the transferee's debt; and the transferee's right will attach from the time the transferee receives the transfer, and be superior to a subsequent materialman's lien. Guaranty Inv. & Loan Co. v. Athens Eng'g Co., 152 Ga. 596, 110 S.E. 873, 1922 Ga. LEXIS 225 (1922).

Subsequent incumbrance of same property by grantor, whether by security deed or mortgage executed by the grantor named in the prior security deed while the grantor retains an equitable estate in the land, will operate upon that equitable estate. Citizens' Bank v. Taylor, 155 Ga. 416, 117 S.E. 247, 1923 Ga. LEXIS 85 (1923).

Foreclosure

Equitable foreclosure. — Where security deed, executed subsequent to two deeds to secure debt, was made to secure an indebtedness represented by a promissory note, and on its face recited the debt and the purpose to secure it, the creditor could foreclose the deed as an equitable mortgage, although the grantor therein had been discharged as a bankrupt from the payment of debts. Pusser v. A. J. Thompson & Co., 132 Ga. 280, 64 S.E. 75, 1909 Ga. LEXIS 77 (1909); Smith v. Farmers' Bank, 165 Ga. 470, 141 S.E. 203, 1928 Ga. LEXIS 11 (1928).

A deed to secure debt may be foreclosed as an equitable mortgage. Lively v. Oberdorfer, 216 Ga. 673, 119 S.E.2d 27, 1961 Ga. LEXIS 308 (1961).

Suit barred by statute of limitations. — Where a deed under seal was made conveying title in order to secure an indebtedness represented by a promissory note, under O.C.G.A. § 44-14-60, and on its face it recited the debt and the purpose to secure it, although suit on the note

became barred by the statute of limitations, the creditor could foreclose the deed as an equitable mortgage within 20 years from its execution. Pusser v. A. J. Thompson & Co., 132 Ga. 280, 64 S.E. 75, 1909 Ga. LEXIS 77 (1909).

Usurious conveyance. — A conveyance made under O.C.G.A. § 44-14-60 to secure a debt, and which is void as title on account of usury, cannot be foreclosed as an equitable mortgage. Broach v. Smith, 75 Ga. 159, 1885 Ga. LEXIS 88 (1885).

Foreclosure as mortgage in federal court. — A deed absolute in form, given as security for a loan of money, and executed contemporaneously with the debtor's notes and with a bond to reconvey, given by the grantee, all in accordance with the provisions of O.C.G.A. § 44-14-60 et seq., may be foreclosed as a mortgage, by an action in equity in a federal court, notwithstanding that these provisions give a special remedy at law; for the equity jurisdiction of the federal courts cannot be limited by state legislation. Ray v. Tatum, 72 F. 112, 1896 U.S. App. LEXIS 1683 (5th Cir. 1896).

A deed to real estate, given to secure a debt, may be foreclosed by the grantee as a mortgage, notwithstanding a provision therein that it is to be construed as a deed passing title, and not as a mortgage, such provision being one for the benefit of the grantee, which the grantee may waive at the grantee's election. Merrihew v. Fort, 98 F. 899, 1899 U.S. App. LEXIS 3442 (C.C.D. Ga. 1899).

The fact that the holder of a conveyance brings action to foreclose the same as a mortgage in a federal court does not change its character to that of a plain mortgage, which is only a security and passes no title, so as to let in the claim of the widow of the grantor to an allowance for support out of the property, but such an allowance made in proceedings to which the grantee was not a party can apply only to the grantor's equity of redemption. British & Am. Mtg. Co. v. Worrill, 168 F. 120, 1909 U.S. App. LEXIS 5383 (C.C.D. Ga. 1909).

Claims not barred as improper deficiency actions. — Trial court erred in ruling that a bank's claims against borrowers and guarantors for breach of promissory notes were barred as improper deficiency actions under O.C.G.A. § 44-14-161(a) due to the bank's failure to seek confirmation after the foreclosure auctions because although the bank conducted and bid at foreclosure auctions of the real property that secured the notes, the transfer of a borrower's right of possession and the borrower's equity of redemption to the bank as the foreclosure sale purchaser never occurred; three days after the foreclosure auctions, the bank notified the borrowers that the bank rescinded any actions taken with respect to foreclosure and that the foreclosures were not and would not be consummated, and by definition, the confirmation procedure had no application when there had been no foreclosure sale. Legacy Cmtys. Group, Inc. v. Branch Banking & Trust Co., 310 Ga. App. 466, 713 S.E.2d 670, 2011 Ga. App. LEXIS 579 (2011), aff'd in part and rev'd in part, 290 Ga. 724, 723 S.E.2d 674, 2012 Ga. LEXIS 300 (2012), vacated in part, 316 Ga. App. 496, 729 S.E.2d 612, 2012 Ga. App. LEXIS 594 (2012).

OPINIONS OF THE ATTORNEY GENERAL

Grantor retains equitable rights. — Despite the strong language of O.C.G.A. § 44-14-60, the grantor in a security deed retains certain equitable rights in the land. 1972 Op. Att'y Gen. No. U72-105.

RESEARCH REFERENCES

Am. Jur. 2d.

23 Am. Jur. 2d, Deeds, §§ 3, 4. 55 Am. Jur. 2d, Mortgages, § 102 et seq.

C.J.S.

59 C.J.S., Mortgages, §§ 8 et seq., 28.

ALR.

Remedy of judgment creditor where debtor surrenders property to vendee under prior security deed, 36 A.L.R. 805.

Extension of existing real estate mort-

gage or deed of trust by subsequent agreement to cover additional indebtedness, 76 A.L.R. 574.

Excessive security for debt as affecting question of fraud upon creditors, 138 A.L.R. 1051.

Deed absolute on its face, with contemporaneous agreement or option for repurchase by grantor, as mortgage vel non, 155 A.L.R. 1104.

Lien as estate or interest in land within venue statute, 2 A.L.R.2d 1261.

Effect of supplying of description of property conveyed after manual delivery of deed or mortgage, 11 A.L.R.2d 1372.

44-14-61. Signing of deeds to secure debt and bills of sale.

In order to admit deeds to secure debt or bills of sale to secure debt to record, they shall be signed by the maker, attested by an officer as provided in Code Section 44-2-15, and attested by one other witness.

History.

Ga. L. 1884-85, p. 124, § 2; Civil Code 1895, § 2773; Civil Code 1910, § 3308; Ga. L. 1931, p. 153, § 1; Code 1933, § 67-1302; Ga. L. 2015, p. 937, § 6/HB 322.

JUDICIAL DECISIONS

Applicability. — There is nothing in O.C.G.A. § 44-14-61 that in any way changes the rules governing the priority of conditional sales contracts and junior judgments; that section applies only to bills of sale to secure debt and security deeds. Parham v. Heath, 90 Ga. App. 26, 81 S.E.2d 848, 1954 Ga. App. LEXIS 618 (1954).

Unwitnessed paper. — In the absence of fraud, a deed which on its 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 its existence. Leeds Bldg. Prods. v. Sears Mortg. Corp., 267 Ga. 300, 477 S.E.2d 565, 1996 Ga. LEXIS 920 (1996) (overruling White v. Magarahan, 1891 Ga. LEXIS 132, 87 Ga. 217, 13 S.E. 509 (1891)); Propes v. Todd, 89 Ga. App. 308, 79 S.E.2d 346, 1953 Ga. App. LEXIS 955 (1953).

Because no unofficial witness attested to or acknowledged a security deed when debtor signed it, despite the recordation of the deed and a subsequent recordation of a scrivener's affidavit attesting that the affiant, an attorney, was an unofficial witness to the signing of the deed, under Georgia law, specifically, O.C.G.A. § 44-14-61, the deed was unperfected; subsequent assignments of the security deed to a bank and then to the creditor were not equivalent to a perfected second security deed that acknowledged the first and, thus, did not cure the patent defect in the deed. Wash. Mut. Home Loans v. Yearwood, 318 B.R. 227, 2004 Bankr. LEXIS 1965 (Bankr. M.D. Ga. 2004).

Failure to properly attest security deed failed to provide notice of security interest. — Security deed in favor of a bank was not attested by an unofficial witness as required by Georgia law and was patently defective and, thus, the security deed did not provide constructive or actual notice of any security interest. As an unattested security deed was equivalent to an unrecorded deed under Georgia law, a Chapter 7 trustee, in the trustee's position as a hypothetical bona fide purchaser of real estate, had the power to avoid the transfer of the improperly attested deed, and the avoided lien was preserved for the benefit of the estate. Flatau v. Ga. Bank & Trust Co. of Augusta (In re Davis), No. 14-30349-JPS, No. 14-3033, 2014 Bankr. LEXIS 4588 (Bankr. M.D. Ga. Oct. 29, 2014).

Unnotarized deed could not be recorded. — Notary was required to place the notary seal on any notarial act, including attestation of the Bank Security Deed, and failure to do so rendered the Bank Security Deed ineligible for recordation because an officer as provided in O.C.G.A.

§ 44-2-15 did not attest to execution of the deed in accordance with O.C.G.A. § 44-14-61. To rule otherwise would make the requirements imposed on notary publics under O.C.G.A. § 45-17-6(a)(1) inapplicable to the common notarial act of attesting to a security deed. Kelley v. Thomasville Nat'l Bank (In re Taylor), No. 16-70218- JTL, No. 16-07006, 2016 Bankr. LEXIS 4202 (Bankr. M.D. Ga. Dec. 7, 2016).

Effect of failure to record a mortgage or bill of sale to secure debt "shall be the same as is the effect of failure to record a deed of bargain and sale." This changes the prior law with reference to those securities so as to render such instruments, even though unrecorded, superior in rank to subsequent liens created by law. Manchester Motors, Inc. v. F & M Bank, 91 Ga. App. 811, 87 S.E.2d 342, 1955 Ga. App. LEXIS 870 (1955).

No priority unless recorded. — Where a bill of sale in its renewed form was for a larger amount than the balance due on the original instrument, in a contest between it and the bill of sale held by the original holder, it would only have had priority in the amount that was still due on the original bill of sale at the time the same was renewed, only it if was properly recorded. Propes v. Todd, 89 Ga. App. 308, 79 S.E.2d 346, 1953 Ga. App. LEXIS 955 (1953).

Properly attested adjustable rate rider did not validate improperly attested deed to secure debt; even though rider was incorporated into the terms of the deed, the deed itself remained improperly attested and ineligible for recordation. Stone v. Decatur Fed. Sav. & Loan Ass'n (In re Fleeman), 81 B.R. 160, 1987 Bankr. LEXIS 1958 (Bankr. M.D. Ga. 1987).

Security deed was improperly attested where it did not bear the signature of either an unofficial witness or a notary public, and recordation of the document was therefore ineffective to give actual or constructive notice. Updike v. First Fed. Sav. & Loan Ass'n, 93 B.R. 795, 1988 Bankr. LEXIS 2041 (Bankr. M.D. Ga. 1988).

Attestation of security deed. — First sentence of O.C.G.A. § 44-14-33 and the statutory recording scheme indicate that the word "duly" in the second sentence of § 44-14-33 should be understood to mean that a security deed is "duly filed, recorded, and indexed" only if the clerk responsible for recording determines, from the face of the document, that it is in the proper form for recording, meaning that it is attested or acknowledged by a proper officer and (in the case of real property) an additional witness; the General Assembly chose to enact the 1995 amendment to O.C.G.A. § 44-14-33 not as a freestanding Code provision but as an addition to a Code provision clearly referenced by O.C.G.A. § 44-14-61, and the General Assembly is presumed to have been aware of the existing state of the law when the legislature enacted the 1995 amendment so the placement of the amendment makes complete sense. United States Bank Nat'l Ass'n v. Gordon, 289 Ga. 12, 709 S.E.2d 258, 2011 Ga. LEXIS 271 (2011).

Because an eight-paged security deed lacked the signature of an unofficial witness, the deed was not in recordable form as required by O.C.G.A. § 44-14-33 and did not provide constructive notice, therefore, the security deed was avoidable under 11 U.S.C. § 544 with regard to a debtor's bankruptcy. Wells Fargo Bank, N.A. v. Gordon, 292 Ga. 474, 749 S.E.2d 368, 2013 Ga. LEXIS 158 (2013).

Affidavit signed by a notary testified to both execution and attestation of a security deed and, thus, substantially complied with the requirements of O.C.G.A. § 44-2-18 to cure any defect in attestation under O.C.G.A. §§ 44-14-33 and 44-14-61 caused by the notary's signature appearing under the term "acknowledgement." As the affidavit cured the defect, the security deed was eligible for recordation under Georgia law, and its recordation provided constructive notice to a subsequent bona fide purchasers and, thus, a bankruptcy trustee could not use the trustee's strong-arm powers to avoid the security deed. Kelley v. Wells Fargo Bank, N.A. (In re Perry), 565 B.R. 442, 2017 Bankr. LEXIS 256 (Bankr. M.D. Ga. 2017).

Deed reference as notice of prior improperly attested deed. — Reference in a properly attested and recorded secu-

rity deed to a prior improperly attested and therefore "unrecorded" security deed provided notice of the existence of the first security deed. Updike v. First Fed. Sav. & Loan Ass'n, 93 B.R. 795, 1988 Bankr. LEXIS 2041 (Bankr. M.D. Ga. 1988).

Rescission had no legal effect. — While the rescission was signed by two witnesses and notarized in accordance with O.C.G.A. § 44-14-61, there was no evidence of the grantor conveying such an interest. Thus, the rescission had no legal effect. Mak v. Argent Mortg. Co., LLC, No. 1:07-cv-02806-JOF, 2009 U.S. Dist. LEXIS 84746 (N.D. Ga. Sept. 15, 2009).

RESEARCH REFERENCES

Am. Jur. 2d.

55 Am. Jur. 2d, Mortgages, §§ 89, 90.

C.J.S.

59 C.J.S., Mortgages, §§ 110, 111.

ALR.

Imputation to attesting witness of notice of contents of instrument, 4 A.L.R. 716.

Effect of purported subscribing witness's denial or forgetfulness of signature by mark, 17 A.L.R. 1267.

Sufficiency of certificate of acknowledgment, 25 A.L.R.2d 1124.

44-14-62. Out-of-state deeds to secure debt and bills of sale.

When executed outside this state, deeds to secure debt and bills of sale to secure debt shall be signed by the maker, attested by an officer as provided in Code Section 44-2-15, and attested by one other witness.

History.

Ga. L. 1931, p. 153, § 1; Code 1933, § 67-1303; Ga. L. 2015, p. 937, § 7/HB 322.

JUDICIAL DECISIONS

Applicability. — There is nothing in O.C.G.A. § 44-14-62 that in any way changes the rules governing the priority of conditional sales contracts and junior judgments; that section applies only to bills of sale to secure debt and security deeds. Parham v. Heath, 90 Ga. App. 26, 81 S.E.2d 848, 1954 Ga. App. LEXIS 618 (1954).

Deed of trust. — Deed of trust to property in Georgia given as security for bonds which was executed out of the State of Georgia, and was attested by a notary public of that state and another witness was properly recorded. In re Lookout Mt. Hotel Co., 50 F.2d 421, 1931 U.S. Dist. LEXIS 1402 (D. Ga.), rev'd, 53 F.2d 463, 1931 U.S. App. LEXIS 2691 (5th Cir. 1931).

Mere misdescription of bond in a mortgage to a surety executed under O.C.G.A. § 44-14-62 will not have the effect to render the mortgage invalid as a lien upon the property described, either as to the mortgagor personally or mortgagor's vendees. Emerson v. Knight, 130 Ga. 100, 60 S.E. 255, 1908 Ga. LEXIS 237 (1908).

Vesting holder of security interest with title by filing. — When the plaintiff, a Georgia citizen, filed a wrongful foreclosure action against, among others, a non-diverse defendant, the removing defendant met the defendant's burden of showing that there was no possibility that the plaintiff could establish a cause of action against the non-diverse defendant because, although it arguably could be held liable for a violation of Georgia foreclosure statutes as a result of acting as foreclosure counsel for the lender, the lender, through the lender's merger predecessor, appeared in the public record before the foreclosure sale. Jackson v.

Bank of Am., NA, 578 Fed. Appx. 856, 2014 U.S. App. LEXIS 16196 (11th Cir. 2014).

RESEARCH REFERENCES

Am. Jur. 2d.
55 Am. Jur. 2d, Mortgages, §§ 89, 90.
C.J.S.
59 C.J.S., Mortgages, §§ 110, 111.
ALR.
Effect of purported subscribing witness's denial or forgetfulness of signature by mark, 17 A.L.R. 1267.

44-14-63. [Effective until July 1, 2023. See note.] Recording of deeds to secure debt and bills of sale to secure debt; effect of failure to record.

(a) Every deed to secure debt shall be recorded in the county where the land conveyed is located. Every bill of sale to secure debt shall be recorded in the county where the maker, if a resident of this state, resided at the time of its execution and, if a nonresident, in the county where the personalty conveyed is located. Deeds to secure debt or bills of sale to secure debt not recorded shall remain valid against the persons executing them.

(b) A deed to secure debt shall not be recorded unless it includes the mailing address of the grantee thereof. Failure to comply with this provision shall not be a defense to any foreclosure or grounds to set aside any foreclosure of any deed to secure debt.

History.
Ga. L. 1884-85, p. 124, § 1; Civil Code 1895, § 2772; Civil Code 1910, § 3307; Ga. L. 1931, p. 153, § 1; Code 1933, § 67-1305; Ga. L. 1989, p. 859, § 1; Ga. L. 2015, p. 937, § 8/HB 322.
Delayed effective date.
Code Section 44-14-63 is set out twice in this Code. This version is effective until July 1, 2023. For version effective July 1, 2023, see the following version.
Cross references.
Imposition, rate, collection, and assessment of taxes, § 48-6-60 et seq.
Law reviews.
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
Recording
Effect of Failure to Record

General Consideration

O.C.G.A. § 44-14-210 did not repeal O.C.G.A. § 44-14-63, nor did it alter its effect, it not being in conflict therewith. Cooke v. Adams Bros. Co., 148 Ga. 289, 96 S.E. 499, 1918 Ga. LEXIS 307 (1918).

Section applies to bills of sale and deeds to secure debts. — O.C.G.A. § 44-14-63 by its express terms applies as well to a bill of sale of personalty to secure debt as to deeds of conveyance of realty to secure debt. Butler v. LaGrange Grocery Co., 29 Ga. App. 612, 116 S.E. 213, 1923 Ga. App. LEXIS 140 (1923).

Deed absolute in form. — Although a deed may have been on its face an absolute deed and expressed a valuable consideration, yet if it was given to secure a debt, falls under O.C.G.A. § 44-14-63. Cabot v. Armstrong, 100 Ga. 438, 28 S.E. 123, 1897 Ga. LEXIS 80 (1897).

Chattel mortgages. — Under O.C.G.A. § 44-14-63 a chattel mortgage to be valid as against other liens must be recorded. In re Smith, 281 F. 574, 1922 U.S. Dist. LEXIS 1504 (D. Ga. 1922). See also Osborne v. Hill, 91 Ga. 137, 16 S.E. 965, 1892 Ga. LEXIS 535 (1892).

Necessity for record. — Prior to the passage of the act from which O.C.G.A. § 44-14-63 was taken, recordation of a chattel mortgage was not required. Tift & Co. v. Dunn, 80 Ga. 14, 5 S.E. 256, 1887 Ga. LEXIS 311 (1887).

Effect of § 44-14-101. — A security deed executed under O.C.G.A. §§ 44-14-60, 44-14-61, 44-14-63, 44-14-67, and 44-14-66, after the passage of O.C.G.A. § 44-14-101, to convey cultivated farmland as security for debt, does not ordinarily comprehend crops matured or unmatured on the land. Penn Mut. Life Ins. Co. v. Larsen, 178 Ga. 255, 173 S.E. 125, 1934 Ga. LEXIS 26 (1934).

Instrument in form of absolute deed. — Where the instrument is written in the form of an absolute conveyance and does not within itself disclose that title is passed merely as security for a debt, the record of the conveyance puts the world upon notice that no interest or equity in the land remains in the grantor, and one subsequently dealing with the grantor could not be misled or injured by the statement of the consideration as contained therein. McClure v. Smith, 115 Ga. 709, 42 S.E. 53, 1902 Ga. LEXIS 542 (1902); McIntire v. Garmany, 8 Ga. App. 802, 70 S.E. 198, 1911 Ga. App. LEXIS 153 (1911); Bank of Chatsworth v. Patterson, 148 Ga. 367, 96 S.E. 996, 1918 Ga. LEXIS 342 (1918).

A parol agreement extending the security to an additional indebtedness is not to be taken as varying the written terms of the instrument, and is good, since where the form is that of an ordinary warranty deed, the mere naming of a consideration is not to be taken as stating any amount of security or limiting it to any particular sum. Hester v. Gairdner, 128 Ga. 531, 58 S.E. 165, 1907 Ga. LEXIS 160 (1907); Wiggs v. Hendricks, 147 Ga. 444, 94 S.E. 556, 1917 Ga. LEXIS 255 (1917); Troup Co. v. Speer, 23 Ga. App. 750, 99 S.E. 541, 1919 Ga. App. LEXIS 333 (1919).

Instrument specifying amount of loan. — Where an instrument made in the form of a security deed by its own language specifies and thus limits a debt in a named amount as being the one which it is actually intended to secure, the record of the instrument will not suffice to give to the grantee thereunder any priority over third persons who may have subsequently and in good faith acquired a lien upon the same property, except as to the amount of the particular indebtedness thus specified. American Nat'l Bank v. Brooks, 143 Ga. 320, 85 S.E. 117, 1915 Ga. LEXIS 416 (1915); Skinner v. Elliott, 17 Ga. App. 511, 87 S.E. 759, 1916 Ga. App. LEXIS 737 (1916); Bank of Cedartown v. Holloway-Smith Co., 146 Ga. 700, 92 S.E. 213, 1917 Ga. LEXIS 451 (1917); A. Leffler Co. v. Lane, 146 Ga. 741, 92 S.E. 214, 1917 Ga. LEXIS 477 (1917).

As between the parties themselves the rule would be different, and although a deed may be given as security for a named indebtedness in a specified amount, it is competent for the parties to extend the security by agreement so that as between them it shall cover an additional indebtedness. Wylly v. Screven, 98 Ga. 213, 25 S.E. 435, 1896 Ga. LEXIS 10 (1896); Hester v. Gairdner, 128 Ga. 531, 58 S.E. 165, 1907 Ga. LEXIS 160 (1907); Troup Co. v. Speer, 23 Ga. App. 750, 99 S.E. 541, 1919 Ga. App. LEXIS 333 (1919).

Whether a conditional sale contract is properly attested is immaterial between the original parties or between the maker and a transferee. Carter v. Commercial Credit Co., 58 Ga. App. 470, 198 S.E. 792, 1938 Ga. App. LEXIS 12 (1938).

Recording

The purpose of the recording statute is to protect against the negligent. — O.C.G.A. § 44-14-63 made it the plain duty of a grantee to record the deed, thereby giving constructive notice to everyone of its existence and of the grantee's rights thereunder; and since it is thus made the duty of such 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. As a means of implementing this protection that section provides that the negligent failure to record renders the unrecorded deed ineffectual as against bona fide purchasers for value and without notice. Archer v. Kelley, 194 Ga. 117, 21 S.E.2d 51, 1942 Ga. LEXIS 536 (1942).

O.C.G.A. § 44-14-63 was modified by O.C.G.A. § 44-2-2, subsequently enacted. Cross v. Citizens' Bank & Trust Co., 160 Ga. 647, 128 S.E. 898, 1925 Ga. LEXIS 222 (1925).

The word "shall" here used is merely directory as to the place where such instruments may be recorded, if at all. City Whsle. Co. v. Harper, 100 Ga. App. 151, 110 S.E.2d 561, 1959 Ga. App. LEXIS 555 (1959).

A "bill of sale" as contemplated by O.C.G.A. § 44-14-63 is a "deed" to personalty, and is included in the meaning of the word "deeds" as employed in O.C.G.A. § 44-2-2; and consequently under that law bills of sale to secure debt are required to be recorded. Merchants' & Mechanics' Bank v. Beard, 162 Ga. 446, 134 S.E. 107, 1926 Ga. LEXIS 215 (1926).

The effect of recordation of conveyances to secure debt is by the law relating thereto made the same as the effect of the recordation of deeds of bargain and sale. City Whsle. Co. v. Harper, 100 Ga. App. 151, 110 S.E.2d 561, 1959 Ga. App. LEXIS 555 (1959).

Laws relating to mortgage registration govern. — The 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 they differ from mortgages, deeds and bills of sale to secure debt since these latter instruments date only from the time they 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 Ga. App. LEXIS 796 (1950).

Recording not necessary to convey title. — It is not essential under O.C.G.A. § 44-14-63, 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 Ga. LEXIS 289 (1915).

Serves as constructive notice. — Under O.C.G.A. §§ 44-2-1 and 44-14-63, when bills of sale to secure debt have been recorded in the county of residence of the maker thereof, such registration serves as constructive notice from the date the same are filed for record. General Fin. & Thrift Corp. v. Bank of Wrightsville, 92 Ga. App. 808, 90 S.E.2d 93, 1955 Ga. App. LEXIS 717 (1955).

The record of a security deed is constructive notice to subsequent grantees. Constructive notice is notice to the world. Cummings v. Johnson, 218 Ga. 559, 129 S.E.2d 762, 1963 Ga. LEXIS 261 (1963).

Record from time of filing. — In a contest between a bill of sale to secure a debt and a lien of a subsequently recorded general execution, the record of the bill of sale dates back from the time of its filing for record in the office of the clerk of the superior court. Merchants' & Mechanics' Bank v. Beard, 162 Ga. 446, 134 S.E. 107, 1926 Ga. LEXIS 215 (1926).

Fractions of a day. — Where a priority as between a bill of sale to secure a debt

Recording (Cont'd)

and the lien of a subsequently recorded general execution depends upon whether the bill of sale was recorded first or the general execution was entered upon the execution docket first, such recording and such entry upon the execution docket having occurred on the same day, in determining such priority fractions of a day are to be considered. Merchants' & Mechanics' Bank v. Beard, 162 Ga. 446, 134 S.E. 107, 1926 Ga. LEXIS 215 (1926).

Where recorded. — A retention-of-title contract attested by a person described as a commercial notary public of one county, although the caption of the instrument indicates that it was executed in a town in another county is presumably officially executed in the first county. It nevertheless is legally executed to record in county indicated in the caption, the residence of the maker. Smith v. Simmons, 35 Ga. App. 427, 133 S.E. 312, 1926 Ga. App. LEXIS 419 (1926).

Place of recording as effecting priority. — Where evidence in trover action establishes that, at the time of execution of bills of sale in question, maker was resident of one county but had domicile in another, in view of fact that O.C.G.A. § 44-14-63 provides for such recording, in the county where the maker resided at the time of the execution of such instruments, and the law draws a clear distinction between residence and domicile, defendant who was holder of junior bill of sale recorded in county where maker was resident had title to property superior to that of plaintiff who was holder of senior bill of sale recorded in county where maker had domicile. Commercial Bank v. Pharr, 75 Ga. App. 364, 43 S.E.2d 439, 1947 Ga. App. LEXIS 544 (1947).

Recording in wrong place equivalent to no record. — The recording of bills of sale in a court other than in the residence of the maker at the time of its execution is equivalent to no record. It will remain valid against persons executing it, but will be postponed to all liens, created or obtained or purchased, made prior to legal record thereof. Commercial Bank v. Pharr, 75 Ga. App. 364, 43 S.E.2d 439, 1947 Ga. App. LEXIS 544 (1947).

Chapter 7 trustee was allowed under 11 U.S.C. § 544 and O.C.G.A. § 44-14-63(a) to avoid a security deed which debtors gave to a bank before the debtors declared Chapter 7 bankruptcy because the bank filed the deed in the wrong county. There was no merit to the bank's claim that the trustee had inquiry notice of the bank's security interest because the debtors used the proceeds of a loan the debtors obtained from the bank to pay a debt to another bank and the other filed documents to cancel its loan that were defective under O.C.G.A. § 44-14-67(c); in addition, the doctrine of equitable subordination did not prevent the trustee from avoiding the bank's secured interest. Rogers v. M&I Bank FSB (In re Morgan), 449 B.R. 821, 2010 Bankr. LEXIS 6263 (Bankr. N.D. Ga. 2010).

Where a conditional bill of sale or retention title contract is executed in another state on property afterward brought into this state, and such instrument is not recorded in the county of the buyer's residence within the time allowed by the statute, bona fide valid liens subsequently created against the property by the buyer would be superior to the rights of such 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 Ga. App. LEXIS 662 (1936).

Recorded deed not showing maturity. — A duly filed and recorded deed, which plainly shows that it was given to secure a debt, but does not show when the same matures, is notice to one dealing with the grantor therein of all the rights which the grantee has under the contract performance of which is thereby secured. Mattlage v. Mulherin's Sons & Co., 106 Ga. 834, 32 S.E. 940, 1899 Ga. LEXIS 763 (1899).

Where subsequent purchaser or creditor has notice of sale. — A sale of personal property to secure a debt, where the property remains in the possession of the vendor, is inoperative and void as against third persons, unless it is reduced to writing, in which event it will be good as to third persons when recorded under O.C.G.A. § 44-14-63, or, when not re-

corded, as to subsequent purchasers or creditors who have actual notice of such sale. Henry Vogt Mach. Co. v. Bailey, 2 Ga. App. 204, 58 S.E. 314, 1907 Ga. App. LEXIS 322 (1907).

Preference arose when security executing not recorded. — Elements of a preference under 11 U.S.C. § 547(b) were met since the mortgagee's claim based on the mortgagee's security deed arose when the security deed was executed, under O.C.G.A. § 44-14-63, but the transfer occurred when the security deed was recorded, and thus was made on behalf of antecedent debt. Ogier v. Mortg. Elec. Registration Sys. (In re Tanoh), No. 08-79087 - MHM, No. 09-6017, 2011 Bankr. LEXIS 3760 (Bankr. N.D. Ga. Sept. 26, 2011).

Effect of Failure to Record

A bill of sale is valid between the parties though not recorded. Arnoldsville Trading Co. v. Jones, 62 Ga. App. 677, 9 S.E.2d 693, 1940 Ga. App. LEXIS 401 (1940).

O.C.G.A. § 44-14-63 so changes the prior law with reference to bills of sale and deeds to secure debts as to render such instruments, even though unrecorded, superior in rank to subsequent liens created by law; however, these statutes do not expressly or impliedly change the prior law with regard to contracts of conditional sale. Evans Motors of Ga., Inc. v. Hearn, 53 Ga. App. 703, 186 S.E. 751, 1936 Ga. App. LEXIS 375 (1936); Massachusetts Mut. Life Ins. Co. v. Hirsch, 184 Ga. 636, 192 S.E. 435, 1937 Ga. LEXIS 607 (1937); Mackler v. Lahman, 196 Ga. 535, 27 S.E.2d 35, 1943 Ga. LEXIS 386 (1943); Refrigeration-Appliances, Inc. v. Atlanta Provision Co., 90 Ga. App. 821, 84 S.E.2d 602, 1954 Ga. App. LEXIS 821 (1954); Manchester Motors, Inc. v. F & M Bank, 91 Ga. App. 811, 87 S.E.2d 342, 1955 Ga. App. LEXIS 870 (1955) (for comment, see 18 Ga. B.J. 82 (1955)).

An unrecorded bill of sale to secure debt 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 Ga. App. LEXIS 870 (1955) (for comment, see 18 Ga. B.J. 82 (1955)).

An unrecorded bill of sale to secure debt has the same effect as a deed of bargain and sale, and, therefore, although unrecorded, is superior in rank to subsequent liens created by law. Associates Disct. Corp. v. Willard, 99 Ga. App. 116, 108 S.E.2d 110, 1959 Ga. App. LEXIS 795 (1959).

Effect of failure provided in § 44-2-1. — The last sentence of O.C.G.A. § 44-14-63 states that the effect of failure to record deeds to secure debt and bills of sale shall be the same as shall be the effect of failure to record a deed of bargain and sale. The effect of this latter failure is provided in O.C.G.A. § 44-2-1. Commercial Bank v. Pharr, 75 Ga. App. 364, 43 S.E.2d 439, 1947 Ga. App. LEXIS 544 (1947).

The penalty of failure to record 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 Ga. LEXIS 571 (1942).

An 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, 1978 U.S. App. LEXIS 12842 (5th Cir. 1978).

An unperfected security interest is subordinate to the rights of lien creditors who acquire their liens without knowledge of the prior security interest and before it is perfected, and this operates in favor of a creditor who has acquired a lien on the property involved by attachment, levy, or the like. Mack Trucks, Inc. v. Ryder Truck Rental, Inc., 110 Ga. App. 68, 137 S.E.2d 718, 1964 Ga. App. LEXIS 547 (1964).

The effect of failure to record a deed of bargain and sale is that it loses its priority over a subsequent recorded deed from the same vendor, taken without notice of the existence of the first. It does not lose priority to a junior judgment or other lien created by operation of law, for the holder of such a lien is not a bona fide purchaser. Mack Trucks, Inc. v. Ryder Truck Rental, Inc., 110 Ga. App. 68, 137 S.E.2d 718, 1964 Ga. App. LEXIS 547 (1964).

Effect of Failure to Record (Cont'd)

Prior to the passage of O.C.G.A. § 44-14-63, a security deed executed in good faith, though unrecorded, was superior to a subsequently acquired lien against the grantor. Phinizy v. Clark, 62 Ga. 623, 1879 Ga. LEXIS 590 (1879); Sosnowski v. Rape, 69 Ga. 548, 1882 Ga. LEXIS 260 (1882); McClure v. Smith, 115 Ga. 709, 42 S.E. 53, 1902 Ga. LEXIS 542 (1902); McIntire v. Garmany, 8 Ga. App. 802, 70 S.E. 198, 1911 Ga. App. LEXIS 153 (1911).

A judgment against a grantor, obtained after the execution by the grantor of a security deed, but prior to its being filed for record in the county where the land lies under O.C.G.A. § 44-14-63, is superior to such deed. Cabot v. Armstrong, 100 Ga. 438, 28 S.E. 123, 1897 Ga. LEXIS 80 (1897); Cambridge Tile Co. v. Scaife & Sons Co., 137 Ga. 281, 73 S.E. 492, 1911 Ga. LEXIS 382 (1911); Coley v. Altamaha Fertilizer Co., 147 Ga. 150, 93 S.E. 90, 1917 Ga. LEXIS 94 (1917); Cooke v. Adams Bros. Co., 148 Ga. 289, 96 S.E. 499, 1918 Ga. LEXIS 307 (1918); Merchants' & Mechanics' Bank v. Beard, 162 Ga. 446, 134 S.E. 107, 1926 Ga. LEXIS 215 (1926).

Priority of lien of judgment duly recorded over earlier security deed recorded afterward. Saunders v. Citizens First Nat'l Bank, 165 Ga. 558, 142 S.E. 127, 1927 Ga. LEXIS 424 (1927).

Priority despite deed not being recorded in proceeding under Uniform Fraudulent Transfers Act. — Judgment voiding a transfer of property as fraudulent under the Uniform Fraudulent Transfers Act (UFTA) (now Uniform Voidable Transactions Act), O.C.G.A. § 18-2-70 et seq., was reversed because, despite not being recorded, the 2002 security deed executed in favor of a former sister-in-law, pledging the property as collateral for a promissory note, gave the former sister-in-law, as one of the defendant's creditors, priority over the plaintiff's judgment, such that the property could not be characterized as the defendant's asset under the UFTA. Wallin v. Wallin, 341 Ga. App. 440, 800 S.E.2d 617, 2017 Ga. App. LEXIS 218 (2017).

Unrecorded bill of sale of crops to secure the debt was superior in rank to the subsequent judgment lien created by law. Cairo Banking Co. v. Citizens Bank, 63 Ga. App. 690, 11 S.E.2d 806, 1940 Ga. App. LEXIS 530 (1940).

Security deed superior to debt outstanding evidenced by unrecorded deed. Mortgage Guarantee Co. of Am. v. Atlanta Com. Bank, 166 Ga. 412, 143 S.E. 562, 1928 Ga. LEXIS 317 (1928).

The record of an agreement extending lien of recorded security deed to an additional debt, is not necessary to prevent a judgment for an unsecured from obtaining priority. McClure v. Smith, 115 Ga. 709, 42 S.E. 53, 1902 Ga. LEXIS 542 (1902).

Landlord's lien for rent and tenant's unrecorded bill of sale. — A landlord's general lien for rent, arising upon the issuance and levy of a distress warrant, is superior to a tenant's unrecorded bill of sale of personalty to secure a debt, though the latter was executed and delivered prior to the date of the levy of the distress warrant upon the property covered by the bill of sale. Butler v. LaGrange Grocery Co., 29 Ga. App. 612, 116 S.E. 213, 1923 Ga. App. LEXIS 140 (1923).

Distress warrant levied on prior to recording of security deed had priority over deed. Virginia-Carolina Chem. Co. v. Rylee, 139 Ga. 669, 78 S.E. 27, 1913 Ga. LEXIS 563 (1913).

A recorded quitclaim deed, when taken in good faith for a valuable consideration, without notice, will prevail 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 Ga. LEXIS 536 (1942).

Where 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 where 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 Ga. LEXIS 474 (1936).

Foreclosure provisions unenforceable. — The 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 Ga. App. LEXIS 842 (1997).

Recording of security deed not necessary to effect a transfer between debtors and lender. — Because the security deed between the debtors and the lender was effective as between those parties at execution, it was not relevant that the security deed was recorded within 90 days prior to the 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, No. 04-6420, 2005 Bankr. LEXIS 1923 (Bankr. N.D. Ga. Aug. 31, 2005), aff'd, No. 05-cv-2689-TCB, 2007 U.S. Dist. LEXIS 69426 (N.D. Ga. Feb. 23, 2007), aff'd, 524 F.3d 1175, 2008 U.S. App. LEXIS 8006 (11th Cir. 2008).

No judgment lien shown. — Trial court erred by granting summary judgment to a judgment lienholder because the lienholder did not establish as a matter of law that the lienholder had any legal or equitable interest in the property at any time after a quitclaim deed was executed; because the record did not establish that the lienholder had any ownership interest in the property upon which the right to seize assets could attach, the trial court erred in finding that the lienholder held a judgment lien against the property. Wells Fargo Bank, N.A. v. Twenty Six Properties, LLC, 325 Ga. App. 662, 754 S.E.2d 630, 2014 Ga. App. LEXIS 46 (2014).

RESEARCH REFERENCES

Am. Jur. 2d.

66 Am. Jur. 2d, Records and Recording Laws, §§ 59, 153 et seq.

C.J.S.

26A C.J.S., Deeds, § 155 et seq. 59 C.J.S., Mortgages, § 192 et seq.

ALR.

Reinstatement and restoration of mortgages released or discharged without authorization, as against subsequent purchasers, lienholders, judgment creditors, and the like, without notice, 35 A.L.R.2d 948.

44-14-63. [Effective July 1, 2023. See note.] Recording of deeds to secure debt and bills of sale to secure debt; effect of failure to record.

(a) Every deed to secure debt shall be recorded in the county where the land conveyed is located. Every bill of sale to secure debt shall be recorded in the county where the maker, if a resident of this state, resided at the time of its execution and, if a nonresident, in the county where the personalty conveyed is located. Deeds to secure debt or bills of sale to secure debt not recorded shall remain valid against the persons executing them.

(b) A deed to secure debt shall not be recorded unless it includes the following information on the first page:

(1) The date of the document;

(2) The names of the signatories of the document;

(3) The grantee's mailing address;

(4) Map and parcel identification information, if applicable;

(5) The original loan amount or the amount of any outstanding principal and additional advance pursuant to a loan modification;

(6) The initial maturity date or dates for such debt;

(7) The amount, if any, of the intangible recording tax imposed on such deed to secure debt;

(8) The amount, if any, of the intangible recording tax imposed for an additional advance pursuant to a security deed modification agreement or other additional advance secured by a security deed; and

(9) If no intangible tax is imposed, a citation to the authority providing for an exemption of such tax.

(c) Failure to comply with this Code section shall not be a defense to any foreclosure or grounds to set aside any foreclosure of any deed to secure debt.

History.

Ga. L. 1884-85, p. 124, § 1; Civil Code 1895, § 2772; Civil Code 1910, § 3307; Ga. L. 1931, p. 153, § 1; Code 1933, § 67-1305; Ga. L. 1989, p. 859, § 1; Ga. L. 2015, p. 937, § 8/HB 322; Ga. L. 2022, p. 280, § 2/HB 974.

Delayed effective date.

Code Section 44-14-63 is set out twice in this Code. This version, as set out above, is effective July 1, 2023. For version effective until July 1, 2023, see the preceding version.

The 2022 amendment, effective July 1, 2023, rewrote the first sentence in subsection (b), which read: "A deed to secure debt shall not be recorded unless it includes the mailing address of the grantee thereof."; redesignated the former second sentence of subsection (b) as present subsection (c); and substituted "this Code section" for "this provision" in subsection (c).

44-14-64. Transfers of deeds to secure debt; execution; partial transfers; transfers by certain financial institutions; requirements for recording; payoff balance.

(a) All transfers of deeds to secure debt shall be in writing; shall be signed by the grantee or, if the deed has been previously transferred, by the last transferee; and shall be witnessed as required for deeds.

(b) Transfers of deeds to secure debt may be endorsed upon the original deed or by a separate instrument identifying the transfer and shall be sufficient to transfer the property therein described and the indebtedness therein secured, whether the indebtedness is evidenced by a note or other instrument or is an indebtedness which arises out of the terms or operation of the deed, together with the powers granted without specific mention thereof.

(c) Transfer of a deed to secure debt and the indebtedness therein secured may be made in whole or in part; provided, however, that, where the transfer is made in part, that portion of the deed and the indebtedness therein secured to be transferred shall be stated upon a separate instrument and not upon the original deed.

(d) A transfer of a deed to secure debt and the indebtedness therein secured in whole or in part in accordance with subsections (a) through (c) of this Code section by a financial institution having deposits insured by an agency of the federal government or a transfer by a lender who regularly purchases or services residential real estate loans aggregating a minimum of $1 million secured by a first deed to secure debt encumbering real estate improved or to be improved by the construction thereon of one to four family dwelling units, where the transferor retains the right to service or supervise the servicing of the deed or interest therein, need not be recorded if:

(1) The original deed to secure debt has been recorded;

(2) An agreement in writing exists on or before the date of the transfer between the transferor and the transferee and sets forth the terms of the transfer and the interests of the parties thereto; and

(3) Possession of the deed, the instrument of indebtedness, and the instrument of transfer is taken by such new transferee for himself or in his representative capacity or by a representative of such transferee which may include the transferor or any other transferee, provided that the agreement in paragraph (2) of this subsection provides for such party to take possession.

(e) As described in subsection (d) of this Code section, the transfer by a financial institution or lender of a deed to secure debt and the indebtedness therein secured in whole or in part without recording in accordance with this Code section shall be effective to provide the new transferee with priority over all subsequent claims against the deed and the indebtedness therein secured to the extent of the interest so transferred, and the priority shall not be lessened by the fact that the transfer is not recorded; provided, however, that a transfer, satisfaction, cancellation, release, quitclaim deed, or modification executed and recorded by the holder of record of the deed to secure debt shall be effective to transfer, satisfy, cancel, release, quitclaim, or modify, as the case may be, all interest of the holder of record of the deed to secure debt and all interest of all transferees claiming by, through, or under the holder of record of the deed to secure debt.

(f) Where the holder of the right to service or supervise the servicing of the transferred deed to secure debt and the indebtedness therein secured is a financial institution or lender as described in subsection (d) of this Code section, it shall have the same rights, responsibilities, and

obligations to act in all matters concerning the servicing, administration, and cancellation of the deed and indebtedness as to third parties as if no such transfer had taken place.

(g) A transfer of a deed to secure debt shall not be recorded unless it includes the mailing address of the last transferee thereof. Failure to comply with this provision shall not be a defense to any foreclosure or grounds to set aside any foreclosure of any deed to secure debt.

(h) A grantor or his transferee shall be entitled to receive without charge a payoff balance from the holder of a deed to secure debt on real property by requesting in writing said balance and providing a self-addressed stamped envelope.

History.
Code 1933, § 67-1305.1, enacted by Ga. L. 1967, p. 737, § 1; Ga. L. 1980, p. 976, § 1; Ga. L. 1989, p. 859, § 2.

JUDICIAL DECISIONS

A joint payee request did not constitute an assignment of FHA's security deed for the reason that it did not identify such security deed and did not purport to be signed by the grantee. Washington Loan & Banking Co. v. Guin, 236 Ga. 779, 225 S.E.2d 318, 1976 Ga. LEXIS 1024 (1976).

Effect of transfer of deed to nominee of lender. — After Chapter 7 debtor executed a note to a lender and also executed a security deed to a grantee, as the lender's nominee, to secure the debt, there was no separation of the note and security deed as a matter of law resulting from the transfer of the security deed. Drake v. Citizens Bank (In re Corley), 447 B.R. 375, 2011 Bankr. LEXIS 807 (Bankr. S.D. Ga. 2011).

Bad faith acted to lift automatic stay of bankruptcy. — Because a debtor filed a second bankruptcy petition for the express purpose of delaying and frustrating the legitimate efforts of a secured creditor to enforce its right of foreclosure, the debtor was found to have not acted in good faith under 11 U.S.C. § 362(g); thus, cause existed to annul or lift the automatic stay pursuant to 11 U.S.C. § 362(d). GRP Fin. Servs. Corp. v. Olsen (In re Olsen), No. 06-66198-MGD, 2007 Bankr. LEXIS 614 (Bankr. N.D. Ga. Jan. 8, 2007).

Effect of transfer of deed from nominee to lender. — Foreclosure sale was valid because there was no defect in the assignment of the power of sale from the nominee to the lender when the security deed did not lack any essential terms regarding the nominee's role, rights, or duties under O.C.G.A. § 10-6-1 and no consideration was needed under O.C.G.A. § 44-14-64(a). The lender did not violate the automatic stay of 11 U.S.C. § 362(a) by recording the sale post-petition because the Chapter 13 debtor retained no interest in the property after the sale. Bishop v. GMAC Mortg., LLC (In re Bishop), 470 B.R. 633, 2011 Bankr. LEXIS 5123 (Bankr. M.D. Ga. 2011).

Assignment of security deed. — Under O.C.G.A. §§ 23-2-114 and 44-14-64(b), the assignments of plaintiff homeowner's security deed granted to defendant bank did not diminish the deed's powers in the bank's foreclosure action, thus, the homeowner's wrongful foreclosure claim failed to state a claim for relief. Milani v. OneWest Bank FSB, 491 Fed. Appx. 977, 2012 U.S. App. LEXIS 21559 (11th Cir. 2012).

District court properly dismissed the plaintiff's suit against multiple financial institutions and fictitious parties seeking declaratory and equitable relief to stop foreclosure proceedings as there was no dispute that the holder of the security deed at the time of the proposed foreclosure had the authority to foreclose on the property in accordance with the security deed's power of sale. Assignment of the

security deed did not diminish the instrument's powers under Georgia law. Stabb v. GMAC Mortg., LLC, 579 Fed. Appx. 706, 2014 U.S. App. LEXIS 16081 (11th Cir. 2014).

Lower court correctly determined that the debtors lacked standing to challenge the assignment of the security deed to a bank because the security deed afforded the debtors no right to dispute the assignment as the debtors were not third-party beneficiaries of the assignment as a whole and were not intended to directly benefit from the transfer of the power of sale. Ames v. JP Morgan Chase Bank, N.A., 298 Ga. 732, 783 S.E.2d 614, 2016 Ga. LEXIS 210 (2016).

RESEARCH REFERENCES

Am. Jur. 2d.

55 Am. Jur. 2d, Mortgages, §§ 1001, 1002, 1012 et seq.

C.J.S.

59 C.J.S., Mortgages, §§ 319, 337, 346 et seq.

ALR.

Excessive security for debt as affecting question of fraud upon creditors, 138 A.L.R. 1051.

44-14-65. [Reserved] Fees for transfer of real property covered by deed to secure debt.

History.

Code 1933, § 67-1301.1, enacted by Ga. L. 1975, p. 370, § 2; repealed by Ga. L. 1984, p. 132, § 1, effective February 3, 1984.

Editor's notes.

Ga. L. 2015, p. 5, § 7/HB 90, effective March 13, 2015, part of an Act to revise, modernize, and correct the Code, reserved the designation of this Code section.

44-14-66. Effect of liens against grantee on grantor's right to reconvey; effect of reconveyance in event of grantor's prior death.

The grantor's right to a reconveyance of the property upon complying with the contract shall not be affected by any liens, encumbrances, or rights which would otherwise attach to the property by virtue of the title being in the grantee; but the right of the grantor to a reconveyance shall be absolute and permanent upon his complying with his contract with the grantee according to the terms. In the event of the prior death of the grantor, such a reconveyance shall be valid and effective to vest title in the heirs, personal representatives, or successors in title of the deceased grantor as their interests may appear.

History.

Ga. L. 1871-72, p. 44, § 2; Code 1873, § 1971; Code 1882, § 1971; Civil Code 1895, § 2775; Civil Code 1910, § 3310; Code 1933, § 67-1307; Ga. L. 1970, p. 176, § 1.

JUDICIAL DECISIONS

The right of the mortgagee under O.C.G.A. § 44-14-66, will be defeated by payment of the secured debt, either by the vendor or the vendor's assignee. Gilliard v. Johnston & Miller, 161 Ga. 17, 129 S.E. 434, 1925 Ga. LEXIS 293 (1925).

The original holders of the bond for title did not have either a fee simple or

mortgageable interest in the land which they could convey to the purchaser at the first sheriff's sale, or those who were substituted for the first purchaser, and therefore were not protected by O.C.G.A. § 44-14-66. Lanier v. Brooker, 65 Ga. 761, 1880 Ga. LEXIS 324 (1880).

Land held by absolute deed as security for a debt still unpaid, is subject to levy and sale as the property of the vendee, under a judgment against the vendee, no matter whether the judgment creditor gave credit on the faith of the property so held or not. Parrott v. Baker, 82 Ga. 364, 9 S.E. 1068, 1889 Ga. LEXIS 384 (1889).

Crops. — A security deed executed under O.C.G.A. §§ 44-14-60, 44-14-61, 44-14-63, 44-14-66, and 44-14-67, after the passage of O.C.G.A. § 44-14-101, to convey cultivated farm land as security for debt, does not ordinarily comprehend crops matured or unmatured on the land. Penn Mut. Life Ins. Co. v. Larsen, 178 Ga. 255, 173 S.E. 125, 1934 Ga. LEXIS 26 (1934).

Legal title automatically reverted. — Trial court did not err in holding that children acquired a collective two-thirds interest in property because pursuant to O.C.G.A. § 44-14-67(a), when the original security deeds were paid off and cancelled legal title automatically reverted to the father and the children, his assigns; the father had no authority thereafter to convey a greater interest than he held and, thus, only the father's own one-third interest could be encumbered by the loan that was made to the father without any involvement by the children. Chase Manhattan Mortg. Corp. v. Shelton, 290 Ga. 544, 722 S.E.2d 743, 2012 Ga. LEXIS 190 (2012).

OPINIONS OF THE ATTORNEY GENERAL

Ownership for annexation purposes. — The intent of the General Assembly in referring to "the record title holder of the fee simple title" in former O.C.G.A. § 36-36-22(d) was to give the grantor of a security deed the right to decide upon the question of annexation; thus, in determining ownership of land for the purpose of determining the eligibility of a landowner to sign an application for annexation to a municipality, it should be done without regard to whether such land is encumbered by an outstanding deed to secure debt. 1967 Op. Att'y Gen. No. 67-16.

RESEARCH REFERENCES

Am. Jur. 2d.
55 Am. Jur. 2d, Mortgages, §§ 362, 363.

C.J.S.
59 C.J.S., Mortgages, § 478.

44-14-67. Cancellation of deed as reconveyance of title.

(a) In all cases where property is conveyed to secure a debt, the surrender and cancellation of the deed, in the same manner as mortgages are canceled, on payment of the debt to any person legally authorized to receive the same, shall operate to reconvey the title of the property to the grantor or the grantor's heirs, executors, administrators, or assigns.

(b) In the case of a deed to secure debt which applies to real property, in order to authorize the clerk of superior court to show the original instrument as canceled of record, there shall be presented for recording:

(1) A cancellation upon the original security deed itself;

(2) A conveyance from the record holder of the security deed, which conveyance is in the form of a quitclaim deed or other form of deed suitable for recording and which refers to the original security deed; or

(3) A cancellation as provided in subsection (c) of this Code section.

Any clerk of superior court who cancels of record any deed to secure debt in the manner authorized in this subsection shall be immune from any civil liability, either in such clerk's official capacity or personally, for so canceling of record such security deed.

(c) Cancellation of a security deed, the original of which has been lost, stolen, or otherwise mislaid, may be made based upon a document executed by the owner of the security interest and who so swears in such document, which document shall be recorded and shall be in substantially the following form:

"_____ County, Georgia

The indebtedness referred to in that certain deed to secure debt from _____ to _____, dated _____, and of record in Deed Book _____, Page _____, in the office of the clerk of the Superior Court of _____ County, Georgia, having been paid in full and the undersigned being the present owner of such secured interest by virtue of being the original grantee or the heir, assign, transferee, or devisee of the original grantee, the clerk of such superior court is authorized and directed to cancel that deed of record as provided in Code Section 44-14-4 of the O.C.G.A. for other mortgage cancellations.

In witness whereof, the undersigned has set his or her hand and seal, this _____ day of _____, _____.

_____ (SEAL)
Signature

Signed, sealed, and delivered
on the date above shown

_____

Unofficial Witness

_____

Notary Public

(SEAL)

My commission expires: _____"

History.

Ga. L. 1889, p. 118, § 1; Civil Code 1895, § 2774; Civil Code 1910, § 3309; Code 1933, § 67-1306; Ga. L. 1986, p. 754, § 2; Ga. L. 1989, p. 498, § 2; Ga. L. 1994, p. 1943, § 12; Ga. L. 1999, p. 81, § 44.

Code Commission notes.

Pursuant to Code Section 28-9-5, in 2022, punctuation was modified at the beginning and ending of the form in subsection (c).

Law reviews.

For annual survey of law of real property, see 38 Mercer L. Rev. 319 (1986).

JUDICIAL DECISIONS

A security deed, although conveying the legal title, does so for the purpose of security only, and upon the satisfaction of the obligation which it is given to secure, is automatically extinguished in effect and can be canceled of record without any reconveyance by the grantee, in accordance with the provisions of O.C.G.A. § 44-14-67. Hennessy v. Woodruff, 210 Ga. 742, 82 S.E.2d 859, 1954 Ga. LEXIS 445 (1954); Sapp v. ABC Credit & Inv. Co., 243 Ga. 151, 253 S.E.2d 82, 1979 Ga. LEXIS 840 (1979).

No reconveyance is necessary to revest title, where land has been conveyed to secure a debt, a cancellation of the deed, as in the case of mortgages, being sufficient for that purpose under O.C.G.A. § 44-14-67. Chapman v. Ayer, 95 Ga. 581, 23 S.E. 131, 1894 Ga. LEXIS 612 (1894); Citizens' Bank v. Taylor, 155 Ga. 416, 117 S.E. 247, 1923 Ga. LEXIS 85 (1923).

Legal title automatically reverted. — Trial court did not err in holding that children acquired a collective two-thirds interest in property because pursuant to O.C.G.A. § 44-14-67(a), when the original security deeds were paid off and cancelled legal title automatically reverted to the father and the children, his assigns; the father had no authority thereafter to convey a greater interest than he held, and thus, only the father's own one-third interest could be encumbered by the loan that was made to the father without any involvement by the children. Chase Manhattan Mortg. Corp. v. Shelton, 290 Ga. 544, 722 S.E.2d 743, 2012 Ga. LEXIS 190 (2012).

It is the duty of the grantee, upon payment of the amount due under the terms of deed to secure debt, to surrender and deliver it to the grantor with a proper entry showing payment, and the grantor may thereafter have it "satisfied" of record. A petition seeking to have the above rule complied with by the grantee is based upon a statutory right. Hennessy v. Woodruff, 210 Ga. 742, 82 S.E.2d 859, 1954 Ga. LEXIS 445 (1954).

Alternate methods. — If an instrument by which title is conveyed to the creditor is of such a character as to pass into the creditor an absolute title, it can be revested only by a reconveyance to the grantor, or by compliance with the provisions of O.C.G.A. § 44-14-67. Burckhalter v. Planters' Loan & Sav. Bank, 100 Ga. 428, 28 S.E. 236, 1897 Ga. LEXIS 78 (1897). See also Ashley v. Cook, 109 Ga. 653, 35 S.E. 89, 1900 Ga. LEXIS 279 (1900).

Nature of interest revested. — Under O.C.G.A. § 44-14-67 the payment of a debt secured by deed to land revests in the grantor in such deed such interest and title therein as can be levied upon under an execution issuing upon a judgment junior in date to such deed, without a reconveyance of the land to the grantor, and, in case of cancellation, without the record of the cancellation of the security deed. Citizens' Mercantile Co. v. Easom, 158 Ga. 604, 123 S.E. 883, 1924 Ga. LEXIS 311 (1924).

Deed with reconveyance clause not mortgage. — Under O.C.G.A. § 44-14-67 an instrument, in all respects in the form of a deed passing title, and executed for the purpose of securing the payment of a described debt is not, because containing the clause: "Reconveyance of said property to be made upon fulfillment of all the conditions of this instrument," properly to be treated as a mere mortgage. Pitts v. Maier, 115 Ga. 281, 41 S.E. 570, 1902 Ga. LEXIS 386 (1902).

A written instrument which by its terms passes title from the vendor to the vendee as security for a debt and which contains no defeasance clause is a deed or bill of sale to secure a debt and is not a mortgage. The title conveyed thereunder does not automatically revert to the vendor upon the payment of the debt, but continues thereafter in the vendee, and is not divested until the performance of some act, as a reconveyance from the vendee to the vendor, or the cancellation and surrender of the instrument by the vendee as required by O.C.G.A. § 44-14-67. Grady v. T.I. Harris, Inc., 41 Ga. App. 111, 151 S.E. 829, 1930 Ga. App. LEXIS 474 (1930).

Distinction between cancellation and record of cancellation. — O.C.G.A. § 44-14-67 deals with the cancellation of the security deed as a separate and distinct thing from the record of such cancellation; and the record of such cancellation as a separate and distinct thing from the cancellation itself. The language of that section, "cancellation of such deed in the same manner that mortgages are now canceled," may mean that such cancellation shall consist of an acknowledgment of the payment of the debt and an order from the grantee authorizing or directing the cancellation of the instrument. The proper construction may be, that, when such order is entered upon the security deed, it is the cancellation thereof contemplated by the section. Citizens' Mercantile Co. v. Easom, 158 Ga. 604, 123 S.E. 883, 1924 Ga. LEXIS 311 (1924).

Voluntary cancellation without consideration. — Under O.C.G.A. § 44-14-67, the cancellation of a security deed and its delivery to the grantor, who had it canceled of record, was held binding and effective, though the cancellation was voluntary and without consideration. In re Hitchcock, 283 F. 447, 1922 U.S. Dist. LEXIS 1307 (D. Ga. 1922).

Effect of failure to record cancellation. — If record of cancellation is not effected according to O.C.G.A. § 44-14-67, the security deed appearing of record to be valid, a purchaser without notice acquires title. Ellis v. Ellis, 161 Ga. 360, 130 S.E. 681, 1925 Ga. LEXIS 355 (1925).

Sufficiency of deed cancellation. — Chapter 7 trustee was allowed under 11 U.S.C. § 544 and O.C.G.A. § 44-14-63(a) to avoid a security deed which debtors gave to a bank before the debtors declared Chapter 7 bankruptcy because the bank filed the deed in the wrong county. There was no merit to the bank's claim that the trustee had inquiry notice of the bank's security interest because the debtors used the proceeds of a loan the debtors obtained from the bank to pay a debt to another bank and the other filed documents to cancel the bank's loan that were defective under O.C.G.A. § 44-14-67(c); in addition, the doctrine of equitable subordination did not prevent the trustee from avoiding the bank's secured interest. Rogers v. M&I Bank FSB (In re Morgan), 449 B.R. 821, 2010 Bankr. LEXIS 6263 (Bankr. N.D. Ga. 2010).

Erroneous cancellation of security deed. — Trial court did not err in reinstating the security deed after the bank erroneously cancelled the security deed as the recorded cancellation did not reconvey title since the debt was not fully satisfied and, thus, the bank retained the bank's right to non-judicial foreclosure. Patel v. J.P. Morgan Chase Bank, N.A., 327 Ga. App. 321, 757 S.E.2d 460, 2014 Ga. App. LEXIS 303 (2014), cert. denied, No. S14C1417, 2014 Ga. LEXIS 956 (Ga. Nov. 17, 2014).

Transfer of bond to reconvey. — Where an owner of land made a conveyance of it to secure a loan, taking bond for reconveyance upon payment, and transferred the bond to another, in the absence of fraud, one who subsequently obtained judgment against the assignor of the bond, and who was not shown to have been a creditor when the transfer was made, did not have the right to subject the land after the payment of the secured debt by the transferee of the bond, the cancellation of the security deed under O.C.G.A. § 44-14-67, and the subsequent making of a quitclaim deed by the secured creditor to the transferee. Burney Tailoring Co. v. Cuzzort, 132 Ga. 852, 65 S.E. 140, 1909 Ga. LEXIS 427 (1909).

Payee of a note authorizing retention of any of maker's collateral then or thereafter acquired and application to the same or other debts, which took a transfer of a note and security deed executed by maker to a bank, was entitled to

a special lien on the land described in the security deed only for the amount of the balance due by the debtor to the bank, and upon payment of such balance the debtor was entitled to have the security deed canceled and surrendered to the debtor. Mitchell v. Mandeville Mills, 180 Ga. 791, 180 S.E. 828, 1935 Ga. LEXIS 565 (1935).

No reconveyance where secured debt not paid in full. — Because the debt to the bank was not paid, the title of the property could not have been reconveyed to the successor of the grantor of the bank's security interest pursuant to O.C.G.A. § 44-14-67(a). Therefore, the bank's security interest was never reconveyed and the bank held a senior position based on the bank's 1997 mortgage to the grantor. Mak v. Argent Mortg. Co., LLC, No. 1:07-cv-02806-JOF, 2009 U.S. Dist. LEXIS 84746 (N.D. Ga. Sept. 15, 2009).

In a case in which (1) a creditor's security interest was inadvertently released before the mortgage on the debtor's residence was paid in full; (2) the debtor sought declaratory relief as to secured status, to avoid preferential transfer, and for monetary damages for wrongful foreclosure; and (3) the creditor moved for summary judgment, the creditor's inadvertent filing of a rescission of cancellation of the creditor's security interest in the debtor's residence did not result in a transfer of an interest of the debtor in the property. Under O.C.G.A. § 44-14-67(a), filing a notice of cancellation did not terminate the creditor's lien; the satisfaction of the debt did so. In re Poff, No. 08-53493-JDW, No. 09-05052, 2010 Bankr. LEXIS 4703 (Bankr. M.D. Ga. Dec. 16, 2010).

Fraudulent deed was facially regular and operated to release security interest. — A 2003 warranty deed that operated to release a prior lender's security interest in the property was not a forgery but was signed by someone fraudulently assuming the authority of an officer of the prior lender and was regular on the deed's face. Therefore, a subsequent lender that foreclosed on the property and purchased the property at the foreclosure sale was a bona fide purchaser for value entitled to take the property free of the prior lender's security interest. Deutsche Bank Nat'l Trust Co. v. JP Morgan Chase Bank, N.A., 307 Ga. App. 307, 704 S.E.2d 823, 2010 Ga. App. LEXIS 1082 (2010), cert. denied, No. S11C0595, 2011 Ga. LEXIS 359 (Ga. Apr. 26, 2011).

Failure to provide a separate statement swearing to fate of original document. — According to In re Morgan, 449 B.R. 821 (Bankr.N.D.Ga. 2010), the failure to provide a separate statement swearing to the fate of the original document does not, by itself, put a hypothetical bona fide purchaser on inquiry notice because "given the plain language of the statute, the presentation of an instrument of cancellation conforming to this form with an attested, witnessed signature in and of itself evidences a sworn statement that the original security deed to be cancelled is unavailable." Though the Morgan decision did not address ownership, the reasoning plainly extends to it; the statute (in the context of O.C.G.A. § 44-14-67(c)), provides a form, so that the form clearly complies with the requirements of the statute. Gordon v. Wells Fargo Bank, N.A. (In re Ingram), No. 08-61696 - MHM, No. 08-6440, 2013 Bankr. LEXIS 2614 (Bankr. N.D. Ga. Apr. 5, 2013).

Summary judgment proper once security deed paid in full. — In an action to remove a cloud from title, the trial court properly granted summary judgment to a bank and cancelled a recorded deed in favor of a holder, as: (1) the holder could no longer claim any legal title to the subject property once the underlying debt thereto was paid; (2) no evidence of valid renewal or extension of the note existed; and (3) the holder lacked standing to challenge any foreclosure on the debt. Northwest Carpets, Inc. v. First Nat'l Bank, 280 Ga. 535, 630 S.E.2d 407, 2006 Ga. LEXIS 341 (2006).

OPINIONS OF THE ATTORNEY GENERAL

Recordation requirements. — When a paid mortgage or security deed is filed with an order of cancellation upon it, clerks of superior court may record the canceled instrument or only the part which bears the order; the part recorded

should be sufficient to identify the transaction; clerks should index cancellations of security instruments with the name of the borrower (mortgagor) in the "grantee" index, make all notations required by statute in the indices and on the recordings, and charge a fee of $3.50, unless the cancellation is by new deed, in which case the fee for recording a deed should also be charged. 1989 Op. Att'y Gen. U89-19.

Cancellation of security deeds and writs of execution from record. 1972 Op. Att'y Gen. No. U72-79.

A clerk must obtain a written authorization executed by or on behalf of grantee in order to cancel a security instrument and, in case of real property, may require additional formalities such as attestations to assure against forgery. 1981 Op. Att'y Gen. No. U81-50.

Sufficiency of deed cancellation. — Under Ga. L. 1986, p. 754, amending O.C.G.A. §§ 44-14-3 and 44-14-67 dealing with deeds to secure debt and their cancellation, the release of corporate security interests in real property or security interests under the UCC, signed by an officer or delegated agent, as provided in O.C.G.A. § 14-5-7(b), will continue to constitute conclusive evidence of corporate authorization for the release, and when the clerk is presented with such a release apparently so signed, in the absence of overt signs of impropriety, it should be accepted for recording. 1986 Op. Att'y Gen. No. 86-17.

RESEARCH REFERENCES

Am. Jur. 2d.

55 Am. Jur. 2d, Mortgages, §§ 359 et seq., 430.

C.J.S.

59 C.J.S., Mortgages, § 451 et seq.

ALR.

Excessive security for debt as affecting question of fraud upon creditors, 138 A.L.R. 1051.

Requiring security as condition of canceling of record mortgage or lien, or of recording payment, 2 A.L.R.2d 1064.

Part 2

Reversion

44-14-80. Reversion of realty to grantor; renewals and affidavits; effect; fees; construction of Code section.

(a) Title to real property conveyed to secure a debt or debts shall revert to the grantor or the grantor's heirs, personal representatives, successors, and assigns as follows:

(1) Title to real property conveyed to secure a debt or debts shall revert to the grantor or his or her heirs, personal representatives, successors, and assigns at the expiration of seven years from the maturity of the debt or debts or the maturity of the last installment thereof as stated or fixed in the record of the conveyance or, if not recorded, in the conveyance; provided, however, that where the parties by affirmative statement contained in the record of conveyance intend to establish a perpetual or indefinite security interest in the real property conveyed to secure a debt or debts, the title shall revert at the expiration of the later of (A) seven years from the maturity of the debt or debts or the maturity of the last installment thereof as stated or fixed in the record of conveyance or, if not

recorded, in the conveyance; or (B) 20 years from the date of the conveyance as stated in the record or, if not recorded, in the conveyance;

(2) If the maturity of the debt or debts or the maturity of the last installment thereof is not stated or fixed, title to real property conveyed to secure a debt or debts shall revert at the expiration of seven years from the date of the conveyance as stated in the record or, if not recorded, in the conveyance; provided, however, that where the parties by affirmative statement contained in the record of conveyance intend to establish a perpetual or indefinite security interest in the real property conveyed to secure a debt or debts, the title shall revert at the expiration of 20 years from the date of the conveyance as stated in the record or, if not recorded, in the conveyance; or

(3) If the maturity is not stated or fixed and the conveyance is not dated, title to real property conveyed to secure a debt or debts shall revert at the expiration of seven years from the date the conveyance is recorded or, if not recorded, is delivered;

provided, however, that foreclosure by an action or by the exercise of power of sale, if started prior to reversion of title, shall prevent the reversion if the foreclosure is completed without delay chargeable to the grantee or the grantee's heirs, personal representatives, successors, or assigns.

(b) If the grantee or the grantee's personal representatives, heirs, successors, or assigns, or any one of them if more than one, or an officer of a corporation having an interest shall, at any time before the title reverts as provided in subsection (a) of this Code section, make and cause to be recorded upon the record of the conveyance or elsewhere in the public records, with a notation of the place of record of the renewal on the record of the conveyance or, if not recorded, upon the conveyance, a written renewal of the debt or debts secured or the part thereof which are not fully paid and are not barred, which renewal shall be signed by the original grantor or the grantor's heirs, personal representatives, or successors in title to the real estate conveyed and shall be dated, the conveyance and record thereof shall remain of full force and effect and the title shall not revert for an additional period of seven years or 20 years according to the appropriate reversion period stated in subsection (a) of this Code section from the date of the renewal unless the debt or debts are paid sooner.

(c) If the grantee or the grantee's personal representatives, heirs, successors, or assigns, or any of them if more than one, or an officer of a corporation having an interest shall, at any time before the title reverts as provided in subsection (a) of this Code section, make and cause to be recorded upon the record of the conveyance or elsewhere in

the public records, with a notation of the place of record thereof on the record of the conveyance or, if not recorded, upon the conveyance, an affidavit setting forth the name and address of the owner and holder of the debt and the deed securing the debt, the nature of the claim, the amount due thereon, the date of the last payment thereon, the maturity date of the indebtedness, and, if the debt has been renewed or extended, the terms of such renewal or extension and a description of the property conveyed therein, the conveyance and record thereof shall remain of full force and effect and title shall not revert for seven years or 20 years according to the appropriate reversion period stated in subsection (a) of this Code section from the maturity of the indebtedness as shown by said affidavit unless the debt or debts are paid sooner.

(d) It shall be the duty of the clerk of the superior court to record the renewals and affidavits provided for and authorized by this Code section; and the clerks shall be entitled to the same fees which are allowed for recording deeds.

(e) Subsections (a) through (d) of this Code section shall not operate to make such conveyance a mortgage, but the conveyance shall be held to be an absolute conveyance of title, subject to reversion.

(f) Nothing in this Code section shall be construed, interpreted, or enforced in a manner which impairs any contract rights under currently existing instruments conveying real property to secure a debt or debts.

History.

Ga. L. 1941, p. 487, §§ 1, 2; Ga. L. 1953, Nov.-Dec. Sess., p. 313, § 1; Ga. L. 1982, p. 3, § 44; Ga. L. 1994, p. 1943, § 13; Ga. L. 1995, p. 1198, §§ 2, 3.

Editor's notes.

Ga. L. 1995, p. 1198, § 4(b), not codified by the General Assembly, provides that where the record of conveyance states or fixes the maturity of the debt or debts or the maturity of the last installment thereof and the parties by affirmative statement contained in the record of conveyance evidence their intention to establish a perpetual or indefinite security interest, section 2 of the Act shall be applicable and effective with respect to all such conveyances even though they may be dated prior to July 1, 1995.

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 note on the 1995 amendment of this section, see 12 Ga. St. U.L. Rev. 313 (1995).

For annual survey of real property law, see 58 Mercer L. Rev. 367 (2006).

JUDICIAL DECISIONS

Section constitutional as applied to deeds to secure debt executed after effective date. — O.C.G.A. § 44-14-80, as applied to deeds to secure debt executed after its effective date, does not offend constitutional provisions prohibiting retrospective legislation. Smith v. Merchants & Farmers Bank, 226 Ga. 715, 177 S.E.2d 249, 1970 Ga. LEXIS 647 (1970).

O.C.G.A. § 44-14-80 is unconstitutional in instances where security

deed predates it because it would be retroactive and it would impair the obligation of a contract since the powers granted in a security deed could have been exercised so long as the debt secured remained unpaid, regardless of whether the evidence of the debt was barred by the statute of limitations. Drake v. Barrs, 225 Ga. 597, 170 S.E.2d 684, 1969 Ga. LEXIS 579 (1969).

What constitutes "affirmative statement." — Use of the words "forever, in fee simple" in a security deed were not an "affirmative statement" within the meaning of O.C.G.A. § 44-14-80(a)(2) such that title to the property did not revert to the grantor for 20 years, rather than seven years, because those words related to the estate granted rather than the duration of the security interest. Parol evidence was not admissible and § 44-14-80 controlled over O.C.G.A. § 44-6-21. Vineville Capital Group, LLC v. McCook, 329 Ga. App. 790, 766 S.E.2d 156, 2014 Ga. App. LEXIS 781 (2014).

Deed more than 20 years past due cannot be foreclosed. — When the debt secured by an unforeclosed deed is more than 20 years past due, title conveyed by the deed shall revert to the grantor. O.C.G.A. § 44-14-80 further denies any right to foreclose, to sell under such deed, or to sue for the land therein. Williams v. O'Connor, 208 Ga. 39, 64 S.E.2d 890, 1951 Ga. LEXIS 531 (1951).

Reversion period was 20 years. — Trial court erred in finding that title to the real property reverted to an ex-husband and by setting aside a security deed on that basis because the security deed contained a sufficient statement that the parties intended to establish a perpetual or indefinite security interest in the real property such that the applicable reversion period was 20 years from the date of the conveyance as set forth in O.C.G.A. § 44-14-80(a)(1). Stearns Bank, N.A. v. Mullins, 333 Ga. App. 369, 776 S.E.2d 485, 2015 Ga. App. LEXIS 322 (2015), cert. denied, No. S15C1821, 2015 Ga. LEXIS 868 (Ga. Nov. 2, 2015), cert. denied sub nom. Hawkins v. Stearns Bank, N.A., No. S15C1827, 2015 Ga. LEXIS 855 (Ga. Nov. 2, 2015).

Reversion period was seven years. — Given the fixed maturity date in the deed, with a loan for a sum certain rather than a revolving line of credit, the deed lacked an affirmative statement of intent to create a perpetual and indefinite security interest in the property and, so, under O.C.G.A. § 44-14-80(a)(1), the seven-year reversionary period applied. Griggs v. Miller, 363 Ga. App. 82, 870 S.E.2d 578, 2022 Ga. App. LEXIS 126 (2022).

Title under one security deed reverted after seven years. — Two security deeds did not create a perpetual or indefinite security interest in the property; therefore, as to a 2008 deed, title reverted to the grantor seven years after the maturity date under O.C.G.A. § 44-14-80(a); however, title did not revert under a 2011 deed because the lender had initiated foreclosure proceedings. West Vill. Holdings, LLC v. ONH Holdings, LLC (In re West Vill. Holdings, LLC), No. 19-05116-LRC, 2020 Bankr. LEXIS 845 (Bankr. N.D. Ga. Mar. 31, 2020).

Extension of reversion of title period. — Trial court erred in granting summary judgment in the appellee's favor on the appellant's wrongful foreclosure claim because the record contained no evidence showing whether the written renewals of the loan from the bank were recorded; thus, the appellate court could not determine from the record before the court whether title reverted to the appellant as a matter of law on November 10, 2010, seven years after the security deed was first filed, or whether the recording of any of the subsequent loan renewals extended the reversion period. Matson v. Bayview Loan Servicing, LLC, 339 Ga. App. 890, 795 S.E.2d 195, 2016 Ga. App. LEXIS 691 (2016).

Extension not triggered. — In an action to quiet title, because the extensions to the maturity date of the note were not recorded and consequently the nonjudicial foreclosure occurred more than seven years after the note's maturity date, the automatic 20 year extension was not triggered. Bell v. Freeport Title & Guaranty, Inc., 355 Ga. App. 94, 842 S.E.2d 565, 2020 Ga. App. LEXIS 266 (2020).

Promissory note secured under the dragnet clause of a previously executed security deed must be entered of record under O.C.G.A. § 44-14-80 in order to prevent title from reverting to the

grantor at the expiration of 20 years from maturity of the original debt. Minor v. Neely, 247 Ga. 147, 273 S.E.2d 853, 1981 Ga. LEXIS 606 (1981).

Notes and security deeds maturing before effective date of section not affected. — O.C.G.A. § 44-14-80 is not applicable to a note and security deed given to secure the same where the note matured before that section, according to its provisions, became effective. Hames v. Hames, 220 Ga. 595, 140 S.E.2d 844, 1965 Ga. LEXIS 568 (1965).

O.C.G.A. § 44-14-80 will not be applied retroactively to loan deed made prior to 1941. McCreary v. Wright, 132 Ga. App. 500, 208 S.E.2d 373, 1974 Ga. App. LEXIS 1729 (1974).

For case where O.C.G.A. § 44-14-80 not retroactive, see Todd v. Morgan, 215 Ga. 220, 109 S.E.2d 803, 1959 Ga. LEXIS 550 (1959).

Exclusion from evidence of deed to secure debt when more than 20 years past due. — Under O.C.G.A. § 44-14-80, a deed to secure debt upon which the plaintiffs rely in a common-law action in ejectment should be excluded from the evidence when objected to, when the debt secured is more than 20 years past due and that section also provides that in such a case title in the deed reverts to the grantor. Williams v. O'Connor, 208 Ga. 39, 64 S.E.2d 890, 1951 Ga. LEXIS 531 (1951).

Notice requirements in security deed. — Issue of whether a grantee properly served notice to cure to a promisor 60 days prior to initiating foreclosure proceedings, as stipulated in the grantee's security deed, was not waived because once the foreclosure sale the grantee conducted was completed, a bank properly amended the bank's petition to include the issue of whether the foreclosure sale was validly conducted; the pre-trial order in the case specifically listed as substantive issues whether the foreclosure sale was validly conducted and, if not, whether title under the grantee's security deed reverted to the promisor pursuant to O.C.G.A. § 44-14-80(a)(1), and the 60-day notice issue directly related to whether the foreclosure sale was validly conducted because the grantee was legally required to advertise and sell the property according to the terms of the security deed. MPP Invs., Inc. v. Cherokee Bank, N.A., 288 Ga. 558, 707 S.E.2d 485, 2011 Ga. LEXIS 2 (2011).

Special master, in accordance with the special master's complete jurisdiction under O.C.G.A. § 23-3-66, was entitled to review the pleadings and evidence to determine the valid interests in real property because an amended pleading properly filed by a bank included claims that a grantee's foreclosure sale was improper and that title under the grantee's security deed reverted to a promisor pursuant to O.C.G.A. § 44-14-80(a)(1). MPP Invs., Inc. v. Cherokee Bank, N.A., 288 Ga. 558, 707 S.E.2d 485, 2011 Ga. LEXIS 2 (2011).

No affirmative statement of perpetual or indefinite security interest. — Title to real property that the debtors conveyed by a deed to secure a debt reverted to the debtors seven years after the maturity date because the deed did not contain an affirmative statement of intent to establish a perpetual or indefinite security interest. Lyons v. Taylor (In re Lyons), No. 17-51834-JPS, No. 17-05048, 2018 Bankr. LEXIS 253 (Bankr. M.D. Ga. Jan. 31, 2018).

Incorporation by reference. — Presence in a deed to secure debt of a date that was referenced in a note as the maturity date of the loan, and the incorporation by reference of the note into the deed sufficed to fulfill the requirements of O.C.G.A. § 44-14-80(a)(1) that the maturity date of a debt be stated in the record of the conveyance; there is no reason that the terms of a note cannot be incorporated by reference into a deed. United Bank v. West Cent. Ga. Bank, 275 Ga. App. 418, 620 S.E.2d 654, 2005 Ga. App. LEXIS 982 (2005).

Estoppel. — Bank was not estopped from asserting that title to real property reverted to a promisor under a grantee's security deed because an investment company had constructive and actual knowledge of the bank's assertion of superior title and the possibility that title to the property pursuant to the grantee's security deed had reverted, and there was no evidence that the company relied in any way upon the bank's actions, silence, or

inactions; the bank filed suit claiming superior title to the property and recorded a notice of lis pendens well in advance of the foreclosure sale, the company, which purchased the property, admitted at the hearing before the special master that the company knew of the suit against the property but decided to purchase the property anyway, and the company also admitted at that hearing that since the grantee's security deed was public record, the company had notice of both the maturity date on the security deed and the date on which automatic reversion could occur pursuant to O.C.G.A. § 44-14-80(a)(1). MPP Invs., Inc. v. Cherokee Bank, N.A., 288 Ga. 558, 707 S.E.2d 485, 2011 Ga. LEXIS 2 (2011).

Entitlement to excess funds after tax sale. — Trial court erred by granting summary judgment to the property owner because the trial court erred by holding that the security deed holder lost the holder's right to excess funds that arose from the tax sale as the relevant date under O.C.G.A. § 44-14-80 when considering who was entitled to the excess funds from the tax sale was the tax sale date, not the fund distribution date. Worthwhile Investments, LLC v. Higgins, 337 Ga. App. 183, 787 S.E.2d 245, 2016 Ga. App. LEXIS 247 (2016), cert. denied, No. S16C1663, 2017 Ga. LEXIS 507 (Ga. June 5, 2017).

No showing of reversion of title. — Trial court did not err in denying the appellant's motion for summary judgment because, while the security deed was recorded, and seven years had passed from the maturity date of the note, the evidence showed without dispute that the note was renewed; and, in the absence of evidence that those renewals were not placed in the public record, the appellant did not yet make a prima facie showing of reversion of title. Matson v. Bayview Loan Servicing, LLC, 339 Ga. App. 890, 795 S.E.2d 195, 2016 Ga. App. LEXIS 691 (2016).

Provision not applicable. — In a quiet title action, under the unique circumstances this case, the maturity date of the last installment was fixed in the security deed, and the reversion provision did not apply. Freeport Title & Guar. v. Tegeue, 360 Ga. App. 18, 858 S.E.2d 554, 2021 Ga. App. LEXIS 241 (2021).

RESEARCH REFERENCES

Am. Jur. 2d.

55 Am. Jur. 2d, Mortgages, § 642 et seq. 66 Am. Jur. 2d, Records and Recording Laws, §§ 48, 157.

C.J.S.

59 C.J.S., Mortgages, § 192.

ALR.

Extension of existing real estate mortgage or deed of trust by subsequent agreement to cover additional indebtedness, 76 A.L.R. 574.

Who may take advantage of failure to renew real estate mortgage as provided by statute, 97 A.L.R. 739.

Renewal by one spouse without the other's participation, of lien on homestead, 143 A.L.R. 1369.

Increase or renewal of mortgage debt without insurer's consent as violation of policy provisions as to mortgages or encumbrances, 163 A.L.R. 1402.

Validity, and applicability to causes of action not already barred, of a statute enlarging limitation period, 79 A.L.R.2d 1080.

44-14-81. When power of sale barred.

Powers of sale in the conveyances of real property to secure debt shall not be exercised after an action to foreclose the instrument is barred. A sale or conveyance under power in such instrument after an action to foreclose the instrument is barred shall be absolutely void and not merely voidable.

History.
Ga. L. 1941, p. 487, § 3.
Cross references.
Exercise of powers of appointment and sale, § 23-2-114 et seq.

44-14-82. When action to recover barred.

No action shall be brought to recover property under a conveyance of real property to secure debt when an action to foreclose and the exercise of power of sale are barred.

History.
Ga. L. 1941, p. 487, § 4.
Cross references.
Exercise of powers of appointment and sale, § 23-2-114 et seq.

44-14-83. Actions to foreclose and exercise of powers of sale after reversion.

No action to foreclose and no action to recover property under a conveyance of real property to secure debt shall be commenced and no power contained in or conferred by a conveyance of real property to secure debt shall be exercised after the title thereby conveyed has reverted as provided in this part.

History.
Ga. L. 1941, p. 487, § 6.

JUDICIAL DECISIONS

Title reverted to grantor after seven years causing grantee to lose security interest. — Because a security deed did not specify a fixed period for repayment or state that the security interest was perpetual under O.C.G.A. § 44-14-80(a), title to the property reverted to the grantor after seven years and the grantee's security interest in the property was lost. Vineville Capital Group, LLC v. McCook, 329 Ga. App. 790, 766 S.E.2d 156, 2014 Ga. App. LEXIS 781 (2014).

44-14-84. Effect of grantor relinquishing possession in settlement of debt.

This part shall not apply in those cases where the grantor or his successors in possession have surrendered possession of the property described in the deed to secure debt to the grantee or his successors in title in settlement of the indebtedness.

History.
Ga. L. 1941, p. 487, § 8.

44-14-85. Withdrawal of foreclosure proceedings after acceleration of maturity of indebtedness; effect on running of statute of limitations; rescission of acceleration.

(a) The acceleration of the maturity of an indebtedness which is evidenced by a note or otherwise and secured by a deed to secure debt conveying real property and the commencement of foreclosure proceedings by the advertisement of a sale under the power contained in the deed or by an action shall not commence the running of the statute of limitations against the exercise of any right, power, or privilege authorized in the deed or the evidence of the indebtedness secured thereby or the right to bring an action to enforce any provision of the deed or to collect the indebtedness secured thereby if the foreclosure proceedings are withdrawn prior to their completion by sale or otherwise. Such withdrawal shall operate to rescind the acceleration of the maturity of the indebtedness and to reinstate the indebtedness upon the terms and conditions existing prior to the acceleration. Such withdrawal shall not prejudice the right of the holder of the indebtedness and deed securing same to exercise any and all rights to accelerate the maturity of the indebtedness and to exercise any right or power contained in the deed or the evidence of the indebtedness secured thereby or conferred by law should a subsequent default occur.

(b) Nothing contained in subsection (a) of this Code section shall prevent, restrict, or otherwise impair the exercise of any other right or privilege conferred by law; but the rights contained in subsection (a) of this Code section shall be cumulative and in addition thereto.

History.
Ga. L. 1956, p. 716, §§ 1, 2.

Law reviews.
For annual survey on commercial law, see 53 Mercer L. Rev. 153 (2001).

For survey article on real property law, see 67 Mercer L. Rev. 193 (2015).

JUDICIAL DECISIONS

Withdrawal does not eliminate question of surety's liability. — O.C.G.A. § 44-14-85 permits withdrawal of foreclosure proceedings prior to completion without prejudice to the right of the holder. However, that section does not eliminate fact questions as to whether a surety on the obligation foreclosed upon is discharged by reason of the withdrawal. Hart v. DeLowe Partners, Ltd., 147 Ga. App. 715, 250 S.E.2d 169, 1978 Ga. App. LEXIS 2918 (1978).

Foreclosure proceedings stated by bankruptcy court. — O.C.G.A. § 44-14-85 applies only to those foreclosure proceedings that have been withdrawn and does not apply where foreclosure proceedings were stayed by the bankruptcy court as a result of action taken by the debtors. Rapps v. Cooke, 246 Ga. App. 251, 540 S.E.2d 241, 2000 Ga. App. LEXIS 1205 (2000).

RESEARCH REFERENCES

Am. Jur. 2d.

55 Am. Jur. 2d, Mortgages, §§ 682, 689.

C.J.S.

54 C.J.S., Limitations of Actions, § 153.

ALR.

Effect on acceleration clause in mortgage of delay in declaring mortgage due, 5 A.L.R. 437.

Right to reasonable time in which to make payment required by mortgage after acceleration clause becomes effective, 21 A.L.R. 1547.

Time within which taxes may be paid to prevent operation of acceleration clause in mortgage, 31 A.L.R. 731.

Acceleration provision in note or mortgage as affecting the running of the statute of limitations, 34 A.L.R. 897; 161 A.L.R. 1211.

Tender after acceleration clause has become operative as preventing foreclosure of mortgage, 41 A.L.R. 732.

Part payment or acknowledgment of indebtedness on bond or note as tolling statute on mortgage securing same, 41 A.L.R. 822.

Effect on note of acceleration of mortgage securing note, 66 A.L.R. 1311.

Grounds of relief from acceleration clause in mortgage, 70 A.L.R. 993.

Duty of creditor to apply funds so as to prevent operation of acceleration clause, 80 A.L.R. 246.

Payment, acknowledgment, or new promise by mortgagor as tolling statute of limitations as against grantee of mortgaged premises, 101 A.L.R. 337.

When "sale" deemed to have taken place for purposes of statute of limitations which fixed commencement of period at time of foreclosure sale or other judicial sale, 101 A.L.R. 1348.

Acceleration provision of mortgage or other instrument as affected by bankruptcy proceedings, 108 A.L.R. 1030.

Posting of notice or other steps preliminary to nonjudicial foreclosure of mortgage or deed of trust as suspending statute of limitations, 122 A.L.R. 938.

Acceleration clause as affected by cross indebtedness or obligation, 151 A.L.R. 896.

Statute of limitations as affecting suit to enforce mortgage or lien securing debt payable in instalments, 153 A.L.R. 785.

Acceleration of note or mortgage as automatic or optional, 159 A.L.R. 1077.

Acceptance of past-due interest as waiver of acceleration clause in note or mortgage, 97 A.L.R.2d 997.

Validity, construction, and application of clause entitling mortgagee to acceleration of balance due in case of conveyance or transfer or mortgaged property, 69 A.L.R.3d 713; 22 A.L.R.4th 1266; 61 A.L.R.4th 1070.

Construction and effect as to interest due of real estate mortgager clause authorizing mortgagor to prepay principal debt, 86 A.L.R.3d 599.

What transfers justify acceleration under "due-on-sale" clause of, 22 A.L.R.4th 1266.

Validity and enforceability of due-on-sale real-estate mortgage provisions, 61 A.L.R.4th 1070.

ARTICLE 4

SECURITY AGREEMENTS RELATING TO CROPS

JUDICIAL DECISIONS

Applicability of article. — O.C.G.A. § 44-14-100 et seq. discusses only liens on crop mortgages and bills of sale as they relate to crops grown within 12 months from the date of such instruments. Citizens Bank v. J.L. Pilcher & Sons, 67 Ga. App. 395, 20 S.E.2d 442, 1942 Ga. App. LEXIS 426 (1942).

RESEARCH REFERENCES

ALR.

Chattel mortgage on livestock as covering animals subsequently acquired by means other than natural increase by generation, 129 A.L.R. 899.

44-14-100. Tree growing and fruit producing as agricultural pursuits; gum producers as farmers.

(a) The planting, growing, cultivating, harvesting, and marketing of trees and the fruits and products thereof shall be considered and treated under the laws of this state as an agricultural pursuit.

(b) Every original producer or manufacturer of crude gum, oleoresin, from which is derived or may be derived gum spirits of turpentine and gum resin, and his or her employees are declared to be, for all intents and purposes, farmers insofar as any law of this state relates to farming and farmers.

History.

Ga. L. 1933, p. 128, §§ 1, 2; Code 1933, § 67-1107; Ga. L. 1939, p. 240, §§ 1, 2; Ga. L. 1962, p. 156, § 1; Ga. L. 1963, p. 188, § 39; Ga. L. 2001, p. 362, § 35.

Cross references.

Forest resources and other plant life generally, § 12-6-1 et seq.

Law reviews.

For article, "Things Attached to Realty," see 15 Mercer L. Rev. 343 (1964).

JUDICIAL DECISIONS

Section strictly construed. — Since O.C.G.A. § 44-14-100 is in derogation of the common law, it must be strictly construed, and the intention of the General Assembly carried out if that intention can be gotten from the section itself. Meadows v. Dixon, 61 Ga. App. 697, 7 S.E.2d 329, 1940 Ga. App. LEXIS 225 (1940).

Treatment of crude gum before section enacted. — Prior to the passage of O.C.G.A. § 44-14-100 at common law and by the law of this state, crude gum was a part of the realty, and only became personalty when it was taken from the tree. As a part of the realty, under the law as it then existed, it was not such a crop as could be mortgaged to secure advances, nor could a bill of sale thereto be given to secure advances for the gathering of the crude gum. Meadows v. Dixon, 61 Ga. App. 697, 7 S.E.2d 329, 1940 Ga. App. LEXIS 225 (1940).

Reason for classification of pine tree products as personalty. — It was the intention of the General Assembly in passing O.C.G.A. § 44-14-100 to classify the products of the pine tree as personalty solely for the purpose of enabling turpentine operators to obtain credit on their products by the giving of bills of sale or a mortgage, and for no other purpose. Meadows v. Dixon, 61 Ga. App. 697, 7 S.E.2d 329, 1940 Ga. App. LEXIS 225 (1940).

OPINIONS OF THE ATTORNEY GENERAL

Commissioner of Agriculture may license warehouse storing pine cones under O.C.G.A. § 10-4-2. 1958-59 Ga. Op. Att'y Gen. 14.

Pine cones may come under O.C.G.A. § 10-4-2, being includable in "agricultural products" as used therein. 1958-59 Ga. Op. Att'y Gen. 14.

Lumber is not an agricultural product within the meaning of O.C.G.A. § 10-4-2. 1958-59 Ga. Op. Att'y Gen. 12.

Nursery products such as ornamental garden shrubs are not farm products as that term is used in Ga. Const. 1976, Art. VII, Sec. 1, Para. IV (see, now, Ga. Const. 1983, Art. VII, Sec. 2, Para. IV), and are subject to property taxation. 1969 Op. Att'y Gen. No. 69-407.

RESEARCH REFERENCES

ALR.

Chattel mortgage on fruit crops growing or to be grown, 54 A.L.R. 1532.

44-14-101. Crops as personalty.

All matured or unmatured crops are declared to be personalty.

History.

Ga. L. 1922, p. 114, §§ 1-3; Ga. L. 1933, p. 128, §§ 1, 2; Code 1933, §§ 85-1901, 85-1902, 85-1903; Ga. L. 2001, p. 362, § 35.

Law reviews.

For article, "Timber Transactions in Georgia," see 19 Ga. B. J. 413 (1957).

For article, "Things Attached to Realty," see 15 Mercer L. Rev. 343 (1964).

JUDICIAL DECISIONS

Prior to O.C.G.A. § 44-14-101, growing crops still attached to soil were part of realty, and a purchaser of the land obtained title to both the land and the crops. Hix v. Williams, 42 Ga. App. 143, 155 S.E. 355, 1930 Ga. App. LEXIS 264 (1930).

Section applies to fruits and products, not plants themselves. — O.C.G.A. § 44-14-101 applies only to the fruits and products of plants, trees, and shrubs and do not refer to the plants, trees, and shrubs themselves. Adcock v. Berry, 194 Ga. 243, 21 S.E.2d 605, 1942 Ga. LEXIS 568 (1942); Newton v. Allen, 220 Ga. 681, 141 S.E.2d 417, 1965 Ga. LEXIS 605 (1965); Marshall v. Georgia Power Co., 134 Ga. App. 479, 214 S.E.2d 728, 1975 Ga. App. LEXIS 2046 (1975).

Section refers to mature crops, not nursery stock. — O.C.G.A. § 44-14-101 refers to crops that mature, and does not include a nursery or nursery stock attached to and growing in the soil. Adcock v. Berry, 194 Ga. 243, 21 S.E.2d 605, 1942 Ga. LEXIS 568 (1942).

O.C.G.A. § 44-14-101 does not embrace as personalty a nursery or nursery stock consisting of plants, trees, and shrubs, attached to and growing in the soil. Adcock v. Berry, 194 Ga. 243, 21 S.E.2d 605, 1942 Ga. LEXIS 568 (1942).

Security deed conveying cultivated land does not include crops. — A security deed executed under O.C.G.A. §§ 44-14-60 and 44-14-61, 44-14-63, 44-14-66, 44-14-67, after the passage of O.C.G.A. § 44-14-101, to convey cultivated farm land as security for debt, does not ordinarily comprehend crops matured or unmatured on the land. Penn Mut. Life Ins. Co. v. Larsen, 178 Ga. 255, 173 S.E. 125, 1934 Ga. LEXIS 26 (1934).

Purchaser acquires landlord's interest in crops where rented to tenant. — Although O.C.G.A. § 44-14-101, making all crops personalty, does not affect the rule that the purchaser of the land acquires the landlord's interest in the crops in cases where the land is rented to a tenant, this rule does not mean that where land is not rented out by the owner, the one who acquires title by deed or otherwise, gets the title to the crops planted or growing thereon. King v. Tilley, 69 Ga. App. 561, 26 S.E.2d 293, 1943 Ga. App. LEXIS 139 (1943).

Party who becomes owner of

rented land before maturity of crops is entitled to recover rent. Neal v. Hubbard, 53 Ga. App. 267, 185 S.E. 384, 1936 Ga. App. LEXIS 61 (1936).

Cropper and landlord both have right of action for wrongful destruction of crops. — Cropper has such an interest in crops, even though not all have matured and contract has not been fully completed by cropper, as would support an action against one who wrongfully destroyed them, which right of action is joint and several with that of the landlord who likewise has an interest in the crops. Thombley v. Hightower, 52 Ga. App. 716, 184 S.E. 331, 1936 Ga. App. LEXIS 235 (1936).

Writing which leases trees for turpentine is lease of realty. — A writing which purports to lease trees for turpentine purposes, not merely the product thereof, is a lease of realty, and does not constitute a contract for the sale of personalty under O.C.G.A. T. 11. Newton v. Allen, 220 Ga. 681, 141 S.E.2d 417, 1965 Ga. LEXIS 605 (1965).

Illegal marijuana is not part of realty and thus can be considered in the possession of a defendant cultivating it. Carney v. State, 134 Ga. App. 816, 216 S.E.2d 617, 1975 Ga. App. LEXIS 2183 (1975).

Crop of pecans is personalty, and does not pass as part of the realty by the sale and conveyance of the land in pursuance of a power expressed in the security deed. Miller v. Jackson, 190 Ga. 668, 10 S.E.2d 35, 1940 Ga. LEXIS 524 (1940).

Crop-growing land is realty but unmatured crops are personalty. — A patch of ground, whether described as a melon patch, a strawberry patch, or any other sort of patch, is necessarily realty. But an unmatured crop growing thereon, as an unmatured melon crop, is, under O.C.G.A. § 44-14-101, personalty. Kitchens v. Brassell, 42 Ga. App. 332, 155 S.E. 905, 1930 Ga. App. LEXIS 389 (1930).

"Melon patch" is both ground and melon crop growing on it. — A melon patch is not only the ground constituting the patch, but is the ground together with the melon crop growing thereon. Kitchens v. Brassell, 42 Ga. App. 332, 155 S.E. 905, 1930 Ga. App. LEXIS 389 (1930).

Damage to melon patch means damage to melon crop. — Damage whether "on" or "to" a melon patch must necessarily be damage affecting the melon crop which is an essential constituent of the melon patch. Kitchens v. Brassell, 42 Ga. App. 332, 155 S.E. 905, 1930 Ga. App. LEXIS 389 (1930).

Damage to unmatured melon crop growing upon melon patch is damage to personalty, and an action to recover for damage to such crop, whether it is an action ex contractu for the value of the crop, or portion thereof taken and converted, or is an action ex delicto for a sum representing damage to the crop, is not an action for damage to realty. Kitchens v. Brassell, 42 Ga. App. 332, 155 S.E. 905, 1930 Ga. App. LEXIS 389 (1930).

Damage to "melon patch." — Damage to a patch, or to a patch which is of the descriptive character of a melon patch, is, insofar as the damage is to the patch alone, damage to realty, yet damage to a "melon patch," where the expression "melon patch" is indicative of a melon crop growing on the patch of ground, is a damage to the crop of melons, and to that extent is necessarily a damage to personalty. Kitchens v. Brassell, 42 Ga. App. 332, 155 S.E. 905, 1930 Ga. App. LEXIS 389 (1930).

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Pecans are both crops and personalty under O.C.G.A. § 44-14-101. 1971 Op. Att'y Gen. No. U71-41.

RESEARCH REFERENCES

Am. Jur. 2d.

6 Am. Jur. 2d, Attachment and Garnishment, §§ 104-106, 329, 330, 335. 21 Am. Jur. 2d, Crops §§ 1, 3. 63 Am. Jur. 2d, Property, §§ 19, 21.

C.J.S.

7 C.J.S., Attachment, § 181. 25 C.J.S., Crops, § 1. 73 C.J.S., Property, § 21.

ALR.

Right to crops sown or grown by one wrongfully in possession of land, 39 A.L.R. 958; 57 A.L.R. 584.

Judicial or execution sale of realty as affecting debtor's share in crops grown by tenant or cropper, 113 A.L.R. 1355.

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

Growing crops as part of land or as a chattel asset, in farm debtor proceedings under Bankruptcy Act, 150 A.L.R. 1175.

Rights in growing, unmatured annual crops as between personal representatives of decedent's estate and heirs or devisees, 92 A.L.R.2d 1373.

ARTICLE 5

TRUST DEEDS

RESEARCH REFERENCES

ALR.

Implied power of trustee under mortgage or deed of trust who purchases property in behalf of bondholders at foreclosure sale, to give new mortgage, 95 A.L.R. 527.

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 A.L.R. 981.

Duty and liability of trustee under mortgage or deed of trust securing debt to mortgagor, subsequent purchaser or lienor, 117 A.L.R. 1054.

Creation of homestead right in real estate as affecting previous mortgage, trust deed, or purchase money or vendor's lien, 123 A.L.R. 427.

Right of trustee under deed of trust, absent a provision in that regard, to bid at foreclosure sale in behalf of holders of bonds or other obligations secured thereby, and duty of court as regards authorization, 135 A.L.R. 393.

Interest of trustee in debt secured under deed of trust (or association with or relationship to one having interest in debt) as affecting validity of deed or exercise of trustee's power of foreclosure or sale, 138 A.L.R. 1013.

Demand for payment as a condition precedent to exercise of power of sale in, or foreclosure of, mortgage securing demand note, 147 A.L.R. 1109.

Foreclosure of mortgage or trust deed as affecting easement claimed in, over, or under property, 46 A.L.R.2d 1197.

44-14-120. Enforcement of rights; petition; order.

Whenever any person has conveyed real property in this state by a deed to a trustee to secure the payment of a note or notes, bonds, or other debt owing to one or more persons, the rights of the trustee named in the deed or his successor in estate, as well as the rights of the holders or owners of the notes or other debts in the real property, may be enforced in the following manner:

(1) The trustee named in the deed or his successor in estate entitled to enforce the deed may, upon the request of the holders or owners of at least two-thirds of the indebtedness thereby secured but

not otherwise, petition the superior court of the county of the residence of the maker of the deed or, if there is more than one maker, the superior court of the county of the residence of either or, if the maker or makers are nonresidents of the state, the superior court of the county wherein the land or any part thereof conveyed by the deed is located or the city court, if any, in the county having jurisdiction of the amount claimed in the petition. The petition shall contain a statement of the case, the amounts demanded, and a description of the property covered by the deed to secure such demands; and

(2) Upon the petition being filed, the court shall grant an order directing the sums demanded in the petition, together with interest and costs, to be paid into the court on or before the first day of the next term immediately succeeding the one at which the order is granted, which order shall be published once a week for four weeks in some newspaper generally circulated in the county or shall be served on the maker of the deed or his special agent or attorney at least 20 days prior to the time at which the money is directed to be paid into the court.

History.
Ga. L. 1896, p. 76, § 1; Civil Code 1910, § 311; Code 1933, § 67-1201; Ga. L. 1982, p. 3, § 44.

JUDICIAL DECISIONS

Section not sole method for foreclosure. — O.C.G.A. § 44-14-120 does not create the only method of foreclosure of trust deeds to secure debts, so that no foreclosure can be had unless the conditions of O.C.G.A. § 44-14-120 are complied with. It means that, upon request of two-thirds in amount of the indebtedness secured, but not otherwise, this unusual method of foreclosure may, but not must, be followed. Under other conditions, other methods must be pursued. In re Lookout Mt. Hotel Co., 50 F.2d 421, 1931 U.S. Dist. LEXIS 1402 (D. Ga.), rev'd, 53 F.2d 463, 1931 U.S. App. LEXIS 2691 (5th Cir. 1931).

Security deeds and trust deeds distinguished, see In re Lookout Mt. Hotel Co., 50 F.2d 421, 1931 U.S. Dist. LEXIS 1402 (D. Ga.), rev'd, 53 F.2d 463, 1931 U.S. App. LEXIS 2691 (5th Cir. 1931).

Deed of trust to property given as security for bonds is trust deed to secure debt under O.C.G.A. § 44-14-120 and not a security deed under O.C.G.A. § 44-14-60. In re Lookout Mt. Hotel Co., 50 F.2d 421, 1931 U.S. Dist. LEXIS 1402 (D. Ga.), rev'd, 53 F.2d 463, 1931 U.S. App. LEXIS 2691 (5th Cir. 1931).

For case where stipulation in deed of trust does not dispense with necessity of service, see City Bank & Trust Co. v. Graf, 177 Ga. 236, 170 S.E. 74, 1933 Ga. LEXIS 154 (1933).

RESEARCH REFERENCES

Am. Jur. 2d.
55 Am. Jur. 2d, Mortgages, §§ 517, 519, 522.

C.J.S.
59 C.J.S., Mortgages, § 324 et seq.

ALR.
Conveyance in consideration of support as creating lien or charge upon the land conveyed, 64 A.L.R. 1250.

Right of trustee under deed of trust,

absent a provision in that regard, to bid at foreclosure sale in behalf of holders of bonds or other obligations secured thereby, and duty of court a regards authorization, 88 A.L.R. 1260; 96 A.L.R. 1456; 135 A.L.R. 393.

Demand for payment as a condition precedent to exercise of power of sale in, or foreclosure of, mortgage securing demand note, 147 A.L.R. 1109.

Failure to keep up insurance as justifying foreclosure under acceleration provision in mortgage or deed of trust, 69 A.L.R.3d 774.

Validity and construction of provision of mortgage or other real-estate financing contract prohibiting prepayment for a fixed period of time, 81 A.L.R.4th 423.

44-14-121. Defense by maker; when and how made; affidavit.

When an order for the payment of the sums demanded in the petition has been granted and published or served as provided in Code Section 44-14-120, the maker of the deed sought to be enforced or his special agent or attorney may appear on or before the first day of the term of the court at which the money is directed to be paid and file his objection to the enforcement of the deed and may set up and avail himself of any defense which he might lawfully set up in an ordinary action on the debts or demands secured by the deed and which defense shows that the petitioner is not entitled to enforce the demands or debts or that the amounts claimed are not due; provided, however, the facts of the defense shall be verified by the affidavit of the maker of the deed or his special agent or attorney at the time of filing the defense.

History.
Ga. L. 1896, p. 76, § 2; Civil Code 1910, § 3312; Code 1933, § 67-1202.

RESEARCH REFERENCES

Am. Jur. 2d.
55 Am. Jur. 2d, Mortgages, § 642 et seq.

C.J.S.
59 C.J.S., Mortgages, § 324 et seq.

44-14-122. Action against maker's personal representative.

When the maker of the deed is dead, the proceedings to enforce the deed may be instituted against his executor or administrator.

History.
Ga. L. 1896, p. 76, § 3; Civil Code 1910, § 3313; Code 1933, § 67-1203.

RESEARCH REFERENCES

Am. Jur. 2d.
31 Am. Jur. 2d, Executors and Administrators, § 9. 55 Am. Jur. 2d, Mortgages, §§ 1275, 1276.

C.J.S.
34 C.J.S., Executors and Administrators, § 730. 59 C.J.S., Mortgages, § 550.

44-14-123. Trial of issues.

When proceedings to enforce a deed of trust are instituted and a defense is set up thereto as provided in Code Section 44-14-121, the issues thus raised shall be tried as other issues are tried in the court in which the proceedings were instituted.

History.
Ga. L. 1896, p. 76, § 4; Civil Code 1910, § 3314; Code 1933, § 67-1204.

44-14-124. Judgment; lien thereof; levy and sale of the land.

When the maker of the deed, after being directed so to do, fails to pay the sums demanded in the petition together with interest and costs as required by Code Section 44-14-120 and also fails to set up and sustain his or her defense against the enforcement of the rights of the trustee and the holders or owners of the bonds, notes, or debts secured by the deed, the court shall give judgment for the amounts which may be due under the deed to be levied on the real property covered thereby. Upon the trustees making and recording a deed reconveying the real property to the maker in the office of the clerk of the superior court of the county where the land is located, the court shall order the real property to be sold in the same manner and under the same regulations which govern sheriff's sales under execution; provided, however, that, if the deed is filed and recorded as provided by law, the judgment shall be a lien upon the real property which shall be superior to any claim or lien, except taxes, whatsoever arising or created subsequent to the date of the deed to the trustee.

History.
Ga. L. 1896, p. 76, § 5; Civil Code 1910, § 3315; Code 1933, § 67-1205; Ga. L. 1982, p. 3, § 44; Ga. L. 2002, p. 415, § 44.

RESEARCH REFERENCES

Am. Jur. 2d.
55 Am. Jur. 2d, Mortgages, §§ 518, 525.
C.J.S.
59 C.J.S., Mortgages, § 324 et seq.
ALR.
Right of trustee under deed of trust, absent a provision in that regard, to bid at foreclosure sale in behalf of holders of bonds or other obligations secured thereby, and duty of court a regards authorization, 96 A.L.R. 1456; 135 A.L.R. 393.

44-14-125. Disposition of proceeds of sale; surplus.

The money arising from the sale of the property shall be paid to the trustee unless claimed by some other lien which by law may have priority over the deed; and, when there is any surplus after paying the sums due under the deed and other liens, the surplus shall be paid to the maker of the deed or his agent.

History.
Ga. L. 1896, p. 76, § 6; Civil Code 1910, § 3316; Code 1933, § 67-1206.

RESEARCH REFERENCES

Am. Jur. 2d.
55 Am. Jur. 2d, Mortgages, §§ 778, 785, 790.

C.J.S.
59A C.J.S., Mortgages, §§ 664 et seq., 961, 966, 967.

ALR.
Trustee in mortgage securing bonds as agent of obligor or holder of bonds as regards deposit or payment in respect of principal or interest, 90 A.L.R. 467; 96 A.L.R. 1233.

44-14-126. Debt due in installments; treatment of surplus.

If the deed is given to secure debts due by installments and is enforced before any one of the installments falls due and there is a surplus of funds as stated in Code Section 44-14-125, the court may retain the funds or order them to be invested to meet the unpaid installments.

History.
Ga. L. 1896, p. 76, § 7; Civil Code 1910, § 3317; Code 1933, § 67-1207.

RESEARCH REFERENCES

Am. Jur. 2d.
55 Am. Jur. 2d, Mortgages, § 790.

C.J.S.
59A C.J.S., Mortgages, § 962.

ARTICLE 6

EXPIRATION AND EXTENSION OF INSTRUMENTS AFFECTING PERSONALTY

RESEARCH REFERENCES

ALR.
What are "tools," "implements," "instruments," "utensils," or "apparatus" within the meaning of debtor's exemption laws, 9 A.L.R. 1020; 36 A.L.R. 669; 52 A.L.R. 826.

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 A.L.R. 1325.

44-14-140. Expiration of notice effected by recording of mortgage or other security instrument on personalty.

The notice given to third persons by the filing for record of any mortgage, bill of sale to secure debt, retention of title contract, or other security instrument creating a lien on, retaining title to, or conveying an interest in personal property only shall expire at the end of seven years from the date of the filing thereof for record.

History.
Ga. L. 1937, p. 760, § 1; Ga. L. 1945, p. 389, § 1.

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Purpose. — O.C.G.A. § 44-14-140 merely had for its purpose the relieving of the party taking the junior conveyance of the necessity of searching the records more than seven years back. City Whsle. Co. v. Harper, 100 Ga. App. 151, 110 S.E.2d 561, 1959 Ga. App. LEXIS 555 (1959).

Limited effect of section. — O.C.G.A. § 44-14-140 merely provides that notice expires at the end of seven years from the date of the filing of instruments for record. Standing alone, that section merely takes from the law the provision that such filing would be notice after the expiration of seven years, nothing more. It does not, in any sense, purport to alter the fact that once notice has been afforded, the respective priorities of the junior and senior instruments are fixed. City Whsle. Co. v. Harper, 100 Ga. App. 151, 110 S.E.2d 561, 1959 Ga. App. LEXIS 555 (1959).

RESEARCH REFERENCES

Am. Jur. 2d.
66 Am. Jur. 2d, Records and Recording Laws, §§ 42, 48. 69 Am. Jur. 2d, Secured Transactions, §§ 405, 407 et seq.

C.J.S.
14 C.J.S., Chattel Mortgages, §§ 168-170.

ALR.
Negotiability of title-retaining note, 28 A.L.R. 699; 44 A.L.R.2d 71.

44-14-141. Extension of time period; affidavit.

The effect regarding third persons of the filing for record of any of the instruments enumerated in Code Section 44-14-140 may in all respects, including the preservation of priority thereof, be extended for successive additional periods, each period not exceeding five years from the date of the filing in the office of the clerk of the superior court wherein any such instrument is recorded, upon the filing by the owner or holder thereof of an affidavit identifying the instrument and stating his interest and the nature and amount unpaid on the obligation still secured thereby. Where the instrument is made to, held, or owned by a trustee or other representative to secure bonds, notes, or other obligations of the maker of the instrument, the affidavit provided for in this Code section may be made and filed by the trustee or other representative.

History.
Ga. L. 1937, p. 760, § 2; Ga. L. 1943, p. 575, § 1.

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O.C.G.A. § 44-14-141 affords to senior grantee means to preserve or restore grantee's priority, and the effect of the record of grantee's instrument

as notice to subsequent grantees, by filing with the clerk an affidavit setting forth therein the matters specified in that section. City Whsle. Co. v. Harper, 100 Ga. App. 151, 110 S.E.2d 561, 1959 Ga. App. LEXIS 555 (1959).

RESEARCH REFERENCES

Am. Jur. 2d.
69 Am. Jur. 2d, Secured Transactions, §§ 409, 410 et seq.
C.J.S.
14 C.J.S., Chattel Mortgages, §§ 168-174.

ALR.
Filing a claim against decedent's estate as an unsecured claim, as a waiver of a mortgage or other lien, 2 A.L.R. 1132.
Negotiability of title-retaining note, 28 A.L.R. 699; 44 A.L.R.2d 71.

44-14-142. Recording of affidavit; indexing; fee.

The clerk of the superior court shall file the affidavit required by Code Section 44-14-141, reindex the instrument mentioned in the affidavit, and enter on the margin of the record of the instrument a reference to the filing of the affidavit, which shall state the date of the filing of the affidavit and the amount unpaid on the obligation secured by the instrument, for which services the clerk shall be entitled to a fee as required by Article 2 of Chapter 6 of Title 15.

History.
Ga. L. 1937, p. 760, § 3; Ga. L. 1981, p. 1396, § 20; Ga. L. 1986, p. 1002, § 10.
Code Commission notes.
Pursuant to Code Section 28-9-5, in 1986, "clerk" was substituted for "clerks" preceding "shall be entitled to a fee".

RESEARCH REFERENCES

Am. Jur. 2d.
66 Am. Jur. 2d, Records and Recording Laws, § 64. 69 Am. Jur. 2d, Secured Transactions, § 409 et seq.
C.J.S.
76 C.J.S., Records, § 19 et seq.

ALR.
Negotiability of title-retaining note, 28 A.L.R. 699; 44 A.L.R.2d 71.

44-14-143. Limitations on instruments filed before March 31, 1937.

The notice given by the filing of any mortgage, bill of sale to secure debt, retention of title contract, or other security instrument creating a lien on, retaining title to, or conveying an interest in personal property which is filed or recorded prior to March 31, 1937, shall not extend more than seven years from March 31, 1937, unless within seven years from March 31, 1937, an affidavit is filed, the instrument reindexed, and the marginal reference made on the record thereof as provided in Code Section 44-14-142.

History.
Ga. L. 1937, p. 760, § 4.

RESEARCH REFERENCES

Am. Jur. 2d.
69 Am. Jur. 2d, Secured Transactions, §§ 405, 407.
C.J.S.
14 C.J.S., Chattel Mortgages, § 169.
ALR.
Negotiability of title-retaining note, 28 A.L.R. 699; 44 A.L.R.2d 71.

44-14-144. Exclusion of public utility corporations from coverage of Code Sections 44-14-140 through 44-14-143.

This article shall not apply to any mortgage, bill of sale to secure debt, retention of title contract, deed of trust, or other security instrument creating a lien on, retaining title to, or conveying an interest in property owned by, sold or leased to, or agreed to be sold or leased to any railroad corporation, street railroad corporation, electric or gas corporation, or other public utility corporation or any receivers, trustees, or other legal officers in possession of or operating any railroad corporation, street railroad corporation, electric or gas corporation, or other public utility corporation.

History.
Ga. L. 1943, p. 540, § 1; Ga. L. 1950, p. 33, § 1.

RESEARCH REFERENCES

ALR.
Negotiability of title-retaining note, 28 A.L.R. 699; 44 A.L.R.2d 71.

ARTICLE 7

FORECLOSURE

Law reviews.
For annual survey on real property law, see 61 Mercer L. Rev. 301 (2009).
For article, "Buying Distressed Commercial Real Estate: What are the Alternatives?," see 16 (No. 4) Ga. St. B.J. 18 (2010).

RESEARCH REFERENCES

ALR.
Action for damages for attempted wrongful foreclosure, 104 A.L.R.6th 485.

PART 1

IN GENERAL

Law reviews.

For annual survey of commercial law, see 38 Mercer L. Rev. 85 (1986).

For article, "Nonjudicial Foreclosures in Georgia: Fresh Doubts, Issues and Strategies," see 23 Ga. St. B.J. 123 (1987).

For article, "Buying Distressed Commercial Real Estate: What are the Alternatives?," see 16 (No. 4) Ga. St. B.J. 18 (2010).

RESEARCH REFERENCES

Am. Jur. Proof of Facts.

Sufficiency of Manner and Timeliness of Redemption of Real Estate Contract from Foreclosure, 66 POF3d 267.

ALR.

Right of trustee of land having interest therein to purchase on his own behalf in association with foreclosure by third-party lienor, in absence of express trust provision, 30 A.L.R.4th 732.

Sufficiency of tender of payment to effect defaulting vendee's redemption of rights in land purchased, 37 A.L.R.4th 286.

44-14-160. Filing of foreclosure and deed under power; penalty for late payment.

(a) Within 90 days of a foreclosure sale, all deeds under power shall be filed by the holder of a deed to secure debt or a mortgage with the clerk of the superior court of the county or counties in which the foreclosed property is located. The clerk shall record and cross reference the deed under power to the deed to secure debt or mortgage foreclosed upon. The deed under power shall be indexed pursuant to standards promulgated by the Georgia Superior Court Clerks' Cooperative Authority.

(b) In the event the deed under power is not filed within 30 days after the time period set forth in subsection (a) of this Code section, the holder shall be required to pay a late filing penalty of $500.00 upon filing in addition to the required filing fees provided for in subsection (f) of Code Section 15-6-77. Such late filing penalty shall be collected by the clerk of the superior court before filing.

(c) The sums collected as a late filing penalty under subsection (b) of this Code section shall be remitted to the governing authority of the county. If the foreclosed property is located within a municipality, the governing authority of the county shall remit the late filing penalty for such property to the governing authority of such municipality within 30 days of its receipt of the penalty. For each late filing penalty for property located within the corporate limits of a municipality, the governing authority of the county may withhold a 5 percent administrative processing fee from the remittance to such municipality.

History.
Ga. L. 1975, p. 422, § 1; Ga. L. 2009, p. 614, § 1/SB 141; Ga. L. 2015, p. 937, § 9/HB 322; Ga. L. 2018, p. 1112, § 44/SB 365.

Law reviews.
For annual survey article on commercial law, see 45 Mercer L. Rev. 87 (1993).
For survey article on real property law, see 60 Mercer L. Rev. 345 (2008).
For article, "Buying Distressed Commercial Real Estate: What are the Alternatives?," see 16 (No. 4) Ga. St. B.J. 18 (2010).
For survey article on real property law, see 67 Mercer L. Rev. 193 (2015).
For annual survey on real property, see 69 Mercer L. Rev. 251 (2017).

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Property not sold. — Under Georgia law, the homeowner had to first show that the homeowner's property was sold at a foreclosure in order to state a plausible claim for wrongful disclosure; because the homeowner did not allege that a foreclosure sale occurred, the homeowner failed to state such a claim. Thomas v. Bank of Am., N.A., 557 Fed. Appx. 873, 2014 U.S. App. LEXIS 3162 (11th Cir. 2014).

Summary judgment proper once security deed paid in full. — In an action to remove a cloud from title, the trial court properly granted summary judgment to a bank and cancelled a recorded deed in favor of a holder, as: (1) the holder could no longer claim any legal title to the subject property once the underlying debt thereto was paid; (2) no evidence of valid renewal or extension of the note existed; and (3) the holder lacked standing to challenge any foreclosure on the debt. Northwest Carpets, Inc. v. First Nat'l Bank, 280 Ga. 535, 630 S.E.2d 407, 2006 Ga. LEXIS 341 (2006).

Failure to timely file deed. — Failure to timely file a deed following a foreclosure sale under O.C.G.A. § 44-14-160 was not fatal to the confirmation of the sale; confirmation was to pass upon the notice, advertisement, and regularity of the sale. To the extent that any claim was available to a debtor, the appropriate vehicle was a wrongful foreclosure action. Harper v. Ameris Bank, 326 Ga. App. 67, 755 S.E.2d 872, 2014 Ga. App. LEXIS 122 (2014).

RESEARCH REFERENCES

C.J.S.
59A C.J.S., Mortgages, § 643.

ALR.
Posting of notice or other steps preliminary to nonjudicial foreclosure of mortgage or deed of trust as suspending statute limitations, 122 A.L.R. 938.
Recognition of action for damages for wrongful foreclosure — general views, 81 A.L.R.6th 161.
Recognition of action for damages for wrongful foreclosure — types of actions, 82 A.L.R.6th 43.

44-14-161. Sales made on foreclosure under power of sale; when deficiency judgment allowed; confirmation and approval; notice and hearing; resale.

(a) When any real estate is sold on foreclosure, without legal process, and under powers contained in security deeds, mortgages, or other lien contracts and at the sale the real estate does not bring the amount of the debt secured by the deed, mortgage, or contract, no action may be taken to obtain a deficiency judgment unless the person instituting the foreclosure proceedings shall, within 30 days after the sale, report the sale to the judge of the superior court of the county in which the land is

located for confirmation and approval and shall obtain an order of confirmation and approval thereon.

(b) The court shall require evidence to show the true market value of the property sold under the powers and shall not confirm the sale unless it is satisfied that the property so sold brought its true market value on such foreclosure sale.

(c) The court shall direct that a notice of the hearing shall be given to the debtor at least five days prior thereto; and at the hearing the court shall also pass upon the legality of the notice, advertisement, and regularity of the sale. The court may order a resale of the property for good cause shown.

History.

Ga. L. 1935, p. 381, § 1.

Law reviews.

For article surveying Georgia cases dealing with commercial law from June 1977 through May 1978, see 30 Mercer L. Rev. 15 (1978).

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

For article surveying Georgia cases in the area of real property from June 1979 through June 1980, see 32 Mercer L. Rev. 175 (1980).

For article surveying commercial law, see 34 Mercer L. Rev. 31 (1982).

For annual survey of commercial law, see 39 Mercer L. Rev. 83 (1987).

For annual survey of commercial law, see 43 Mercer L. Rev. 119 (1991).

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

For survey article on commercial law, see 44 Mercer L. Rev. 99 (1992).

For annual survey article discussing nonjudicial foreclosure sales, see 46 Mercer L. Rev. 95 (1994).

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 of real property law, see 56 Mercer L. Rev. 395 (2004).

For annual survey of real property law, see 57 Mercer L. Rev. 331 (2005).

For article, "Enforcing Commercial Real Estate Loan Guaranties," see 15 (No. 2) Ga. St. B. J. 12 (2009).

For annual survey on real property law, see 61 Mercer L. Rev. 301 (2009).

For article, "Georgia Foreclosure Confirmation Proceedings in Today's Recessionary Real Estate World: Back to the Future," see 16 (No. 4) Ga. St. B.J. 11 (2010).

For annual survey of law on real property, see 62 Mercer L. Rev. 283 (2010).

For annual survey on real property, see 66 Mercer L. Rev. 151 (2014).

For comment, "Eleventh Circuit Survey: January 1, 2013 - December 31, 2013: Comment: Confirming the Enforceability of the Guaranty Agreement After Non-Judicial Foreclosure in Georgia," see 65 Mercer L. Rev. 1167 (2014).

For comment, "Are Fannie Mae and Freddie Mac State Actors? State Action, Due Process, and Nonjudicial Foreclosure," see 65 Emory L.J. 107 (2015).

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

For comment, "Kicked While They're Down: Deficiency Judgments and the Great Recession," see 67 Emory L.J. 1273 (2018).

JUDICIAL DECISIONS

Analysis

General Consideration
Sales Made on Foreclosure Under Power of Sale
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General Consideration

Constitutionality discussed. Hinson v. First Nat'l Bank, 221 Ga. 408, 144 S.E.2d 765, 1965 Ga. LEXIS 479 (1965).

O.C.G.A. § 44-14-161, setting the venue for a confirmation hearing in the county where the land lies, is constitutional. Wall v. Federal Land Bank, 240 Ga. 236, 240 S.E.2d 76, 1977 Ga. LEXIS 1459 (1977).

O.C.G.A. § 44-14-161 does not violate equal protection or due process because there is insufficient state action in the Georgia foreclosure procedure. Alliance Partners v. Harris Trust & Sav. Bank, 266 Ga. 514, 467 S.E.2d 531, 1996 Ga. LEXIS 96 (1996).

O.C.G.A. § 44-14-141 is in derogation of the common law and must be strictly construed. Dukes v. Ralston Purina Co., 127 Ga. App. 696, 194 S.E.2d 630, 1972 Ga. App. LEXIS 1001 (1972); First Nat'l Bank & Trust Co. v. Kunes, 128 Ga. App. 565, 197 S.E.2d 446, 1973 Ga. App. LEXIS 1547, aff'd, 230 Ga. 888, 199 S.E.2d 776, 1973 Ga. LEXIS 1098 (1973); Southern Mut. Inv. Corp. v. Thornton, 131 Ga. App. 765, 206 S.E.2d 846, 1974 Ga. App. LEXIS 1548 (1974); Calvert Fire Ins. Co. v. Environs Dev. Corp., 601 F.2d 851, 1979 U.S. App. LEXIS 12152 (5th Cir. 1979); Weems v. McCloud, 619 F.2d 1081, 1980 U.S. App. LEXIS 16299 (5th Cir. 1980); Taylor v. Thompson, 158 Ga. App. 671, 282 S.E.2d 157, 1981 Ga. App. LEXIS 2366 (1981); Bentley v. North Ga. Prod. Credit Ass'n, 170 Ga. App. 361, 317 S.E.2d 339, 1984 Ga. App. LEXIS 1902 (1984).

History. — O.C.G.A. § 44-14-161 was enacted during the depression when many mortgagors were forced into bankruptcy by the deficiency judgments which were sought and obtained against them after mortgagees had acquired the property at nonjudicial foreclosure sales for nominal or depressed prices. Taylor v. Thompson, 158 Ga. App. 671, 282 S.E.2d 157, 1981 Ga. App. LEXIS 2366 (1981).

Legislative intent. — The intent of the General Assembly in 1935, in adopting O.C.G.A. § 44-14-161, was to provide for debtor relief. First Nat'l Bank & Trust Co. v. Kunes, 230 Ga. 888, 199 S.E.2d 776, 1973 Ga. LEXIS 1098 (1973); Kennedy v. Gwinnett Com. Bank, 155 Ga. App. 327, 270 S.E.2d 867, 1980 Ga. App. LEXIS 2569 (1980).

The legislative intention was to have a speedy determination through a bench trial of the specific items stated in

O.C.G.A. § 44-14-161. In this way there would be no lengthy litigation which would cloud the title to the property and delay a sale thereof; nor, would the borrower be deprived of the right to a jury trial on meritorious matters involved in the loan transaction. Jones v. Hamilton Mtg. Corp., 140 Ga. App. 490, 231 S.E.2d 491, 1976 Ga. App. LEXIS 1530 (1976).

There is no indication of a legislative intent to incorporate, within the reporting provision of O.C.G.A. § 44-14-161, the time requirement of the Civil Practice Act, O.C.G.A. § 9-11-4(c), for service on the debtor within five days from the day the report of sale is presented to the judge. Oviedo v. Connecticut Nat'l Bank, 194 Ga. App. 626, 391 S.E.2d 417, 1990 Ga. App. LEXIS 245 (1990), cert. denied, No. S90C0787, 1990 Ga. LEXIS 736 (Ga. Apr. 18, 1990).

The purpose of O.C.G.A. § 44-14-161 is to protect debtors from deficiency judgments when the forced sale of their property brings less than fair market value. Goodman v. Nadler, 113 Ga. App. 493, 148 S.E.2d 480, 1966 Ga. App. LEXIS 1107 (1966); United States v. Golf Club Co., 435 F.2d 9, 1970 U.S. App. LEXIS 6057 (5th Cir. 1970); First Nat'l Bank & Trust Co. v. Kunes, 128 Ga. App. 565, 197 S.E.2d 446, 1973 Ga. App. LEXIS 1547, aff'd, 230 Ga. 888, 199 S.E.2d 776, 1973 Ga. LEXIS 1098 (1973); Adams v. Gwinnett Com. Bank, 140 Ga. App. 233, 230 S.E.2d 324, 1976 Ga. App. LEXIS 1421 (1976), aff'd, 238 Ga. 722, 235 S.E.2d 476, 1977 Ga. LEXIS 1180 (1977); Colodny v. Krause, 141 Ga. App. 134, 232 S.E.2d 597, 1977 Ga. App. LEXIS 1797, cert. denied, 434 U.S. 892, 98 S. Ct. 267, 54 L. Ed. 2d 177, 1977 U.S. LEXIS 3559 (1977); Calvert Fire Ins. Co. v. Environs Dev. Corp., 601 F.2d 851, 1979 U.S. App. LEXIS 12152 (5th Cir. 1979); Kennedy v. Gwinnett Com. Bank, 155 Ga. App. 327, 270 S.E.2d 867, 1980 Ga. App. LEXIS 2569 (1980); Weems v. McCloud, 619 F.2d 1081, 1980 U.S. App. LEXIS 16299 (5th Cir. 1980); Redman Indus., Inc. v. Tower Properties, Inc., 517 F. Supp. 144, 1981 U.S. Dist. LEXIS 14425 (N.D. Ga. 1981).

The Georgia confirmation proceeding is designed to protect a debtor from a deficiency judgment when the nonjudicial foreclosure sale brings less than the property's fair market value. It is a prerequisite to obtaining a deficiency judgment. Bank of Am. Nat'l Trust & Sav. Ass'n v. Virginia Hill Partners, 110 B.R. 84, 1989 Bankr. LEXIS 2352 (Bankr. N.D. Ga. 1989).

The purpose of O.C.G.A. § 44-14-161 is to protect debtors from deficiency judgments when the forced sale of their property brings less than the fair market value. Commercial Exch. Bank v. Johnson, 197 Ga. App. 529, 398 S.E.2d 817, 1990 Ga. App. LEXIS 1391 (1990).

O.C.G.A. § 44-14-161 analogous to commercial reasonableness requirement. — The Georgia confirmation statute is analogous to the commercial reasonableness requirement in personal property situations. United States v. Yates, 774 F. Supp. 1368, 1991 U.S. Dist. LEXIS 13950 (M.D. Ga. 1991).

O.C.G.A. § 44-14-161 is a debtor's relief Act to subject a land foreclosure sale under a power to the scrutiny of the court. Wall v. Federal Land Bank, 240 Ga. 236, 240 S.E.2d 76, 1977 Ga. LEXIS 1459 (1977).

O.C.G.A. § 44-14-161 provides the debtor with protection against an unfair deficiency claim and not with a basis for seeking damages in the event the sale does not result in obtaining the fair market value of the property. Kennedy v. Gwinnett Com. Bank, 155 Ga. App. 327, 270 S.E.2d 867, 1980 Ga. App. LEXIS 2569 (1980).

Civil Practice Act inapplicable. — Although O.C.G.A. § 44-14-161 does not expressly provide to the contrary, the Civil Practice Act, O.C.G.A. Ch. 11, T. 9, is not applicable to require service upon a debtor of a creditor's application for confirmation of a non-judicial foreclosure sale of real property, since such an application is not a "complaint" within the meaning of O.C.G.A. § 9-11-4(a). Vlass v. Security Pac. Nat'l Bank, 263 Ga. 296, 430 S.E.2d 732, 1993 Ga. LEXIS 501 (1993).

In the case of a loan secured by both real and personal property, the provision of O.C.G.A. § 11-9-504 for liquidation of the guarantor's personal property "in a commercially reasonable manner" did not apply where the lender chose

General Consideration (Cont'd)

to exercise its "rights and remedies in respect of the real property" as permitted under former O.C.G.A. § 11-9-501(4). Senske v. Harris Trust & Sav. Bank, 233 Ga. App. 407, 504 S.E.2d 272, 1998 Ga. App. LEXIS 991 (1998).

Applicability to Small Business Administration loans. — O.C.G.A. § 44-14-161(a) governs actions between a defendant debtor and the Small Business Administration (SBA) in which the SBA seeks to recover the deficiency. United States v. Yates, 774 F. Supp. 1368, 1991 U.S. Dist. LEXIS 13950 (M.D. Ga. 1991).

O.C.G.A. § 18-2-1 gives an expansive definition of "debtor" as the term should be understood in O.C.G.A. § 44-14-161. First Nat'l Bank & Trust Co. v. Kunes, 230 Ga. 888, 199 S.E.2d 776, 1973 Ga. LEXIS 1098 (1973).

O.C.G.A. § 44-14-161, by using the word "debtor," included all who were presently subject to payment of the debt, or who might be subjected to payment thereof, if within the knowledge of the payee of the note. First Nat'l Bank & Trust Co. v. Kunes, 128 Ga. App. 565, 197 S.E.2d 446, 1973 Ga. App. LEXIS 1547, aff'd, 230 Ga. 888, 199 S.E.2d 776, 1973 Ga. LEXIS 1098 (1973).

The term "debtor" in O.C.G.A. § 44-14-161(c), appears to refer to the debtor on the underlying debt, i.e., the promissory note, as that is the only party against whom the deficiency may be enforced. Commercial Exch. Bank v. Johnson, 197 Ga. App. 529, 398 S.E.2d 817, 1990 Ga. App. LEXIS 1391 (1990).

O.C.G.A. § 44-14-161(a) applies to both primary debtors and guarantors; an action for the balance remaining on a note following a foreclosure sale against a guarantor rather than the primary debtor is still an action for a deficiency judgment under that section and is barred if no confirmation was obtained. United States v. Yates, 774 F. Supp. 1368, 1991 U.S. Dist. LEXIS 13950 (M.D. Ga. 1991).

The definition of "debtor" in O.C.G.A. § 44-14-162.1 does not apply to O.C.G.A. § 44-14-161. Hill v. Moye, 221 Ga. App. 411, 471 S.E.2d 910, 1996 Ga. App. LEXIS 511 (1996).

It would not matter for purposes of O.C.G.A. § 44-14-161 whether the debtors were primarily or secondarily liable on the debt. First Nat'l Bank & Trust Co. v. Kunes, 230 Ga. 888, 199 S.E.2d 776, 1973 Ga. LEXIS 1098 (1973).

Signers of an indemnity agreement are "debtors" within the meaning of O.C.G.A. § 44-14-161 immediately upon the default on the promissory notes and as such should receive notice of confirmation proceedings and be given an opportunity to contest the approval of the sales before claims for the balance of the indebtedness can be prosecuted against them. First Nat'l Bank & Trust Co. v. Kunes, 230 Ga. 888, 199 S.E.2d 776, 1973 Ga. LEXIS 1098 (1973).

The term "debtor" as used in O.C.G.A. § 44-14-161 includes a guarantor of the debt. Ricks v. United States, 434 F. Supp. 1262, 1976 U.S. Dist. LEXIS 12889 (S.D. Ga. 1976).

Term "debtor" inapplicable to guarantor having limited liability. — The term "debtor" in O.C.G.A. § 44-14-161(c) is inapplicable to guarantors and sureties in circumstances where the guarantor has limited liability as to the underlying debt. Commercial Exch. Bank v. Johnson, 197 Ga. App. 529, 398 S.E.2d 817, 1990 Ga. App. LEXIS 1391 (1990).

O.C.G.A. § 44-14-161's purpose is to pass upon the notice, advertisement, and regularity of the sale and to reinsure that the property was sold for a fair value. It provides debtors with formidable protection against gross deficiency judgments. Wall v. Federal Land Bank, 240 Ga. 236, 240 S.E.2d 76, 1977 Ga. LEXIS 1459 (1977).

O.C.G.A. § 44-14-161 does not purport to affect the validity of sales but just to prevent deficiency judgments in addition to unfair sales. It was intended to supplement the debtor's right to set aside the sale. FDIC v. Dye, 642 F.2d 837, 1981 U.S. App. LEXIS 14190 (5th Cir. 1981).

The public policy behind confirmation proceedings is not to impose an affirmative duty upon the foreclosing party to obtain the true market value of the property. Kennedy v. Gwinnett Com.

Bank, 155 Ga. App. 327, 270 S.E.2d 867, 1980 Ga. App. LEXIS 2569 (1980).

Protection of debtor from double payment. — The strongest ground of public policy for the enforcement of statutes requiring confirmation in foreclosure proceedings is to protect the debtor from being subjected to double payment in cases where the property was purchased for a sum less than its market value. Redman Indus., Inc. v. Tower Properties, Inc., 517 F. Supp. 144, 1981 U.S. Dist. LEXIS 14425 (N.D. Ga. 1981).

Confirmation statutes are thought necessary to prevent inequities that arise when a creditor buys property on which it has foreclosed at a low price when property values are depressed and the economy is recessionary, and then proceeds to seek a personal judgment against the debtor for the difference between the low price the creditor has paid for the property at the foreclosure sale and the balance of the debt. Redman Indus., Inc. v. Tower Properties, Inc., 517 F. Supp. 144, 1981 U.S. Dist. LEXIS 14425 (N.D. Ga. 1981); Stamps v. Ford Motor Co., 650 F. Supp. 390, 1986 U.S. Dist. LEXIS 18434 (N.D. Ga. 1986).

The courts consistently strike down schemes aimed at avoiding the deficiency legislation by illusory changes in form; a flimsy avoidance device based upon an intermediate surety would have no chance of success. Redman Indus., Inc. v. Tower Properties, Inc., 517 F. Supp. 144, 1981 U.S. Dist. LEXIS 14425 (N.D. Ga. 1981).

Guarantors and sureties are protected by O.C.G.A. § 44-14-161. Redman Indus., Inc. v. Tower Properties, Inc., 517 F. Supp. 144, 1981 U.S. Dist. LEXIS 14425 (N.D. Ga. 1981).

O.C.G.A. § 44-14-161 does not operate to extinguish a debt; it just limits the creditor's remedies. Calvert Fire Ins. Co. v. Environs Dev. Corp., 601 F.2d 851, 1979 U.S. App. LEXIS 12152 (5th Cir. 1979).

O.C.G.A. § 44-14-161 does not extinguish the deficiency debt; rather, it limits the creditor's remedies. Hence, a creditor retains the option of selling other security to recover the deficiency. Citizens Bank v. Wiggins, 167 B.R. 992, 1994 U.S. Dist. LEXIS 5539 (M.D. Ga. 1994).

O.C.G.A. § 44-14-161 is not applicable to a note and security deed executed prior to the passage of the Act. Atlantic Loan Co. v. Peterson, 181 Ga. 266, 182 S.E. 15, 1935 Ga. LEXIS 70 (1935); Guardian Life Ins. Co. of Am. v. Laird, 181 Ga. 416, 182 S.E. 617, 1935 Ga. LEXIS 105 (1935).

Creditor legally may seek, should a deficiency exist, to foreclose upon additional collateral, regardless of its compliance with O.C.G.A. § 44-14-161. A creditor does not, however, have an "unqualified right" to additional collateral when such collateral is under the exclusive, equitable jurisdiction of the bankruptcy court. Synovus Bank v. Brooks (In re Brooks), 479 B.R. 917, 2012 Bankr. LEXIS 4761 (Bankr. N.D. Ga. 2012).

Section inapplicable where conveyance by warranty deed. — Creditor's failure to seek confirmation of any sale of property pursuant to O.C.G.A. § 44-14-161 did not bar the creditor from seeking a deficiency judgment, where the property owner voluntarily conveyed the property to the creditor by warranty deed for the express purpose of avoiding non-judicial foreclosure, and that section was therefore inapplicable as a matter of law. Ashburn Bank v. Reinhardt, 183 Ga. App. 292, 358 S.E.2d 675, 1987 Ga. App. LEXIS 1939 (1987).

Merger of deeds securing same property. — When two deeds secure the same property and are held by the same creditor, the deeds merge and confirmation of the sale is required. United States v. Yates, 774 F. Supp. 1368, 1991 U.S. Dist. LEXIS 13950 (M.D. Ga. 1991).

The purchaser at public outcry, whether a party to the debt, or a third person, bids at the sale with full knowledge of enactment of O.C.G.A. § 44-14-161, which clearly contains the language that "the court may, for good cause shown, order a resale of the property," and the purchaser is bound by this language in that section. Davie v. Sheffield, 123 Ga. App. 223, 180 S.E.2d 263 (1971).

Questions of fact remained to be determined. — Grant of summary judgment to the creditors was reversed because questions of fact existed as to whether one creditor's failure to confirm

General Consideration (Cont'd)

the foreclosure sale barred the claims asserted by it and the other creditor as well as a question of fact existed as to whether all of the debts at issue, including the 2004 loan, were owed to a single creditor and were given for the same purpose. Bryant v. Optima Int'l, 339 Ga. App. 696, 792 S.E.2d 489, 2016 Ga. App. LEXIS 642 (2016).

When foreclosure sale is final. — The crying of a sale on the courthouse steps is only a step toward finalizing a foreclosure sale and does not, without more, serve as evidence of a consummated foreclosure sale. Gooden v. Buffalo Sav. Bank, 21 B.R. 456, 1982 Bankr. LEXIS 4389 (Bankr. N.D. Ga. 1982).

A foreclosure sale is not final until the deed is transferred. Gooden v. Buffalo Sav. Bank, 21 B.R. 456, 1982 Bankr. LEXIS 4389 (Bankr. N.D. Ga. 1982).

Creditor not required to foreclose prior to seeking judgment on a note. — Trial court's decision granting summary judgment in favor of a creditor on the creditor's suit on a promissory note and guaranty executed by debtors was proper. The creditor was not required to foreclose on the property securing the note and obtain judicial confirmation under O.C.G.A. § 44-14-161(a) prior to seeking judgment on the note. Reese Developers, Inc. v. First State Bank, 306 Ga. App. 13, 701 S.E.2d 505, 2010 Ga. App. LEXIS 848 (2010).

O.C.G.A. § 44-14-161(a) did not bar a bank from first suing the guarantors on their guarantees and then, eleven months later, conducting a nonjudicial foreclosure sale of the collateral because, at the time the bank filed suit on the guarantees, the bank had no deficiency to recover because the bank had not conducted a nonjudicial sale of the property. State Bank of Tex. v. Patel, 453 Fed. Appx. 857, 2011 U.S. App. LEXIS 19958 (11th Cir. 2011).

Foreclosure sale properly conducted and consummated with bank as purchaser. — Foreclosure sales were properly conducted and consummated under O.C.G.A. § 44-14-161 because a bank purchased the secured properties at the sale after the debtor defaulted on promissory notes to the bank, the requisite procedures for the sale were followed, and the fact that the bank conveyed the debtor's interest to the bank's wholly-owned subsidiary under a separate agreement did not undercut the underlying sales. Peachtree Homes, Inc. v. Bank of America, N.A., 315 Ga. App. 243, 726 S.E.2d 737, 2012 Ga. App. LEXIS 347 (2012).

Property omitted from appraisal meant invalid foreclosure sale. — Good cause existed to believe that the property did not sell for true market value because the lender's bid at the foreclosure sale was based on an appraisal that did not include the entire land mass or full extent of the property at issue. Based on this clear omission in the appraisal, the trial court was authorized to find that the property did not sell for fair market value at the foreclosure sale. Ciuperca v. RES-GA Seven, LLC, 319 Ga. App. 61, 735 S.E.2d 107, 2012 Ga. App. LEXIS 1022 (2012), cert. denied, No. S13C0563, 2013 Ga. LEXIS 402 (Ga. Apr. 29, 2013).

Sales Made on Foreclosure Under Power of Sale

Court of Appeals would not construe O.C.G.A. § 44-14-161, which is operative only in the limited circumstance that the sale of the property does not satisfy the underlying debt and then solely in the discretion of the parties, so as to engraft judicially upon the power of sale a tacit requirement to seek and secure confirmation in every instance that the power is exercised or face the possibility of suit merely because the debtor is of the belief fair market value was not obtained. Kennedy v. Gwinnett Com. Bank, 155 Ga. App. 327, 270 S.E.2d 867, 1980 Ga. App. LEXIS 2569 (1980).

O.C.G.A. § 44-14-161 lays down a condition precedent to obtaining a deficiency judgment in cases where "any real estate is sold on foreclosure, without legal process, under powers contained in security deeds," and the sale does not cover the amount of the debt. On its face, that section refers only to the foreclosure procedure. Gentry v. Hibbler-Barnes Co., 113 Ga. App. 1, 147 S.E.2d 31, 1966 Ga. App. LEXIS 939 (1966).

In a foreclosure sale, issues which go to the heart of the underlying ob-

ligation itself should be raised within the confines of a subsequent action for a deficiency judgment. Alexander v. Weems, 157 Ga. App. 507, 277 S.E.2d 793, 1981 Ga. App. LEXIS 1882 (1981).

Debt secured. — A note for a downpayment is not a part of the "debt secured" for the balance owing unless so described in the instruments themselves. Murray v. Hasty, 132 Ga. App. 125, 207 S.E.2d 602, 1974 Ga. App. LEXIS 1617 (1974).

Intent of parties. — That portion of mortgage containing the power of sale is to be construed so as to effectuate the intention of the parties, and the power must be exercised in accordance with the intention of the parties as indicated in the clause in the mortgage conferring the power. The power is conferred for the purpose of enabling the mortgagee to collect the debt. Kennedy v. Gwinnett Com. Bank, 155 Ga. App. 327, 270 S.E.2d 867, 1980 Ga. App. LEXIS 2569 (1980).

When a power of sale is exercised all that is required of the foreclosing party is to advertise and sell the property according to the terms of the instrument, and that the sale be conducted in good faith. Kennedy v. Gwinnett Com. Bank, 155 Ga. App. 327, 270 S.E.2d 867, 1980 Ga. App. LEXIS 2569 (1980).

The foreclosing party is not an insurer of the results of the exercise of the power of sale; that party's only obligation is to sell according to the terms of the deed, in good faith, and to obtain the amount produced by such a sale. Kennedy v. Gwinnett Com. Bank, 155 Ga. App. 327, 270 S.E.2d 867, 1980 Ga. App. LEXIS 2569 (1980).

The remedy by sale will be taken to have satisfied the primary obligation to pay the debt unless the creditor conforms to the law by making a proper showing that the security in fact brought in its true market value, which is then credited against the primary obligation. Gentry v. Hibbler-Barnes Co., 113 Ga. App. 1, 147 S.E.2d 31, 1966 Ga. App. LEXIS 939 (1966).

Where property sold under foreclosure brings the full amount of the debt secured by a deed to secure debt, O.C.G.A. § 44-14-161 is inapplicable since that section only applies where the sale brings less than the amount of the debt secured by the deed. Nationwide Fin. Corp. v. Banks, 147 Ga. App. 73, 248 S.E.2d 54, 1978 Ga. App. LEXIS 2618 (1978).

A creditor with notes secured by a deed to secure a debt is not put to an election, but may pursue remedies under both instruments concurrently until the creditor obtains a satisfaction of the debt under either. Norwood Realty Co. v. First Fed. Sav. & Loan Ass'n, 99 Ga. App. 692, 109 S.E.2d 844, 1959 Ga. App. LEXIS 935 (1959); Brown v. Georgia State Bank, 141 Ga. App. 570, 234 S.E.2d 151, 1977 Ga. App. LEXIS 1997 (1977); Homes of Tomorrow, Inc. v. FDIC, 149 Ga. App. 321, 254 S.E.2d 475, 1979 Ga. App. LEXIS 1835 (1979).

A creditor who holds a promissory note secured by a deed is not put to an election of remedies as to whether the creditor shall sue upon the note or exercise a power of sale contained in the deed, but the creditor may do either, or pursue both remedies concurrently until the debt is satisfied. Taylor v. Thompson, 158 Ga. App. 671, 282 S.E.2d 157, 1981 Ga. App. LEXIS 2366 (1981).

Available remedies. — There is nothing in O.C.G.A. § 44-14-161 which says that the creditor may not, if the creditor chooses, obtain satisfaction of the debt by reducing it to judgment and levying it on whatever property the creditor chooses, whether or not it has been pledged as security for the particular debt evidenced by the note. Gentry v. Hibbler-Barnes Co., 113 Ga. App. 1, 147 S.E.2d 31, 1966 Ga. App. LEXIS 939 (1966).

A holder of a note who is also the grantee of a deed to secure the indebtedness of the note is not forced to exercise the power of sale in the deed to secure the debt. On the contrary, the holder may at holder's option elect to sue on the note and to exercise rights pursuant to O.C.G.A. § 44-14-210 or to exercise the power of sale, to seek judicial confirmation of the sale and to sue for deficiency pursuant to O.C.G.A. § 44-14-161. Brown v. Rooks, 240 Ga. 674, 242 S.E.2d 128, 1978 Ga. LEXIS 800 (1978).

A secured creditor has an option of either proceeding to suit on the note, or of

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foreclosure by exercise of the power of sale, seeking confirmation and then suing for the deficiency. Homes of Tomorrow, Inc. v. FDIC, 149 Ga. App. 321, 254 S.E.2d 475, 1979 Ga. App. LEXIS 1835 (1979).

The holder of a note who is also the grantee in a deed to secure the indebtedness of the note is not forced to exercise the power of sale in the deed. The holder may sue on the note or exercise the power of sale. Trust Inv. & Dev. Co. v. First Ga. Bank, 238 Ga. 309, 232 S.E.2d 828, 1977 Ga. LEXIS 1010 (1977); Stewart v. Diehl, 219 Ga. App. 821, 466 S.E.2d 913, 1996 Ga. App. LEXIS 26 (1996).

Failure to satisfy untacked judgment from proceeds of foreclosure sale of security deed not a "deficiency". — When defendant-assignee was assigned a note that was in default and a security deed by defendant-assignor, the assignee's judgment, not being a contractual obligation, did not tack on to the note and become one obligation; since the judgment does not tack, the failure to satisfy the judgment from the proceeds of a foreclosure sale of the security deed under a power of sale contained therein does not constitute a "deficiency" within the meaning of O.C.G.A. § 44-14-161. Cook v. F & M Bank, 247 Ga. 661, 279 S.E.2d 199, 1981 Ga. LEXIS 831 (1981).

When a creditor who holds a promissory note secured by a deed to secure debt containing a power of sale sues on the note and obtains a money judgment and thereafter elects to exercise the power of sale in the deed to secure debt, and the proceeds of such sale are not sufficient to satisfy the judgment, the creditor is not required to comply with O.C.G.A. § 44-14-161 before attempting to enforce further the judgment. Taylor v. Thompson, 158 Ga. App. 671, 282 S.E.2d 157, 1981 Ga. App. LEXIS 2366 (1981).

Claims not barred as improper deficiency actions. — Trial court erred in ruling that a bank's claims against borrowers and guarantors for breach of promissory notes were barred as improper deficiency actions under O.C.G.A. § 44-14-161(a) due to the bank's failure to seek confirmation after the foreclosure auctions because although the bank conducted and bid at foreclosure auctions of the real property that secured the notes, the transfer of a borrower's right of possession and the borrower's equity of redemption to the bank as the foreclosure sale purchaser never occurred; three days after the foreclosure auctions, the bank notified the borrowers that the bank rescinded any actions taken with respect to foreclosure and that the foreclosures were not and would not be consummated, and by definition, the confirmation procedure had no application when there had been no foreclosure sale. Legacy Cmtys. Group, Inc. v. Branch Banking & Trust Co., 310 Ga. App. 466, 713 S.E.2d 670, 2011 Ga. App. LEXIS 579 (2011), aff'd in part and rev'd in part, 290 Ga. 724, 723 S.E.2d 674, 2012 Ga. LEXIS 300 (2012), vacated in part, 316 Ga. App. 496, 729 S.E.2d 612, 2012 Ga. App. LEXIS 594 (2012).

Waiver of confirmation. — When a buyer of foreclosed properties bought the properties for less than the amounts owed, but the buyer's efforts at confirmation of the sales failed, the buyer was nevertheless entitled to pursue the guarantors of the notes on the properties for the deficiency because the guarantors had waived "any and all rights or defenses based on suretyship," and the confirmation defense under O.C.G.A. § 44-14-161(a) was based on suretyship. York v. RES-GA LJY, LLC, 336 Ga. App. 253, 784 S.E.2d 96, 2016 Ga. App. LEXIS 155 (2016), aff'd, 300 Ga. 869, 799 S.E.2d 235, 2017 Ga. LEXIS 229 (2017).

Decision of the court of appeals that upheld deficiency judgments against the guarantors was affirmed as the guarantors waived any defense based on the failure of the creditor to confirm the relevant foreclosure sales because the contractual language of the commercial guaranties made it clear that the guarantors waived any defenses under an anti-deficiency law such as O.C.G.A. § 44-14-161; and such a waiver was permitted by law. York v. RES-GA LJY, LLC, 300 Ga. 869, 799 S.E.2d 235, 2017 Ga. LEXIS 229 (2017).

Where various forms of collateral, including two pieces of real estate, were

provided as security for a single agreement, and both pieces of real estate were foreclosed but only one foreclosure was confirmed, all obligations under the agreement were discharged and any further actions under the agreement were barred. Surety Managers, Inc. v. Stanford, 633 F.2d 709, 1980 U.S. App. LEXIS 11044 (5th Cir. 1980), cert. denied, 454 U.S. 828, 102 S. Ct. 121, 70 L. Ed. 2d 104, 1981 U.S. LEXIS 3241 (1981).

Effect of dragnet clauses. — Where a deed to secure debt given to secure a specific note described therein, containing a dragnet or open-end clause making the property conveyed thereby security for all other debts and obligations either then or thereafter owed by the grantor to the grantee, if foreclosed by exercise of the power of sale in the security deed for which no confirmation of sale was sought, the grantee is not barred from maintaining an action to recover on another note between the same parties, subsequently made for another loan and secured by a security deed on a different property. Vaughn & Co. v. Saul, 143 Ga. App. 74, 237 S.E.2d 622, 1977 Ga. App. LEXIS 2193 (1977).

Where there are separate debts arising from separate contractual obligations, failure to confirm the foreclosure arising from one of the obligations does not bar action on separate obligation, even if the obligations relate to same subject matter. Surety Managers, Inc. v. Stanford, 633 F.2d 709, 1980 U.S. App. LEXIS 11044 (5th Cir. 1980), cert. denied, 454 U.S. 828, 102 S. Ct. 121, 70 L. Ed. 2d 104, 1981 U.S. LEXIS 3241 (1981); Clements v. Fleet Fin., Inc., 206 Ga. App. 736, 426 S.E.2d 910, 1992 Ga. App. LEXIS 1760 (1992), cert. denied, No. S93C0565, 1993 Ga. LEXIS 303 (Ga. Mar. 19, 1993).

O.C.G.A. § 44-14-161 did not bar an automobile credit corporation from pursuing a recovery under notes and security deeds relating to loans from business assets and inventory that were separate obligations from that securing a real estate loan sold at an unconfirmed foreclosure sale. GMAC v. Newton, 213 Ga. App. 405, 444 S.E.2d 805, 1994 Ga. App. LEXIS 635 (1994), cert. denied, No. S94C1445, 1994 Ga. LEXIS 1013 (Ga. Sept. 16, 1994).

Trial court did not err by granting summary judgment to the lender in the lender's suit on a note because the mortgage loans were held by different entities when the other lender foreclosed on the lender's first-priority security deed, thus, the loans were not inextricably intertwined and the deficiency could be collected by the lender. Hildebrand v. Bank of America, N.A., 332 Ga. App. 175, 772 S.E.2d 790, 2015 Ga. App. LEXIS 157 (2015), cert. denied, No. S15C1305, 2015 Ga. LEXIS 622 (Ga. Sept. 8, 2015).

Creditor may sue only on independent obligation. — A creditor's action against debtors to recover on a balloon note with a cross default clause after default on a separate purchase money note, after the creditor purchased the property personally under powers contained in the security deed and did not obtain judicial confirmation of the foreclosure sale, was a prohibited attempt to recover a deficiency judgment on a debt secured by a purchase money security deed, not an attempt to recover on an independent, separate unsecured obligation. Tufts v. Levin, 213 Ga. App. 35, 443 S.E.2d 681, 1994 Ga. App. LEXIS 437 (1994).

Subsequent sales. — The words "no action may be taken to obtain a deficiency judgment" do not inhibit subsequent sale under power of property other than the property which at a former sale under power had failed to "bring the amount of the debt." Salter v. Bank of Commerce, 189 Ga. 328, 6 S.E.2d 290, 1939 Ga. LEXIS 724 (1939).

Irregular sale due to title status not shown. — The trial court properly entered an order confirming the sale of real property foreclosed on by a bank, under a power of sale contained in a deed to secure debt given by a debtor, as that debtor failed to show that any rights under O.C.G.A. § 44-14-161 or O.C.G.A. § 9-11-58 were jeopardized, and a claim that the sale was irregular due to the status of the property's title on the date of the sale fell outside of the ambit of § 44-14-161. Friedman v. Regions Bank, 288 Ga. App. 57, 653 S.E.2d 507, 2007 Ga. App. LEXIS 1139 (2007).

Where mortgagors executed two separate loans and gave as security an interest

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in two separate parcels of real property, and subsequently combined the debts, with the separate parcels remaining as security, the confirmation requirement did not bar the lender, who had foreclosed on one of the properties without confirming the sale, from foreclosing on the other property. Lawson v. Habersham Bank, 233 Ga. App. 88, 503 S.E.2d 341, 1998 Ga. App. LEXIS 902 (1998).

Confirmation and Approval of Sale

1. Nature of Proceeding

The confirmation required by O.C.G.A. § 44-14-161 is not a civil case within the meaning of Ga. Const. 1976, Art. VI, Sec. XIV, Para. VI (see, now, Ga. Const. 1983, Art. VI, Sec. II, Para. VI), requiring civil cases to be brought in the county where the defendant resides. Wall v. Federal Land Bank, 240 Ga. 236, 240 S.E.2d 76, 1977 Ga. LEXIS 1459 (1977); Weems v. McCloud, 619 F.2d 1081, 1980 U.S. App. LEXIS 16299 (5th Cir. 1980).

The confirmation required by O.C.G.A. § 44-14-161 is not an equitable proceeding. Taylor v. Thompson, 158 Ga. App. 671, 282 S.E.2d 157, 1981 Ga. App. LEXIS 2366 (1981).

O.C.G.A. § 44-14-161 merely provides for a proceeding whereby the court is called upon to determine whether the duty to conduct the sale according to the terms of the deed and in good faith has been met and the debtor's concomitant right to have the property extinguish debtor's debt to the maximum extent possible is protected. Kennedy v. Gwinnett Com. Bank, 155 Ga. App. 327, 270 S.E.2d 867, 1980 Ga. App. LEXIS 2569 (1980).

A confirmation proceeding is summary in nature. Weems v. McCloud, 619 F.2d 1081, 1980 U.S. App. LEXIS 16299 (5th Cir. 1980).

A confirmation proceeding is not a suit in equity. Weems v. McCloud, 619 F.2d 1081, 1980 U.S. App. LEXIS 16299 (5th Cir. 1980).

A confirmation proceeding is not an equitable proceeding. — O.C.G.A. § 44-14-161 does not state that the confirmation provided therein is an equitable proceeding, and it is not. Cases under that section therefore are not within the jurisdiction of the Supreme Court, but within the jurisdiction of the Court of Appeals. Dockery v. Parks, 224 Ga. 369, 162 S.E.2d 332, 1968 Ga. LEXIS 783 (1968); Taylor v. Thompson, 158 Ga. App. 671, 282 S.E.2d 157, 1981 Ga. App. LEXIS 2366 (1981).

The confirmation hearing is not an action in personam, because no personal judgment is recovered. It is not an action in rem, because it does not adjudicate title. Wall v. Federal Land Bank, 240 Ga. 236, 240 S.E.2d 76, 1977 Ga. LEXIS 1459 (1977).

Confirmation proceeding not same as wrongful foreclosure suit. — Prior pending wrongful foreclosure action did not require the abatement and dismissal of a bank's application for confirmation under O.C.G.A. § 44-14-161 because the confirmation proceeding did not involve the same cause of action as the wrongful foreclosure suit, but was instead a special statutory proceeding and not a complaint which initiated a civil action or suit. BBC Land & Dev., Inc. v. Bank of N. Ga., 294 Ga. App. 759, 670 S.E.2d 210, 2008 Ga. App. LEXIS 1304 (2008).

Confirmation served as res judicata and collateral estoppel. — Trial court properly granted summary judgment to the lender on the borrower's wrongful foreclosure counterclaim because the earlier confirmation of the foreclosure sale precluded the claim under either the doctrine of res judicata and collateral estoppel. Flint Timber, L.P. v. AgSouth Farm Credit, ACA, 347 Ga. App. 271, 819 S.E.2d 76, 2018 Ga. App. LEXIS 502 (2018), cert. denied, No. S19C0237, 2019 Ga. LEXIS 308 (Ga. Apr. 29, 2019).

Liability of parties not adjudicated. — Except as to the confirmed amount of the sale, the confirmation judgment does not establish the liability of any party with regards to the indebtedness. Harris & Tilley, Inc. v. First Nat'l Bank, 157 Ga. App. 88, 276 S.E.2d 137, 1981 Ga. App. LEXIS 1674 (1981).

Title to property. — The confirmation judgment is not a personal judgment against any party and, strictly speaking, it does not adjudicate the title of the

property sold. Weems v. McCloud, 619 F.2d 1081, 1980 U.S. App. LEXIS 16299 (5th Cir. 1980); Harris & Tilley, Inc. v. First Nat'l Bank, 157 Ga. App. 88, 276 S.E.2d 137, 1981 Ga. App. LEXIS 1674 (1981).

The proceeding here is not a suit but an application to the judge of the superior. Jonesboro Inv. Trust Ass'n v. Donnelly, 141 Ga. App. 780, 234 S.E.2d 349, 1977 Ga. App. LEXIS 2067 (1977); Wammock v. Smith, 143 Ga. App. 186, 237 S.E.2d 668, 1977 Ga. App. LEXIS 2237 (1977); Weems v. McCloud, 619 F.2d 1081, 1980 U.S. App. LEXIS 16299 (5th Cir. 1980).

Suit to void sale not equivalent. — While a petition to set aside is a suit in equity, a confirmation proceeding is an "application" limited in scope and requiring specified procedures. Georgia law, by establishing different tests for confirmation and for voiding sales, indicates the two are not equivalent. FDIC v. Dye, 642 F.2d 837, 1981 U.S. App. LEXIS 14190 (5th Cir. 1981).

Not a proceeding against bankrupt. — Where the confirmation of the sale is the only act taking place after bankruptcy of debtor, it is neither the assertion of a lien against the bankrupt or the bankrupt's property, nor a "proceeding" against the bankrupt. Jonesboro Inv. Trust Ass'n v. Donnelly, 141 Ga. App. 780, 234 S.E.2d 349, 1977 Ga. App. LEXIS 2067 (1977).

This statutory framework does not authorize confirmation of sales of personalty. Gordon v. Weldon, 154 Ga. App. 531, 268 S.E.2d 796, 1980 Ga. App. LEXIS 2270 (1980).

Since O.C.G.A. § 44-14-161 does not apply to sales of personalty, the confirmation court is without authority to address matters concerning sales of personalty, even if they are related to the sale of realty; consequently, the issue of whether various items of equipment were sold separately or were included in the sale of a tract of land is not an issue that the confirmation may address. Walton Motor Sales, Inc. v. Ross, 736 F.2d 1449, 1984 U.S. App. LEXIS 20368 (11th Cir. 1984).

Initiation of proceedings. — While O.C.G.A. § 44-14-161 provides that no sale made under a power shall be confirmed unless the superior court is satisfied the property brought its true market value, there is no requirement that the foreclosing party initiate proceedings to have the sale confirmed. Kennedy v. Gwinnett Com. Bank, 155 Ga. App. 327, 270 S.E.2d 867, 1980 Ga. App. LEXIS 2569 (1980).

Where the lender was not seeking a deficiency judgment against the borrower, it was under no duty to pursue confirmation of a sale; thus, the borrower could not use the confirmation statute to force the resale of property after the lender voluntarily moved to dismiss the proceeding. Gutherie v. Ford Equip. Leasing Co., 210 Ga. App. 763, 437 S.E.2d 482, 1993 Ga. App. LEXIS 1320 (1993), cert. denied, No. S94C0237, 1994 Ga. LEXIS 164 (Ga. Jan. 21, 1994), cert. denied, No. S94C0253, 1994 Ga. LEXIS 583 (Ga. Feb. 21, 1994).

Power to institute proceedings. — In a proceeding under the terms of O.C.G.A. § 44-14-161 providing for the confirmation and approval of sales of realty, sold on foreclosures, without legal process, under power contained in a security deed, such power is exercised by the grantee, who is the purchaser at such sale. Dupree v. Turner, 99 Ga. App. 332, 108 S.E.2d 171, 1959 Ga. App. LEXIS 849 (1959).

The words "person instituting the foreclosure" mean the entity given the right to institute the proceedings under the terms of the instrument. This entity continues to exist in its successors in estate who become so by operation of law. Darby & Assocs. v. FDIC, 141 Ga. App. 78, 232 S.E.2d 615, 1977 Ga. App. LEXIS 1772 (1977), overruled in part as stated in Cartersville Developers, LLC. v. Ga. Bank & Trust, 292 Ga. App. 375, 664 S.E.2d 783, 2008 Ga. App. LEXIS 780 (2008).

Only the "person instituting the foreclosure proceedings" can seek confirmation of a sale. Cheek v. Savannah Valley Prod. Credit Ass'n, 244 Ga. 768, 262 S.E.2d 90, 1979 Ga. LEXIS 1403 (1979).

Issue in confirmation proceeding. — The issue in a confirmation proceeding is whether the property sold brought, at the time of the sale sought to be confirmed, its true market value; what the

Nature of Proceeding (Cont'd)

property may have brought or what it may have been regarded as being worth on the market at a time relative to the sale is not controlling. Kong v. Shearson Lehman Hutton Mtg. Corp., 211 Ga. App. 93, 438 S.E.2d 132, 1993 Ga. App. LEXIS 1441 (1993), cert. denied, No. S94C0383, 1994 Ga. LEXIS 377 (Ga. Feb. 3, 1994).

Limitations on confirmation proceedings. — Because a confirmation proceeding is limited to whether a sale is properly advertised and brought the fair market value of the land, issues regarding whether a security deed executed by the executor of an estate could and did secure a personal debt with an undivided interest in estate property could not have been put in issue and determined in the proceeding. Dorsey v. Mancuso, 249 Ga. App. 259, 547 S.E.2d 787, 2001 Ga. App. LEXIS 476 (2001).

A confirmation judgment cannot be collaterally attacked in a subsequent deficiency action but is accorded the same respect as other judgments of a court of general jurisdiction. Weems v. McCloud, 619 F.2d 1081, 1980 U.S. App. LEXIS 16299 (5th Cir. 1980).

Statute does not mandate separate evidentiary hearing for each property foreclosed. — Trial court did not abuse the court's discretion when the court consolidated the confirmation hearings on three foreclosure sales because O.C.G.A. § 44-14-161 did not mandate a separate evidentiary hearing for each property foreclosed. Belans v. Bank of Am., N.A., 306 Ga. App. 252, 701 S.E.2d 889, 2010 Ga. App. LEXIS 910 (2010).

Failure to show waiver of confirmation process on part of guarantors. — As to foreclosure deficiency judgment, the trial court erred by denying the guarantors of the mortgage summary judgment because the loan documents failed to include an adequate waiver of the confirmation process required by O.C.G.A. § 44-14-161. Apex Bank v. Thompson, 349 Ga. App. 285, 826 S.E.2d 162, 2019 Ga. App. LEXIS 155 (2019).

Trial court erred by failing to confirm sale. — Trial court erred by denying a creditor's petition to confirm the foreclosure sale of six townhouses because the sale satisfied applicable notice and advertisement requirements and the uncontradicted evidence showed that the townhouses did sell for at least fair market value. RBC Real Estate Fin., Inc. v. Winmark Homes, Inc., 318 Ga. App. 507, 736 S.E.2d 117, 2012 Ga. App. LEXIS 943 (2012).

2. Application in Out-of-State and Federal Courts

O.C.G.A. § 44-14-161 is obviously drawn so as to apply only to foreclosure sales in Georgia. Goodman v. Nadler, 113 Ga. App. 493, 148 S.E.2d 480, 1966 Ga. App. LEXIS 1107 (1966); Colodny v. Krause, 141 Ga. App. 134, 232 S.E.2d 597, 1977 Ga. App. LEXIS 1797, cert. denied, 434 U.S. 892, 98 S. Ct. 267, 54 L. Ed. 2d 177, 1977 U.S. LEXIS 3559 (1977); Kelly v. American Fed. Sav. & Loan Ass'n, 178 Ga. App. 542, 343 S.E.2d 755, 1986 Ga. App. LEXIS 1697 (1986).

Confirmation is not required where the land is not in Georgia. FDIC v. Hoover-Morris Enters., 642 F.2d 785, 1981 U.S. App. LEXIS 14291 (5th Cir. 1981).

Statute cannot operate so as to deprive federal courts of jurisdiction to confirm a foreclosure sale in a case which is otherwise subject to federal jurisdiction. FDIC v. Windland Co., 245 Ga. 194, 264 S.E.2d 11, 1980 Ga. LEXIS 736 (1980).

Trial court did not err in dismissing the bank's petition for confirmation of the foreclosure sale when, by filing the application with the court rather than the superior court judge, the bank failed to comply with the requirements of O.C.G.A. § 44-14-161(a). Citizens Bank of Effingham v. Rocky Mt. Enterps., LLC, 308 Ga. App. 600, 708 S.E.2d 557, 2011 Ga. App. LEXIS 244 (2011).

O.C.G.A. § 44-14-161 should be construed as allowing the confirmation proceedings to be brought in any United States district court which would otherwise present an available forum. Windland Co. v. FDIC, 151 Ga. App. 742, 261 S.E.2d 407, 1979 Ga. App. LEXIS 2779 (1979), rev'd, 245 Ga. 194, 264 S.E.2d 11, 1980 Ga. LEXIS 736 (1980).

Confirmation proceedings conducted in federal district courts com-

ply with O.C.G.A. § 44-14-161 for the purposes of deficiency suits later brought in state courts. Weems v. McCloud, 619 F.2d 1081, 1980 U.S. App. LEXIS 16299 (5th Cir. 1980).

Courts of this state cannot refuse to entertain suit for a deficiency judgment where a federal court of proper jurisdiction has confirmed a foreclosure sale because the sale was not reported to the judge of the superior court of the county in which the land lies for confirmation and approval. FDIC v. Windland Co., 245 Ga. 194, 264 S.E.2d 11, 1980 Ga. LEXIS 736 (1980).

When confirmation proceedings are heard, in federal court, O.C.G.A. § 44-14-161, reasonably construed, requires only that the foreclosure sale be reported to the judge of the court in which proceedings are to be heard. FDIC v. M.C. Honea, Jr., Inc., 440 F. Supp. 1064, 1977 U.S. Dist. LEXIS 13148 (N.D. Ga. 1977).

Although O.C.G.A. § 44-14-161 speaks in terms of confirmation by a state court judge, it has been held that when that section is applicable to a federal proceeding, it is sufficient that the sale be reported to and confirmed by the judge of the federal court in which confirmation is sought. United States v. Smith, 479 F. Supp. 804, 1979 U.S. Dist. LEXIS 8616 (N.D. Ga. 1979).

Proceeding is within contemplation of automatic stay provisions of bankruptcy law. — Judicial confirmation is an action or proceeding in the nature of a civil suit to obtain a judicial determination of legal rights or remedies to enable the creditor to pursue recovery or collection of a claim for a deficiency against the debtor, and is an action or proceeding as contemplated by the automatic stay provisions of the federal bankruptcy law. Bank of Am. Nat'l Trust & Sav. Ass'n v. Virginia Hill Partners, 110 B.R. 84, 1989 Bankr. LEXIS 2352 (Bankr. N.D. Ga. 1989).

Automatic stay, as it applied to the commencement of actions or proceedings against the debtor, terminated when the court entered the court's order on February 17, 2011, granting the debtor a discharge in bankruptcy, 11 U.S.C. § 362(c)(2)(C); notice of the order of discharge was served on the bank on February 19, 2011. Thus, when the bank foreclosed the following July or August of 2011, there was no stay in place; accordingly, 11 U.S.C. § 108(c)(1) controlled and the tolling under § 108(c) ended when the time within which the confirmation had to be reported to the state superior court lapsed thirty days after the foreclosure. Mt. Valley Cmty. Bank v. Freeman (In re Freeman), No. 10-32105 JPS, No. 11-3019, 2012 Bankr. LEXIS 5887 (Bankr. M.D. Ga. Dec. 21, 2012), aff'd, 508 B.R. 247, 2014 U.S. Dist. LEXIS 39841 (M.D. Ga. 2014).

O.C.G.A. § 44-14-161 is adopted as a part of the federal law governing the rights between a loan guarantor and the Small Business Administration. Since that section prohibits the entertaining of a suit for a deficiency judgment when there has been no compliance with the requirement for judicial confirmation of the foreclosure sale, the Small Business Administration cannot recover a deficiency judgment against a guarantor without showing a judicial confirmation. United States v. Dismuke, 616 F.2d 755, 1980 U.S. App. LEXIS 17854 (5th Cir. 1980).

O.C.G.A. § 44-14-161 not applicable. — Where Small Business Administration was not attempting to collect on a deficiency judgment but rather was proceeding against the guarantor of corporate debt on the guarantor's direct and primary obligation to pay the debt of the defaulting corporate debtor, fact that SBA had not obtained information of sale of corporate property within 30 days did not preclude SBA from maintaining action against guarantor. Ricks v. United States, 434 F. Supp. 1262, 1976 U.S. Dist. LEXIS 12889 (S.D. Ga. 1976).

Stay under federal law lifted to allow proceeding under statute. — Automatic stay was lifted under 11 U.S.C. § 362(d)(1) to permit a creditor to proceed with the confirmation of a foreclosure sale because, pursuant to O.C.G.A. § 44-14-161, the creditor could not pursue the creditor's deficiency claim unless the sale was confirmed by the superior court within 30 days. In re McDaniel, No. 08-50021-JDW, 2008 Bankr. LEXIS 4227 (Bankr. M.D. Ga. May 5, 2008).

Application in Out-of-State and Federal Courts (Cont'd)

Running of 30-day period. — Because the language in the stay relief order in this case was sufficiently close to the language of the stay relief order in In re Virginia Hill Partners I, 110 B.R. 84 (Bankr. N.D. Ga. 1989), the stay was not lifted to permit the creditor to commence proceedings to confirm the sale, including reporting the sale as required by Georgia law. The 30-day period under the Georgia confirmation statute would not begin to run here until either the bankruptcy was dismissed or the court lifted the automatic stay. Haugen v. Multibank 2009-1 Cre Venture, LLC (In re LaPrade's Marina, LLC), 566 B.R. 84, 2017 Bankr. LEXIS 783 (Bankr. N.D. Ga. 2017).

3. Report of Sale

Requirement not jurisdictional. — The requirement that the report of the sale shall be made to the judge of the superior court of the county in which the land lies is not a jurisdictional requirement. Weems v. McCloud, 619 F.2d 1081, 1980 U.S. App. LEXIS 16299 (5th Cir. 1980).

Requirement may be waived. — The requirement that the report of the sale shall be made to the judge of the superior court of the county in which the land lies is a venue requirement which may be waived by the debtor. Weems v. McCloud, 619 F.2d 1081, 1980 U.S. App. LEXIS 16299 (5th Cir. 1980).

The word "report" is not a word of art, and its ordinary significance, as defined by Webster, is to give an account of, to relate, to tell. Dukes v. Ralston Purina Co., 127 Ga. App. 696, 194 S.E.2d 630, 1972 Ga. App. LEXIS 1001 (1972).

The judge personally is the one to whose attention the sale and its particulars must be brought. Goodman v. Vinson, 142 Ga. App. 420, 236 S.E.2d 153, 1977 Ga. App. LEXIS 1642 (1977).

Second reporting to judge of sale of property was not required of financial institution after the setting aside, for failure to serve notice of hearing to all interested parties, of an earlier confirmation of sale of property on foreclosure without legal process, since the financial institution had timely reported the sale before the confirmation was set aside; the order setting aside the earlier confirmation did not "erase the slate clean" of all previously filed documents — it merely reinstated the case in the trial court and returned it to the posture it had occupied prior to judgment. Rogers v. Fidelity Fed. Sav. & Loan Ass'n, 180 Ga. App. 330, 349 S.E.2d 7, 1986 Ga. App. LEXIS 2178 (1986).

Substantial compliance with report of sale by filing with judge's secretary. — Where plaintiff-appellant presented petition for confirmation and approval of a foreclosure sale at the chambers of the superior court judge, the petition was accepted by the judge's secretary and that the judge's secretary had the delegated authority to accept petitions in any ministerial matter, this was sufficient compliance with O.C.G.A. § 44-14-161(a). Cornelia Bank v. Brown, 166 Ga. App. 68, 303 S.E.2d 171, 1983 Ga. App. LEXIS 2070 (1983).

There is no authority for making the word "report" mean "file." This is especially true inasmuch as O.C.G.A. § 44-14-161 makes no mention of reporting to or filing with the clerk, but specifically provides that the report is to be made to the judge. Dukes v. Ralston Purina Co., 127 Ga. App. 696, 194 S.E.2d 630, 1972 Ga. App. LEXIS 1001 (1972).

Report to clerk insufficient. — The presentation of the petition to the clerk will not suffice under O.C.G.A. § 44-14-161 specifically requiring a report of the sale "to the judge of the superior court of the county in which the land lies" and making no mention of the court or the clerk. Goodman v. Vinson, 142 Ga. App. 420, 236 S.E.2d 153, 1977 Ga. App. LEXIS 1642 (1977); John Alden Life Ins. Co. v. Gwinnett Plantation, Ltd., 220 Ga. App. 846, 470 S.E.2d 482, 1996 Ga. App. LEXIS 357 (1996).

Filing of a confirmation petition with the clerk of court was insufficient to meet the mandates of O.C.G.A. § 44-14-161(a). Lanier Bank & Trust Co. v. Nix, 221 Ga. App. 323, 471 S.E.2d 229, 1996 Ga. App. LEXIS 396 (1996), cert. denied, No. S96C1381, 1996 Ga. LEXIS 757 (Ga. June 28, 1996).

A mortgagor's filing of bankruptcy proceedings. — A mortgagor's filing of

bankruptcy proceedings tolled the running of periods of limitation which would have otherwise expired during the period of a stay in bankruptcy until 30 days after termination of the stay. Where a stay was in effect when a foreclosure sale was held, the 30-day period provided in O.C.G.A. § 44-14-161 did not begin until 30 days after the bankruptcy was dismissed and the sale was not invalid because it was not reported within 30 days. Breeze v. Columbus Bank & Trust Co., 214 Ga. App. 534, 448 S.E.2d 276, 1994 Ga. App. LEXIS 941 (1994).

The act of reporting a foreclosure sale is not an end in and of itself and serves no purpose except in connection with confirmation and approval. FDIC v. M.C. Honea, Jr., Inc., 440 F. Supp. 1064, 1977 U.S. Dist. LEXIS 13148 (N.D. Ga. 1977).

The report requirement in O.C.G.A. § 44-14-161 is not intended to give notice to the debtor as such notice is also provided for. Goodman v. Vinson, 142 Ga. App. 420, 236 S.E.2d 153, 1977 Ga. App. LEXIS 1642 (1977).

The trial court did not err in concluding that O.C.G.A. § 44-14-161 governing foreclosures under power of sale did not contain a requirement for service of the report of sale on the debtor within 30 days. The 30-day report to the judge is not intended to give notice to the debtor. The notice requirement for the debtor is that the debtor be given at least five days notice of the confirmation hearing, which notice would include a copy of the report. Oviedo v. Connecticut Nat'l Bank, 194 Ga. App. 626, 391 S.E.2d 417, 1990 Ga. App. LEXIS 245 (1990), cert. denied, No. S90C0787, 1990 Ga. LEXIS 736 (Ga. Apr. 18, 1990).

Report to federal judge. — O.C.G.A. § 44-14-161 contemplates that the report of a foreclosure sale be received by the same judge who is to confirm and approve the sale. Thus, if the confirmation action is brought in federal court, then the report must be made to the appropriate federal judge rather than to the judge of the superior court of the county in which the land lies. FDIC v. M.C. Honea, Jr., Inc., 440 F. Supp. 1064, 1977 U.S. Dist. LEXIS 13148 (N.D. Ga. 1977).

The terms of O.C.G.A. § 44-14-161 were complied with where application to the superior court was made within 30 days, although judicial approval was rendered after 30 days. Dukes v. Ralston Purina Co., 127 Ga. App. 696, 194 S.E.2d 630, 1972 Ga. App. LEXIS 1001 (1972).

Report of the sale to a judge sitting as presiding judge of the superior court was sufficient to comply with O.C.G.A. § 44-14-161; it is not necessary to make the report to the specific judge to whom the case is assigned. Hernandez v. Resolution Trust Corp., 210 Ga. App. 538, 436 S.E.2d 534, 1993 Ga. App. LEXIS 1244 (1993), cert. denied, No. S94C0159, 1994 Ga. LEXIS 148 (Ga. Jan. 21, 1994).

Tender of report as evidence not required. — Nothing in the language of O.C.G.A. § 44-14-161(a) imposes an evidentiary or procedural requirement that the report to the superior court be formally tendered into evidence as an exhibit. Stepp v. Farm & Home Life Ins. Co., 222 Ga. App. 257, 474 S.E.2d 108, 1996 Ga. App. LEXIS 801 (1996).

4. Confirmation

Need to confirm. — O.C.G.A. § 44-14-161 provides that if a creditor fails to obtain judicial confirmation of a foreclosure sale that the foreclosure purchase price of the property was the reasonable equivalent of the fair market value, the creditor may not pursue a deficiency claim against the debtor; however, a creditor need confirm a foreclosure only in order to realize its claim from any property to which its security interest does not extend. Empire Fin. Servs. v. Gingold (In re Real Estate W. Ventures, L.P.), 170 B.R. 736, 1993 Bankr. LEXIS 2231 (Bankr. N.D. Ga. 1993).

Following nonjudicial foreclosure, a creditor was barred from suing on a note without confirmation where there was but one promissory note and one deed to secure debt, and the only obligation the debtor owed the creditor was the note secured by the foreclosed property. Southeast Timerlands, Inc. v. Haiseal Timber, Inc., 224 Ga. App. 98, 479 S.E.2d 443, 1996 Ga. App. LEXIS 1318 (1996), cert. denied, No. S97C0633, 1997 Ga. LEXIS 402 (Ga. Apr. 24, 1997).

Confirmation (Cont'd)

Grant of summary judgment to a bank in a mortgage foreclosure action because the bank was not required to comply with the confirmation of a foreclosure sale requirements under O.C.G.A. § 44-14-161 since the guaranties signed by the guarantors clearly waived the condition precedent requirement of the confirmation statute by virtue of the waiver clauses in the loan documents. Nine Twenty, LLC v. Bank of the Ozarks, 337 Ga. App. 180, 786 S.E.2d 555, 2016 Ga. App. LEXIS 288 (2016).

Grant of summary judgment to bank in mortgage foreclosure action was reversed because the borrower created a genuine issue of fact with regard to whether the construction loan and second line of credit were for similar and related purposes, namely to improve secured property, so as to trigger the requirement of judicial confirmation before the bank could file suit against the borrower for breach of contract. Wells v. Regions Bank, 350 Ga. App. 652, 829 S.E.2d 889, 2019 Ga. App. LEXIS 356 (2019).

Sale must be advertised in every county where property located. — Trial court did not err in denying a mortgagee's application for confirmation of a nonjudicial foreclosure sale because the court properly ruled that the mortgagee's advertisement failed to comport with the statutory requirements of O.C.G.A. § 44-14-162(a); a sale of real property under a power of sale made pursuant to § 44-14-162(a) must be advertised in every county where the property or any portion of the property is located. Nicholson Hills Dev. v. Branch Banking & Trust Co., 316 Ga. App. 857, 730 S.E.2d 572, 2012 Ga. App. LEXIS 682 (2012).

Foreign limited liability company was not transacting business by petitioning for confirmation. — Trial court did not err by denying a mortgagor's motion to dismiss the foreclosure confirmation proceeding based on the mortgagee being a foreign limited liability company impermissibly transacting business in Georgia because a limited liability company was not considered to be transacting business in Georgia merely because it engaged in acquiring loan documents, conducting a foreclosure sale, purchasing the property at the sale, reporting the sale, and filing the confirmation petition. Powder Springs Holdings, LLC v. RL BB ACQ II-GA PSH, LLC, 325 Ga. App. 694, 754 S.E.2d 655, 2014 Ga. App. LEXIS 54 (2014).

Sale properly confirmed. — Trial court did not err in confirming the November sale of certain real estate in a foreclosure action because the mortgagor failed to show that it was deprived of any protection afforded by O.C.G.A. § 44-16-161 as the confirmation proceeding commenced in connection with the November sale comprised a new action after the July sale was invalidated, all of the advertisement requirements were met, and the property was sold for its true market value. Howser Mill Homes, LLC v. Branch Banking & Trust Co., 318 Ga. App. 148, 733 S.E.2d 441, 2012 Ga. App. LEXIS 869 (2012).

Trial court did not err by confirming a foreclosure sale because issues as to whether the foreclosing bank recorded an assignment of the deed to secure debt before the foreclosure sale and the validity of the assignment were irrelevant to the confirmation proceeding. River Walk Farm, L.P. v. First Citizens Bank & Trust Co., 321 Ga. App. 173, 741 S.E.2d 165, 2013 Ga. App. LEXIS 192 (2013).

Trial court properly confirmed a foreclosure sale under O.C.G.A. § 44-14-161 because the borrower raised no issue to support reversal as the bank provided admissible testimony as to the advertisement, notice, and regularity of the actual sale, supporting documents, and no objection was made. Sugarloaf Plaza, LLC v. Touchmark National Bank, 319 Ga. App. 648, 738 S.E.2d 104, 2013 Ga. App. LEXIS 36 (2013).

Trial court properly confirmed the foreclosure of an apartment complex because, although the valuations of the property were not identical, there was no evidence that the property was worth more than the bank paid at auction. Ga. Ltd. Partners, LLC v. City Nat'l Bank, 323 Ga. App. 766, 748 S.E.2d 131, 2013 Ga. App. LEXIS 740 (2013).

The trial judge's confirmation is a condition precedent to the creditor be-

ing permitted to sue debtor for any money deficiency resulting from the sale. United States v. Golf Club Co., 435 F.2d 9, 1970 U.S. App. LEXIS 6057 (5th Cir. 1970); Thompson v. Maslia, 127 Ga. App. 758, 195 S.E.2d 238, 1972 Ga. App. LEXIS 1016 (1972); Windland Co. v. FDIC, 151 Ga. App. 742, 261 S.E.2d 407, 1979 Ga. App. LEXIS 2779 (1979), rev'd, 245 Ga. 194, 264 S.E.2d 11, 1980 Ga. LEXIS 736 (1980).

O.C.G.A. § 44-14-161 requires a confirmation as a condition precedent to an action for a deficiency judgment. Commercial Exch. Bank v. Johnson, 197 Ga. App. 529, 398 S.E.2d 817, 1990 Ga. App. LEXIS 1391 (1990).

Where two notes were secured by the same deed and the same property, but the foreclosure advertisement only referenced one note, the action was nevertheless a suit for a deficiency judgment which was barred due to failure to obtain a confirmation. C.K.C., Inc. v. Free, 196 Ga. App. 280, 395 S.E.2d 666, 1990 Ga. App. LEXIS 879 (1990); Ward v. Pembroke State Bank, 212 Ga. App. 322, 441 S.E.2d 691, 1994 Ga. App. LEXIS 221 (1994).

Trial court did not abuse the court's discretion by ordering the resale of the property in a foreclosure confirmation proceeding because nothing in the record indicated that the trial court failed to exercise the court's discretion out of a belief that the bank was entitled to a resale merely because the bank had relied on a flawed appraisal; rather, the trial court found that the bank relied on a flawed appraisal in good faith and that the bank had shown good cause for a resale. Sanusi v. Cmty. & S. Bank, 330 Ga. App. 198, 766 S.E.2d 815, 2014 Ga. App. LEXIS 821 (2014).

Confirmation is not a prerequisite to the finality of a foreclosure sale but only to seeking a deficiency in the case of a final foreclosure sale. Gooden v. Buffalo Sav. Bank, 21 B.R. 456, 1982 Bankr. LEXIS 4389 (Bankr. N.D. Ga. 1982).

Failure to obtain confirmation does not prevent enforcement against additional security. — Trial court did not err in granting summary judgment to a note holder on the holder's suit against a debtor as a personal guarantor of the note because the failure to confirm the nonjudicial foreclosure sale pursuant to the security deed did not prevent the holder from seeking to enforce the holder's contractual right to recover against additional security on the debt. HWA Props., Inc. v. Cmty. & S. Bank, 322 Ga. App. 877, 746 S.E.2d 609, 2013 Ga. App. LEXIS 632 (2013), cert. denied, No. S13C1731, 2013 Ga. LEXIS 980 (Ga. Nov. 18, 2013).

Because the record did not demonstrate that the promissory notes underlying a bank's claims were inextricably intertwined with any debt on six of the foreclosure sales, the trial court was not authorized to conclude that the bank's claims relating to those promissory notes were barred as impermissible attempts to obtain deficiency judgments. First Citizens Bank & Trust, Inc. v. Ruddell, 330 Ga. App. 82, 766 S.E.2d 538, 2014 Ga. App. LEXIS 816 (2014).

In a bank's appeal of summary judgments entered against the bank and in favor of various defendants, which precluded the bank from recovering monies from the defendants owed under various promissory notes, credit agreements, and/or guaranties, the court affirmed some of the judgments and reversed others because the fact that the bank did not seek to have the sales of the realty confirmed was irrelevant to the defendant's liability. First Citizens Bank & Trust, Inc. v. Ruddell, 330 Ga. App. 82, 766 S.E.2d 538, 2014 Ga. App. LEXIS 816 (2014).

Issue of standing irrelevant to confirmation proceeding. — Trial court did not err in confirming and approving a foreclosure sale pursuant to O.C.G.A. § 44-14-161 because the issue of a bank's standing to bring the confirmation action against the guarantors was not relevant to the confirmation proceeding which was commenced in accordance with O.C.G.A. § 44-14-161(a); standing issues are outside the scope of a confirmation hearing. Boring v. State Bank & Trust Co., 307 Ga. App. 93, 704 S.E.2d 207, 2010 Ga. App. LEXIS 1110 (2010).

Property owner's claim that a bank was not a real party in interest was not relevant to a confirmation proceeding pursuant to O.C.G.A. § 44-14-162, as the matter was commenced in accordance with

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O.C.G.A. § 44-14-161(a) by the person instituting the foreclosure proceedings; issues of standing and assignment were irrelevant to the confirmation proceeding. White Oak Homes, Inc. v. Cmty. Bank & Trust, 314 Ga. App. 502, 724 S.E.2d 810, 2012 Ga. App. LEXIS 221 (2012), cert. denied, No. S12C1120, 2012 Ga. LEXIS 671 (Ga. July 2, 2012).

Confirmation properly denied. — Order denying a creditor's application for confirmation of a foreclosure sale was proper because the trial court, as the trier of fact, was authorized to weigh the evidence and judge the credibility of both experts to conclude that the creditor's expert's valuation under the discounted cash model was unreliable and the builder's expert, who used the bulk sales comparison approach, was more credible and used a more appropriate method. Eagle GA I SPE, LLC v. Atreus Cmtys. of Fairburn, Inc., 319 Ga. App. 844, 738 S.E.2d 675, 2013 Ga. App. LEXIS 92 (2013), cert. denied, No. S13C0958, 2013 Ga. LEXIS 575 (Ga. June 17, 2013).

Consummation. — Even where confirmation is withheld, a foreclosure may still be final if it is consummated. Gooden v. Buffalo Sav. Bank, 21 B.R. 456, 1982 Bankr. LEXIS 4389 (Bankr. N.D. Ga. 1982).

There was evidence to support the trial court's finding that a foreclosure sale was consummated because a bank presented the testimony of an attorney that the attorney witnessed the foreclosure sale at issue, that the foreclosure sale occurred outside the annex of the county courthouse, that the sale consisted of several lots, which the attorney identified by their lot numbers, that the foreclosure notice was read in the notice's entirety and the sale was opened for bidding, that the bank submitted an opening bid, and that there were no other bidders. Winstar Dev., Inc. v. SunTrust Bank, 308 Ga. App. 655, 708 S.E.2d 604, 2011 Ga. App. LEXIS 255 (2011).

Trial court properly declared that a bank's first nonjudicial foreclosure sale was not valid because the bank never consummated the bank's successful bid at the sale of the property securing the loan since the transfer of the borrower's right of possession and the bank's equity of redemption to the bank as the foreclosure sale purchaser never occurred; the bank did not transfer the borrower's right of possession to itself as the first foreclosure sale purchaser at the sale, and the bank did not apply sale proceeds to eliminate or reduce the borrower's obligation under the secured promissory note. Building Block Enterprises, LLC v. State Bank & Trust Company, 314 Ga. App. 147, 723 S.E.2d 467, 2012 Ga. App. LEXIS 146 (2012), cert. denied, No. S12C1053, 2012 Ga. LEXIS 553 (Ga. May 29, 2012).

Compliance with section required before bringing action for deficiency judgment. — When the creditor wishes to exercise a power of foreclosure prior to obtaining a judgment on the note and thereby save time and expense, the creditor will be required to comply with O.C.G.A. § 44-14-161 before bringing any action for a deficiency judgment. Taylor v. Thompson, 158 Ga. App. 671, 282 S.E.2d 157, 1981 Ga. App. LEXIS 2366 (1981).

The fact that a creditor may choose not to seek foreclosure and pursue other remedies does not alter the fact that when the creditor does foreclose it must confirm in order to recover a deficiency judgment. Redman Indus., Inc. v. Tower Properties, Inc., 517 F. Supp. 144, 1981 U.S. Dist. LEXIS 14425 (N.D. Ga. 1981).

The law requires that if the lender chooses to foreclose on the collateral, it must obtain confirmation of the sale in order to pursue an action for the deficiency. United States v. Yates, 774 F. Supp. 1368, 1991 U.S. Dist. LEXIS 13950 (M.D. Ga. 1991).

Continuing to pursue a lawsuit on a promissory note after the foreclosure proceedings have been concluded constitutes an "action" on the part of the creditor to obtain a deficiency judgment against the debtor and would require compliance with O.C.G.A. § 44-14-161. Vaughan v. Moore, 202 Ga. App. 592, 415 S.E.2d 47, 1992 Ga. App. LEXIS 100 (1992).

Trial court's holding that a bank was not required to confirm a second nonjudicial foreclosure sale under O.C.G.A. § 44-14-161 before pursuing an action for a

deficiency judgment against a guarantor was an erroneous advisory opinion because the bank did file a confirmation petition and, thus, the parties failed to show under O.C.G.A. § 9-4-2(a) that there was any justiciable controversy on the issue of whether it was required to do so. Building Block Enterprises, LLC v. State Bank & Trust Company, 314 Ga. App. 147, 723 S.E.2d 467, 2012 Ga. App. LEXIS 146 (2012), cert. denied, No. S12C1053, 2012 Ga. LEXIS 553 (Ga. May 29, 2012).

Failure to comply with confirmation requirements precludes deficiency judgment. — Trial court erred by granting a note holder a deficiency judgment because since the note holder did not obtain a judgment on the note against the debtor prior to the foreclosure sale, it was required to comply with the confirmation requirements of O.C.G.A. § 44-14-161 in order to obtain a deficiency judgment on the note. HWA Props., Inc. v. Cmty. & S. Bank, 322 Ga. App. 877, 746 S.E.2d 609, 2013 Ga. App. LEXIS 632 (2013), cert. denied, No. S13C1731, 2013 Ga. LEXIS 980 (Ga. Nov. 18, 2013).

Failure to obtain confirmation does not invalidate the remaining obligation; it simply renders it impossible for the holder to sue on it, just as would a discharge in bankruptcy of the maker, properly pleaded. Turpin v. North Am. Acceptance Corp., 119 Ga. App. 212, 166 S.E.2d 588, 1969 Ga. App. LEXIS 1047 (1969); Marler v. Rockmart Bank, 146 Ga. App. 548, 246 S.E.2d 731, 1978 Ga. App. LEXIS 2451 (1978).

Where the mortgagors' possible liability to mortgage insurer, not the lender, arose from a completely independent source than the debt mortgagors owed the lender, mortgage insurer's action to recover under a loan indemnity agreement was not barred by the lender's failure to have the foreclosure sale confirmed. Turner v. Commonwealth Mtg. Assurance Co., 207 Ga. App. 428, 428 S.E.2d 398, 1993 Ga. App. LEXIS 242 (1993).

Not prevention of other remedies. — Failure to have a sale confirmed does not prevent a creditor from pursuing other contractual security on the debt. Calvert Fire Ins. Co. v. Environs Dev. Corp., 601 F.2d 851, 1979 U.S. App. LEXIS 12152 (5th Cir. 1979); Surety Managers, Inc. v. Stanford, 633 F.2d 709, 1980 U.S. App. LEXIS 11044 (5th Cir. 1980), cert. denied, 454 U.S. 828, 102 S. Ct. 121, 70 L. Ed. 2d 104, 1981 U.S. LEXIS 3241 (1981).

Failure to obtain confirmation of a sale under O.C.G.A. § 44-14-161 did not preclude the lender from filing a complaint against the individual debtor under 11 U.S.C. § 523(a)(4) or (a)(6) of the Bankruptcy Code, alleging a claim for conversion of accounts receivable which also secured the loan. Presidential Fin. Corp. v. Snead, 231 B.R. 823, 1999 Bankr. LEXIS 303 (Bankr. N.D. Ga. 1999).

Recovery of rents and profits not precluded by failure to obtain confirmation. — Bankruptcy creditor's failure to obtain judicial confirmation following foreclosure did not preclude the creditor from recovering rents and profits, where the property was sold for more than its fair market value and the rents and profits represented separate contractual security to which the creditor was entitled. In re Johnson, Wilson & Dillon, 123 B.R. 439, 1990 Bankr. LEXIS 2754 (Bankr. N.D. Ga. 1990).

Simply limits remedies. — Failure to obtain confirmation of sale does not extinguish the debt; it simply limits the creditor's remedies. Surety Managers, Inc. v. Stanford, 633 F.2d 709, 1980 U.S. App. LEXIS 11044 (5th Cir. 1980), cert. denied, 454 U.S. 828, 102 S. Ct. 121, 70 L. Ed. 2d 104, 1981 U.S. LEXIS 3241 (1981).

Suit on deficiency impossible. — Failure to obtain confirmation of a sale under power simply renders it impossible for the holder to sue on the deficiency. Such failure does not operate to satisfy the debt or prevent the creditor from pursuing other available remedies. First Fed. Sav. & Loan Ass'n v. Fisher, 422 F. Supp. 1, 1976 U.S. Dist. LEXIS 15740 (N.D. Ga. 1976).

Where the creditor bank did not have the foreclosure sale confirmed by the superior court, it could not take action under the state law to assert a deficiency claim. In re Wiggins, 167 B.R. 990, 1993 Bankr. LEXIS 2179 (Bankr. M.D. Ga. 1993), aff'd, 167 B.R. 992, 1994 U.S. Dist. LEXIS 5539 (M.D. Ga. 1994).

Nature of deficiency. — Where a sale under power was had but no confirmation

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thereof was had under O.C.G.A. § 44-14-161, no action could be brought for any deficiency under the terms of that section, even if the deficiency included attorney fees which had become a part of the principal at the time of the sale. Sockwell v. Pettus, 139 Ga. App. 311, 228 S.E.2d 343, 1976 Ga. App. LEXIS 1778 (1976).

Right to confirmation not waived. — Guaranty language was not sufficient to amount to a waiver of the guarantor's rights under the confirmation statute, where the guarantor gave the lender the power to conduct a foreclosure sale on the collateral, but the power was "to be exercised only to the extent permitted by law," and no confirmation was obtained. United States v. Yates, 774 F. Supp. 1368, 1991 U.S. Dist. LEXIS 13950 (M.D. Ga. 1991).

If no confirmation is sought or, if sought, is not obtained, the debtor has secured the full benefit of the confirmation statute because the debt is, in effect, extinguished. Kennedy v. Gwinnett Com. Bank, 155 Ga. App. 327, 270 S.E.2d 867, 1980 Ga. App. LEXIS 2569 (1980).

There is no requirement in O.C.G.A. § 44-14-161 or otherwise that the grantee exercising the power of sale announce that the sale is subject to confirmation, or to delay transfer of the property until the confirmation is obtained. Homes of Tomorrow, Inc. v. FDIC, 149 Ga. App. 321, 254 S.E.2d 475, 1979 Ga. App. LEXIS 1835 (1979).

There is no confirmation prerequisite for a suit based on legal malpractice, where the action is based on foreclosure on a security deed and for failure to provide a valid security deed. Kirby v. Chester, 174 Ga. App. 881, 331 S.E.2d 915, 1985 Ga. App. LEXIS 1988 (1985).

Superior court is trier of fact. — In confirmation proceedings, the superior court sits as a trier of fact, and its findings and conclusions have the effect of a jury verdict. What value is, or may have been, is a question of fact to be resolved as others are and in so doing the superior court is the judge of the credibility of the witnesses and of the weight to be given the evidence. La Ronde, Ltd. v. Amsouth Bank, 203 Ga. App. 400, 416 S.E.2d 881, 1992 Ga. App. LEXIS 434 (1992).

Confirmation not required. — Where a bank does not seek a deficiency as to the debt secured by the realty, but seeks to recover on a separate note that defendant signed as the indorser thereof, the fact that the bank did not seek to have the sale of the realty confirmed is irrelevant to defendant's liability. Breitzman v. Heritage Bank, 180 Ga. App. 171, 348 S.E.2d 713, 1986 Ga. App. LEXIS 2097 (1986).

Where the judgment obtained by the creditor was awarded only against borrower and not against the guarantors individually, since the guarantors were entitled only to the same rights as the borrower with regard to a creditor's attempt to collect a deficiency after foreclosure, and since the borrower could not have insisted on confirmation of the sale before the creditor attempted to collect the deficiency, it did not appear that the guarantors were entitled to any greater rights to do so before the deficiency was sought to be collected from them. Therefore, the creditor was not required to obtain judicial confirmation of its foreclosure sale of the borrower's property before attempting to collect the deficiency from the guarantors. Business Dev. Corp. v. Bickerstaff, 73 B.R. 421, 1987 Bankr. LEXIS 710 (Bankr. N.D. Ga. 1987).

Where a personal note of a corporation president and a note of the corporation arose from bank loans for separate and distinct purposes, notwithstanding the existence of only one security deed and a dragnet clause in the personal note that could be construed as indirectly subjecting foreclosed property that was collateral for the personal loan to constitute additional collateral for the corporate loan, an action by the bank against the corporation to collect the balance due on its note was not barred by failure of the bank to confirm foreclosure sale of the land. Baby Days, Inc. v. Bank of Adairsville, 218 Ga. App. 752, 463 S.E.2d 171, 1995 Ga. App. LEXIS 875 (1995), cert. denied, No. S96C0260, 1996 Ga. LEXIS 269 (Ga. Jan. 26, 1996).

Bank that ceased efforts to foreclose on real estate securing borrowers' and guar-

antors' notes evidencing obligations to the bank and sued the borrowers and guarantors on the notes, brought a suit that was not an improper deficiency action, due to the bank's failure to obtain confirmation, because the bank was not required to obtain confirmation since: (1) no sale was consummated; (2) the bank could both sue on the notes and foreclose until the debt was paid; and (3) the borrowers and the guarantors were not harmed, as the borrowers' and the guarantors' interests were the same before and after the attempted sale, and no negligence, fraud, collusion, or bad faith was shown. Tampa Inv. Group, Inc. v. Branch Banking & Trust Co., 290 Ga. 724, 723 S.E.2d 674, 2012 Ga. LEXIS 300 (2012).

Dragnet clause contained in initial loans did not effectively merge debts into one debt requiring judicial confirmation of the foreclosure sale because the loans made to debtors and a limited liability company (LLC) were separate; the debtors and a banks' predecessor were the original parties to the loans made to the debtors, and the LLC and another bank were the original parties to the loan made to the LLC. 3 West Invs., LLC v. Hamilton State Bank, 316 Ga. App. 796, 728 S.E.2d 843, 2012 Ga. App. LEXIS 521 (2012), cert. denied, No. S12C1886, 2012 Ga. LEXIS 982 (Ga. Nov. 19, 2012).

Because loans made to debtors were separate from a loan made to a limited liability company (LLC), confirmation of the nonjudicial foreclosure sale under O.C.G.A. § 44-14-161(a) was not required in order for a bank to pursue collection under the loan to the LLC. 3 West Invs., LLC v. Hamilton State Bank, 316 Ga. App. 796, 728 S.E.2d 843, 2012 Ga. App. LEXIS 521 (2012), cert. denied, No. S12C1886, 2012 Ga. LEXIS 982 (Ga. Nov. 19, 2012).

Because a lender was not seeking a deficiency judgment when the lender sued the guarantors of a mortgage loan, the denial of confirmation did not preclude the lender from obtaining a judgment against the guarantors for the difference between what the lender paid in the foreclosure sale and the unpaid balance of the debt, including taxes, penalties, and interest. Inland Mortg. Capital Corp. v. Chivas Retail Partners, LLC, 740 F.3d 1146, 2014 U.S. App. LEXIS 1829 (7th Cir.), cert. denied, 574 U.S. 820, 135 S. Ct. 92, 190 L. Ed. 2d 39, 2014 U.S. LEXIS 5582 (2014).

Defendants' guaranties for a promissory note waived the defendants' right to insist on judicial confirmation of foreclosure sale as a prerequisite to seeking a deficiency judgment as required by Georgia law. Coastal Bank v. Martin, 717 Fed. Appx. 860, 2017 U.S. App. LEXIS 23328 (11th Cir. 2017).

Confirmation not required where sale follows judgment on note. — Where a creditor elects to resort to the courts and obtain a judgment on the note prior to exercising the power of sale, the creditor will not be required to have such sale confirmed before attempting further enforcement of the judgment. Taylor v. Thompson, 158 Ga. App. 671, 282 S.E.2d 157, 1981 Ga. App. LEXIS 2366 (1981).

Where a foreclosure sale has occurred after a default judgment has been entered, the failure to obtain confirmation of the sale does not affect the validity or enforceability of the judgment with respect to any amounts which may remain due thereunder. Georgia R.R. Bank & Trust Co. v. Griffith, 176 Ga. App. 198, 335 S.E.2d 417, 1985 Ga. App. LEXIS 2205 (1985).

Mortgage industrial revenue bonds were personal property and were not subject to the confirmation procedure. Merrill v. First Union Nat'l Bank, 224 Ga. App. 773, 481 S.E.2d 890, 1997 Ga. App. LEXIS 235 (1997), cert. denied, No. S97C0922, 1997 Ga. LEXIS 561 (Ga. May 30, 1997).

Failure to confirm does not estop a creditor from pursuing other contractual security on the debt. Taylor v. Thompson, 158 Ga. App. 671, 282 S.E.2d 157, 1981 Ga. App. LEXIS 2366 (1981); Worth v. First Nat'l Bank, 175 Ga. App. 297, 333 S.E.2d 173, 1985 Ga. App. LEXIS 2084 (1985); Mobley v. Commonwealth Mtg. Ins. Co., 264 Ga. 652, 450 S.E.2d 205, 1994 Ga. LEXIS 905 (1994).

A creditor may seek to enforce a contractual right to pursue other contractual security for its debt following a foreclosure sale of real property without obtaining confirmation of the foreclosure, and guaranties and the deed to secure debt on

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guarantors' residence are additional security which the creditor can pursue to satisfy the debt owed to it by the borrower without confirming the foreclosure sale of the borrower's real property. Business Dev. Corp. v. Bickerstaff, 73 B.R. 421, 1987 Bankr. LEXIS 710 (Bankr. N.D. Ga. 1987).

Failure to obtain confirmation of a sale does not operate to extinguish the remaining debt; rather, it simply precludes the person exercising the power of sale from bringing action to obtain a deficiency judgment. Taylor v. Thompson, 158 Ga. App. 671, 282 S.E.2d 157, 1981 Ga. App. LEXIS 2366 (1981).

Failure to provide proof of confirmation did not prevent IRS from recognizing debtor's discharge-of- indebtedness income. — IRS was entitled to summary judgment on Chapter 7 debtors' claim that it miscalculated the amount of income the debtors had in 2006 when it added $19,898 to their income because a mortgage company forgave $19,898 of a $189,898 debt the debtors owed after it foreclosed a mortgage and sold the debtors' house for $170,000. The mortgage company's failure to provide proof that the sale was confirmed by a state court, pursuant to O.C.G.A. § 44-14-161 et seq., did not prevent the IRS from recognizing the debtors' discharge-of-indebtedness income. Godfrey v. IRS (In re Godfrey), No. 08-10409-WHD, No. 08-1032, 2009 Bankr. LEXIS 3581 (Bankr. N.D. Ga. Aug. 31, 2009).

Foreclosure on separate security after failure to confirm. — Lender's failure to "confirm" the foreclosure sale of property given as security for a 1984 loan did not prohibit the federal Small Business Administration (SBA) from foreclosing on separate security given for a 1983 SBA loan to the same borrower. Regan v. United States Small Bus. Admin., 729 F. Supp. 1339, 1990 U.S. Dist. LEXIS 903 (S.D. Ga. 1990), aff'd, 926 F.2d 1078, 1991 U.S. App. LEXIS 4091 (11th Cir. 1991).

Generally, notes made at different times to different creditors and for different collateral purposes are not subject to confirmation. Oakvale Rd. Assocs. v. Mortgage Recovery, 231 Ga. App. 414, 499 S.E.2d 404, 1998 Ga. App. LEXIS 486 (1998), cert. denied, No. S98C1087, 1998 Ga. LEXIS 853 (Ga. Sept. 11, 1998).

Assignee could pursue confirmations. — Superior court correctly construed O.C.G.A. § 44-14-161 and properly allowed an assignee to pursue the confirmations of foreclosure sales because to the extent deficiencies remained after the foreclosures with respect to the underlying indebtedness, claims therefore belonged to the assignee; the original creditor of the underlying notes and the entity that instituted the foreclosure proceedings transferred the notes to the assignee. Titshaw v. Northeast Ga. Bank, 304 Ga. App. 712, 697 S.E.2d 837, 2010 Ga. App. LEXIS 604 (2010).

Separate security obligation actionable. — Failure to confirm foreclosure under one security instrument did not bar lender from suing defendants on an independent, separate, unsecured obligation. Devin Lamplighter, Ltd. v. American Gen. Fin., Inc., 206 Ga. App. 747, 426 S.E.2d 645, 1992 Ga. App. LEXIS 1789 (1992).

Confirmation not required when debts are not inextricably intertwined. — Creditor, who foreclosed on three different tracts of land, each of which secured separate promissory notes, was able to seek a deficiency judgment on two notes, despite not having confirmed the foreclosure sale pursuant to O.C.G.A. § 44-14-161(a), because the debts at issue were not "inextricably intertwined." In re Cox, 456 B.R. 592, 2011 Bankr. LEXIS 3154 (Bankr. N.D. Ga. 2011).

Confirmation of intertwined debts. — Notes executed almost a year apart for different, although related, purposes in the same land were inextricably intertwined so that failure to obtain judicial confirmation of the first sale precluded a deficiency judgment after the second sale. Oakvale Rd. Assocs. v. Mortgage Recovery, 231 Ga. App. 414, 499 S.E.2d 404, 1998 Ga. App. LEXIS 486 (1998), cert. denied, No. S98C1087, 1998 Ga. LEXIS 853 (Ga. Sept. 11, 1998).

As a maker's two debts to a bank were incurred for the same purpose, were secured by the same property, and both

contained a cross-default clause, the two debts were inextricably intertwined. Thus, the bank's suit on the second promissory note constituted a claim for a deficiency judgment requiring judicial confirmation under O.C.G.A. § 44-14-161(a) of the foreclosure sale associated with the first note, and any further action by the bank to recover against the maker on the second note was barred by the bank's failure to comply with § 44-14-161(a). Iwan Renovations, Inc. v. N. Atlanta Nat'l Bank, 296 Ga. App. 125, 673 S.E.2d 632, 2009 Ga. App. LEXIS 159 (2009).

Lender's foreclosure sales and deficiency judgments were barred by O.C.G.A. § 44-14-161(a) because the lender failed to get judicial confirmation of the debts, which were inextricably intertwined- in that they were incurred for the same purpose, secured by the same property, held by the same creditor, and owed by the same debtor. Bank of N. Ga. v. Windermere Dev., Inc., 316 Ga. App. 33, 728 S.E.2d 714, 2012 Ga. App. LEXIS 476 (2012).

Erroneous hearsay ruling did not warrant reversal. — Superior court did not err in confirming the nonjudicial foreclosure sale because the court's erroneous hearsay ruling was not harmful and did not warrant reversal; the ruling did not deprive a construction company and guarantors of an evidentiary basis to support their challenge to the regularity of the sale, and the superior court had a sufficient record to consider their argument and find that the sale was regular. Diplomat Constr., Inc. v. State Bank of Tex., 314 Ga. App. 889, 726 S.E.2d 140, 2012 Ga. App. LEXIS 297 (2012).

Supersedeas does not apply to foreclosure confirmation proceeding. — Trial court erred by dismissing an investment company's request for confirmation of a second foreclosure sale under O.C.G.A. § 44-14-161(c) by finding that a supersedeas arose from the mortgagor's appeal because the supersedeas statute, O.C.G.A. § 5-6-46(a), expressly only applied to civil cases, and did not apply to a foreclosure confirmation proceeding. Summit Inv. Mgmt. Acquisitions I, LLC v. Greg A. Becker Enters., Ltd., 317 Ga. App. 608, 732 S.E.2d 286, 2012 Ga. App. LEXIS 774 (2012).

5. True Market Value

Market value defined. — The market value is the price which it will bring when it is offered for sale by one who desires, but is not obliged, to sell it, and is bought by one who wishes to buy, but is not under a necessity to do so. Wachovia Mtg. Co. v. Moore, 138 Ga. App. 101, 225 S.E.2d 460, 1976 Ga. App. LEXIS 2069 (1976).

The focus of the definition of "market value" is the price that two parties agree will be paid for the property itself, without consideration of such collateral issues as the financial responsibility for or the nature and amount of expenses and closing costs to be paid to others in connection with buying or selling it. Wheeler v. Coastal Bank, 182 Ga. App. 112, 354 S.E.2d 694, 1987 Ga. App. LEXIS 1614 (1987).

"Fair market value" of real estate and "true market value" are used interchangeably by the appellate courts. Aaron v. Life Ins. Co. of Ga., 138 Ga. App. 286, 226 S.E.2d 96, 1976 Ga. App. LEXIS 2137 (1976).

What market value is under the circumstances is a question of fact to be resolved as others are, and the weight to be given it was for the judge in the nonjury hearing. Kent v. Scott Hudgens Realty & Mtg., Inc., 138 Ga. App. 30, 225 S.E.2d 447, 1976 Ga. App. LEXIS 2043 (1976).

Burden of proof is on the mortgagee to present evidence as to the fair market value of the property. Weems v. McCloud, 619 F.2d 1081, 1980 U.S. App. LEXIS 16299 (5th Cir. 1980).

O.C.G.A. § 44-14-161 requires that the trial judge make a determination as to whether the sale brought the property's true market value, not whether the price was grossly inadequate. FDIC v. Ivey-Matherly Constr. Co., 144 Ga. App. 313, 241 S.E.2d 264, 1977 Ga. App. LEXIS 2687 (1977); FDIC v. M.C. Honea, Jr., Inc., 440 F. Supp. 1064, 1977 U.S. Dist. LEXIS 13148 (N.D. Ga. 1977); United States v. Smith, 479 F. Supp. 804, 1979 U.S. Dist. LEXIS 8616 (N.D. Ga. 1979).

Appellate review of "market value." — On appellate review, the test is whether the record contains any evidence to support the findings of the trial court that the

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property brought its true market value at the foreclosure sale. Tarleton v. Griffin Fed. Savs. Bank, 202 Ga. App. 454, 415 S.E.2d 4, 1992 Ga. App. LEXIS 24 (1992).

Because a bank's appraiser correctly deducted the cost to complete the homes on the owners' properties from the "subject to" market value of the properties, and because the basis for the appraiser's opinion amounted to more than sheer speculation, the trial court's foreclosure confirmation order complied with O.C.G.A. § 44-14-161(b) by including findings of fact that supported the conclusion that each of the properties sold for the property's true market value. McBryar v. Branch Banking & Trust Co., 305 Ga. App. 857, 700 S.E.2d 731, 2010 Ga. App. LEXIS 830 (2010).

Appellate court's review of the trial court's determination that a lender failed to produce evidence of the true market value is whether the record contains any evidence to support the findings of the trial court, and whether the appellate court views the evidence in the light most favorable to the trial court's judgment because O.C.G.A. § 44-14-161 specifically refers to "real estate" and "land" as the subject of the confirmation of sale procedure, not leased estates. GCCFC 2007-GGP Abercorn St. Ltd. P'ship v. Abercorn Common, LLLP, 316 Ga. App. 879, 730 S.E.2d 589, 2012 Ga. App. LEXIS 673 (2012).

In reviewing the trial court's decision, the test is not whether the appellate court would have accepted a particular appraisal as the most reliable and accurate, but whether the record contains any evidence to support the findings of the trial court that the property brought the property's true market value at the foreclosure sale. Ga. Ltd. Partners, LLC v. City Nat'l Bank, 323 Ga. App. 766, 748 S.E.2d 131, 2013 Ga. App. LEXIS 740 (2013).

Appellate court will not disturb methodology. — Where a bidder for property provided the court with the basis for the bidder's opinions regarding the fair market value of the property, and it appeared that the bidder's opinion was not based on sheer speculation, the appellate court could not second guess the methodology utilized to reach the opinion. La Ronde, Ltd. v. Amsouth Bank, 203 Ga. App. 400, 416 S.E.2d 881, 1992 Ga. App. LEXIS 434 (1992).

Trial court's order confirming a foreclosure sale of property for $14,800,000.00 was proper as a lienholder's appraiser testified that the property's value was $13,290,000.00; because the appraiser's opinions were not based on sheer speculation, the appellate court did not second-guess the methodology. Wilson v. Prudential Indus. Props., LLC, 276 Ga. App. 180, 622 S.E.2d 890, 2005 Ga. App. LEXIS 1197 (2005).

In a foreclosure action, because the appeals court could not second guess the methodology used by an expert in appraising the market value of the property at issue, and the trial court had sufficient data to derive its own opinion as to the market value of the property at the time of the sale, it properly confirmed the foreclosure sale. Chamblee Hotels, LLC v. Chesterfield Mortg. Investors, Inc., 287 Ga. App. 342, 651 S.E.2d 447, 2007 Ga. App. LEXIS 887 (2007), cert. denied, No. S08C0072, 2008 Ga. LEXIS 75 (Ga. Jan. 28, 2008).

Dollar amount need not be established. — O.C.G.A. § 44-14-161 requires the trial court to call for sufficient evidence to satisfy the court as to what is the true market value of the property. It does not demand the court establish as a matter of fact and law what is the actual dollar amount of the true market value. American Century Mtg. Investors v. Strickland, 138 Ga. App. 657, 227 S.E.2d 460, 1976 Ga. App. LEXIS 2275 (1976); Echols v. Edwards, 185 Ga. App. 688, 365 S.E.2d 844, 1988 Ga. App. LEXIS 222 (1988).

Must be accurate reflection. — Whether in bankruptcy or not, before a deficiency action may be brought by a creditor who forecloses on Georgia real estate, it must have the price at which the property sold judicially confirmed to be an accurate reflection of the property's fair market value. United States v. Oakland City Apts., Inc., 1 B.R. 123, 1979 Bankr. LEXIS 822 (Bankr. N.D. Ga. 1979).

The price brought at a public sale, after proper and lawful advertise-

ment is prima facie the market value of the property sold as a general rule, absent anything to indicate that there was chilling of the bidding, fraud, or the like adversely affecting the sale. But under the terms of O.C.G.A. § 44-14-161 the applicant may not rely solely on such a prima facie showing; the applicant must introduce evidence showing the value of the property at the time of sale. Thompson v. Maslia, 127 Ga. App. 758, 195 S.E.2d 238, 1972 Ga. App. LEXIS 1016 (1972); Peachtree Mtg. Corp. v. First Nat'l Bank, 143 Ga. App. 17, 237 S.E.2d 416, 1977 Ga. App. LEXIS 2173 (1977).

Market value on date of sale. — Where initial foreclosure sales were set aside and properties ordered to be resold, sellers were required to show the true market value of the properties on the date of the resales, not on the date of the initial foreclosure sales. Kong v. Shearson Lehman Hutton Mtg. Corp., 211 Ga. App. 93, 438 S.E.2d 132, 1993 Ga. App. LEXIS 1441 (1993), cert. denied, No. S94C0383, 1994 Ga. LEXIS 377 (Ga. Feb. 3, 1994).

Testimony of the selling price of an identical piece of property does not establish precise market value as a matter of law. Smith v. Fidelity Fed. Sav. & Loan Ass'n, 149 Ga. App. 730, 256 S.E.2d 43, 1979 Ga. App. LEXIS 2005 (1979).

Appraisal that occurred five weeks before sale sufficient. — Because there was evidence of the parcels' value about five weeks before the foreclosure sales occurred, the appraisal date was relatively close to the date of the foreclosure sales, which was sufficient for the trial court to confirm the sales as required under O.C.G.A. § 44-14-161. LRD, LLC v. State Bank & Trust Co., 326 Ga. App. 644, 757 S.E.2d 251, 2014 Ga. App. LEXIS 259 (2014).

Expert testimony. — Assuming that the superior court erred by concluding that, under O.C.G.A. § 44-14-161(b), the parties were limited to introducing evidence of the properties' value on only the date of the foreclosure sale, the borrowers induced the error and could not complain because the borrowers specifically argued to the superior court that the lender's evidence had to be excluded since the condition of the property after the foreclosure sale was not relevant to the true market value at the time of the sale; the borrowers did not show that the superior court disregarded their expert's testimony for valuing the property. Eayrs v. Wells Fargo Bank, N.A., 311 Ga. App. 504, 716 S.E.2d 561, 2011 Ga. App. LEXIS 764 (2011).

Superior court did not err in confirming a foreclosure sale because the lender's expert explained the basis for the expert's methodology and testified about the sources upon which the expert relied, and as it appeared that the expert's opinion was not based on sheer speculation, the appellate court could not second-guess any methodology utilized to reach the opinion; the superior court expressly invited the borrowers to cross-examine the expert about the basis of the expert's opinions to verify that the opinions were not based on an inspector's condition report. Eayrs v. Wells Fargo Bank, N.A., 311 Ga. App. 504, 716 S.E.2d 561, 2011 Ga. App. LEXIS 764 (2011).

Superior court did not err in confirming the nonjudicial foreclosure sale of a hotel leasehold interest held by a lender under a deed securing a promissory note a construction company executed because there was competent evidence supporting the superior court's finding that the auction brought the true market value for the property; the superior court found the lender's expert credible and the valuation methodology sound. Diplomat Constr., Inc. v. State Bank of Tex., 314 Ga. App. 889, 726 S.E.2d 140, 2012 Ga. App. LEXIS 297 (2012).

Trial court did not abuse the court's discretion by admitting the expert testimony proffered by the mortgagee because the testimony was sufficient, competent evidence supporting the finding that the foreclosure sale should be confirmed and provided proof of the true market value as of the date of the foreclosure sale. Powder Springs Holdings, LLC v. RL BB ACQ II-GA PSH, LLC, 325 Ga. App. 694, 754 S.E.2d 655, 2014 Ga. App. LEXIS 54 (2014).

Hearsay evidence insufficient to support finding of true market value. — At a foreclosure confirmation hearing held under O.C.G.A. § 44-14-161, a trial

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court erred in relying on three appraisal reports to find that the foreclosed properties were sold at fair market value because the reports were hearsay: although the appraiser was present, the appraiser did not testify, and the bank's attorney merely stated in the appraiser's place that the sales were made at fair market value. Belans v. Bank of Am., 303 Ga. App. 35, 692 S.E.2d 694, 2010 Ga. App. LEXIS 289 (2010).

Bulk sales analysis upheld. — Trial court did not err in confirming a foreclosure sale under O.C.G.A. § 44-14-161(b) even though expenses and carrying costs were deducted in determining true market value of the subdivision property and even when a bulk sales analysis resulted in a lower true market value than an analysis of each individual lot contained on the property. Trefren v. Freedom Bank, 300 Ga. App. 112, 684 S.E.2d 144, 2009 Ga. App. LEXIS 1095 (2009).

Trial court did not err in confirming foreclosure sales pursuant to O.C.G.A. § 44-14-161 because there was evidence to support the court's finding that the two properties sold for their true market value at foreclosure sale; although the appraisal of the bank's expert did not specifically provide the separate true market value for each parcel of lots, the expert's testimony and appraisal provided the methodology by which the separate value of each parcel could be obtained, i.e., multiplying the true market value of each lot by the number of lots in each parcel, and it was clear from the appraisal reports and testimony of the bank's expert and the expert of the debtor and guarantor that the valuation of each parcel would not change if the properties were sold separately or together as a bulk transaction. Battle Props. v. Branch Banking & Trust Co., 310 Ga. App. 217, 712 S.E.2d 625, 2011 Ga. App. LEXIS 528 (2011).

What property may have brought or what it may have been regarded as being worth on the market at times relatively close to the date of sale may be considered as aids in arriving at market value at the time of sale. Thompson v. Maslia, 127 Ga. App. 758, 195 S.E.2d 238, 1972 Ga. App. LEXIS 1016 (1972).

It is no defense in Georgia if market values are depressed by general economic factors. Weems v. McCloud, 619 F.2d 1081, 1980 U.S. App. LEXIS 16299 (5th Cir. 1980).

If the trial judge is not satisfied that the foreclosure sale brought what in the judge's opinion approximates the true market value of the property, the judge is required to deny confirmation of the sale and, if necessary, to order a resale. American Century Mtg. Investors v. Strickland, 138 Ga. App. 657, 227 S.E.2d 460, 1976 Ga. App. LEXIS 2275 (1976).

Where realty and personalty are sold for a lump sum and it is impossible to tell what amount the realty sold for, the evidence does not show that the real property brought its true market value as required by O.C.G.A. § 44-14-161 and the trial judge errs if the sale is confirmed. Hinson v. First Nat'l Bank, 221 Ga. 408, 144 S.E.2d 765, 1965 Ga. LEXIS 479 (1965); United States v. Golf Club Co., 435 F.2d 9, 1970 U.S. App. LEXIS 6057 (5th Cir. 1970).

Evidence sufficient to show the fair market value. — Creditor's testimony regarding assignment of note and deed of trust from a bank to the creditor established that the assignments were made, although the issue of whether the creditor, as the person instituting the foreclosure action, was the real party in interest was irrelevant to a confirmation proceeding; the creditor's testimony about the creditor's experience with the property, how much the creditor had invested in it, how much the creditor's borrowed against it, its condition at the time of the foreclosure sale, and the creditor's opinion that he bid the fair market value for the property, along with the testimony of one of the buyers and the tax appraisal, was sufficient to show the fair market value of the property at the time of the sale. McCain v. Galloway, 267 Ga. App. 505, 600 S.E.2d 449, 2004 Ga. App. LEXIS 706 (2004).

Mortgagee was entitled to confirmation of a foreclosure sale because the mortgagee showed that the property at issue sold for true market value as required under O.C.G.A. § 44-14-161 because a deduction by the mortgagee's expert for loss of rental income due to the incompletion of

buildings on the property was proper as the property was worth more fully rented. Nash v. Compass Bank, 296 Ga. App. 874, 676 S.E.2d 28, 2009 Ga. App. LEXIS 340 (2009).

Lender's appraiser's opinion as to foreclosed property's true market value at the time of foreclosure was properly admitted under former O.C.G.A. § 24-9-67.1(b) (see now O.C.G.A. § 24-7-702). The lender's expert's appraisal was based upon extensive facts and careful analysis taking into account the potential for future recovery of a down real estate market by the discounted flow method, which the borrower conceded was reliable. Blue Marlin Dev., LLC v. Branch Banking & Trust Co., 302 Ga. App. 120, 690 S.E.2d 252, 2010 Ga. App. LEXIS 52 (2010).

Trial court did not err in confirming a nonjudicial sale of certain property since the trial court was not required to disregard the valuation opinion of the mortgagee's appraiser merely because it was based on the existing one-unit configuration of the property, and the evidence was sufficient to show that the appraiser's opinion was not based on sheer speculation; nothing in O.C.G.A. § 44-14-161 or prior case law requires a trial court in every instance to adopt the highest and best use as the basis for determining true market value and to reject any appraisal which was not explicitly based on the property's highest and best use. TKW Partners, LLC v. Archer Capital Fund, L.P., 302 Ga. App. 443, 691 S.E.2d 300, 2010 Ga. App. LEXIS 156 (2010).

Trial court did not err in finding find that a property's "as-is" value, rather than a value based on its "highest and best use," was the true market value for purposes of O.C.G.A. § 44-14-161(b), because two appraisers agreed on the value of the property as a single unit, and the trial court's finding that there was no variance between the experts as to the "true market value" of the property was construed to reflect that fact and not a misunderstanding as to the nature of the evidence; the trial court acknowledged that there was a dispute as to what the true value was and then ruled that the highest and best use of the property was not its proper value. TKW Partners, LLC v. Archer Capital Fund, L.P., 302 Ga. App. 443, 691 S.E.2d 300, 2010 Ga. App. LEXIS 156 (2010).

Sufficient evidence supported confirmation of a lender's application for a foreclosure sale under O.C.G.A. 44-14-161(b) because the appraiser used a valid valuation method, and the appraisal was supported by competent evidence showing that the property's true market value was equivalent to the price the lender paid at a nonjudicial foreclosure sale. Greenwood Homes, Inc. v. Regions Bank, 302 Ga. App. 591, 692 S.E.2d 42, 2010 Ga. App. LEXIS 189 (2010).

Evidence supported a trial court's conclusion that properties were sold for their true fair market values because there was no testimony as to the value of any personal property, and the record showed that the foreclosure sale involved only the sale of real property; a bank's expert appraiser testified as to the methodology the appraiser used to determine the value of each property sold, and the appraiser testified that the properties in the first sales had no appliances therein and that some in the third had no flooring, carpet, or appliances. Belans v. Bank of Am., N.A., 306 Ga. App. 252, 701 S.E.2d 889, 2010 Ga. App. LEXIS 910 (2010).

Sufficient evidence supported the trial court's confirmation of a foreclosure sale pursuant to O.C.G.A. § 44-14-161 because the appraiser relied on the factual data collected by the appraiser's staff for the appraiser's valuation of the property, not on the staff's opinions as to the value of the property, and there was no evidence that the appraiser's valuation was based on sheer speculation; O.C.G.A. § 44-14-161(b) does not preclude any specific method of property appraisal. Boring v. State Bank & Trust Co., 307 Ga. App. 93, 704 S.E.2d 207, 2010 Ga. App. LEXIS 1110 (2010).

Trial court did not err in confirming a non-judicial foreclosure sale of property to a bank because the record contained sufficient evidence to permit the trial court to determine that the foreclosure sale brought at least the true market value of the property as required by O.C.G.A. § 44-14-161(b) when the scope of an appraisal addendum included a re-inspec-

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tion of the property and a review of changes in market conditions since the first appraisal and through the date of the foreclosure sale; even if the appraiser's recurring valuation for the property and cost-to-complete calculations strained credulity, the trial court was presented with additional, uncontested evidence to support the court's finding that the property sold for at least the property's true market value because the appraiser testified that the appraiser received no direction from the bank about the total to return when the appraiser reached $480,000 for the second time, and there was evidence that the true market value of the property could have actually been less than what the bank paid for the property. Atreus Cmtys. of Am., LLC v. KeyBank Nat'l Ass'n, 307 Ga. App. 716, 706 S.E.2d 107, 2011 Ga. App. LEXIS 56 (2011).

Trial court did not err in confirming a foreclosure sale by a bank because the trial court was authorized to find that the bank's winning bid at the sale represented the true market value of the property; the trial court was entitled to rely upon the valuation of the property by the bank's expert, including the expert's utilization of a 15 percent discount for builder/buyer risk in valuing the uncompleted house on the property, because the expert testified that the calculation was arrived at based on the expert's consultation with two separate homebuilders, and the expert arrived at the ultimate valuation after inspecting the uncompleted, vandalized home and assessing the condition of the surrounding subdivision. Jimmy Britt Builders, Inc. v. Suntrust Bank, 307 Ga. App. 663, 706 S.E.2d 665, 2011 Ga. App. LEXIS 39 (2011).

Because a foreclosure sale reflected the price that would be obtained in a sale under usual market conditions, and because deductions such as carrying costs and entrepreneurial profit factored directly into the price a willing buyer would pay for the properties, the trial court properly determined the properties' true market value under O.C.G.A. § 44-14-161(b). Henderson Prop. Holdings, LLC v. Sea Island Bank, 310 Ga. App. 795, 714 S.E.2d 382, 2011 Ga. App. LEXIS 657 (2011), cert. denied, No. S11C1787, 2011 Ga. LEXIS 991 (Ga. Nov. 30, 2011).

Trial court did not err in confirming a nonjudicial foreclosure sale because the borrowers did not object to the testimony or the reports of the lender's appraiser as to the fair market value of the property, and there was no evidence that the appraiser's opinion was based on sheer speculation. O.C.G.A. § 44-14-161(b) did not preclude any specific method of property appraisal. Ivy Rd. Props., LLC v. First Citizens Bank & Trust Co., 311 Ga. App. 409, 715 S.E.2d 809, 2011 Ga. App. LEXIS 750 (2011).

Superior court did not err in confirming a foreclosure sale because the borrowers did not show that the lender's scheduling and cancelling the foreclosure sale caused the properties to bring in less than the properties fair market value on the date of the sale. Eayrs v. Wells Fargo Bank, N.A., 311 Ga. App. 504, 716 S.E.2d 561, 2011 Ga. App. LEXIS 764 (2011).

Because the mortgage guarantors did not rebut an appraiser's revised opinion of the true market value of a property, and because the revised value was less than the amount a bank bid in the bank's foreclosure sale, the trial court properly determined that the bank's bid, which brought at least the true market value of the property, complied with O.C.G.A. § 44-14-161(b). Metro Land Holdings Invs., LLC v. Bank of Am., N.A., 311 Ga. App. 498, 716 S.E.2d 566, 2011 Ga. App. LEXIS 769 (2011).

Order confirming a non-judicial foreclosure sale was not erroneous because there was evidence supporting the trial court's finding that the subject properties sold for at least the properties' true market value; the bank introduced the written appraisal reports and expert testimony from the bank's appraiser, which showed that the first property sold for $1,500 less than the property's value, which was within the range of the property's true market value, and the trial court's decision to adopt the determination of the bank's expert that the highest and best use of the property would be residential, and the expert's valuation method of calculating the retail value of the property by utilizing the sales

comparison approach and then discounting that value to achieve the property's true market value, was not in error. River Forest, Inc. v. United Bank, 320 Ga. App. 115, 739 S.E.2d 403, 2013 Ga. App. LEXIS 132 (2013).

Confirmation of a foreclosure sale of subdivided property for $530,000 was proper because there was some evidence that the fair market value of the lots was $5,500 to $6,600, which was considerably less than the actual sales price of $10,000 per lot, and the borrower's expert's opinion that the per lot value was $12,000 was not supported by any comparable sales. Lost Lake Dev. Corp. v. Cmty. & S. Bank, 325 Ga. App. 527, 754 S.E.2d 114, 2014 Ga. App. LEXIS 9 (2014), cert. denied, No. S14C0742, 2014 Ga. LEXIS 609 (Ga. Sept. 8, 2014).

Evidence in the record, including the testimony of the demolition company owner regarding the cost of demolition, supported the trial court's determination that the price paid by the buyer represented the true market value of the property. Conyers 138, LLC v. ONH1, LLC, 341 Ga. App. 521, 801 S.E.2d 318, 2017 Ga. App. LEXIS 234 (2017).

Evidence insufficient. — A party who explains arrival at a total price figure by adding component values, but provides no adequate explanation of how that party arrived at the value of the components, does not provide sufficient evidence to accurately ascertain the true market value so as to make a determination under O.C.G.A. § 44-14-161. Mallett v. Fulford, 142 Ga. App. 200, 235 S.E.2d 650, 1977 Ga. App. LEXIS 1541 (1977).

Refusal to confirm a foreclosure sale was proper where the only evidence presented to the trial court as to the fair market value of the subject property was an appraisal submitted by an expert who failed to consider comparable properties close to the subject property which had much higher values than the more distant properties used by the assignees' expert, and which indicated that the true market value was much higher than the foreclosure sale price; the trial court found that the expert and the expert's appraisal were simply not believable. Foster v. Tycor, Inc., 267 Ga. App. 767, 601 S.E.2d 172, 2004 Ga. App. LEXIS 783 (2004).

Confirmation of nonjudicial foreclosure sales of certain properties did not comply with O.C.G.A. § 44-14-161 because the only evidence at the confirmation hearing regarding the properties' true market value was the testimony of the creditor's counsel, which was insufficient. Belans v. Bank of Am., N. A., 303 Ga. App. 654, 694 S.E.2d 725, 2010 Ga. App. LEXIS 384 (2010).

Superior court erred by confirming a foreclosure sale because no construction of the record would have authorized a finding that the sale price was at least the true market value of the property; the foreclosure sale amount was a matter of fact, and neither evidence nor stipulation of such amount was presented to the trial judge. Titshaw v. Northeast Ga. Bank, 304 Ga. App. 712, 697 S.E.2d 837, 2010 Ga. App. LEXIS 604 (2010).

Because the sellers' appraiser failed to account for substantial improvements to the interior of the residence in developing the appraiser's opinion of the property's market value, the trial court properly denied the sellers' application for confirmation under O.C.G.A. § 44-14-161(b). Hammock v. Issa, 310 Ga. App. 547, 713 S.E.2d 717, 2011 Ga. App. LEXIS 599 (2011).

Superior court did not err in denying a lender's petition to confirm the foreclosure of a shopping center because the lender failed to convince the superior court, by a preponderance of the evidence, that the property sold for the property's true market value pursuant to O.C.G.A. § 44-14-161; the lender's expert appraised the leased fee interest in the property and not the fee simple interest. GCCFC 2007-GGP Abercorn St. Ltd. P'ship v. Abercorn Common, LLLP, 316 Ga. App. 879, 730 S.E.2d 589, 2012 Ga. App. LEXIS 673 (2012).

In confirming foreclosure sale of property upon which was situated a condominium complex consisting of 30 partially constructed units, the court could calculate the true market value of the real estate as a single investment opportunity rather than by adding together the true market values of each of the separate residential units, where the security deed merely described the property as two tracts and contained no express requirement that the property be

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sold in individual units. Marion G. Davis, Inc. v. Cameron-Brown Co., 177 Ga. App. 646, 340 S.E.2d 216, 1986 Ga. App. LEXIS 1507 (1986).

Calculation of amount of loss with reasonable degree of certainity. — Trial court erred in basing the court's holding that the appellees were not liable for the deficiency on the court's finding that the appellant suffered no damages as a result of the recording of the materialman's liens because the appellant obtained an order confirming the foreclosure sale and, thus, met the court's burden of proof of showing the amount of loss in a manner in which the trial judge could calculate the amount of the loss with a reasonable degree of certainty. Fannie Mae v. Las Colinas Apartments, LLC, 346 Ga. App. 867, 815 S.E.2d 334, 2018 Ga. App. LEXIS 434 (2018), cert. denied, No. S18C1616, 2019 Ga. LEXIS 177 (Ga. Mar. 4, 2019).

Market value exceeding bid amount. — Trial court did not err in denying confirmation petition, where appraisals offered by both parties supported the court's conclusion that the market value of the condominium units involved had exceeded the amount bid for them at the foreclosure sales. First Nat'l Bank v. Childress-Ross Properties, Inc., 189 Ga. App. 765, 377 S.E.2d 533, 1989 Ga. App. LEXIS 19 (1989).

A "quick sale value" does not constitute competent evidence of the "true market value" of real property within the meaning of O.C.G.A. § 44-14-161. Gutherie v. Ford Equip. Leasing Co., 206 Ga. App. 258, 424 S.E.2d 889, 1992 Ga. App. LEXIS 1609 (1992).

Trial court erred by confirming a foreclosure sale under O.C.G.A. § 44-14-161(b) based on an appraisal that discounted the value of each town home by $10,000 because the homes were in foreclosure because evidence of the "quick sale" value of the properties did not reflect the price that would have been obtained in a sale under the usual market conditions. Cartersville Developers, LLC. v. Ga. Bank & Trust, 292 Ga. App. 375, 664 S.E.2d 783, 2008 Ga. App. LEXIS 780 (2008).

Although a foreclosure sale price was the same as the quick sale value, and the experts were not informed about two higher offers for a portion of the property before their appraisals, reversal of a decision confirming the foreclosure sale was not required because the expert's opinion was not based solely on the quick sale value but on other factors. Mundy Mill Dev., LLC v. ACR Prop. Servs., LP, 306 Ga. App. 730, 703 S.E.2d 137, 2010 Ga. App. LEXIS 1036 (2010).

Hearing

1. Powers and Duties of Court

O.C.G.A. § 44-14-161 does not violate Ga. Const. 1976, Art. VI, Sec. XV, Para. I (see now Ga. Const. 1983, Art. I, Sec. I, Para. XI) by failing to provide for the trial of issues of fact by jury. Harwell v. First Fed. Sav. & Loan Ass'n, 245 Ga. 757, 267 S.E.2d 229, 1980 Ga. LEXIS 926 (1980).

No jury trial is required under O.C.G.A. § 44-14-161. Kilgore v. Life Ins. Co., 138 Ga. App. 890, 227 S.E.2d 860, 1976 Ga. App. LEXIS 2357 (1976).

A right to a jury trial does not exist in confirmation proceedings brought in the state courts of Georgia. FDIC v. New London Enters., Ltd., 619 F.2d 1099, 1980 U.S. App. LEXIS 16300 (5th Cir. 1980).

The duty of the court is to test the fairness of the technical procedure of the actual sale and to insure that the sale has brought at least the true market value of the property. Jones v. Hamilton Mtg. Corp., 140 Ga. App. 490, 231 S.E.2d 491, 1976 Ga. App. LEXIS 1530 (1976); Hamilton Mtg. Corp. v. Bowles, 142 Ga. App. 882, 237 S.E.2d 198, 1977 Ga. App. LEXIS 2163 (1977); Weems v. McCloud, 619 F.2d 1081, 1980 U.S. App. LEXIS 16299 (5th Cir. 1980); Harris & Tilley, Inc. v. First Nat'l Bank, 157 Ga. App. 88, 276 S.E.2d 137, 1981 Ga. App. LEXIS 1674 (1981); Alexander v. Weems, 157 Ga. App. 507, 277 S.E.2d 793, 1981 Ga. App. LEXIS 1882 (1981).

The judge sits as a trier of fact and the judge's findings and conclusions have the effect of a jury verdict. Thompson v. Maslia, 127 Ga. App. 758, 195 S.E.2d 238,

1972 Ga. App. LEXIS 1016 (1972); Alexander v. Weems, 157 Ga. App. 507, 277 S.E.2d 793, 1981 Ga. App. LEXIS 1882 (1981).

Judge's weight and credibility of evidence. — What value is, or may have been, is a question of fact to be resolved as others are. In so doing the trier of fact is the judge of the credibility of the witnesses and of the weight to be given the evidence. Thompson v. Maslia, 127 Ga. App. 758, 195 S.E.2d 238, 1972 Ga. App. LEXIS 1016 (1972); Alexander v. Weems, 157 Ga. App. 507, 277 S.E.2d 793, 1981 Ga. App. LEXIS 1882 (1981).

Findings required. — A judge hearing a confirmation of a nonjudicial sale of property is required to render a judgment with findings of fact. Weems v. McCloud, 619 F.2d 1081, 1980 U.S. App. LEXIS 16299 (5th Cir. 1980).

A judgment in an action to confirm a foreclosure sale is inadequate if it contains no specific finding concerning the sufficiency of the price brought at sale. Lanier v. Citizens State Bank, 186 Ga. App. 395, 367 S.E.2d 585, 1988 Ga. App. LEXIS 361 (1988).

Sale may be declared void. — O.C.G.A. § 44-14-161 gives the judge authority to declare a sale of real estate on foreclosure to be absolutely void rather than merely to order another sale because of an irregularity. Tingle v. Atlanta Fed. Sav. & Loan Ass'n, 93 Ga. App. 393, 91 S.E.2d 804, 1956 Ga. App. LEXIS 748 (1956).

A trial judge has the authority to rule upon a motion for revision during the same term. Thompson v. Maslia, 127 Ga. App. 758, 195 S.E.2d 238, 1972 Ga. App. LEXIS 1016 (1972).

Collateral estoppel and res judicata. — Confirmation court's holding that the land brought its true market value did not have either collateral estoppel or res judicata effect on the district court's consideration of the proceeds issue since the confirmation court is without authority to address matters concerning sales of personalty. Walton Motor Sales, Inc. v. Ross, 736 F.2d 1449, 1984 U.S. App. LEXIS 20368 (11th Cir. 1984).

2. Issues

A. Generally

The confirmation proceeding is a statutory proceeding which by law determines only that the sale was properly advertised and brought the fair market value of the land. It originated as a means of protecting the debtor from being subject to double payment in cases where the property was purchased for a sum less than its fair market value and it provides an opportunity for debtors, including endorsers of the obligation, to contest the approval of the sales before claims for the balance of the indebtedness can be prosecuted against them. Harris & Tilley, Inc. v. First Nat'l Bank, 157 Ga. App. 88, 276 S.E.2d 137, 1981 Ga. App. LEXIS 1674 (1981).

A confirmation proceeding held in accordance with O.C.G.A. § 44-14-161 is extremely narrow in scope, the issues in such proceedings being the evaluation of real estate sold under power as to the date of its sale and the regularity of that sale. Alexander v. Weems, 157 Ga. App. 507, 277 S.E.2d 793, 1981 Ga. App. LEXIS 1882 (1981).

Requirements must be substantially met. — At a hearing for confirmation of a foreclosure sale, if either the notice or the advertisement does not substantially meet legal requirements, the sale should be set aside. But not every irregularity or deficiency at this point will void the sale. Walker v. Northeast Prod. Credit Ass'n, 148 Ga. App. 121, 251 S.E.2d 92, 1978 Ga. App. LEXIS 3042 (1978).

Court's inquiry should be limited. — The court's inquiry in a confirmation of a foreclosure sale should go only to the value of the real estate on the date of sale, in the course of the examination to determine the fairness of the technical procedures used, but only for the purpose of making sure that the sale was not chilled and the price bid was in fact market value. Shantha v. West Ga. Nat'l Bank, 145 Ga. App. 712, 244 S.E.2d 643, 1978 Ga. App. LEXIS 2099 (1978); Walker v. Northeast Prod. Credit Ass'n, 148 Ga. App. 121, 251 S.E.2d 92, 1978 Ga. App. LEXIS 3042

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(1978); Weems v. McCloud, 619 F.2d 1081, 1980 U.S. App. LEXIS 16299 (5th Cir. 1980).

The sole issue in the confirmation procedure under O.C.G.A. § 44-14-161 is the evaluation of the real estate as of the date of the sale. Hamilton Mtg. Corp. v. Bowles, 142 Ga. App. 882, 237 S.E.2d 198, 1977 Ga. App. LEXIS 2163 (1977).

O.C.G.A. § 44-14-161 does not contemplate that the court shall undertake to decide controversies between the parties as to the amount of debt or side agreements which could have been the basis of an injunction preventing the foreclosure sale. Jones v. Hamilton Mtg. Corp., 140 Ga. App. 490, 231 S.E.2d 491, 1976 Ga. App. LEXIS 1530 (1976); Hamilton Mtg. Corp. v. Bowles, 142 Ga. App. 882, 237 S.E.2d 198, 1977 Ga. App. LEXIS 2163 (1977); Harris & Tilley, Inc. v. First Nat'l Bank, 157 Ga. App. 88, 276 S.E.2d 137, 1981 Ga. App. LEXIS 1674 (1981).

In an action to confirm a sale under O.C.G.A. § 44-14-161, the debtors were not permitted to raise the defense that intangible taxes had not been paid as required by O.C.G.A. § 48-6-77; alleged defenses to the original debt are not relevant to the confirmation proceeding. Guthrie v. Bank S., 195 Ga. App. 123, 393 S.E.2d 60, 1990 Ga. App. LEXIS 424 (1990), cert. denied, No. S90C0984, 1990 Ga. LEXIS 850 (Ga. May 9, 1990).

In every confirmation of sale case, the issue of a resale is always raised regardless of whether it has been affirmatively pleaded in creditor's complaint, if the debtor is afforded the opportunity to defend against confirmation as well as against a resale. Adams v. Gwinnett Com. Bank, 140 Ga. App. 233, 230 S.E.2d 324, 1976 Ga. App. LEXIS 1421 (1976), aff'd, 238 Ga. 722, 235 S.E.2d 476, 1977 Ga. LEXIS 1180 (1977); Homes of Tomorrow, Inc. v. FDIC, 149 Ga. App. 321, 254 S.E.2d 475, 1979 Ga. App. LEXIS 1835 (1979).

Default is not an issue in confirmation proceedings. Homes of Tomorrow, Inc. v. FDIC, 149 Ga. App. 321, 254 S.E.2d 475, 1979 Ga. App. LEXIS 1835 (1979).

Real parties in interest. — The issue of whether an assignee of the Federal Deposit Insurance Corporation was a real party in interest was not relevant to a confirmation proceeding which was commenced in accordance with O.C.G.A. § 44-14-161 by the person instituting the foreclosure proceedings. Sparti v. Joslin, 230 Ga. App. 346, 496 S.E.2d 490, 1998 Ga. App. LEXIS 139 (1998).

The fact that a sale may have been conducted unfairly has no relevance in a confirmation of sale proceeding under O.C.G.A. § 44-14-161, unless the unfairness relates to the requirements of notice, advertisement, and regularity. Keever v. GECC, 141 Ga. App. 864, 234 S.E.2d 696, 1977 Ga. App. LEXIS 2099 (1977).

B. Notice to Debtor

Any debtor not given timely notice may not be held liable in any subsequent deficiency action. Weems v. McCloud, 619 F.2d 1081, 1980 U.S. App. LEXIS 16299 (5th Cir. 1980).

Actual notice or knowledge will not cure the failure to comply with the notice provision of O.C.G.A. § 44-14-161. First Nat'l Bank & Trust Co. v. Kunes, 128 Ga. App. 565, 197 S.E.2d 446, 1973 Ga. App. LEXIS 1547, aff'd, 230 Ga. 888, 199 S.E.2d 776, 1973 Ga. LEXIS 1098 (1973); Chastain Place, Inc. v. Bank S., 185 Ga. App. 178, 363 S.E.2d 616, 1987 Ga. App. LEXIS 2455 (1987).

The fact that the guarantor of a mortgage had actual notice of the hearing on a confirmation application did not change the requirement for valid personal service. Ameribank v. Quattlebaum, 220 Ga. App. 345, 469 S.E.2d 462, 1996 Ga. App. LEXIS 129 (1996).

Where the guarantor of a mortgage was not named a party in a confirmation petition and was not given notice of the confirmation hearing as required by O.C.G.A. § 44-14-161, the hearing should have been dismissed; notice given to the guarantor by the mortgagee's counsel did not satisfy the statutory requirement. Quattlebaum v. Ameribank, 227 Ga. App. 517, 489 S.E.2d 319, 1997 Ga. App. LEXIS 775 (1997), aff'd, 269 Ga. 857, 505 S.E.2d 476, 1998 Ga. LEXIS 932 (1998).

Personal service generally is required in order to give legal notice where no proceedings are pending between the

parties at the time a notice is to be given. Henry v. Hiwassee Land Co., 246 Ga. 87, 269 S.E.2d 2, 1980 Ga. LEXIS 976 (1980).

Purchasers who were responsible on the underlying debt were "debtors" within the meaning of O.C.G.A. § 44-14-161 and were entitled to notice by personal service. Hill v. Moye, 221 Ga. App. 411, 471 S.E.2d 910, 1996 Ga. App. LEXIS 511 (1996).

Notice by mail. — The mailing of copies of the petition to the defendant and defendant's counsel within five days of the hearing, in the absence of a contention of nonreceipt thereof, constituted "notice" of the hearing as required by O.C.G.A. § 44-14-161. Boardman v. Georgia R.R. Bank & Trust Co., 127 Ga. App. 63, 192 S.E.2d 390, 1972 Ga. App. LEXIS 782 (1972).

Service by publication. — Service of a debtor by publication was found to be necessary by the trial court, and there was evidence to support this finding. One process server had attempted unsuccessfully to serve the guarantor at least 12 times, at four different addresses, and another attempted service at four different locations, including seven visits and hours of surveillance of what the server believed was the debtor's residence. Belans v. Bank of Am., 303 Ga. App. 35, 692 S.E.2d 694, 2010 Ga. App. LEXIS 289 (2010).

Trial court erred when the court found that a debtor was served properly because there was no evidence that the requirements of publication under O.C.G.A. § 9-11-4(f)(1) were met, and a bank offered no evidence to show that the notice requirements of O.C.G.A. § 44-14-161(c) were met; the published advertisement for service on the debtor provided no specifics as to the date or time of the confirmation hearing as was required under the confirmation statute, O.C.G.A. § 44-14-161. Winstar Dev., Inc. v. SunTrust Bank, 308 Ga. App. 655, 708 S.E.2d 604, 2011 Ga. App. LEXIS 255 (2011).

The grantee in security deed was not required to give notice to the grantor of the grantee's intention to exercise the power of sale ten days before the running of the first advertisement for such sale, where plaintiff did not proceed with the first foreclosure proceeding for the reason that the defendant procured a restraining order against the foreclosure, and when that was dissolved plaintiff had every right, in the absence of an appeal, to exercise its rights under the power of sale by immediately recommencing the proceeding. Norwood Realty Co. v. First Fed. Sav. & Loan Ass'n, 99 Ga. App. 692, 109 S.E.2d 844, 1959 Ga. App. LEXIS 935 (1959).

Notice to guarantors required unless waived. — Lender's compliance with the requirements contained in O.C.G.A. § 44-14-161 was a condition precedent to the lender's ability to pursue a guarantor for a deficiency after a foreclosure had been conducted but the guarantors had the contractual ability to waive the condition precedent requirement. PNC Bank, Nat'l Ass'n v. Smith, 298 Ga. 818, 785 S.E.2d 505, 2016 Ga. LEXIS 169 (2016).

Notice held sufficient. — Where the defaulting property owners' attorney acknowledged at the confirmation hearing that proper notice was received of the confirmation hearing "two weeks ago or something like that" the bank was not barred from prosecuting the confirmation applications. Phillips v. Connecticut Nat'l Bank, 196 Ga. App. 477, 396 S.E.2d 538, 1990 Ga. App. LEXIS 983 (1990), cert. denied, No. S90C1488, 1990 Ga. LEXIS 584 (Ga. Sept. 4, 1990).

Notice publication of a confirmation hearing for nonjudicial foreclosure sales of certain properties was sufficient because two process servers had unsuccessfully tried to personally serve a guarantor, including 12 attempts at four different locations. Belans v. Bank of Am., N. A., 303 Ga. App. 654, 694 S.E.2d 725, 2010 Ga. App. LEXIS 384 (2010).

Trial court did not err in concluding that the debtors had been properly served pursuant to O.C.G.A. §§ 9-11-4 and 44-14-161(c) because there was undisputed evidence from which the trial court could have concluded that the debtors were attempting to evade service; a private process server, who had a description of a vehicle that had been parked at the address of one of the debtors, saw the vehicle and followed the vehicle, but the driver noticed the server, drove past the address of the house, and when the server pulled into the driveway after the driver and approached the garage door, which was

Notice to Debtor (Cont'd)

not yet closed, and announced that the server had papers, no one responded. Winstar Dev., Inc. v. SunTrust Bank, 308 Ga. App. 655, 708 S.E.2d 604, 2011 Ga. App. LEXIS 255 (2011).

Notice of a non-judicial foreclosure sale confirmation hearing was given to two debtors more than five days prior to the confirmation hearing, when a deputy left copies of the pleadings, including a rule nisi, at the debtors' home with the debtors' father, a person of suitable age and discretion then residing therein; this method of service complied with O.C.G.A. §§ 9-11-4(e)(7) and 44-14-161 to initiate a valid confirmation proceeding. Gulia v. North Atlanta Bank, 334 Ga. App. 701, 780 S.E.2d 74, 2015 Ga. App. LEXIS 696 (2015), cert. denied, No. S16C0481, 2016 Ga. LEXIS 178 (Ga. Feb. 22, 2016).

Notice held insufficient. — The fact that the debtor actually received a notice of hearing prepared by the lender was insufficient where the debtor was not named as a party on the application for confirmation and where the notice of hearing had not been directed by the court as required by O.C.G.A. § 44-14-161. Ameribank v. Quattlebaum, 269 Ga. 857, 505 S.E.2d 476, 1998 Ga. LEXIS 932 (1998).

Petitioners' motion to set aside an order confirming a non-judicial foreclosure sale was improperly denied as the evidence did not show that the bank provided the petitioners with the required notice of the rescheduled confirmation hearing because the drafts of the cover letters by the bank to be sent to the petitioners notifying the petitioners of the reset hearing date were addressed to only one petitioner, contained the wrong address, and did not include a letter to the second petitioner; the proper service addresses for the petitioners had been made part of the record; and no other evidence showed that the notices were written, properly addressed and duly mailed to the petitioners; thus, a non-amendable defect appeared on the face of the record. Nadel v. Branch Banking & Trust Company, 340 Ga. App. 213, 797 S.E.2d 140, 2017 Ga. App. LEXIS 41 (2017).

C. Advertisement

The advertisement must meet the requirements of O.C.G.A. § 9-13-140 requiring a full and complete description of the property. Weems v. McCloud, 619 F.2d 1081, 1980 U.S. App. LEXIS 16299 (5th Cir. 1980).

Reference to outstanding security deeds omitted. — When an advertisement states that the sale will be of the whole fee simple interest and for cash and does not mention outstanding security deeds, Georgia confirmation proceedings have addressed the issue of whether bidding was thereby chilled. Weems v. McCloud, 619 F.2d 1081, 1980 U.S. App. LEXIS 16299 (5th Cir. 1980).

Advertisement sufficient. — Where the property description in the advertisement is the same as that in the loan deed, with the exception of certain lots expressly excepted because the plaintiff had previously released them to the defendant, and all of the property held by the plaintiff under the deed to secure debt which had not been previously released to the defendant was advertised, and no property not so held was included, the advertisement was sufficient as to the property, since it stated the amount owing it was also sufficient as to the debt. Norwood Realty Co. v. First Fed. Sav. & Loan Ass'n, 99 Ga. App. 692, 109 S.E.2d 844, 1959 Ga. App. LEXIS 935 (1959).

The advertisement of sale showing the property was being sold as the property of the grantor in the deed to secure debt containing the power of sale under which the property was being advertised does not void the sale merely because the grantor in the deed to secure debt had, prior thereto, sold its equity of redemption to another subject to the deed to secure debt; nor is such sale void because the name of the party or parties in possession was not stated in the advertisement. Five Dee Ranch Corp. v. Federal Land Bank, 148 Ga. App. 734, 252 S.E.2d 662, 1979 Ga. App. LEXIS 1635 (1979).

Trial court's conclusion that the advertisement of foreclosure sales conformed to O.C.G.A. § 44-14-161 was supported by competent evidence because a bank's at-

torney testified that the attorney caused the advertisements to be run and provided the four dates upon which the advertisements were published during the month preceding the sale; the attorney also testified that the legal descriptions in the newspaper matched that contained in the security deeds and the deeds under power of sale. Belans v. Bank of Am., N.A., 306 Ga. App. 252, 701 S.E.2d 889, 2010 Ga. App. LEXIS 910 (2010).

Superior court did not err in finding that a lender's advertisement of a nonjudicial foreclosure sale properly included a description of the property in accordance with O.C.G.A. § 9-13-140(a) because the legal description in the advertisement was identical to the description in the security deed by which the lender took its interest from a construction company and guarantors; thus, there was no discrepancy between the two, and the advertisement properly reflected the interest taken under the deed and available at the foreclosure sale. Diplomat Constr., Inc. v. State Bank of Tex., 314 Ga. App. 889, 726 S.E.2d 140, 2012 Ga. App. LEXIS 297 (2012).

Admission of publisher's affidavit and tear sheet from newspaper indicating advertisement of foreclosure sale was published held proper. — In a foreclosure matter under O.C.G.A. § 44-14-161, a trial court's admission of the publisher's affidavit and the tear sheet from the newspaper which indicated that the advertisement of the foreclosure sale was published on each of four listed dates, was proper, as those documents were not hearsay. White Oak Homes, Inc. v. Cmty. Bank & Trust, 314 Ga. App. 502, 724 S.E.2d 810, 2012 Ga. App. LEXIS 221 (2012), cert. denied, No. S12C1120, 2012 Ga. LEXIS 671 (Ga. July 2, 2012).

3. Debtor's Rights

A debtor has the right to cross-examine witnesses and to present own evidence. Weems v. McCloud, 619 F.2d 1081, 1980 U.S. App. LEXIS 16299 (5th Cir. 1980).

Objections may be raised. — While a debtor is not required to file an answer to the mortgagee's report, the debtor is permitted to raise objections. Weems v. McCloud, 619 F.2d 1081, 1980 U.S. App. LEXIS 16299 (5th Cir. 1980).

Raising defenses. — A debtor may raise defenses which relate to the true market value or the specified issues of fairness in the technical procedures. Weems v. McCloud, 619 F.2d 1081, 1980 U.S. App. LEXIS 16299 (5th Cir. 1980).

Counterclaims. — A debtor may not raise counterclaims or ask for any alleged excess resulting from the sale. Weems v. McCloud, 619 F.2d 1081, 1980 U.S. App. LEXIS 16299 (5th Cir. 1980).

Grounds for injunction. — A debtor may not raise the issue of the existence of a default, the amount of the debt, or the existence of any side agreement which could have been the basis of an injunction preventing the foreclosure sale. Weems v. McCloud, 619 F.2d 1081, 1980 U.S. App. LEXIS 16299 (5th Cir. 1980).

Affirmative relief for debtor. — If confirmation is sought and obtained, the debtor is likewise afforded the full measure to which the debtor is entitled, and extinguishment of the debt to the extent of the true market value of the property securing it; the debtor is entitled to no other form of affirmative relief under the confirmation statute. Kennedy v. Gwinnett Com. Bank, 155 Ga. App. 327, 270 S.E.2d 867, 1980 Ga. App. LEXIS 2569 (1980).

Addition of parties. — The Civil Practice Act, O.C.G.A. Ch. 9, T. 11, controls in an application to confirm a foreclosure sale and permits the adding of parties to the proceedings. An application should not be dismissed because additional parties are necessary for adjudication but additional parties may be added. Small Bus. Admin. v. Desai, 193 Ga. App. 852, 389 S.E.2d 372, 1989 Ga. App. LEXIS 1670 (1989).

Pursuant to the Civil Practice Act, O.C.G.A. Ch. 9, T. 11, the addition of parties to an application for confirmation relates back to the date of the original filing. Small Bus. Admin. v. Desai, 193 Ga. App. 852, 389 S.E.2d 372, 1989 Ga. App. LEXIS 1670 (1989).

An amendment to add the mortgagee as copetitioner to an application to confirm a foreclosure sale would be effective under the relation back rule even though the thirty-day period imposed by O.C.G.A. § 44-14-161 for reporting the sale and

Debtor's Rights (Cont'd)

obtaining confirmation on it had expired by the time the mortgagee moved to be added as a party. Small Bus. Admin. v. Desai, 193 Ga. App. 852, 389 S.E.2d 372, 1989 Ga. App. LEXIS 1670 (1989).

Damages. — Even though power of sale in mortgage is conferred upon the grantee for the purpose of facilitating the grantee's collection of the amount of the underlying debt which is secured by the property, the power must be exercised fairly; breach of this duty to conduct the sale "fairly" gives rise to a claim for damages to the injured holder of the equity of redemption. Kennedy v. Gwinnett Com. Bank, 155 Ga. App. 327, 270 S.E.2d 867, 1980 Ga. App. LEXIS 2569 (1980).

No right to jury trial. — There is no right to a jury trial on an application for confirmation under O.C.G.A. § 44-14-161. BBC Land & Dev., Inc. v. Bank of N. Ga., 294 Ga. App. 759, 670 S.E.2d 210, 2008 Ga. App. LEXIS 1304 (2008).

4. Evidence

O.C.G.A. § 44-14-161 requires that evidence satisfactory to the court of the true market value of the property is a condition precedent to the confirmation. Goodman v. Nadler, 113 Ga. App. 493, 148 S.E.2d 480, 1966 Ga. App. LEXIS 1107 (1966).

Discovery procedures of the Civil Practice Act, O.C.G.A. Ch. 9, T. 11 are permitted in a confirmation proceeding because it is a special statutory proceeding and no statute establishes a contrary rule of discovery. Alliance Partners v. Harris Trust & Sav. Bank, 266 Ga. 514, 467 S.E.2d 531, 1996 Ga. LEXIS 96 (1996).

Discovery is limited to the issues considered at the confirmation hearing and, thus, a debtor is permitted discovery only on the regularity of the sale and the market value of the property. Alliance Partners v. Harris Trust & Sav. Bank, 266 Ga. 514, 467 S.E.2d 531, 1996 Ga. LEXIS 96 (1996).

The applicant for confirmation must introduce evidence sufficient to show that the price equaled the property's value. FDIC v. Dye, 642 F.2d 837, 1981 U.S. App. LEXIS 14190 (5th Cir. 1981).

Inasmuch as the statute does not specifically require the taking of evidence by oral testimony nor is a jury trial mandated, the failure to proceed in such a fashion does not raise itself to the sort of inherently personal and fundamental right which may not be waived. Lewis v. First Nat'l Bank, 141 Ga. App. 338, 233 S.E.2d 465, 1977 Ga. App. LEXIS 1901 (1977).

Use of affidavits. — The better practice is to conduct a confirmation hearing by way of testimony, but affidavit evidence, by agreement will satisfy the requirements of O.C.G.A. § 44-14-161. Lewis v. First Nat'l Bank, 141 Ga. App. 338, 233 S.E.2d 465, 1977 Ga. App. LEXIS 1901 (1977).

Ex parte affidavits should not be allowed in evidence in any trial when the evidence was finally adjudicated because admission denied the privilege of cross-examination as allowed by former O.C.G.A. § 24-9-64 (see now O.C.G.A. § 24-6-611). Lewis v. First Nat'l Bank, 141 Ga. App. 338, 233 S.E.2d 465, 1977 Ga. App. LEXIS 1901 (1977).

Allegations in motion to dismiss. — As against general demurrer (now motion to dismiss), there is no requirement that the one asking for confirmation must affirmatively allege what the true market value is. Hinson v. First Nat'l Bank, 221 Ga. 408, 144 S.E.2d 765, 1965 Ga. LEXIS 479 (1965).

Evidence supported approval of a bank's foreclosure sale because the bank's expert testified that: (1) the value of the property did not exceed the amount paid by the bank; (2) the expert used both a cost and a market approach to determine the property's value; (3) the expert considered the percentage of the property that consisted of wetlands; and (4) the expert verified the comparable sales used to form the expert's opinion. Statesboro Blues Dev., LLC v. Farmers & Merchants. Bank, 301 Ga. App. 851, 690 S.E.2d 205, 2010 Ga. App. LEXIS 5 (2010).

5. Review

Standard of review. — Where the trial judge, sitting as the trier of the facts, hears the evidence, the judge's finding based upon conflicting evidence is analo-

gous to the verdict of a jury and should not be disturbed by a reviewing court if there is any evidence to support it. Thompson v. Maslia, 127 Ga. App. 758, 195 S.E.2d 238, 1972 Ga. App. LEXIS 1016 (1972); Thomas v. Henry, 150 Ga. App. 792, 258 S.E.2d 710, 1979 Ga. App. LEXIS 2378 (1979).

The trial court has considerable discretion in the conduct of a confirmation hearing and in determining the relief to be afforded but the finding of the trial court, as the trier of fact, must be supported by some evidence. Wheeler v. Coastal Bank, 182 Ga. App. 112, 354 S.E.2d 694, 1987 Ga. App. LEXIS 1614 (1987).

Assumption that trial court is correct. — No evidence having been produced showing a sale under the power contained in a deed to secure debt, the appellate court assumed the order of the court confirming the sale was correct. Worth v. Alma Exch. Bank & Trust, 171 Ga. App. 748, 320 S.E.2d 816, 1984 Ga. App. LEXIS 2330 (1984).

The trial court's determination that the sale reflects "true market value" will be affirmed, where there is no evidence that the sale was chilled or any fraud exerted. Smith v. Fidelity Fed. Sav. & Loan Ass'n, 149 Ga. App. 730, 256 S.E.2d 43, 1979 Ga. App. LEXIS 2005 (1979).

Change in value. — A reviewing court should not disturb the trial judge's findings merely because there is in the record evidence that at a time three months after the sale it may have acquired a different value. If that were true a confirmation could always be attacked because of a subsequent change in value. Thompson v. Maslia, 127 Ga. App. 758, 195 S.E.2d 238, 1972 Ga. App. LEXIS 1016 (1972).

Lack of special finding. — Evidence was sufficient to support a judgment of confirmation of sale under the exercise of the power contained in the security deed on the theory that the property brought its fair market value at such sale, and the judgment rendered was not subject to exception on the ground that the court did not make a special finding therein to this effect. Norwood Realty Co. v. First Fed. Sav. & Loan Ass'n, 99 Ga. App. 692, 109 S.E.2d 844, 1959 Ga. App. LEXIS 935 (1959).

Objection too late. — Guarantor did not preserve for review the assertion that the report of the third sale was untimely because the objection to the timeliness of the report of the third sale did not come until the appeal following entry of the first confirmation order. Belans v. Bank of Am., N.A., 309 Ga. App. 208, 709 S.E.2d 853, 2011 Ga. App. LEXIS 259 (2011), cert. denied, No. S11C1273, 2011 Ga. LEXIS 749 (Ga. Oct. 3, 2011).

Genuine issues of fact remained as to amount of damages. — In a mortgage foreclosure action, the grant of summary judgment to the bank as to the amount of damages owed on the note and guarantees was reversed because the discrepancies were material to the amount of unpaid principal, interest, and contractual attorney fees owed by the mortgagors; thus, material issues of fact existed as to the amount of damages. Mashburn Constr., L.P. v. CharterBank, 340 Ga. App. 580, 798 S.E.2d 251, 2017 Ga. App. LEXIS 105 (2017), cert. denied, No. S17C1331, 2017 Ga. LEXIS 642 (Ga. Aug. 14, 2017).

Resale

1. Discretion of Court

Resale provision permissive, not mandatory. — The provision that resale "may be granted for good cause shown" in O.C.G.A. § 44-14-161(c) is entirely permissive, and not mandatory. It means there is no presumption in favor of resale and there is no entitlement to a resale. Resolution Trust Corp. v. Morrow Auto Ctr., Ltd., 216 Ga. App. 226, 454 S.E.2d 138, 1995 Ga. App. LEXIS 82 (1995).

No presumption in favor of resale. — No presumption exists in favor of resale and there is no entitlement to a resale, either for mere failure to show the sale brought true market value, for a mere flawed appraisal, or for any reason. Sanusi v. Cmty. & S. Bank, 330 Ga. App. 198, 766 S.E.2d 815, 2014 Ga. App. LEXIS 821 (2014).

The authority of the trial judge in O.C.G.A. § 44-14-161 to order a resale may be equated with the right to exercise legal discretion. Adams v. Gwinnett Com. Bank, 238 Ga. 722, 235 S.E.2d 476, 1977 Ga. LEXIS 1180 (1977).

Discretion of Court (Cont'd)

O.C.G.A. § 44-14-161 plainly grants a trial court the discretionary power to order a resale. Adams v. Gwinnett Com. Bank, 140 Ga. App. 233, 230 S.E.2d 324, 1976 Ga. App. LEXIS 1421 (1976), aff'd, 238 Ga. 722, 235 S.E.2d 476, 1977 Ga. LEXIS 1180 (1977).

O.C.G.A. § 44-14-161(c) confers upon the trial court legal discretion in determining whether to order a resale. Government Nat'l Mtg. Ass'n v. Belue, 201 Ga. App. 661, 411 S.E.2d 894, 1991 Ga. App. LEXIS 1568 (1991).

The language of O.C.G.A. § 44-14-161 vests considerable discretion in the judge. Thompson v. Maslia, 127 Ga. App. 758, 195 S.E.2d 238, 1972 Ga. App. LEXIS 1016 (1972).

There is no requirement that the deed to secure debt itself must authorize a resale. Homes of Tomorrow, Inc. v. FDIC, 149 Ga. App. 321, 254 S.E.2d 475, 1979 Ga. App. LEXIS 1835 (1979).

Decision is the court's. — O.C.G.A. § 44-14-161 leaves the decision whether to order a resale of property sold pursuant to a power of sale, where the property fails to bring its fair market value, to the sound discretion of the trial court. United States v. Golf Club Co., 435 F.2d 9, 1970 U.S. App. LEXIS 6057 (5th Cir. 1970).

O.C.G.A. § 44-14-161 imposes no duty on the court to order resales when property sold at a foreclosure sale brings less than its fair market value, but rather leaves the ordering of resales to the discretion of the trial court. United States v. Golf Club Co., 435 F.2d 9, 1970 U.S. App. LEXIS 6057 (5th Cir. 1970).

Denial of resale not an abuse of discretion. — Trial court did not abuse the court's discretion in denying a resale because the creditor failed to show that either the trial court's ruling was unsupported by any evidence or that the court's ruling misstated or misapplied the relevant law. The creditor should have detected the flaws in the appraisal upon which the creditor relied as the creditor's decision-maker had the experience, sophistication, and resources to detect the flaws. RES-GA LJY, LLC v. Y. D. I., Inc., 322 Ga. App. 607, 745 S.E.2d 820, 2013 Ga. App. LEXIS 571 (2013).

Resale order has the effect of setting aside prior sale. — Following confirmation of a foreclosure sale, the debtor argued that the lender did not have title to the property because the trial court had not rescinded an earlier foreclosure sale; however, the trial court's resale order had the effect of setting aside the first sale. Further, a challenge to title fell outside the ambit of a confirmation proceeding. Yellow Creek Invs., LLC v. Multibank 2009-1 CRE Venture, LLC, 329 Ga. App. 577, 765 S.E.2d 728, 2014 Ga. App. LEXIS 747 (2014), cert. denied, No. S15C0514, 2015 Ga. LEXIS 217 (Ga. Mar. 30, 2015).

There is no abuse of the exercise of the trial court's discretion, as a matter of law, where no "good cause" has been shown which would demand a foreclosure resale. Five Dee Ranch Corp. v. Federal Land Bank, 148 Ga. App. 734, 252 S.E.2d 662, 1979 Ga. App. LEXIS 1635 (1979).

There is no abuse of discretion by the trial court in ordering a resale where there is evidence that the property did not bring its true market value, but the creditor's failure in this regard was not brought about by any failure to sell and buy the property intentionally at a price less than the true market value. Adams v. Gwinnett Com. Bank, 140 Ga. App. 233, 230 S.E.2d 324, 1976 Ga. App. LEXIS 1421 (1976), aff'd, 238 Ga. 722, 235 S.E.2d 476, 1977 Ga. LEXIS 1180 (1977).

Trial court did not err by ordering a resale of property after the court declined to confirm a nonjudicial foreclosure sale, as there was nothing to show that the court did not base the court's order on the court's own discretion or that the court acted under any belief in a mandate to order a resale simply because the property failed to sell for fair market value pursuant to O.C.G.A. § 44-14-161(c). Vill. at Lake Lanier, LLC v. State Bank & Trust Co., 314 Ga. App. 498, 724 S.E.2d 806, 2012 Ga. App. LEXIS 220 (2012).

The court does not err in ordering a resale where there is evidence supporting the court's finding that the price received at the sale was inadequate, and O.C.G.A.

§ 44-14-161 authorizes such resale. Davie v. Sheffield, 123 Ga. App. 228, 180 S.E.2d 263, 1971 Ga. App. LEXIS 1174 (1971).

2. Good Cause

A failure to sell for the true market value constitutes good cause for ordering a resale. Adams v. Gwinnett Com. Bank, 140 Ga. App. 233, 230 S.E.2d 324, 1976 Ga. App. LEXIS 1421 (1976), aff'd, 238 Ga. 722, 235 S.E.2d 476, 1977 Ga. LEXIS 1180 (1977); Homes of Tomorrow, Inc. v. FDIC, 149 Ga. App. 321, 254 S.E.2d 475, 1979 Ga. App. LEXIS 1835 (1979); Damil, Inc. v. First Nat'l Bank, 165 Ga. App. 678, 302 S.E.2d 600, 1983 Ga. App. LEXIS 1985 (1983).

A resale may be had for mere inadequacy of price. Davie v. Sheffield, 123 Ga. App. 228, 180 S.E.2d 263, 1971 Ga. App. LEXIS 1174 (1971).

Good faith. — Georgia courts have granted resales only when they find that a mortgagee has in good faith bid a price less than the true market value. Weems v. McCloud, 619 F.2d 1081, 1980 U.S. App. LEXIS 16299 (5th Cir. 1980).

An order to resell under O.C.G.A. § 44-14-161, which is technically an order to set aside a sale and also an order to resell, may be appropriate where the court denies confirmation of a sale for an inadequate price, but finds that the creditor acted in good faith in conducting the sale. FDIC v. Dye, 642 F.2d 837, 1981 U.S. App. LEXIS 14190 (5th Cir. 1981).

Trial court did not err by ordering a resale of property after the court declined to confirm a nonjudicial foreclosure sale as, pursuant to O.C.G.A. § 44-14-161(c), the court focused on the appropriate "good cause" standard rather than a standard based on "good faith"; the resale was properly ordered when the bank acted in good faith and when the property failed to sell for the property's true market value. Vill. at Lake Lanier, LLC v. State Bank & Trust Co., 314 Ga. App. 498, 724 S.E.2d 806, 2012 Ga. App. LEXIS 220 (2012).

A defense to a resale order must bear upon the question of the good faith of the mortgagee in the conduct of the sale and bid, and must be a defense otherwise relevant to the issue of confirmation vel non. Weems v. McCloud, 619 F.2d 1081, 1980 U.S. App. LEXIS 16299 (5th Cir. 1980).

Failure to prove good cause. — Trial court erred in ordering property to be resold under O.C.G.A. § 44-14-161(c) because the mortgagee did not meet the mortgagee's burden of proving good cause for the resale, and the mortgagor did not have the opportunity to defend against the same; by agreement of the parties and with the express consent of the trial court, the remaining issues relevant to the confirmation proceeding had been reserved for a later hearing, and thus, when the trial court ordered the resale, it had neither heard argument nor received any evidence related to the other aspects of the foreclosure sale or the desired outcome of the confirmation proceeding. Nicholson Hills Dev. v. Branch Banking & Trust Co., 316 Ga. App. 857, 730 S.E.2d 572, 2012 Ga. App. LEXIS 682 (2012).

RESEARCH REFERENCES

Am. Jur. 2d.

55 Am. Jur. 2d, Mortgages, § 613.

Am. Jur. Pleading and Practice Forms.

18 Am. Jur. Pleading and Practice Forms, Mortgages, § 193.

C.J.S.

59A C.J.S., Mortgages, § 643.

ALR.

Power of equity in absence of statute to render deficiency judgment in foreclosure action, 34 A.L.R. 1015.

Statute affecting mortgagee's rights and remedies in respect of deficiency as unconstitutional impairment of obligation of contract, 108 A.L.R. 891; 115 A.L.R. 435; 130 A.L.R. 1482; 133 A.L.R. 1473.

Failure to make persons whose rights were subject to mortgage parties to foreclosure suit as affecting right to deficiency judgment, 108 A.L.R. 1351.

Conflict of laws as to application of statute proscribing or limiting availability of action for deficiency after sale of collateral real estate, 44 A.L.R.3d 922.

Mortgages: effect upon obligation of

guarantor or surety of statute forbidden, or restricting deficiency judgment, 49 A.L.R.3d 554.

Propriety of setting minimum or "upset price" for sale of property at judicial foreclosure, 4 A.L.R.5th 693.

Necessity of production of original note involved in mortgage foreclosure — twenty-first century cases, 86 A.L.R.6th 411.

44-14-162. Sales made on foreclosure under power of sale; manner of advertisement and conduct necessary for validity; filing.

(a) No sale of real estate under powers contained in mortgages, deeds, or other lien contracts shall be valid unless the sale shall be advertised and conducted at the time and place and in the usual manner of the sheriff's sales in the county in which such real estate or a part thereof is located and unless notice of the sale shall have been given as required by Code Section 44-14-162.2. If the advertisement contains the street address, city, and ZIP Code of the property, such information shall be clearly set out in bold type. In addition to any other matter required to be included in the advertisement of the sale, if the property encumbered by the mortgage, security deed, or lien contract has been transferred or conveyed by the original debtor to a new owner and an assumption by the new owner of the debt secured by said mortgage, security deed, or lien contract has been approved in writing by the secured creditor, then the advertisement should also include a recital of the fact of such transfer or conveyance and the name of the new owner, as long as information regarding any such assumption is readily discernable by the foreclosing creditor. Failure to include such a recital in the advertisement, however, shall not invalidate an otherwise valid foreclosure sale.

(b) The security instrument or assignment thereof vesting the secured creditor with title to the security instrument shall be filed prior to the time of sale in the office of the clerk of the superior court of the county in which the real property is located.

History.

Ga. L. 1935, p. 381, § 2; Ga. L. 1981, p. 834, § 1; Ga. L. 2001, p. 856, § 1; Ga. L. 2008, p. 624, § 1/SB 531.

Editor's notes.

Ga. L. 2001, p. 856, § 2, not codified by the General Assembly, provides that the 2001 amendment "shall become effective July 1, 2001, and shall apply with respect to sales under power which are first advertised on or after that date."

Law reviews.

For comment on Ruff v. Lee, 230 Ga. 426, 197 S.E.2d 376 (1973), see 8 Ga. L. Rev. 264 (1973).

For survey article on real property law, see 60 Mercer L. Rev. 345 (2008).

For article, "Buying Distressed Commercial Real Estate: What are the Alternatives?," see 16 (No. 4) Ga. St. B.J. 18 (2010).

For comment, "Are Fannie Mae and Freddie Mac State Actors? State Action, Due Process, and Nonjudicial Foreclosure," see 65 Emory L.J. 107 (2015).

JUDICIAL DECISIONS

Analysis

General Consideration
Notice
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General Consideration

O.C.G.A. § 44-14-162 is constitutional, and a foreclosure pursuant to it does not violate procedural due process rights. National Community Bldrs., Inc. v. Citizens & S. Nat'l Bank, 232 Ga. 594, 207 S.E.2d 510, 1974 Ga. LEXIS 1007 (1974).

There is no denial of due process of law because no hearing is required before sale. Southern Mut. Inv. Corp. v. Thornton, 131 Ga. App. 765, 206 S.E.2d 846, 1974 Ga. App. LEXIS 1548 (1974).

Equal protection. — Since no meaningful government involvement to constitute state action is involved, any contention that O.C.G.A. § 44-14-162 violates the equal protection or due process provisions of the Constitution is without merit. Coffey Enters. Realty & Dev. Co. v. Holmes, 233 Ga. 937, 213 S.E.2d 882, 1975 Ga. LEXIS 1490 (1975).

No state action. — A creditor's power of sale is derived from the parties' contractual undertaking rather than from O.C.G.A. § 44-14-162. Therefore, the mere enactment and enforcement of that section does not itself constitute state action. Roberts v. Cameron-Brown Co., 410 F. Supp. 988, 1975 U.S. Dist. LEXIS 14005 (S.D. Ga. 1975).

O.C.G.A. § 44-14-162 is unconstitutional as to pre-existing contracts where the security deed contains contradictory provisions as to sale on default. Atlantic Loan Co. v. Peterson, 181 Ga. 266, 182 S.E. 15, 1935 Ga. LEXIS 70 (1935); Gentry v. Hibbler-Barnes Co., 113 Ga. App. 1, 147 S.E.2d 31, 1966 Ga. App. LEXIS 939 (1966).

O.C.G.A. § 44-14-162, unlike the personal property foreclosure Acts, does not itself create any rights in creditors. Law v. USDA, 366 F. Supp. 1233, 1973 U.S. Dist. LEXIS 11305 (N.D. Ga. 1973); Global Indus., Inc. v. Harris, 376 F. Supp. 1379, 1974 U.S. Dist. LEXIS 8408 (N.D. Ga. 1974).

Protects consumer interests. — O.C.G.A. § 44-14-162 provides minimal requirements for the exercise of any contractual power of sale contained in security instruments. In this sense, it may be deemed protective of consumer interests. Law v. USDA, 366 F. Supp. 1233, 1973 U.S. Dist. LEXIS 11305 (N.D. Ga. 1973); Global Indus., Inc. v. Harris, 376 F. Supp. 1379, 1974 U.S. Dist. LEXIS 8408 (N.D. Ga. 1974).

Power of sale contractual. — O.C.G.A. § 44-14-162 regulates the manner in which foreclosure sales under powers contained in security deeds are conducted; but, the creditor's power of sale is derived from the parties' contractual undertaking rather than from that section. Global Indus., Inc. v. Harris, 376 F. Supp. 1379, 1974 U.S. Dist. LEXIS 8408 (N.D. Ga. 1974).

O.C.G.A. § 44-14-162 does not come into operation unless there already exists a power of sale contained in a deed to secure debt, mortgage, or other lien contract. It does not direct that a power of sale be employed; it merely specifies the minimal procedures to be employed once the parties have entered into a contractual relation. Law v. USDA, 366 F. Supp. 1233, 1973 U.S. Dist. LEXIS 11305 (N.D. Ga. 1973); Global Indus., Inc. v. Harris, 376 F. Supp. 1379, 1974 U.S. Dist. LEXIS 8408 (N.D. Ga. 1974).

Section does not authorize such sales. — O.C.G.A. § 44-14-162 merely regulates the manner in which foreclosure sales under powers contained in security deeds are conducted and does not even directly authorize such sales. Roberts v. Cameron-Brown Co., 410 F. Supp. 988, 1975 U.S. Dist. LEXIS 14005 (S.D. Ga. 1975).

Issues of standing and assignment not relevant. — Property owner's claim

General Consideration (Cont'd)

that a bank was not a real party in interest was not relevant to a confirmation proceeding pursuant to O.C.G.A. § 44-14-162 as the matter was commenced in accordance with O.C.G.A. § 44-14-161(a) by the person instituting the foreclosure proceedings; issues of standing and assignment were irrelevant to the confirmation proceeding. White Oak Homes, Inc. v. Cmty. Bank & Trust, 314 Ga. App. 502, 724 S.E.2d 810, 2012 Ga. App. LEXIS 221 (2012), cert. denied, No. S12C1120, 2012 Ga. LEXIS 671 (Ga. July 2, 2012).

Inclusion of nonjudicial foreclosure in deed. — O.C.G.A. § 44-14-162 does govern the exercise of private powers of sale, but it does not require the inclusion of nonjudicial foreclosure in a deed to secure debt or a mortgage. Roberts v. Cameron-Brown Co., 556 F.2d 356, 1977 U.S. App. LEXIS 12318 (5th Cir. 1977).

No confirmation where no indication of proper advertising or notification. — Where no evidence appeared in the transcript of the hearing on the confirmation petition tending to indicate either that the sale was properly advertised or that the landowner was properly notified of the sale, the judgment of confirmation must be reversed. Martin v. Federal Land Bank, 173 Ga. App. 142, 325 S.E.2d 787, 1984 Ga. App. LEXIS 2747 (1984), aff'd, 254 Ga. 610, 333 S.E.2d 370 (1985).

Assignment recorded after notice of sale. — Because Georgia law requires only that the foreclosing entity record the security deed prior to the time of sale, that the assignment was recorded after the notice of sale under power was first published did not affect the trustee's authority to foreclose on the property after recordation. Phillips v. Ocwen Loan Servicing, No. 1:12-cv-3861-WSD, 2014 U.S. Dist. LEXIS 127763 (N.D. Ga. Sept. 12, 2014).

Preservation for review. — Property owner's claim that a foreclosure advertisement did not comply with O.C.G.A. §§ 9-13-140(a) and 44-14-162 was waived on appeal due to the owner's failure to comply with Ga. Ct. App. R. 25(a)(1); the owner did not show how the enumeration of error was preserved for review, and it did not provide any relevant citation to the record to show that the claim of error was raised below. White Oak Homes, Inc. v. Cmty. Bank & Trust, 314 Ga. App. 502, 724 S.E.2d 810, 2012 Ga. App. LEXIS 221 (2012), cert. denied, No. S12C1120, 2012 Ga. LEXIS 671 (Ga. July 2, 2012).

Resale of property when first sale invalid. — Trial court did not err in allowing a bank to resell property because the first foreclosure sale was invalid and, therefore, inoperative, and the bank cured the invalidity by conducting a second foreclosure; when the lender is also the purchaser at an invalid sale the lender can treat the sale as void and resell the property in the manner that the lender should have sold the property in the first place. Duke Galish, LLC v. SouthCrest Bank, 314 Ga. App. 801, 726 S.E.2d 54, 2012 Ga. App. LEXIS 139 (2012), cert. denied, No. S12C1210, 2012 Ga. LEXIS 713 (Ga. Sept. 10, 2012).

Trial court did not err in allowing a bank to resell property because the borrower did not show that the bank acted in bad faith during the foreclosure process; the bank undertook to remedy the defect in the first foreclosure sale by dismissing the action to confirm the sale and by proceeding to foreclose again, after the assignment had been recorded. Duke Galish, LLC v. SouthCrest Bank, 314 Ga. App. 801, 726 S.E.2d 54, 2012 Ga. App. LEXIS 139 (2012), cert. denied, No. S12C1210, 2012 Ga. LEXIS 713 (Ga. Sept. 10, 2012).

Trial court erred by failing to confirm sale. — Trial court erred by denying a creditor's petition to confirm the foreclosure sale of six townhouses because the sale satisfied applicable notice and advertisement requirements and the uncontradicted evidence showed that the townhouses did sell for at least fair market value. RBC Real Estate Fin., Inc. v. Winmark Homes, Inc., 318 Ga. App. 507, 736 S.E.2d 117, 2012 Ga. App. LEXIS 943 (2012).

Borrowers lacked standing to challenge assignment of security deed. — In a wrongful foreclosure action, the district court did not err in concluding that the borrowers lacked standing to challenge the assignment of the security deed because, even though the assignment al-

legedly contained a patent defect in attestation, they were not parties to the assignment and had demonstrated no other right to challenge it. Haynes v. McCalla Raymer LLC, 793 F.3d 1246, 2015 U.S. App. LEXIS 12025 (11th Cir. 2015).

Notice

No notice beyond that required by law, the advertisement, and the contract is necessary. Southern Mut. Inv. Corp. v. Thornton, 131 Ga. App. 765, 206 S.E.2d 846, 1974 Ga. App. LEXIS 1548 (1974).

Holder of mortgage or trust deed not required to give notice. — In the absence of a specific provision to that effect, the holder of a mortgage or trust deed with power of sale is not required to give notice of the exercise of the power to a subsequent purchaser or incumbrancer; and the validity of the sale is not affected by the fact that such notice is not given. Miller Grading Contractors v. Georgia Fed. Sav. & Loan Ass'n, 247 Ga. 730, 279 S.E.2d 442, 1981 Ga. LEXIS 838 (1981).

Right to notice other than by advertisement. — Only the property owner was entitled to receive any notice of the initiation of foreclosure proceedings other than by advertisement. Breitzman v. Heritage Bank, 180 Ga. App. 171, 348 S.E.2d 713, 1986 Ga. App. LEXIS 2097 (1986).

By receiving actual notice of foreclosure sale, appellant received more notice than law required, since notice by advertisement in accordance with O.C.G.A. § 44-14-162 is sufficient. McKinney v. South Boston Sav. Bank, 156 Ga. App. 114, 274 S.E.2d 34, 1980 Ga. App. LEXIS 2902 (1980).

The holder of a secondary deed to secure debt is not entitled to any notice beyond that called for by the contract. Ruff v. Lee, 230 Ga. 426, 197 S.E.2d 376, 1973 Ga. LEXIS 936 (1973) (for comment, see 8 Ga. L. Rev. 264 (1973)).

Holders of inferior security deed assigned to foreclosing party were not entitled to receive and to rely upon notice of the exercise of power of sale in first security deed other than that provided for in the first security deed and O.C.G.A. § 44-14-162. Kennedy v. Gwinnett Com. Bank, 155 Ga. App. 327, 270 S.E.2d 867, 1980 Ga. App. LEXIS 2569 (1980).

Junior lien holders and mortgagees are not entitled to any notice of sale except by publication under O.C.G.A. § 44-14-162. Chattanooga Fed. Sav. & Loan Ass'n v. Northwest Recreational Activities, Inc., 4 B.R. 33, 1980 Bankr. LEXIS 5709 (Bankr. N.D. Ga. 1980).

The fact that the advertisement did not state that the automatic stay provisions of the Bankruptcy Code had been lifted with respect to the debtor's property did not tend to "chill" the sale of the property. Shingler v. Coastal Plain Prod. Credit Ass'n, 180 Ga. App. 539, 349 S.E.2d 785, 1986 Ga. App. LEXIS 2218 (1986).

Failure to meet notice requirements. — At a hearing for confirmation of a foreclosure sale, if either the notice or the advertisement does not substantially meet legal requirements, the sale should be set aside; but, not every irregularity or deficiency at this point will void the sale. Walker v. Northeast Prod. Credit Ass'n, 148 Ga. App. 121, 251 S.E.2d 92, 1978 Ga. App. LEXIS 3042 (1978).

The alleged failure to advertise the four weeks immediately preceding the sale pursuant to O.C.G.A. § 9-13-141, would not render the sale absolutely void. Stripling v. F & M Bank, 175 Ga. App. 75, 332 S.E.2d 373, 1985 Ga. App. LEXIS 2022 (1985).

Foreclosure sale was void where the required legal advertisement was not published during the week immediately preceding the sale. Foster v. F & M Bank, 108 B.R. 361, 1989 Bankr. LEXIS 2418 (Bankr. M.D. Ga. 1989).

Advertisement which a bank published when the bank sold a bowling alley at a foreclosure sale, which provided a metes and bounds description of the property, was sufficient under O.C.G.A. §§ 9-13-40 and 44-14-162 to foreclose on and convey title only to the real property, and a trial was required to determine the amount of money the bank had to turn over to a Chapter 7 debtor's bankruptcy estate under 11 U.S.C. § 542 because the bank improperly sold the debtor's personal property. The court found that it could not determine on summary judgment whether bowling alley lanes and pin setters the bank sold were fixtures or per-

Notice (Cont'd)

sonal property, and the court ordered the parties to present evidence on that issue at trial. Lubin v. Ga. Commerce Bank (In re Southern Bowling, Inc.), No. 05-86834-WLH, No. 09-06045, 2010 Bankr. LEXIS 4007 (Bankr. N.D. Ga. Oct. 8, 2010).

There remained a material question of fact as to plaintiff debtors' claim to set aside a foreclosure sale based on the lack of proper statutory notice called for in O.C.G.A. § 44-14-162(a) because, under O.C.G.A. § 44-14-162.2(b), nonjudicial foreclosure procedure required that a "copy" of the notice submitted to the publisher be sent to the debtor. The notice sent to the debtors differed from the one published. Rainey v. FMF Capital, LLC, No. 1:11-CV-0364-CAP, 2012 U.S. Dist. LEXIS 117200 (N.D. Ga. Mar. 30, 2012).

Trial court erred in dismissing a pro se borrower's complaint for wrongful foreclosure and breach of contract against the borrower's lender's alleged assignee; the trial court could not consider documents attached to the motion to dismiss, and the complaint adequately alleged failure to give the borrower notice and improper advertising, contrary to O.C.G.A. §§ 44-14-162(a) and 44-14-162.2. Babalola v. HSBC Bank, USA, N.A., 324 Ga. App. 750, 751 S.E.2d 545, 2013 Ga. App. LEXIS 924 (2013).

Failure to include a reinstatement balance. — Notice of foreclosure under a power of sale contained in a deed to secure debt was not defective because it failed to provide a reinstatement balance. Wright v. Barnett Mtg. Co., 226 Ga. App. 94, 485 S.E.2d 583, 1997 Ga. App. LEXIS 524 (1997).

Notice of foreclosure sale held sufficient. — Bank gave proper statutory notification of a foreclosure sale to property owners pursuant to O.C.G.A. § 44-14-162(a) when the bank sent to the property's address and the property owners' primary residence, by certified mail, a written notice of the foreclosure sale that specified the bank as the foreclosing party by name, address, and telephone number pursuant to O.C.G.A. § 44-14-162.2. Mortensen v. Bank of Am., N.A., No. 3:10-CV-13, 2011 U.S. Dist. LEXIS 132637 (M.D. Ga. Nov. 17, 2011).

Foreclosure notice sent by a loan servicer or agent of a secured party was not defective under O.C.G.A. § 44-14-162. Howard v. Mortg. Elec. Registration Sys., No. 1:10-cv-1630-WSD, 2012 U.S. Dist. LEXIS 116366 (N.D. Ga. Aug. 17, 2012).

Foreclosure advertisement sufficient. — Foreclosure sale advertisement of a condominium development was sufficient although the advertisement did not note that several units in the development had been sold prior to the foreclosure. The description of the property was correct in itself, and the excepted units were identified on the courthouse steps at the time of the sale. Dan Woodley Cmtys., Inc. v. Suntrust Bank, 310 Ga. App. 656, 714 S.E.2d 145, 2011 Ga. App. LEXIS 628 (2011).

Superior court did not err in finding that a lender's advertisement of a nonjudicial foreclosure sale properly included a description of the property in accordance with O.C.G.A. § 9-13-140(a) because the legal description in the advertisement was identical to the description in the security deed by which the lender took the lender's interest from a construction company and guarantors; thus, there was no discrepancy between the two, and the advertisement properly reflected the interest taken under the deed and available at the foreclosure sale. Diplomat Constr., Inc. v. State Bank of Tex., 314 Ga. App. 889, 726 S.E.2d 140, 2012 Ga. App. LEXIS 297 (2012).

Sale properly confirmed. — Trial court did not err in confirming the November sale of certain real estate in a foreclosure action because the mortgagor failed to show that it was deprived of any protection afforded by O.C.G.A. § 44-16-161 as the confirmation proceeding commenced in connection with the November sale comprised a new action after the July sale was invalidated, all of the advertisement requirements were met, and the property was sold for its true market value. Howser Mill Homes, LLC v. Branch Banking & Trust Co., 318 Ga. App. 148, 733 S.E.2d 441, 2012 Ga. App. LEXIS 869 (2012).

Sale must be advertised in every county where property located. — Trial court did not err in denying a mortgagee's application for confirmation of a

nonjudicial foreclosure sale because the court properly ruled that the mortgagee's advertisement failed to comport with the statutory requirements of O.C.G.A. § 44-14-162(a); a sale of real property under a power of sale made pursuant to § 44-14-162(a) must be advertised in every county where the property or any portion of the property is located. Nicholson Hills Dev. v. Branch Banking & Trust Co., 316 Ga. App. 857, 730 S.E.2d 572, 2012 Ga. App. LEXIS 682 (2012).

Conduct of Sale

Manner of sales. — O.C.G.A. § 44-14-162 requires that sales be advertised and conducted in the county in which the real estate is located and at the time, place and usual manner of sheriff's sales, not that sales under power are required to be conducted at the usual time of sheriff's sales in the particular county where the property is located. Butler v. Forsyth County Bank, 153 Ga. App. 122, 264 S.E.2d 502, 1980 Ga. App. LEXIS 1703 (1980).

Given evidence that a security deed was delivered to the clerk's office at 9:41 a.m. on the morning of the day of a foreclosure sale, and because the legal hours of sales were from 10:00 a.m. to 4:00 p.m., the assignment of the security deed to the assignee was filed prior to the sale as required by O.C.G.A. § 44-14-162(b). L & K Enters., LLC v. City National Bank, N.A., 326 Ga. App. 744, 755 S.E.2d 270, 2014 Ga. App. LEXIS 121 (2014).

Crucial point of inquiry on confirmation. — Not every irregularity furnishes a basis for voiding a foreclosure sale. The crucial point of the inquiry on confirmation is to insure that the sale was not chilled and the price bid was in fact market value. Stripling v. F & M Bank, 175 Ga. App. 75, 332 S.E.2d 373, 1985 Ga. App. LEXIS 2022 (1985).

Confirmation of sale. — The court's inquiry in a confirmation of a foreclosure sale should go only to the value of the real estate on the date of sale, in the course of the examination to determine which the fairness of the technical procedures used may be examined, but only for the purpose of making sure that the sale was not chilled and the price bid was in fact market value. Shantha v. West Ga. Nat'l Bank, 145 Ga. App. 712, 244 S.E.2d 643, 1978 Ga. App. LEXIS 2099 (1978); Walker v. Northeast Prod. Credit Ass'n, 148 Ga. App. 121, 251 S.E.2d 92, 1978 Ga. App. LEXIS 3042 (1978).

Whether in bankruptcy or not, before a deficiency action may be brought by a creditor who forecloses on Georgia real estate, it must have the price at which the property sold judicially confirmed to be an accurate reflection of the property's fair market value. United States v. Oakland City Apts., Inc., 1 B.R. 123, 1979 Bankr. LEXIS 822 (Bankr. N.D. Ga. 1979).

Trial court did not err by confirming a foreclosure sale because issues as to whether the foreclosing bank recorded an assignment of the deed to secure debt before the foreclosure sale and the validity of the assignment were irrelevant to the confirmation proceeding. River Walk Farm, L.P. v. First Citizens Bank & Trust Co., 321 Ga. App. 173, 741 S.E.2d 165, 2013 Ga. App. LEXIS 192 (2013).

Payment of surplus received from sale. — Grantee of deeds to secure debt had to pay to grantors the surplus from a foreclosure sale of two properties to the grantee's agent and a subsequent transfer of the properties to third parties for profit. Tower Fin. Servs., Inc. v. Smith, 204 Ga. App. 910, 423 S.E.2d 257, 1992 Ga. App. LEXIS 1276 (1992), cert. denied, No. S92C1381, 1992 Ga. LEXIS 821 (Ga. Oct. 2, 1992).

Upon the failure of a purchaser to comply with a high bid, a property sold at public auction may not be conveyed to the next highest bidder without complying with the terms of O.C.G.A. §§ 9-13-161 and 44-14-162. Little v. Fleet Fin., 224 Ga. App. 498, 481 S.E.2d 552, 1997 Ga. App. LEXIS 126 (1997).

Credit sale not found. — If a sheriff's sale was, in other respects, lawful, the mere fact that the sheriff gave a bidder to whom the property had been sold time within which to raise the money to pay for the property would not render it a credit sale. Dorsey v. North Am. Life Ins. Co., 217 Ga. 650, 123 S.E.2d 919, 1962 Ga. LEXIS 352 (1962).

Sale not consummated prior to bankruptcy. — Because a creditor conducted a foreclosure sale of a bankruptcy

Conduct of Sale (Cont'd)

debtor's property shortly before the debtor filed a bankruptcy petition, the debtor retained a right of redemption which passed to the bankruptcy estate since the sale was not consummated by payment of the bid amount and execution of a deed prior to the debtor's bankruptcy. Chase Home Fin. LLC v. Geiger, 340 B.R. 422, 2006 Bankr. LEXIS 897 (Bankr. M.D. Ga. 2006).

No entitlement to relief. — Borrower who claimed that a mortgage company, a company (LLC) that serviced the borrower's loan, the mortgage company's nominee, and the LLC's foreclosure counsel violated the borrower's rights when they refused to rescind a mortgage and foreclosed on investment property failed to allege facts which showed that the LLC or the nominee violated state law, the Truth in Lending Act, 15 U.S.C. § 1601 et seq., or the Fair Debt Collection Practices Act, 15 U.S.C. § 1692 et seq., and the court denied the borrower's request for a temporary restraining order or a preliminary injunction prohibiting foreclosure. The borrower incorrectly cited O.C.G.A. § 44-14-236 as the basis for the borrower's claims under state law, and the borrower failed to allege facts that entitled the borrower to relief under O.C.G.A. § 44-14-162 et seq., Georgia's nonjudicial foreclosure statute. Hennington v. Greenpoint Mortg. Funding, Inc., No. 1:09-CV-00676-RWS, No. 1:09-CV-00962-RWS, 2009 U.S. Dist. LEXIS 41343 (N.D. Ga. May 15, 2009).

Wrongful foreclosure claim sufficiently pled. — Trial court erred by dismissing the mortgagors' complaint for wrongful foreclosure because, construed in the light most favorable to the mortgagors, the complaint sufficiently alleged that the bank owed obligations to the mortgagors under the security deed and that the bank breached those contractual obligations by going forward with the foreclosure sale despite the error in the published foreclosure advertisements. Racette v. Bank of Am., N.A., 318 Ga. App. 171, 733 S.E.2d 457, 2012 Ga. App. LEXIS 873 (2012).

RESEARCH REFERENCES

Am. Jur. 2d.

55 Am. Jur. 2d, Mortgages, § 573 et seq.

C.J.S.

59A C.J.S., Mortgages, § 626 et seq.

ALR.

Statute affecting mortgagee's rights and remedies in respect of deficiency as unconstitutional impairment of obligation of contract, 108 A.L.R. 891; 115 A.L.R. 435; 130 A.L.R. 1482; 133 A.L.R. 1473.

Recognition of action for damages for wrongful foreclosure — types of actions, 82 A.L.R.6th 43.

Necessity of production of original note involved in mortgage foreclosure — twenty-first century cases, 86 A.L.R.6th 411.

44-14-162.1. "Debtor" defined.

As used in Code Sections 44-14-162.2 through 44-14-162.4, the term "debtor" means the grantor of the mortgage, security deed, or other lien contract. In the event the property encumbered by the mortgage, security deed, or lien contract has been transferred or conveyed by the original debtor, the term "debtor" shall mean the current owner of the property encumbered by the debt, if the identity of such owner has been made known to and acknowledged by the secured creditor prior to the time the secured creditor is required to give notice pursuant to Code Section 44-14-162.2.

History.
Ga. L. 1981, p. 834, § 2.

Law reviews.
For note, "Opportunity Costs: Nonjudicial Foreclosure and the Subprime Mortgage Crisis in Georgia," see 25 Ga. St. U.L. Rev. 1205 (2009).

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The definition of "debtor" in O.C.G.A. § 44-162.1 does not apply to O.C.G.A. § 44-14-161. Hill v. Moye, 221 Ga. App. 411, 471 S.E.2d 910, 1996 Ga. App. LEXIS 511 (1996).

Right to notice other than by advertisement. — Only the property owner was entitled to receive any notice of the initiation of foreclosure proceedings other than by advertisement. Breitzman v. Heritage Bank, 180 Ga. App. 171, 348 S.E.2d 713, 1986 Ga. App. LEXIS 2097 (1986).

No confirmation where no indication of proper advertising or notification. — Where no evidence appeared in the transcript of the hearing on the confirmation petition tending to indicate either that the sale was properly advertised or that the landowner was properly notified of the sale, the judgment of confirmation must be reversed. Martin v. Federal Land Bank, 173 Ga. App. 142, 325 S.E.2d 787, 1984 Ga. App. LEXIS 2747 (1984), aff'd, 254 Ga. 610, 333 S.E.2d 370 (1985).

Notice of foreclosure held sufficient. — Trial court did not err in granting a bank and a law firm summary judgment in a former husband's action alleging that they wrongfully foreclosed on property that the husband obtained from his former wife via a divorce decree because the bank and law firm provided the wife with notice of the impending foreclosure sale as required under the terms of the security deed and O.C.G.A. § 44-14-162.2; because the husband did not obtain any legal interest in the property until the quitclaim deed from his wife was filed, he was not the owner of the property at the time the bank and law firm were required to provide notice of the foreclosure sale. Farris v. First Fin. Bank, 313 Ga. App. 460, 722 S.E.2d 89, 2011 Ga. App. LEXIS 1125 (2011).

Requirements for notice to debtor. — Trial court did not err in finding the lending company failed to comply with the foreclosure notice provisions of O.C.G.A. § 44-14-162.2 because the company's attorney failed to offer any reasonable explanation as to why, despite knowing that the debtor was the record owner of the properties, the company only sent the notices to the predecessor in interest, and its agent, and the lending company was not entitled to equitable estoppel despite actual notice to the debtor. DIP Lending I, LLC v. Cleveland Avenue Properties, LLC, 345 Ga. App. 155, 812 S.E.2d 532, 2018 Ga. App. LEXIS 189 (2018).

Damages for wrongful foreclosure without notice. — In a suit brought by a purchaser seeking damages for wrongful foreclosure of certain real property after two foreclosure sales, the trial court erred in granting the second foreclosing bank attorney fees under O.C.G.A. § 9-15-14, based on frivolous litigation, as that second bank had knowledge of the purchaser's acquisition of the property via the first foreclosure, therefore, the purchaser's suit did not lack substantial justification as to the second bank and the second bank's failure to provide proper notice of the sale to the purchaser. Roylston v. Bank of Am., N.A., 290 Ga. App. 556, 660 S.E.2d 412, 2008 Ga. App. LEXIS 371 (2008).

Trial court erred by failing to confirm sale. — Trial court erred by denying a creditor's petition to confirm the foreclosure sale of six townhouses because the sale satisfied applicable notice and advertisement requirements and the uncontradicted evidence showed that the townhouses did sell for at least fair market value. RBC Real Estate Fin., Inc. v. Winmark Homes, Inc., 318 Ga. App. 507, 736 S.E.2d 117, 2012 Ga. App. LEXIS 943 (2012).

44-14-162.2. Mailing or delivery of notice to debtor; procedure.

(a) Notice of the initiation of proceedings to exercise a power of sale in a mortgage, security deed, or other lien contract shall be given to the debtor by the secured creditor no later than 30 days before the date of the proposed foreclosure. Such notice shall be in writing, shall include the name, address, and telephone number of the individual or entity who shall have full authority to negotiate, amend, and modify all terms of the mortgage with the debtor, and shall be sent by registered or certified mail or statutory overnight delivery, return receipt requested, to the property address or to such other address as the debtor may designate by written notice to the secured creditor. The notice required by this Code section shall be deemed given on the official postmark day or day on which it is received for delivery by a commercial delivery firm. Nothing in this subsection shall be construed to require a secured creditor to negotiate, amend, or modify the terms of a mortgage instrument.

(b) The notice required by subsection (a) of this Code section shall be given by mailing or delivering to the debtor a copy of the notice of sale to be submitted to the publisher.

History.

Ga. L. 1981, p. 834, § 2; Ga. L. 2000, p. 1589, § 3; Ga. L. 2001, p. 1212, § 6; Ga. L. 2008, p. 624, § 2/SB 531.

Editor's notes.

Ga. L. 2000, p. 1589, § 16, not codified by the General Assembly, provides that this Act is applicable with respect to notices delivered on or after July 1, 2000.

Ga. L. 2001, p. 1212, § 7, not codified by the General Assembly, provides that this Act is applicable with respect to notices delivered on or after July 1, 2001.

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 60 Mercer L. Rev. 345 (2008).

For annual survey on real property law, see 61 Mercer L. Rev. 301 (2009).

For annual survey of law on real property, see 62 Mercer L. Rev. 283 (2010).

For annual survey on real property, see 65 Mercer L. Rev. 233 (2013).

JUDICIAL DECISIONS

Notice via certified mail to property address is sufficient to comply with O.C.G.A. § 44-14-162.2 despite lender's actual notice of debtor's new address where debtor failed to provide written notice to lender of debtor's new address. Zeller v. Home Fed. Savs. & Loan Ass'n, 220 Ga. App. 843, 471 S.E.2d 1, 1996 Ga. App. LEXIS 212 (1996); Wright v. Barnett Mtg. Co., 226 Ga. App. 94, 485 S.E.2d 583, 1997 Ga. App. LEXIS 524 (1997).

Notice sufficient when sent to property address. — In an action that arose from foreclosure proceedings on two rental properties owned by the plaintiff, the plaintiff's claim for wrongful foreclosure pursuant to O.C.G.A. § 44-14-162.2 based on improper notice was dismissed because based on the plaintiff's concession that notices were sent to the rental properties it was clear that the notice defendants provided was sufficient; if the plaintiff wished to receive notice at a location other than the rental properties, the plaintiff was required to specify another address in writing, and the defendants'

actual knowledge of the plaintiff's California address did not trigger a duty for the defendants to send the notice to that address. Desouza v. Fed. Home Mortg. Corp., No. CV 110-130, 2012 U.S. Dist. LEXIS 110288 (S.D. Ga. Aug. 6, 2012), dismissed, No. CV 110-130, 2012 U.S. Dist. LEXIS 192273 (S.D. Ga. Dec. 10, 2012), aff'd, 572 Fed. Appx. 719, 2014 U.S. App. LEXIS 13854 (11th Cir. 2014).

Borrower's claim that the lenders' notices of foreclosure were defective because the notices were mailed to the rental properties and not to the borrower's California residential address, in violation of O.C.G.A. § 44-14-162.2(a), was rejected because the borrower never notified the lenders of the borrower's address, although the lenders had actual knowledge of the borrower's address. DeSouza v. Fed. Home Mortg. Corp., 572 Fed. Appx. 719, 2014 U.S. App. LEXIS 13854 (11th Cir. 2014).

Requirements for notice to debtor. — O.C.G.A. § 44-14-162.2 does not require a secured creditor to be identified in the notice to the debtors as all the statute requires is the name, address, and telephone number of the entity with authority to negotiate, amend, and modify the terms of the mortgage with the debtor. You v. JP Morgan Chase Bank, N.A., 293 Ga. 67, 743 S.E.2d 428, 2013 Ga. LEXIS 454 (2013).

Where a homeowner appealed a district court's decision to grant a Fed. R. Civ. P. 12(b)(6) motion in favor of a bank, the homeowner unsuccessfully contended that the foreclosure notice letter violated O.C.G.A. § 44-14-162.2 because it failed to identify the secured creditor. That statute did not categorically require the foreclosure notice to name either the secured creditor or the note holder. Abdullahi v. Bank of Am., 549 Fed. Appx. 864, 2013 U.S. App. LEXIS 23321 (11th Cir. 2013).

Trial court did not err in finding the lending company failed to comply with the foreclosure notice provisions of O.C.G.A. § 44-14-162.2 because the company's attorney failed to offer any reasonable explanation as to why, despite knowing that the debtor was the record owner of the properties, the company only sent the notices to the predecessor in interest, and its agent, and the lending company was not entitled to equitable estoppel despite actual notice to the debtor. DIP Lending I, LLC v. Cleveland Avenue Properties, LLC, 345 Ga. App. 155, 812 S.E.2d 532, 2018 Ga. App. LEXIS 189 (2018).

Insufficient allegation under the Fair Debt Collection Practices Act.— Claim under the Fair Debt Collection Practices Act, 15 U.S.C. § 1692 et seq., was not sufficiently alleged against a law firm representing the bank because the firm's involvement was limited to two statutorily required foreclosure notifications that the firm sent to the homeowners and there was no allegation that the firm had engaged in conduct related to debt collection. Saint Vil v. Perimeter Mortg. Funding Corp., 630 Fed. Appx. 928, 2015 U.S. App. LEXIS 18907 (11th Cir. 2015).

Debtor has no standing to challenge assignment. — Trial court properly granted the defendants' motion to dismiss the plaintiff's breach of contract claim for failure to state a claim because the notice of foreclosure that was attached to and incorporated into the complaint clearly showed that it included the required information and was, thus, sufficient as a matter of law under O.C.G.A. § 44-14-162.2. Bankston v. RES-GA Twelve, LLC, 334 Ga. App. 302, 779 S.E.2d 80, 2015 Ga. App. LEXIS 624 (2015).

Lower court correctly determined that the debtors lacked standing to challenge the assignment of the security deed to a bank because the security deed afforded the debtors no right to dispute the assignment as the debtors were not third-party beneficiaries of the assignment as a whole and were not intended to directly benefit from the transfer of the power of sale. Ames v. JP Morgan Chase Bank, N.A., 298 Ga. 732, 783 S.E.2d 614, 2016 Ga. LEXIS 210 (2016).

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 its agents, and could not assert an absent grantee's priority to escape the consequences of his own failure to provide a correct property address to all future hold-

ers 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 Ga. App. LEXIS 1099 (2007), cert. denied, No. S08C0335, 2008 Ga. LEXIS 169 (Ga. Feb. 11, 2008).

Trial court did not err in confirming a nonjudicial sale of certain property because the mortgagee's notice of foreclosure substantially complied with the requirements of O.C.G.A. § 44-14-162.2 and was legally sufficient for purposes of confirming the sale since the notice included the name, address, and telephone number of the mortgagee's attorney; O.C.G.A. § 44-14-162.2 does not require the individual or entity be expressly identified as having full authority to negotiate, amend, and modify all terms of the mortgage. TKW Partners, LLC v. Archer Capital Fund, L.P., 302 Ga. App. 443, 691 S.E.2d 300, 2010 Ga. App. LEXIS 156 (2010).

Creditor's notice of a foreclosure sale that was sent to the debtor's original address listed in the loan documents complied with O.C.G.A. § 44-14-162.2, although the creditor was aware that the debtor had a new address. The debtor's obligation to provide written notice of the address change was not satisfied by a phone call to the creditor, nor the debtor's return address on the debtor's payment envelopes, nor even the creditor's actual notice of the new address. Colbert v. Branch Banking & Trust Co., 302 Ga. App. 687, 691 S.E.2d 598, 2010 Ga. App. LEXIS 210 (2010).

Trial court did not err in granting a bank and a law firm summary judgment in a former husband's action alleging that they wrongfully foreclosed on property that the husband obtained from the former wife via a divorce decree because the bank and law firm provided the wife with notice of the impending foreclosure sale as required under the terms of the security deed and O.C.G.A. § 44-14-162.2; because the husband did not obtain any legal interest in the property until the quitclaim deed from his wife was filed, the husband was not the owner of the property at the time the bank and law firm were required to provide notice of the foreclosure sale. Farris v. First Fin. Bank, 313 Ga. App. 460, 722 S.E.2d 89, 2011 Ga. App. LEXIS 1125 (2011).

Bank gave proper statutory notification of a foreclosure sale to property owners pursuant to O.C.G.A. § 44-14-162(a) when the bank sent to the property's address and the property owners' primary residence, by certified mail, a written notice of the foreclosure sale that specified the bank as the foreclosing party by name, address, and telephone number pursuant to O.C.G.A. § 44-14-162.2. Mortensen v. Bank of Am., N.A., No. 3:10-CV-13, 2011 U.S. Dist. LEXIS 132637 (M.D. Ga. Nov. 17, 2011).

Former spouse did not demonstrate that a bank and law firm failed to comply with O.C.G.A. § 44-14-162.2(a) because following the former spouse's alleged acquisition of the property, the former spouse provided no evidence that a written request was made that the bank and law firm send any notices regarding the property to a different address; thus, the bank and law firm complied with the statute by the certified mailing of the foreclosure notice to the property address. Farris v. First Fin. Bank, 313 Ga. App. 460, 722 S.E.2d 89, 2011 Ga. App. LEXIS 1125 (2011).

Foreclosure Notice document — whose authenticity had not been challenged by plaintiff — clearly demonstrated that the Notice complied with all statutory requirements where the trustee was the proper secured creditor and was identified, the Notice was sent to the property address, which was authorized under the statute, and plaintiff had not alleged that plaintiff requested the Notice be sent to an alternate address. Bowman v. U.S. Bank Nat'l Ass'n, No. 1:12-cv-04263-JOF, 2013 U.S. Dist. LEXIS 149660 (N.D. Ga. Aug. 1, 2013).

District court did not err in dismissing the debtor's wrongful foreclosure claim against the bank and a law firm without leave to amend because the debtor could no longer amend as a matter of course, and amending the complaint would be futile as the debtor alleged no facts suggesting that the bank did not have legal

right to foreclose, and the record reflected that the bank, through the law firm, gave adequate notice, so the debtor would not have been able to state a claim under the Fair Debt Collection Practices Act, 15 U.S.C. § 1692k, wrongful foreclosure claim, or trespass claim as each of those claims would have been predicated on improper foreclosure proceedings. Muhammad v. JPMorgan Chase Bank, NA, 567 Fed. Appx. 851, 2014 U.S. App. LEXIS 9901 (11th Cir. 2014).

Foreclosure notice substantially complied with Georgia's statutory notice requirements, even though the notice incorrectly identified the loan servicer as the entity with full authority to modify the borrowers' loan because the servicer directed the borrowers to Fannie Mae, the entity with full authority to modify their loan. Haynes v. McCalla Raymer LLC, 793 F.3d 1246, 2015 U.S. App. LEXIS 12025 (11th Cir. 2015).

In an action by a decedent's estate administrator, seeking to enjoin, inter alia, the non-judicial foreclosure sale of certain real property, the district court had subject matter jurisdiction because a foreclosure law firm had been fraudulently joined due to the lack of a possible claim against it as the notice of sale identified the proper entity with full authority to negotiate, amend, and modify all terms of the mortgage. Shannon v. Albertelli Firm, P.C., 610 Fed. Appx. 866, 2015 U.S. App. LEXIS 7552 (11th Cir. 2015).

In an action by a decedent's estate administrator, seeking to enjoin, inter alia, the non-judicial foreclosure sale of certain real property, notice was appropriate because it identified the entity with full authority to negotiate, amend, and modify all terms of the mortgage, although another entity held the note. Shannon v. Albertelli Firm, P.C., 610 Fed. Appx. 866, 2015 U.S. App. LEXIS 7552 (11th Cir. 2015).

When a homeowner appealed a district court's Fed. R. Civ. P. 12(b)(6) dismissal of a case arising from an attempted nonjudicial foreclosure, the homeowner's claim that the notice of foreclosure was deficient because the notice omitted the words full and all was rejected. Kurtzman v. Nationstar Mortg. LLC, 709 Fed. Appx. 655, 2017 U.S. App. LEXIS 19750 (11th Cir. 2017).

Notice of foreclosure proceedings sufficient. — Trial court did not err in granting summary judgment in favor of the mortgagee in a wrongful foreclosure action because the mortgagee submitted evidence that the mortgagee's attorney mailed written notice of the initiation of foreclosure proceedings on the mortgagor by certified mail and by regular mail to the property address and to the mortgagor's post office box and, although there is no evidence that the mortgagor received any of the notices, the evidence of the proof of mailing was sufficient. Thompson-El v. Bank of Am., N.A., 327 Ga. App. 309, 759 S.E.2d 49, 2014 Ga. App. LEXIS 325 (2014).

Trial court did not err in finding that the foreclosure notice satisfied the requirements of O.C.G.A. § 44-14-162.2 because the loan servicing corporation complied with the statute by sending the mortgagor a notice of foreclosure more than 30 days before the non-judicial foreclosure sale and the notice specifically informed the mortgagor that the loan servicing corporation had authority to negotiate, amend, and modify all terms of their note and security deed. Reese v. Provident Funding Assocs., LLP, 327 Ga. App. 266, 758 S.E.2d 329, 2014 Ga. App. LEXIS 314 (2014).

Requirement that a notice of foreclosure must be sent by the secured party means by the foreclosing party, i.e., the name of the party with the authority to negotiate, amend, and modify the terms of the loan, and the required notice need not expressly identify the foreclosing party as a secured creditor. Sheely v. Bank of Am., N.A., 36 F. Supp. 3d 1364, 2014 U.S. Dist. LEXIS 110173 (N.D. Ga. 2014).

Unpublished decision: Lender directed the homeowners to Fannie Mae to modify their loan and the notice the homeowners received substantially complied with the statutory notice requirements. Haynes v. McCalla Raymer, LLC, No. 14-14036, 2015 U.S. App. LEXIS 11924 (11th Cir. July 10, 2015).

District court did not err in granting summary judgment to a mortgage company on the pro se plaintiffs' wrongful

foreclosure claim as there were no genuine issues of material fact; as a matter of contract, the mortgage company complied with all the terms of the security deed's power of sale provision, and the notice of default also showed that it substantially complied with the statutory requirements of O.C.G.A. § 44-14-162.2(a). Aning v. Fannie Mae, 633 Fed. Appx. 773, 2016 U.S. App. LEXIS 17634 (11th Cir. 2016).

Material question of fact regarding sufficiency of notice. — There remained a material question of fact as to plaintiff debtors' claim to set aside a foreclosure sale based on the lack of proper statutory notice because, under O.C.G.A. § 44-14-162.2(b), nonjudicial foreclosure procedure required that a "copy" of the notice submitted to the publisher be sent to the debtor. The notice sent to the debtors differed from the one published. Rainey v. FMF Capital, LLC, No. 1:11-CV-0364-CAP, 2012 U.S. Dist. LEXIS 117200 (N.D. Ga. Mar. 30, 2012).

Trial court erred in granting summary judgment to a loan servicer on a borrower's claim for wrongful foreclosure because there was evidence that the servicer failed to provide notice of the foreclosure to the borrower's attorney as the borrower had requested in compliance with O.C.G.A. § 44-14-162.2. Zhong v. PNC Bank, N.A., 345 Ga. App. 135, 812 S.E.2d 514, 2018 Ga. App. LEXIS 184 (2018), cert. denied, No. S18C1034, 2018 Ga. LEXIS 696 (Ga. Oct. 9, 2018), cert. denied, No. S18C1032, 2018 Ga. LEXIS 700 (Ga. Oct. 9, 2018).

Notice held insufficient. — While the bank's first letter was sent by certified mail, it was not a notice of the initiation of proceedings to exercise a power of sale, but was an initial correspondence letter and the bank's second letter to the debtors was a notice of foreclosure sale for the property, but was only sent by first class mail, which did not satisfy the requirements of O.C.G.A. § 44-14-162.2(a). Peters v. CertusBank Nat'l Ass'n, 329 Ga. App. 29, 763 S.E.2d 498, 2014 Ga. App. LEXIS 614 (2014).

Right to notice other than by advertisement. — Only the property owner was entitled to receive any notice of the initiation of foreclosure proceedings other than by advertisement. Breitzman v. Heritage Bank, 180 Ga. App. 171, 348 S.E.2d 713, 1986 Ga. App. LEXIS 2097 (1986).

Deed of sale need not be set aside where only 14 days' notice was received by property owner who had defaulted on installment payments, even though O.C.G.A. § 44-14-162.4 requires that a deed under power contain a recital setting forth the giving of 15-day notice. Abdalla v. Reagin Enters., Inc., 256 Ga. 279, 347 S.E.2d 585, 1986 Ga. LEXIS 805 (1986).

Actual receipt of properly mailed notice immaterial. — Where it was undisputed that the grantee mailed a notification of the sale under power correctly addressed to the grantor in accordance with O.C.G.A. § 44-14-162.2, the actual receipt (or want of receipt) by the grantor of the notice of sale under power was immaterial to the right of the grantee to sale under power. McCollum v. Pope, 261 Ga. 835, 411 S.E.2d 874, 1992 Ga. LEXIS 22 (1992).

The notice is complete upon mailing to the address of record with the creditor and the debtor's actual receipt of the notice is immaterial. Davis v. Victor Warren Properties, Inc., 216 B.R. 898, 1997 Bankr. LEXIS 2142 (Bankr. N.D. Ga. 1997).

Trial court properly refused to set aside a foreclosure sale and a deed under a power of sale, as plaintiffs, first and second mortgagors, received the 15-day notice of the sale that was required by O.C.G.A. § 44-14-162.2; plaintiffs' failure to accept the certified letter containing the notice constituted receipt, as the letter was properly addressed and mailed to their post office box. Arrington v. Reynolds, 255 Ga. App. 291, 564 S.E.2d 870, 2002 Ga. App. LEXIS 603 (2002).

Although the debtors did not receive the Notice of Acceleration and Foreclosure because it was delivered to and signed for by their granddaughter who lives next door, it was undisputed that the Notice was correctly addressed. Accordingly, the lack of receipt was immaterial under Georgia law. 21st Mortg. Corp. v. Johnson (In re Johnson), 2015 Bankr. LEXIS 537 (Bankr. S.D. Ga. Feb. 18, 2015).

Chapter 13 debtor's wrongful foreclosure claim failed because the bank mailed notice of the sale under power to the

debtor in accordance with the requirements of Georgia law, and actual receipt was immaterial to the right of the bank. Because there was no state action involved, constitutional due process was not implicated. McCallum v. Bank of Am., N.A. (In re McCallum), No. 17-51487-JPS, No. 17-5054, 2018 Bankr. LEXIS 815 (Bankr. M.D. Ga. Mar. 22, 2018).

Foreclosure of unimproved lots. — The notice requirements of O.C.G.A. § 44-14-162.2 were not applicable to the foreclosure of unimproved lots. Stepp v. Farm & Home Life Ins. Co., 222 Ga. App. 257, 474 S.E.2d 108, 1996 Ga. App. LEXIS 801 (1996).

Complaint was not sufficient to state a claim. — Claim for wrongful foreclosure was insufficient to state a claim because the foreclosing bank, as the assignee of a deed of trust, had authority to conduct the non-judicial foreclosure despite the fact the bank did not hold the note. Muhammad v. JP Morgan Chase Bank, N.A., No. 1:13-CV-00353-MHS-JFK, 2013 U.S. Dist. LEXIS 192825 (N.D. Ga. June 19, 2013), dismissed, No. 1:13-CV-00353-MHS, 2013 U.S. Dist. LEXIS 192824 (N.D. Ga. July 22, 2013).

Borrower was not allowed to add a claim under O.C.G.A. § 44-14-162.2 against the assignee lender since the claims were based on the assertion that the assignee did not have full authority to negotiate, amend, and modify the terms of the loan because it was merely a servicing agent, the Georgia Supreme Court had indicated that a servicing agent could have full authority within the meaning of § 44-14-162.2, and the assignee was specifically assigned both the security deed and the promissory note as well as all powers, options, privileges, and immunities arising under those instruments. Hall v. HSBC Mortg. Servs., 581 Fed. Appx. 800, 2014 U.S. App. LEXIS 17970 (11th Cir. 2014).

Complaint stated claim for wrongful foreclosure. — Trial court erred in dismissing a pro se borrower's complaint for wrongful foreclosure and breach of contract against his lender's alleged assignee; the trial court could not consider documents attached to the motion to dismiss, and the complaint adequately alleged failure to give the borrower notice and improper advertising, contrary to O.C.G.A. §§ 44-14-162.2 and 44-14-162(a). Babalola v. HSBC Bank, USA, N.A., 324 Ga. App. 750, 751 S.E.2d 545, 2013 Ga. App. LEXIS 924 (2013).

Damages for wrongful foreclosure without notice. — In a suit brought by a purchaser seeking damages for wrongful foreclosure of certain real property after two foreclosure sales, the trial court erred in granting the second foreclosing bank attorney fees under O.C.G.A. § 9-15-14, based on frivolous litigation, as that second bank had knowledge of the purchaser's acquisition of the property via the first foreclosure, therefore, the purchaser's suit did not lack substantial justification as to the second bank and the second's bank failure to provide proper notice of the sale to the purchaser. Roylston v. Bank of Am., N.A., 290 Ga. App. 556, 660 S.E.2d 412, 2008 Ga. App. LEXIS 371 (2008).

Allegation of failure to provide notice supports wrongful foreclosure claim. — Trial court erred in finding that a mortgagor's claim that the mortgagee breached the mortgagee's duty in failing to provide proper notice of the foreclosure sale showed no basis for a wrongful foreclosure claim because an allegation that the lender failed to provide notice of foreclosure as required by O.C.G.A. § 44-14-162.2 supported a wrongful foreclosure claim under Georgia law and the trial court erroneously considered the mortgagee's evidence outside of the pleadings. Mbigi v. Wells Fargo Home Mortg., 336 Ga. App. 316, 785 S.E.2d 8, 2016 Ga. App. LEXIS 173 (2016).

Application to foreclosure sales. — Trial court properly granted summary judgment to two banks in a purchaser's suit seeking the excess proceeds from two foreclosure sales and damages based upon claims that the banks failing to provide proper notice of the foreclosure sales as required by the Georgia Residential Mortgage Act, O.C.G.A. § 44-14-162.2, did not apply to the foreclosure sales at issue, rather, the statute only applies to the sale of a mortgage loan. Roylston v. Bank of Am., N.A., 290 Ga. App. 556, 660 S.E.2d 412, 2008 Ga. App. LEXIS 371 (2008).

Rescission of foreclosure sale. — Trial court properly granted summary

judgment to a bank in a suit alleging wrongful rescission by a purchaser after the bank rescinded a foreclosure sale because the case law holding that substantial compliance with O.C.G.A. § 44-14-162.2 is sufficient in the notice to the debtor did not apply retroactively to avoid the bank's avail of the safe harbor provision of O.C.G.A. § 9-13-172.1(d)(1). Stowers v. Branch Banking & Trust Co., 317 Ga. App. 893, 731 S.E.2d 367, 2012 Ga. App. LEXIS 740 (2012), cert. denied, No. S13C0317, 2013 Ga. LEXIS 114 (Ga. Feb. 4, 2013).

Res judicata barred subsequent suit against bank following foreclosure. — Trial court properly granted the bank's motion to dismiss the plaintiffs' breach of contract and wrongful foreclosure claims under O.C.G.A. § 9-11-12(b)(6) because the plaintiffs' previous litigation against the bank could have included the plaintiffs' new claims and, thus, were barred by the doctrine of res judicata. Harris v. Deutsche Bank Nat'l Trust Co., 338 Ga. App. 838, 792 S.E.2d 111, 2016 Ga. App. LEXIS 550 (2016).

Proof of notice was insufficient to support motion to dismiss. — Court found that the notice of foreclosure letter did not meet all of the statutory requirements of O.C.G.A. § 44-14-162.2. The notice failed to indicate whether it was sent by registered or certified mail or statutory overnight delivery, and thus the court could not dismiss the borrower's wrongful foreclosure claim on this basis. Rule v. Chase Home Fin. LLC, No. 3:11-CV-146, 2012 U.S. Dist. LEXIS 69699 (M.D. Ga. May 18, 2012).

Wrongful foreclosure claim was unavailing. — In a wrongful foreclosure action, the property owner did not show that a bank breached a legal duty owed to the owner with respect to providing notice under O.C.G.A. § 44-14-162.2 because the owner did not show that the bank breached a legal duty owed to the owner, the owner's wrongful foreclosure claim was unavailing. Carr v. U.S. Bank, N.A., 539 Fed. Appx. 926, 2013 U.S. App. LEXIS 18441 (11th Cir. 2013).

Trial court erred by failing to confirm sale. — Trial court erred by denying a creditor's petition to confirm the foreclosure sale of six townhouses because the sale satisfied applicable notice and advertisement requirements and the uncontradicted evidence showed that the townhouses did sell for at least fair market value. RBC Real Estate Fin., Inc. v. Winmark Homes, Inc., 318 Ga. App. 507, 736 S.E.2d 117, 2012 Ga. App. LEXIS 943 (2012).

RESEARCH REFERENCES

ALR.

Recognition of action for damages for wrongful foreclosure — types of actions, 82 A.L.R.6th 43.

44-14-162.3. Waiver or release of notice requirement.

No waiver or release of the notice requirement of Code Section 44-14-162.2 shall be valid when made in or contemporaneously with the security instrument containing the power of nonjudicial foreclosure sale; but, notwithstanding the requirements of Code Sections 44-14-162.1, 44-14-162.2, this Code section, and Code Section 44-14-162.4, a subsequent quitclaim deed in lieu of foreclosure shall be valid and effective as such.

History.

Ga. L. 1981, p. 834, § 2; Ga. L. 2002, p. 415, § 44; Ga. L. 2009, p. 614, § 2/SB 141; Ga. L. 2012, p. 1079, § 1/SB 333.

Editor's notes.

Ga. L. 2012, p. 1079, § 3/SB 333, not codified by the General Assembly, provides that: "This Act shall become effective on July 1, 2012, and shall apply to sales made on foreclosure under power of sale executed on or after July 1, 2012."

Law reviews.

For annual survey on real property law, see 61 Mercer L. Rev. 301 (2009).

For article, "Georgia Foreclosure Confirmation Proceedings in Today's Recessionary Real Estate World: Back to the Future," see 16 (No. 4) Ga. St. B.J. 11 (2010).

For annual survey on real property, see 64 Mercer L. Rev. 255 (2012).

JUDICIAL DECISIONS

Foreclosure of unimproved lots. — The notice requirements of O.C.G.A. § 44-14-162.2 were not applicable to the foreclosure of unimproved lots. Stepp v. Farm & Home Life Ins. Co., 222 Ga. App. 257, 474 S.E.2d 108, 1996 Ga. App. LEXIS 801 (1996).

44-14-162.4. Recitals in deeds as to meeting of notice requirement.

All deeds under power shall contain recitals setting forth the giving of notice in compliance with Code Section 44-14-162.2. The effect of such recitals shall be to protect the validity of the title of any subsequent purchaser in good faith other than the lender.

History.

Ga. L. 1981, p. 834, § 2; Ga. L. 2012, p. 1079, § 2/SB 333.

Editor's notes.

Ga. L. 2012, p. 1079, § 3/SB 333, not codified by the General Assembly, provides that: "This Act shall become effective on July 1, 2012, and shall apply to sales made on foreclosure under power of sale executed on or after July 1, 2012."

JUDICIAL DECISIONS

Deed of sale need not be set aside where only 14 days' notice was received by property owner who had defaulted on installment payments, even though O.C.G.A. § 44-14-162.4 requires that a deed under power contain a recital setting forth the giving of 15-day notice. Abdalla v. Reagin Enters., Inc., 256 Ga. 279, 347 S.E.2d 585, 1986 Ga. LEXIS 805 (1986).

44-14-163. Vacation of certain judgments prior to sale; jurisdiction, power, and authority.

When a judgment is rendered upon any obligation secured by a deed to secure debt, a bond for title to realty, or a bill of sale to personalty given under Code Section 44-14-60, the court which rendered the judgment shall have the jurisdiction, power, and authority to vacate and set aside the judgment at any time before the sale of the property described in the deed, bond for title, or bill of sale is made upon the motion of the attorney of the plaintiff in execution and of the attorney of the defendant in execution and the payment of the costs. The jurisdiction, power, and authority to vacate and set aside a judgment as provided in this Code section shall extend to a judgment on a purchase-money note, a conditional sale contract where a title is reserved as security or a bond for title is given, a judgment and decree foreclosing a mortgage, and all other cases where it is necessary under Code

Section 44-14-210 to reconvey property to the defendant in execution for the purpose of levy and sale.

History.
Ga. L. 1927, p. 220, § 1; Code 1933, § 110-801.

RESEARCH REFERENCES

ALR.
Taking note for price as waiver of reservation of title under conditional sale, 13 A.L.R. 1044; 55 A.L.R. 1160.

Power of lower court to set aside, on ground of fraud, judgment entered pursuant to mandate of, or affirmed by, review court, 146 A.L.R. 1230.

Vacation or setting aside of judgment as to one or more of multiple parties against whom rendered as requiring its vacation as to all, 42 A.L.R.2d 1030.

Consent as ground for vacating judgment, or granting new trial, in civil case, after expiration of term or time prescribed by statute or rules of court, 3 A.L.R.3d 1191.

44-14-164. Vacation of certain judgments prior to sale; cancellation of execution; invalidation of deed made for purpose of levy and sale; notation on record.

Whenever a judgment is so vacated and set aside, the clerk of the court in which it was rendered shall mark the fi. fa. issued on the judgment "canceled"; and the clerk of the superior court shall enter the same upon the general execution docket and make thereon an appropriate reference to the order vacating the judgment. Whenever a judgment is vacated and set aside as provided in Code Section 44-14-163, any deed reconveying the property to the defendant in fi. fa. for the purpose of levy and sale shall be automatically canceled and rendered null and void by virtue of this Code section; and the clerk of the superior court shall enter on the record of such deed or reconveyance, when recorded, the word "canceled" and shall make an appropriate reference to the order vacating the judgment.

History.
Ga. L. 1927, p. 220, § 2; Code 1933, § 110-802.

RESEARCH REFERENCES

ALR.
Taking note for price as waiver of reservation of title under conditional sale, 13 A.L.R. 1044; 55 A.L.R. 1060.

Rights and remedies respecting improvements made in reliance on a decree or order as to title or possession of real property which is subsequently reversed, 30 A.L.R. 936.

Reversal of judgment as affecting another judgment based on the reversed judgment and rendered pending the appeal, 81 A.L.R. 712.

44-14-165. Vacation of certain judgments prior to sale; effect.

When a judgment is vacated and set aside as provided by Code Sections 44-14-163 and 44-14-164, the obligation upon which the judgment was rendered, as well as the deed, bond for title, bill of sale securing the same, and other instruments mentioned in Code Section 44-14-163, shall be fully restored in all respects to their original status which existed prior to the commencement of the action in which the judgment was rendered; and thereafter the instruments shall be for all purposes whatsoever legally of force and effect as if an action had not been instituted and a judgment had not been obtained on the obligation.

History.
Ga. L. 1927, p. 220, § 3; Code 1933, § 110-803.

RESEARCH REFERENCES

ALR.
Rights and remedies respecting improvements made in reliance on a decree or order as to title or possession of real property which is subsequently reversed, 30 A.L.R. 936.

Part 2

Foreclosure on Mortgages

Law reviews.
For note discussing how an open end or dragnet clause within a deed to secure debt ensnares subsequent purchasers of real property in light of Commercial Bank v. Readd, 240 Ga. 519, 242 S.E.2d 25 (1978), see 30 Mercer L. Rev. 363 (1978).

RESEARCH REFERENCES

ALR.
Power of court to authorize discontinuance of public service corporation upon foreclosing a mortgage on its plant, 8 A.L.R. 238.

Sale under power in mortgage or trust deed as affected by inadequacy of price, 8 A.L.R. 1001.

Effect of foreclosure of mortgage as terminating lease, 14 A.L.R. 664.

Contracts requiring vendor or mortgagee to look to property alone for payment, 17 A.L.R. 714.

Right of mortgagee to receiver, 36 A.L.R. 609; 55 A.L.R. 533; 87 A.L.R. 1008; 111 A.L.R. 730.

Remedies in respect of mortgage on real property in another state or the debt secured thereby, 42 A.L.R. 470.

Reacquisition by mortgagor, or his grantee, of the title through foreclosure of first mortgage as affecting rights under a second mortgage to which the property was subject before the foreclosure, 51 A.L.R. 445; 111 A.L.R. 1285.

Validity and effect of provision in insurance policy for forfeiture upon foreclosure, or commencement of foreclosure, or other proceeding to enforce a mortgage, 57 A.L.R. 1044.

Rights and remedies of purchaser under foreclosure sale where foreclosure proceedings are imperfect or irregular, 73 A.L.R. 612.

Validity of mortgage securing unlimited future advances, 81 A.L.R. 631.

Right under mortgage by co-owners of undivided interests to foreclose as against less than all of such interests, 82 A.L.R. 1347.

Power of court or receiver pending foreclosure suit and before sale as regards rental or other conditions of occupation, with respect to persons in possession under lease or agreement subordinate to mortgage, 86 A.L.R. 366.

Power of Legislature or court to protect bondholders as class, without consent of all of them, against sacrifice of property on foreclosure, 88 A.L.R. 1270.

Financial depression as justification of moratorium or other relief to mortgagors, 90 A.L.R. 1330; 94 A.L.R. 1352; 96 A.L.R. 853; 97 A.L.R. 1123; 104 A.L.R. 375.

Misstatement as to amount of liens against the property in notice of sale under power in real estate mortgage, as affecting validity of sale or as ground for avoiding it, 91 A.L.R. 731.

Implied power of trustee under mortgage or deed of trust who purchases property in behalf of bondholders at foreclosure sale, to give new mortgage, 95 A.L.R. 527.

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 A.L.R. 216.

Covenant in real estate mortgage to pay taxes as surviving foreclosure, 99 A.L.R. 581.

Liability of mortgagee or mortgaged property for expenses of receivership not sought by him, or for expenditures by receiver in connection with the property, 104 A.L.R. 990.

Failure to take judgment for deficiency in suit to foreclose mortgage brought after appointment of receiver or trustee in bankruptcy of mortgagor as affecting right to its allowance as claim in insolvency or bankruptcy proceedings, 104 A.L.R. 1141.

Liability of mortgagee for damages because of wrongful foreclosure or improper execution of rightful foreclosure, 108 A.L.R. 592.

Relation and rights inter se of purchaser under foreclosure of mortgage and tenant under lease subsequent to mortgage, 109 A.L.R. 447.

Provisions in mortgage of real property, or decree of foreclosure, or extraneous agreements, as affecting right of purchaser at foreclosure to what would otherwise pass as part of the realty, 110 A.L.R. 347.

Right to maintain single suit to foreclose separate mortgages, securing same debt or portions thereof, upon real property in different counties, 110 A.L.R. 1477.

Release of mortgagor (or intermediate grantee who has assumed the mortgage) by subsequent dealings between his grantee and mortgagee, 112 A.L.R. 1324.

Right to join state (or officer who represents state) in mortgage foreclosure suit in order to cut off interest acquired by state subject to the mortgage, 113 A.L.R. 1511.

Accountability of mortgagee or pledgee for profit made upon resale of the property after purchase thereof at foreclosure or other enforcement sale, 117 A.L.R. 863.

Strict foreclosure as remedy where claimant of title, interest, or lien subordinate to mortgage was not made party to prior judicial foreclosure and sale, 118 A.L.R. 769.

Judgment for debt without foreclosure of mortgage securing it as affecting mortgage, or right to foreclose the same, where no execution or attachment is levied under the judgment, 121 A.L.R. 917.

Sale in inverse order of alienation, 131 A.L.R. 4.

Right of junior lienor in respect of redemption as affected by failure to make him a party to suit to foreclose senior mortgage or properly to serve him with process in such suit, 134 A.L.R. 1490.

Validity and effect, as against mortgagee or purchaser upon foreclosure, of mortgagor's assignment of rents to third person, 146 A.L.R. 1133.

Waiver of right to foreclose mortgage, 148 A.L.R. 686.

Opening mortgage foreclosure decree to bring in omitted parties, 155 A.L.R. 66.

Extension of time to redeem from mortgage foreclosure sale, by agreement or other acts of one person entitled to redeem, as inuring to benefit of other person entitled to redeem, 161 A.L.R. 201.

Foreclosure of mortgage or trust deed as affecting easement claimed in, over, or under property, 46 A.L.R.2d 1197.

Foreclosure sale or mortgaged real estate as a whole or in parcels, 61 A.L.R.2d 505.

Right of junior mortgagee whose mortgage covers only a part of land subject to first mortgage to redeem pro tanto, where he was not bound by foreclosure sale, 46 A.L.R.3d 1362.

Failure to keep up insurance as justifying foreclosure under acceleration provision in mortgage or deed of trust, 69 A.L.R.3d 774.

44-14-180. Manner of foreclosing; petition; rule; venue.

Mortgages on real estate may be foreclosed in the following manner:

(1) Any person who applies and who is entitled to foreclose the mortgage shall, by himself or his attorney, petition the superior court of the county wherein the mortgaged property is located, which petition shall contain a statement of the case, the amount of the petitioner's demand, and a description of the property mortgaged;

(2) Upon the filing of the petition, the court shall grant a rule directing that the principal, the interest, and the costs be paid into court. The rule shall be published twice a month for two months or served on the mortgagor or his special agent or attorney at least 30 days prior to the time at which the money is directed to be paid into the court; and

(3) Notwithstanding paragraphs (1) and (2) of this Code section, where the land covered by the mortgage shall consist of a single tract of land divided by a county line or county lines, the mortgage may be foreclosed on the entire tract in either of the counties in which part of it is located; but, if the mortgagor shall reside upon the land, the mortgage shall be foreclosed in the county of his residence.

History.

Laws 1829, Cobb's 1851 Digest, pp. 570, 572; Laws 1836, Cobb's 1851 Digest, p. 572; Code 1863, § 3866; Code 1868, § 3886; Code 1873, § 3962; Ga. L. 1878-79, p. 50, § 1; Code 1882, § 3962; Civil Code 1895, § 2743; Civil Code 1910, § 3276; Ga. L. 1920, p. 78, § 1; Code 1933, § 67-201.

Law reviews.

For note discussing problems with venue in Georgia, and proposing statutory revisions to improve the resolution of venue questions, see 9 Ga. St. B.J. 254 (1972).

JUDICIAL DECISIONS

Analysis

General Consideration
Service

General Consideration

Foreclosure consequences of power to mortgage. Adams v. Mayor of Rome, 59 Ga. 765, 1877 Ga. LEXIS 389 (1877).

Proceeding statutory. — The proceeding to foreclose under O.C.G.A. § 44-14-180 was statutory, and not an equitable action. Smith v. First Nat'l Bank, 143 Ga. 543, 85 S.E. 696, 1915 Ga. LEXIS 513 (1915).

Locus of land gives jurisdiction. — Under O.C.G.A. § 44-14-180 the locus of the land gives jurisdiction, and the only judgment the court can pass is that the lands shall be sold to satisfy the debt. No other property can be levied on. DeGive v. Lewis, 52 Ga. 588, 1874 Ga. LEXIS 359 (1874).

Where judgment is granted in the county of the mortgagor's residence, which is not where the land is situated, the claimant of the land under a mortgage fi. fa. may raise the objection on the trial of the claim. Hackenhull v. Westbrook, 53 Ga. 285, 1874 Ga. LEXIS 465 (1874).

Venue of attorney's liens. — A proceeding to foreclose an attorney's lien upon real property is to be brought as is a proceeding to foreclose a mortgage upon property of like kind; and hence the venue of such a proceeding is the county wherein the land lies as provided for in O.C.G.A. § 44-14-180. McCalla v. Nichols, 102 Ga. 28, 28 S.E. 988, 1897 Ga. LEXIS 443 (1897).

The action fails, where there is a total absence of a rule nisi in a mortgage foreclosure, and the mere filing of the petition will not suffice to authorize the action to be treated as commenced and pending. York v. Edwards, 52 Ga. App. 388, 183 S.E. 339, 1936 Ga. App. LEXIS 646 (1936).

Effect of waiver of statutory requirements. — Waivers by the defendant of statutory requirements, of O.C.G.A. §§ 44-14-180 and 44-14-181, and consents that the rules nisi and absolute may be issued and the mortgage finally foreclosed at the first term, do not bind third persons, nor confer such jurisdiction on the court as will authorize it to render a final judgment of foreclosure at the first term. As to third persons such a judgment is void. Smith v. First Nat'l Bank, 143 Ga. 543, 85 S.E. 696, 1915 Ga. LEXIS 513 (1915).

A petition, under O.C.G.A. § 44-14-180 is a pleading and may be amended as a pleading. Ledbetter v. McWilliams, 90 Ga. 43, 15 S.E. 634, 1892 Ga. LEXIS 119 (1892).

Foreclosure as action within statute of limitations. George v. Gardner, 49 Ga. 441, 1873 Ga. LEXIS 397 (1873).

In seeking to foreclose a mortgage which on its face appears to be barred by the statute of limitations, where the desire is to avoid the bar by reason of a new promise of partial payment, such relieving facts must be alleged with sufficient certainty under O.C.G.A. § 44-14-180 to enable the defendant to meet the same by plea as well as proof. Jesup v. Epping, 66 Ga. 334, 1881 Ga. LEXIS 16 (1881).

Proceedings were not barred by the limitations statute. York v. Edwards, 52 Ga. App. 388, 183 S.E. 339, 1936 Ga. App. LEXIS 646 (1936).

Pendency of proceedings no hindrance to other actions. — The pendency of proceedings to foreclose a mortgage under O.C.G.A. § 44-14-180, is no hindrance to a regular action upon the notes to secure which the mortgage was given. Juchter v. Boehm, Bendheim & Co., 63 Ga. 71, 1879 Ga. LEXIS 122 (1879).

Lack of title in mortgagor. — Where the mortgagor of land has no title to it, but only a bargain for it, with part payment of the purchase money, the mortgagee cannot have the aid of a court of equity to foreclose the mortgage as against the holder of the title, without offering to pay the remainder of the purchase money. Crummey v. Mechanics' & Sav. Bank, 30 Ga. 670, 1860 Ga. LEXIS 167 (1860).

Debt not due at commencement of terms. — Although, when the term commenced at which the rule nisi to foreclose was taken, the debt, to secure which the mortgage was given, was not due, yet if, when the petition and rule nisi were represented, the debt had matured and the rule nisi was served on the defendant more than three months (now 30 days) before the next term, at which the money due on the mortgage was required to be paid; this is all that the mortgagee was

entitled to under O.C.G.A. § 44-14-180. Hart v. Altmeyer & Co., 74 Ga. 367, 1884 Ga. LEXIS 393 (1884).

The evidence in a claim case pending a fi. fa. on a mortgage was sufficient to show that a rule nisi and a rule absolute were granted. Redding v. Anderson, 144 Ga. 100, 86 S.E. 241, 1915 Ga. LEXIS 71 (1915).

No appeal lies from a rule absolute awarded by the court for the foreclosure of a mortgage. Clifton v. Livor, 24 Ga. 91, 1858 Ga. LEXIS 162 (1858).

For discussion of the effect on O.C.G.A. § 44-14-180 of certain laws not directly amending that section, see Swift v. Van Dyke, 98 Ga. 725, 26 S.E. 59, 1896 Ga. LEXIS 132 (1896).

Service

Process compared. — While the rule nisi signed by the judge differs from the process issued by the clerk in ordinary cases, in that there must be personal service or service by publication, and the leaving of a copy at the defendant's residence is not sufficient, as well as differing in other respects, it is nevertheless in many respects analogous to regular process. York v. Edwards, 52 Ga. App. 388, 183 S.E. 339, 1936 Ga. App. LEXIS 646 (1936).

Rule is only process. — In a statutory proceeding to foreclose a mortgage on realty, the only "process" that is necessary is the rule nisi prescribed by O.C.G.A. § 44-14-180, and the only prayer for process that is necessary is a prayer for such a rule. Smith v. Downing Co., 21 Ga. App. 741, 95 S.E. 19, 1918 Ga. App. LEXIS 505 (1918). See also Montgomery v. King, 123 Ga. 14, 50 S.E. 963, 1905 Ga. LEXIS 360 (1905).

Service by publications. — Where the plaintiff seeks a judgment in rem, and not a judgment in personam, service by publication, in accordance with the terms of O.C.G.A. § 44-14-180, is no less effective than personal service. Smith v. Downing Co., 21 Ga. App. 741, 95 S.E. 19, 1918 Ga. App. LEXIS 505 (1918).

Leaving a copy at defendant's residence. — In cases of foreclosure of mortgages, the service must be personal, or by publication under O.C.G.A. § 44-14-180. Service by leaving a copy at the residence of the defendant is not sufficient. Dykes v. McClung, 74 Ga. 382, 1884 Ga. LEXIS 403 (1884); Hobby v. Bunch, 83 Ga. 1, 10 S.E. 113, 1889 Ga. LEXIS 1 (1889); Southern States Phosphate & Fertilizer Co. v. Clark, 149 Ga. 647, 101 S.E. 536, 1919 Ga. LEXIS 354 (1919).

If the only service of the rule nisi to foreclose the mortgage under O.C.G.A. § 44-14-180, was by leaving copy at the most notorious place of abode of the defendant, and there was no personal service, this furnished a good ground of defense to the foreclosure. Meeks v. Johnson, 75 Ga. 629, 1885 Ga. LEXIS 190 (1885).

The service of the rule on a trustee to foreclose mortgage on land, is sufficient under O.C.G.A. § 44-14-180; and the cestui que trust need not be made a party. Wood v. Nisbet, 20 Ga. 72, 1856 Ga. LEXIS 14 (1856).

Service by an unofficial person is not legal under O.C.G.A. § 44-14-180. Falvey v. Jones, 80 Ga. 130, 4 S.E. 264, 1887 Ga. LEXIS 342 (1887); Hobby v. Bunch, 83 Ga. 1, 10 S.E. 113, 1889 Ga. LEXIS 1 (1889); Montgomery v. King, 123 Ga. 14, 50 S.E. 963, 1905 Ga. LEXIS 360 (1905); Southern States Phosphate & Fertilizer Co. v. Clark, 19 Ga. App. 376, 91 S.E. 573, 1917 Ga. App. LEXIS 125 (1917); Southern States Phosphate & Fertilizer Co. v. Clark, 149 Ga. 647, 101 S.E. 536, 1919 Ga. LEXIS 354 (1919).

Where the entry of service is signed by one assuming to act as deputy sheriff, and an affidavit of illegality is interposed alleging that such person is not in fact a deputy sheriff, if both the sheriff and the person acting as deputy sheriff are not made parties to the traverse, there is no such attack upon the return as would justify a judgment setting it aside, and on motion such a ground of illegality should be dismissed. Southern States Phosphate & Fertilizer Co. v. Clark, 19 Ga. App. 376, 91 S.E. 573, 1917 Ga. App. LEXIS 125 (1917).

Day of serving rule counted. — The day on which the rule nisi to foreclose a mortgage on land was served should be counted. English v. Ozburn, 59 Ga. 392, 1877 Ga. LEXIS 284 (1877).

The return day in case of a foreclosure of a mortgage on real estate, under

Service (Cont'd)

O.C.G.A. § 44-14-180, was the day to which the rule nisi was returnable. Swint v. Milner Banking Co., 30 Ga. App. 733, 119 S.E. 336, 1923 Ga. App. LEXIS 656 (1923).

Late service returnable to next term. — Where a rule nisi upon a petition to foreclose was issued more than three months (now 30 days) before the next term of court, at which term the mortgagor was required to pay the money into court, and personal service of the rule nisi was effected prior to the term at which the payment was required to be made, but too late to be due service to that term, it would go over and become returnable to the next succeeding term. Vaughan v. F & M Bank, 145 Ga. 338, 89 S.E. 195, 1916 Ga. LEXIS 310 (1916).

Where quarterly terms of the superior court in a particular county are provided for by law, and, a rule nisi on a petition to foreclose a mortgage on realty is granted at one term under O.C.G.A. § 44-14-180, and the first day of the next regular succeeding term will occur within less than three months (now 30 days) after the grant of the rule nisi, it should be made returnable to the first term thereafter for which lawful service can be had, or the next term but one. Southern States Phosphate & Fertilizer Co. v. Clark, 19 Ga. App. 376, 91 S.E. 573, 1917 Ga. App. LEXIS 125 (1917).

As in the case of ordinary process served an insufficient length of time before the appearance term, which O.C.G.A. § 44-14-180 makes good for the next succeeding term, a rule nisi issued upon a petition to foreclose a mortgage upon realty, service of which is made prior to the term at which the mortgagee is directed to pay the money into court, but too late to be due service for that term, goes over, and becomes returnable to the next succeeding term. York v. Edwards, 52 Ga. App. 388, 183 S.E. 339, 1936 Ga. App. LEXIS 646 (1936).

Effect of defective service. — Where service of a rule nisi was acknowledged by the mortgagors four days before the rule absolute was granted by the court, and the judgment absolute recited that the mortgagors named had "acknowledged service on this rule nisi," such defective service did not render the judgment absolute void, but voidable. Milltown Lumber Co. v. Blitch, 146 Ga. 253, 91 S.E. 62, 1916 Ga. LEXIS 694 (1916).

In the service of a rule nisi issued by the judge in proceedings to foreclose an attorney's lien on land, analogous to a rule nisi in mortgage foreclosure proceedings, the service of an ordinary copy instead of a certified copy of the rule nisi, especially when in effect so provided in the rule nisi, does not render the service and proceedings void. York v. Edwards, 52 Ga. App. 388, 183 S.E. 339, 1936 Ga. App. LEXIS 646 (1936).

A recital of service under O.C.G.A. § 44-14-180, if silent as to the mode of service, is to be read in connection with the sheriff's return. Hobby v. Bunch, 83 Ga. 1, 10 S.E. 113, 1889 Ga. LEXIS 1 (1889).

Correction of irregularities. — Where valid process has been issued with an action setting out a cause of action, and there has been no sufficient service through no fault or laches of the plaintiff or plaintiff's attorney, the judge may by order provide for the correction of any mere irregularity in the process or service; and after the perfection of service, even though subsequent to the return term, such service will relate to the date of the filing of the petition, which will be treated as the time of commencement of the action. York v. Edwards, 52 Ga. App. 388, 183 S.E. 339, 1936 Ga. App. LEXIS 646 (1936).

Right of creditor of mortgagor to show improper service. — Where service was regularly returned as made upon a special agent of the mortgagor, a creditor of the mortgagor could not dispute the legality of the service by showing that the person served was not in fact a special agent, it not appearing that the mortgagor had repudiated the service. Flannery & Co. v. Baldwin Fertilizer Co., 94 Ga. 696, 21 S.E. 587, 1894 Ga. LEXIS 276 (1894).

Attorneys' liens. — A proceeding to foreclose an attorney's lien upon real property is to be brought as is a proceeding to foreclose a mortgage upon land; the process is a rule nisi issued by the court, and

not a process issued by the clerk as in ordinary cases. Moss v. Strickland, 138 Ga. 539, 75 S.E. 622, 1912 Ga. LEXIS 604 (1912); York v. Edwards, 52 Ga. App. 388, 183 S.E. 339, 1936 Ga. App. LEXIS 646 (1936).

Time of rendering judgment on attorney's lien. — When a petition for foreclosure of an attorney's lien was filed in the superior court during a regular term thereof, under O.C.G.A. § 44-14-180, and thereafter the defendant acknowledged due and legal service of such proceedings, the court had jurisdiction to render a judgment of foreclosure at its next succeeding term. Ray v. Hixon, 107 Ga. 768, 33 S.E. 692, 1899 Ga. LEXIS 149 (1899).

RESEARCH REFERENCES

Am. Jur. 2d.

55 Am. Jur. 2d, Mortgages, §§ 629, 630, 658, 660.

C.J.S.

59A C.J.S., Mortgages, § 739 et seq.

ALR.

Compliance with Mortgage Statutory Pre-Foreclosure Notice Requirements, 61 A.L.R. 7th 3.

Provision in land contract against removal of buildings as affecting rights of third person under chattel mortgage or conditional sale, 30 A.L.R. 542.

Foreclosure of one mortgage as affecting another mortgage on the property held by the same party, 39 A.L.R. 1485.

Tender after acceleration clause has become operative as preventing foreclosure of mortgage, 41 A.L.R. 732.

Mortgagor's statutory right to redeem or his right to possession after foreclosure as subject to levy and seizure by creditors, 42 A.L.R. 884; 57 A.L.R. 1128.

Relief to person who by mistake has foreclosed real estate mortgage in manner inimical to his own interests, 42 A.L.R. 1192.

Liability of grantee assuming mortgage debt to mortgagee or one in privity with him, 47 A.L.R. 339.

Right to litigate validity of tax title in suit to foreclose mortgage, 85 A.L.R. 1073.

Application of rents and profits in hands of receiver appointed in mortgage foreclosure proceedings, to the payment of taxes, 88 A.L.R. 1352.

Financial depression as justification of moratorium or other relief to mortgagor, 97 A.L.R. 1123; 104 A.L.R. 375.

Judicial foreclosure of mortgage as affecting one who was not personally served within jurisdiction and did not appear, as regards the value of the property or the adequacy of the bid in foreclosure, in a subsequent action to enforce his personal liability on the obligation secured by the mortgage, 120 A.L.R. 1366.

Personal representatives, or nonlien creditors, of deceased mortgagor or of deceased grantee of premises subject to mortgage (with or without assumption of mortgage debt), as necessary or proper parties to foreclosure suit, 124 A.L.R. 784.

Waiver by mortgagor, his grantee, etc., of statutory provision for exclusive remedy in respect of mortgage or debt secured, 146 A.L.R. 1348.

Bar of limitation against action on debt secured by mortgage as affecting suit to foreclose mortgage, 161 A.L.R. 886.

Misstatement in trustee's or mortgagee's report as to amount for which property has been sold under power of sale as ground for avoiding sale, 22 A.L.R.2d 979.

Bankruptcy court's injunction against mortgage or lien enforcement proceedings commenced, before bankruptcy, in another court, 40 A.L.R.2d 663.

Redemption rights of vendee defaulting under executory land sale contract after foreclosure sale or foreclosure decree enforcing vendor's lien or rights, 51 A.L.R.2d 672.

Construction of provision in real estate mortgage, land contract, or other security instrument for release of separate parcels of land as payments are made, 41 A.L.R.3d 7.

44-14-181. Proceedings by personal representative when mortgagee deceased.

If the person entitled to foreclose a mortgage on real estate is dead, the application and proceeding to foreclose may be made and prosecuted by his executor or administrator.

History.
Orig. Code 1863, § 3867; Code 1868, § 3887; Code 1873, § 3963; Code 1882, § 3963; Civil Code 1895, § 2744; Civil Code 1910, § 3277; Code 1933, § 67-202.

JUDICIAL DECISIONS

The administrator of the mortgagee is entitled to foreclose at law against the administrator of the mortgagor, and the heirs of the mortgagor are not necessary parties. Dixon v. Cuyler, 27 Ga. 248, 1859 Ga. LEXIS 47 (1859).

Foreclosure in administrative capacity. — When a mortgage, made to W, his heirs and assigns, was transferred by W, by written assignment to J as administrator of S, deceased, such assignment, if properly stamped, conveyed the mortgage to the estate, and it became assets in the hands of the administrator, and the proceedings to foreclose it, must be in the name of said J, as administrator and not in an individual character. Flagg & Fish v. Johnston, 39 Ga. 27, 1869 Ga. LEXIS 165 (1869).

RESEARCH REFERENCES

Am. Jur. 2d.
55 Am. Jur. 2d, Mortgages, § 1110.
C.J.S.
59A C.J.S., Mortgages, § 708 et seq.
ALR.
Revivor or other steps necessary in event of mortgagee's death after sale of property but before confirmation of sale, 150 A.L.R. 502.

44-14-182. Foreclosure by transferee.

An endorsement to order or in blank by the payee of a mortgage note gives the endorsee or the holder for value the right to foreclose the mortgage in his own name. A mortgage transferred without written assignment may be foreclosed in the name of the mortgagee bringing the action for the use of such assignee; and proceedings begun in the name of the transferee may be amended by making the mortgagee a party before or after the judgment.

History.
Civil Code 1895, § 2745; Civil Code 1910, § 3278; Code 1933, § 67-203.
History of Section.
This Code section was codified from the decisions of Nicholson v. Whaley, 90 Ga. 257, 16 S.E. 84 (1892); Burgwyn & Bros. Tobacco Co. v. Bentley & Co., 90 Ga. 508, 16 S.E. 216 (1892), and Setze v. First Nat'l Bank, 140 Ga. 603, 79 S.E. 540 (1913). It appeared for the first time in the Code of 1895.

JUDICIAL DECISIONS

Holder of note. — A blank endorsement of the payee of a mortgage note is sufficient to pass the legal title in the note and mortgage to the holder thereof, and the mortgage may be foreclosed by the holder in the holder's own name. Patillo v. Hallet & Davis Piano Co., 26 Ga. App. 327, 106 S.E. 206, 1921 Ga. App. LEXIS 131 (1921).

Holder using mortgagee's name. — The purchaser of notes secured by mortgage may foreclose the mortgage at law by using the name of the mortgagee for the purchaser's use, even against the consent of the mortgagee, by giving proper indemnity. Calhoun v. Tullass, 35 Ga. 119, 1866 Ga. LEXIS 173 (1866).

Transferee foreclosing where first foreclosure irregular. — A transferee of a mortgage fi. fa. can foreclose the mortgage in own name as transferee, if for any reason the first foreclosure on which the fi. fa. is based is irregular or defective. Ragan v. Coley & Bro., 4 Ga. App. 421, 61 S.E. 862, 1908 Ga. App. LEXIS 321 (1908).

Amendment of parties. — Although the bearer of a mortgage, as such, has no right to foreclose it in the bearer's own name, yet where it appears that one so proceeding had, in fact, a transfer in writing to the bearer personally, the verbal inaccuracy in describing the character as plaintiff could have been amended. Taylor v. Blasingame, 73 Ga. 111, 1884 Ga. LEXIS 42 (1884).

Amendment of judgment after adjournment. — After the adjournment of the term at which it was rendered, a judgment cannot be amended on the merits of the cause by reason of facts or conditions subsequently transpiring. Richards v. McHan, 139 Ga. 37, 76 S.E. 382, 1912 Ga. LEXIS 517 (1912).

Evidence justifying recovery. — In an action upon a mortgage note, instituted by the payee for the use of an assignee, where it appears that the assignee is the holder of the legal title, the assignee is the real party at interest. Although the petition may not be amended by striking the name of the nominal party plaintiff and substituting therefor the name of the assignee as plaintiff, there may nevertheless be a recovery for the plaintiff upon evidence which sustains only the right of the assignee to recover, where such evidence has been admitted without objection. Carden v. Hall, 34 Ga. App. 806, 131 S.E. 296, 1926 Ga. App. LEXIS 50 (1926).

RESEARCH REFERENCES

Am. Jur. 2d.

55 Am. Jur. 2d, Mortgages, §§ 1017, 1019.

C.J.S.

59 C.J.S., Mortgages, § 352.

ALR.

One taking assignment of mortgage in payment of or as collateral security for prior debt as a bona fide purchaser, 80 A.L.R. 395.

Mortgagee's rights in respect of assumption clause in deed as affected by invalidity or avoidability of clause as between grantor and grantee, 100 A.L.R. 911.

Personal liability of purchaser of property subject to chattel mortgage, to the mortgagee, 100 A.L.R. 1038.

Release of vendee (or intermediate assignee of vendee's interest) by subsequent dealings between assignee and vendor, 125 A.L.R. 979.

44-14-183. Proceedings against personal representative when mortgagor deceased.

When the mortgagor is dead, the proceedings to foreclose the mortgage on real estate may be instituted against his executor or administrator.

History.
Orig. Code 1863, § 3870; Code 1868, § 3890; Code 1873, § 3966; Code 1882, § 3966; Civil Code 1895, § 2748; Civil Code 1910, § 3281; Code 1933, § 67-204.

JUDICIAL DECISIONS

If a mortgagor dies insolvent, and there is no administration on mortgagor's estate, and the equity of redemption has been sold, the mortgagee may proceed to foreclose, in equity, against such purchaser and the purchaser's vendees. May & Stokes v. Rawson, 21 Ga. 461, 1857 Ga. LEXIS 88 (1857).

Sale. — If, pending a regular proceeding to foreclose a mortgage upon realty given by a testator, the executor validly sells the mortgaged property, this will bar the rendition of a judgment of foreclosure. Reed v. Aubrey, 91 Ga. 435, 17 S.E. 1022, 1893 Ga. LEXIS 341 (1893). See also Newsom v. Carlton, 59 Ga. 516, 1877 Ga. LEXIS 320 (1877).

RESEARCH REFERENCES

Am. Jur. 2d.
55 Am. Jur. 2d, Mortgages, § 1295.
C.J.S.
59 C.J.S., Mortgages, § 550.
ALR.
Necessity in suit to foreclose mortgage on property of decedent of joining as parties devisees or heirs of decedent, and effect of failure to do so, 119 A.L.R. 807.

Personal representatives, or nonlien creditors, of deceased mortgagor or of deceased grantee of premises subject to mortgage (with or without assumption of mortgage debt), as necessary or proper parties to foreclosure suit, 124 A.L.R. 784.

44-14-184. Defense against foreclosure; verification.

When a rule nisi to foreclose a mortgage on real estate has been granted and published or served as required in Code Section 44-14-180, the mortgagor or his special agent or attorney may appear at the time at which the money is directed to be paid and file his objections to the foreclosure of the mortgage and may set up and avail himself of any defense which he might lawfully set up in an ordinary action instituted on the debt or demand secured by the mortgage and which defense shows that the applicant is not entitled to the foreclosure sought or that the amount claimed is not due; provided, however, that the facts of the defense shall be verified by the affidavit of the mortgagor or his special agent or attorney at the time of the filing of the affidavit.

History.
Laws 1799, Cobb's 1851 Digest, p. 510; Laws 1839, Cobb's 1851 Digest, p. 572; Code 1863, § 3868; Code 1868, § 3888; Code 1873, § 3964; Code 1882, § 3964; Civil Code 1895, § 2746; Civil Code 1910, § 3279; Code 1933, § 67-301.
Law reviews.
For annual survey of real property law, see 57 Mercer L. Rev. 331 (2005).

JUDICIAL DECISIONS

Analysis

General Consideration
Defenses

General Consideration

An appeal is not the defendant's remedy where a counteraffidavit filed by the defendant to a mortgage foreclosure in a justice's court is dismissed for insufficiency because it sets up no defense to the foreclosure but constitutes a claim of title to the property filed by the defendant personally. Wage Earners' Real Estate Co. v. Gaulden, 43 Ga. App. 702, 159 S.E. 910, 1931 Ga. App. LEXIS 523 (1931).

Defenses

Accumulative defenses. — In a proceeding to foreclose, it is competent for the mortgagor, at the second term, to show cause why the rule absolute should not be granted, that the mortgage debt is usurious, that it is founded upon a gaming consideration, or that it was contracted to compound a felony, or that the mortgage was given under duress or has been released, or to avail any other defense which goes to show that the mortgagee is not "entitled" to a judgment of foreclosure, or, that the amount claimed is not due. Dixon v. Cuyler, 27 Ga. 248, 1859 Ga. LEXIS 47 (1859).

Where a defense is purely equitable, a party is not foreclosed from asserting a right, by suffering judgment at law to go against that party by reason of sickness. Clifton v. Livor, 24 Ga. 91, 1858 Ga. LEXIS 162 (1858).

Property subject to bankruptcy. — That mortgaged property is subject to be administered in bankruptcy will not entitle the mortgagor to resist the administration of it by foreclosure and sale under proceedings in the appropriate court of the state. Broach v. Powell, 79 Ga. 79, 3 S.E. 763, 1887 Ga. LEXIS 166 (1887).

That the defendant has been adjudged a bankrupt, and the property covered by the mortgage regularly set apart to defendant as defendant's exemption, is not a good plea in bar to the foreclosure of said mortgage, where it is not alleged that the mortgagee proved the lien in the bankrupt court, or that the assignee has interfered in any manner with the mortgage. Cumming v. Clegg, 52 Ga. 605, 1874 Ga. LEXIS 364 (1874). See also Hatcher v. Jones, 53 Ga. 208, 1874 Ga. LEXIS 442 (1874).

A discharge in bankruptcy is no defense to the foreclosure of a mortgage executed more than four months prior to the filing of the petition in bankruptcy, when the debt secured by the mortgage has not been proved in the bankrupt court. Camp v. Young, 119 Ga. 981, 47 S.E. 560, 1904 Ga. LEXIS 425 (1904). See also Evans v. Rounsaville & Bro., 115 Ga. 684, 42 S.E. 100, 1902 Ga. LEXIS 530 (1902).

Stay pending bankruptcy determination. — A plea interposed to a proceeding to foreclose a mortgage on land, that, pending the proceedings to foreclose, the mortgagor was adjudicated a bankrupt, and praying that such proceedings be stayed until the question of the discharge in bankruptcy of the mortgagor is determined, is not good. Carter v. Peoples Nat'l Bank, 109 Ga. 573, 35 S.E. 61, 1900 Ga. LEXIS 263 (1900).

Homestead. — Where a homestead was set apart under the Constitution of 1868, and a mortgage on the homestead property was given in 1898, it was permissible for the defendant to set up the homestead in defense under O.C.G.A. § 44-14-184 to an action to foreclose the mortgage. Ach & Co. v. Milam, 118 Ga. 105, 44 S.E. 870, 1903 Ga. LEXIS 466 (1903).

In an action against a mortgagor individually to foreclose a mortgage on land, it is no defense to the foreclosure that after the mortgage was given a part of the land covered by the mortgage had been set apart to the defendant as the head of a family for a homestead. Rathel v. Fort, 134 Ga. 268, 67 S.E. 417, 1910 Ga. LEXIS 164 (1910).

Property subjected to support of others. — Where property has been mort-

Defenses (Cont'd)

gaged, which is subject to the support of the mother of the mortgagors during her natural life, and proceedings are instituted to foreclose by the mortgagees, there is no good legal or equitable ground why the mortgages should not be foreclosed, as between the mortgagors and mortgagees. Colquitt & Baggs v. Tarver, 45 Ga. 631, 1872 Ga. LEXIS 299 (1872).

That the land covered by a mortgage lien had been set apart to the widow of the mortgagor as a year's support, over objections filed by the mortgagee, constituted no defense to the foreclosure of the mortgage. Derrick v. Sams, 98 Ga. 397, 25 S.E. 509, 1896 Ga. LEXIS 52 (1896).

Lack of title in deceased owner. — Where a person executed a mortgage upon certain property, that person's administrator is estopped, in an action brought to foreclose the mortgage, to plead want of title in intestate at the time the mortgage was executed. Carter & Woolfolk v. Jackson, 115 Ga. 676, 42 S.E. 46, 1902 Ga. LEXIS 527 (1902).

Forgery of deed in vendor's title. — To the foreclosure of a mortgage on land for the purchase money thereof, it was no defense that one of the deeds in the vendor's title appeared on its face to be a forgery; there being no allegation that the vendor warranted the title to the vendee, nor that there was fraud in the transaction, nor that any of the purchase money had been paid. O'Neal v. Carmichael, 84 Ga. 511, 11 S.E. 352, 1889 Ga. LEXIS 364 (1889).

Trust property mortgaged. — In a proceeding to foreclose a mortgage on real estate, the mortgagor cannot set up as a defense against the mortgagee, that the property so mortgaged was trust property, and that the mortgagor had no right to mortgage it. Boisclair v. Jones, 36 Ga. 499, 1867 Ga. LEXIS 75 (1867).

A plea of not indebted, though supplemented by the allegation that the mortgage "was obtained by fraud on the part of the plaintiff," without alleging the particular fraudulent acts relied upon to defeat a recovery, is not such an issuable defense as prevents the granting of a rule absolute. Woods v. Roberts, 97 Ga. 254, 22 S.E. 986, 1895 Ga. LEXIS 352 (1895).

Debt not due. — In view of O.C.G.A. § 44-14-184 a plea which denied that the debt was due, and alleged want of consideration and fraud in the procurement of the draft to secure which the mortgage was made, should not have been dismissed on demurrer (now motion to dismiss). Hall v. Davis, 73 Ga. 101, 1884 Ga. LEXIS 33 (1884).

Fraud in procurement of draft. — See Hall v. Davis, 73 Ga. 101, 1884 Ga. LEXIS 33 (1884).

Usury. — Upon a rule to foreclose a mortgage, the mortgagor may show, by way of defense, that the contract upon which it was given was usurious. Bailey v. Lumpkin, 1 Ga. 392, 1846 Ga. LEXIS 89 (1846).

Payment. — A mortgage on land given to secure the payment of promissory notes cannot, after they have been paid, be foreclosed. Ryan v. Rice, 109 Ga. 448, 34 S.E. 569, 1899 Ga. LEXIS 676 (1899).

A general allegation in an answer, that the mortgagee has paid $50.00 or $60.00 for which no credit has been given, and that the mortgagee is unable to give the sum or date of each payment, without alleging to whom, or when, or where such payments were made, is subject to demurrer (now motion to dismiss). Montgomery v. King, 125 Ga. 388, 54 S.E. 135, 1906 Ga. LEXIS 173 (1906).

Payment as jury question. — Whether the consideration for which a mortgage is alleged to have been executed, is bona fide, or merely colorable to defraud creditors, or so inadequate as to constitute a badge of fraud, is a question of fact for the jury. Williams v. C. G.H. Kelsey Halsted, 6 Ga. 365, 1849 Ga. LEXIS 47 (1849).

Holder's title to note invalid. — The proceedings were instituted to foreclose a mortgage, in the name of the original mortgagee, for the use of certain persons to whom it was alleged that the security notes had been transferred, and no effort was made to cut off any defense which the mortgagor might have, a mere denial that the title to the notes was in the usees, and an allegation that they held such notes only as securities, did not furnish any valid defense to the foreclosure. Montgomery v. King, 125 Ga. 388, 54 S.E. 135, 1906 Ga. LEXIS 173 (1906).

Setoff. — A mortgagor may plead damages arising from a breach of an independent contract, as a setoff in bar of a proceeding to foreclose a mortgage on land, under O.C.G.A. § 44-14-184. Mahone v. Elliott, 141 Ga. 214, 80 S.E. 713, 1914 Ga. LEXIS 177 (1914). See also Alston v. J.W. Wheatley & Co., 47 Ga. 646, 1873 Ga. LEXIS 190 (1873).

In a proceeding to foreclose a chattel mortgage, the mortgagor is not entitled to plead the defense of setoff in such a summary proceeding, since this defense is not one which goes to the justice of plaintiff's demand. Glass v. Adams, 44 Ga. App. 437, 161 S.E. 630, 1931 Ga. App. LEXIS 755 (1931).

Judgment improperly rendered. — A petition filed by the defendant to set aside and vacate a judgment of foreclosure improperly rendered, and to enjoin the sale of defendant's property under a levy of the execution issued thereon, was not subject to a general demurrer (now motion to dismiss) in view of O.C.G.A. § 44-14-184. Walton v. Wilkinson Bolton Co., 158 Ga. 13, 123 S.E. 103, 1924 Ga. LEXIS 71 (1924).

RESEARCH REFERENCES

Am. Jur. 2d.

55 Am. Jur. 2d, Mortgages, § 676.

C.J.S.

59A C.J.S., Mortgages, § 700.

ALR.

Tender after acceleration clause has become operative as preventing foreclosure of mortgage, 41 A.L.R. 732.

Judicial foreclosure of mortgage as affecting one who was not personally served within jurisdiction and did not appear, a regards the value of the property or the adequacy of the bid in foreclosure, in a subsequent action to enforce his personal liability on the obligation secured by the mortgage, 120 A.L.R. 1366.

Necessity of production of original note involved in mortgage foreclosure — twenty-first century cases, 86 A.L.R.6th 411.

44-14-185. Defenses by third persons; right of purchaser not party to foreclosure to go behind judgment.

If the mortgagor or his special agent or attorney fails to set up a defense as provided in Code Section 44-14-184, it shall not be competent for any third person to interpose a defense and neither will the court itself, of its own motion, do so. However, one who purchases mortgaged property prior to the commencement of statutory proceedings to foreclose and who is not a party to the proceedings is not bound by the judgment of foreclosure and may, when the mortgage fi. fa. is levied, go behind the judgment and set up the defense that the mortgage could not be legally enforced against him whenever this is necessary and proper to establish the claim of title upon which he relies.

History.

Orig. Code 1863, § 3869; Code 1868, § 3889; Code 1873, § 3965; Code 1882, § 3965; Civil Code 1895, § 2747; Civil Code 1910, § 3280; Code 1933, § 67-302.

History of Section.

This Code section is derived from the decisions in Osborne v. Rice, 107 Ga. 281, 33 S.E. 54 (1899), and Simmerson v. Herringdine, 166 Ga. 143, 142 S.E. 687 (1928).

JUDICIAL DECISIONS

In general. — A third person, who is not a party to the record, will not be permitted to make objections to the foreclosure of a mortgage, under O.C.G.A. § 44-14-185, until that person has been regularly made a party by the judgment of the court but those not parties are not concluded by judgment. McDougald v. Hall, 3 Ga. 174, 1847 Ga. LEXIS 93 (1847); Jackson v. Stanford, 19 Ga. 14, 1855 Ga. LEXIS 14 (1855); Sutton v. Sutton, 25 Ga. 383, 1858 Ga. LEXIS 83 (1858); A.J. Williams & Co. v. Terrell, 54 Ga. 462, 1875 Ga. LEXIS 199 (1875); Lilienthal v. Champion, 58 Ga. 158, 1877 Ga. LEXIS 39 (1877); Frost v. Borders, 59 Ga. 817, 1877 Ga. LEXIS 407 (1877).

To set up a cause of action pursuant to O.C.G.A. § 44-14-185 a purchaser of mortgaged property must show some reason why the foreclosure could not have been legally enforced as against the purchaser's claim of title. Covington v. GMAC, 102 Ga. App. 683, 117 S.E.2d 554, 1960 Ga. App. LEXIS 720 (1960).

Spouses. — In an action by a wife to cancel a deed of conveyance made by her to her husband and a mortgage on the same property made by her husband to a creditor, the wife was not estopped by the judgment foreclosing the mortgage upon the property in a statutory proceeding by the creditor against the husband, she not being a party thereto. Simmons Hdwe. Co. v. Timmons, 180 Ga. 531, 179 S.E. 726, 1935 Ga. LEXIS 468 (1935).

Junior vendees. — A foreclosure of a mortgage by the statutory method, to which proceeding a junior vendee of the land is not a party, while not conclusive on such vendee is valid as between the holder of the mortgage and the mortgagor. Roberts v. Atlanta Cem. Ass'n, 146 Ga. 490, 91 S.E. 675, 1917 Ga. LEXIS 358 (1917).

Junior mortgagees. — Under O.C.G.A. § 44-14-185 which does not require or permit a junior mortgagee to become a party to a statutory proceeding to foreclose the senior mortgage, where the property has been sold in such foreclosure proceedings the remedy of the junior mortgagee is by a bill to redeem. American Loan & Trust Co. v. Atlanta Elec. Ry., 99 F. 313, 1899 U.S. App. LEXIS 3450 (C.C.N.D. Ga. 1899).

Creditors who are not parties, have no right to intervene to prevent a foreclosure, by virtue of O.C.G.A. § 44-14-185, but they may resort to equity to prevent the foreclosure of a fraudulent mortgage which jeopardizes their rights. Albany & Renssellaer Iron & Steel Co. v. Southern Agric. Works, 76 Ga. 135, 1886 Ga. LEXIS 2 (1886).

Intervention by noncreditors. — In a statutory proceeding by rule nisi to foreclose a mortgage, it is not competent for parties who claim that property belonging to them has been misappropriated, and that they have an interest in the property of the mortgagor, to intervene as defendants to the foreclosure of the mortgage and seek equitable decrees in their favor in such proceeding, by reason of O.C.G.A. § 44-14-185. If they have any equitable rights, they cannot be thus asserted. Trust Co. v. Sessions, 136 Ga. 862, 72 S.E. 347, 1911 Ga. LEXIS 257 (1911).

Defendant estopped from denying title. — By virtue of O.C.G.A. § 44-14-185 the defendant was estopped by deed from denying title to the mortgaged premises, and neither defendant nor the court, at defendant's suggestion, could intervene for the protection of the rights of a third person, who would not be bound by a judgment to which defendant was not, and could not be made, a party. Hall v. Davis, 73 Ga. 101, 1884 Ga. LEXIS 33 (1884).

A claimant against a mortgage fi. fa. cannot take advantage of the fact that the mortgage was foreclosed within 12 months from the granting of letters of administration upon the estate of the deceased mortgagor. Baker v. Shephard, 30 Ga. 706, 1860 Ga. LEXIS 179 (1860).

Collateral attack. — All others, than parties or privies, may attack the judgment of foreclosure whenever and wherever it comes in their way and may therefore attack it collaterally. Johnston v. Crawley, 22 Ga. 348, 1857 Ga. LEXIS 157 (1857).

RESEARCH REFERENCES

ALR.

One taking assignment of mortgage in payment of or as collateral security for prior debt as a bona fide purchaser, 80 A.L.R. 395.

Judicial foreclosure of mortgage as affecting one who was not personally served within jurisdiction and did not appear, a regards the value of the property or the adequacy of the bid in foreclosure, in a subsequent action to enforce his personal liability on the obligation secured by the mortgage, 120 A.L.R. 1366.

44-14-186. Jury trial.

When proceedings to foreclose a mortgage shall be instituted and a defense shall be set up thereto, the issue shall be submitted to and tried by a jury.

History.

Orig. Code 1863, § 3871; Code 1868, § 3891; Code 1873, § 3967; Code 1882, § 3967; Civil Code 1895, § 2749; Civil Code 1910, § 3282; Code 1933, § 67-303.

Cross references.

Juries, § 15-12-1 et seq.

JUDICIAL DECISIONS

At what term issue tried. — Where a rule nisi on a petition to foreclose in the superior court directed that the money due on the mortgage be paid into court on or before the first day of the term next immediately succeeding the term at which it was granted, and the rule was served on the defendant at least three months (now 30 days) before the term designated for the payment, the issue made by a defense filed at that term was triable at that term. Lankford v. Peterson, 20 Ga. App. 147, 92 S.E. 764, 1917 Ga. App. LEXIS 757 (1917).

RESEARCH REFERENCES

ALR.

Tender after acceleration clause has become operative as preventing foreclosure of mortgage, 41 A.L.R. 732.

Right to jury trial of issues as to personal judgment for deficiency in suit to foreclose mortgage, 112 A.L.R. 1492.

44-14-187. Judgment; sale of mortgaged property.

When the mortgagor, after being directed so to do, fails to pay the principal, interest, and costs as required by Code Section 44-14-230 and fails to set up and sustain his defense against the foreclosure of the mortgage, the court shall give judgment for the amount which may be due on the mortgage and shall order the mortgaged property to be sold in the manner and under the same regulations which govern sheriffs' sales under execution.

History.

Laws 1790, Cobb's 1851 Digest, p. 571; Code 1863, § 3872; Ga. L. 1866, p. 25, § 1; Code 1868, § 3892; Code 1873, § 3968;

Code 1882, § 3968; Civil Code 1895, § 2750; Civil Code 1910, § 3283; Code 1933, § 67-401.

JUDICIAL DECISIONS

Conclusiveness of judgment. — Ordinarily a judgment of foreclosure bars only the rights of the mortgagor, the mortgagor's heirs and legal representatives. Howard v. Gresham, 27 Ga. 347, 1859 Ga. LEXIS 71 (1859).

A decree foreclosing a mortgage is conclusive upon the defendant in the bill, and upon any purchaser from defendant who purchased after the decree was rendered. Gunn v. Wades, 62 Ga. 20, 1878 Ga. LEXIS 290 (1878).

The foreclosure of a mortgage is conclusive between parties and privies, and in a subsequent controversy between them evidence is not admissible to go behind the judgment of foreclosure. Spinks v. Glenn, 67 Ga. 744, 1881 Ga. LEXIS 270 (1881).

Amendment to rule absolute to show credits is not allowed. Cherry v. Home Bldg. & Loan Ass'n, 57 Ga. 361, 1876 Ga. LEXIS 122 (1876).

Impeachment of judgment. — Upon the trial of a claim case, where the claimant claims through a judgment of foreclosure of mortgage, made by the defendant in execution to defendant's vendor, the plaintiff in execution may impeach that judgment and mortgage, and prove it fraudulent on the trial. Williams v. Martin, 7 Ga. 377, 1849 Ga. LEXIS 150 (1849).

Burden of proof in impeachment. — Where on its face a mortgage fi. fa. is valid, the burden of proving that it was based on an invalid judgment of foreclosure is on the claimant. Redding v. Anderson, 144 Ga. 100, 86 S.E. 241, 1915 Ga. LEXIS 71 (1915).

A judgment foreclosing a mortgage, is not within O.C.G.A. § 9-12-61 providing for the dormancy of judgments. Butt v. Maddox, 7 Ga. 495, 1849 Ga. LEXIS 169 (1849); Horton v. Clark, 40 Ga. 412, 1869 Ga. LEXIS 109 (1869); Redding v. Anderson, 144 Ga. 100, 86 S.E. 241, 1915 Ga. LEXIS 71 (1915).

Sufficiency of judgment. — A judgment of foreclosure of real estate which substantially complies with O.C.G.A. § 44-14-187 is sufficient. Dickerson v. Powell, 21 Ga. 143, 1857 Ga. LEXIS 20 (1857).

On the trial of a rule to foreclose a mortgage, the main question is, whether the plaintiff is entitled to recover, as respects the mortgaged property title debt which the mortgage describes, and if not the whole, how much of it. A verdict for so many dollars as principal, with interest, is sufficiently formal and full. O.C.G.A. § 44-14-187 directs what judgment is to be rendered by way of rule absolute in the foreclosure proceeding. Byrd v. Turpin, 62 Ga. 591, 1879 Ga. LEXIS 580 (1879).

Court's judgment without jury. — When the mortgagor, upon proceedings to foreclose a mortgage, fails to pay the money into court as directed by the rule nisi duly served upon the mortgagor, and also fails to set up and maintain any defense against the foreclosure of the mortgage, there is, in such case, no issue for trial by jury, and it is the province of the court, upon hearing competent and sufficient evidence, to render judgment under O.C.G.A. § 44-14-187 for the amount which may be due on such mortgage and to order the mortgaged property sold. Ray v. Atlanta Banking Co., 110 Ga. 305, 35 S.E. 117, 1900 Ga. LEXIS 389 (1900). See also Sutton v. Gunn, 86 Ga. 652, 12 S.E. 979, 1891 Ga. LEXIS 38 (1891).

Levy on property in possession of third person. — It is not a trespass for a sheriff to levy a mortgage fi. fa. upon the mortgaged property named in the process, in the possession of a third person and held by that person adversely to the mortgagor — in such a case the sheriff has no discretion, but must levy at all events. Wallace v. Holly, 13 Ga. 389, 1853 Ga. LEXIS 99 (1853).

Property described in levy. — Whether the property described in the levy was the same as that described in the mortgage and the rule absolute was a

question of fact and not of law. Ray v. Atlanta Banking Co., 110 Ga. 305, 35 S.E. 117, 1900 Ga. LEXIS 389 (1900).

Effect of omissions on levy. — Where the sheriff, while making the levy, omitted to recite that the land was levied upon as the property of the defendant named in the execution, the levy was not for that reason void, or inadmissible upon the trial of a claim case between the plaintiff in execution and a third person. Thorton v. Ferguson, 133 Ga. 825, 67 S.E. 97, 144 Am. St. Rep. 226 (1910).

Rights of purchaser at sale. — A bona fide purchaser of land under a mortgage fi. fa. will be protected in title, notwithstanding any irregularity in the proceeding of the foreclosure. DeLorme v. Pease, 19 Ga. 220, 1856 Ga. LEXIS 162 (1856).

Where property sold under a void foreclosure of a mortgage as the property of a mortgagor, has been purchased at sheriff's sale, and the purchase money applied to the payment of the mortgage, and the sale and purchase are afterwards set aside and declared void, the purchaser can be subrogated to the rights which the mortgagee originally had to have the mortgage foreclosed and the property therein conveyed sold in discharge of the lien of the mortgage. Dutcher v. Hobby, 86 Ga. 198, 12 S.E. 356, 1890 Ga. LEXIS 212 (1890).

Bona fide purchaser in possession for four years. — Judgments on foreclosure of mortgages are not within the provisions of O.C.G.A. § 9-12-93, providing that a bona fide purchase of real property and possession for four years discharges the property "from the lien of any judgment against the person from whom he purchased." Redding v. Anderson, 144 Ga. 100, 86 S.E. 241, 1915 Ga. LEXIS 71 (1915).

Resale. — Where, under the express or implied terms of a sale, the purchase price was to be paid upon delivery of the goods, and the vendor, without collecting the purchase price, nevertheless proceeded to make delivery in pursuance of the contract, and the vendee, after such delivery, proceeded to resell the goods to a bona fide purchaser for value, the rights of such innocent third person were governed by the provisions of O.C.G.A. §§ 44-14-187 through 44-14-189 relative to conditional sales, and the vendor could recover the goods from such innocent purchaser, where the terms of sale had not been reduced to writing and recorded as required by these sections. Brumby Chair Co. v. City of Columbus, 46 Ga. App. 163, 167 S.E. 221, 1932 Ga. App. LEXIS 90 (1932).

Rights of mortgagor's creditors. — It was held under O.C.G.A. § 44-14-187 that if a mortgage debt be infected with usury, and the mortgagor is insolvent, it is the equitable right of a creditor of the mortgagor to compel the mortgagee to purge the claim of the usury charged their common debtor. Parker v. Barnesville Sav. Bank, 107 Ga. 650, 34 S.E. 365, 1899 Ga. LEXIS 116 (1899).

RESEARCH REFERENCES

Am. Jur. Pleading and Practice Forms.

18 Am. Jur. Pleading and Practice Forms, Mortgages, § 41.

ALR.

Priority as between judgment entered and deed or mortgage filed on same day, 37 A.L.R. 268.

Financial depression or lack of market as ground for enjoining sale under a mortgage or deed of trust to secure debts, 82 A.L.R. 976; 90 A.L.R. 1330; 94 A.L.R. 1352; 96 A.L.R. 853; 97 A.L.R. 1123; 104 A.L.R. 375.

Protection of mortgagor or owner of mortgaged property, on foreclosure sale, by fixing upset or minimum price, requiring credit of specified amount on mortgage debt, or denying or limiting amount of deficiency judgment, 85 A.L.R. 1480; 89 A.L.R. 1087; 90 A.L.R. 1330; 94 A.L.R. 1352; 96 A.L.R. 853; 97 A.L.R. 1123; 104 A.L.R. 375.

Mortgagor in possession as liable to receiver for occupational rent; right to receiver as affected by mortgagor being in possession, 91 A.L.R. 1236.

Remedy of, and damages recoverable by, mortgagor in case of a premature sale under mortgage, 97 A.L.R. 1059.

Insurance: mortgagor or privy as sole and unconditional owner after judgment of foreclosure and during redemption period, 107 A.L.R. 1201.

Right of creditor or mortgagee to redeem from his own sale, 108 A.L.R. 993.

Personal liability to mortgagor, as distinguished from mortgagee, of vendee of mortgaged premises who does not in terms assume or agree to pay mortgage, 111 A.L.R. 1114.

Reacquisition by mortgagor, or his grantee, of the title through foreclosure of first mortgage as affecting rights under a second mortgage to which the property was subject before the foreclosure, 111 A.L.R. 1285.

Judicial foreclosure of mortgage as affecting one who was not personally served within jurisdiction and did not appear, as regards the value of the property or the adequacy of the bid in foreclosure, in a subsequent action to enforce his personal liability on the obligation secured by the mortgage, 120 A.L.R. 1366.

Rights and remedies of mortgagee where mortgaged property is bid in on foreclosure as less than mortgage debt and it is redeemed by mortgagor or latter's grantee, 128 A.L.R. 796.

Price obtained at foreclosure sale as affecting liability of guarantor of mortgage debt, 128 A.L.R. 975.

Creditor or encumbrancer redeeming from mortgage sale as acquiring title and rights of sale purchaser, 135 A.L.R. 196.

Revivor or other steps necessary in event of mortgagee's death after sale of property but before confirmation of sale, 150 A.L.R. 502.

Redemption by trustee or beneficiaries from mortgage foreclosure sale, 159 A.L.R. 477.

Redemption rights of vendee defaulting under executory land sale contract after foreclosure sale or foreclosure decree enforcing vendor's lien or rights, 51 A.L.R.2d 672.

Foreclosure sale of mortgaged real estate as a whole or in parcels, 61 A.L.R.2d 505.

Rights of holder of "first refusal" option on real property in event of sale at foreclosure or other involuntary sale, 17 A.L.R.3d 962.

Mortgages effect upon obligation of guarantor or surety of statute forbidden, or restricting deficiency judgment, 49 A.L.R.3d 554.

Right of vendee under executory land contract to lien for amount paid on purchase price as against subsequent creditors of or purchasers from vendor, 82 A.L.R.3d 1040.

44-14-188. Effect of judgment on one purchasing during pendency of proceedings.

After proceedings to foreclose the mortgage have been begun, a purchaser from the mortgagor shall be bound by the judgment of foreclosure.

History.

Civil Code 1895, § 2376; Civil Code 1910, § 3269; Code 1933, § 67-402.

History of Section.

This Code section was codified from the decision of Stokes v. Maxwell, 59 Ga. 78 (1877), which held that the purchaser of land subject to the lien of the mortgage, who buys after the mortgagor has been sued and served with the rule nisi to foreclose the mortgage, will be concluded by the judgment of foreclosure, although the mortgagor was not served until after the term to which the rule was returnable.

JUDICIAL DECISIONS

Rights of one who purchases prior to commencement of proceedings. — One who purchases mortgaged property, prior to the commencement of statutory proceedings to foreclose, and who is not a party to such proceedings, is not bound by

the judgment of foreclosure, and may, when the mortgage fi. fa. is levied, go behind the judgment and set up that the mortgage was barred by the statute of limitations at the date of the filing of the petition to foreclose. Washington Exch. Bank v. Holland & Co., 121 Ga. 305, 48 S.E. 912, 1904 Ga. LEXIS 123 (1904).

Resale. — Where, under the express or implied terms of a sale, the purchase price was to be paid upon delivery of the goods, and the vendor, without collecting the purchase price, nevertheless proceeded to make delivery in pursuance of the contract, and the vendee, after such delivery, proceeded to resell the goods to a bona fide purchaser for value, the rights of such innocent third person were governed by the provisions of O.C.G.A. §§ 44-14-187 through 44-14-189 relative to conditional sales, and the vendor could recover the goods from such innocent purchaser, where the terms of sale had not been reduced to writing and recorded as required by these sections. Brumby Chair Co. v. City of Columbus, 46 Ga. App. 163, 167 S.E. 221, 1932 Ga. App. LEXIS 90 (1932).

RESEARCH REFERENCES

Am. Jur. 2d.

55 Am. Jur. 2d, Mortgages, § 1240.

ALR.

Reacquisition by mortgagor, or his grantee, of the title through foreclosure of first mortgage as affecting rights under a second mortgage to which the property was subject before the foreclosure, 111 A.L.R. 1285.

44-14-189. Rights of purchaser at void or irregular sale.

A purchaser at a void or irregular judicial sale under the foreclosure of a mortgage shall succeed to all of the interests of the mortgagee.

History.

Civil Code 1895, § 5471; Civil Code 1910, § 6076; Code 1933, § 67-403.

History of Section.

This Code section is a codification of the principle enunciated in Dutcher v. Hobby, 86 Ga. 198, 12 S.E. 356, 22 Am. St. R. 444, 10 L.R.A. 472 (1890).

JUDICIAL DECISIONS

O.C.G.A. § 44-14-189 is based on the doctrine of subrogation. Ashley v. Cook, 109 Ga. 653, 35 S.E. 89, 1900 Ga. LEXIS 279 (1900).

For a discussion of the doctrine of subrogation, see Wilkins, Neely & Jones v. Gibson, 113 Ga. 31, 38 S.E. 374, 1901 Ga. LEXIS 150 (1901); Hiers v. Exum, 158 Ga. 19, 122 S.E. 784, 1924 Ga. LEXIS 72 (1924).

O.C.G.A. § 44-14-189 included sales under a judgment which set up a special lien granted by a security deed. Ashley v. Cook, 109 Ga. 653, 35 S.E. 89, 1900 Ga. LEXIS 279 (1900). See also Ray v. Pitman, 119 Ga. 678, 46 S.E. 849, 1904 Ga. LEXIS 330 (1904) and Hamilton v. Rogers, 126 Ga. 27, 54 S.E. 926, 1906 Ga. LEXIS 305 (1906).

O.C.G.A. § 44-14-189 does not apply where the purchasers at the void judicial sale were the mortgagees in the mortgage which was foreclosed. Kirland v. Gaskins, Paulk & Co., 20 Ga. App. 235, 92 S.E. 965, 1917 Ga. App. LEXIS 830 (1917).

Foreclosure for benefit of purchaser. — The purchaser at a void sale under a power in a mortgage may have the mortgage foreclosed for the purchaser's benefit. Wilkins v. McGehee, 86 Ga. 764, 13 S.E. 84, 1891 Ga. LEXIS 60 (1891).

Resale. — Where, under the express or implied terms of a sale, the purchase price was to be paid upon delivery of the goods, and the vendor, without collecting the purchase price, nevertheless proceeded to make delivery in pursuance of the con-

tract, and the vendee, after such delivery, proceeded to resell the goods to a bona fide purchaser for value, the rights of such innocent third person were governed by the provisions of O.C.G.A. §§ 44-14-187 through 44-14-189 relative to conditional sales, and the vendor could recover the goods from such innocent purchaser, where the terms of sale had not been reduced to writing and recorded as required by these sections. Brumby Chair Co. v. City of Columbus, 46 Ga. App. 163, 167 S.E. 221, 1932 Ga. App. LEXIS 90 (1932).

RESEARCH REFERENCES

Am. Jur. Pleading and Practice Forms.

23 Am. Jur. Pleading and Practice Forms, Subrogation, § 2.

ALR.

Rights in mortgage security, of mortgagor or intermediate grantee who pays the mortgage debt after conveying the property, 2 A.L.R. 242.

44-14-190. Disposition of proceeds.

The money arising from the sale of mortgaged property sold under the regulations prescribed in this part shall be paid to the person foreclosing the mortgage unless claimed by some other lien which by law has priority of payment over the mortgage; and, when there is any surplus after paying off the mortgage and other liens, the surplus shall be paid to the mortgagor or his agent.

History.

Laws 1799, Cobb's 1851 Digest, p. 571; Code 1863, § 3873; Code 1868, § 3893; Code 1873, § 3969; Code 1882, § 3969; Civil Code 1895, § 2751; Civil Code 1910, § 3284; Code 1933, § 67-501.

Law reviews.

For survey article on real property law, see 60 Mercer L. Rev. 345 (2008).

JUDICIAL DECISIONS

Oldest lien has priority. — The mortgagee, having the oldest lien, was equitably entitled to have the proceeds in the hands of the sheriff applied thereto. Winter v. Garrard, 7 Ga. 183, 1849 Ga. LEXIS 120 (1849). See also Thomson v. McCordel, 27 Ga. 273, 1859 Ga. LEXIS 53 (1859).

Payment of surplus. — Grantee of deeds to secure debt had to pay to grantors the surplus from a foreclosure sale of two properties to the grantee's agent and a subsequent transfer of the properties to third parties for profit. Tower Fin. Servs., Inc. v. Smith, 204 Ga. App. 910, 423 S.E.2d 257, 1992 Ga. App. LEXIS 1276 (1992), cert. denied, No. S92C1381, 1992 Ga. LEXIS 821 (Ga. Oct. 2, 1992).

Second mortgage referring to older mortgage. — A first mortgage was entitled to priority over a second which recited that there was an older mortgage on the same property, in a distribution of the proceeds of the mortgaged property, raised at a sale made by a receiver. Kiser & Co. v. Carrollton Dry Goods Co., 96 Ga. 760, 22 S.E. 303, 1895 Ga. LEXIS 184 (1895).

Two mortgages executed on the same day are of equal date, and if both are recorded in time, are entitled to share pro rata in a fund not sufficient to satisfy them both. The law will not note fractions of a day except to prevent injustice, and in cases specially provided for by law. Russell v. C.D. Carr & Co., 38 Ga. 459, 1868 Ga. LEXIS 110 (1868).

Where facts apparent on the faces of mortgages executed on same day show that it was the intention of the parties to

give the preference to one over the others, that lien so preferred will be enforced. Coleman & Co. v. Carhart, 74 Ga. 392, 1884 Ga. LEXIS 407 (1884).

When there is a fund in court on which a judgment creditor can lay hands without trouble, expense or delay, a court of equity will not, at the instance of other creditors, holding junior mortgage liens on the fund, force the judgment creditor to proceed with a judgment against property in the hands of third persons, where the judgment creditor must encounter expense and delay in collecting the debt. Behn & Foster v. William H. Young & Co., 21 Ga. 207, 1857 Ga. LEXIS 38 (1857).

Judgment obtained between mortgage and novation. — On a rule for distribution of money in the sheriff's hands, judgments junior to mortgages to a party will prevail over a mortgage fi. fa. junior to the judgments and founded on a mortgage to that party, alleged to have been given in renewal of the former mortgages, but shown by the record to be a novation. Williams & Co. v. Donalson, 84 Ga. 593, 10 S.E. 1015, 1890 Ga. LEXIS 297 (1890).

Judgment younger than mortgage but older than general judgment on same. — The owner of a mortgage on realty did not foreclose the mortgage, but obtained a general judgment on the debt secured by it, and the property embraced in the mortgage was sold by the sheriff. Another creditor, who had a judgment younger than the mortgage but older than the general judgment brought a rule against the sheriff for distribution of the funds realized from the sale of the property and the fund was properly awarded to the older of the two judgments. Thomasville Live Stock Co. v. Burney, 19 Ga. App. 703, 91 S.E. 1062, 1917 Ga. App. LEXIS 314 (1917).

Creditor holding bonds as collateral. — At a time subsequent to the deposit of bonds with a creditor as collateral, the creditor became the purchaser of the bonds under circumstances which rendered void the transaction culminating in a sale of the bonds to the creditor. If the sale was void, the holder of the bonds claiming to be the purchaser was relegated to the position of holder of the bonds as collateral security, and as such was the proper beneficiary in the proceedings to foreclose the trust deed to secure the payment of the bonds. Valdosta M. & W.R.R. v. Valdosta Bank & Trust Co., 144 Ga. 761, 87 S.E. 1083, 1916 Ga. LEXIS 121 (1916).

Damages for wrongful foreclosure. — Measure of damages for wrongful foreclosure was the fair market value of the property foreclosed rather than the full bid price at a foreclosure sale to an agent of the grantee, in light of the grantee's subsequent sale of the property to a good faith purchaser which prevented the grantors from redeeming their equity. Tower Fin. Servs., Inc. v. Smith, 204 Ga. App. 910, 423 S.E.2d 257, 1992 Ga. App. LEXIS 1276 (1992), cert. denied, No. S92C1381, 1992 Ga. LEXIS 821 (Ga. Oct. 2, 1992).

In a suit brought by a purchaser seeking damages for wrongful foreclosure of certain real property after two foreclosure sales, the trial court erred in granting the second foreclosing bank attorney fees under O.C.G.A. § 9-15-14, based on frivolous litigation since the second bank had knowledge of the purchaser's acquisition of the property via the first foreclosure, therefore, the purchaser's suit did not lack substantial justification as to the second bank and the second bank's failure to provide proper notice of the sale to the purchaser. Roylston v. Bank of Am., N.A., 290 Ga. App. 556, 660 S.E.2d 412, 2008 Ga. App. LEXIS 371 (2008).

RESEARCH REFERENCES

Am. Jur. 2d.

55 Am. Jur. 2d, Mortgages, § 778.

Am. Jur. Pleading and Practice Forms.

18 Am. Jur. Pleading and Practice Forms, Mortgages, § 232.

C.J.S.

59A C.J.S., Mortgages, §§ 960, 961.

ALR.

Garnishment of money in escrow, 10 A.L.R. 741.

Taxes not ascribable to property sold as

a charge on proceeds of judicial or foreclosure sale, 58 A.L.R. 1220.

Financial depression or lack of market as ground for enjoining sale under a mortgage or deed of trust to secure debt, 82 A.L.R. 976; 90 A.L.R. 1330; 94 A.L.R. 1352; 96 A.L.R. 853; 97 A.L.R. 1123; 104 A.L.R. 375.

Protection of mortgagor or owner of mortgaged property, on foreclosure sale, by fixing upset or minimum price, requiring credit of specified amount on mortgage debt, or denying or limiting amount of deficiency judgment, 89 A.L.R. 1087; 90 A.L.R. 1330; 94 A.L.R. 1352; 96 A.L.R. 853; 97 A.L.R. 1123; 104 A.L.R. 375.

Personal liability to mortgagor, as distinguished from mortgagee, of vendee of mortgaged premises who does not in term assume or agree to pay mortgage, 111 A.L.R. 1114.

Rights in respect of surplus arising upon foreclosure sale of entire property covered by first mortgage, as between junior mortgagee of part of the property, and holders of liens upon other part subject to first mortgage, 119 A.L.R. 1109.

Rights and remedies of mortgagee where mortgaged property is bid in on foreclosure as less than mortgage debt and it is redeemed by mortgagor or latter's grantee, 128 A.L.R. 796.

Right of true owner to recover proceeds of sale or lease of real property made by another in the belief that he was the owner of the property, 133 A.L.R. 1443.

Constitutionality of statute which in effect limits judgment after crediting thereon fair market value of property purchased by him at execution sale, 144 A.L.R. 858.

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

Recognition of action for damages for wrongful foreclosure — general views, 81 A.L.R.6th 161.

44-14-191. Treatment of proceeds of sale when debt due in installments.

If the mortgage is given to secure a debt due by installments and is foreclosed before any one of the installments falls due and there is a surplus of funds as provided in Code Section 44-14-190, the court may retain the funds or order them to be invested to meet the unpaid installments.

History.

Orig. Code 1863, § 3874; Code 1868, § 3894; Code 1873, § 3970; Code 1882, § 3970; Civil Code 1895, § 2752; Civil Code 1910, § 3285; Code 1933, § 67-502.

RESEARCH REFERENCES

Am. Jur. 2d.

55 Am. Jur. 2d, Mortgages, § 785.

ALR.

Right of holder of interest coupons through one who had guaranteed their payment to share with holder of principal obligation in proceeds of mortgage security, 41 A.L.R. 1254.

Financial depression or lack of market as ground for enjoining sale under a mortgage or deed of trust to secure debt, 82 A.L.R. 976; 90 A.L.R. 1330; 94 A.L.R. 1352; 96 A.L.R. 853; 97 A.L.R. 1123; 104 A.L.R. 375.

Protection of mortgagor or owner of mortgaged property, on foreclosure sale, by fixing upset or minimum price, requiring credit of specified amount on mortgage debt, or denying or limiting amount of deficiency judgment, 89 A.L.R. 1087; 90 A.L.R. 1330; 94 A.L.R. 1352; 96 A.L.R. 853; 97 A.L.R. 1123; 104 A.L.R. 375.

Excess of payment for one period as applicable to subsequent period under

contract or mortgage providing for periodic payments, 89 A.L.R.3d 947.

Part 3

Foreclosure of Deeds to Secure Debt, Purchase Contracts, and Bonds for Title

JUDICIAL DECISIONS

Priority. — As between secured creditors in a real property senior creditor foreclosure situation, junior creditors' rights are only as protected under the foreclosure requirements. Chattanooga Fed. Sav. & Loan Ass'n v. Northwest Recreational Activities, Inc., 4 B.R. 33, 1980 Bankr. LEXIS 5709 (Bankr. N.D. Ga. 1980).

RESEARCH REFERENCES

ALR.

Reservation of vendor's lien as preventing severance of estate in mineral from estate in surface by deed otherwise having that effect, 29 A.L.R. 618.

Jurisdiction of court in suit to foreclose mortgage securing issue of bonds to pass upon proposed reorganization plan, 109 A.L.R. 1139.

Rights in proceeds of vehicle collision policy, under "loss-payable" clause, of conditional seller, chattel mortgagee, or the like, of vehicle where there has been improper repossession or foreclosure after the damage, 46 A.L.R.2d 992.

Foreclosure sale of mortgaged real estate as a whole or in parcels, 61 A.L.R.2d 505.

44-14-210. Execution and recordation of quitclaim deed following judgment; levy and sale; disposition of proceeds; notice.

(a) In cases where a contract to purchase or a bond for title has been made, where purchase money has been partly paid, or where a deed to secure a debt has been executed and the purchase money or secured debt has been reduced to judgment by the payee, assignee, or holder of the debt, the holder of the legal title or, if dead, his executor or administrator, without order of any court, shall make and execute to the defendant in fi. fa. or, if he is dead, to his executor or administrator a quitclaim conveyance to the real or personal property and shall file and have the quitclaim conveyance recorded in the clerk's office. Thereupon, the property may be levied upon and sold as other property of the defendant; and the proceeds shall be applied to the payment of the judgment or, if there are conflicting claims, the proceeds shall be applied as determined in proceedings had for that purpose.

(b) In all cases provided for in subsection (a) of this Code section, notice of the levy and time of sale shall be given by the levying officer to the vendor or holder of the title given to secure the debt, if known, and also to the defendant in fi. fa. and, in case of death, to their legal

representatives. Depositing a properly addressed and stamped letter in the post office shall be deemed sufficient notice under this subsection.

History.

Laws 1847, Cobb's 1851 Digest, p. 517; Laws 1850, Cobb's 1851 Digest, p. 518; Code 1863, § 3581; Code 1868, § 3604; Code 1873, § 3654; Code 1882, §§ 1970, 3654; Ga. L. 1894, p. 100, §§ 1, 3; Civil Code 1895, §§ 5432, 5434; Civil Code 1910, §§ 6037, 6039; Code 1933, §§ 39-202, 67-1501.

JUDICIAL DECISIONS

Analysis

General Consideration
Debt Reduced to Judgment
1. Bond for Title
2. Purchase Money Partially Paid
3. Deed to Secure Debt
Quitclaim Deed
Filing and Recording
Levy and Sale
Notice

General Consideration

For case discussing history of O.C.G.A. § 44-14-210, see Coleman v. Maclean & Co., 101 Ga. 308, 28 S.E. 861 (1897); Maddox v. Arthur, 122 Ga. 671, 50 S.E. 668, 1905 Ga. LEXIS 298 (1905).

For cases discussing the effect of the Act of 1894, see Johnson v. Equitable Sec. Co., 114 Ga. 604, 40 S.E. 787, 1902 Ga. LEXIS 736 (1902); Smith v. Fourth Nat'l Bank, 145 Ga. 741, 89 S.E. 762, 1916 Ga. LEXIS 464 (1916); Cooke v. Adams Bros. Co., 148 Ga. 289, 96 S.E. 499, 1918 Ga. LEXIS 307 (1918); Jordan Mercantile Co. v. Brooks, 149 Ga. 157, 99 S.E. 289, 1919 Ga. LEXIS 170 (1919).

Constitutionality. — See Brown v. Rooks, 240 Ga. 674, 242 S.E.2d 128, 1978 Ga. LEXIS 800 (1978).

Bank's right to contract for power of sale and state regulation of banking do not constitute state action. — The statutory authorization of the right of a creditor bank to contract with debtors for a power of sale under a deed to secure debt does not, when combined with the state's general regulation of the banking industry's loan making procedures, convert the exercise of such power of sale into state action; therefore, any contention that the creditor's exercise of its power of sale under the deed to secure debt violates the debtors' rights to procedural due process under U.S. Const., Amend. 14 is without merit. Ray v. Bank of Covington, 247 Ga. 758, 279 S.E.2d 425, 1981 Ga. LEXIS 847 (1981).

Remedy distinct. — The remedies provided by O.C.G.A. §§ 44-14-210 and 44-14-280 are distinct and altogether independent of each other. Jackson v. Parks, 49 Ga. App. 29, 174 S.E. 203, 1934 Ga. App. LEXIS 247 (1934).

O.C.G.A. § 44-14-210 applies only to a regular sale under final judgment. Bradley v. GMAC, 51 Ga. App. 609, 181 S.E. 188, 1935 Ga. App. LEXIS 418 (1935).

"Judgment" defined. — When the holder of a deed to secure debt pursues the remedy provided in O.C.G.A. § 44-14-210, it is essential that the purchase-money or secured debt be reduced to judgment. The "judgment" here referred to means a judgment in personam against the maker of the debt. Hirsch v. Northwestern Mut. Life Ins. Co., 191 Ga. 524, 13 S.E.2d 165, 1941 Ga. LEXIS 321 (1941).

It would not be correct to hold that in codifying O.C.G.A. § 44-14-210 the words therein, "and the purchase money or secured debt has been reduced to judgment," mean other than a judgment on the debt, i.e., a personal judgment against the de-

fendant for the amount of the debt. Hirsch v. Northwestern Mut. Life Ins. Co., 191 Ga. 524, 13 S.E.2d 165, 1941 Ga. LEXIS 321 (1941).

Not applicable to attachments. — O.C.G.A. § 44-14-210 applies to a levy and sale of the property under a final judgment, but not to an attachment and seizure of the property thereon. Johnson v. Walter J. Wood Stove Co., 6 Ga. App. 65, 64 S.E. 287, 1909 Ga. App. LEXIS 179 (1909).

Not applicable to junior creditors and claimants. — Ordinarily junior creditors and claimants of property have an adequate remedy at law and are not entitled to the equitable relief provided in O.C.G.A. § 44-14-210. Rucker v. Tabor & Almand, 133 Ga. 720, 66 S.E. 917, 1910 Ga. LEXIS 32 (1910); Western Union Tel. Co. v. Brown & Randolph Co., 154 Ga. 229, 114 S.E. 36, 1922 Ga. LEXIS 339 (1922).

A trustee in bankruptcy may take advantage of O.C.G.A. § 44-14-210, construed in connection with the powers given the trustee by bankruptcy law, as to a debtor's property secured by deed. Bank of Manchester v. Birmingham Trust & Sav. Co., 156 Ga. 486, 119 S.E. 603, 1923 Ga. LEXIS 266 (1923).

In bankruptcy proceedings the date of the security deed, not that of the judgment thereon, prevails, and, consequently, the plaintiff may bring the property involved to sale under the provisions of O.C.G.A. § 44-14-210 if the deed has been executed more than four months prior to the filing of the petition in bankruptcy. Harvard v. Davis, 145 Ga. 580, 89 S.E. 740, 1916 Ga. LEXIS 408 (1916).

Compliance not prerequisite to jurisdiction. — Nothing in O.C.G.A. § 44-14-210 indicates that compliance with it was intended to be made a prerequisite to the attaching of a court's jurisdiction of a suit brought for the foreclosure of a security deed. First Nat'l Bank v. Charles Broadway Rouss, Inc., 61 F.2d 489, 1932 U.S. App. LEXIS 4339 (5th Cir. 1932), cert. denied, 287 U.S. 670, 53 S. Ct. 314, 77 L. Ed. 577, 1933 U.S. LEXIS 19 (1933).

A city court has jurisdiction to give the remedy provided in O.C.G.A. § 44-14-210, for the suit mentioned is not a case respecting title to land. Edenfield v. Bank of Millen, 7 Ga. App. 645, 67 S.E. 896, 1910 Ga. App. LEXIS 443 (1910).

The requirements of O.C.G.A. § 44-14-210 must be complied with before a valid sale of property in which a plaintiff in attachment has reserved title. Rhodes & Son Furn. Co. v. Jenkins, 2 Ga. App. 475, 58 S.E. 897, 1907 Ga. App. LEXIS 430 (1907); Johnson v. Walter J. Wood Stove Co., 6 Ga. App. 65, 64 S.E. 287, 1909 Ga. App. LEXIS 179 (1909).

Effect of noncompliance. — Strict compliance with the law was formerly required, on pain of the denial of the remedy; but since the passage of this act the creditor by a failure to comply strictly with its provisions is deprived only of that to which the creditor would have been entitled upon strict compliance therewith. In any case the creditor retains all the ordinary remedies that a title can give, and also such of those given by this Act to which the creditor remains entitled. Williamson v. Orient Ins. Co., 100 Ga. 791, 28 S.E. 914, 1897 Ga. LEXIS 144 (1897).

Where a plaintiff seeking the remedy given by O.C.G.A. §§ 44-14-210 and 44-14-211 does not fully comply with their provisions, the claimant to the property affected will prevail by reason of such noncompliance. Black v. Gate City Coffin Co., 115 Ga. 15, 41 S.E. 259, 1902 Ga. LEXIS 294 (1902); Sloan v. Loftis, 157 Ga. 93, 120 S.E. 781, 1923 Ga. LEXIS 370 (1923).

Transfers by creditor. — The creditor may transfer the whole or any part of the debt secured and with it the real estate as security. Hunt v. New England Mtg. Sec. Co., 92 Ga. 720, 19 S.E. 27, 1893 Ga. LEXIS 238 (1893); Moss & Co. v. Stokely, 107 Ga. 233, 33 S.E. 61, 1899 Ga. LEXIS 37 (1899); Cumming v. McDade, 118 Ga. 612, 45 S.E. 479, 1903 Ga. LEXIS 633 (1903).

Simple endorsement of the deed is not sufficient under O.C.G.A. § 44-14-210 to transfer the debt secured and with it the property as security. Sheppard v. Reese, 114 Ga. 411, 40 S.E. 282, 1901 Ga. LEXIS 723 (1901).

A transfer of property among defendants affords no ground for illegality when the plaintiff, pursing the remedy provided by O.C.G.A. § 44-14-210, recov-

General Consideration (Cont'd)

ers judgment against one or more of them. Stocking v. Moury, 129 Ga. 257, 58 S.E. 712, 1907 Ga. LEXIS 348 (1907).

Administrator's petition for marshalling no stay to creditor's use of remedy. — See Royal v. Edinburgh-American Land Mtg. Co., 143 Ga. 347, 85 S.E. 190, 1915 Ga. LEXIS 433 (1915).

Debt Reduced to Judgment

1. Bond for Title

Conditions for passage of title. — A grantor has a durable interest in the property covered by the bond only after redemption has been made by the grantor or by a judgment creditor desiring to subject the property: no title passes on sale unless the holder of the bond for title has legal title. Buchan v. Williamson, 131 Ga. 501, 62 S.E. 815, 1908 Ga. LEXIS 132 (1908). See also Ramey v. Denny, 133 Ga. 751, 66 S.E. 918, 1910 Ga. LEXIS 50 (1910).

A grantor's equitable interest under a bond for title is not leviable. Virginia-Carolina Chem. Co. v. Rylee, 139 Ga. 669, 78 S.E. 27, 1913 Ga. LEXIS 563 (1913).

When interest becomes leviable. — Where a deed to secure an indebtedness has been made and bond for title given to the grantor to make a reconveyance upon payment of the debt, the grantor has not a leviable interest until redemption has been made either by the grantor or by a judgment creditor desiring to subject the property. Penn Mut. Life Ins. Co. v. Donalson, 177 Ga. 84, 169 S.E. 337, 1933 Ga. LEXIS 122 (1933).

Where a trustee holds a bond for title for a person who has paid part of the purchase money, the latter does not have such an interest in the property as may be levied upon under O.C.G.A. § 44-14-210. Goldman v. Dent, 102 Ga. 9, 29 S.E. 138, 1897 Ga. LEXIS 436 (1897).

Interest of purchaser holding bond. — Where a grantor conveys property which is security for a debt to a purchaser who agrees to pay the debt, the creditor of the grantor may nevertheless pursue a remedy under O.C.G.A. § 44-14-210 against the grantor and have the property sold, notwithstanding that no notice is given to the purchaser and that the latter holds a bond for title from the grantor, for the purchaser's equitable interest under the bond must succumb to the legal interest acquired by the creditor. Scott v. Paisley, 158 Ga. 876, 124 S.E. 726, 1924 Ga. LEXIS 359 (1924), aff'd, 271 U.S. 632, 46 S. Ct. 591, 70 L. Ed. 1123, 1926 U.S. LEXIS 646 (1926).

2. Purchase Money Partially Paid

Rights of vendor when purchase money unpaid. — Upon the failure of the purchaser or transferee to pay the purchase-money the vendor may sue for the land, or the vendor may sue the purchaser upon the notes given for such purchase-money, under the provisions of O.C.G.A. § 44-14-210, or, as the land remains liable for the purchase-money the vendor may call upon such assignee to pay the balance of the purchase-money, render the land, or have it sold to satisfy the debt. McHan v. Stansell, 39 Ga. 197, 1869 Ga. LEXIS 202 (1869); Alston v. Wingfield, 53 Ga. 18, 1874 Ga. LEXIS 382 (1874); Couch v. Crane, 142 Ga. 22, 82 S.E. 459, 1914 Ga. LEXIS 252 (1914).

When a party seeks a levy and sale of property under O.C.G.A. § 44-14-210, it is not selecting the exclusive method by which it can satisfy its judgment but is merely availing itself of a remedy that will provide payment toward the judgment balance; there is nothing in O.C.G.A. § 44-14-210 that precludes a judgment debtor from seeking further relief if its judgment is not satisfied after application of the sale proceeds. Southern Land & Cattle Co. v. Brock, 218 Ga. App. 297, 460 S.E.2d 843, 1995 Ga. App. LEXIS 689 (1995), cert. denied sub nom. Block v. Southern Land & Cattle Co., No. S95C1842, 1995 Ga. LEXIS 1187 (Ga. Nov. 17, 1995).

The same remedies obtain in favor of a transferee of a note for the purchase price of property. Henry v. McAllister, 93 Ga. 667, 20 S.E. 66, 1894 Ga. LEXIS 382 (1894); Maddox v. Arthur, 122 Ga. 671, 50 S.E. 668, 1905 Ga. LEXIS 298 (1905). See also Ray v. Anderson, 119 Ga. 926, 47 S.E. 205, 1904 Ga. LEXIS 408 (1904); Guarantee Trust & Banking Co. v. American Nat'l

Bank, 15 Ga. App. 778, 84 S.E. 222, 1915 Ga. App. LEXIS 61 (1915).

Nature and scope of remedy. — This remedy is in the nature of a proceeding in rem, and does not seek a personal judgment against the assignee. Its scope is to subject the land to the payment of the purchase money. Dunson v. Lewis, 156 Ga. 692, 119 S.E. 846, 1923 Ga. LEXIS 311 (1923).

Transfer of installment notes. — O.C.G.A. § 44-14-210 does not authorize a vendor of land who has taken several notes for the unpaid purchase-money thereof to transfer them to different persons and to convey to each of them an undivided interest in the property in proportion to the part of the unpaid purchase-money so transferred to the vendor, and thus empower such transferee to obtain judgment, file a deed, and sell such undivided interest in the manner pointed out by O.C.G.A. § 44-14-210, or to obtain a general judgment against the purchaser together with a special lien upon the undivided interest in the land so conveyed. Strickland v. Lowry Nat'l Bank, 140 Ga. 653, 79 S.E. 539, 1913 Ga. LEXIS 213 (1913).

3. Deed to Secure Debt

Remedy not exclusive. — In general, see Dykes v. McVay, 67 Ga. 502, 1881 Ga. LEXIS 212 (1881); Hines v. Rutherford, 67 Ga. 606, 1881 Ga. LEXIS 239 (1881); Ashley v. Cook, 109 Ga. 653, 35 S.E. 89, 1900 Ga. LEXIS 279 (1900).

Alternate remedies. — The remedies given by the law and by O.C.G.A. § 44-14-210 are alternate, not concurrent. Couch v. Crane, 142 Ga. 22, 82 S.E. 459, 1914 Ga. LEXIS 252 (1914).

A creditor may foreclose writing as mortgage if the creditor does not wish to utilize the remedy afforded by O.C.G.A. § 44-14-210. Macon Sav. Bank v. Jones Motor Co., 168 Ga. 805, 149 S.E. 217, 1929 Ga. LEXIS 250 (1929); Ryals v. Lindsay, 176 Ga. 7, 167 S.E. 284, 1932 Ga. LEXIS 369 (1932).

Trover. — Procuring a judgment under O.C.G.A. § 44-14-210 does not impair the plaintiff's right to trover provided there has been no execution of the judgment. Mitchell v. Castlen, 5 Ga. App. 134, 62 S.E. 731, 1908 Ga. App. LEXIS 35 (1908).

Election of remedies not required. — A creditor, who holds a promissory note secured by a deed, is not put to an election of remedies as to whether the creditor shall sue upon the note or exercise a power of sale contained in the deed, but the creditor may do either, or pursue both remedies concurrently until the debt is satisfied. Pico, Inc. v. Mickel, 138 Ga. App. 856, 230 S.E.2d 488, 1976 Ga. App. LEXIS 2346 (1976), aff'd, 238 Ga. 218, 232 S.E.2d 841, 1977 Ga. LEXIS 966 (1977); Trust Inv. & Dev. Co. v. First Ga. Bank, 238 Ga. 309, 232 S.E.2d 828, 1977 Ga. LEXIS 1010 (1977); Brown v. Georgia State Bank, 141 Ga. App. 570, 234 S.E.2d 151, 1977 Ga. App. LEXIS 1997 (1977); Brown v. Rooks, 240 Ga. 674, 242 S.E.2d 128, 1978 Ga. LEXIS 800 (1978).

Sufficiency of security deed. — Where debtor gave a security deed to creditor which did not contain formal language but did convey property described in the deed, such deed was sufficient to invest 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 Ga. LEXIS 417 (1936).

Proof that the defendant had title when defendant made the security deed to the plaintiff is sufficient to make out a prima facie case against a third party claimant in favor of the plaintiff in fi. fa., notwithstanding the entry of levy stated the claimant was in possession at the time of the levy. Heaton v. Hayes, 188 Ga. 632, 4 S.E.2d 570, 1939 Ga. LEXIS 592 (1939).

Quitclaim Deed

Delivery of deed to debtor is not required under O.C.G.A. § 44-14-210. Denton Bros. v. Hannah, 12 Ga. App. 494, 77 S.E. 672, 1913 Ga. App. LEXIS 608 (1913); Terrell v. Gould, 168 Ga. 607, 148 S.E. 515, 1929 Ga. LEXIS 196 (1929); Alsabrook v. Prudential Ins. Co. of Am., 46 Ga. App. 400, 167 S.E. 735, 1933 Ga. App. LEXIS 74 (1933).

Fact that the quitclaim deed was never delivered to the defendant did not render it void. Alsabrook v. Pruden-

Quitclaim Deed (Cont'd)

tial Ins. Co. of Am., 46 Ga. App. 400, 167 S.E. 735, 1933 Ga. App. LEXIS 74 (1933).

It is the duty of the vendor to convey the land by quitclaim deed to the purchaser for the purpose of levy and sale under O.C.G.A. § 44-14-210; when the vendor holds title as security for payment of purchase money; and upon a refusal by the vendor to make such a conveyance, a court of equity will compel the vendor to make such conveyance. Campbell v. Gormley, 184 Ga. 647, 192 S.E. 430, 1937 Ga. LEXIS 605 (1937).

Proper person to execute deed. — Under O.C.G.A. § 44-14-210, the "holder of the legal title," and not the original vendor, is the proper person to execute the quitclaim deed under the fi. fa. If a note only is transferred and no deed is made conveying the legal title to the land as security, then it is necessary, after the transferee has obtained judgment, that the vendor execute a quitclaim deed to the purchaser before the fi. fa. could have been levied, because in that event the vendor would have continued to be the holder of the legal title. Swinson v. Shurling, 162 Ga. 604, 134 S.E. 613, 1926 Ga. LEXIS 249 (1926).

Where the holder of the legal title under a deed to secure debt, executed a power of attorney empowering the holder's named attorney in fact to bring suit on papers comprising the deed and evidence of debt, to cause the property to be sold under levy after judgment, and to bid in the property in the name of such holder of the legal title, this authority included, as a "necessary and usual means" of selling the property, the right to execute the quitclaim reconveyance to the debtor, record of which in the clerk's office is made by O.C.G.A. § 44-14-210, a prerequisite to a valid levy and sale of the property. Johnson v. Johnson, 184 Ga. 783, 193 S.E. 345, 1937 Ga. LEXIS 636 (1937).

When reconveyance not required. — Where a warranty deed to secure a debt contains no defeasance clause, and no bond to reconvey is executed contemporaneously therewith — the grantee being given the power to sell the land at public outcry upon default in the payment of the debt — it is not necessary that title be again placed in the grantor in order to bring the property to sale. Penn Mut. Life Ins. Co. v. Donalson, 177 Ga. 84, 169 S.E. 337, 1933 Ga. LEXIS 122 (1933).

Reconveyance is not necessary before the issuance of attachment and seizure of the property thereunder. Bradley v. GMAC, 51 Ga. App. 609, 181 S.E. 188, 1935 Ga. App. LEXIS 418 (1935).

Effect on sale. — Where land is conveyed by a deed to secure a debt, and the grantee or the grantee's assignee obtains a judgment against the debtor and has the land levied on and sold under execution, without filing and having recorded a deed reconveying the land to the debtor, the levy and sale are void, but where a sale is made solely by virtue of a power of sale in the security deed, no reconveyance to the grantor is necessary. Williams Realty & Loan Co. v. Simmons, 188 Ga. 184, 3 S.E.2d 580, 1939 Ga. LEXIS 492 (1939).

Nature of title passed. — Regardless of the time intervening between the date of the execution of a quitclaim deed and a levy and sale of the property therein conveyed, the grantee would never by virtue of such a deed acquire title to the land for any purpose other than to authorize its sale under the levy, nor would the grantee in the security deed thereby forfeit rights and title under the security deed for any purpose other than to enable the grantee to have a legal levy and sale of the premises involved. Minchew v. Juniata College, 188 Ga. 517, 4 S.E.2d 212, 1939 Ga. LEXIS 572 (1939).

Where a grantee in a security deed reduces claim to judgment and executes to the defendant in fi. fa. a quitclaim deed for the purpose of levy and sale, which deed is duly recorded, and the property is sold by the sheriff, and the holder of the security deed becomes the purchaser at such sale, such reconveyance is in effect "in escrow" only for the purpose specified, and does not divest the grantee in the security deed of rights thereunder. Gooch v. Citizens & S. Nat'l Bank, 196 Ga. 322, 26 S.E.2d 727, 1943 Ga. LEXIS 357 (1943).

Time of execution. — Where the quitclaim deed to the debtor was executed before the issuance of the execution, this did not render the quitclaim deed inopera-

tive. Alsabrook v. Prudential Ins. Co. of Am., 46 Ga. App. 400, 167 S.E. 735, 1933 Ga. App. LEXIS 74 (1933).

The fact that the vendor had previously conveyed the land by warranty deed to one of the purchasers is not in compliance with the requirements of O.C.G.A. § 44-14-210. Holbrook v. Adams, 166 Ga. 871, 144 S.E. 657, 1928 Ga. LEXIS 423 (1928).

Where there was no evidence to show that the plaintiff, the grantee in a security deed, had executed a quitclaim deed to the grantor in the security deed for the purpose of levy and sale, the trial court erred in directing a verdict finding the property subject to the plaintiff's execution. Sparks v. Sparks, 193 Ga. 368, 18 S.E.2d 556, 1942 Ga. LEXIS 392 (1942).

Accounting to other creditors. — Where a creditor grantee in a security deed obtains judgment, and sells the land without a deed of reconveyance as required by O.C.G.A. § 44-14-210, but goes into possession of the land and receives the rents, or has the use of the land personally, the creditor becomes chargeable with its proper rental, and must, in a proceeding with other judgment creditors, involving the distribution of the proceeds of other land covered by their liens, make an accounting for such rents by reducing the amount of the creditor's claim accordingly. Williams Realty & Loan Co. v. Simmons, 188 Ga. 184, 3 S.E.2d 580, 1939 Ga. LEXIS 492 (1939).

Filing and Recording

Necessity for filing and recording deed. — Though a claim may be reduced to judgment and a quitclaim deed to the defendant in fi. fa. duly executed and signed, as required by O.C.G.A. § 44-14-210, yet there can be no valid levy based upon such judgment unless such deed be duly filed and recorded. National Bank v. Danforth, 80 Ga. 55, 7 S.E. 546, 1887 Ga. LEXIS 322 (1887); Dedge v. Bennett, 138 Ga. 787, 76 S.E. 52, 1912 Ga. LEXIS 712 (1912); Coates v. Jones, 142 Ga. 237, 82 S.E. 649, 1914 Ga. LEXIS 660 (1914). See also Brunson v. Grant, 48 Ga. 394, 1873 Ga. LEXIS 70 (1873).

The property is not subject to levy and sale on a judgment for the secured debt until it has been reconveyed to the debtor, and until such reconveyance has been filed and recorded in the office of the clerk of the superior court. Callaway v. Life Ins. Co., 166 Ga. 818, 144 S.E. 381, 1928 Ga. LEXIS 413 (1928).

When filing not required. — A vendor abandoning this remedy in favor of ejectment need not file the deed. Hines v. Rutherford, 67 Ga. 606, 1881 Ga. LEXIS 239 (1881).

Place of recording. — When the defendant's land lies partly in each of two counties and a levy is sought upon the entire tract, the deed must be recorded in each county. Cade v. Larned, 99 Ga. 588, 27 S.E. 166, 1896 Ga. LEXIS 452 (1896).

Time of recording. — Where the vendor of land executed a quitclaim deed thereto for the purpose of levying the execution which issued upon the judgment against the vendee for the unpaid purchase-money, such deed, filed and recorded before the levy, is not invalid for such purpose, although not recorded until after the death of the vendor. Terrell v. Gould, 168 Ga. 607, 148 S.E. 515, 1929 Ga. LEXIS 196 (1929).

When the first deed filed is defective another may be filed. Moss v. Lovett, 99 Ga. 321, 25 S.E. 649, 1896 Ga. LEXIS 394 (1896).

Levy and Sale

The words "may be levied" as used in O.C.G.A. § 44-14-210 are permissive, not mandatory. Hines v. Rutherford, 67 Ga. 606, 1881 Ga. LEXIS 239 (1881).

Prerequisites to levy. — Before a sheriff can levy upon the land as the land of the defendant in fi. fa., the legal title thereto had to be put in the defendant in fi. fa. by executing a quitclaim deed in favor of the defendant and filing and having the same recorded in the clerk's office of the county where the land is. Alsabrook v. Prudential Ins. Co. of Am., 46 Ga. App. 400, 167 S.E. 735, 1933 Ga. App. LEXIS 74 (1933).

Rights of junior lienholders. — Creditors of a vendee, before a deed from vendor to vendee has been filed and recorded under the provisions of O.C.G.A. § 44-14-210, cannot themselves subject the land to levy and sale, their liens being

Levy and Sale (Cont'd)

inferior to those of the vendor. Harvill v. Lowe, 47 Ga. 214, 1872 Ga. LEXIS 315 (1872).

If there be a failure to enter on an execution made under O.C.G.A. § 44-14-210 a credit which should be so entered, this will not of itself be sufficient grounds to warrant the grant of an injunction to arrest a levy and sale thereunder. Brown v. Wilson, 56 Ga. 534, 1876 Ga. LEXIS 355 (1876).

Discretion of levying officer. — In the case of a levy upon land, made in pursuance of the mandate of the court directing the sale of specific property under a final judgment of foreclosure against the defendant, the levying officer has no discretion, but the officer's duty is to levy on the specific property to pay the judgment; nor would the officer be authorized in the seizure of any person's interest in the property except that of the defendant. Heaton v. Hayes, 188 Ga. 632, 4 S.E.2d 570, 1939 Ga. LEXIS 592 (1939).

Effect of sheriff's deed. — The title, legal and equitable, of the creditor becomes complete and indefeasible when the creditor obtains the sheriff's deed conveying to the creditor as a purchaser at the official sale the property in dispute. Crawford v. Pritchard, 81 Ga. 14, 6 S.E. 689, 1888 Ga. LEXIS 52 (1888); Hirsch v. Northwestern Mut. Life Ins. Co., 191 Ga. 524, 13 S.E.2d 165, 1941 Ga. LEXIS 321 (1941).

If the possession acquired be by virtue of a void sale by the sheriff, the creditor acquires no more right to the property than if the creditor had taken possession under the security deed on account of default in the payment of the debt. Hirsch v. Northwestern Mut. Life Ins. Co., 191 Ga. 524, 13 S.E.2d 165, 1941 Ga. LEXIS 321 (1941).

Notice

No notice required when parties all informed. Palmer v. Simpson, 69 Ga. 792, 1883 Ga. LEXIS 120 (1883).

Persons not entitled to notice. — There is no principle entitling purchasers who purchased land which was subject to the security deed to notice of the exercise of this statutory power by the creditor, and that in failing to provide such notice O.C.G.A. § 44-14-210 does not deprive them of property without due process of law or deny them the equal protection of the laws. Scott v. Paisley, 271 U.S. 632, 46 S. Ct. 591, 70 L. Ed. 1123, 1926 U.S. LEXIS 646 (1926).

Where the holder of a security deed assigns such deed and conveys the property therein described, the assignee takes all rights, title, and powers of the assignor in the security deed, and such assignor is precluded by a judgment of foreclosure of such deed from thereafter claiming a reversionary interest in the land embraced in the deed, although the assignor had no notice of the foreclosure proceedings. Owens v. Conyers, 189 Ga. 793, 7 S.E.2d 675, 1940 Ga. LEXIS 379 (1940).

Failure to give notice. — When a defendant in execution is the vendee of land, and has only a bond for titles, and a portion of the purchase money has been paid, and the land is levied on and sold by judgments against the vendee, and no notice is given as required by O.C.G.A. § 44-14-210, nothing is sold but the interest of the defendant, and the vendor cannot claim any of the proceeds on the ground that the vendor's purchase money is not all paid. The vendor's remedy is by filing a deed and selling the land, or by action of ejectment on legal title. Estes v. Ivey, 53 Ga. 52, 1874 Ga. LEXIS 394 (1874).

RESEARCH REFERENCES

Am. Jur. 2d.

30 Am. Jur. 2d, Executions, §§ 232, 244. 55 Am. Jur. 2d, Mortgages, § 572 et seq. 68 Am. Jur. 2d, Secured Transactions, § 572 et seq.

Am. Jur. Pleading and Practice Forms.

24A Am. Jur. Pleading and Practice Forms, Vendor and Purchaser, § 3.

C.J.S.

33 C.J.S., Executions, § 45. 59A C.J.S., Mortgages, § 690 et seq.

ALR.

Judgment as lien on judgment debtor's equitable interest in real property, 30 A.L.R. 504.

Rights or interests covered by quitclaim deed, 44 A.L.R. 1266; 162 A.L.R. 556.

Recording laws as applied to power of attorney under which deed or mortgagee is executed, 114 A.L.R. 660.

Constitutionality of provision for service by publication of notice of proceeding by purchaser at tax sale to foreclose delinquent owner's right of redemption, or of other proceeding perfect tax purchaser's title, 145 A.L.R. 597.

Interest of vendee under executory contract as subject to execution, judgment lien, or attachment, 1 A.L.R.2d 727.

44-14-211. Attachment against grantor in deed to realty to secure debt; execution and recordation of quitclaim, levy, and deed following judgment; sale; disposition of proceeds.

In all cases where a deed to land has been executed to secure a debt or the performance of an obligation and the grantor therein is or becomes thereafter liable to the process of attachment, an attachment may issue against him at the instance of the payee, assignee, or holder of the debt or obligation upon his compliance with the provisions of law relating to attachments. The attachment shall be levied upon the land described in the deed, and the subsequent proceedings shall be in all respects as prescribed by law in relation to attachments. The holder of the legal title of the land described in the deed or, if dead, his executor or administrator may make and execute, without order of any court, for the purpose of levy and sale after the rendition of judgment in attachment and the issuance of execution thereon, a quitclaim deed of conveyance of the land to the grantor in the deed and may file the same for record in the office of the clerk of the superior court of the county where the land is located. When a judgment is obtained upon the attachment and the deed is so filed and recorded, the execution issued upon the judgment may be levied upon the land and the land may be sold as other property of the defendant. The proceeds arising from the sale shall be applied to the payment of the judgment or, if there are conflicting claims, the proceeds shall be applied as determined in proceedings had for that purpose; provided, however, this Code section shall not apply unless the debt or debts or liabilities so secured have become due under the terms of the contract creating the obligation or obligations.

History.

Ga. L. 1918, p. 133, § 1; Code 1933, § 67-1502.

JUDICIAL DECISIONS

Election of remedies. — The holder of a note who is also the grantee in a deed to secure the indebtedness of the note is not forced to exercise the power of sale in the deed. The holder may sue on the note or exercise the power of sale. Trust Inv. & Dev. Co. v. First Ga. Bank, 238 Ga. 309, 232 S.E.2d 828, 1977 Ga. LEXIS 1010 (1977).

RESEARCH REFERENCES

Am. Jur. 2d.

6 Am. Jur. 2d, Attachment and Garnishment, §§ 144-146. 55 Am. Jur. 2d, Mortgages, § 525.

C.J.S.

7 C.J.S., Attachment, §§ 49, 54.

PART 4

FORECLOSURES ON PERSONALTY

Cross references.

Die, molds, forms, and patterns, T. 44, C. 12, Art. 8.

Law reviews.

For note discussing execution and levy as a means of enforcing security interest in light of Article 9, Part 5 of the Uniform Commercial Code, see 3 Ga. L. Rev. 198 (1968).

For comment discussing due process problems with Georgia's personal property foreclosure procedure prior to the adoption of the 1974 Acts, in light of Hall v. Stone, 229 Ga. 96, 189 S.E.2d 403 (1972), see 9 Ga. St. B.J. 336 (1973).

For article surveying Georgia cases in the area of commercial law from June 1979 through May 1980, see 32 Mercer L. Rev. 11 (1980).

For article, "Nonjudicial Foreclosures in Georgia: Fresh Doubts, Issues and Strategies," see 23 Ga. St. B.J. 123 (1987).

JUDICIAL DECISIONS

Application of §§ 9-11-1 through 9-11-132. — As a proceeding under O.C.G.A. Ch. 14, T. 44 is a special statutory proceeding, the rules in O.C.G.A. §§ 9-11-12(a) and 9-11-56 regarding the time periods granted for the filing of an answer and the filing of and hearing on a motion for summary judgment are not applicable. Adams v. Citizens & S. Nat'l Bank, 132 Ga. App. 622, 208 S.E.2d 628, 1974 Ga. App. LEXIS 1770 (1974).

A claim for indebtedness, whether filed in a separate action or in the same action as a foreclosure proceeding under O.C.G.A. § 44-14-230 et seq., must stand or fall upon the principles set forth in O.C.G.A. §§ 9-11-1 through 9-11-132, including, but not limited to, process and service of process, and may not be "piggybacked" into court using the special rules applicable to foreclosure actions under O.C.G.A. § 44-14-230 et seq. Porter v. Midland-Guardian Co., 242 Ga. 1, 247 S.E.2d 743, 1978 Ga. LEXIS 1066 (1978); Dein v. Citizens Jewelry Co., 149 Ga. App. 340, 254 S.E.2d 403, 1979 Ga. App. LEXIS 1844 (1979); Good Housekeeping Shops v. Hines, 150 Ga. App. 240, 257 S.E.2d 205, 1979 Ga. App. LEXIS 2131 (1979).

Sections 9-13-120 through 9-13-129 apply to the use of an affidavit of illegality to halt an execution proceeding on a writ of possession issued pursuant to a proceeding under O.C.G.A. § 44-14-230 et seq. Riviera Equip., Inc. v. Omega Equip. Corp., 147 Ga. App. 412, 249 S.E.2d 133, 1978 Ga. App. LEXIS 2703 (1978).

An affidavit of illegality will lie to halt an execution which the defendant in a foreclosure case swears is proceeding illegally. Riviera Equip., Inc. v. Omega Equip. Corp., 147 Ga. App. 412, 249 S.E.2d 133, 1978 Ga. App. LEXIS 2703 (1978).

An affidavit of illegality does not have to be accompanied by bond unless the defendant desires to maintain possession of the property. Riviera Equip., Inc. v. Omega Equip. Corp., 147 Ga. App. 412, 249 S.E.2d 133, 1978 Ga. App. LEXIS 2703 (1978).

Finality of judgments. — The Supreme Court has ruled that O.C.G.A. § 5-6-34 is determinative as to the finality of judgments entered under O.C.G.A. § 44-14-230 et seq. Jordan v. Ford Motor Credit Co., 147 Ga. App. 515, 249 S.E.2d 327, 1978 Ga. App. LEXIS 2746 (1978).

Default judgments. — O.C.G.A. § 44-14-230 et seq. specifically contemplates that under limited circumstances a default judgment is authorized which will fully adjudicate "all of the amount due." Porter v. Midland-Guardian Co., 145 Ga. App. 262, 243 S.E.2d 595, 1978 Ga. App. LEXIS 1943, rev'd, 242 Ga. 1, 247 S.E.2d 743, 1978 Ga. LEXIS 1066 (1978).

Money judgment. — There is no provision in O.C.G.A. § 44-14-230 et seq. allowing a money judgment for the full amount of the indebtedness, as distinguished from a deficiency judgment, to be taken against the debtor other than in O.C.G.A. § 44-14-269 which only applies to immediate writs of possession under O.C.G.A. § 44-14-260 et seq., which sections pertain alone to commercial transactions, and not to consumer transactions. Jordan v. Ford Motor Credit Co., 147 Ga. App. 515, 249 S.E.2d 327, 1978 Ga. App. LEXIS 2746 (1978).

Where seller of jewelry instituted action under O.C.G.A. § 44-14-230 et seq. which provided the sole basis for jurisdiction, the trial court erred in entering a money judgment. Dein v. Citizens Jewelry Co., 149 Ga. App. 340, 254 S.E.2d 403, 1979 Ga. App. LEXIS 1844 (1979).

A person holding a conditional sale contract may pursue any number of consistent remedies to enforce the payment of the debt until it is satisfied. Obtaining a judgment on the note and foreclosure of the security device are consistent remedies, and the utilization of one will not constitute either an election or abandonment of the other. Porter v. Midland-Guardian Co., 145 Ga. App. 262, 243 S.E.2d 595, 1978 Ga. App. LEXIS 1943, rev'd, 242 Ga. 1, 247 S.E.2d 743, 1978 Ga. LEXIS 1066 (1978).

A creditor may bring separate actions to foreclose a security interest and on an indebtedness, and accordingly, both remedies may be sought in the same action. Porter v. Midland-Guardian Co., 242 Ga. 1, 247 S.E.2d 743, 1978 Ga. LEXIS 1066 (1978).

OPINIONS OF THE ATTORNEY GENERAL

A justice of the peace may only honor applications for writs of possession as provided by former Chapter 67-7 (now O.C.G.A. § 44-14-230 et seq.) when the amount in controversy does not exceed $200.00. 1974 Op. Att'y Gen. No. U74-104.

RESEARCH REFERENCES

ALR.

Term "increase," in description in chattel mortgage on animals, as including increase other than by generation, 1 A.L.R. 554.

Uniting interest of chattel mortgagor and mortgagee in same person as merger, 29 A.L.R. 702.

Provision in land contract against removal of buildings as affecting rights of third person under chattel mortgage or conditional sale, 30 A.L.R. 542.

Remedies in respect of mortgage on real property in another state or the debt secured thereby, 42 A.L.R. 470.

Reacquisition by mortgagor, or his grantee, of the title through foreclosure of first mortgage as affecting rights under a second mortgage to which the property was subject before the foreclosure, 51 A.L.R. 445; 111 A.L.R. 1285.

Who may take advantage of failure of chattel mortgagee to file renewal, 51 A.L.R. 591.

Premature refiling of chattel mortgage, 63 A.L.R. 591.

Powers of sale as including power to exchange, 63 A.L.R. 1003.

Rights to attorneys' fees on enforcing chattel mortgage, 63 A.L.R. 1314.

Requisites and sufficiency of change of possession under an unrecorded chattel mortgage, 79 A.L.R. 1018.

Levy by chattel mortgagee under execution or attachment upon property covered by mortgage as affecting lien of mortgage, 92 A.L.R. 1277.

Implied power of trustee under mortgage or deed of trust who purchases property in behalf of bondholders at foreclosure sale, to give new mortgage, 95 A.L.R. 527.

Financial depression as justification of moratorium or other relief to mortgagor (including decisions under statutes in that regard), 104 A.L.R. 375.

Liability of mortgagee or mortgaged property for expenses of receivership not sought by him, or for expenditures by receiver in connection with the property, 104 A.L.R. 990.

Failure to take judgment for deficiency in suit to foreclose mortgage brought after appointment or receiver of trustee in bankruptcy of mortgagor as affecting right to its allowance as claim in insolvency or bankruptcy proceedings, 104 A.L.R. 1141.

Liability of mortgagee for damages because of wrongful foreclosure or improper execution of rightful foreclosure, 108 A.L.R. 592.

Accountability of mortgagee or pledgee for profit made upon resale of the property after purchase thereof at foreclosure or other enforcement sale, 117 A.L.R. 863.

Waiver of right to foreclose mortgage, 148 A.L.R. 686.

Necessity and sufficiency of notice of sale to mortgagor where chattel mortgage is sought to be foreclosed without judicial proceedings by sale under power, 30 A.L.R.2d 539.

Rights in proceeds of vehicle collision policy, under "loss-payable" clause, of conditional seller, chattel mortgagee, or the like, of vehicle where there has been improper repossession or foreclosure after the damage, 46 A.L.R.2d 992.

Subpart 1

In General

44-14-230. Authority to foreclose; execution; sale.

(a) Any person holding a security interest on personal property under a transaction governed by this part or by Title 11, the "Uniform Commercial Code," and wishing to foreclose the security interest shall be authorized to foreclose the security interest and shall be entitled to an execution directed to all and singular the sheriffs, the marshals, the constables, or their lawful deputies, of this state, which execution shall command the sale of the secured property to satisfy the amount due from the debtor, together with the costs of the proceedings to foreclose the security interest in accordance with the procedure specified in this part, together with an order directing the defendant or the party in possession to turn over to the sheriff, the marshal, the constable, or their lawful deputies the property sought to be foreclosed upon as provided for in subsection (d) of Code Section 44-14-233.

(b)(1) As used in this subsection, the term "rental transaction" means the lease or rental of goods or personal property.

(2) Any owner of personal property leased or rented in a rental

transaction who wishes to regain possession of such property as authorized by the terms of the transaction may obtain a writ of possession under this subpart in the same manner as is authorized for a holder of a security interest in personal property.

(3) Solely for the purpose of applying the procedures specified by this part to rental transactions and not for any other purposes, the owner of the property shall be considered to be a secured party and the rented or leased property shall be considered to be secured property. Proceedings to regain property under a rental transaction shall be as provided in this subpart, except that after a writ of possession is granted the rented or leased property shall be delivered to the owner and shall not be levied upon.

History.

Laws 1799, Cobb's 1851 Digest, p. 571; Laws 1839, Cobb's 1851 Digest, p. 572; Code 1863, § 3875; Code 1868, § 3895; Ga. L. 1871-72, p. 20, § 1; Code 1873, § 3971; Code 1882, § 3971; Ga. L. 1882-83, p. 74, § 1; Ga. L. 1882-83, p. 109, § 1; Civil Code 1895, § 2753; Civil Code 1910, § 3286; Code 1933, § 67-701; Ga. L. 1974, p. 398, § 1; Ga. L. 1983, p. 724, § 1; Ga. L. 1984, p. 892, § 2; Ga. L. 1987, p. 3, § 44; Ga. L. 1987, p. 1023, § 1.

Law reviews.

For article on this part and personal property foreclosures, see 11 Ga. St. B. J. 230 (1975).

For article, "The Civil Jurisdiction of State and Magistrate Courts," see 24 Ga. St. B. J. 29 (1987).

For article, "Foreclosure Diversion and Mediation in the States," see 33 Georgia St. U.L. Rev. 411 (2017).

JUDICIAL DECISIONS

Nature of proceedings. — Foreclosing a mortgage on personalty, under this section, is a proceeding at law. Manheim v. Claflin & Co., 81 Ga. 129, 7 S.E. 284, 1888 Ga. LEXIS 75 (1888).

A foreclosure under this section is such a disaffirmance of title by the mortgagee as waives the assertion of title, although the mortgage may be only a part of a contract which also contains a reservation of title, and although the instrument in question might either be foreclosed as a mortgage or afford the basis of an assertion of title in the payee by trover. Kennedy v. Manry, 6 Ga. App. 816, 66 S.E. 29, 1909 Ga. App. LEXIS 487 (1909); Puett v. Edwards, 17 Ga. App. 645, 88 S.E. 36, 1916 Ga. App. LEXIS 831 (1916).

Remedy not exclusive. — A mortgagee of personalty may foreclose under this section and proceed at the same time on the mortgage debt by ordinary action. Juchter v. Boehm, Bendheim & Co., 63 Ga. 71, 1879 Ga. LEXIS 122 (1879).

Substantial compliance required. — A substantial compliance with the method pointed out for foreclosing a chattel mortgage by this section is essential to a judgment of foreclosure. Duke v. Culpepper, 72 Ga. 842, 1884 Ga. LEXIS 330 (1884).

If the requirements for the foreclosure of a chattel mortgage have been substantially complied with, and all defects in the proceedings appear to be amendable, the proceeding is not void, and third persons acquiring rights to the property sold thereunder will be protected therein. Hardy v. Luke, 18 Ga. App. 423, 89 S.E. 540, 1916 Ga. App. LEXIS 388 (1916).

Place of foreclosure. — A mortgage on personalty must be foreclosed in the county of the residence of the mortgagor, if a resident of this state; and that it is so

foreclosed should affirmatively appear from the record. Rich v. Colquitt, 65 Ga. 113, 1880 Ga. LEXIS 113 (1880).

The issuing of an execution is essential to a complete foreclosure of a chattel mortgage under this section. De Vaughn v. Byrom, 110 Ga. 904, 36 S.E. 267, 1900 Ga. LEXIS 657 (1900).

Execution is final process. — This section provides for issuance of an execution under which the property shall be levied on and sold. This is a summary remedy, and the fi. fa. is final process which may be levied immediately, without any provision for the holder of the note to give notice as prescribed in O.C.G.A. § 13-1-11. Watters & Co. v. O'Neill, 151 Ga. 680, 108 S.E. 35, 1921 Ga. LEXIS 361 (1921).

This section does not make provision for the execution to be returnable to any particular term of court, so, O.C.G.A. § 9-13-9 would apply. Youmans v. Consumers Fin. Corp., 77 Ga. App. 373, 48 S.E.2d 684, 1948 Ga. App. LEXIS 557 (1948).

Finality of judgment. — The judgment of the trial court directing that the property be advertised and the proceeds of the sale paid under certain directions to the plaintiff is a final judgment. A judgment of a court having jurisdiction which provides for the control of the surplus of the funds derived from the sale of the property so as to protect the lien created for the unaccrued instalments of the debt in an action for the foreclosure of a bill of sale on personal property to secure a debt where a part of the payments provided for in the instrument sought to be foreclosed are past due and other payments not yet accrued, is a final judgment. Miller Serv., Inc. v. Miller, 77 Ga. App. 413, 48 S.E.2d 761, 1948 Ga. App. LEXIS 569 (1948).

A general judgment cannot be taken against the defendant in fi. fa. in a foreclosure brought under this section. Walker v. Small Equip. Co., 114 Ga. App. 603, 152 S.E.2d 629, 1966 Ga. App. LEXIS 866 (1966).

Purchase money notes. — A purchase money note for an amount exceeding $100.00, which contains a reservation of title to the personalty for the purchase price of which the note was given, and does not include a mortgage, cannot be foreclosed as a mortgage. Puett v. Edwards, 17 Ga. App. 645, 88 S.E. 36, 1916 Ga. App. LEXIS 831 (1916).

Single mortgage securing two creditors. — Where a debtor made a single mortgage covering a stock of goods to secure two creditors to the amounts respectively due them, the mortgage could be foreclosed in favor of both creditors at the same time; and such foreclosure would not be the joining of distinct and separate claims in the same action. Chamberlin & Co. v. Beck, Gregg & Co., 68 Ga. 346, 1882 Ga. LEXIS 10 (1882).

Foreclosure on multiple securities. — A single foreclosure proceeding under this section between the same creditor and the identical defaulting debtor on multiple security instruments is valid, even though the conditional sale contracts involve different motor vehicles and were made on different dates. Dampier v. Citizens & S. Nat'l Bank, 129 Ga. App. 240, 199 S.E.2d 330, 1973 Ga. App. LEXIS 961 (1973).

Attorney's fees. — By the terms of a contract, attorneys fees were as much a part of the debt secured as were the notes themselves. The court was right in awarding ten per cent to the plaintiff's attorney as fees in the foreclosure under this section. McCall v. Walter, 71 Ga. 287, 1883 Ga. LEXIS 180 (1883).

Mortgage to secure note for advances to make crop. — A chattel mortgage properly executed and recorded, to secure the payment of a promissory note given for advances to make a crop, is a valid mortgage, and may be foreclosed under this section. Stephens v. Tucker, 55 Ga. 543, 1875 Ga. LEXIS 460 (1875).

Directing sheriff to sell. — A direction in a mortgage fi. fa. that of the personalty covered thereby the sheriff make a specified sum, is in effect a direction to sell for that purpose. Chamberlin & Co. v. Beck, Gregg & Co., 68 Ga. 346, 1882 Ga. LEXIS 10 (1882).

Omissions or irregularities on the part of the sheriff are not chargeable to the buyer. The only questions with which a purchaser is concerned are the judgment, the levy, and the delivery of the property, all other questions are between

the parties to the judgment and the sheriff. Parr & Wood Furn. Co. v. Barnett, 16 Ga. App. 550, 85 S.E. 823, 1915 Ga. App. LEXIS 122 (1915).

Rights of trustee in bankruptcy. — If a mortgage on personalty was foreclosed, as provided in this section, and the sheriff took possession, a trustee in bankruptcy of the mortgagor, appointed after a subsequent adjudication, would not have the right to have the property delivered to him, although the petition in involuntary bankruptcy was filed before the mortgage was foreclosed. The mere fact that in the bankruptcy proceeding a temporary receiver had been named, but had not taken possession when the sheriff seized the property under the mortgage foreclosures, would not alter the case. Neill v. Barbaree, 135 Ga. 771, 70 S.E. 638, 1911 Ga. LEXIS 76 (1911).

Upon summary foreclosure of a mortgage on personalty under this section and seizure of the property, the mortgagor or other creditor may contest the validity of the lien or the amount claimed to be due. A trustee in bankruptcy may do so. Neill v. Barbaree, 135 Ga. 771, 70 S.E. 638, 1911 Ga. LEXIS 76 (1911).

Failure to raise defenses. — Where a proceeding to foreclose a retention of title contract is instituted and the defendant's answer sets up no defense to the foreclosure proceeding and in fact, is not responsive to the foreclosure proceeding, but refers to a trover proceeding and nowhere denies that the amount claimed or any part thereof is due, the answer filed fails to set up any defense and is subject to dismissal. Little v. Yow, 69 Ga. App. 335, 25 S.E.2d 232, 1943 Ga. App. LEXIS 71 (1943).

Instructions. — It was not error for the trial court to fail to charge the substance of this section in the absence of a request. First Nat'l Bank v. Vinson, 102 Ga. App. 828, 118 S.E.2d 225, 1960 Ga. App. LEXIS 759 (1960).

Automobile lessor obtained no priority over mechanic's lien by initiating foreclosure. — Automobile lessor did not, merely by initiating a foreclosure action in regard to the vehicle, thereby acquire any status as a secured party for purposes of obtaining a priority over the holder of a prior validly perfected mechanic's lien. First Nat'l Bank v. Strother Ford, Inc., 188 Ga. App. 749, 374 S.E.2d 203, 1988 Ga. App. LEXIS 1201 (1988).

RESEARCH REFERENCES

Am. Jur. 2d.

69 Am. Jur. 2d, Secured Transactions, §§ 572 et seq., 637 et seq.

C.J.S.

14 C.J.S., Chattel Mortgages, §§ 355-359, 364, 398, 412-422, 425.

ALR.

Relief to person who by mistake has foreclosed real estate mortgage in manner inimical to his own interests, 42 A.L.R. 1192.

Chattel mortgagee's failure to pursue proper course after taking possession as affecting personal liability of mortgagor, 47 A.L.R. 582.

Purchase by pledgee of subject of pledge, 76 A.L.R. 705; 37 A.L.R.2d 1381.

Exclusiveness of statutory method of enforcing chattel mortgage, 88 A.L.R. 912.

Validity, construction, and application of insecurity clause in chattel mortgage, 125 A.L.R. 313.

Rights and remedies of mortgagee where mortgaged property is bid in on foreclosure as less than mortgage debt and it is redeemed by mortgagor or latter's grantee, 128 A.L.R. 796.

Attachment as affected by release or modification of lien to which property was subject when attachment was levied, 128 A.L.R. 1392.

Mortgagee's purchase at his own foreclosure sale as affecting right of subrogation against him arising out of facts antedating the sale, 141 A.L.R. 1217.

Rights in proceeds of vehicle collision policy, under "loss-payable" clause, of conditional seller, chattel mortgagee, or the like, of vehicle where there has been improper repossession or foreclosure after the damage, 46 A.L.R.2d 992.

What conduct by repossessing chattel mortgagee or conditional vendor entails tort liability, 99 A.L.R.2d 358.

Replevin or claim-and-delivery: modern view as to validity of statute or contrac-

tual provision authorizing summary repossession of consumer goods sold under retail installment sales contract, 45 A.L.R.3d 1233.

Failure to keep up insurance as justifying foreclosure under acceleration provision in mortgage or deed of trust, 69 A.L.R.3d 774.

44-14-231. Petition for writ of possession; affidavit.

Upon a statement of the facts under oath, any person holding a security interest on personal property and wishing to foreclose the security interest may petition, by affidavit, either in person or by his or her agent or attorney in fact or at law, for a writ of possession. Such affidavit shall be made pursuant to the requirements of Code Section 9-10-113 and forwarded with the petition to the appropriate judge, magistrate, or clerk in the county where the debtor may reside or where the secured property is located.

History.

Code 1933, § 67-702, enacted by Ga. L. 1974, p. 398, § 1; Ga. L. 1975, p. 1213, § 1; Ga. L. 1978, p. 1705, § 1; Ga. L. 1983, p. 884, § 4-1; Ga. L. 1987, p. 1023, § 2; Ga. L. 2002, p. 630, § 3.

Law reviews.

For article on this part and personal property foreclosures, see 11 Ga. St. B. J. 230 (1975).

JUDICIAL DECISIONS

Venue. — An action under O.C.G.A. § 44-14-231 is not a "civil action" within the meaning of Ga. Const. 1983, Art. VI, Sec. II, Para. VI, and thus venue is proper in a county other than that of the defendant's residence. McClintock v. Wellington Trade, Inc., 252 Ga. 563, 315 S.E.2d 428, 1984 Ga. LEXIS 772 (1984).

An action pursuant to O.C.G.A. § 44-14-231 is not limited to proceeding only against a debtor who is in possession of the property, but contemplates that the defendant may be someone who is in possession of the property other than the debtor. Camilla Cotton Oil Co. v. C.I.T. Corp., 143 Ga. App. 840, 240 S.E.2d 212, 1977 Ga. App. LEXIS 2528 (1977); Sylvester Motor & Tractor Co. v. Farmers Bank, 153 Ga. App. 614, 266 S.E.2d 293, 1980 Ga. App. LEXIS 1923 (1980).

Rights determined. — Like writ of possession, writ of immediate possession, whether upheld or dissolved, determines only right to possession pending final decision on merits. Ward v. Charles D. Hardwick Co., 156 Ga. App. 96, 274 S.E.2d 20, 1980 Ga. App. LEXIS 2893 (1980).

Judicial immunity for magistrate judge. — Given that, in Georgia, issuance of writs of possession is delegated to magistrates by Georgia law, the debtor's complaint against the magistrate judge was subject to dismissal for failure to state a claim because the magistrate judge was acting as an arm of the state and was therefore entitled to Eleventh Amendment immunity; the judge was also acting within the judge's judicial capacity and therefore entitled to judicial immunity. Singleton v. Yoder's Storage Bldgs., LLC (In re Singleton), No. 16-60415-EJC, No. 16-06015-EJC, 2017 Bankr. LEXIS 3213 (Bankr. S.D. Ga. Sept. 20, 2017).

Oath administered by unauthorized person. — Where oath made before notary public and not by party authorized to issue summons, all subsequent proceedings were nugatory. Jordan v. Ford Motor Credit Co., 141 Ga. App. 280, 233 S.E.2d 256, 1977 Ga. App. LEXIS 1871 (1977).

Amendable defect. — Where a party seeking to foreclose a security interest in personal property sues out a writ of possession based on a petition not under oath, in violation of O.C.G.A. § 44-14-231, the failure is an amendable defect under

O.C.G.A. §§ 9-11-1 through 9-11-132 and does not render the proceedings void. C.E. Morgan Bldg. Prods., Inc. v. Safe-Lite Mfg., Inc., 244 Ga. 475, 260 S.E.2d 870, 1979 Ga. LEXIS 1296 (1979).

Failure to raise timely objection. — Where the parties went to trial on the merits of the plaintiff's petition for writ of possession seeking to foreclose security interest in personal property, without the defendant's raising any objection concerning the plaintiff's failure to verify the petition until appeal, the objection came too late. C.E. Morgan Bldg. Prods., Inc. v. Safe-Lite Mfg., Inc., 244 Ga. 475, 260 S.E.2d 870, 1979 Ga. LEXIS 1296 (1979).

Court cannot command return of property, dispensing with levy on secured property. — O.C.G.A. § 44-14-231 authorizes a court having jurisdiction to grant a writ of possession to secured property; it does not authorize a state court judge to command affirmatively that the defendant return the property and thus allow a plaintiff to dispense with a levy made on the secured property. Ponderosa Granite Co. v. First Nat'l Bank, 173 Ga. App. 105, 325 S.E.2d 591, 1984 Ga. App. LEXIS 2739 (1984).

Default judgments. — O.C.G.A. § 44-14-269 deals with petitions for immediate writ of possession and is inapplicable to a proceeding dealing with a petition for a writ of possession under O.C.G.A. § 44-14-231. Spencer v. Taylor, 144 Ga. App. 641, 242 S.E.2d 308, 1978 Ga. App. LEXIS 1721 (1978).

Res judicata and collateral estoppel did not apply. — Trial court did not err in ruling for a creditor in the creditor's action against a debtor pursuant to O.C.G.A. § 44-14-231 to foreclose on personal property and to recover monies lent and unpaid because the doctrines of res judicata and collateral estoppel did not apply when the merits of the creditor's claims for foreclosure and monies lent had not been previously adjudicated by a court of competent jurisdiction; the issue before an administrative law judge (ALJ) in the Office of State Administrative Hearings was limited to whether the Georgia Department of Revenue acted properly in cancelling the creditor's certificate of title to a vehicle, and the issue of the debtor's failure to pay the debtor's debt to the creditor was not an issue litigated and decided in the administrative proceeding. Allen v. Santana, 303 Ga. App. 844, 695 S.E.2d 314, 2010 Ga. App. LEXIS 422 (2010).

OPINIONS OF THE ATTORNEY GENERAL

A justice of the peace may only honor applications for writs of possession as provided by O.C.G.A. § 44-14-230 et seq. when the amount in controversy does not exceed $200.00. 1974 Op. Att'y Gen. No. U74-104.

RESEARCH REFERENCES

Am. Jur. 2d.

69 Am. Jur. 2d, Secured Transactions, §§ 590-606.

C.J.S.

14 C.J.S., Chattel Mortgages, §§ 272, 405-408.

ALR.

Relief to person who by mistake has foreclosed real estate mortgage in manner inimical to his own interests, 42 A.L.R. 1192.

Chattel mortgagee's failure to pursue proper course after taking possession as affecting personal liability of mortgagor, 47 A.L.R. 582.

Jurisdiction of court of state other than that in which property is located to redeem from or enforce a chattel mortgage debt secured thereby, 69 A.L.R. 622.

Bankruptcy court's injunction against mortgage or lien enforcement proceedings commenced, before bankruptcy, in another court, 40 A.L.R.2d 663.

Maintenance of replevin or similar possessory remedy by cotenant, or security transaction creditor thereof, against other cotenants, 93 A.L.R.2d 358.

44-14-232. Summons; service on defendant; debtor's duty to notify creditor of address changes; form.

(a) When the petition provided for in Code Section 44-14-231 is made, the judge, the magistrate, or the clerk shall grant and issue a summons as prescribed in this Code section to the sheriff, his deputy or marshal, or any lawful constable of the county where the debtor resides or the secured property is located. Service shall be made by the officer by delivering a copy of the summons attached to a copy of the petition to the defendant personally; or, if the officer is unable to serve the defendant personally, service may be had by delivering the summons and the petition to any person sui juris residing on the premises; or, if no such person is found residing on the premises after reasonable effort, service may be had by tacking a copy of the summons and the petition on the door of the premises and, on the same day of the tacking, by enclosing, directing, stamping, and mailing by first-class mail a copy of the summons and the petition to the defendant at his last known address, if any, and making an entry of this action on the petition filed in the case.

(b) The summons served on the defendant pursuant to subsection (a) of this Code section shall command and require the defendant 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.

(c) It shall be the obligation of the debtor to advise the secured creditor of any change of his address subsequent to the date of the granting of the security interest.

(d) The form of the summons shall be uniform in every county of this state and is prescribed as follows:

"IN THE _____ COURT OF _____ COUNTY

STATE OF GEORGIA

(Style of case) CIVIL ACTION NO. _____

SUMMONS

TO THE ABOVE-NAMED DEFENDANT:

The defendant _____ herein _____ hereby commanded and required personally or by attorney to file with the Clerk of the _____ Court of _____ County (insert location) within seven days from the date of service of the within affidavit and

summons, or on the first business day thereafter if the seventh day falls on a Saturday, a Sunday, or a legal holiday, then and there to answer said affidavit in writing or orally. If the defendant fails to answer on or before the seventh day from the date of service, the defendant may reopen the default as a matter of right by making an answer within seven days after the date of the default notwithstanding the provision of Code Section 9-11-55 of the Official Code of Georgia Annotated. If the seventh day is a Saturday, a Sunday, or a legal holiday, the answer may be made on the next day which is not a Saturday, a Sunday, or a legal holiday. The last possible date on which the defendant may answer is the _____ day of _____, _____. If answer is not so made, a writ of possession shall issue against you as by law provided, pursuant to plaintiff's affidavit.

Witness the Honorable _____, Judge of said Court.

This _____ day of _____, _____.

_____
Clerk,
_____ Court of _____ County

Service perfected on
defendant, this _____
day of _____, _____.

_____
Sheriff, deputy, marshal
or constable"

History.

Code 1933, § 67-703, enacted by Ga. L. 1974, p. 398, § 1; Ga. L. 1978, p. 1705, § 2; Ga. L. 1982, p. 3, § 44; Ga. L. 1987, p. 1023, § 3; Ga. L. 1999, p. 81, § 44; Ga. L. 2002, p. 415, § 44.

Law reviews.

For article on this part and personal property foreclosures, see 11 Ga. St. B. J. 230 (1975).

JUDICIAL DECISIONS

The trial court acquires no jurisdiction over defendant in the absence of service in accordance with the statutory mandate, or the waiver thereof. McGowan v. W.S. Badcock Corp., 144 Ga. App. 255, 240 S.E.2d 779, 1977 Ga. App. LEXIS 2661 (1977).

The fact that defendant acquires knowledge of the pending suit does not cure the defective service. McGowan v. W.S. Badcock Corp., 144 Ga. App. 255, 240 S.E.2d 779, 1977 Ga. App. LEXIS 2661 (1977).

Instructions. — It was not error for the trial court to fail to charge the substance of O.C.G.A. § 44-14-232 in the absence of a request. First Nat'l Bank v. Vinson, 102 Ga. App. 828, 118 S.E.2d 225, 1960 Ga. App. LEXIS 759 (1960).

Where the plaintiff in a mortgage

execution wrongfully causes personal property described in the execution to be brought from Alabama into Georgia for the purpose of having it levied upon under the execution, a levy on the property under such circumstances is illegal and void, in the absence of acquiescence and consent of the mortgagor. Robinson v. Smith, 80 Ga. App. 151, 55 S.E.2d 638, 1949 Ga. App. LEXIS 795 (1949).

Notice required where parties intended contract preempted by federal law. — A mobile home financing contract which was silent with regard to foreclosure and repossession did not permit the creditor to repossess by self help without notice (O.C.G.A. § 11-9-503), or to foreclose upon seven-days notice pursuant to a writ of possession (O.C.G.A. § 44-14-232), for the simple reason that the parties intended to enter a contract preempted by federal law, which requires 30 days notice to a defaulting debtor prior to repossession or foreclosure. Grant v. GECC, 764 F.2d 1404, 1985 U.S. App. LEXIS 26366 (11th Cir. 1985), cert. denied, 476 U.S. 1124, 106 S. Ct. 1993, 90 L. Ed. 2d 673, 1986 U.S. LEXIS 3167 (1986).

RESEARCH REFERENCES

Am. Jur. 2d.

69 Am. Jur. 2d, Secured Transactions, §§ 607-614.

C.J.S.

14 C.J.S., Chattel Mortgages, §§ 399, 404.

ALR.

Right of holder of interest coupons through one who had guaranteed their payment to share with holder of principal obligation in proceeds of mortgage security, 41 A.L.R. 1254.

Replevin or claim-and-delivery: Modern view as to validity of statute or contractual provision authorizing summary repossession of consumer goods sold under retail installment sales contract, 45 A.L.R.3d 1233.

44-14-233. Answer; reopening the default; granting writ upon default; trial; order to turn over property to sheriff or other.

(a) If the defendant fails to answer on or before the date provided in subsection (b) of Code Section 44-14-232, the defendant may reopen the default as a matter of right by making an answer within seven days after the date of the default notwithstanding the provisions of Code Section 9-11-55. If the seventh day is a Saturday, a Sunday, or a legal holiday, the answer may be made on the next day which is not a Saturday, a Sunday, or a legal holiday.

(b) If the defendant fails to answer or open the default, the court shall grant a writ of possession and, if otherwise permitted by this part, the plaintiff shall be entitled to a verdict and a judgment by default in open court or in chambers and without the intervention of a jury for all of the amount due, together with costs, as if every item and paragraph of the affidavit provided for in Code Section 44-14-231 were supported by proper evidence.

(c) The defendant may answer either in writing or orally. If the defendant answers orally, the substance thereof shall be endorsed by the court on the petition. The answer may contain any legal or equitable defense or counterclaim. If the defendant answers, a trial of the issues shall be had in accordance with the procedure prescribed for civil

actions in courts of record. Every effort shall be made by the trial court to expedite a trial of the issues and place the case on the next available calendar. However, the trial shall not be held before seven days have elapsed from the date the defendant files his answer. The defendant shall be allowed to remain in possession of the secured property pending the final outcome of the litigation, provided that the defendant complies with Code Section 44-14-234.

(d) The court shall issue an order directing the defendant or person in possession of property sought to be foreclosed to turn over said property to the sheriff, marshal, constable, or their lawful deputies whenever that court issues a writ of possession for personal property pursuant to this part.

(e) A suggested form for the order authorized under subsection (d) of this Code section is as follows:

"IN THE _____ COURT OF _____ COUNTY

STATE OF GEORGIA

(Style of case) CIVIL ACTION NO. _____

ORDER

A writ of possession having been issued against the defendant for personal property to be foreclosed upon, it is:

ORDERED that the defendant or the party in possession of the property specified in that writ of possession be and that person is hereby directed to turn over to the sheriff, marshal, or constable of _____ County or his lawful deputies, or to any sheriff, marshal, or constable of this state or their lawful deputies, the (describe property), instanter, or advise said officer of the location of the property if same is not in defendant's possession.

SO ORDERED, this _____ day of _____, _____.

_____

JUDGE

PRESENTED BY:

_____

Attorney's name
and address"

History.

Code 1933, § 67-704, enacted by Ga. L. 1974, p. 398, § 1; Ga. L. 1978, p. 1705, § 3; Ga. L. 1987, p. 1023, § 4; Ga. L. 1999, p. 81, § 44.

Law reviews.

For article on this part and personal property foreclosures, see 11 Ga. St. B. J. 230 (1975).

For article, "The Civil Jurisdiction of State and Magistrate Courts," see 24 Ga. St. B. J. 29 (1987).

JUDICIAL DECISIONS

The purpose in enacting O.C.G.A. § 44-14-233 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. Brown v. Wilson Chevrolet-Olds, Inc., 150 Ga. App. 525, 258 S.E.2d 139, 1979 Ga. App. LEXIS 2279 (1979).

The Personal Property Foreclosure Act requires the making of a contemporaneous record, and it must be strictly construed and observed. Brown v. Wilson Chevrolet-Olds, Inc., 150 Ga. App. 525, 258 S.E.2d 139, 1979 Ga. App. LEXIS 2279 (1979).

Request for jury trial and demand for a court reporter is no "answer" to a petition for a writ of possession. The trial court is therefore mandated by law to issue the writ of possession, which does not amount to a denial of the constitutional right to a jury trial. Banks v. Borg-Warner Acceptance Corp., 168 Ga. App. 46, 308 S.E.2d 54, 1983 Ga. App. LEXIS 2671 (1983).

The failure to endorse an answer upon the petition at the time of the hearing is not an amendable defect so as to be cured by judgment or subsequent "supplemental record." Brown v. Wilson Chevrolet-Olds, Inc., 150 Ga. App. 525, 258 S.E.2d 139, 1979 Ga. App. LEXIS 2279 (1979).

O.C.G.A. § 44-14-230 et seq. specifically contemplates that under limited circumstances a default judgment is authorized which will fully adjudicate "all of the amount due." Porter v. Midland-Guardian Co., 145 Ga. App. 262, 243 S.E.2d 595, 1978 Ga. App. LEXIS 1943, rev'd, 242 Ga. 1, 247 S.E.2d 743, 1978 Ga. LEXIS 1066 (1978).

Default judgment entered prior to seven-day period following the original default is voidable during that seven-day period and may be set aside. However, where the defendant files no answer or other pleadings during that time, a later motion to set aside the judgment comes too late. Steele v. Bank of Dalton, 168 Ga. App. 224, 308 S.E.2d 577, 1983 Ga. App. LEXIS 2733 (1983).

Answer untimely. — In an action for an immediate writ of possession against borrowers who had defaulted, the bank's motion to dismiss the borrowers' answer and counterclaim was properly granted, because the borrowers failed to open the default judgment as a matter of right within seven days, as required by O.C.G.A. § 44-14-233(a) and, thus, the case remained in default. Mathis v. River City Bank, 317 Ga. App. 560, 731 S.E.2d 788, 2012 Ga. App. LEXIS 766 (2012).

There is no provision in O.C.G.A. § 44-14-233 allowing a judgment by default for all of the amount due, together with costs. Spencer v. Taylor, 144 Ga. App. 641, 242 S.E.2d 308, 1978 Ga. App. LEXIS 1721 (1978).

Defendant's failure to post bond entitled plaintiff to immediate writ of possession. — Consulting company sued a store for breach of contract; the store's debt to the company was secured by UCC financing statements on the store's inventory. The company was entitled to an immediate writ of possession because after the suit was filed, the store sold and transferred merchandise subject to the company's security interest without posting bond as required by O.C.G.A. §§ 44-14-234(3) and 44-14-237. Deere Park &

Assocs. v. C H Furniture Source, LLC, 296 Ga. App. 382, 674 S.E.2d 635, 2009 Ga. App. LEXIS 229 (2009).

Judgment reversed when owner not accorded statutory procedures. — Trial court improperly issued the court's final judgment without affording the owner the procedures accorded the owner by O.C.G.A. § 44-14-233(c). The earlier hearing did not amount to a trial since it was neither noticed nor understood as such by the parties or the trial court, which issued a ruling only on the interlocutory matter of the registry payments at its conclusion. Ware v. Vanderbilt Mortg. & Fin., Inc., 320 Ga. App. 702, 740 S.E.2d 691, 2013 Ga. App. LEXIS 263 (2013).

RESEARCH REFERENCES

Am. Jur. 2d.

69 Am. Jur. 2d, Secured Transactions, § 572.

C.J.S.

14 C.J.S., Chattel Mortgages, §§ 355, 400, 405, 411.

ALR.

Right to litigate validity of tax title in suit to foreclose mortgage, 85 A.L.R. 1073.

Right to jury trial of issues as to personal judgment for deficiency in suit to foreclose mortgage, 112 A.L.R. 1492.

44-14-234. Payment into court; issuance of writ; possession and disposition of property pending resolution; disposition of payments.

In any foreclosure action, the defendant shall comply with the following provisions:

(1) 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, the defendant shall be required to pay into the registry of the trial court:

(A) All past due amounts which are admitted to be due and for which there are no allegations of defenses or claims which, if proven, would offset said amounts alleged past due; and

(B) All amounts of unaccelerated payments which become due after the issuance of the summons as said amounts of payments become due;

provided, however, that, in lieu of the payments, the defendant shall be allowed to submit a receipt to the court indicating that the payments have been made to the secured creditor. In the event that the amount of the payments actually due or to become due is in controversy, the court shall determine the amount to be paid into the court in the same manner as provided in paragraph (2) of this Code section;

(2) If the plaintiff and the defendant disagree as to the amounts actually due or to become due, the court shall set a hearing date to determine the amount to be paid into the court. At the hearing, the parties may submit to the court any evidence of the amounts actually due or to become due, including any security agreement and evidence of any claims or defenses arising out of the same transaction, for the

purpose of establishing the actual amount of the payments to be paid into the registry of the court;

(3) After the date of the service of the summons as provided in Code Section 44-14-232, the defendant shall not transfer, remove, or convey the secured property without posting bond as provided in Code Section 44-14-237;

(4) If the defendant fails to comply with any provision of this Code section to the detriment of the plaintiff, the court shall issue a writ of possession. The issuance of a writ of possession shall not affect the merits of the case but shall only affect the right to possession pending a final decision on the merits; and

(5) The court shall order the clerk of the court to pay to the plaintiff the amounts paid into the registry of the court as the payments are made; provided, however, that, if the defendant 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 plaintiff without delay only that portion of the funds to which the defendant 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.

History.

Code 1933, § 67-705, enacted by Ga. L. 1974, p. 398, § 1; Ga. L. 1982, p. 3, § 44; Ga. L. 1987, p. 1023, § 5.

Law reviews.

For article on this part and personal property foreclosures, see 11 Ga. St. B. J. 230 (1975).

For article surveying Georgia cases dealing with commercial law from June 1977 through May 1978, see 30 Mercer L. Rev. 15 (1978).

JUDICIAL DECISIONS

A writ of possession issued under O.C.G.A. § 44-14-234(4) is interlocutory in character. Greene v. Citizens & S. Bank, 134 Ga. App. 73, 213 S.E.2d 175, 1975 Ga. App. LEXIS 1910 (1975).

The trial judge is not authorized to issue a writ of possession pursuant to the provisions of O.C.G.A. § 44-14-234(4) where the defendants set forth several bases for relief and as a matter of law the pleadings do not reveal the absence of any defense. Jordan v. F & M Bank, 138 Ga. App. 43, 225 S.E.2d 498, 1976 Ga. App. LEXIS 2047 (1976).

Appellate procedure. — Since appeal to a writ of possession is not based on a final judgment, an appellant must follow the provisions of O.C.G.A. § 5-6-34 for an interlocutory appeal. Dein v. Citizens Jewelry Co., 145 Ga. App. 118, 243 S.E.2d 286, 1978 Ga. App. LEXIS 1882, 1978 Ga. App. LEXIS 3228 (1978).

An order entered pursuant to O.C.G.A. § 44-14-234 is not final and thus a direct appeal from such order will not lie. Foskey v. Bank of Alapaha, 147 Ga. App. 541, 249 S.E.2d 346, 1978 Ga. App. LEXIS 2763 (1978); Cavender v. First Nat'l Bank, 173 Ga. App. 660, 327 S.E.2d 789, 1985 Ga. App. LEXIS 1653 (1985).

Defendants are not required to make payments into the registry of the court where the defendants set forth several bases for denying the relief, and, as a matter of law, the pleadings do not reveal the absence of any defense. Jordan

v. F & M Bank, 138 Ga. App. 43, 225 S.E.2d 498, 1976 Ga. App. LEXIS 2047 (1976).

The defendant is not required to pay into the registry of the court disputed past due amounts or accelerated payments. Such issues must be resolved on trial and not on a hearing purportedly under O.C.G.A. § 44-14-234. Smalls v. Harrison, 150 Ga. App. 473, 258 S.E.2d 227, 1979 Ga. App. LEXIS 2262 (1979); Cavender v. First Nat'l Bank, 173 Ga. App. 660, 327 S.E.2d 789, 1985 Ga. App. LEXIS 1653 (1985).

Defendant's failure to post bond entitled plaintiff to immediate writ of possession. — Consulting company sued a store for breach of contract; the store's debt to the company was secured by UCC financing statements on the store's inventory. The company was entitled to an immediate writ of possession because after the suit was filed, the store sold and transferred merchandise subject to the company's security interest without posting bond as required by O.C.G.A. §§ 44-14-234(3) and 44-14-237. Deere Park & Assocs. v. C H Furniture Source, LLC, 296 Ga. App. 382, 674 S.E.2d 635, 2009 Ga. App. LEXIS 229 (2009).

Evidence of past due amounts. — At an evidentiary hearing under O.C.G.A. § 44-14-234 the trial judge only determines the amounts actually to become due. As to amounts past due no procedure for a hearing is provided. Thus, as the Appeals Court construes the Act, no evidence of past due amounts should be considered and the trial judge should only determine whether there are allegations of defenses or claims which would offset amounts alleged past due. Foskey v. Bank of Alapaha, 147 Ga. App. 541, 249 S.E.2d 346, 1978 Ga. App. LEXIS 2763 (1978).

Complaint moot on appeal. — Complaint on appeal concerning the issuance of writ of possession and a court order requiring the defendant to pay sums of money into the court's registry pursuant to O.C.G.A. § 44-14-234 was rendered moot by the entry of a final decision in trial court. Dein v. Citizens Jewelry Co., 149 Ga. App. 340, 254 S.E.2d 403, 1979 Ga. App. LEXIS 1844 (1979).

Funds improperly disbursed. — Where appellants' initial complaint disputed only part of the funds paid into the registry, in subsequent amendments to their complaint, appellants asserted additional defenses to the disbursement of any of the moneys which had been paid into the registry, the court improperly disbursed the registry funds prior to a final determination of the issues still in controversy. Daniel v. Roby, 151 Ga. App. 486, 260 S.E.2d 397, 1979 Ga. App. LEXIS 2579 (1979).

Where a petition for writ of possession is premature at the time of a first judgment in a case, if evidence and inferences show that at the time of the rendition of a second order, defendant is in default, the petition at the time of the second hearing and order still has viability and is not subject to dismissal for being premature. Good Housekeeping Shops v. Hines, 150 Ga. App. 240, 257 S.E.2d 205, 1979 Ga. App. LEXIS 2131 (1979).

RESEARCH REFERENCES

C.J.S.

14 C.J.S., Chattel Mortgages, §§ 407-409.

ALR.

Chattel mortgage on property consumable in use, 49 A.L.R. 1495.

Purchase by pledgee of subject of pledge, 76 A.L.R. 705; 37 A.L.R.2d 1381.

Right of mortgagee lawfully in possession, or one entitled to his rights, to retain possession until debt is paid, although debt or right to foreclose is barred by limitation, 115 A.L.R. 339.

44-14-235. Appeals; possession pending appeal.

Any judgment by the court shall be appealable pursuant to Chapters 2, 3, 6, and 7 of Title 5 or any other applicable law. If the judgment of

the court awards possession of the secured property to the plaintiff and the defendant appeals this judgment, the defendant shall remain in possession of the secured property, provided that the defendant complies with all of the provisions of Code Section 44-14-234 until the issue has been finally determined on appeal.

History.
Code 1933, § 67-706, enacted by Ga. L. 1974, p. 398, § 1.
Law reviews.
For article on this part and personal property foreclosures, see 11 Ga. St. B. J. 230 (1975).

44-14-236. Execution and levy; retention by plaintiff; sale.

Whenever a writ of possession is granted pursuant to a petition filed in accordance with Code Section 44-14-231, a levy may be made on the secured property by the sheriff, the deputy, the marshal, the constable, or a duly qualified levying officer of the court pursuant to the writ of possession. At the option of the plaintiff, the sheriff, the deputy, the marshal, the constable, or a duly qualified levying officer of the court shall either surrender the secured property to the plaintiff for retention or disposition in accordance with Article 9 of Title 11 or shall advertise and sell the same as in the case of levy and sale under execution.

History.
Code 1933, § 67-707, enacted by Ga. L. 1974, p. 398, § 1.
Law reviews.
For article on this part and personal property foreclosures, see 11 Ga. St. B. J. 230 (1975).

JUDICIAL DECISIONS

Extent of court's authority. — While O.C.G.A. § 44-14-236 authorizes a court having jurisdiction to grant a writ of possession to the secured property, it does not authorize a state court judge to command affirmatively that the defendant return the property and thus allow a plaintiff to dispense with a levy made on the secured property by the sheriff, deputy, marshal, constable or a duly qualified levying officer of the court. Riviera Equip., Inc. v. Omega Equip. Corp., 145 Ga. App. 640, 244 S.E.2d 139, 1978 Ga. App. LEXIS 2074 (1978).

RESEARCH REFERENCES

Am. Jur. 2d.
69 Am. Jur. 2d, Secured Transactions, § 575.
C.J.S.
14 C.J.S., Chattel Mortgages, §§ 407, 425.
ALR.
Purchase by pledgee of subject of pledge, 76 A.L.R. 705; 37 A.L.R.2d 1381.

44-14-237. Transfer, movement, or conveyance of property by defendant after posting of bond.

In all cases where the defendant may desire to transfer, remove, or convey any of the secured property after the service of the summons and after having an opportunity to answer, the defendant shall post bond for the delivery of the property at the time and place of sale. The bond shall be with good security for a sum equal to the value of the property or the amount of the alleged remaining balance, whichever is less. The value of the property shall be estimated by the judge, the magistrate, or the clerk. Upon the approval of the bond by the judge, the magistrate, or the clerk, the defendant may transfer, remove, or convey such property as may be approved by the judge, the magistrate, or the clerk.

History.
Code 1933, § 67-709, enacted by Ga. L. 1974, p. 398, § 1; Code 1933, § 67-708, as redesignated by Ga. L. 1975, p. 1213, § 3; Ga. L. 1987, p. 1023, § 6.

Law reviews.
For article on this part and personal property foreclosures, see 11 Ga. St. B. J. 230 (1975).

JUDICIAL DECISIONS

Defendant's failure to post bond entitled plaintiff to immediate writ of possession. — Consulting company sued a store for breach of contract; the store's debt to the company was secured by UCC financing statements on the store's inventory. The company was entitled to an immediate writ of possession because after the suit was filed, the store sold and transferred merchandise subject to the company's security interest without posting bond as required by O.C.G.A. §§ 44-14-234(3) and 44-14-237. Deere Park & Assocs. v. C H Furniture Source, LLC, 296 Ga. App. 382, 674 S.E.2d 635, 2009 Ga. App. LEXIS 229 (2009).

RESEARCH REFERENCES

C.J.S.
14 C.J.S., Chattel Mortgages, § 408.

44-14-238. Foreclosure when debts due in installments; treatment of surplus.

If a mortgage on personalty is given to secure several debts falling due at different times, the mortgagee may foreclose when the first debt becomes due; and the court will control the surplus so as to protect the lien created for the debts not due.

History.
Orig. Code 1863, § 1967; Code 1868, § 1955; Code 1873, § 1965; Code 1882, § 1965; Civil Code 1895, § 2739; Civil Code 1910, § 3272; Code 1933, § 67-1001.

JUDICIAL DECISIONS

In this state there can be but one foreclosure of a mortgage. Strickland v. Lowry Nat'l Bank, 140 Ga. 653, 79 S.E. 539, 1913 Ga. LEXIS 213 (1913).

The policy of the law is against repeated foreclosures of the same mortgage, and in harmony with this policy, this provision is made for a single foreclosure where the debt secured thereby falls due in installments. Georgia Realty Co. v. Bank of Covington, 19 Ga. App. 219, 91 S.E. 267, 1917 Ga. App. LEXIS 68 (1917).

Judgment final. — A judgment which provides for the control of the surplus of the funds under O.C.G.A. § 44-14-238 is a final judgment. Miller Serv., Inc. v. Miller, 77 Ga. App. 413, 48 S.E.2d 761, 1948 Ga. App. LEXIS 569 (1948).

Control over surplus. — Under O.C.G.A. § 44-14-238, the court will control the surplus so as to protect the lien created for the debts or installments not due. The court may order the part which is in judgment to be paid, and the balance to be invested to meet the indebtedness still unpaid. Hatcher v. Chancey, 71 Ga. 689, 1883 Ga. LEXIS 249 (1883). See also McCurry v. Pitner, 159 Ga. 807, 126 S.E. 781, 1925 Ga. LEXIS 58 (1925).

Equitable relief. — Under O.C.G.A. § 44-14-238 where partial payments were made on the first two installments, but nothing was paid on the third, and the purchaser was wholly unable to pay for the land, the vendor might, by equitable proceedings, obtain judgment for the indebtedness, and a decree ordering the sale of the land and providing that, if, after paying the installments due, there should remain a surplus, the sheriff should return it to satisfy the installment thereafter to become due. If the debtor be insolvent, this could be done as well where title was retained as security as where a mortgage is taken for that purpose. Littleton v. Spell, 77 Ga. 227, 2 S.E. 935, 1887 Ga. LEXIS 94 (1887).

Notes payable in specifics. — It makes no difference, under O.C.G.A. § 44-14-238, that notes, to secure which the mortgage was given, are payable in specifics. Hatcher v. Chancey, 71 Ga. 689, 1883 Ga. LEXIS 249 (1883).

Separate notes for interest. — A mortgage to secure a promissory note for a stated amount of principal, and separate notes maturing at different times for the interest to accrue thereon, cannot, in advance of the maturity of the principal note, unless specially so stipulated, be absolutely foreclosed for the full amount of the principal and the matured interest notes, and the collection thereof summarily enforced by a process amounting to no more than an ordinary mortgage execution. In such a case the remedy provided by O.C.G.A. § 44-14-238 is available. Cumberland Island Co. v. Bunkley, 108 Ga. 756, 33 S.E. 183, 1899 Ga. LEXIS 348 (1899).

Mortgage by tenants in common. — Where two give a lien on their separate interests in the same property to a common creditor, the mortgage may be foreclosed separately against each. Baker v. Shephard, 30 Ga. 706, 1860 Ga. LEXIS 179 (1860).

When a mortgage was executed by two tenants in common, it may be foreclosed against one as to that tenant's interest. Baker v. Shepherd, 37 Ga. 12, 1867 Ga. LEXIS 122 (1867).

Security notes passed to several holders. — A mortgage having been made to secure several negotiable notes, and the notes having been passed to several different holders, and one of the holders having obtained a general judgment, and another having foreclosed the mortgage in the name of the mortgagee for use, a sale of the premises under the general judgment passed the title free from the mortgage lien. The notes not covered by either judgment cannot be enforced against the land, but are thrown, in equity, upon the fund produced by the sale, for their pro rata share thereof. Smith v. Bowne, 60 Ga. 484, 1878 Ga. LEXIS 512 (1878).

RESEARCH REFERENCES

Am. Jur. 2d.
69 Am. Jur. 2d, Secured Transactions, §§ 557, 572, 590-606, 734-736.
C.J.S.
14 C.J.S., Chattel Mortgages, §§ 183, 360.
ALR.
Validity, construction, and application of insecurity clause in chattel mortgage, 125 A.L.R. 313.
Excess of payment for one period as applicable to subsequent period under contract or mortgage providing for periodic payments, 89 A.L.R.3d 947.

44-14-239. Foreclosure before debt due; grounds; affidavit.

Whenever a process of attachment may be legally brought against any person upon any debt or demand secured by a mortgage on personal property, or whenever the purchaser of mortgaged property is seeking to remove the property outside of the county, or when the defendant is seeking to dispose fraudulently or is fraudulently disposing of the mortgaged property and a disposal of the property will lessen the security, the creditor may foreclose his mortgage in the manner prescribed by law, except that the affidavit need not state that the debt or demand is due but shall state that the debtor has placed himself in one of the positions where a process of attachment could legally issue against him, or that the defendant is disposing or seeking to dispose of the mortgaged property and that a disposal of the property will lessen the security and shall state the amount of the debt or demand claimed and when the debt will be due.

History.
Ga. L. 1882-83, p. 109, § 1; Civil Code 1895, § 2754; Civil Code 1910, § 3287; Civil Code 1933, § 67-1002.

JUDICIAL DECISIONS

An affidavit to foreclose a mortgage under O.C.G.A. § 44-14-239 is amendable. Bainbridge Stock Co. v. Krause-McFarlin Co., 8 Ga. App. 220, 68 S.E. 1013, 1910 Ga. App. LEXIS 110 (1910); Hardy v. Luke, 18 Ga. App. 423, 89 S.E. 540, 1916 Ga. App. LEXIS 388 (1916).

Evidence of intention to make fraudulent disposal. — Where a chattel mortgage is foreclosed and levied before its maturity, under O.C.G.A. §§ 18-3-1 and 44-14-239, upon the grounds that the mortgagor is actually disposing or attempting to dispose of the mortgaged property so as to lessen the security, and that the mortgagor is about to remove from the county of residence, it is not necessary for the plaintiff to show that the defendant was attempting to dispose of the property or was about to remove from the county on the very day upon which the affidavit to obtain the foreclosure was made. It is sufficient to show the existence of such a present design or intention and the defendant's purpose to carry it into execution at or about the time of the foreclosure. Louis Stix & Co. v. S. Pump & Co., 36 Ga. 526, 1867 Ga. LEXIS 83 (1867); Perryman v. Pope, 102 Ga. 502, 31 S.E. 37, 1897 Ga. LEXIS 524 (1897); Nichols v. Ward, 27 Ga. App. 501, 108 S.E. 832, 1921 Ga. App. LEXIS 232 (1921).

Allegations insufficient. — An allegation in an affidavit for the foreclosure of a mortgage before maturity of the debt, that the "defendants" are about to remove the mortgaged property beyond the limits of the county, is not a compliance with

O.C.G.A. § 44-14-239 where the affidavit does not show that the defendants are purchasers of the mortgaged property. Upchurch v. Nichols, 15 Ga. App. 359, 83 S.E. 273, 1914 Ga. App. LEXIS 112 (1914).

Sufficiency of statement as to when debt due. — The requirement in O.C.G.A. § 44-14-239 that the affidavit shall state when the amount of the debt or demand "will be due," was sufficiently met by the assertion in the affidavit of foreclosure that "there is now due on said mortgage the sum of $500.00 principal and $15.00 interest, and that the amount of said several sums is now due." Hardy v. Luke, 18 Ga. App. 423, 89 S.E. 540, 1916 Ga. App. LEXIS 388 (1916).

RESEARCH REFERENCES

C.J.S.

14 C.J.S., Chattel Mortgages, §§ 356, 360.

ALR.

Validity, construction, and application of insecurity clause in chattel mortgage, 125 A.L.R. 313.

Failure to keep up insurance as justifying foreclosure under acceleration provision in mortgage or deed of trust, 69 A.L.R.3d 774.

44-14-240. Foreclosure before debt due; levy and sale; disposition of proceeds.

All subsequent proceedings respecting the levy and sale of the mortgaged property shall be conducted in the manner prescribed by law; and the money realized from the sale of the property shall be disbursed by the proper officer under the terms and rules prescribed by law, except that the money shall not be paid over to the plaintiff in fi. fa. until the debt secured by the mortgage becomes due.

History.

Ga. L. 1882-83, p. 109, § 2; Civil Code 1895, § 2755; Civil Code 1910, § 3288; Code 1933, § 67-1003.

RESEARCH REFERENCES

Am. Jur. 2d.

69 Am. Jur. 2d, Secured Transactions, § 575.

C.J.S.

14 C.J.S., Chattel Mortgages, §§ 407, 425.

44-14-241. Foreclosure before debt due; affidavit of illegality; bond; trial of issue.

After the levy of the execution on the mortgaged property, the defendant may file his affidavit of illegality, in which affidavit he may avail himself of any defense that he could have set up in an ordinary action upon the demand secured by the mortgage and may show that he is not justly indebted to the plaintiff in the sum claimed in the affidavit of foreclosure. The subsequent proceedings, as to the giving of bond and the trial of the issue made in the case, shall be conducted in the manner prescribed by Code Section 44-14-233.

History.
Ga. L. 1882-83, p. 109, § 3; Civil Code 1895, § 2756; Civil Code 1910, § 3289; Code 1933, § 67-1004.

JUDICIAL DECISIONS

The mortgagor may, in an affidavit of illegality, set up any defense the mortgagor might have urged in an action on the note secured by the mortgage and which goes to show that the amount claimed is not due and owing by the mortgagor. Fellows v. Sapp, 45 Ga. App. 89, 163 S.E. 314, 1932 Ga. App. LEXIS 174 (1932).

Setoff not available. — In an affidavit of illegality to the foreclosure of a mortgage on personalty, the mortgagor may utilize the defense of recoupment; but the mortgagor cannot plead setoff in such a proceeding. Holleman v. Commercial Credit Co., 66 Ga. App. 772, 19 S.E.2d 336, 1942 Ga. App. LEXIS 301 (1942).

It was error to dismiss an affidavit of illegality, on motion, on the ground that it was not the proper remedy of the defendant, without passing upon its merits. Crawford v. Scott, 137 Ga. 760, 74 S.E. 520, 1912 Ga. LEXIS 139 (1912).

Subpart 2

Foreclosures Arising out of Commercial Transactions

44-14-260. Definitions.

As used in this subpart, the term:

(1) "Commercial transaction" means a transaction which gives rise to an obligation to pay for goods sold or leased, services rendered, or moneys loaned for use in the conduct of a business or profession and not for personal consumption.

(2) "Consumer transaction" means the sale, lease, or rental of goods, services, or property, real or personal, primarily for personal, family, or household purposes.

(3) "Waiver" means a written statement signed by the defendant, which statement contains language clearly and unambiguously waiving any and all rights the defendant may have to a notice prior to seizure by a creditor having an interest in personal property of the defendant. No waiver shall be effective unless the interest sought to be foreclosed upon arose out of a commercial transaction.

History.
Code 1933, § 67-718, enacted by Ga. L. 1975, p. 1213, § 3.

JUDICIAL DECISIONS

Motor home loan consumer transaction. — Because motor homes are generally used for personal purposes rather than commercial ones, the trial court properly concluded that a loan transaction between original motor home purchaser and bank was a consumer transaction. Washington State Employees Credit Union v. Robinson, 206 Ga. App. 782, 427 S.E.2d 15, 1992 Ga. App. LEXIS 1795

(1992), cert. denied, No. S93C0592, 1993 Ga. LEXIS 301 (Ga. Mar. 19, 1993).

RESEARCH REFERENCES

Am. Jur. 2d.
68 Am. Jur. 2d, Secured Transactions, §§ 23, 590-606.
C.J.S.
14 C.J.S., Chattel Mortgages, § 370.
ALR.
Chattel mortgage on property consumable in use, 49 A.L.R. 1495.

44-14-261. Petition for immediate writ of possession; verification; exemption of consumer transactions.

Any person seeking to foreclose an interest in personal property arising out of a commercial transaction under this subpart may seek an immediate writ of possession from the court before which the petition is filed if the petition contains a statement of facts, under oath, by the petitioner or his agent or attorney which sets forth the basis of the petitioner's claim and a sufficient ground for the issuance of an immediate writ of possession. No such writ shall issue on an interest arising out of a consumer transaction; provided, however, that an immediate writ of possession may issue for merchandise or services rendered on merchandise which was paid for, in whole or in part, by a bad check as the term "bad check" is defined in Code Section 44-14-516.

History.
Code 1933, § 67-709, enacted by Ga. L. 1975, p. 1213, § 3; Ga. L. 1989, p. 803, § 1.
Law reviews.
For article on Chapter 67-7 (now this part,) and personal property foreclosures, see 11 Ga. St. B.J. 230 (1975).

JUDICIAL DECISIONS

Filing a foreclosure petition is not a jurisdictional prerequisite to a creditor's right to seek an immediate writ of possession. Flateau v. Reinhardt, Whitley & Wilmot, 220 Ga. App. 188, 469 S.E.2d 222, 1996 Ga. App. LEXIS 417 (1996).

RESEARCH REFERENCES

Am. Jur. 2d.
69 Am. Jur. 2d, Secured Transactions, §§ 590-606, 607-614.
C.J.S.
14 C.J.S., Chattel Mortgages, §§ 185, 405.
ALR.
Chattel mortgage on property consumable in use, 49 A.L.R. 1495.
Bankruptcy court's injunction against mortgage or lien enforcement proceedings commenced, before bankruptcy, in another court, 40 A.L.R.2d 663.

44-14-262. Grounds for immediate writ of possession.

The petitioner seeking an immediate writ of possession shall allege

under oath specific facts sufficient to show that it is within the power of the defendant to conceal, waste, encumber, convert, convey, or remove from the jurisdiction of the court the property which is the subject matter of the petition or that the petitioner's postjudgment remedy would otherwise be inadequate.

History.
Code 1933, § 67-710, enacted by Ga. L. 1975, p. 1213, § 3.

JUDICIAL DECISIONS

As to who shall have possession pending trial of merits of foreclosure, the merits of foreclosure itself and particularly defenses and counterclaims thereto have no actual relevancy to this question. Ward v. Charles D. Hardwick Co., 156 Ga. App. 96, 274 S.E.2d 20, 1980 Ga. App. LEXIS 2893 (1980).

It is error to rule on merits of foreclosure while ostensibly determining merits of writ of immediate possession. Ward v. Charles D. Hardwick Co., 156 Ga. App. 96, 274 S.E.2d 20, 1980 Ga. App. LEXIS 2893 (1980).

RESEARCH REFERENCES

Am. Jur. 2d.
69 Am. Jur. 2d, Secured Transactions, § 121.
C.J.S.
14 C.J.S., Chattel Mortgages, § 241.
ALR.
Chattel mortgagee's failure to pursue proper course after taking possession as affecting personal liability of mortgagor, 47 A.L.R. 582.

Right of mortgagee lawfully in possession, or one entitled to his rights, to retain possession until debt is paid, although debt or right to foreclose is barred by limitation, 115 A.L.R. 339.

44-14-263. Bond or waiver required.

The petition for an immediate writ of possession shall be accompanied by a waiver, as defined in Code Section 44-14-260, or the petitioner shall furnish a bond in the amount of the petitioner's claim for the payment of damages which the defendant may sustain if the writ is obtained wrongfully.

History.
Code 1933, § 67-711, enacted by Ga. L. 1975, p. 1213, § 3.

JUDICIAL DECISIONS

Not available to defendant. — A defendant, as against a plaintiff (i.e., by counterclaim), cannot utilize the provisions of O.C.G.A. § 44-14-263. Solomon Refrigeration, Inc. v. Osburn, 148 Ga. App. 772, 252 S.E.2d 686, 1979 Ga. App. LEXIS 1653 (1979).

Attorneys' fees. — There is no statutory provision providing for recovery of attorneys' fees in suits involving immedi-

ate writs of possession. Solomon Refrigeration, Inc. v. Osburn, 148 Ga. App. 772, 252 S.E.2d 686, 1979 Ga. App. LEXIS 1653 (1979).

RESEARCH REFERENCES

Am. Jur. 2d.
69 Am. Jur. 2d, Secured Transactions, § 734.

C.J.S.
14 C.J.S., Chattel Mortgages, §§ 229, 233.

44-14-264. Issuance of writ; procedure when showing insufficient.

The court before which the petition is pending shall issue a writ for immediate possession upon finding that the petitioner has complied with Code Sections 44-14-261 through 44-14-263. If the petitioner is found not to have made sufficient showing to obtain an immediate writ of possession, the court may nevertheless treat the petition as one being filed under Code Section 44-14-231 and may proceed accordingly.

History.
Code 1933, § 67-712, enacted by Ga. L. 1975, p. 1213, § 3.

RESEARCH REFERENCES

ALR.
Right of mortgagee lawfully in possession, or one entitled to his rights, to retain possession until debt is paid, although debt or right to foreclose is barred by limitation, 115 A.L.R. 339.

44-14-265. Service of notice to defendant.

When an immediate writ of possession has been granted, a copy of the petition, the affidavits, the waiver or bond, and the order shall be served in any manner provided in Code Section 44-14-232 as if the petition were one filed under Code Section 44-14-231.

History.
Code 1933, § 67-713, enacted by Ga. L. 1975, p. 1213, § 3.

RESEARCH REFERENCES

Am. Jur. 2d.
69 Am. Jur. 2d, Secured Transactions, §§ 607-614.

C.J.S.
14 C.J.S., Chattel Mortgages, §§ 183, 404.

44-14-266. Execution and levy.

Upon the granting of a writ of immediate possession, the action shall proceed in the manner provided under Code Section 44-14-236.

History.
Code 1933, § 67-714, enacted by Ga. L. 1975, p. 1213, § 3.

44-14-267. Time for filing defenses.

At any time prior to the sale or other final disposition of the property by the levying officer or petitioner as provided for under Code Section 44-14-236 but no later than 30 days after service as provided for under Code Section 44-14-265, the defendant may appear and file any legal or equitable defense or counterclaim to the petitioner's claim for a writ of immediate possession. After the filing of such defense or counterclaim, a trial of any issue requiring a trial shall be had in accordance with the procedure prescribed for civil actions in courts of record.

History.
Code 1933, § 67-715, enacted by Ga. L. 1975, p. 1213, § 3; Ga. L. 1982, p. 3, § 44.

RESEARCH REFERENCES

C.J.S.
14 C.J.S., Chattel Mortgages, § 400.
ALR.
Right of mortgagee lawfully in possession, or one entitled to his rights, to retain possession until debt is paid, although debt or right to foreclose is barred by limitation, 115 A.L.R. 339.

44-14-268. Motion for dissolution of writ; payment of claim or furnishing of bond; procedure upon dissolution of writ.

(a) At any time within which the defendant may file defenses as provided for under Code Section 44-14-267, the defendant may:

(1) Move for a dissolution of the writ, which motion shall be granted unless the petitioner proves the grounds upon which the writ was issued; or

(2) Pay to the court the full amount of the petitioner's claim, including costs, or furnish a bond with good and sufficient security for the value of the property as determined after hearing by the court before which the matter is pending or a bond for the amount of petitioner's claim, including costs, whichever is less.

(b) If the writ is dissolved under paragraph (1) or (2) of subsection (a) of this Code section, the action shall proceed on the petitioner's claim as if no writ had issued; and any issue requiring trial shall be had in accordance with the procedure prescribed for civil actions in courts of record.

History.
Code 1933, § 67-716, enacted by Ga. L. 1975, p. 1213, § 3.

JUDICIAL DECISIONS

A defendant may regain possession of repossessed property at that time which defendant pays into court the full amount of petitioner's claim including costs or furnishes a proper bond. Sumner v. Adel Banking Co., 244 Ga. 73, 259 S.E.2d 32, 1979 Ga. LEXIS 1120 (1979).

Defendant is entitled to trial on defenses to foreclosure and counterclaims whether defendant retains possession under O.C.G.A. § 44-14-268(a) or whether defendant gives it up. Ward v. Charles D. Hardwick Co., 156 Ga. App. 96, 274 S.E.2d 20, 1980 Ga. App. LEXIS 2893 (1980).

Error to rule on merits of foreclosure while ostensibly determining merits of writ of immediate possession. Ward v. Charles D. Hardwick Co., 156 Ga. App. 96, 274 S.E.2d 20, 1980 Ga. App. LEXIS 2893 (1980).

RESEARCH REFERENCES

C.J.S.
14 C.J.S., Chattel Mortgages, §§ 236-238.
ALR.
Right of mortgagee lawfully in possession, or one entitled to his rights, to retain possession until debt is paid, although debt or right to foreclose is barred by limitation, 115 A.L.R. 339.

44-14-269. Default judgment.

Upon the failure of the defendant to appear and answer within the time provided in Code Section 44-14-267, if the service on the defendant was made in such a manner as to comply with Code Section 9-11-4, a default judgment shall be entered against the defendant for the full amount of the petitioner's claim.

History.
Code 1933, § 67-717, enacted by Ga. L. 1975, p. 1213, § 3.

JUDICIAL DECISIONS

O.C.G.A. § 44-14-269 deals with petitions for immediate writ of possession and is inapplicable to a proceeding dealing with a petition for a writ of possession under O.C.G.A. § 44-14-230. Spencer v. Taylor, 144 Ga. App. 641, 242 S.E.2d 308, 1978 Ga. App. LEXIS 1721 (1978).

O.C.G.A. § 44-14-269 only applies to immediate writs of possession under O.C.G.A. § 44-14-260 et seq., which sections pertain alone to commercial transactions, and not to consumer transactions, as those terms are defined in O.C.G.A. § 44-14-260. Porter v. Midland-Guardian Co., 242 Ga. 1, 247 S.E.2d 743, 1978 Ga. LEXIS 1066 (1978).

RESEARCH REFERENCES

C.J.S.
14 C.J.S., Chattel Mortgages, § 411.

Subpart 3

Foreclosures on Bills of Sale or Contracts Retaining Title

RESEARCH REFERENCES

ALR.

Rights as between conditional seller and one claiming under or through sale or mortgage by buyer which is subject to the seller's reservation of title, 87 A.L.R. 941.

Rights in proceeds of vehicle collision policy, under "loss-payable" clause, of conditional seller, chattel mortgagee, or the like, of vehicle where there has been improper repossession or foreclosure after the damage, 46 A.L.R.2d 992.

Relative rights as between assignee of conditional seller and a subsequent buyer from the conditional seller after repossession or the like, 72 A.L.R.2d 342.

Sufficiency of description in chattel mortgage as covering all property of a particular kind, 2 A.L.R.3d 839; 30 A.L.R.3d 9; 25 A.L.R.5th 696.

Specific performance of land contract notwithstanding failure of vendee to make required payments on time, 55 A.L.R.3d 10.

Equipment leases as security interest within Uniform Commercial Code sec. 1-201(37), 76 A.L.R.3d 11.

Sufficiency of address of debtor in financing statement required by UCC sec. 9-402(1), 99 A.L.R.3d 807.

Sufficiency of address of secured party in financing statement required under UCC sec. 9-402(1), 99 A.L.R.3d 1080.

Sufficiency of description of collateral in financing statement under UCC secs. 9-110 and 9-402, 100 A.L.R.3d 10.

What is "commercially reasonable" disposition of collateral required by UCC sec. 9-504(3), 7 A.L.R.4th 308.

Sufficiency of secured party's notification of sale or other intended disposition of collateral under UCC sec. 9-504(3), 11 A.L.R.4th 241.

Construction and effect of "future advances" clauses under UCC Article 9, 90 A.L.R.4th 859.

44-14-280. Manner of foreclosure.

The owner of any bill of sale or written contract retaining title to personal property to secure a debt may foreclose the contractor bill of sale in the same manner as mortgages on personal property are foreclosed.

History.

Ga. L. 1899, p. 82, § 1; Civil Code 1910, § 3298; Ga. L. 1921, p. 114, § 1; Code 1933, § 67-1601.

JUDICIAL DECISIONS

The remedies provided by O.C.G.A. §§ 44-14-210 and 44-14-280 are distinct and altogether independent of each other. Macon Sav. Bank v. Jones Motor Co., 168 Ga. 805, 149 S.E. 217, 1929 Ga. LEXIS 250 (1929); Jackson v. Parks, 49 Ga. App. 29, 174 S.E. 203, 1934 Ga. App. LEXIS 247 (1934).

Remedy not exclusive. — The remedy provided in O.C.G.A. § 44-14-280 is not exclusive. The owner has the right also to bring trover. Hill v. Marshall, 18 Ga. App. 652, 90 S.E. 175, 1916 Ga. App. LEXIS 1169 (1916).

In a contract for the sale of personal property, where the purchaser agrees that upon default in any payment due under the contract the purchaser will voluntarily surrender the property to the seller, to be sold and the proceeds applied upon the indebtedness, or agrees that upon such default the seller may institute tro-

ver proceedings to recover the property, etc., these remedies are cumulative of the seller's right to collect the indebtedness in any other manner as provided by law; and the seller's failure to pursue, for the collection of the indebtedness, any method prescribed in the contract for that purpose, cannot be a defense against the seller's right to foreclose as provided by law under O.C.G.A. § 44-14-280. Jones Motor Co. v. Macon Sav. Bank, 37 Ga. App. 767, 142 S.E. 199, 1928 Ga. App. LEXIS 603 (1928), aff'd, 168 Ga. 805, 149 S.E. 217, 1929 Ga. LEXIS 250 (1929).

There is nothing inconsistent in trying to collect the purchase price and at the same time retaining title as security for the unpaid balance of the price. An effort to collect payment does not constitute an abandonment of the security. Turner v. Kay Jewelry Co., 101 Ga. App. 173, 112 S.E.2d 783, 1960 Ga. App. LEXIS 820 (1960).

Seller not estopped. — A suit by the seller to foreclose the contract as a mortgage under O.C.G.A. § 44-14-280 does not estop the seller from afterwards bringing an action of trover for the property. Hilliard v. GMAC, 54 Ga. App. 105, 187 S.E. 218, 1936 Ga. App. LEXIS 464 (1936); Turner v. Kay Jewelry Co., 101 Ga. App. 173, 112 S.E.2d 783, 1960 Ga. App. LEXIS 820 (1960); Whitehead v. Southern Disct. Co., 109 Ga. App. 126, 135 S.E.2d 496, 1964 Ga. App. LEXIS 812 (1964).

Effect of action on title. — Where personalty is sold and title retained in the seller as security for the balance of the purchase money, an action by the seller to foreclose the contract as a mortgage under O.C.G.A. § 44-14-280, does not have the effect of transferring the title into the buyer. Hilliard v. GMAC, 54 Ga. App. 105, 187 S.E. 218, 1936 Ga. App. LEXIS 464 (1936); Turner v. Kay Jewelry Co., 101 Ga. App. 173, 112 S.E.2d 783, 1960 Ga. App. LEXIS 820 (1960); Whitehead v. Southern Disct. Co., 109 Ga. App. 126, 135 S.E.2d 496, 1964 Ga. App. LEXIS 812 (1964).

A suit on a promise to pay the purchase price of the chattel to which the contract retains title does not admit that the title to the chattel is in the maker of the instrument. Turner v. Kay Jewelry Co., 101 Ga. App. 173, 112 S.E.2d 783, 1960 Ga. App. LEXIS 820 (1960).

Chattel mortgage foreclosures law applies. — The foreclosure of a conditional sales contract is governed by the law which applies to chattel mortgage foreclosures. A.D.L. Sales Co. v. Gailey, 48 Ga. App. 798, 173 S.E. 734, 1934 Ga. App. LEXIS 200 (1934); Dixon v. GMAC, 105 Ga. App. 413, 124 S.E.2d 660, 1962 Ga. App. LEXIS 939 (1962).

A bill of sale to secure a debt may be foreclosed in the same manner as a chattel mortgage. Carroll v. Richards, 50 Ga. App. 272, 178 S.E. 178, 1934 Ga. App. LEXIS 737 (1934); Miller Serv., Inc. v. Miller, 77 Ga. App. 413, 48 S.E.2d 761, 1948 Ga. App. LEXIS 569 (1948).

Conveyance to debtor not required. — O.C.G.A. § 44-14-280 does not suggest or require that the owner of a bill of sale of personal property shall convey or reconvey to the debtor the personal property covered by such bill of sale, prior to the foreclosure of the contract in the manner in which mortgages are foreclosed, or the recordation of such a conveyance. Macon Sav. Bank v. Jones Motor Co., 168 Ga. 805, 149 S.E. 217, 1929 Ga. LEXIS 250 (1929); Cobb v. Growers' Fin. Corp., 40 Ga. App. 442, 149 S.E. 920, 1929 Ga. App. LEXIS 187 (1929).

Bill of sale. — A promissory note given by a purchaser of personal property, in which it is agreed that title shall remain in the seller until the purchase money is paid, is not a "bill of sale," and therefore cannot be foreclosed in a justice's court under O.C.G.A. § 44-14-280. Berry v. Robinson & Overton, 122 Ga. 575, 50 S.E. 378, 1905 Ga. LEXIS 270 (1905); Wynn & Robinson v. Tyner, 139 Ga. 765, 78 S.E. 185, 1913 Ga. LEXIS 596 (1913).

Showing that bill given to secure debt. — An absolute bill of sale intended to secure a debt may be foreclosed as provided in O.C.G.A. § 44-14-280, whether the fact that it is intended as security is shown by a bond to reconvey, or by other appropriate evidence. Denton Bros. v. Shields, 120 Ga. 1076, 48 S.E. 423, 1904 Ga. LEXIS 802 (1904).

Conditional sales contract. — An instrument which recites that the promis-

sory note embodied therein, for a specified amount payable in installments, is given "for the purchase money" of described property, and that "the title to the above described property is to remain in the [seller] until fully paid for," is a contract of conditional sale, retaining title in the seller until compliance by the purchaser with the conditions of the sale. Jett v. Gordon, 52 Ga. App. 370, 183 S.E. 346, 1936 Ga. App. LEXIS 633 (1936).

Effect of homestead and exemption laws. — The setting aside of the property afterwards, as being exempt from levy and sale by virtue of the homestead and exemption laws, in no wise affected the previously acquired title of the lender. Where, after a levy upon the property under a proceeding to foreclose the bill of sale as provided in O.C.G.A. § 44-14-280, the borrower filed a claim to the property, upon the ground that it was exempt from levy and sale by virtue of the homestead and exemption laws, and where it appeared from the claim filed that the property levied upon was impressed with exemption after the borrower had executed the bill of sale to secure the debt to the lender, the court did not err in dismissing the claim on demurrer (now motion to dismiss) and allowing the levy to proceed. Tarver v. Beneficial Loan Soc'y, 39 Ga. App. 646, 148 S.E. 288, 1929 Ga. App. LEXIS 486 (1929).

Priority of lien. — The lien of an ordinary attachment upon which no judgment had been rendered is not superior to the claim of a vendor under a duly executed, but unrecorded, retention of title contract of sale of personal property which contract has been foreclosed under the provisions of O.C.G.A. § 44-14-280. Bank of Ringgold v. West Publishing Co., 61 Ga. App. 426, 6 S.E.2d 598, 1939 Ga. App. LEXIS 310 (1939).

Real parties in interest. — Where plaintiff was the named seller in a conditional sale contract, and had acquired title to the property involved prior to the commencement of its foreclosure proceedings, it was error to dismiss the case on the ground that it did not show sufficient interest in itself to maintain the action. Jack Fred Co. v. Lago, 96 Ga. App. 675, 101 S.E.2d 165, 1957 Ga. App. LEXIS 661 (1957).

Instructions. — It was not error to fail to charge the substance of O.C.G.A. § 44-14-280 in the absence of a request; such a charge would not have aided the jury and the judge so charged that the jury could find a verdict based on whether they found pro or con as to specific facts. First Nat'l Bank v. Vinson, 102 Ga. App. 828, 118 S.E.2d 225, 1960 Ga. App. LEXIS 759 (1960).

RESEARCH REFERENCES

Am. Jur. 2d.

69 Am. Jur. 2d, Secured Transactions, § 572 et seq.

ALR.

Right of conditional seller to retake property without legal process, 146 A.L.R. 1331.

What conduct by repossessing chattel mortgagee or conditional vendor entails tort liability, 99 A.L.R.2d 358.

Replevin or claim-and-delivery: modern view as to validity of statute or contractual provision authorizing summary repossession of consumer goods sold under retail installment sales contract, 45 A.L.R.3d 1233.

44-14-281. Proceedings after foreclosure; defenses.

In the event any bill of sale is foreclosed as provided in Code Section 44-14-280, the proceedings after foreclosure shall be the same as the proceedings to foreclose mortgages, with the same right to defend in the manner in which defenses to foreclosures of mortgages are now provided for by law.

History.
Ga. L. 1899, p. 82, § 2; Civil Code 1910, § 3299; Code 1933, § 67-1602.

JUDICIAL DECISIONS

The debtor may, by affidavit of illegality, utilize any defense which the debtor might set up in an ordinary action upon the demand secured by a mortgage, and which goes to show that the amount claimed is not due and owing in a proceeding to foreclose a bill of sale retaining title to secure a debt. Atlas Auto Fin. Co. v. Atkins, 79 Ga. App. 91, 53 S.E.2d 171, 1949 Ga. App. LEXIS 589 (1949).

While the debtor is permitted to utilize a valid defense of recoupment, the debtor is not entitled to plead the defense of setoff in such a summary proceeding, since the latter defense is not one which goes to the justice of the plaintiff's demand. Atlas Auto Fin. Co. v. Atkins, 79 Ga. App. 91, 53 S.E.2d 171, 1949 Ga. App. LEXIS 589 (1949).

A general plea of no indebtedness is insufficient as setting out a defense in an affidavit of illegality to a statutory foreclosure of a retention of title contract of sale. Kent v. Rogers, 58 Ga. App. 835, 200 S.E. 235, 1938 Ga. App. LEXIS 147 (1938).

In a suit to foreclose a contract retaining title to personalty, ground of an affidavit of illegality which states that the debt is not due and not unpaid and that the affidavit of foreclosure is untrue, pleads no facts showing that the amount claimed is not due, and, as a general denial, it is not an issuable defense which the defendant might have set up in an ordinary action upon the demand secured by the contract retaining title. Carter v. Rich's, Inc., 83 Ga. App. 188, 63 S.E.2d 241, 1951 Ga. App. LEXIS 829 (1951).

Lack of authority. — Ordinarily, where a retention-of-title contract is foreclosed against property, that the employee who signed the contract in the partnership name was not authorized to execute an instrument of that nature on behalf of the partnership sets up a valid defense to the foreclosure. Long Tobacco Harvesting Co. v. Brannen, 98 Ga. App. 142, 105 S.E.2d 390, 1958 Ga. App. LEXIS 528 (1958).

Failure to set up defense. — Where a proceeding to foreclose a retention of title contract is instituted and the defendant's answer sets up no defense to the foreclosure proceeding and, in fact, is not responsive to the foreclosure proceeding, but refers to a trover proceeding and nowhere denies that the amount claimed or any part thereof is due, the answer filed fails to set up any defense and is subject to dismissal. Little v. Yow, 69 Ga. App. 335, 25 S.E.2d 232, 1943 Ga. App. LEXIS 71 (1943).

RESEARCH REFERENCES

C.J.S.
14 C.J.S., Chattel Mortgages, § 405.

44-14-282. Levy and sale following execution and recording of bill of sale to defendant; priorities; disposition of proceeds.

When any judgment has been or shall be rendered in any court of this state upon any note or other evidence of debt given for the purchase money of personal property and where the title for the property has been retained in the vendor, it shall be lawful for the holder of the note or other evidence of debt in which title is retained to make, file, and

have recorded in the office of the clerk of the superior court where the defendant resides a bill of sale to the defendant for the personal property or, if he is dead, to his executor or administrator or, if there is no executor or administrator, to the heirs of the deceased; and, if the holder of the note or other evidence of debt in which title is retained is dead, his executor or administrator may in like manner make and file such bill of sale without obtaining an order of the court for that purpose. Upon the filing of the bill of sale, the personal property may be levied on and sold under such judgment as in other cases; provided, however, that the judgment shall take and be a lien upon the personal property and the proceeds of the sale thereof, prior to all other judgments, claims, liens, and other encumbrances, until the judgment shall be fully paid and satisfied.

History.
Ga. L. 1887, p. 62, § 1; Code 1933, § 67-1603.
History of Section.
This Code section is derived from the decision in Jordan Mercantile Co. v. Brooks, 149 Ga. 157, 99 S.E. 289 (1919).

RESEARCH REFERENCES

Am. Jur. 2d.
69 Am. Jur. 2d, Secured Transactions, § 575.
C.J.S.
14 C.J.S., Chattel Mortgages, § 342.
ALR.
Priority as between lien for repairs and the like, and right of seller under conditional sales contract, 36 A.L.R.2d 198.

Subpart 4

Foreclosures in Magistrate Court

RESEARCH REFERENCES

ALR.
Right to attorneys' fees on enforcing chattel mortgage, 63 A.L.R. 1314.

44-14-300. Amount of mortgage; filing of affidavit; execution.

Any person having a mortgage on personal property to secure a debt not exceeding $100.00 in principal and desiring to foreclose the mortgage may, by himself, his agent, or his attorney, make an affidavit of the amount of the principal and the interest due on the mortgage, which affidavit shall be annexed to the mortgage. When the mortgage or verified copy with the affidavit annexed thereto shall be filed with any magistrate in the county where the mortgagor resides, if a resident of this state, or, if not a resident of this state, in the county where the mortgaged property is located, it shall be the duty of the magistrate to issue an execution directed to all and singular the sheriffs, the mar-

shals, their deputies, and the constables of this state commanding the sale of the property to satisfy the principal, the interest, and the costs of the proceedings to foreclose the mortgage.

History.
Ga. L. 1878-79, p. 152, § 1; Code 1882, § 3974a; Ga. L. 1882-83, p. 67, § 1; Civil Code 1895, § 2760; Civil Code 1910, § 3293; Code 1933, § 67-901; Ga. L. 1983, p. 884, § 4-1; Ga. L. 1984, p. 22, § 44.

JUDICIAL DECISIONS

Concurrent jurisdiction with county court. — A county court has no jurisdiction to try and determine an issue made upon the foreclosure of a chattel mortgage and a counter-affidavit filed thereto, where the amount involved is less than $50.00. In such cases, the justice's court of the district of the defendant's residence has jurisdiction under O.C.G.A. § 44-14-300. Where the principal sum secured does not exceed $100.00, but is more than $50.00, the two courts have concurrent jurisdiction. Aycock v. Subers, 73 Ga. 807, 1884 Ga. LEXIS 236 (1884).

Filing papers with justice. — Where an affidavit to foreclose a chattel mortgage and the mortgage itself have been handed to a justice of the peace, this is a sufficient "filing" of these papers with that officer. Adams v. Goodwin, 99 Ga. 138, 25 S.E. 24, 1896 Ga. LEXIS 248 (1896).

An annexation of an affidavit of foreclosure to the mortgage or a verified copy thereof is merely directory, and failure to annex affidavit does not void the writ of fieri facias issued pursuant thereto. Simpson v. Jones, 182 Ga. 544, 186 S.E. 558, 1936 Ga. LEXIS 486 (1936).

Return to proper court. — Where a chattel mortgage was foreclosed in a justice's court under O.C.G.A. § 44-14-300, and upon the levying of the execution issued thereunder a claim was interposed, it was properly returned to the court where the foreclosure took place and whence the execution issued. Ridling v. Stewart, 77 Ga. 539, 1886 Ga. LEXIS 361 (1886).

RESEARCH REFERENCES

Am. Jur. 2d.
69 Am. Jur. 2d, Secured Transactions, §§ 572 et seq., 637 et seq.

C.J.S.
14 C.J.S., Chattel Mortgages, §§ 355-359, 364, 398, 412-422, 425.

ALR.
Chattel mortgagee's failure to pursue proper course after taking possession as affecting personal liability of mortgagor, 47 A.L.R. 582.

Purchase by pledgee of subject of pledge, 76 A.L.R. 705; 37 A.L.R.2d 1381.

Bankruptcy court's injunction against mortgage or lien enforcement proceedings commenced, before bankruptcy, in another court, 40 A.L.R.2d 663.

44-14-301. Notice to mortgagor.

It shall be the duty of the magistrate with whom the affidavit and the mortgage are filed to give notice to the mortgagor of the proceedings at the time of issuing the execution.

History.
Ga. L. 1880-81, p. 126, § 2; Code 1882, § 3974d; Civil Code 1895, § 2763; Civil Code 1910, § 3296; Code 1933, § 67-905; Ga. L. 1983, p. 884, § 4-1.

JUDICIAL DECISIONS

O.C.G.A. § 44-14-301 is not applicable to superior courts. Golden v. J. M. Easterling & Sons, 37 Ga. App. 172, 139 S.E. 102, 1927 Ga. App. LEXIS 564 (1927).

O.C.G.A. § 44-14-301 does not require that the execution shall recite that the notice has been given. Spooner v. Coachman, 18 Ga. App. 705, 90 S.E. 373, 1914 Ga. App. LEXIS 482 (1914).

There was no error in refusing to dismiss a levy on the grounds that no notice was given under O.C.G.A. § 44-14-301 when the lack of notice was not raised until appeal. Spooner v. Coachman, 18 Ga. App. 705, 90 S.E. 373, 1914 Ga. App. LEXIS 482 (1914).

Waiver. — Where there is no motion to dismiss the levy on the ground that the notice prescribed by O.C.G.A. § 44-14-301 had not been given, and the defendant in fi. fa., although reciting such failure, entered a plea to the merits without actual protestation, the failure to give the notice referred to must be taken as waived. McFarlin v. Reeves, 10 Ga. App. 581, 73 S.E. 862, 1912 Ga. App. LEXIS 619 (1912), overruled, Spooner v. Coachman, 18 Ga. App. 705, 90 S.E. 373, 1914 Ga. App. LEXIS 482 (1914); Futch v. Taylor, 22 Ga. App. 441, 96 S.E. 183, 1918 Ga. App. LEXIS 380 (1918).

RESEARCH REFERENCES

Am. Jur. 2d.
69 Am. Jur. 2d, Secured Transactions, §§ 607-614.

C.J.S.
14 C.J.S., Chattel Mortgages, §§ 399, 404.

44-14-302. Levy and sale of property; advertisement.

When the execution provided for by Code Section 44-14-300 is delivered to a constable, he shall levy on the property wherever it may be found; and, after advertising the same for ten days preceding the sale by giving a full description of the property to be sold and the process under which he is proceeding in a written advertisement at three or more public places in the district in which the property may be found, he shall put up and expose the property for sale as provided in this Code section; provided, however, that the sale shall be had within the legal hours of sale on a regular court day and at the usual place of holding magistrate courts for the district. The constable shall put up and expose the property for sale at the time and place and in the same manner as constable's sales are required to be held.

History.
Ga. L. 1878-79, p. 152, § 2; Ga. L. 1882-83, p. 67, § 1; Code 1882, § 3974b; Civil Code 1895, § 2761; Civil Code 1910, § 3294; Code 1933, § 67-902; Ga. L. 2003, p. 140, § 44.

RESEARCH REFERENCES

Am. Jur. 2d.
69 Am. Jur. 2d, Secured Transactions, § 575.

C.J.S.
14 C.J.S., Chattel Mortgages, §§ 407, 425.

ALR.

Purchase by pledgee of subject of pledge, 76 A.L.R. 705; 37 A.L.R.2d 1381.

Protection of mortgagor or owner of mortgaged property, on foreclosure sale, by fixing upset or minimum price, requiring credit of specified amount on mortgage debt, or denying or limiting amount of deficiency judgment, 85 A.L.R. 1480; 89 A.L.R. 1087; 90 A.L.R. 1330; 94 A.L.R. 1352; 96 A.L.R. 853; 97 A.L.R. 1123; 104 A.L.R. 375.

44-14-303. Defenses by mortgagor; hearing in magistrate's court.

The mortgagor may avail himself of any defense he may have to the foreclosure in the same manner and upon the same conditions as allowed by law in case of foreclosure of chattel mortgages in the superior courts. Whenever any such defense is filed by the mortgagor, the magistrate issuing the execution shall have the power and jurisdiction to hear and determine the issues made thereon as in other cases at law.

History.

Ga. L. 1878-79, p. 152, § 3; Code 1882, § 3974c; Civil Code 1895, § 2762; Civil Code 1910, § 3295; Code 1933, § 67-903; Ga. L. 1983, p. 884, § 3-31.

JUDICIAL DECISIONS

Failure to raise defense. — Where a proceeding to foreclose a retention of title contract is instituted and the defendant's answer sets up no defense to the foreclosure proceeding and, in fact, is not responsive to the foreclosure proceeding, but refers to a trover proceeding and nowhere denies that the amount claimed or any part thereof is due, the answer filed fails to set up any defense and is subject to dismissal. Little v. Yow, 69 Ga. App. 335, 25 S.E.2d 232, 1943 Ga. App. LEXIS 71 (1943).

RESEARCH REFERENCES

Am. Jur. 2d.

69 Am. Jur. 2d, Secured Transactions, § 572.

C.J.S.

14 C.J.S., Chattel Mortgages, §§ 355, 400, 405, 411.

ALR.

Effect of oral agreement to enlarge time for redemption from sale under mortgage or other lien on real property, 54 A.L.R. 1207.

ARTICLE 8

LIENS

Cross references.

Judgment liens generally, § 9-12-80 et seq.

Security interests in and liens on motor vehicles, § 40-3-50 et seq.

Die, molds, forms, and patterns, T. 44, C. 12, Art. 8.

Tax executions, T. 48, C. 3.

PART 1

IN GENERAL

JUDICIAL DECISIONS

Lien may be waived by express agreement based upon valuable consideration. Ford Motor Credit Co. v. Parsons, 155 Ga. App. 46, 270 S.E.2d 230, 1980 Ga. App. LEXIS 2450 (1980).

RESEARCH REFERENCES

ALR.

Redemption from mortgage or judicial sale as affecting lien intervening that under which property was sold and that under which it was redeemed, 26 A.L.R. 435.

Bankruptcy: lessor's right, upon bankruptcy of lessee, to enforce lien or retain security for future rentals, 45 A.L.R. 717.

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, 53 A.L.R. 135.

Contract for compensation other than that of attorney on basis of share in or percentage of property or fund as creating an equitable lien, 54 A.L.R. 289.

Single mechanic's lien upon several parcels, as enforceable against less than all of the parcels (including effect of release of some of them from the lien), 130 A.L.R. 423.

Acceptance of unsecured note or other personal obligation of vendee as waiver or discharge of vendor's lien, 132 A.L.R. 440.

Priority of lien of sales or consumers' tax, 136 A.L.R. 1015.

Constitutionality of statute giving to lien for alteration of property pursuant to public requirement, mechanic's lien, or similar lien, preference over pre-existing mortgage or other lien, 141 A.L.R. 66.

Rights and remedies under lien statute of one performing work only part of which is of a lienable character, 149 A.L.R. 682.

Mere assertion of unfounded lien as constituting conversion, 169 A.L.R. 100.

Right of holder of mortgage or lien to proceeds of property insurance payable to owner not bound to carry insurance for former's benefit, 9 A.L.R.2d 299.

Easement, servitude, or restrictive covenant as affected by enforcement of assessment or improvement liens, 26 A.L.R.2d 873.

Right of vendee under executory land contract to lien for amount paid on purchase, 33 A.L.R.2d 1384; 82 A.L.R.3d 1040.

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 A.L.R.2d 1116.

Abandonment of construction or of contract as affecting time for filing mechanics' liens or time for giving notice to owner, 52 A.L.R.3d 797.

44-14-320. Certain liens established; removal of nonconforming liens.

(a) The following liens are established in this state:

(1) Liens for taxes in favor of the state, the counties, and the municipal corporations;

(2) Liens in favor of creditors by judgment and decree;

(3) Liens in favor of laborers;

(4) Liens in favor of landlords;

(5) Liens in favor of mortgagees;

(6) Liens in favor of landlords furnishing supplies;

(7) Liens in favor of mechanics on real and personal property;

(8) Liens in favor of contractors, materialmen, subcontractors, materialmen furnishing material to subcontractors, and laborers furnishing labor to subcontractors, machinists, and manufacturers of machinery. As used in this paragraph, the term "subcontractor" includes, but is not limited to, subcontractors having privity of contract with the prime contractor;

(9) Liens in favor of certain creditors against steamboats and other watercraft;

(10) Liens in favor of the proprietors of sawmills and the proprietors of planing mills and other similar establishments;

(11) Liens in favor of innkeepers, boardinghouse keepers, carriers, livery stable keepers, pawnbrokers, depositories, bailees, factors, acceptors, and attorneys at law;

(12) Liens in favor of owners of stallions, jacks, bulls, and boars;

(13) Liens in favor of railroad employees, owners of stock killed, and persons furnishing supplies to railroads;

(14) Liens in favor of laundrymen;

(15) Liens in favor of jewelers;

(16) Liens in favor of the state for expenditures from the hazardous waste trust fund pursuant to subsection (e) of Code Section 12-8-96. Such liens shall be superior to all other liens except liens for taxes and other prior perfected recorded liens or claims of record; and

(17) Liens in favor of a nonprofit organization or entity that is exempt from taxation under 26 U.S.C. Section 501(c) which exercises the powers of a fire department as provided for under Chapter 3 of Title 25 that are requested by property owners and that are based upon fees and rates charged that are consistent with the Federal Emergency Management Agency of the United States Department of Homeland Security's Schedule of Equipment Rates as such existed on July 1, 2019.

(b)(1) All liens provided for in this chapter or specifically established by federal or state statute, county, municipal, or consolidated government ordinance or specifically established in a written declaration or covenant which runs with the land shall be exempt from subsection

(c) of this Code section. All other liens shall be defined as nonconforming liens and shall not be eligible for filing and recording.

(2) Each nonconforming lien shall be a nullity with no force or effect whatsoever, even if said nonconforming lien is filed, recorded, and indexed in the land records of one or more counties in this state.

(c)(1) Any person, corporation, or other entity against whose property a nonconforming lien is filed or recorded may, without notice to any party, file an ex parte petition for an order to remove a nonconforming lien from the record in the superior court of the county in which said lien is filed or recorded and obtain an order from said superior court directing the clerk of the superior court to record the order and mark the recorded nonconforming lien: "CANCELED OF RECORD PURSUANT TO ORDER DATED _____, RECORDED AT DEED BOOK ____, PAGE ____. THIS _____ DAY OF _____, _____." The petition shall set forth that:

(A) The movant is a party against whose property a nonconforming lien is filed;

(B) The lien in question is a nonconforming lien as defined under this Code section; and

(C) A certified copy of the nonconforming lien is attached as an exhibit.

The petition must be executed by the movant or movant's attorney. The order may be entered as early as the date of filing of the petition and shall set forth that, upon review of the petition and the certified copy of the recorded instrument attached thereto, it is the order of the court that said lien is a nonconforming lien under this Code section and that the clerk of the court is ordered to record the order and mark the nonconforming lien canceled of record.

(2) Any official or employee of the government of this state or any branch thereof, any political subdivision of this state, or the government of the United States or any branch thereof against whose property a nonconforming lien is filed or recorded may, without notice to any party and in lieu of the procedure provided by paragraph (1) of this subsection, file an ex parte affidavit of nonconforming lien in the superior court of the county in which said lien is filed or recorded. The affidavit shall set forth that:

(A) Such person against whose property a nonconforming lien is filed is an official or employee of the government of this state or a branch thereof, a political subdivision of this state, or the government of the United States or a branch thereof;

(B) The lien in question is a nonconforming lien as defined under

this Code section and was filed against the government official or employee based upon the performance or nonperformance of his or her official duties; and

(C) A certified copy of the nonconforming lien is attached as an exhibit.

The affidavit filed for such government official or employee must be executed by the Attorney General or a deputy or assistant attorney general in the case of an official or employee of the government of this state or a branch thereof, the attorney representing a political subdivision of this state in the case of an official or employee of such political subdivision, or a United States attorney or an assistant United States attorney in the case of an official or employee of the government of the United States or a branch thereof. The lien shall be conclusively presumed to be nonconforming upon the filing of such affidavit, and the clerk of the court shall instanter mark the recorded nonconforming lien: "CANCELED OF RECORD PURSUANT TO AFFIDAVIT DATED _____, RECORDED AT DEED BOOK ____, PAGE ____. THIS _____ DAY OF _____, _____."

History.

Ga. L. 1873, p. 42, § 1; Code 1873, § 1972; Code 1882, § 1972; Civil Code 1895, § 2787; Ga. L. 1909, p. 151, § 1; Civil Code 1910, § 3329; Code 1933, § 67-1701; Ga. L. 1956, p. 562, § 1; Ga. L. 1997, p. 970, § 2; Ga. L. 1997, p. 1050, § 3; Ga. L. 1999, p. 81, § 44; Ga. L. 2000, p. 1487, § 1; Ga. L. 2019, p. 294, § 1/HB 387.

Cross references.

Liens for attorneys' services, §§ 15-19-14, 15-19-15.

Child support liens in favor of Department of Human Resources, § 19-11-18.

Liens of innkeepers on property of guests, § 43-21-5 et seq.

Holding of liens on one's own property, § 44-6-3.

Tax liens, § 48-5-28.

Law reviews.

For article, "The Rights of Attorneys and Their Clients in Fee Disputes," see 16 Ga. St. B.J. 150 (1980).

JUDICIAL DECISIONS

Real property liens strictly construed. — One seeking to make good a lien on real property must be brought clearly within the law relating thereto, and because such liens are creatures of statute and strictly construed, they may not be extended to cover instances not clearly and plainly provided for thereby. Stephens v. Clark, 154 Ga. App. 306, 268 S.E.2d 361, 1980 Ga. App. LEXIS 2135 (1980).

Definition of "liens for taxes." — The words "liens for taxes," as employed in O.C.G.A. § 44-14-320, are broad and sufficient to include taxes provided by subsequent statute, for support of the state and counties and municipal corporations located in the state that are not ad valorem or based on property. Atlanta Trust Co. v. Atlanta Realty Corp., 177 Ga. 581, 170 S.E. 791, 1933 Ga. LEXIS 363 (1933).

Tax liens are highest priority and apply to bona fide buyers. — Liens for state, county, and municipal taxes are superior to all other liens, and such lien follows the property into the hands of

bona fide purchasers. Carroll v. Richards, 50 Ga. App. 272, 178 S.E. 178, 1934 Ga. App. LEXIS 737 (1934).

Unless lien not recorded when purchaser buys. — Recording the fi. fa. issued by the State Revenue Commissioner on the general execution docket is not a condition precedent to the lien for sales taxes attaching, and the only effect of a failure to record the lien is that as against innocent purchasers the lien will be lost. State v. Atlanta Provision Co., 90 Ga. App. 147, 82 S.E.2d 145, 1954 Ga. App. LEXIS 655 (1954).

Priority of perfected security interest. — Under former O.C.G.A. § 11-9-310 (see now O.C.G.A. § 11-9-333), a perfected security interest takes priority over all liens described in O.C.G.A. § 44-14-320, including mechanic's lien as provided for in O.C.G.A. § 44-14-363. Newton Ford Tractor Co. v. JI Case Credit Corp., 163 Ga. App. 497, 294 S.E.2d 723, 1982 Ga. App. LEXIS 2550 (1982).

Priority of liens. — Judgment creditor's lien did not have priority over an assignee's security deed because the funds from the assignor's loan were used to pay off a bank's prior security deed and, thus, the assignee was able to step into the shoes of the bank, a senior creditor, as to the priority of the creditor's lien; O.C.G.A. § 44-14-320(a) only listed the liens established in Georgia without listing the liens in order of priority. Hayes v. EMC Mortg. Corp., 296 Ga. App. 709, 675 S.E.2d 594, 2009 Ga. App. LEXIS 316 (2009).

Interest in tort action. — Although a court had earlier rejected a debtor's reliance on O.C.G.A. § 44-12-24 in seeking a ruling that the assignment of a tort action was invalid because the debtor had assigned the future proceeds of the action, not the right of action, the assignee creditor's default allowed the court to accept the debtor's assertion that the assignment of the proceeds to be received in the future was not a valid, enforceable assignment under Georgia law; in addition, the creditor had no lien or perfected security interest in the proceeds under O.C.G.A. § 44-14-320; thus, because there was no valid assignment and because the creditor did not have a valid, perfected security interest under Georgia law, then the creditor was an unsecured creditor with only a claim based on the debtor's breach of her promise to pay. Carson v. Rhodes (In re Carson), No. R04-43220-PWB, No. R04-43220-PWB, No. 05-4018, 2006 Bankr. LEXIS 2614 (Bankr. N.D. Ga. June 12, 2006).

When tax lien attaches. — A lien and its rank is provided for the state for sales and use taxes; and such lien attaches on the day on which the dealer is required to make the return and remittance to the State Revenue Commissioner; and such lien for taxes are declared to be superior to all other liens. State v. Atlanta Provision Co., 90 Ga. App. 147, 82 S.E.2d 145, 1954 Ga. App. LEXIS 655 (1954).

If receiver pays proceeds of sale to deed holder, both become liable for tax on sale. — Where certain tax executions are declared to be valid prior liens upon property or funds arising from the sale of such property, and a receiver appointed by the superior court, notwithstanding the order of that court required payment of taxes, pays out all or part of such funds to the holder of a deed to secure a debt, the holder is thereby rendered liable with holder's surety for the payment of such tax executions, and is subject to action by the holder of the executions. Belser v. Puckett, 179 Ga. 249, 175 S.E. 565, 1934 Ga. LEXIS 264 (1934).

No right to excess funds generated by tax sale. — Redeeming creditor of a tax-sale property does not have a priority lien against excess funds arising from that sale. DLT List, LLC v. M7VEN Supportive Hous. & Dev. Group, 301 Ga. 131, 800 S.E.2d 362, 2017 Ga. LEXIS 374 (2017).

In Wester v. United Capital Financial of Atlanta, LLC, 282 Ga. App. 392 (2006) and again in United Capital Financial of Atlanta v. American Investment Assoc., 302 Ga. App. 400 (2010), the Georgia Court of Appeals held that a creditor who redeems property following a tax sale has first priority to excess funds resulting from that tax sale, but properly overruled those decisions in DLT List, LLC. v. M7VEN Supportive Housing & Dev. Group, 335 Ga. App. 318 (2015) concluding that a redeeming creditor has no such priority. DLT List, LLC v. M7VEN Supportive Hous. & Dev. Group, 301 Ga. 131,

800 S.E.2d 362, 2017 Ga. LEXIS 374 (2017).

Laborer's lien supersedes landlord's. — Although a laborer's general lien arose subsequent to a landlord's lien, the laborer's lien is nevertheless superior in dignity to the landlord's lien. Little v. Walters, 40 Ga. App. 447, 150 S.E. 201, 1929 Ga. App. LEXIS 192 (1929).

As a general rule, party cannot hold lien on own property. Stephens v. Clark, 154 Ga. App. 306, 268 S.E.2d 361, 1980 Ga. App. LEXIS 2135 (1980).

Partner has no right to materialman or contractor's lien on property. — A coequal partner does not have a right to a common-law materialman's or contractor's lien on the partnership property. Stephens v. Clark, 154 Ga. App. 306, 268 S.E.2d 361, 1980 Ga. App. LEXIS 2135 (1980).

Materialman who supplies subcontractor has no lien on property. — A materialman who furnishes material to a subcontractor for the improvement of real estate is not entitled to a lien upon the property so improved, where the subcontractor has no contractual relation with the owner of the realty. Buffalo Forge Co. v. Southern Ry., 43 Ga. App. 445, 159 S.E. 301, 1931 Ga. App. LEXIS 419 (1931).

Subrogation agreement overcomes constructive notice of intervening lien. — An agreement for subrogation, made with either the debtor or the creditor, is sufficient to overcome constructive notice of the intervening lien. McCollum v. Lark, 187 Ga. 292, 200 S.E. 276, 1938 Ga. LEXIS 779 (1938).

Lender who pays off realty encumbrance gets priority in repayment. — One who advances money to pay off an encumbrance upon realty at the instance either of the owner of the property or the holder of the encumbrance, either upon the understanding, or where an understanding will be implied that the advance is to be secured by a first lien on the property, is not a mere volunteer. In the event the new security is not a first lien on the property, the holder of the security, if not chargeable with culpable or inexcusable neglect, will be subrogated to the rights of the prior encumbrancer under the security held by the encumbrancer, unless the superior or equal equity of others would be prejudiced (knowledge of an intervening encumbrance not alone preventing the person advancing the money from claiming the right of subrogation, when the exercise of such right will not substantially prejudice the rights of the intervening encumbrancer). Equity will set aside a cancellation of such security and revive the same for the last encumbrancer's benefit. McCollum v. Lark, 187 Ga. 292, 200 S.E. 276, 1938 Ga. LEXIS 779 (1938).

Homeowners association as judgment creditor entitled to file a lien. — Because a judgment debtor's personal property was automatically bound by a judgment as of the date a state court judgment was rendered, O.C.G.A. §§ 9-12-80 and 44-14-320(a)(2), a homeowners' association became a judgment creditor of the homeowners upon the entry of a state court judgment and was entitled to file a lien binding the homeowners' property. Laosebikan v. Lakemont Cmty. Ass'n, 302 Ga. App. 220, 690 S.E.2d 505, 2010 Ga. App. LEXIS 90 (2010).

Enforcement of lien if no prejudice to rights of intervening lienor. — Where a lender, pursuant to a contract with the debtor, in which the debtor attempts to convey to the lender a first lien upon realty, and agrees that the lender shall be subrogated to the rights of any creditor whose lien the lender discharges, discharges a lien superior to the conveyance from the debtor, with only constructive notice of another lien of record, the lender is subrogated to the creditor whose lien the lender discharges, and may revive the lien and enforce the same against the property when to do so would not prejudice the rights of the intervening lienor who had done nothing to change his position in reliance upon the cancellation of the lien paid. McCollum v. Lark, 187 Ga. 292, 200 S.E. 276, 1938 Ga. LEXIS 779 (1938).

When subrogation arises. — Subrogation will arise only in those cases where the party claiming it advanced the money to pay a debt which, in the event of default by the debtor, he would be bound to pay, or where he has some interest to protect, or where he advanced the money under an

agreement, express or implied, made either with the debtor or creditor, that he would be subrogated to the rights and remedies of the creditor. McCollum v. Lark, 187 Ga. 292, 200 S.E. 276, 1938 Ga. LEXIS 779 (1938).

Assignment of liens in writing. — Liens mentioned in O.C.G.A. § 44-14-320 are within O.C.G.A. § 44-14-324, requiring assignments to be in writing. Planter's Bank v. Prater, 64 Ga. 609, 64 Ga. 610, 1880 Ga. LEXIS 370 (1880).

Stableman's lien inapplicable to defendant after executing replevy bond. — Where the person to whom levying officer had delivered mules, who had incurred the expenses of their upkeep, foreclosed upon the mules a livery stableman's lien for their upkeep from the time the possession of the mules was tendered to the defendant after that person executed a replevy bond, a verdict for the defendant was as a matter of law demanded. Rogers v. Echols, 50 Ga. App. 711, 179 S.E. 131, 1935 Ga. App. LEXIS 274 (1935).

Insufficient evidence to determine if there was assignment or lien. — Debtor's motion for default judgment, in an action for a declaration that the assignment of proceeds from a lawsuit to a defendant was invalid, was denied because the debtor did not assign a right of action, so O.C.G.A. § 44-12-24 did not apply, and there was no allegation that the defendant had a lien and if so, whether it was unperfected, so O.C.G.A. § 44-14-320 did not apply. Carson v. Rhodes (In re Carson), No. R04-43220-PWB, No. R04-43220-PWB, No. 05-4018, 2005 Bankr. LEXIS 2673 (Bankr. N.D. Ga. Nov. 9, 2005).

RESEARCH REFERENCES

Am. Jur. 2d.

51 Am. Jur. 2d, Liens, §§ 52, 53.

C.J.S.

53 C.J.S., Liens, § 9.

ALR.

Periodical use of vehicle or horse by owner as defeating lien for storage, repairs, or board, 3 A.L.R. 664.

Common-law lien on personalty for work performed thereon, upon the owner's premises, 3 A.L.R. 862.

Priority as between judgment lien and unrecorded mortgage, 4 A.L.R. 434.

Validity and effect of provision in contract against mechanic's lien, 13 A.L.R. 1065; 102 A.L.R. 356; 76 A.L.R.2d 1087.

Power of the state to create and enforce liens on ships for a nonmaritime tort, 20 A.L.R. 1095.

Discharge of mortgage and taking back of new mortgage as affecting lien intervening between the old and new mortgage, 33 A.L.R. 149; 98 A.L.R. 843.

Mechanics' lien for material specially fabricated for and adapted to building, but not used therein, 33 A.L.R. 320.

Substitution by court of security for attorney's lien, 33 A.L.R. 1296.

Priority as between judgment entered and deed or mortgage filed on same day, 37 A.L.R. 268.

Mechanic's lien: owner's right to deduction on account of damages sustained through contractor's delay, 37 A.L.R. 766.

Independence of contract considered with relation to the scope and construction of statutes, 43 A.L.R. 335.

Bankruptcy: lessor's right, upon bankruptcy of lessee, to enforce lien or retain security for future rentals, 45 A.L.R. 717.

Destruction, demolition, removal of, or damage to improvement as affecting mechanic's lien, 74 A.L.R. 428.

Lien of mortgage securing corporate bonds as affected by exchange of bonds for those of reorganized or new corporations, 81 A.L.R. 139.

Lien on vendee's or optionee's interest in respect of real property as attaching to title acquired by completion of contract or exercise of option, 85 A.L.R. 927.

Vendor's or vendee's lien against realty in case of combined sale of realty and personalty, 88 A.L.R. 92.

State's prerogative right of preference at common law, 90 A.L.R. 184; 167 A.L.R. 640.

Different classes of "vendors' liens," so-called, upon real property, 91 A.L.R. 148.

Mortgagee's release of mortgagor's personal liability by dealings with purchaser of part of mortgaged property who had

assumed mortgage debt as affecting lien of mortgage upon other part which has been conveyed by mortgagor to third person, 101 A.L.R. 618.

Remedy available to holder of mechanic's lien which has priority over antecedent mortgage or vendor's title or lien as regards improvement, but not as regards land, where it is impossible or impractical to remove the improvement, 107 A.L.R. 1012.

Means of enforcing or making effective attorney's retaining lien, 111 A.L.R. 487.

Claim of lessor or privy against receiver of lessee in respect of leasehold which latter elects not to take over, 111 A.L.R. 556.

Character of service contemplated by statutes giving a lien or preference, in event of insolvency, to servants, employees, laborers, etc., 111 A.L.R. 1453; 142 A.L.R. 362.

Statute relating to attorney's lien as affecting common-law or equitable lien, 120 A.L.R. 1243.

Constitutionality of statute impairing or postponing lien for taxes, 136 A.L.R. 328.

Who is contractor or subcontractor, as distinguished from materialman, for purposes of mechanic's lien, contractor's bond, or other provision for securing compensation under construction contract, 141 A.L.R. 321.

Terms of attorney's contingent-fee contract as creating an equitable lien in his favor, 143 A.L.R. 204.

Respective rights and estates of persons claiming real property through sales from different agencies to enforce taxes or assessments, as between which there is parity of lien, 167 A.L.R. 1001.

Right of attorney to set off claim for unrelated services against client's claim for money collected, 173 A.L.R. 429.

Attorney's right to lien or equitable assignment in respect of client's share or interest in decedent's estate, or in trust, 175 A.L.R. 1132.

Lien for storage of motor vehicle, 48 A.L.R.2d 894; 85 A.L.R.3d 199.

Validity of statute making private property owner liable to contractor's laborers, materialmen, or subcontractors where owner fails to exact bond or employ other means of securing their payment, 59 A.L.R.2d 885.

Interest and penalties on federal tax covered in part by prebankruptcy liens as allowable or as surviving discharge in bankruptcy, 77 A.L.R.2d 1125.

Time for filing notice or claim of mechanic's lien where claimant has contracted with general contractor and later contracts directly with owner, 78 A.L.R.2d 1165.

Mechanic's lien for services in connection with subdividing land, 87 A.L.R.2d 1004.

What constitutes "commencement of building or improvement" for purposes of determining accrual of mechanic's lien, 1 A.L.R.3d 822.

Charge for use of machinery, tools, or appliances used in construction as basis for mechanic's lien, 3 A.L.R.3d 573.

Mechanic's lien based on contract with vendor pending executory contract for sale of property as affecting purchaser's interest, 50 A.L.R.3d 944.

Abandonment of construction or of contract as affecting time for filing mechanics' liens or time for giving notice to owner, 52 A.L.R.3d 797.

Assertion of statutory mechanic's or materialman's lien against oil and gas produced or against proceeds attributable to oil and gas sold, 59 A.L.R.3d 278.

Building and construction contracts: right of subcontractor who has dealt only with primary contractor to recover against property owner in quasi contract, 62 A.L.R.3d 288.

Enforceability of mechanic's lien attached to leasehold estate against landlord's fee, 74 A.L.R.3d 330.

Removal or demolition of building or other structure as basis for mechanic's lien, 74 A.L.R.3d 386.

Release or waiver of mechanic's lien by general contractor as affecting rights of subcontractor or materialman, 75 A.L.R.3d 505.

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 A.L.R.3d 1100.

Priority between attorney's lien for fees against a judgment and lien of creditor against same judgment, 34 A.L.R.4th 665.

Loss of garageman's lien on repaired vehicle by owner's use of vehicle, 74 A.L.R.4th 90.

Architect's services as within mechanics' lien statute, 31 A.L.R.5th 664.

Discharge of mortgage and taking back of new mortgage as affecting lien intervening between old and new mortgages, 43 A.L.R.5th 519.

44-14-321. Lien of judgment on debt given for purchase money; priority.

The judgment upon any evidence of debt given for the purchase money of land, where titles have not been made but bond for titles has been given, shall be a lien upon the land and the proceeds of the sale thereof and shall be prior to all other judgments, claims, liens, and encumbrances until the judgment shall be fully paid and satisfied.

History.

Laws 1847, Cobb's 1851 Digest, p. 517; Laws 1850, Cobb's 1851 Digest, p. 518; Code 1863, § 3581; Ga. L. 1868, p. 16, § 1; Code 1868, § 3604; Ga. L. 1873, p. 42, § 19; Code 1873, §§ 1974, 3654; Ga. L. 1877, p. 21, § 1; Ga. L. 1880-81, p. 63, § 5; Code 1883, §§ 1994, 3654; Civil Code 1895, § 2788; Civil Code 1910, § 3330; Code 1933, § 67-1702.

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In a distribution, money in court must be applied to oldest lien that has attached to it. Alexander Underwriters, Inc. v. Insurance Agencies of Ga., Inc., 156 Ga. App. 560, 275 S.E.2d 138, 1980 Ga. App. LEXIS 3123 (1980).

Judgment on one of several notes. — Where judgment has been obtained on one of several purchase money notes, the others being not yet mature, the land may be sold, under O.C.G.A. § 44-14-321, and the vendor will have a right to the proceeds, to the extent of the entire price, prior to the rights of other creditors. The vendor will not, however, be allowed payment until the money is due. Brown v. Farmer, 94 Ga. 178, 21 S.E. 292, 1894 Ga. LEXIS 40 (1894).

Executors of deceased partner, who have title to renewals of purchase money notes, may proceed under O.C.G.A. § 44-14-321, without any conveyance by the surviving members of the firm or the liens of the deceased. Blalock v. Jackson, 94 Ga. 469, 20 S.E. 346, 1894 Ga. LEXIS 133 (1894).

Necessity for deed conveyance before levying execution. — An execution cannot, under the last sentence of O.C.G.A. § 44-14-321, be lawfully levied upon the land until the plaintiff has executed and recorded a deed conveying the land to the defendant. Rogers v. Smith, 98 Ga. 788, 25 S.E. 753, 1896 Ga. LEXIS 150 (1896).

Lien need not be alleged in suit to obtain judgment. — It is not necessary in suits upon notes given for land and judgments thereon, to specify or declare a lien thereon on the face of the declaration and judgment, in order to sell the same under execution by filing a deed for the land with the clerk under O.C.G.A. § 44-14-321. Coleman v. Slade & Etheridge, 75 Ga. 61, 1885 Ga. LEXIS 70 (1885).

Where land is sold subject to prior security title, the vendor may claim a lien on surplus of proceeds of sale at the instance of the holder of such title. Hinton v. Burns, 20 Ga. App. 467, 93 S.E. 120, 1917 Ga. App. LEXIS 934 (1917).

A purchase-money security deed operates as an absolute conveyance of title until the secured indebtedness is fully paid. It generally takes precedence over simultaneous or prior liens against the purchaser, but not prior liens against the property. Connolly v. State, 199 Ga. App. 887, 406 S.E.2d 222, 1991 Ga. App. LEXIS 712 (1991).

Lien for purchase money is prior to secret equity of vendee's spouse. Con-

nally v. Cruger, 40 Ga. 259, 1869 Ga. LEXIS 77 (1869).

A divorce decree did not create a lien superior to the claims of judgment creditors because the decree did not award a lump support payment or create a lien in favor of the children. Dee v. Sweet, 224 Ga. App. 285, 480 S.E.2d 316, 1997 Ga. App. LEXIS 44 (1997).

RESEARCH REFERENCES

Am. Jur. 2d.

46 Am. Jur. 2d, Judgments, §§ 404, 405.

Am. Jur. Pleading and Practice Forms.

24A Am. Jur. Pleading and Practice Forms, Vendor and Purchaser, § 3.

C.J.S.

50 C.J.S., Judgments, § 584 et seq. 53 C.J.S., Liens, § 33 et seq.

ALR.

Priority as between judgments of different dates as regards lien on subsequently acquired property, 67 A.L.R. 1301.

Different classes of "vendors' lien," so-called, upon real property, 91 A.L.R. 148.

Remedy for enforcement of judgment lien after death of judgment debtor, 114 A.L.R. 1165.

Creation of homestead right in real estate as affecting previous mortgage, trust deed, or purchase money or vendor's license, 123 A.L.R. 427.

Real estate broker's rights and remedies in respect of property or proceeds for payment or security of his compensation, 125 A.L.R. 921.

Issuance or levy of execution as extending period of judgment lien, 77 A.L.R.2d 1064.

Specific performance of land contract notwithstanding failure of vendee to make required payments on time, 55 A.L.R.3d 10.

44-14-322. Vendor's equitable lien abolished.

The vendor's equitable lien for the purchase money of lands is abolished.

History.

Orig. Code 1863, § 1988; Code 1868, § 1978; Code 1873, § 1997; Code 1882, § 1997; Civil Code 1895, § 2823; Civil Code 1910, § 3373; Code 1933, § 67-1703.

JUDICIAL DECISIONS

O.C.G.A. § 44-14-322 is not retroactive. Bass v. Ware, 34 Ga. 386, 1866 Ga. LEXIS 107 (1866).

Abolition does not dispense with purchaser's equity. — The abolition of the vendor's equitable lien did not dispense with the natural equity acquired by the purchaser through payment of the purchase money, as the law recognizes that title is held in trust for the purchaser. Horner v. Savannah Valley Enters., Inc., 234 Ga. 371, 216 S.E.2d 113, 1975 Ga. LEXIS 1137 (1975).

Vendor has no priority in decedent's estate. — In the distribution of a decedent's estate, a vendor holding promissory notes has no priority of payment out of the land. Jones v. Janes, 56 Ga. 325, 1876 Ga. LEXIS 282 (1876).

RESEARCH REFERENCES

Am. Jur. 2d.
77 Am. Jur. 2d, Vendor and Purchaser, § 583.
Am. Jur. Pleading and Practice Forms.
24A Am. Jur. Pleading and Practice Forms, Vendor and Purchaser, § 3.
C.J.S.
92A C.J.S., Vendor and Purchaser, § 529.
ALR.
Vendor and purchaser: vendor's lien to secure legacy which one receiving quitclaim from legatee agrees to pay, 2 A.L.R. 810.

Bankruptcy: priority as between vendor's lien on real estate and rights of trustee in bankruptcy of purchaser, 22 A.L.R. 1338.

Contract for development and sale of land as creating a power coupled with interest or supporting an equitable lien, 65 A.L.R. 1080.

Unperformed agreement as to security for, or creation of fund for payment of, purchase price, as waiver of vendor's lien real property, 119 A.L.R. 1180.

Real estate broker's rights and remedies in respect of property or proceeds for payment or security of his compensation, 125 A.L.R. 921.

Right of seller or assignor of leasehold to vendor's lien, 67 A.L.R.2d 1094.

44-14-323. Rank of liens according to date.

All liens which are not regulated and fixed as to rank by this title shall rank according to date, the oldest having priority.

History.
Ga. L. 1873, p. 42, § 20; Code 1873, § 1995; Code 1882, § 1995; Civil Code 1895, § 2821; Civil Code 1910, § 3371; Code 1933, § 67-1704.

JUDICIAL DECISIONS

Application of legislative intent. — Under O.C.G.A. § 44-14-323, the legislature specifically provided that all liens, which are not regulated and fixed as to rank shall rank according to date, the oldest having priority; Georgia's appellate courts have embraced the "first in time, first in right" approach in prioritizing judgments, holding that, money in court, on a rule for its distribution, must be applied, as far as it goes, to the oldest lien that has attached to it, if there be nothing to affect the validity of the lien. Vesta Holdings I, LLC v. Tax Comm'r, 259 Ga. App. 717, 578 S.E.2d 293, 2003 Ga. App. LEXIS 251 (2003).

A purchase money mortgage is accorded special priority over any lien against the property arising through or against the purchaser. Register v. Reese, 37 B.R. 708, 1983 Bankr. LEXIS 4771 (Bankr. N.D. Ga. 1983).

Subordination clause. — Trial court's finding with respect to the priority of a bank's security deed and the landowners' security deed was erroneous because the subordination clause in the landowners' real estate sales agreement merged into their security deed and was extinguished; thus, the trial court was required to determine the priority of the deeds pursuant to O.C.G.A. § 44-14-323, and, as such, the landowners' deed was inferior to the bank's deed because the landowners' deed expressly stated as such and was recorded after the bank's deed. Tallahassee State Bank v. Macon, 317 Ga. App. 128, 730 S.E.2d 646, 2012 Ga. App. LEXIS 677 (2012), cert. denied, No. S12C1983, 2013 Ga. LEXIS 278 (Ga. Mar. 18, 2013).

Foreclosed security deed may have priority. — Where there is a clause in the lease making the rights of the lessee "subject to" a subsequent security deed, the foreclosed security deed has priority. Trust Co. Bank v. Atlanta Speedshop Dragway, Inc., 208 Ga. App. 867, 432

S.E.2d 608, 1993 Ga. App. LEXIS 735 (1993).

Lender paying realty encumbrance receives priority over later creditor. — Where one advances money to pay off an encumbrance on realty either at the instance of the owner of the property or the holder of the encumbrance, either upon the understanding or under an implied understanding that the advance is to be secured by the senior lien on the property, should new security not be a first lien on the property, the holder of the security, if not chargeable with culpable or inexcusable neglect, will be subrogated to the rights of the prior encumbrance under the security, unless the superior or equal equity of others would be prejudiced thereby. Knowledge of the existence of an intervening encumbrance will not alone prevent the person advancing the money to pay off the senior encumbrance from claiming the right of subrogation where the exercise of such right will not substantially prejudice the rights of the intervening encumbrancer. Under the foregoing circumstances, equity will set aside a cancellation of such security and revive the same for the benefit of the party who paid it off. Davis v. Johnson, 241 Ga. 436, 246 S.E.2d 297, 1978 Ga. LEXIS 1014 (1978).

A divorce decree did not create a lien superior to the claims of judgment creditors because the decree did not award a lump support payment or create a lien in favor of the children. Dee v. Sweet, 224 Ga. App. 285, 480 S.E.2d 316, 1997 Ga. App. LEXIS 44 (1997).

Lien found not to "impair" exemption to which bankruptcy debtor entitled. See Orsburn v. Diners Club, Inc., 35 B.R. 217, 1983 Bankr. LEXIS 5047 (Bankr. N.D. Ga. 1983).

Rights of lessee. — Under the general principle contained in O.C.G.A. § 44-14-323, the rights of a lessee are superior to those of a subsequent lienholder. Raiford v. DOT, 206 Ga. App. 114, 424 S.E.2d 789, 1992 Ga. App. LEXIS 1402 (1992), cert. denied, No. S93C0320, 1993 Ga. LEXIS 24 (Ga. Jan. 8, 1993), cert. denied, No. S93C0317, 1993 Ga. LEXIS 25 (Ga. Jan. 8, 1993).

RESEARCH REFERENCES

Am. Jur. 2d.

51 Am. Jur. 2d, Liens, §§ 68-70, 75.

C.J.S.

53 C.J.S., Liens, § 14.

ALR.

Priority as between liens for public improvements, 5 A.L.R. 1301; 99 A.L.R. 1478.

Character of service contemplated by statutes giving a lien or preference, in event of insolvency, to servants, employees, laborers, etc., 54 A.L.R. 567.

Doctrine of inverse order of alienation as affected by release of part of property covered by mortgage or other lien, 110 A.L.R. 65; 131 A.L.R.4th 108.

State's prerogative right of preference at common law, 167 A.L.R. 640.

Priority as between lien for repairs and the like, and right of seller under conditional sales contract, 36 A.L.R.2d 198.

Priority as between artisan's lien and chattel mortgage, 36 A.L.R.2d 229.

Right of vendee under executory land contract to lien for amount paid on purchase price as against subsequent creditors of or purchasers from vendor, 82 A.L.R.3d 1040.

44-14-324. Assignment of liens; rights of assignee.

Except as otherwise provided by law, assignments of all liens shall be in writing. Under an assignment, the assignee shall have all the rights of the assignor as provided by law.

History.

Ga. L. 1873, p. 42, § 21; Code 1873, § 1996; Code 1882, § 1996; Civil Code 1895, § 2822; Civil Code 1910, § 3372;

Code 1933, § 67-1705.

JUDICIAL DECISIONS

O.C.G.A. § 44-14-324 applies to mortgages. Planter's Bank v. Prater, 64 Ga. 609, 64 Ga. 610, 1880 Ga. LEXIS 370 (1880); National Bank v. Exchange Bank, 110 Ga. 692, 36 S.E. 265, 1900 Ga. LEXIS 615 (1900).

One not payee must have written assignment to foreclose. — Where a promissory note and mortgage upon personal property are combined together in one instrument, one who is not the payee named in the paper cannot foreclose the mortgage in that person's own name as holder and owner thereof without having a written assignment of the same. Nicholson v. Harris, 90 Ga. 257, 16 S.E. 84 (1892).

Landlord's lien may be assigned in writing whether the contract between landlord and tenant written or not. I.M. Scott & Co. v. Ward, 21 Ga. App. 535, 94 S.E. 863, 1918 Ga. App. LEXIS 392 (1918).

Warehouseman's attempted pledge of other's property will not constitute assignment. — An attempt by a warehouseman to pledge property of another in the warehouseman's possession by means of warehouse receipts will not constitute a transfer of liens thereon. National Exch. Bank v. Graniteville Mfg. Co., 79 Ga. 22, 3 S.E. 411, 1887 Ga. LEXIS 155 (1887).

RESEARCH REFERENCES

Am. Jur. 2d.
6 Am. Jur. 2d, Assignments, § 50.
C.J.S.
53 C.J.S., Liens, § 15.
ALR.
Subrogation to prior lien of one who advances money to discharge it and takes new mortgage, as against intervening lien, 70 A.L.R. 1396.

44-14-325. Transfers and assignments of evidences of indebtedness secured by lien; how made.

All transfers and assignments of rent notes, mortgage notes, and other such evidences of indebtedness which are secured either by contract lien or out of which a lien springs by operation of law shall be sufficiently technical and valid where the transfer or assignment plainly seeks to pass the title to any of the papers in writing from one person to another.

History.
Ga. L. 1899, p. 90, § 1; Civil Code 1910, § 3345; Code 1933, § 67-1706.

JUDICIAL DECISIONS

Intent. — The purpose of O.C.G.A. § 44-14-325 is not to lessen the power of assignment, but to broaden it, so as to do away with, as much as possible, the formality of transfers of lien notes. Setze v. First Nat'l Bank, 140 Ga. 603, 79 S.E. 540, 1913 Ga. LEXIS 195 (1913).

O.C.G.A. § 44-14-325 applies where transfer is by endorsement of note "without recourse." Berry v. Van Hise,

148 Ga. 27, 95 S.E. 690, 1918 Ga. LEXIS 175 (1918); Jordan Mercantile Co. v. Brooks, 149 Ga. 157, 99 S.E. 289, 1919 Ga. LEXIS 170 (1919). But see West Yellow Pine Co. v. Kendrick, 9 Ga. App. 350, 71 S.E. 504, 1911 Ga. App. LEXIS 548 (1911).

Assignee of purchase money note may recover personalty where note provides title. — Where one sells personal property, taking a purchase money note in which title to the property is reserved until the note is paid, the transfer or assignment of the note transfers or assigns the right to recover the property in an action of trover upon failure of the maker of the note to pay the same, provides that title is retained through the purchase money note; and this is true whether the transfer makes reference to the property to which title is reserved or not, and or whether some or all of the transfers are made "without recourse" on the transferor. Jordan Mercantile Co. v. Brooks, 149 Ga. 157, 99 S.E. 289, 1919 Ga. LEXIS 170 (1919).

What purchase money notes not contemplated by section. — O.C.G.A. § 44-14-325 does not contemplate purchase money notes in connection with which there is a contract reserving title, or a bond to convey title on payment of the purchase money. Berry v. Van Hise, 148 Ga. 27, 95 S.E. 690, 1918 Ga. LEXIS 175 (1918). But see West Yellow Pine Co. v. Kendrick, 9 Ga. App. 350, 71 S.E. 504, 1911 Ga. App. LEXIS 548 (1911).

Owner of title through conveyance of security deed has power equal to grantee. — Where one becomes owner of title conveyed by security deed and of indebtedness secured thereby, and power of sale not expressed in deed as limited to grantee, but having been conferred upon grantee or "assigns," that person is entitled to exercise the power to the same extent as the grantee. Universal Chain Theatrical Enters., Inc. v. Oldknow, 176 Ga. 472, 168 S.E. 239 (1933).

Necessary elements for joint payee request. — Where a joint payee request does not identify the escrow account and does not contain words showing any intent to make an assignment; i.e., does not contain words seeking to pass title in the escrow fund, then that request does not constitute an assignment of a contractor's interest in the escrow account. Washington Loan & Banking Co. v. Guin, 236 Ga. 779, 225 S.E.2d 318, 1976 Ga. LEXIS 1024 (1976).

Simple endorsement of mortgage note, payable to order, is sufficient under O.C.G.A. § 44-14-325. Setze v. First Nat'l Bank, 140 Ga. 603, 79 S.E. 540, 1913 Ga. LEXIS 195 (1913); Beall v. Patterson, 146 Ga. 233, 91 S.E. 71, 1916 Ga. LEXIS 677 (1916); Patillo v. Hallet & Davis Piano Co., 26 Ga. App. 327, 106 S.E. 206, 1921 Ga. App. LEXIS 131 (1921).

Note transfers must be in writing. Gamble v. Shingler, 22 Ga. App. 608, 96 S.E. 705, 1918 Ga. App. LEXIS 624 (1918).

For example of O.C.G.A. § 44-14-325 as applied to landlord's lien and rent note, see I.M. Scott & Co. v. Ward, 23 Ga. App. 416, 98 S.E. 412, 1919 Ga. App. LEXIS 711 (1919); International Agric. Corp. v. Powell, 31 Ga. App. 348, 120 S.E. 668, 1923 Ga. App. LEXIS 942 (1923).

For example of O.C.G.A. § 44-14-325 as applied to bill of sale used as security, see Dawson v. English, 8 Ga. App. 585, 69 S.E. 1133, 1911 Ga. App. LEXIS 64 (1911).

RESEARCH REFERENCES

Am. Jur. 2d.
6 Am. Jur. 2d, Assignments, § 50.

C.J.S.
53 C.J.S., Liens, § 15.

44-14-326. Transfers and assignments of evidences of indebtedness secured by lien; effect as transfer of lien.

Upon all such transfers or assignments of any rent note, mortgage note, or other evidence of indebtedness mentioned in Code Section 44-14-325, the transfer or assignment shall carry, together with the

title thereof, the lien connected with the same without naming or specifically transferring the lien so that the effect of the transfer or assignment will be to carry the lien completely and fully as a necessary incident of the transfer.

History.
Ga. L. 1899, p. 90, § 2; Civil Code 1910, § 3346; Code 1933, § 67-1707.

JUDICIAL DECISIONS

O.C.G.A. § 44-14-326 applies to remote as well as immediate endorsees. Berry v. Van Hise, 148 Ga. 27, 95 S.E. 690, 1918 Ga. LEXIS 175 (1918); Jordan Mercantile Co. v. Brooks, 149 Ga. 157, 99 S.E. 289, 1919 Ga. LEXIS 170 (1919).

Section gives assignee of debt notes title and lien. — O.C.G.A. § 44-14-326 says that all transfers and assignments of rent notes, mortgage notes, and other such evidences of indebtedness, shall carry to such transferee or assignee the title to such instrument and also the lien connected therewith, without specially naming or transferring the lien; so that effect of such transfer or assignment will be to completely and fully carry the lien as a necessary incident thereof. Alley v. First Nat'l Bank, 46 Ga. App. 527, 168 S.E. 317, 1933 Ga. App. LEXIS 133 (1933).

Assignee may seek to have judgment made special lien on property. — Under O.C.G.A. §§ 10-3-1 and 44-14-326, transferee of such notes may ask in a court of law, without asking for intervention of equitable principles, that a judgment rendered on such notes be declared to be a special lien on the land or other property which is described in the instrument securing the notes. Alley v. First Nat'l Bank, 46 Ga. App. 527, 168 S.E. 317, 1933 Ga. App. LEXIS 133 (1933).

Transferee has power equal to grantee. — Where one becomes owner of title conveyed by security deed and of indebtedness secured thereby, and power of sale not expressed in deed as limited to grantee, but having been conferred upon grantee or "assigns," that person is entitled to exercise the power to same extent as grantee. Universal Chain Theatrical Enters., Inc. v. Oldknow, 176 Ga. 492, 168 S.E. 239, 1933 Ga. LEXIS 207 (1933).

RESEARCH REFERENCES

Am. Jur. 2d.
6 Am. Jur. 2d, Assignments, § 50.

C.J.S.
53 C.J.S., Liens, § 15.

PART 2

LANDLORDS

Cross references.
Landlord and tenant relationship generally, T. 44, C. 7.

Law reviews.
For article, "Distress and Dispossessory Warrants in Georgia," see 12 Ga. B.J. 266 (1950).

RESEARCH REFERENCES

ALR.

Subject matter covered by landlord's statutory lien for rent, 9 A.L.R. 300; 96 A.L.R. 249.

Judicial or execution sale of realty as affecting debtor's share in crops grown by tenant or cropper, 13 A.L.R. 1425; 41 A.L.R. 2d 1355.

Landlord's lien or right of distress on property sold to tenant on conditional sale, 45 A.L.R. 949.

Right as between landlord and conditional seller of property to tenant, 45 A.L.R. 967; 98 A.L.R. 628.

Injunction to prevent tenant in arrears for rent from removing chattels or improvements not constituting fixtures, 53 A.L.R. 294.

Lien on, or trust in respect of, land, as security for repayment of money loaned to the purchaser and used in paying for the property without express agreement for security thereon, 60 A.L.R. 1240.

Statutes in relation to chattel mortgages, as applicable to provisions in lease of real property purporting to give lessor lien on lessee's chattel, 64 A.L.R. 627.

Right of vendee under unrecorded executory land contract as against subsequent deed or mortgage executed by, or judgment rendered against vendor, 87 A.L.R. 1505.

Different classes of "vendors' liens," so-called, upon real property, 91 A.L.R. 148.

Unaccepted tender as affecting lien of real estate mortgage, 93 A.L.R. 12.

Landlord's acceptance of chattel mortgage, or conditional sales contract, as waiver of landlord's lien or reservation of title, 96 A.L.R. 568.

Discharge of mortgage and taking back of new mortgage as affecting lien intervening between old and new mortgages, 98 A.L.R. 843; 43 A.L.R.5th 519.

Return of chattel to seller after delivery to buyer as revical of seller's lien; and its effect upon conditions of enforcing lien, 118 A.L.R. 564.

Interest subject to a homestead right in others as subject to lien of judgment or to attachment or execution, 122 A.L.R. 1150.

Attachment, execution, or recovery of personal judgment as waiver of landlord's lien, 151 A.L.R. 679.

44-14-340. Lien for farming supplies, equipment and other items furnished tenant; operation of law or special contract; enforcement; duty to inform; priorities.

Landlords furnishing supplies, money, horses, mules, asses, oxen, farming utensils, and equipment necessary to make crops shall have the right to secure themselves from the crops raised during the year in which such things are furnished upon such terms as may be agreed upon by the parties but with the following conditions:

(1) The liens provided for in this Code section shall arise by operation of law from the relationship of landlord and tenant as well as by a special contract in writing whenever the landlord shall furnish the articles enumerated in this Code section or any of them to the tenant for the purposes named. The liens may be enforced in the manner provided in Code Section 44-14-550;

(2) Whenever the liens are created by a special contract in writing, they shall be assignable by the landlord and may be enforced by the assignees in the manner provided for the enforcement of such liens by landlords;

(3) The liens shall only exist as liens on the crops raised during the

year in which they are made and may be foreclosed before the debt is due if the tenant is removing or seeking to remove his crops from the premises or when other legal process, not in favor of the landlord nor controlled by him nor levied at his instance or procurement, is being enforced against the crops;

(4) Every person giving a lien under this Code section who has previously given a lien or liens under it or any other lien shall, when giving a new lien under this Code section on the same property to another person, inform such person, if asked, as to the facts of the amount of such lien or liens and to whom given; and

(5) The liens created under this Code section are declared to be superior in rank to other liens and shall, as between themselves and other liens not excepted by this paragraph, rank according to date; but they shall be inferior to liens for taxes, the general and special liens of laborers, and the special liens of landlords for rent.

History.

Ga. L. 1873, p. 42, §§ 5, 6; Code 1873, § 1978; Ga. L. 1874, p. 18, § 1; Ga. L. 1875, p. 20, §§ 1, 2; Ga. L. 1878-79, p. 47, § 1; Code 1882, § 1978; Ga. L. 1890-91, p. 72, § 1; Ga. L. 1895, p. 26, § 1; Civil Code 1910, § 3348; Code 1933, § 61-202; Ga. L. 1982, p. 3, § 44.

JUDICIAL DECISIONS

Analysis

General Consideration
Supplier and Recipient
Supplies
Characteristics of Lien
Priorities
Enforcement

General Consideration

Section 44-14-550 procedure must be complied with. — Where lessor did not follow the requisite procedure for assertion of liens in O.C.G.A. § 44-14-550, no lien arose under O.C.G.A. § 44-14-340. Jarrell v. Collins, 176 Ga. App. 368, 336 S.E.2d 305, 1985 Ga. App. LEXIS 2378 (1985).

Jury trial. — There was no right to a jury trial in an action under the Georgia Crop Lien Foreclosure Statute; a foreclosure judgment in excess of the value of the crop was void and was vacated. Bitt Int'l Co. v. Fletcher, 259 Ga. App. 406, 577 S.E.2d 276, 2003 Ga. App. LEXIS 116 (2003).

Supplier and Recipient

Relation of landlord must exist. — For one to have a lien as landlord for supplies, without special contract in writing, the relation of landlord must exist and that it did exist must appear in the affidavit of foreclosure. Eve v. Crowder, 59 Ga. 799, 1877 Ga. LEXIS 401 (1877).

Tenant need not actually possess realty before advancement. — Where one person rents to another land upon which to make a crop, the contract raises the relation of landlord and tenant between them, within the meaning of O.C.G.A. § 44-14-340. It is not essential that the tenant should enter into actual possession of the premises before the ad-

Supplier and Recipient (Cont'd)

vancement is made. Johnson v. McDaniel, 138 Ga. 203, 75 S.E. 101, 1912 Ga. LEXIS 257 (1912); Lowe & Pittard v. Warbington, 144 Ga. 181, 86 S.E. 537, 1915 Ga. LEXIS 112 (1915).

Subtenant substitutes for tenant as to liability for lien. — When a landlord accepts a subtenant as the tenant, the subtenant becomes the substitute of the original tenant to such an extent that the lien of the landlord for supplies furnished the tenant to aid in making the crop cannot be defeated as to the particular crop by a contract of subrenting to which the landlord has not consented. Nash v. Orr, 9 Ga. App. 33, 70 S.E. 194, 1911 Ga. App. LEXIS 411 (1911).

Tenant may be landlord to a subtenant so as to have a lien under O.C.G.A. § 44-14-340. Strickland v. Stiles, 107 Ga. 308, 33 S.E. 85, 1899 Ga. LEXIS 57 (1899).

Landlord must furnish supplies as landlord. — In order for a landlord to have a lien upon a tenant's crop for supplies, under O.C.G.A. § 44-14-340 the landlord must furnish the articles as landlord. Scott v. Pound, 61 Ga. 579, 1878 Ga. LEXIS 186 (1878); Swann v. Morris, 83 Ga. 143, 9 S.E. 767, 1889 Ga. LEXIS 21 (1889).

Landlord has no lien for items given as agent. — Landlord has no lien for articles furnished in capacity as a mere agent for another. Henderson v. Hughes, 4 Ga. App. 52, 60 S.E. 813, 1908 Ga. App. LEXIS 195 (1908).

Trustee, as landlord, may foreclose a lien in the trustee's own name under O.C.G.A. § 44-14-340 though the land belongs to another person. Fargason v. Ford, 119 Ga. 343, 46 S.E. 431, 1904 Ga. LEXIS 830 (1904).

Landlord has right to lien although agent supplies tenant. — Landlord is entitled to a lien for supplies where, at the request or with the consent of the tenant, the landlord directs the furnishing of supplies to the tenant by an agent and assumes sole liability for the debt thus created. Henderson v. Hughes, 4 Ga. App. 52, 60 S.E. 813, 1908 Ga. App. LEXIS 195 (1908).

When no lien arises. — Landlord has no lien for supplies furnished to aid in making a crop, if they are furnished by another, or if they are furnished without the tenant's consent, or the debt is assumed by the landlord without the tenant's consent. Henderson v. Hughes, 4 Ga. App. 52, 60 S.E. 813, 1908 Ga. App. LEXIS 195 (1908).

No lien when landlord merely provides money for supplies already in use. — Landlord has no lien for supplies, where the supplies are furnished to the tenant by a third person on the tenant's credit, and the mere furnishing of the money, three or four weeks thereafter, by the landlord to enable the tenant to pay promptly for the fertilizer already purchased and partly used is not necessary to make the crop. Landers v. Touchstone, 27 Ga. App. 310, 108 S.E. 125, 1921 Ga. App. LEXIS 857 (1921).

No lien if landlord merely surety. — In order for a landlord to have a lien upon a tenant's crop for supplies, etc., the landlord must furnish the articles, and not merely become the tenant's surety for the price to some other person by whom they are sold to the tenant. Scott v. Pound, 61 Ga. 579, 1878 Ga. LEXIS 186 (1878); Swann v. Morris, 83 Ga. 143, 9 S.E. 767, 1889 Ga. LEXIS 21 (1889); Brimberry v. Mansfield, 86 Ga. 792, 13 S.E. 132, 1891 Ga. LEXIS 70 (1891); Rodgers v. Black, 99 Ga. 139, 25 S.E. 23, 1896 Ga. LEXIS 250 (1896).

For example of case with landlord surety see O'Quinn v. Carter, 34 Ga. App. 310, 129 S.E. 296, 1925 Ga. App. LEXIS 242 (1925).

No lien if only one of two recipients is tenant. — Where supplies are furnished to two parties to make a crop, but only one is a tenant, no lien arises under O.C.G.A. § 44-14-340. Saterfield v. Moore, 110 Ga. 514, 35 S.E. 638, 1900 Ga. LEXIS 571 (1900).

No lien if landlord without notice substitutes partnership for original tenant. — Landlord who rents to an individual and stipulates to furnish that person board, but afterwards accepts a partnership, of which the first tenant is a member, as tenant in lieu of the original tenancy, has no lien upon the crop made

by the partnership for the board of the original tenant, the partnership having made no stipulation as to such board, and the new partner not knowing of any contract relating thereto. Reynolds v. Hindman, 88 Ga. 314, 14 S.E. 471, 1891 Ga. LEXIS 345 (1891).

Cropper is not a tenant and there is therefore no lien under O.C.G.A. § 44-14-340 for supplies furnished to a cropper. Fields v. Argo, 103 Ga. 387, 30 S.E. 29, 1898 Ga. LEXIS 129 (1898).

Supplies

Definition of "supplies." — In foreclosing a lien under O.C.G.A. § 44-14-340 a landlord has the right to include any instrumentality necessary to make a crop, which was furnished by the landlord and used by the tenant, and which was essential to the creation and cultivation of the crop. Boyce v. Day, 3 Ga. App. 275, 59 S.E. 930, 1907 Ga. App. LEXIS 617 (1907).

The term "supplies" includes money furnished by the landlord and used by the tenant in making and gathering the crops. Strickland v. Stiles, 107 Ga. 308, 33 S.E. 85, 1899 Ga. LEXIS 57 (1899).

Test of whether articles subject to lien. — The means employed by the tenant to obtain such things as are necessary to produce the crop are immaterial. The essential questions to be answered are: whether the articles furnished to the tenant by the landlord personally, whether the articles furnished by the landlord used in making the crop and whether the use of the articles were supplied were essentially necessary to the making of the crop in question. Boyce v. Day, 3 Ga. App. 275, 59 S.E. 930, 1907 Ga. App. LEXIS 617 (1907).

Lien possible for board. — Board furnished to the tenant under the rent contract whereby the tenant agrees that the landlord shall have a lien on the tenant's crop of board, is within O.C.G.A. § 44-14-340. Jones v. Eubanks, 86 Ga. 616, 12 S.E. 1065, 1891 Ga. LEXIS 31 (1891). See also, Reynolds v. Hindman, 88 Ga. 314, 14 S.E. 471, 1891 Ga. LEXIS 345 (1891).

Tenant need not use supplies to make crop. — In the foreclosure of a landlord's lien for supplies, it is not necessary to prove that the supplies furnished were actually used in making the crop. To create the lien it is sufficient that the supplies were actually furnished, and that the landlord understood and intended that they should be used to aid in making the crop. Nash v. Orr, 9 Ga. App. 33, 70 S.E. 194, 1911 Ga. App. LEXIS 411 (1911); Buxton v. Hickman, 18 Ga. App. 260, 89 S.E. 380, 1916 Ga. App. LEXIS 268 (1916).

Characteristics of Lien

Lien arises by operation of law. — Landlord's lien for supplies arises by virtue of O.C.G.A. § 44-14-340 when the supplies are furnished, but such lien cannot be asserted against the tenant's crop except by foreclosure. W.A. Lathem & Sons v. Stringer, 17 Ga. App. 585, 87 S.E. 840, 1916 Ga. App. LEXIS 801 (1916); W.A. Lathem & Sons v. Stringer, 145 Ga. 224, 88 S.E. 941, 1916 Ga. LEXIS 250 (1916); Hawkins v. Smith, 24 Ga. App. 464, 101 S.E. 311, 1919 Ga. App. LEXIS 854 (1919); Moseman v. Comer, 160 Ga. 106, 127 S.E. 406, 1925 Ga. LEXIS 96 (1925); Turner v. Sitton, 160 Ga. 215, 127 S.E. 847, 1925 Ga. LEXIS 121 (1925).

Lien resembles purchase money claim. — Under O.C.G.A. § 44-14-340, landlords furnishing supplies to their tenants for the purpose of making crops on the rented premises have a lien, by operation of law, on the crops there made in the year for which the supplies were furnished and such a lien is in the nature of a claim for purchase money. Mutual Fertilizer Co. v. Moultrie Banking Co., 36 Ga. App. 322, 136 S.E. 803, 1927 Ga. App. LEXIS 55 (1927).

Time lien attaches. — Lien of a materialman on real estate, under O.C.G.A. § 44-14-340, when created and declared as required by O.C.G.A. § 44-14-362, attaches from the time the materialman commences, under the contract, to deliver material, and takes priority over title acquired with actual notice of the materialman's claim of lien by a subsequent grantee from the owner of real estate to secure debts, although the deed is executed and recorded before the completion of the contract of the materialman to furnish material, before the claim of lien is recorded, and before the commence-

Characteristics of Lien (Cont'd)

ment of an action to foreclose the lien or recover the amount of the claim. Picklesimer v. Smith, 164 Ga. 600, 139 S.E. 72, 1927 Ga. LEXIS 235 (1927).

Time lien attaches against third party with notice. — When a contractor or materialman has done work or furnished material for the improvement of real estate, the contractor's liens when declared and created, as provided in O.C.G.A. § 44-14-362, attach from the time the work under the contract is commenced or the material is furnished, as against third persons having actual notice of such liens. Marbut-Williams Lumber Co. v. Dixie Elec. Co., 166 Ga. 42, 142 S.E. 270, 1928 Ga. LEXIS 209 (1928).

Lien unaffected by bankruptcy. — Lien given by O.C.G.A. § 44-14-340 is not obtained by legal proceedings, and is not affected by bankruptcy of the tenant, but is to be recognized and enforced in the bankruptcy proceedings. Henderson v. Mayer, 225 U.S. 631, 32 S. Ct. 699, 56 L. Ed. 1233, 1912 U.S. LEXIS 2110 (1912); In re Harper, 294 F. 899, 1924 U.S. Dist. LEXIS 1858 (D. Ga. 1924), dismissed, Corrigan v. Buckley, 271 U.S. 323, 46 S. Ct. 521, 70 L. Ed. 969, 1926 U.S. LEXIS 884 (1926).

For example of lien not affected by bankruptcy. Sitton v. Turner, 34 Ga. App. 12, 128 S.E. 77, 1925 Ga. App. LEXIS 5 (1925).

Lien does not give landlord right to pick crop. — The fact that a landlord has a lien for supplies does not give the landlord a right to pick a crop without the tenant's consent in order to save the crop. Wadley v. Williams, 75 Ga. 272, 1885 Ga. LEXIS 112 (1885).

Lien is assignable and the assignee may enforce it even though it is assigned on the day it is created, no supplies having been furnished. Benson v. Gottheimer, 75 Ga. 642, 1885 Ga. LEXIS 193 (1885).

Third party buyer recording before materials delivered is not liable for lien. — Contractor's lien under O.C.G.A. § 44-14-340 cannot attach or exist prior to delivery of any of the material. It follows that a holder of legal title to realty, under a security deed executed by the owner and duly recorded prior to delivery of material furnished to such owner for improvement of the realty, cannot at the time of taking the security be affected with notice of any lien which the materialman may set up for material furnished to improve the property. Marbut-Williams Lumber Co. v. Dixie Elec. Co., 166 Ga. 42, 142 S.E. 270, 1928 Ga. LEXIS 209 (1928).

Lien covers only year when advances made. — Special lien given to landlords upon the crops of their tenants for money and articles furnished to make the crops embrace only the crops of the year in which such advances are made for such purposes. Where the affidavit of foreclosure and the execution issued thereon show on their face that the money and articles furnished are for the preceding year as well as the current year, and also asserts a general lien upon other property (livestock), the affidavit and execution issued thereon are void. Parker v. Bond, 47 Ga. App. 318, 170 S.E. 331, 1933 Ga. App. LEXIS 389 (1933).

"Year" not solar year. — Where the supplies are furnished in November to be used in making next year's crop, the lien given by O.C.G.A. § 44-14-340 arises. Johnson v. McDaniel, 138 Ga. 203, 75 S.E. 101, 1912 Ga. LEXIS 257 (1912).

No execution against supplies until used. — Supplies furnished but not yet utilized by the tenant for the purpose intended, are not subject to levy and sale under executions against the tenant held by third persons if title did not pass to tenant because landlord told tenant to hold supplies until further orders. Mutual Fertilizer Co. v. Moultrie Banking Co., 36 Ga. App. 322, 136 S.E. 803, 1927 Ga. App. LEXIS 55 (1927).

Lien attaches to sale under common-law levy. — If crops subject to lien under O.C.G.A. § 44-14-340 are sold under a common-law levy, the lien will attach to the proceeds of such sale. Cochran v. Waits, Johnson & Co., 127 Ga. 93, 56 S.E. 241, 1906 Ga. LEXIS 747 (1906).

Priorities

Landlord's lien is not effective as against a bona fide purchaser. De

Laigle v. Shuptrine, 28 Ga. App. 380, 110 S.E. 920, 1922 Ga. App. LEXIS 530 (1922).

Lien applies to assignee of bankrupt. — The fact that the lien was not foreclosed prior to the assignment by the bankrupt of the homestead set aside to the bankrupt out of the proceeds of the bankrupt's share of the crops will not defeat the landlord's lien. Moseman v. Comer, 160 Ga. 106, 127 S.E. 406, 1925 Ga. LEXIS 96 (1925).

Landlord's lien for supplies is superior to that of a mortgagee, also for supplies. Manley v. Underwood, 27 Ga. App. 822, 110 S.E. 49, 1921 Ga. App. LEXIS 454 (1921).

Materialman's lien supersedes second security deed to vendee with notice. — Where, after materialmen had furnished material to improve the real estate embraced in the deed above referred to, the owner executes and delivers to the vendee therein a second deed to secure debt, and the vendee takes such second deed with actual notice of the claims of liens by such materialmen, the liens of the materialmen, when created and declared as required by O.C.G.A. § 44-14-362, would take priority over the title acquired by the vendee in such second security deed. Picklesimer v. Smith, 164 Ga. 600, 139 S.E. 72, 1927 Ga. LEXIS 235 (1927).

Lien of judgment not divested by superior factor's lien. — Although a factor's lien on crops for supplies furnished formerly included in the statute is superior to the lien of a judgment, delivery of the crops to the factor will not vest title in the factor nor divest the judgment lien. Stallings v. Harrold, Johnson & Co., 60 Ga. 478, 1878 Ga. LEXIS 510 (1878).

Enforcement

Proper remedy to enforce a lien, under O.C.G.A. § 44-14-340 is that prescribed in O.C.G.A. § 44-14-550, and a distress warrant. Mackenzie v. Flannery & Co., 90 Ga. 590, 16 S.E. 710, 1892 Ga. LEXIS 221 (1892).

Strict construction as to debts enforced. — As O.C.G.A. § 44-14-340 creates this special lien, with the right of summary enforcement, only under certain circumstances, debts cannot be collected in the mode so provided, unless they fall within the terms of such section. Parties cannot by agreement bring other debts than those which the law itself embraces within its scope. Parks v. Simpson, 124 Ga. 523, 52 S.E. 616, 1905 Ga. LEXIS 772 (1905).

Bankruptcy obviates need for enforcement procedures. — While the method of enforcing liens given by O.C.G.A. § 44-14-340 to a landlord must ordinarily be followed, such procedure is not necessary, where before it is taken the property passes into possession of a court of bankruptcy. In re Harper, 294 F. 899, 1924 U.S. Dist. LEXIS 1858 (D. Ga. 1924), dismissed, Corrigan v. Buckley, 271 U.S. 323, 46 S. Ct. 521, 70 L. Ed. 969, 1926 U.S. LEXIS 884 (1926). But see Moseman v. Comer, 160 Ga. 106, 127 S.E. 406, 1925 Ga. LEXIS 96 (1925).

Foreclosure limited before note due. — Where a note is given for supplies the lien under O.C.G.A. § 44-14-340 cannot be foreclosed until the note is due except as provided in O.C.G.A. § 44-14-340(3). Harmon v. Earwood, 29 Ga. App. 399, 115 S.E. 502, 1923 Ga. App. LEXIS 30 (1923).

Payment demand unnecessary if tenant removing crops. — Since a lien under O.C.G.A. § 44-14-340 may be foreclosed before the debt is due, if the tenant is removing or seeking to remove crops from the premises, a demand for payment is not, in such a case, an essential prerequisite to the right to foreclose. Vaughn v. Strickland, 108 Ga. 659, 34 S.E. 192, 1899 Ga. LEXIS 317 (1899).

RESEARCH REFERENCES

Am. Jur. 2d.

49 Am. Jur. 2d, Landlord and Tenant, §§ 793-877, 810-812.

C.J.S.

52 C.J.S., Landlord and Tenant, § 624.

ALR.

Priority as between landlord's lien on chattels and chattel mortgage, 52 A.L.R. 935.

Subject-matter covered by landlord's

statutory lien for rent, 96 A.L.R. 249.

Attachment, execution, or recovery of personal judgment as waiver of landlord's lien, 151 A.L.R. 679.

False statement as to existing encumbrance on chattel in obtaining loan or credit as criminal false pretense, 53 A.L.R.2d 1215.

Secured transactions: priority as between statutory landlord's lien and security interest perfected in accordance with Uniform Commercial Code, 99 A.L.R.3d 1006.

44-14-341. Special lien on tenant's crops; priorities; general lien on tenant's property.

Landlords shall have a special lien for rent on crops grown on land rented from them, which lien shall be superior to all other liens except liens for taxes, and shall also have a general lien on the property of the debtor which is subject to levy and sale, which general lien shall date from the time of the levy of a distress warrant to enforce the general lien.

History.

Ga. L. 1873, p. 42, § 5; Code 1873, § 1977; Code 1882, § 1977; Ga. L. 1887, p. 34, § 1; Ga. L. 1889, p. 71, § 1; Civil Code 1895, § 2795; Civil Code 1910, § 3340; Code 1933, § 61-203.

JUDICIAL DECISIONS

O.C.G.A. § 44-14-341 does not vest title, but only a lien, special for the rent of the land that made the crop, good from its maturity, but general in respect to other rent, and good only from levy. Worrill v. Barnes, 57 Ga. 404, 1876 Ga. LEXIS 132 (1876).

One-year statute of limitations inapplicable to landlord rent liens. — Limitation of one year in O.C.G.A. § 44-14-550(8) does not apply to the prosecution and enforcement by distress warrant of a special or general claim or demand by a landlord for rent. Only the general statutes of limitation apply as to the enforcement of such demands. Jones v. Blackwelder, 16 Ga. App. 345, 85 S.E. 356, 1915 Ga. App. LEXIS 620 (1915).

Landlord's crop lien has priority over laborer's lien absent contrary accord. — A landlord's lien has priority on the proceeds of crops grown on rented premises over a laborer's lien on the same unless there be some conflicting agreement such as might operate to interfere with the general rule. Nelson v. Fuqua, 46 Ga. App. 754, 169 S.E. 206, 1933 Ga. App. LEXIS 230 (1933).

Point when landlord's lien takes precedence. — A lien resulting from a judgment in favor of the plaintiff landlord, relates back to the date of the levy and will take precedence over a common-law judgment rendered subsequently to such levy, but before the final verdict and judgment in the distress warrant proceeding. Corley-Powell Produce Co. v. Allen, 42 Ga. App. 641, 157 S.E. 251, 1931 Ga. App. LEXIS 82 (1931).

Point when rent distress warrant lien becomes effective. — The lien of the distress warrant for rent becomes effective and binding on a bale of cotton when a distress warrant is levied thereon, provided the claimant bona fide purchaser had not brought the cotton before the levy was made. Atchison v. Taliaferro County, 65 Ga. App. 177, 15 S.E.2d 534, 1941 Ga. App. LEXIS 288 (1941).

General lien given by O.C.G.A. § 44-14-341 dates from levy of distress warrant to enforce the same. Prior to levy it

covers no specific property, and attaches only to what is seized under the distress warrant issued to enforce the lien given by statute. But in this respect it is the full equivalent of a common-law distress. Henderson v. Mayer, 225 U.S. 631, 32 S. Ct. 699, 56 L. Ed. 1233, 1912 U.S. LEXIS 2110 (1912); Oglethorpe Sav. & Trust Co. v. Morgan, 149 Ga. 787, 102 S.E. 528, 1920 Ga. LEXIS 406 (1920).

Tenant's discharge in bankruptcy does not affect rent lien. — A landlord's lien for rent, whether the special lien upon the crops grown on the rented premises which is created by O.C.G.A. § 44-14-341, or the general lien which arises upon the levy of a distress warrant, is not a lien created by judgment or one "obtained through legal proceedings," and is therefore not discharged by the filing of a petition for the tenant's discharge in bankruptcy, although within four months of the creation of the lien. In re Burns, 175 F. 633, 1909 U.S. Dist. LEXIS 70 (D. Ga. 1909), aff'd, Henderson v. Mayer, 225 U.S. 631, 32 S. Ct. 699, 56 L. Ed. 1233, 1912 U.S. LEXIS 2110 (1912); Henderson v. Mayer, 225 U.S. 631, 32 S. Ct. 699, 56 L. Ed. 1233, 1912 U.S. LEXIS 2110 (1912); White v. Idelson, 38 Ga. App. 612, 144 S.E. 802, 1928 Ga. App. LEXIS 357 (1928).

General lien of a landlord for rent, given by O.C.G.A. § 44-14-341, is not created by judgment, nor obtained through legal proceedings, although the levy may be made within four months of the filing of the petition in bankruptcy against the tenant. Henderson v. Mayer, 225 U.S. 631, 32 S. Ct. 699, 56 L. Ed. 1233, 1912 U.S. LEXIS 2110 (1912).

Statutory landlord lien possible even when landlord has only lien for rent and additional security. — Where a landlord does not have absolute title to the crops, but the tenant does have an interest in the crops which are subject to the landlord's lien for rent, and the landlord takes additional security to secure the payment of rental, this does not prevent their statutory landlord's lien from coming into existence or destroy its integrity. Goss v. Toney, 184 F.2d 918, 1950 U.S. App. LEXIS 4244 (5th Cir. 1950).

When general landlord lien supersedes general creditor's judgment. — Where a general landlord lien was in existence at the time a creditors' petition was filed, although it then may have been inchoate, requiring levy of a distress warrant to perfect it, yet where it was afterwards so perfected before the rendition of judgment in favor of general creditors, it would be entitled to priority over such judgment. J.B. Withers Cigar Co. v. Kirkpatrick, 196 Ga. 41, 26 S.E.2d 255, 1943 Ga. LEXIS 316 (1943).

General lien not voided by creditor's action. — The general lien of a landlord exists by virtue of statute as applied to relationship, and is not destroyed or vacated by the institution of a creditors' action under the insolvent traders law. J.B. Withers Cigar Co. v. Kirkpatrick, 196 Ga. 41, 26 S.E.2d 255, 1943 Ga. LEXIS 316 (1943).

General landlord's lien perfected by distress warrant. — While it is declared in O.C.G.A. § 44-14-341 that the general lien of a landlord shall date from the levy of a distress warrant, the lien is not created by any judicial proceeding, but arises by operation of law as applied to relationship, and needs only to be perfected by issuance and levy of a distress warrant. J.B. Withers Cigar Co. v. Kirkpatrick, 196 Ga. 41, 26 S.E.2d 255, 1943 Ga. LEXIS 316 (1943).

Alleged "assignee of rents" was not a landlord at the time crops were sought to be distrained, and had no standing to assert the lien provided by O.C.G.A. § 44-14-341. South Cent. Farm Credit v. V.T. Properties, Inc., 208 Ga. App. 296, 430 S.E.2d 645, 1993 Ga. App. LEXIS 515 (1993), cert. denied, No. S93C1147, 1993 Ga. LEXIS 777 (Ga. July 15, 1993).

Effect of assignment of rent contract where consideration fails. — An assignment before maturity of a written contract for rent does not operate to raise in favor of the assignee the general lien given to landlords, when it appears that before the levy of a distress warrant in favor of the transferee the consideration of such contract had entirely failed. Garner v. Douglasville Banking Co., 136 Ga. 310, 71 S.E. 478, 1911 Ga. LEXIS 527 (1911).

Levy is not necessary in order to fix landlord's special lien upon a crop for rent. Cochran v. Waits, Johnson & Co., 127 Ga. 93, 56 S.E. 241, 1906 Ga. LEXIS 747 (1906); W.A. Lathem & Sons v. Stringer,

17 Ga. App. 585, 87 S.E. 840, 1916 Ga. App. LEXIS 801 (1916); I.M. Scott & Co. v. Ward, 21 Ga. App. 535, 94 S.E. 863, 1918 Ga. App. LEXIS 392 (1918).

Landlord may elect to enforce either lien or both in one distress warrant. McDougal v. Sanders, 75 Ga. 140, 1885 Ga. LEXIS 84 (1885).

Landlord's special lien attaches to whole crop. Daniel v. Harris, 84 Ga. 479, 10 S.E. 1013, 1889 Ga. LEXIS 356 (1889); Manley v. Underwood, 27 Ga. App. 822, 110 S.E. 49, 1921 Ga. App. LEXIS 454 (1921).

Lien attaches to crop of subtenant. — Under O.C.G.A. § 44-14-341 the crops raised on rented land by a subtenant, can be lawfully subjected to the payment of the rent contracted for by the original tenant. Alston v. Wilson, 64 Ga. 482, 1880 Ga. LEXIS 329 (1880); Hudson v. Stewart, 110 Ga. 37, 35 S.E. 178, 1900 Ga. LEXIS 319 (1900).

No necessity for demand in special lien. — In order to enforce the special lien of a landlord, the rent must be due, but a demand for the payment thereof is not required. Colclough & Co. v. Mathis, 79 Ga. 394, 4 S.E. 762, 1887 Ga. LEXIS 236 (1887).

Purchaser without notice protected against rent liens. — A bona fide purchaser, without notice, of a crop grown on rented premises will be protected against the lien, general or special, of the landlord for rent. Thornton v. Carver, 80 Ga. 397, 6 S.E. 915, 1888 Ga. LEXIS 148 (1888); Collins v. Harrison, 24 Ga. App. 404, 100 S.E. 794, 1919 Ga. App. LEXIS 689 (1919); Chason v. O'Neal, 158 Ga. 725, 124 S.E. 519, 1924 Ga. LEXIS 332 (1924); McCommons-Thompson-Boswell Co. v. White, 33 Ga. App. 20, 125 S.E. 76, 1924 Ga. App. LEXIS 679 (1924).

Purchaser of the land acquires landlord's interest in crops in cases where the land is rented to a tenant. Evans v. Looney, 86 Ga. App. 79, 70 S.E.2d 801, 1952 Ga. App. LEXIS 880 (1952).

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52 C.J.S., Landlord and Tenant, § 631.

ALR.

Priority as between landlord's lien on chattels and chattel mortgage, 52 A.L.R. 935.

Subject-matter covered by landlord's statutory lien for rent, 96 A.L.R. 249.

Landlord's lien for rent as including taxes or other expenditures which tenant has agreed to pay or make, 99 A.L.R. 1104.

Priority of lien of sales or consumers' tax, 136 A.L.R. 1015.

Construction and application of provision in lease under which landlord is to receive percentage of lessee's profits or receipts, 38 A.L.R.2d 1113; 58 A.L.R.3d 384.

Application of statutory landlord's lien to property of third person used by tenant on rented premises, 95 A.L.R.3d 1205.

Secured transactions: priority as between statutory landlord's lien and security interest perfected in accordance with Uniform Commercial Code, 99 A.L.R.3d 1006.

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 A.L.R.3d 1100.

44-14-342. Priority and date of general liens; date of special liens for rent; enforcement of liens.

The general liens of landlords shall be inferior to liens for taxes and to the general and special liens of laborers but shall rank with other liens and with each other according to date, the date being from the time of levying a distress warrant. The special liens of landlords for rent shall date from the maturity of the crops on the lands rented unless

otherwise agreed on but shall not be enforced by distress warrant until the rent is due, unless the tenant is removing his property, or when other legal process is being enforced against the crops, in which case the landlord may enforce the general and special liens.

History.

Code 1868, § 2260; Ga. L. 1873, p. 42, § 5; Code 1873, §§ 1977, 2286; Code 1882, § 1977; Ga. L. 1887, p. 34, § 1; Ga. L. 1889, p. 71, § 1; Civil Code 1895, § 2796; Civil Code 1910, § 3341; Code 1933, § 61-204; Ga. L. 1982, p. 3, § 44.

JUDICIAL DECISIONS

What constitutes debts due for rent. — The debts due for rent, referred to in O.C.G.A. § 53-7-91, are not debts for rent arising during the year in which the crops upon the rented land are grown, but this provision refers to debts of the decedent arising by contract made by the decedent prior to the time of death. Evans v. Carroll, 167 Ga. 68, 144 S.E. 912, 1928 Ga. LEXIS 101 (1928).

No conflict with O.C.G.A. § 53-7-91. — There is no conflict between the provisions of O.C.G.A. §§ 44-14-342 and 53-7-91. Evans v. Carroll, 167 Ga. 68, 144 S.E. 912, 1928 Ga. LEXIS 101 (1928).

General rent lien superior to tenant's unrecorded bill of sale of personalty to secure debt. — A landlord's general lien for rent, arising upon the issuance and levy of a distress warrant, is superior to a tenant's unrecorded bill of sale of personalty to secure a debt, even if the latter is executed and delivered prior to the date of the levy of the distress warrant upon the property covered by the bill of sale. Butler v. LaGrange Grocery Co., 29 Ga. App. 612, 116 S.E. 213, 1923 Ga. App. LEXIS 140 (1923).

Landlord's lien is superior to lien of mortgage. Manley v. Underwood, 27 Ga. App. 822, 110 S.E. 49, 1921 Ga. App. LEXIS 454 (1921).

General lien for rent prior to distress does not prevail over lien to trustee in bankruptcy. — The general lien of the landlord for rent prior to distress is inchoate, and covers no specific property, and gives no priority over the lien given to the trustee in bankruptcy. In re Grovenstein-Bishop Co., 223 F. 878, 1915 U.S. Dist. LEXIS 1488 (D. Ga. 1915); In re City Drug Store, 224 F. 132, 1913 U.S. Dist. LEXIS 1871 (D. Ga. 1913); Southern Ry. v. Wilder, 231 F. 933, 1916 U.S. App. LEXIS 1743 (5th Cir. 1916); Watkins v. Alexander & Garrett, Inc., 283 F. 968, 1922 U.S. App. LEXIS 2313 (5th Cir. 1922).

Mortgagee lien executed before levy of distress warrant. — A landlord's general lien for rent under O.C.G.A. § 44-14-342 is inferior to the lien of mortgagee executed before the levying of the distress warrant. Preetorius v. Anderson, 236 F. 723, 1916 U.S. App. LEXIS 2331 (5th Cir. 1916).

Later laborer's lien. — Although a laborer's general lien arose subsequently to a landlord's lien, the laborer's lien is nevertheless superior in dignity to the landlord's lien. Little v. Walters, 40 Ga. App. 447, 150 S.E. 201, 1929 Ga. App. LEXIS 192 (1929).

Conditional bill of sale has priority over subsequent lien under distress warrant for rent. — A 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, has priority over the landlord's subsequent lien under a distress warrant for rent. Blackmar Co. v. Wright Co., 62 Ga. App. 861, 10 S.E.2d 117, 1940 Ga. App. LEXIS 455 (1940).

Special lien on crops attaches without levy, and is not affected by bankruptcy of the tenant before distress. In re Harper, 294 F. 899, 1924 U.S. Dist. LEXIS 1858 (D. Ga. 1924), dismissed, Corrigan v. Buckley, 271 U.S. 323, 46 S. Ct. 521, 70 L. Ed. 969, 1926 U.S. LEXIS 884 (1926).

Special lien for rent is superior to older common-law judgments. If after foreclosure proceedings the crops are sold

under common-law executions, the proceeds are subject to the special lien, in preference to the judgment creditors. Cochran v. Waits, Johnson & Co., 127 Ga. 93, 56 S.E. 241, 1906 Ga. LEXIS 747 (1906).

When judgment lien for landlord supersedes common-law judgment. — A lien resulting from a judgment in favor of the landlord, relates back to the date of the levy and will take precedence over a common-law judgment rendered subsequently to such levy, but before the final verdict and judgment in the distress warrant proceeding. Corley-Powell Produce Co. v. Allen, 42 Ga. App. 641, 157 S.E. 251, 1931 Ga. App. LEXIS 82 (1931).

Crops raised by administrators not immune from special liens. — The fact that the crop upon which the lien is here asserted was raised upon lands upon which administrators were continuing to conduct the business of the decedent does not deprive the landlord of the special lien provided for under O.C.G.A. § 44-14-342. Evans v. Carroll, 167 Ga. 68, 144 S.E. 912, 1928 Ga. LEXIS 101 (1928).

Special liens of landlords date from maturity of crops on the lands rented, unless otherwise agreed upon. Oglethorpe Sav. & Trust Co. v. Morgan, 149 Ga. 787, 102 S.E. 528, 1920 Ga. LEXIS 406 (1920).

RESEARCH REFERENCES

Am. Jur. 2d.

49 Am. Jur. 2d, Landlord and Tenant, §§ 792, 844 et seq.

C.J.S.

52 C.J.S., Landlord and Tenant, § 619.

ALR.

Priority as between landlord's lien on chattels and chattel mortgage, 52 A.L.R. 935.

Landlord's lien for rent as including taxes or other expenditures which tenant has agreed to pay or make, 99 A.L.R. 1104.

Right or interest subject to, and priority of, statutory lien for labor or material in developing property for oil and gas, 122 A.L.R. 1182.

Priority of lien of sales or consumers' tax, 136 A.L.R. 1015.

Secured transactions: priority as between statutory landlord's lien and security interest perfected in accordance with Uniform Commercial Code, 99 A.L.R.3d 1006.

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 A.L.R.3d 1100.

44-14-343. Enforcement of special lien for rent by distress warrant.

A landlord's special lien for rent shall be enforced by a distress warrant in the same manner as general liens for rent are enforced; and no further allegations in the affidavit to procure a distress warrant to enforce a special lien for rent shall be necessary than are necessary to enforce the landlord's general lien for rent.

History.

Ga. L. 1887, p. 34, § 1; Civil Code 1895, § 2797; Civil Code 1910, § 3342; Code 1933, § 61-205.

RESEARCH REFERENCES

Am. Jur. 2d.
49 Am. Jur. 2d, Landlord and Tenant, § 853.
C.J.S.
52 C.J.S., Landlord and Tenant, § 676.
ALR.
Subject matter covered by landlord's statutory lien for rent, 9 A.L.R. 300; 96 A.L.R. 249.
Landlord's lien or right of distress on property sold to tenant on conditional sale, 45 A.L.R. 949.
Right as between landlord and conditional seller of property to tenant, 45 A.L.R. 967; 98 A.L.R. 628.
Priority as between landlord's lien on chattels and chattel mortgage, 52 A.L.R. 935.
Attachment, execution, or recovery of personal judgment as waiver of landlord's lien, 151 A.L.R. 679.
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 A.L.R.3d 1100.

44-14-344. Special lien for rent in favor of transferee of rent contract; when lien arises.

Whenever any written contract for rent is transferred by the landlord by written assignment before the maturity of the crops on the lands rented, the special lien in favor of the landlord shall, on the maturity of the crops, arise in favor of the transferee of such rent contract in the same manner as it would have done in favor of the landlord had no transfer been made.

History.
Ga. L. 1882-83, p. 109, § 1; Civil Code 1895, § 2798; Civil Code 1910, § 3343; Code 1933, § 61-206.

JUDICIAL DECISIONS

No lien if rent contract consideration fails. — If the consideration for the rent contract has failed before assignment, no lien arises in favor of the assignee under O.C.G.A. § 44-14-344. Camp v. West & Co., 113 Ga. 304, 38 S.E. 822, 1901 Ga. LEXIS 237 (1901); Garner v. Douglasville Banking Co., 136 Ga. 310, 71 S.E. 478, 1911 Ga. LEXIS 527 (1911).

No setoff against lien assignee. — A plea of setoff against the original landlord is not available as against a bona fide assignee claiming a lien under O.C.G.A. § 44-14-344. Mosley v. Bank of Lincolnton, 143 Ga. 181, 84 S.E. 438, 1915 Ga. LEXIS 339 (1915).

RESEARCH REFERENCES

Am. Jur. 2d.
49 Am. Jur. 2d, Landlord and Tenant, § 853.
C.J.S.
52 C.J.S., Landlord and Tenant, § 676.
ALR.
Rights of lessee who relets for entire term as against sublessee or person claiming under latter, 32 A.L.R. 1429.
Acceptance of rent from assignee or sublessee as relieving assignor or sublessor, 36 A.L.R. 316.
Lessee as surety for rent after assignment; and effect of lessor's dealings (other than consent to assignment or mere acceptance of rent from assignee) to release lessee, 99 A.L.R. 1238.
What amounts to assignment or sublease as distinguished from employment contract, within provision of lease against

assignment or sublease without lessor's consent, 163 A.L.R. 532.

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 A.L.R.3d 1100.

44-14-345. Special lien for rent in favor of transferee of rent contract; foreclosure by transferee.

The special lien provided for in Code Section 44-14-344 may be foreclosed by the transferee in his own name. The affidavit of foreclosure shall contain a recital of the fact of transfer and such other allegations as are necessary in the foreclosure of special liens by landlords.

History.
Ga. L. 1882-83, p. 109, § 2; Civil Code 1895, § 2799; Civil Code 1910, § 3344; Code 1933, § 61-207.

RESEARCH REFERENCES

Am. Jur. 2d.
49 Am. Jur. 2d, Landlord and Tenant, § 804.

C.J.S.
52 C.J.S., Landlord and Tenant, § 614.

ALR.
Assignment of lease as breach of covenant against subletting, 7 A.L.R. 249; 79 A.L.R. 1379.

Rights of lessee who relets for entire term as against sublessee or person claiming under latter, 32 A.L.R. 1429.

Acceptance of rent from assignee or sublessee as relieving assignor or sublessor, 36 A.L.R. 316.

Lessee as surety for rent after assignment; and effect of lessor's dealings (other than consent to assignment or mere acceptance of rent from assignee) to release lessee, 99 A.L.R. 1238.

44-14-346. Giving false information as to liens; penalty.

A person who has given a lien under Code Section 44-14-340 or any other lien shall, when giving a new lien under the Code section on the same property to another person, inform such person, if questioned as to the facts, of the amount of such prior lien and to whom it was given. Any person who gives false information as to such facts shall be guilty of a misdemeanor.

History.
Ga. L. 1873, p. 42, § 6; Code 1873, § 1978; Ga. L. 1875, p. 20, § 1; Ga. L. 1878-79, p. 47, § 1; Ga. L. 1880-81, p. 63, § 1; Code 1882, § 1978; Ga. L. 1890-91, p. 72, § 1; Ga. L. 1895, p. 25, § 1; Penal Code 1895, § 668; Penal Code 1910, § 713; Code 1933, § 61-9901.

JUDICIAL DECISIONS

O.C.G.A. § 44-14-346 is designed solely for the protection of landlords' liens. Jacobs v. State, 4 Ga. App. 509, 61 S.E. 924, 1908 Ga. App. LEXIS 457 (1908).

O.C.G.A. § 44-14-346 does not apply to voluntary statements without solicitation or interrogation. Williams v. State, 13 Ga. App. 338, 79 S.E. 207, 1913 Ga. App. LEXIS 146 (1913).

Obtaining money on recorded mortgage or bill of sale by false statements may violate O.C.G.A. § 44-14-

346. Brown v. State, 6 Ga. App. 329, 64 S.E. 1001, 1909 Ga. App. LEXIS 283 (1909).

Provider of second security deed should cite prior mortgage in writing to avoid fraud charges. — There is, in this state, a law against cheating and swindling, and a person of reasonable prudence, in giving a second security deed, might wish it stated for that person's protection that a prior security deed or mortgage was in existence, and that the other party so understood. Persons have been convicted in this state for fraudulently misrepresenting the condition of their title. Federal Land Bank v. Bank of Lenox, 192 Ga. 543, 16 S.E.2d 9, 1941 Ga. LEXIS 615 (1941).

For example of case dealing with sufficiency of indictment and accusation, see Jacobs v. State, 4 Ga. App. 509, 61 S.E. 924, 1908 Ga. App. LEXIS 457 (1908).

RESEARCH REFERENCES

Am. Jur. 2d.
51 Am. Jur. 2d, Liens, §§ 52, 53 et seq.

44-14-347. Unlawful purchase of corn or cotton from tenant or laborer after notice of disability to sell; penalty.

Any person who buys any corn or any cotton in the seed from tenants or laborers residing on the land of another as such or from the agent of such tenant or laborer when such tenant or laborer had no right to sell such corn or cotton and after notice of such disability to sell has been given in writing by the landlord or employer to such buyer shall be guilty of a misdemeanor.

History.
Ga. L. 1876, p. 115, § 1; Code 1882, § 4562b; Penal Code 1895, § 542; Penal Code 1910, § 554; Code 1933, § 61-9902.

JUDICIAL DECISIONS

Security title resembles lien with additional elements. — While a bill of sale to secure debt or a security deed or a conditional sale contract with reservation of title amounts to something in addition to an ordinary mortgage lien, such a security title also embraces within itself the elements and characteristics of a lien. Waldroup v. State, 198 Ga. 144, 30 S.E.2d 896, 1944 Ga. LEXIS 350 (1944).

RESEARCH REFERENCES

Am. Jur. 2d.
49 Am. Jur. 2d, Landlord and Tenant, §§ 808, 820, 821.

C.J.S.
52 C.J.S., Landlord and Tenant, § 619.

44-14-348. Unlawful sale of farm products on which lien exists; penalty.

Any person who sells or otherwise disposes of crops upon which there is a lien for rent and advances, before the payment of the rent and advances, without the consent of and with intent to defraud the lienor

or assignee of the lien, where loss is thereby sustained by the lienor or assignee of the lien, shall be guilty of a misdemeanor.

History.
Ga. L. 1871-72, p. 71, §§ 1, 2; Code 1873, § 4600; Ga. L. 1875, p. 26, § 1; Ga. L. 1876, p. 114, § 1; Code 1882, § 4600; Penal Code 1895, § 671; Penal Code 1910, § 721; Code 1933, § 61-9903.

JUDICIAL DECISIONS

Elements necessary for violation. — To make the defendant's sale a violation of the provisions of O.C.G.A. § 44-14-348, three essential facts must appear: that the sale, made before the rent or advances were paid, was without the consent of the landlord; that it was made with the intent to defraud the landlord; and that loss was thereby sustained by the landlord. Unless all three of these things are shown, the defendant's conviction is unauthorized. Davis v. State, 53 Ga. App. 325, 185 S.E. 400, 1936 Ga. App. LEXIS 87 (1936).

For list of elements of offense, see Morrison v. State, 111 Ga. 642, 36 S.E. 902, 1900 Ga. LEXIS 683 (1900); Thompson v. State, 12 Ga. App. 201, 76 S.E. 1072, 1913 Ga. App. LEXIS 491 (1913); White v. State, 24 Ga. App. 74, 100 S.E. 39, 1919 Ga. App. LEXIS 416 (1919).

O.C.G.A. § 44-14-348 includes loans secured with fraudulent intent. Bugg v. State, 17 Ga. App. 211, 86 S.E. 405, 1915 Ga. App. LEXIS 310 (1915).

O.C.G.A. § 44-14-348 includes sales of any nature. Bell v. State, 14 Ga. App. 425, 81 S.E. 253, 1914 Ga. App. LEXIS 279 (1914).

No application to situations where part of crop is pawned. Gilbert v. State, 16 Ga. App. 249, 85 S.E. 86, 1915 Ga. App. LEXIS 564 (1915).

Mortgage is not lien on crops planted to replace prior crops destroyed by natural causes. Hall v. State, 2 Ga. App. 739, 59 S.E. 26, 1907 Ga. App. LEXIS 507 (1907).

No lien on crops for supplies furnished for prior year. Robinson v. State, 10 Ga. App. 791, 74 S.E. 92, 1912 Ga. App. LEXIS 689 (1912).

Venue is fixed by place of sale. Ham v. State, 7 Ga. App. 57, 66 S.E. 22, 1909 Ga. App. LEXIS 533 (1909).

Indictment including word "removed" sufficient. — Indictment substantially setting forth the offense in the language of O.C.G.A. § 44-14-348, except that it charged that the defendant "sold, removed, and otherwise disposed of" the crops, the language of the section being "sells or otherwise disposes of," which discrepancy did not in any way prevent the jury from easily understanding the nature of the offense charged, was sufficient. Faircloth v. State, 69 Ga. App. 441, 26 S.E.2d 118, 1943 Ga. App. LEXIS 110 (1943).

For case where the accusation held insufficient, see Bell v. State, 14 Ga. App. 425, 81 S.E. 253, 1914 Ga. App. LEXIS 279 (1914).

O.C.G.A. § 44-14-348 requires proof of fraudulent intent. Smith v. State, 27 Ga. App. 554, 87 S.E. 829 (1916).

Tenancy is not proved merely because the wife of the accused rented the premises. Hackney v. State, 101 Ga. 512, 28 S.E. 1007, 1897 Ga. LEXIS 252 (1897).

Assent to defendant's sale of other crops is no defense. Smith v. State, 17 Ga. App. 554, 87 S.E. 829, 1916 Ga. App. LEXIS 775 (1916).

Judge may award probation contingent on repayment to landlord. — A sentence on a conviction for a fraudulent disposition of crops subject to a landlord's lien under O.C.G.A. § 44-14-348 which provides for probation in lien of a prison sentence on the condition that the landlord is repaid is a valid and legal sentence and is not violative of Ga. Const. 1976, Art. I, Sec. I, Para. XX (see, now, Ga. Const. 1983, Art. I. Sec. I, Para. XXIII). Davis v. State, 53 Ga. App. 325, 185 S.E. 400, 1936 Ga. App. LEXIS 87 (1936).

For case where cotenant was properly convicted for disposing of crop, see Smith v. State, 17 Ga. App. 554, 87 S.E. 829, 1916 Ga. App. LEXIS 775 (1916).

RESEARCH REFERENCES

Am. Jur. 2d.
49 Am. Jur. 2d, Landlord and Tenant, §§ 808, 820, 821.

C.J.S.
52 C.J.S., Landlord and Tenant, § 646.

44-14-349. Priority of liens affecting manufactured and mobile homes.

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

(1) "Lienholder" shall mean the holder of a perfected security interest and its assignees or servicers of the underlying debt obligation. The term shall apply only to the lienholder or an assignee or servicer of the lienholder for unpaid purchase price or first lien who has recorded such lien on the title of the manufactured home or mobile home.

(2) "Manufactured home" has the same meaning as provided in paragraph (4) of Code Section 8-2-131.

(3) "Manufactured home community" means a parcel or tract of land on which three or more manufactured homes or mobile homes are located on a continual, nonrecreational basis and offered to the public.

(4) "Mobile home" has the same meaning as provided in paragraph (6) of Code Section 8-2-131.

(b) As provided by this Code section, any lien or charge against a manufactured home or mobile home for rent upon the real property on which the manufactured home or mobile home is or has been located is subordinate to the rights of the lienholder for unpaid purchase price or first lien, which is recorded on the title of the manufactured home or mobile home, and the assignee of such lienholder if not recorded on the title.

(c) In the event a manufactured home or mobile home has been vacant for more than 30 days and after notice to the lienholder as provided in this Code section, rent charges, as provided in this Code section, may be collected by the owner of the manufactured home community from the lienholder and the assignee of any such lienholder by an action at law as authorized by this Code section.

(d) The owner of the manufactured home community shall be entitled to collect rent charges accruing from 30 days after the lienholder receives written notice of a completed eviction of the owner or occupant of a manufactured home or mobile home by the owner of the manufactured home community or notice that a manufactured home or mobile home has been abandoned or voluntarily surrendered by the home-

owner or occupant and that the manufactured home or mobile home is presently vacant and unoccupied.

(e) The notice shall state that an action for eviction has been completed against the homeowner or occupant, that the home is presently vacant and unoccupied, the amount of the daily rent charges calculated pursuant to subsection (i) of this Code section, and the date upon which the homeowner or occupant was required to make regular payments to the owner of the manufactured home community.

(f) The lienholder shall notify the owner of the manufactured home community within 30 days of receipt of the notice pursuant to subsections (d) and (e) of this Code section whether it intends to make payment of the rent charges and, if the lienholder agrees to make payment, to pay the rent charges that are due pursuant to this Code section. Thereafter, the lienholder shall pay rent charges according to the schedule of payments that the homeowner or occupant was responsible for paying through the date that the manufactured home or mobile home is removed from the owner of the manufactured home community's property. If the lienholder fails to notify the owner of the manufactured home community that it does not intend to pay the rent charges, the rent charges shall accrue and be due and owing to the property owner.

(g) In the event that the lienholder files either an action for replevin of the home or forecloses on the lien for unpaid purchase price or first lien, the lienholder shall be responsible for unpaid rent and rent charges that have accrued beginning 30 days after the eviction of the owner or occupant of the manufactured home or mobile home.

(h) In the event that the homeowner or occupant declares bankruptcy, the accruing of any rent or rent charge due by the lienholder to the owner of the manufactured home community shall be stayed by the bankruptcy until 30 days after the final court action discharging the bankruptcy or releasing the collateral, whichever occurs first.

(i) The maximum rent charge available to the owner of a manufactured home community shall be a daily rate equal to one-thirtieth of the then current lot rental amount paid by the homeowner or occupant as defined in the current or most recent lease agreement between the homeowner or occupant and the owner of the manufactured home community. In the event that no written lease agreement is in effect between the owner of the manufactured home community and the owner or occupant of a manufactured home or mobile home, the maximum rent charge available to the owner of the manufactured home community shall be $3.00 per day.

(j) Notice required as set forth in subsections (d) and (e) of this Code section shall be mailed by certified mail, return receipt requested, or

statutory overnight delivery to the registered agent of the lienholder or, if the lienholder is not a corporation, to the lienholder's last known address. Notice by certified mail shall be effective on the date of receipt or, if refused, on the date of refusal.

(k) It shall be unlawful for the owner of the manufactured home community to refuse to allow the lienholder to repossess and move the manufactured home or mobile home for failure to pay any charges for which notice was not provided in accordance with the requirements of this Code section. In the event the owner of the manufactured home community refuses to allow the lienholder to repossess and move the manufactured home or mobile home, the owner of the manufactured home community shall be liable to the lienholder for each day that the owner of the manufactured home community unlawfully maintains possession of the home, at a daily rate equal to one-thirtieth of the monthly payment due according to the contract and security agreement entered into between the homeowner or occupant and the lienholder.

(l) If either a lienholder or an owner of a manufactured home community brings an action at law against the other in a court of competent jurisdiction, the prevailing party, as determined by the court, in addition to other relief granted by the court, may be awarded costs of litigation including reasonable attorney's fees.

(m) If, after receipt of a notice pursuant to subsections (d) and (e) of this Code section, a lienholder sells or assigns a manufactured home or mobile home, the lender shall provide the purchaser of such home with a copy of the notice received from the owner of the manufactured home community and the purchaser shall take the home subject to the rights of the owner of the manufactured home community pursuant to this Code section. The owner of the manufactured home community may enforce his or her rights for rent charges against the purchaser without issuing additional notices.

History.
Code 1981, § 44-14-349, enacted by Ga. L. 2008, p. 946, § 1/HB 579.

PART 3

MECHANICS AND MATERIALMEN

Law reviews.
For article discussing 1976 to 1977 development in mechanic's and materialmen's liens, see 29 Mercer L. Rev. 219 (1977).

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

For article, "Owner Defenses Under Georgia's Lien Statute," see 26 Ga. St. B. J. 76 (1989).

JUDICIAL DECISIONS

Compatible with Arbitration Code. — Counterclaim to foreclose claim of lien is not inconsistent with attempt to enforce arbitration under contract, nor does such counterclaim amount to waiver of contractual right to arbitrate. H.R.H. Prince Ltc. Faisal M. Saud v. Batson-Cook Co., 161 Ga. App. 219, 291 S.E.2d 249, 1982 Ga. App. LEXIS 1824 (1982).

Mechanics' and materialmen's liens strictly construed. — As mechanics' and materialmen's liens under O.C.G.A. Ch. 14, T. 44 are in derogation of common law, they are to be strictly construed against the mechanic and materialman and will be extended no further than the chapter's words plainly import. Pacific S. Mtg. Trust v. Melton, 151 Ga. App. 593, 260 S.E.2d 910, 1979 Ga. App. LEXIS 2655 (1979).

Lien laws strictly construed against creditor. — Inasmuch as Georgia lien laws and procedures are in derogation of the common law, they must be construed strictly against the creditor and in favor of the debtor. Brockett Rd. Apts. v. Georgia Pac. Corp., 138 Ga. App. 198, 225 S.E.2d 771, 1976 Ga. App. LEXIS 2103 (1976).

Materialman has the burden of proving the lien and must be brought clearly within the law. Pacific S. Mtg. Trust v. Melton, 151 Ga. App. 593, 260 S.E.2d 910, 1979 Ga. App. LEXIS 2655 (1979).

Substantial compliance with chapter sufficient. — No particular form is required to establish a lien under the provisions of O.C.G.A. Ch. 14, T. 44, a substantial compliance with the statutory provisions being sufficient. Murphy v. Fuller, 96 Ga. App. 403, 100 S.E.2d 137, 1957 Ga. App. LEXIS 593 (1957).

Minor defects in work do not defeat lien. — Mere trivial defects or omissions in the work done by either the prime contractor or the subcontractor in completing the particular improvement which is the subject of the subcontract will not defeat the right to a lien. McCrary v. Barberi, 100 Ga. App. 167, 110 S.E.2d 426, 1959 Ga. App. LEXIS 559 (1959).

Machinery rented by the hour which includes operating personnel is a nonlienable item, and if it is the only charge within the 90-day statutory period, the plaintiff's lien is not within the 90-day statutory period and is not enforceable. Pacific S. Mtg. Trust v. Melton, 151 Ga. App. 593, 260 S.E.2d 910, 1979 Ga. App. LEXIS 2655 (1979).

O.C.G.A. Ch. 14, T. 44 operates as sort of an automatic garnishment, which without summons or service impounds the fund due by the owner, and requires it to be held up until the expiration of the time named in the statute. Carter v. Sherwood Plaza, Inc., 118 Ga. App. 612, 164 S.E.2d 867, 1968 Ga. App. LEXIS 1477 (1968).

Lien attaches when materials furnished. — Where a plaintiff brings suit to enforce its lien, the lien attaches not from the time of the rendition of the judgment against the debtor, nor from the date of the filing of the petition to enforce the lien, nor from the date upon which the claim of the lien was filed for record, but from the date when the materials were furnished. Middle Ga. Lumber Co. v. Hunt, 53 Ga. App. 578, 186 S.E. 714, 1936 Ga. App. LEXIS 324 (1936).

Lien attaches against notified third party when work begins. — Under O.C.G.A. § 44-14-360 et seq. as against a third person with actual notice, the lien of a contractor on real estate improved under a contract with the property, owner if and when properly created and declared, attaches from the time the work under contract is commenced. Gellis v. B.L.I. Constr. Co., 148 Ga. App. 527, 251 S.E.2d 800, 1978 Ga. App. LEXIS 3217 (1978).

Foreclosure permitted after statutory requirements met. — By merely furnishing the materials to a defendant, the owner of the improved real estate, a plaintiff has only an inchoate claim of lien or right to acquire a lien, but upon compliance with the statutory requirements its lien is completed and made good, and suit to foreclose can be brought. Middle Ga. Lumber Co. v. Hunt, 53 Ga. App. 578, 186 S.E. 714, 1936 Ga. App. LEXIS 324 (1936).

Evidence required to make full payment a defense. — Payment of the entire contract price by the owner to the contrac-

tor does not provide a defense to the action to foreclose a materialman's lien unless the owner further shows either that the contractor's affidavit confirming payment of the agreed price of reasonable value had been obtained, or that the money had in fact been used for payment of labor and materials. Roberts v. Georgia S. Supply Co., 92 Ga. App. 303, 88 S.E.2d 554, 1955 Ga. App. LEXIS 583 (1955).

Contractor's supplier must sue contractor as prerequisite to action against landowner. — The lien of one who furnishes labor and material upon the employment of a contractor cannot be foreclosed by a direct action against the owner of the premises without previously or concurrently suing the contractor to whom the labor and material were furnished; the landowner should not be called on to pay a debt the landowner did not contract, and for which the landowner's property is liable only by force of a statute, until the materialman has established by judgment, in a proceeding to which the contractor is a party, that the contractor owes to the landowner the amount for which the landowner is seeking to assert a lien. Cheshire v. Engelhart, 82 Ga. App. 458, 61 S.E.2d 434, 1950 Ga. App. LEXIS 1135 (1950).

Subcontractors limited to claims assertable by prime contractor. — Where part of a construction contract is sublet to a subcontractor by a prime contractor, the owner may not be subjected to a lien for any claim or amount which the main contractor could not assert against the owner. Subcontracts are made subject to prime contracts in this connection. McCrary v. Barberi, 100 Ga. App. 167, 110 S.E.2d 426, 1959 Ga. App. LEXIS 559 (1959).

Except in part of contract not involving subcontractor's work. — The subcontractor is bound by the terms of the prime contract and performs work subject to notice that the subcontractor's rights to liens against an owner depend on whether the prime contractor could recover a judgment against the owner for the work which is the subject matter of the subcontract. This ruling applies only to work which it is the duty of both the prime contractor and the subcontractor to satisfactorily complete. It does not apply to situations where a prime contractor could not recover from the owner for a part of the work with which the subcontractor was not concerned. McCrary v. Barberi, 100 Ga. App. 167, 110 S.E.2d 426, 1959 Ga. App. LEXIS 559 (1959).

Recovery where materialman has no contractual relationship with general contractor. — A materialman or subcontractor may not recover against an owner or general contractor with whom it has no contractual relationship, based on the theory of unjust enrichment or implied contract; rather, it is limited to the statutory remedies provided by Georgia's lien statute. P.P.G. Indus., Inc. v. Hayes Constr. Co., 162 Ga. App. 151, 290 S.E.2d 347, 1982 Ga. App. LEXIS 2085 (1982).

RESEARCH REFERENCES

ALR.

Right to appointment of receiver in action to enforce mechanics' lien, 1 A.L.R. 1466.

Common-law lien on personalty for work performed thereon, upon the owner's premises, 3 A.L.R. 862.

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 A.L.R. 685.

Enforceability of a mechanics' lien against the property of a married woman for work performed or materials furnished under a contract made with her husband, 4 A.L.R. 1025.

How far is public property subject to mechanics' liens, 26 A.L.R. 326.

Requisites and sufficiency of notice of mechanics' lien in case of "cost plus" contract, 26 A.L.R. 1328.

Mechanic's lien for building erected by licensee, 45 A.L.R. 581.

After-acquired title as supporting mechanics' lien, 52 A.L.R. 693.

Mechanic's or materialman's lien on homestead, 65 A.L.R. 1192.

Preexisting indebtedness of contractor to owner as affecting right of subcontrac-

tor, materialman, or laborer to mechanic's lien, 68 A.L.R. 1263.

Destruction, demolition, removal of, or damage to improvement as affecting mechanic's lien, 74 A.L.R. 428.

Right of one who pays or advances money, or assumes obligation to pay laborer or materialman, to mechanic's lien or priority, 74 A.L.R. 522.

Lessee as agent of lessor within contemplation of mechanic's lien laws, 79 A.L.R. 962; 163 A.L.R. 992.

Mechanics' lien as affected by agreement to pay with property other than money, 81 A.L.R. 766.

Termination of lease as affecting mechanic's lien on buildings erected by tenant where lien did not attach to landlord's title, 87 A.L.R. 1290.

Arbitration proceeding as affecting mechanics' lien or liability of surety on owner's bond for discharge of lien, or on contractor's bond, 93 A.L.R. 1151.

Failure of foreign corporation to comply or delay in complying with conditions of its right to do business as affecting its right to assert mechanics' lien, 95 A.L.R. 367.

Effect of bankruptcy of contractor or subcontractor upon mechanics' liens of his subcontractors, laborers, and materialmen, 98 A.L.R. 323.

Requirement of written contract as condition of mechanic's lien as affected by an oral modification, or a modification partly oral and partly written, of a written contract, or a subsequent modification in writing not registered or filed as required by statute, 108 A.L.R. 434.

Right of one who contracts with, or furnishes labor or material to, public contractor's surety after latter has taken overwork, in respect of part of contract price retained by public agency, 122 A.L.R. 511.

Time for filing claim for mechanic's lien as affected by removal by, or return to, claimant of part of material furnished, 122 A.L.R. 755.

Construction and application of statutory provisions making notice by owner of nonresponsibility for work or improvements on his property necessary to prevent attachment of mechanic's lien, 123 A.L.R. 7; 85 A.L.R.2d 949.

Value of services or material furnished by subcontractor, laborer, or materialman, or price fixed by the contract by which they were employed, as measure of their recovery on bond of principal contractor, or as against amount earned by contractor but withheld by contractee or paid into court, 123 A.L.R. 416.

Single mechanic's lien upon several parcels, as enforceable against less than all of the parcels (including effect of release of some of them from the lien), 130 A.L.R. 423.

Personal judgment as essential to enforcement of mechanic's lien, 147 A.L.R. 1099.

Amount of owner's obligation under his guaranty of subcontractor's or materialman's account, as deductible from amount otherwise due principal contractor, as against claims of other subcontractors or materialmen, 153 A.L.R. 759.

Estoppel of mechanic's lien claimant as predicable upon his representations to owner as to payment made to claimant by contractor or subcontractor, 155 A.L.R. 350.

Lien for storage of motor vehicle, 48 A.L.R.2d 894.

Priority between mechanics' liens and advances made under previously executed mortgage, 80 A.L.R.2d 179.

Sufficiency of notice under statute making notice by owner of nonresponsibility necessary to prevent mechanic's lien, 85 A.L.R.2d 949.

Mechanic's lien for services in connection with subdividing land, 87 A.L.R.2d 1004.

Swimming pool as lienable item within mechanic's lien statute, 95 A.L.R.2d 1371.

Mechanic's lien for work on or material for separate buildings of one owner, 15 A.L.R.3d 73.

Surveyor's work as giving rise to right to mechanic's lien, 35 A.L.R.3d 1391.

Mechanic's lien based on contract with vendor pending executory contract for sale of property as affecting purchaser's interest, 50 A.L.R.3d 944.

Municipal property as subject to mechanic's lien, 51 A.L.R.3d 657.

Abandonment of construction or of contract as affecting time for filing mechanics' liens or time for giving notice to owner, 52 A.L.R.3d 797.

Building and construction contracts: right of subcontractor who has dealt only with primary contractor to recover against property owner in quasi contract, 62 A.L.R.3d 288.

Release or waiver of mechanic's lien by general contractor as affecting rights of subcontractor or materialman, 75 A.L.R.3d 505.

Lien for towing or storage, ordered by public officer, of motor vehicle, 85 A.L.R.3d 199.

Vacation and sick pay and other fringe benefits as within mechanic's lien statute, 20 A.L.R.4th 1268.

Loss of garageman's lien on repaired vehicle by owner's use of vehicle, 74 A.L.R.4th 90.

Architect's services as within mechanics' lien statute, 31 A.L.R.5th 664.

44-14-360. Definitions.

As used in this part, the term:

(.1) "Business day" means any day that is not a Saturday, Sunday, or legal holiday.

(1) "Contractor" means a contractor having privity of contract with the owner of the real estate.

(2) "Land surveyor" shall have the same meaning as provided in Code Section 43-15-2.

(2.1) "Lien action" means a lawsuit, proof of claim in a bankruptcy case, or a binding arbitration.

(3) "Materials," in addition to including those items for which liens are already permitted under this part, means tools, appliances, machinery, or equipment used in making improvements to the real estate, to the extent of the reasonable value or the contracted rental price, whichever is greater, of such tools, appliances, machinery, or equipment.

(4) "Materialmen" means all persons furnishing the materials, tools, appliances, machinery, or equipment included in the definition of materials in paragraph (3) of this Code section.

(5) "Professional engineer" shall have the same meaning as provided in Code Section 43-15-2.

(6) "Registered forester" shall have the same meaning as provided in Code Section 12-6-41.

(7) "Registered interior designer" shall have the same meaning as provided in Code Section 43-4-1.

(8) "Registered land surveyors" and "registered professional engineers" means land surveyors or professional engineers who are registered as land surveyors or professional engineers under Chapter 15 of Title 43 at the time of performing, rendering, or furnishing services protected under this part.

(9) "Residential property" means single-family and two-family, three-family, and four-family residential real estate.

(10) "Subcontractor" means, but is not limited to, subcontractors having privity of contract with the contractor.

History.

Ga. L. 1873, p. 42, §§ 1, 7; Code 1873, §§ 1972, 1979; Code 1882, §§ 1972, 1979; Ga. L. 1893, p. 34, §§ 1, 2; Ga. L. 1895, p. 27, § 1; Civil Code 1895, §§ 2787, 2801; Ga. L. 1897, p. 30, §§ 1, 2; Ga. L. 1899, p. 33, § 1; Civil Code 1910, §§ 3329, 3336, 3352; Code 1933, §§ 67-1701, 67-2001; Ga. L. 1953, Jan.-Feb. Sess., p. 582, §§ 1, 2; Ga. L. 1956, p. 185, §§ 1, 5, 6, 7; Ga. L. 1956, p. 562, §§ 1, 2; Ga. L. 1978, p. 243, § 1; Ga. L. 1983, p. 1450, § 1; Ga. L. 1985, p. 1322, § 1; Ga. L. 1991, p. 915, § 1; Ga. L. 2008, p. 1063, § 1/SB 374; Ga. L. 2021, p. 674, § 2/HB 480.

The 2021 amendment, effective May 10, 2021, in paragraphs (2), (5), and (6), substituted "shall have the same meaning as provided" for "means the same as the definition thereof", added paragraph (7), and redesignated former paragraphs (7) through (9) as present paragraphs (8) through (10), respectively. See Editor's notes for applicability.

Editor's notes.

Ga. L. 2021, p. 674, § 7/HB 480, not codified by the General Assembly, provides: "This Act shall become effective upon its approval by the Governor or upon its becoming law without such approval and Sections 2 through 8 of this Act shall apply to labor, services, or materials performed or furnished by registered interior designers on or after such date" This Act was approved by the Governor on May 10, 2021.

Law reviews.

For note on 1991 amendment of this Code section, see 8 Ga. St. U.L. Rev. 166 (1992).

For survey article on construction law, see 44 Mercer L. Rev. 125 (1992).

For annual survey article on real property law, see 50 Mercer L. Rev. 307 (1998).

For survey article on construction law for the period from June 1, 2002 through May 31, 2003, see 55 Mercer L. Rev. 85 (2003).

For survey article on construction law, see 60 Mercer L. Rev. 59 (2008).

For survey article on real property law, see 60 Mercer L. Rev. 345 (2008).

JUDICIAL DECISIONS

Definition of "material." — Within the meaning of O.C.G.A. § 44-14-360, material is something that goes into and becomes a part of the finished structure, such as lumber, nails, glass, hardware, etc., which is necessary to the completion of the building. D.H. Overmyer Whse. Co. v. W.C. Caye & Co., 116 Ga. App. 128, 157 S.E.2d 68, 1967 Ga. App. LEXIS 720 (1967).

Material improving real estate — Scenery and other stage and science outfit of an opera house are "material" for improving real estate, within O.C.G.A. § 44-14-360. Waycross Opera House Co. v. Sossman, 94 Ga. 100, 20 S.E. 252, 1894 Ga. LEXIS 20 (1894).

"Material for the improvement" of real estate means something that goes into and becomes a part of the finished structure, such as lumber, nails, glass, hardware, etc., which is necessary to the completion of the building. Skandia Draperies Mfg. Co. v. Augusta Innkeepers, Ltd., 157 Ga. App. 279, 277 S.E.2d 282, 1981 Ga. App. LEXIS 1781 (1981).

The Georgia courts do not uniformly apply the definitional limitations of the term "materials," as used in O.C.G.A. § 44-14-360, when that term arises in other contexts. Sims' Crane Serv., Inc. v. Reliance Ins. Co., 514 F. Supp. 1033, 1981 U.S. Dist. LEXIS 9561 (S.D. Ga. 1981), aff'd, 667 F.2d 30, 1982 U.S. App. LEXIS 22211 (11th Cir. 1982).

Cause of action on statutory payment bond not precluded by lack of right to enforce special lien. — Although the term "materials," as judicially interpreted, may exclude certain items as nonlienable, the word may very well include the same items for purposes of a separate statute, such as the bond statute; clearly, then, the lack of a right of action to enforce a special lien under Georgia lien law, as statutorily provided or judicially

discerned, does not, of itself, preclude a beneficiary's right to sue on a statutory payment bond, or, by analogy, on a private payment bond. Sims' Crane Serv., Inc. v. Reliance Ins. Co., 514 F. Supp. 1033, 1981 U.S. Dist. LEXIS 9561 (S.D. Ga. 1981), aff'd, 667 F.2d 30, 1982 U.S. App. LEXIS 22211 (11th Cir. 1982).

"Subcontractor" means one who, pursuant to a contract with the prime contractor or in a direct chain of contracts leading to the prime contractor, performed services or procured another to perform services in furtherance of the goals of the prime contractor. Tonn & Blank, Inc. v. D.M. Asphalt, Inc., 187 Ga. App. 272, 370 S.E.2d 30, 1988 Ga. App. LEXIS 628 (1988).

Owner as "contractor." — There was no reason why an owner could not also have been a contractor for purposes of a materialman's lien; because a property owner listed itself as "general contractor" in its notices of commencement, and because a materials supplier was not in privity with the owner, the supplier was required to provide the owner with the O.C.G.A. § 44-14-361(a) notice to contractor; since the supplier failed to give the proper notice, its materialman's liens were invalid. Roofing Supply of Atlanta, Inc. v. Forrest Homes, Inc., 279 Ga. App. 504, 632 S.E.2d 161, 2006 Ga. App. LEXIS 629 (2006).

Machinery which cannot be basis of lien generally. — The general rule is that machinery not totally depreciated by use on the property, incorporated into the improvement, or in connection with which labor was also supplied cannot be the basis of a valid lien. Air Serv. Co. v. Cosmo Invs., Inc., 115 Ga. App. 596, 155 S.E.2d 413, 1967 Ga. App. LEXIS 1179 (1967).

No machinist's lien on realty unless machines become attached as fixtures. — Machinists and manufacturers of machinery have no lien on real estate for machinery furnished, unless the machinery furnished is attached to and becomes incorporated with the realty for which it was furnished. J.S. Schofield & Son v. Stout, Mills & Temple, 59 Ga. 537, 1877 Ga. LEXIS 326 (1877); D.H. Overmyer Whse. Co. v. W.C. Caye & Co., 116 Ga. App. 128, 157 S.E.2d 68, 1967 Ga. App. LEXIS 720 (1967).

Furnishing machinery for sawmill comes under section. — The furnishing of machinery for a steam sawmill, to improve or enlarge the mill or to keep it efficient, entitles the machinist to a lien under O.C.G.A. § 44-14-360 and not O.C.G.A. § 44-14-515. Filer & Stowell Co. v. Empire Lumber Co., 91 Ga. 657, 18 S.E. 359, 1893 Ga. LEXIS 300 (1893).

All charges made by materialman for use of equipment are nonlienable items. Sears Roebuck & Co. v. Superior Rigging & Erecting Co., 120 Ga. App. 412, 170 S.E.2d 721, 1969 Ga. App. LEXIS 796 (1969).

Equipment or machinery rented or leased to a contractor to perform work are nonlienable. Mableton Erectors, Inc. v. Dunn Properties of Ga., Inc., 135 Ga. App. 504, 218 S.E.2d 175, 1975 Ga. App. LEXIS 1718 (1975).

Lessor of machinery not attached to realty not entitled to lien. — A mere lessor of machinery to a contractor does not come within the class in favor of whom the lien is granted, nor does the machinery itself, not being something in the order of a steam mill or other mechanical device intended to be attached to and used on the realty. D.H. Overmyer Whse. Co. v. W.C. Caye & Co., 116 Ga. App. 128, 157 S.E.2d 68, 1967 Ga. App. LEXIS 720 (1967).

Lessor of air compressor and drill has no lien on realty imposed. — O.C.G.A. § 44-14-360 does not give a lessor of machinery consisting of an air compressor and drill a lien on real estate for the rental value of the machinery leased to a contractor who uses it in improving the real estate of the owner against whom the lien is sought. Air Serv. Co. v. Cosmo Invs., Inc., 115 Ga. App. 596, 155 S.E.2d 413, 1967 Ga. App. LEXIS 1179 (1967).

Rental on a company's scaffolding is not lienable. D.H. Overmyer Whse. Co. v. W.C. Caye & Co., 116 Ga. App. 128, 157 S.E.2d 68, 1967 Ga. App. LEXIS 720 (1967).

Materialmen entitled to lien under section generally. — O.C.G.A. § 44-14-360 provides a lien only to materialmen who may have supplied the materials di-

rectly to the owner of the realty, or to a contractor or a subcontractor engaged in making the improvement. Georgia-Pacific Corp. v. Dan Austin Properties, Inc., 126 Ga. App. 191, 190 S.E.2d 131, 1972 Ga. App. LEXIS 1096, aff'd, 229 Ga. 803, 194 S.E.2d 472, 1972 Ga. LEXIS 778 (1972).

Seller of building equipment and tools not entitled to lien. — One who sells shovels, shovel handles, gloves, tape, rope, files, matches, pulley and hook, hammers, brushes, sand screen, lamp chimney, and saw files to a contractor who has a contract for improving realty is not entitled to a lien for those items. D.H. Overmyer Whse. Co. v. W.C. Caye & Co., 116 Ga. App. 128, 157 S.E.2d 68, 1967 Ga. App. LEXIS 720 (1967).

No lien for one who furnishes equipment and tools, but performs no labor or services. — The owner of horses, equipment, or machinery, who furnishes them to another to aid in construction or improvements, or in any work for which a lien is given, but who performs no manual labor or other services in connection therewith, is not entitled to a lien. D.H. Overmyer Whse. Co. v. W.C. Caye & Co., 116 Ga. App. 128, 157 S.E.2d 68, 1967 Ga. App. LEXIS 720 (1967).

No lien for supplier of supplier. — The supplier of a supplier of materials to be used in the improvement of realty is not entitled to a claim of lien therefor under O.C.G.A. § 44-14-360. Georgia-Pacific Corp. v. Dan Austin Properties, Inc., 126 Ga. App. 191, 190 S.E.2d 131, 1972 Ga. App. LEXIS 1096, aff'd, 229 Ga. 803, 194 S.E.2d 472, 1972 Ga. LEXIS 778 (1972).

Rental value of machinery covered by surety bond. — Under O.C.G.A. § 44-14-360(3), bond obligees' property would be subject to a special lien for the rental value of machinery leased to subcontractor by materialmen. Sims' Crane Serv., Inc. v. Reliance Ins. Co., 514 F. Supp. 1033, 1981 U.S. Dist. LEXIS 9561 (S.D. Ga. 1981), aff'd, 667 F.2d 30, 1982 U.S. App. LEXIS 22211 (11th Cir. 1982) (decided prior to 1991 amendment).

O.C.G.A. § 44-14-360 does not operate in favor of a contractor paving a sidewalk in a street adjacent to a lot. Seeman v. Schultze, 100 Ga. 603, 28 S.E. 378, 1897 Ga. LEXIS 112 (1897).

Supplier of equipment was supplier of material. — Under O.C.G.A. §§ 44-14-360(3) and 44-14-361.1(a), a supplier of equipment for a construction project was a supplier of material and thus had to furnish its equipment for the improvement of the project in order for its lien to arise. Cent. Atlanta Tractor Sales, Inc. v. Athena Dev., LLC, 289 Ga. App. 355, 657 S.E.2d 290, 2008 Ga. App. LEXIS 87 (2008).

Mechanic's lien foreclosure action improperly dismissed. — In a mechanic's lien foreclosure action brought by a construction company against a property owner, the trial court erred by dismissing the action as untimely since the lien, although stating that the debt became due on a date more than three months from the date the lien was filed, also stated that the construction company provided services, labor, and/or materials to the property owner within three months of the filing of the complaint. D. C. Ecker Constr., Inc. v. Ponce Inv., LLC, 294 Ga. App. 833, 670 S.E.2d 526, 2008 Ga. App. LEXIS 1322 (2008), cert. denied, No. S09C0486, 2009 Ga. LEXIS 184 (Ga. Feb. 23, 2009).

RESEARCH REFERENCES

Am. Jur. Pleading and Practice Forms.

17B Am. Jur. Pleading and Practice Forms, Mechanics' Liens, § 2.

ALR.

Garnishment of funds payable under building and construction contract, 16 A.L.R.5th 548.

Architect's services as within mechanics' lien statute, 31 A.L.R.5th 664.

44-14-361. Creation of liens; property to which lien attaches; items to be included in lien.

(a) The following persons shall each have a special lien on the real estate, factories, railroads, or other property for which they furnish labor, services, or materials:

(1) All mechanics of every sort who have taken no personal security for work done and material furnished in building, repairing, or improving any real estate of their employers;

(2) All contractors, all subcontractors and all materialmen furnishing material to subcontractors, and all laborers furnishing labor to subcontractors, materialmen, and persons furnishing material for the improvement of real estate;

(3) All registered architects furnishing plans, drawings, designs, or other architectural services on or with respect to any real estate;

(4) All registered foresters performing or furnishing services on or with respect to any real estate;

(5) All registered land surveyors and registered professional engineers performing or furnishing services on or with respect to any real estate;

(6) All contractors, all subcontractors and materialmen furnishing material to subcontractors, and all laborers furnishing labor for subcontractors for building factories, furnishing material for factories, or furnishing machinery for factories;

(7) All machinists and manufacturers of machinery, including corporations engaged in such business, who may furnish or put up any mill or other machinery in any county or who may repair the same;

(8) All contractors to build railroads;

(9) All suppliers furnishing rental tools, appliances, machinery, or equipment for the improvement of real estate; and

(10) All registered interior designers furnishing plans, drawings, designs, or other interior design services on or with respect to any real estate.

(b) Each special lien specified in subsection (a) of this Code section may attach to the real estate of the owner for which the labor, services, or materials are furnished if they are furnished at the instance of the owner, contractor, or some other person acting for the owner or contractor and shall include the value of work done and materials furnished in any easement or public right of way adjoining said real

estate if the work done or materials furnished in the easement or public right of way is for the benefit of said real estate and is within the scope of the owner's contract for improvements to said real estate.

(c) Each special lien specified in subsection (a) of this Code section shall include the amount due and owing the lien claimant under the terms of its express or implied contract, subcontract, or purchase order subject to subsection (e) of Code Section 44-14-361.1.

(d) Each special lien specified in subsection (a) of this Code section shall include interest on the principal amount due in accordance with Code Section 7-4-2 or 7-4-16.

History.

Ga. L. 1873, p. 42, § 7; Code 1873, § 1979; Code 1882, § 1979; Ga. L. 1893, p. 34, §§ 1, 2; Ga. L. 1895, p. 27, § 1; Civil Code 1895, § 2801; Ga. L. 1897, p. 30, §§ 1, 2; Ga. L. 1899, p. 33, § 1; Civil Code 1910, § 3352; Code 1933, § 67-2001; Ga. L. 1953, Jan.-Feb. Sess., p. 582, §§ 1, 2; Ga. L. 1956, p. 185, § 1; Ga. L. 1956, p. 562, § 2; Ga. L. 1982, p. 1144, § 1; Ga. L. 1983, p. 3, § 33; Ga. L. 1983, p. 1450, § 1; Ga. L. 1985, p. 1322, § 2; Ga. L. 1991, p. 915, § 2; Ga. L. 2006, p. 738, § 1/SB 530; Ga. L. 2013, p. 1102, § 1/HB 434; Ga. L. 2021, p. 674, § 3/HB 480.

History of Section.

This Code section originated in an Act of the General Assembly passed in 1841. Kwilecki v. Young, 180 Ga. 602, 180 S.E. 137 (1935).

The 2021 amendment, effective May 10, 2021, deleted "and" at the end of paragraph (a)(8), substituted "; and" for a period at the end of paragraph (a)(9), and added paragraph (a)(10). See Editor's notes for applicability.

Code Commission notes.

Pursuant to Code Section 28-9-5, in 2006, "owner or contractor" was substituted for "owner contractor" near the middle of subsection (b).Ga. L. 1982, p. 1144, § 1 amended this Code section, to become effective April 1, 1983. However, that 1982 Act was repealed by Ga. L. 1983, p. 1450, § 4, effective March 31, 1983. This Code section, as amended by the 1982 Act, was also amended by Ga. L. 1983, p. 3, § 33, effective January 25, 1983; however, owing to the repeal of the 1982 Act, that amendment may not be given effect.Ga. L. 2021, p. 674, § 7/HB 480, not codified by the General Assembly, provides: "This Act shall become effective upon its approval by the Governor or upon its becoming law without such approval and Sections 2 through 8 of this Act shall apply to labor, services, or materials performed or furnished by registered interior designers on or after such date." This Act was approved by the Governor on May 10, 2021.

Law reviews.

For article, "Some Rescission Problems in Truth-In-Lending, as Viewed From Georgia," see 7 Ga. St. B.J. 315 (1971).

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).

For article discussing role of attorney in representing subcontractor and available enforcement mechanisms, see 14 Ga. St. B.J. 104 (1978).

For article, "Lien Claimants and Real Estate Lenders — The Struggle For Priority," see 16 Ga. St. B.J. 187 (1980).

For note, "A New Concept: Preliminary Notice of Lien Rights," see 19 Ga. St. B.J. 42 (1982).

For article surveying real property law, see 34 Mercer L. Rev. 255 (1982).

For annual survey of construction law, see 43 Mercer L. Rev. 141 (1991).

For note on 1991 amendment of this Code section, see 8 Ga. St. U.L. Rev. 166 (1992).

For annual survey article discussing materialmen's liens, see 46 Mercer L. Rev. 117 (1994).

For article, "Recent Developments in Construction Law," see 5 Ga. St. B.J. 24 (1999).

For survey article on construction law, see 59 Mercer L. Rev. 55 (2007).

For survey article on construction law, see 60 Mercer L. Rev. 59 (2008).

For article, "Non-Privity Lien Rights on Private Construction Projects: The Court of Appeals of Georgia Provides Clarity," see 15 (No. 5) Ga. St. B.J. 20 (2010).

For annual survey on construction law, see 65 Mercer L. Rev. 67 (2013).

For article with annual survey on real property, see 73 Mercer L. Rev. 217 (2021).

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Analysis

General Consideration
Mechanics
Contractors and Subcontractors
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Priority of Liens
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General Consideration

O.C.G.A. § 44-14-361 constitutional. — The Georgia materialmen's lien sections do not deprive property owners of a significant property interest without notice and hearing; they serve an important public interest and the statutes are not unconstitutional. Tucker Door & Trim Corp. v. Fifteenth St. Co., 235 Ga. 727, 221 S.E.2d 433, 1975 Ga. LEXIS 976 (1975).

No denial of due process. — O.C.G.A. § 44-14-361 is not in violation of the provision of the Constitution which declares that no person shall be deprived of property without due process of law, or the provision which guarantees that protection to property shall be impartial and complete. Prince v. Neal-Millard Co., 124 Ga. 884, 53 S.E. 761, 1906 Ga. LEXIS 652 (1906).

For a discussion of historical changes in O.C.G.A. § 44-14-361, see Prince v. Neal-Millard Co., 124 Ga. 884, 53 S.E. 761, 1906 Ga. LEXIS 652 (1906).

Amendments to O.C.G.A. § 44-14-361 apply prospectively. — Trial court properly denied a subcontractor summary judgment as to the court's interpretation of O.C.G.A. § 44-14-361 as to materialmen liens because the trial court properly concluded that the amendments to § 44-14-361 did not apply retroactively and the trial court properly applied the version of § 44-14-361 in effect at the time the subcontractor obtained the lien in 2007. Stock Building Supply, Inc. v. Platte River Insurance Company, 336 Ga. App. 113, 783 S.E.2d 708, 2016 Ga. App. LEXIS 133 (2016).

Supplier of supplier not entitled to lien. — O.C.G.A. § 44-14-361 provides a lien to materialmen who have supplied the materials directly to the owner of realty or to a contractor or subcontractor engaged in making an improvement; the supplier of a supplier is not entitled to claim a lien. Pettigrew v. Southern Aluminum Finishing Co. (In re Amarlite Architectural Prods., Inc.), 178 B.R. 904, 1995 Bankr. LEXIS 261 (Bankr. N.D. Ga. 1995).

A subcontractor that contracted with a construction company to supply labor and materials for the "rebranding" of service stations never had valid liens to release, cancel, or refrain from foreclosing upon; there was no evidence that the subcontractor furnished its work at the instance of the station owners or their agents, and the owners' knowledge of and consent to the work was not sufficient, standing alone, to establish the validity of the liens. Lane Supply, Inc. v. W. H. Ferguson & Sons, Inc., 286 Ga. App. 512, 649 S.E.2d 614, 2007 Ga. App. LEXIS 820 (2007).

O.C.G.A. § 44-14-361 is in derogation of the common law. Opportunities Industrialization Ctr. of Atlanta, Inc. v. T & B-Scottdale Contractors, 26 B.R. 394,

General Consideration (Cont'd)

1983 Bankr. LEXIS 7073 (Bankr. N.D. Ga. 1983).

Purpose of the materialman's lien statutes in every state is, in substance, the same: to give the furnisher of labor and material a claim upon the owner, to compel the owner at the owner's peril to withhold final payment until the owner has received assurance from the contractor that the owner has paid all material and labor claims, which are or which may be perfected into liens. Gignilliat v. West Lumber Co., 80 Ga. App. 652, 56 S.E.2d 841, 1949 Ga. App. LEXIS 896 (1949); Scott v. Williams, 111 Ga. App. 735, 143 S.E.2d 16, 1965 Ga. App. LEXIS 1079 (1965); Mullins v. Noland Co., 406 F. Supp. 206, 1975 U.S. Dist. LEXIS 14649 (N.D. Ga. 1975).

The object of O.C.G.A. § 44-14-361 is to secure a lien for that which goes into the structure. Skandia Draperies Mfg. Co. v. Augusta Innkeepers, Ltd., 157 Ga. App. 279, 277 S.E.2d 282, 1981 Ga. App. LEXIS 1781 (1981).

The manifest purpose of O.C.G.A. § 44-14-361 is to make the property of the owner liable for material which entered into the construction of the improvement on the employment of a contractor, within the limits of the contract price, unless the materialman waives the lien or, upon the final payment of the contract price, takes from the contractor a sworn statement that all work done or material furnished has been paid for at the agreed price or reasonable value. Henderson v. Mitchell Eng'g Co., 158 Ga. App. 306, 279 S.E.2d 750, 1981 Ga. App. LEXIS 2175 (1981).

O.C.G.A. § 44-14-361 is given a strict construction. Ingalls Iron Works Co. v. Standard Accident Ins. Co., 107 Ga. App. 454, 130 S.E.2d 606, 1963 Ga. App. LEXIS 876 (1963).

The lien statutes are in derogation of the common law, are to be strictly construed against the mechanic and materialmen, and will be extended no further than their words plainly import; the materialman has the burden of proving a lien and must be brought clearly within the law. Sims' Crane Serv., Inc. v. Reliance Ins. Co., 514 F. Supp. 1033, 1981 U.S. Dist. LEXIS 9561 (S.D. Ga. 1981), aff'd, 667 F.2d 30, 1982 U.S. App. LEXIS 22211 (11th Cir. 1982).

The lien statutes are strictly construed, and strict compliance with them is required. Roberts v. Porter, Davis, Saunders & Churchill, 193 Ga. App. 898, 389 S.E.2d 361, 1989 Ga. App. LEXIS 1685 (1989).

Mechanics' and materialmen's liens under O.C.G.A. § 44-14-361 are in derogation of common law and thus are to be strictly construed against the mechanic and materialman. L & W Supply Corp. v. Whaley Constr. Co., 197 Ga. App. 680, 399 S.E.2d 272, 1990 Ga. App. LEXIS 1433 (1990).

The statutory bond requirement, on the other hand, is afforded a liberal interpretation for the protection of persons who supply labor and materials used in the prosecution of the general contract. Sims' Crane Serv., Inc. v. Reliance Ins. Co., 514 F. Supp. 1033, 1981 U.S. Dist. LEXIS 9561 (S.D. Ga. 1981), aff'd, 667 F.2d 30, 1982 U.S. App. LEXIS 22211 (11th Cir. 1982).

The right to the lien under O.C.G.A. § 44-14-361 proceeds upon the theory that the work and material or machinery for which the lien is sought have increased the value of the realty by becoming a part thereof. Skandia Draperies Mfg. Co. v. Augusta Innkeepers, Ltd., 157 Ga. App. 279, 277 S.E.2d 282, 1981 Ga. App. LEXIS 1781 (1981).

The lien is created and imposed by operation of law, while the bond is a matter of contract, albeit a contract required by the statute to be made in order to give validity to another. Sims' Crane Serv., Inc. v. Reliance Ins. Co., 514 F. Supp. 1033, 1981 U.S. Dist. LEXIS 9561 (S.D. Ga. 1981), aff'd, 667 F.2d 30, 1982 U.S. App. LEXIS 22211 (11th Cir. 1982).

The lien on the property is the security for the laborer and the materialman, while under the bond statute, where no lien can be secured, the bond is the security. Sims' Crane Serv., Inc. v. Reliance Ins. Co., 514 F. Supp. 1033, 1981 U.S. Dist. LEXIS 9561 (S.D. Ga. 1981), aff'd, 667 F.2d 30, 1982 U.S. App. LEXIS 22211 (11th Cir. 1982).

Meaning of "contract price." — Where a contractor abandoned the work against the will of the owner, the gross

sum fixed as the price for completing the entire work is the true "contract price," and not the sum contemplated to be paid in the event the owner suspended the work at a period before completion. Hunnicutt & Bellingrath Co. v. Van Hoose, 111 Ga. 518, 36 S.E. 669, 1900 Ga. LEXIS 674 (1900).

Definition of "true owner." — The expression "true owner" as used in O.C.G.A. § 44-14-361, does not mean legal title. Such a lien obtains on whatever interest the one has who has the right and authority to cause the improvements to be made. West Lumber Co. v. Gignilliat, 77 Ga. App. 336, 48 S.E.2d 688, 1948 Ga. App. LEXIS 549 (1948).

The term "true owner" as used in O.C.G.A. § 44-14-361 includes one having an estate in realty, and the lien prescribed would attach to such an interest in realty. This interest in realty should be distinguished from the interest of one entitled only to the use and enjoyment of the premises, that is to say, one having only a usufruct. Jones v. E.I. Rooks & Son, 78 Ga. App. 790, 52 S.E.2d 580, 1949 Ga. App. LEXIS 980 (1949).

The words "true owner," are sufficiently comprehensive to embrace the owner of an equitable title to the real estate, and the liens therein provided for may attach to the equitable owner's interest. Maloy v. Planter's Whse. & Lumber Co., 142 Ga. App. 69, 234 S.E.2d 807, 1977 Ga. App. LEXIS 1478 (1977).

The words "true owner," as used in O.C.G.A. § 44-14-361, are sufficiently comprehensive to include the owner of a leasehold estate. James G. Wilson Mfg. Co. v. Chamberlin-Johnson-DuBose Co., 140 Ga. 593, 79 S.E. 465, 1913 Ga. LEXIS 192 (1913).

Where a lien claim was filed solely against the owner's reversionary interest and not against the leasehold interest in the premises, the lien document failed to reveal affirmatively the identity of the real person whose interest in the premises was being subjected to the lien, the lien claim was not effective. Meco of Atlanta, Inc. v. Super Valu Stores, Inc., 215 Ga. App. 146, 449 S.E.2d 687, 1994 Ga. App. LEXIS 1102 (1994).

All liens under this section are of same character. — The liens specified in O.C.G.A. § 44-14-361 are of the same character and governed by the same principles of law. Guaranty Inv. & Loan Co. v. Athens Eng'g Co., 152 Ga. 596, 110 S.E. 873, 1922 Ga. LEXIS 225 (1922).

No lien for entire contract if no lien for one part. — Where there is an entire contract and there is no lien for one part there can be no lien for any part. D.H. Overmyer Whse. Co. v. W.C. Caye & Co., 116 Ga. App. 128, 157 S.E.2d 68, 1967 Ga. App. LEXIS 720 (1967).

Item cannot be made lienable by inclusion in contract for lienable items. — An item which is not lienable cannot be made so by including it in a contract for work or items which are lienable. D.H. Overmyer Whse. Co. v. W.C. Caye & Co., 116 Ga. App. 128, 157 S.E.2d 68, 1967 Ga. App. LEXIS 720 (1967).

Burden on lienholder plaintiff to show lienable items separable. — If items lienable can be separated from those which are nonlienable on a foreclosure proceeding, the burden of doing so rests upon the lienholder. D.H. Overmyer Whse. Co. v. W.C. Caye & Co., 116 Ga. App. 128, 157 S.E.2d 68, 1967 Ga. App. LEXIS 720 (1967).

Failure to prove lien amount. — Trial court erred by granting summary judgment to a subcontractor because the subcontractor failed to prove the lien amount, if any, the subcontractor was entitled to and the subcontractor was not entitled to a lien for the attorney fees and interest allegedly owed since there was no agreement for such amounts. Hill v. VNS Corp., 329 Ga. App. 274, 764 S.E.2d 876, 2014 Ga. App. LEXIS 666 (2014).

Landlord's equitable interest in improvements not subject to lien. — The fact that improvements became the landlord's property upon termination of the tenant's lease did not create a basis for imposing a lien against the landlord. The landlord's equitable interest in improvements is not subject to a lien. F.S. Assocs. v. McMichael's Constr. Co., 197 Ga. App. 705, 399 S.E.2d 479, 1990 Ga. App. LEXIS 1451 (1990).

Public property is not subject to a lien under O.C.G.A. § 44-14-361. Neal-Millard Co. v. Trustees of Chatham Academy, 121 Ga. 208, 48 S.E. 978, 1904 Ga. LEXIS 90 (1904).

General Consideration (Cont'd)

Where a supplier filed a materialman's lien against the Atlanta Housing Authority's property, this lien was of no legal effect, inasmuch as a lien cannot be effective against state property. B & B Elec. Supply Co. v. H.J. Russell Constr. Co., 166 Ga. App. 499, 304 S.E.2d 544, 1983 Ga. App. LEXIS 2222 (1983).

Section applies to contract by incorporators. — O.C.G.A. § 44-14-361 is applicable as against a corporation where the contract performance of which is claimed to give a lien was made with individuals who agreed to incorporate. Chicago Bldg. & Mfg. Co. v. Talbotton Creamery & Mfg. Co., 106 Ga. 84, 31 S.E. 809, 1898 Ga. LEXIS 24 (1898).

Section inapplicable to master-servant and principal-agent relationships. — O.C.G.A. § 44-14-361(b) does not apply to cases where the relationship of master and servant or principal and agent exists. Fitts v. Addis, 83 Ga. App. 696, 64 S.E.2d 466, 1951 Ga. App. LEXIS 942 (1951).

Where relationship of master and servant exists between an owner and builder, the master becomes liable for the acts of the servant as the master's agent within the scope of the master's employment, and therefore is subject to a personal judgment, and the master's property is subject to liens for the labor and materials which had been furnished to the master through such servant, and of which the master received the benefit. Christian v. Bremer, 199 Ga. 285, 34 S.E.2d 40, 1945 Ga. LEXIS 303 (1945).

Section is inapplicable where the lienor was employed directly by the owner, the debtor. — O.C.G.A. § 44-14-361 is designed to protect a property owner without notice, when the debtor did not contract directly with the lienor and the existence of a lien is not obvious, by providing that the lien in that situation will be effective only after filing for record. Marietta Baptist Tabernacle v. Tomberlin Assocs., 576 F.2d 1237, 1978 U.S. App. LEXIS 9984 (5th Cir. 1978).

Section inapplicable to lease option to erect improvements subject to lessor's approval. — O.C.G.A. § 44-14-361 was never intended, and does not purport, to cover a situation where a lessee under the terms of the lease has an option to erect a fence on the real estate, which the lessee may remove if the lessee and the lessor cannot agree on satisfactory terms for it to remain on the realty. Wall v. Mills, 126 Ga. App. 149, 190 S.E.2d 146, 1972 Ga. App. LEXIS 1080 (1972).

Requirements for perfecting liens. — Under O.C.G.A. § 44-14-361.1, to make good the liens specified in O.C.G.A. § 44-14-361, not only must there be a substantial compliance by the alleged lienor with the contract, and the recording of the claim of lien within three months, but it is also essential to the creation of a lien that an action for the recovery of the amount of the claim be commenced within 12 months from the time the same became due. Kwilecki v. Young, 180 Ga. 602, 180 S.E. 137, 1935 Ga. LEXIS 501 (1935).

Failure to state date claim became due did not render lien invalid. — Summary judgment for an owner in a supplier's suit to enforce a materialman's lien was improper because O.C.G.A. § 44-14-361.1(a)(2) tempered the principle of strict construction with respect to the form of the claim of lien, and the fact that the lien failed to state the date the supplier's claim became due did not render the lien invalid; the claim of lien complied "in substance" with the required form. Vulcan Constr. Materials, LP v. Franklin Builders Props., Inc., 298 Ga. App. 120, 679 S.E.2d 356, 2009 Ga. App. LEXIS 621 (2009).

Filing of lien cannot constitute abuse of process. — Under O.C.G.A. § 44-14-360 et seq., a lien attaches when a laborer performs work on real property. However, under O.C.G.A. § 44-14-361.1(a)(2) and (a)(3), it must be perfected within three months after either the completion of the work or the date materials are furnished and an action to recover the amount of the claim must be instituted within 12 months from the time labor or materials were last furnished. Thus, a lien is not civil process and plaintiffs do not state a claim upon which relief can be granted when they contend that the filing of a lien constitutes an abuse of process. Carl E. Jones Dev., Inc. v. Wilson, 149 Ga. App. 679, 255 S.E.2d 135, 1979 Ga. App. LEXIS 1982 (1979).

Equity jurisdiction where statutory remedy unavailable. — Where a statute

creates a specific lien, in favor of masons and carpenters on buildings erected by them, and also gives them a specific remedy for the enforcement of such lien, a court of equity has no jurisdiction to enforce it, unless there is some impediment or difficulty charged to exist which would render the remedy given by O.C.G.A. § 44-14-361 unavailable. King v. Rutledge, 208 Ga. 172, 65 S.E.2d 801, 1951 Ga. LEXIS 315 (1951).

Lien when fixed, is not affected by repeal of statute. — Where the lien of a materialman has, under the terms of O.C.G.A. § 44-14-361, become fixed and secured, such lien is then a vested right. No subsequent repeal or modification of the statute under which it became fixed can destroy or modify such right. Waters v. Dixie Lumber & Mfg. Co., 106 Ga. 592, 32 S.E. 636, 1899 Ga. LEXIS 733 (1899).

Section has no extraterritorial effect. — O.C.G.A. §§ 44-14-361, 44-14-380, and 44-14-381, which give to laborers a general lien upon the property of their employers for labor performed, has no extraterritorial effect, and give no lien arising out of a contract for labor, made in another state and executed by labor performed therein. Downs v. Bedford, 39 Ga. App. 155, 146 S.E. 514, 1929 Ga. App. LEXIS 231 (1929).

Foreign judgment not sufficient until brought as action in this state. Columbian Iron Works v. Crystal Springs Bleachery Co., 145 Ga. 621, 89 S.E. 751, 1916 Ga. LEXIS 424 (1916).

Nonresidents of Georgia have the same remedies under O.C.G.A. § 44-14-361 as citizens. Thurman v. Kyle, 71 Ga. 628, 1883 Ga. LEXIS 235 (1883).

When state law applies to foreign contracts. — Although a contract for furnishing materials in Georgia is made in another state, the Georgia law will apply as to the lien of the materialman. Thurman v. Kyle, 71 Ga. 628, 1883 Ga. LEXIS 235 (1883).

Basis of laborers' and materialmen's liens. — The liens of laborers and materialmen do not rest upon contract, but upon the law which gives to laborers and materialmen liens for labor performed and material furnished in the improvement of real estate. Williams v. Brewton, 170 Ga. 164, 152 S.E. 441, 1930 Ga. LEXIS 412 (1930).

Bankruptcy. — Chapter 7 Trustee was not entitled to a default judgment on a complaint to avoid a contractor's mechanics' lien under 11 U.S.C. § 547 because the facts alleged in the complaint suggested that the contractor's lien may have fallen outside the purview of 11 U.S.C. § 545; by alleging that the contractor's lien was a mechanics' lien, the trustee established the lien's nonavoidability under 11 U.S.C. § 547(c)(6). Hays v. Wellborn Forest Prods. (In re Spejcher), No. 06-62501, No. 06-6347, 2006 Bankr. LEXIS 3685 (Bankr. N.D. Ga. Oct. 30, 2006).

No entitlement to full amount of creditor's materialman's liens. — Creditor would not necessarily be entitled to a claim in the full amount of the creditor's materialman's liens under O.C.G.A. § 44-14-361 but rather, would only be entitled to recover the damages the creditor suffered pursuant to O.C.G.A. § 51-1-6 due to the debtor's crime of false swearing, which would be the value of liens lost, which in turn depended on the value of the properties to which the liens attached and the existence of any superior liens on those properties. In the absence of an established underlying claim, summary judgment in the creditor's favor on the creditor's nondischargeability claims was not warranted. Thomas Concrete of Ga., Inc. v. Osbourne (In re Osbourne), No. 10-82440-WLH, No. 10-06621, 2017 Bankr. LEXIS 2414 (Bankr. N.D. Ga. Aug. 24, 2017).

Lien amount claimed for lost profits was invalid. — Although a contractor's claim for lost profits in the contractor's materialman's lien was invalid under O.C.G.A. § 44-14-361(c) and (e), because the lost profits amount was easily determined, the trial court erred by invalidating the entire lien, instead of amending the lien to exclude non-lienable amounts as permitted by O.C.G.A. § 44-14-361.1(a) and (a.1). Duke Builders, Inc. v. Massey, 351 Ga. App. 535, 831 S.E.2d 172, 2019 Ga. App. LEXIS 445 (2019), aff'd, 310 Ga. 152, 849 S.E.2d 186, 2020 Ga. LEXIS 653 (2020).

Materialmen's lien cannot include anticipated profits. — Georgia Supreme Court held that the Georgia Court of Ap-

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peals was correct to hold that a materialmen's lien may not include anticipated profits, and the Supreme Court affirmed that holding. Massey v. Duke Builders, Inc., 310 Ga. 152, 849 S.E.2d 186, 2020 Ga. LEXIS 653 (2020).

Mechanics

Mechanic's lien strictly construed. — The mechanic's lien, as to realty, is in derogation of common law, and is to be construed strictly and extended no further than its words plainly import. Fox v. Rucker, 30 Ga. 525, 1860 Ga. LEXIS 136 (1860); Tuck v. Moss Mfg. Co., 127 Ga. 729, 56 S.E. 1001, 1907 Ga. LEXIS 469 (1907); Oglethorpe Sav. & Trust Co. v. Morgan, 149 Ga. 787, 102 S.E. 528, 1920 Ga. LEXIS 406 (1920); Carter-Moss Lumber Co. v. Short, 66 Ga. App. 330, 18 S.E.2d 61, 1941 Ga. App. LEXIS 209 (1941).

For a history of legislation on mechanic's liens, see Prince v. Neal-Millard Co., 124 Ga. 884, 53 S.E. 761, 1906 Ga. LEXIS 652 (1906).

Requirements for mechanic's lien. — In the case of a mechanic, it is necessary that the mechanic should be an operative engaged in a business requiring some particular skill in doing the work by virtue of which the law creates in the mechanic's favor a lien. Dantel Corp. v. Whidby, 98 Ga. App. 119, 105 S.E.2d 242, 1958 Ga. App. LEXIS 518 (1958).

O.C.G.A. § 44-14-361 concerns itself with the taking of personal security for the property by a mechanic; it has been often held that the taking of such an arrangement by a materialman does not constitute a waiver of a valid lien given materialmen under that section. Henderson v. Mitchell Eng'g Co., 158 Ga. App. 306, 279 S.E.2d 750, 1981 Ga. App. LEXIS 2175 (1981).

Working foreman entitled to mechanic's lien. — A working foreman, who, in addition to the foreman's duties as a supervisor, is expected to perform manual type labor personally is not, in the main, a laborer so as to be entitled to a lien under O.C.G.A. § 44-14-380, but was a mechanic within the meaning of O.C.G.A. § 44-14-361. Dantel Corp. v. Whidby, 98 Ga. App. 119, 105 S.E.2d 242, 1958 Ga. App. LEXIS 518 (1958).

Person who is contractor and mechanic may have lien. — One who occupies the position both of a contractor and of a mechanic, in either capacity, or in both, has a right to a lien, under O.C.G.A. § 44-14-361. Thurman v. Pettitt, 72 Ga. 38, 1883 Ga. LEXIS 8 (1883).

Mechanic's lien on building valid even though building owner did not own underlying real property. — Company admitted that the company held property interests in the improvements. Even if the company did not have title to the building on which the lien was claimed and title was in a third party not subject to the suit, this would not bar an action for foreclosing the statutory lien because if the company had any interest in the premises upon which the lien took effect, that interest was bound. Pinnacle Props. V, LLC v. Mainline Supply of Atlanta, LLC, 319 Ga. App. 94, 735 S.E.2d 166, 2012 Ga. App. LEXIS 1037 (2012).

Mechanic cannot have lien on municipal property. — Under O.C.G.A. § 44-14-361 a mechanic is not entitled to a lien for work done on property belonging to a municipal corporation and used for public purposes. City of Albany v. Lynch, 119 Ga. 491, 46 S.E. 622, 1904 Ga. LEXIS 248 (1904).

Mechanics who have taken personal security thereby waive their right to a lien. Rembrant, Inc. v. Phillips Constr. Co., 500 F. Supp. 766, 1980 U.S. Dist. LEXIS 14642 (S.D. Ga. 1980).

Mechanic may obtain general judgment in action for specific property. — A mechanic may institute an action for the enforcement of this lien against the specific property on which the lien attaches, and in the same action obtain a general judgment against the debtor for the same debt. Parish v. Murphy, 51 Ga. 614, 1874 Ga. LEXIS 214 (1874).

A mechanic may in a proper case, seek a judgment for the recovery of a debt for labor and materials furnished in improving property, and simultaneously seek the declaration of a special lien on the improved property. Rogers v. Johnson, 116 Ga. App. 295, 157 S.E.2d 48, 1967 Ga. App. LEXIS 782 (1967).

Avoidance in bankruptcy. — Chapter 7 trustee's right to avoid a mechanic's lien on estate property, which attached post-petition and without the trustee's consent or authorization by the court, was not limited by relevant state law because at no point since assuming the duties as trustee had the trustee consented to any work being done by the transferee on the property, which was required for the lien to attach. Scarver v. Ellis (In re McKeever), 567 B.R. 652, 2017 Bankr. LEXIS 435 (Bankr. N.D. Ga. 2017).

Exception to the automatic stay pursuant to 11 U.S.C. § 362(b)(3) did not apply to a post-petition mechanic's lien because the lien was not properly perfected and enforceable as the Chapter 7 trustee did not authorize any of the work listed in the lien. Scarver v. Ellis (In re McKeever), 567 B.R. 652, 2017 Bankr. LEXIS 435 (Bankr. N.D. Ga. 2017).

Contractors and Subcontractors

Definition of "contractor." — As used in O.C.G.A. § 44-14-361, the word "contractor" is not to be construed in its technical sense, which would embrace any person who had any contract of any character, but is to be given its limited, colloquial sense, meaning a person engaged in the business of making contracts for the improvement of real estate. Pittsburgh Plate Glass Co. v. Peters Land Co., 123 Ga. 723, 51 S.E. 725, 1905 Ga. LEXIS 586 (1905); Central of Ga. Ry. v. Shiver, 125 Ga. 218, 53 S.E. 610, 1906 Ga. LEXIS 94 (1906); Murphy v. Fuller, 96 Ga. App. 403, 100 S.E.2d 137, 1957 Ga. App. LEXIS 593 (1957).

Tenant does not come within the meaning of the phrase "contractor, or some other person," in O.C.G.A. § 44-14-361. Central of Ga. Ry. v. Shiver, 125 Ga. 218, 53 S.E. 610, 1906 Ga. LEXIS 94 (1906).

Stipulation under section did not salvage contractor's breach of contract claim. — In a breach of contract action associated with a construction project, the trial court properly granted a limited liability company's motion for a directed verdict against a contractor, as the contractor failed to present sufficient evidence linking the limited liability company to the contract sued upon, but all the evidence involved the contractor's negotiations and dealings with a businessperson and that company; further, the appeals court found that a stipulation between the parties referred only to the notice requirement of the lien statute, O.C.G.A. § 44-14-361.1(a), and instead declined to stretch the wording in the stipulation to mean more than what the parties clearly intended. L. Lowe & Co., Inc. v. Sunset Strip Props., LLC, 283 Ga. App. 357, 641 S.E.2d 797, 2007 Ga. App. LEXIS 62 (2007).

Contractor need not satisfy materialman's lien rights. — O.C.G.A. § 44-14-361 does not impose a duty or independent obligation on a general contractor to satisfy lien rights held by a materialman. Mullins v. Noland Co., 406 F. Supp. 206, 1975 U.S. Dist. LEXIS 14649 (N.D. Ga. 1975).

Owner may withhold payment to general contractor so long as materialmen's rights remain unsatisfied. — The existence of such inchoate rights, when coupled with the general contractor's obligations, predicated in part upon potential criminal, if not civil liability, compel the finding that a general contractor may seek to expedite own payment and foreclose any necessity on the part of materialmen to enforce their lien rights by agreeing to discharge those rights by direct payment. Mullins v. Noland Co., 406 F. Supp. 206, 1975 U.S. Dist. LEXIS 14649 (N.D. Ga. 1975).

Contractor's failure to pay materialman precludes recovery against owner. — A contractor cannot recover a judgment against the owner in the face of undisputed evidence that the contractor has not paid a materialman who has foreclosed a lien on the owner's premises in an amount greater than that remaining due by the owner to the contractor. Mullins v. Noland Co., 406 F. Supp. 206, 1975 U.S. Dist. LEXIS 14649 (N.D. Ga. 1975).

Subcontractor's lien possible although owner not party to subcontract. — Absence of contractual liability of owners due to their absence as parties to the subcontract does not prevent the establishment of a lien by a subcontractor under O.C.G.A. § 44-14-361. Sasser & Co.

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v. Griffin, 133 Ga. App. 83, 210 S.E.2d 34, 1974 Ga. App. LEXIS 976 (1974).

O.C.G.A. § 44-14-361 does not exclude a subcontractor from claiming a lien; rather, it limits the entities to which the owner of the real property may turn to establish as a defense that the agreed price or reasonable value thereof has been paid. Spicewood, Inc. v. Ferro Pipeline Co., 181 Ga. App. 277, 351 S.E.2d 711, 1986 Ga. App. LEXIS 2386 (1986).

Owner's responsibility to ensure proper disbursement of payments. — It is the owner's responsibility to see to it that the payments which the owner makes on the construction contract price are properly disbursed by the contractor to those having valid claims for labor and materials. Henderson v. Mitchell Eng'g Co., 158 Ga. App. 306, 279 S.E.2d 750, 1981 Ga. App. LEXIS 2175 (1981).

Effect on subcontractors of payments by owner to contractor. — Payments by the owner to the contractor do not affect the liens of subcontractors or materialmen unless made in accordance with O.C.G.A. § 44-14-361 or actually applied to the claims of the materialmen. Prince v. Neal-Millard Co., 124 Ga. 884, 53 S.E. 761, 1906 Ga. LEXIS 652 (1906); Massachusetts Bonding & Ins. Co. v. Realty Trust Co., 142 Ga. 499, 83 S.E. 210, 1914 Ga. LEXIS 442 (1914), writ of error dismissed, 241 U.S. 687, 36 S. Ct. 451, 60 L. Ed. 1237, 1916 U.S. LEXIS 1857 (1916).

Subcontractor's lien had priority over lender's later-filed security deed. — Subcontractor's lien filed before a lender's security deed was superior to the deed, pursuant to O.C.G.A. § 44-2-2(b). The general contractor's affidavit that the subcontractors had been or will be paid was insufficient to satisfy the plain language of O.C.G.A. § 44-14-361.2(a), requiring a statement that payment had been made, and did not extinguish the lien. Ga. Primary Bank v. Atlanta Paving, Inc., 309 Ga. App. 851, 711 S.E.2d 409, 2011 Ga. App. LEXIS 474 (2011).

Estoppel of subcontractor with notice of payment to contractor. — Where the owner notifies a subcontractor of an intended payment to the contractor and no objection is made, the subcontractor will be estopped to the extent of such payment. Bailie v. Woodward Lumber Co., 141 Ga. 806, 82 S.E. 232, 1914 Ga. LEXIS 157 (1914).

No subcontractor lien if contractor abandons. — A subcontractor has no lien where no sum is due the original contractor because of the subcontractor's wrongful abandonment of the contractor. Rowell v. Harris, 121 Ga. 239, 48 S.E. 948, 1904 Ga. LEXIS 97 (1904).

No lien absent contractual relationship. — Absent proof of a contractual relationship, either directly or through a chain of contracts, between the owner of the property and the person to whom the materials are furnished, a lien created under O.C.G.A. § 44-14-361 will not attach. Benning Constr. Co. v. Dykes Paving & Constr. Co., Inc., 263 Ga. 16, 426 S.E.2d 564, 1993 Ga. LEXIS 274 (1993).

Lien upon railroad is upon the whole railroad to which it applies. There is no provision of law allowing a contractor to set up and enforce a lien upon a part of any railroad, though such part may be all of the road which the contractor constructed or aided to construct. Farmers' Loan & Trust Co. v. Candler, 87 Ga. 241, 13 S.E. 560, 1891 Ga. LEXIS 140 (1891).

Contractor building a railroad has no equitable lien independent of O.C.G.A. § 44-14-361. Farmers' Loan & Trust Co. v. Candler, 92 Ga. 249, 18 S.E. 540, 1893 Ga. LEXIS 51 (1893).

No lien for subcontractor building railroad. — The lien given by O.C.G.A. § 44-14-361 to "contractors to build railroads" is confined to those contractors employed by the person or company owning the railroad, and the right of lien does not extend to subcontractors. Carter v. Rome & Carrollton Constr. Co., 89 Ga. 158, 15 S.E. 36, 1892 Ga. LEXIS 294 (1892).

Criminal liability for failure of general contractor to disburse funds to lienholders. — The general contractor is an interested witness. If the contractor receives the full contract price for the job the contractor becomes a trustee of the funds for the purpose of disbursing them

properly to those who hold valid claims for labor and materials, and the contractor's failure faithfully to do so would render the contractor criminally liable. Mullins v. Noland Co., 406 F. Supp. 206, 1975 U.S. Dist. LEXIS 14649 (N.D. Ga. 1975).

Notice of commencement defective. — Grant of summary judgment to the property owner on a materialman's lien was reversed because it failed to identify or provide contact information for its construction lender in its Notice of Commencement, rendering it fatally defective under O.C.G.A. § 44-14-361.5(d) and because the Notice of Commencement did not substantially comply with § 44-14-361.5(b), the material supplier's failure to file its Notice to Contractor within the prescribed time was excused under § 44-14-361.5(d). Capitol Materials, Inc. v. JLB Buckhead, LLC, 337 Ga. App. 848, 789 S.E.2d 803, 2016 Ga. App. LEXIS 351 (2016).

Owner as "contractor." — There was no reason why an owner could not also have been a contractor for purposes of a materialman's lien; because a property owner listed itself as "general contractor" in its notices of commencement, and because a materials supplier was not in privity with the owner, the supplier was required to provide the owner with the O.C.G.A. § 44-14-361(a) notice to contractor; since the supplier failed to give the proper notice, its materialman's liens were invalid. Roofing Supply of Atlanta, Inc. v. Forrest Homes, Inc., 279 Ga. App. 504, 632 S.E.2d 161, 2006 Ga. App. LEXIS 629 (2006).

Materialmen

Lien given to materialmen is purely statutory, and does not depend upon subrogation, except to the extent that the total amount paid out may not exceed the contract price. Roberts v. Georgia S. Supply Co., 92 Ga. App. 303, 88 S.E.2d 554, 1955 Ga. App. LEXIS 583 (1955).

Materialman's liens must strictly comply with section. — O.C.G.A. §§ 44-14-361 and 44-14-361.1 provide a method of effecting a lien for materials furnished for the purpose of improving real estate, and strict compliance with these sections is required. King v. Rutledge, 208 Ga. 172, 65 S.E.2d 801, 1951 Ga. LEXIS 315 (1951).

Section gives lien for materials furnished to improve real estate. — O.C.G.A. § 44-14-361 gives to one furnishing material for the improvement of real estate upon the employment of a contractor, or some other person than the owner, a lien upon the real estate improved for the material used in the improvement. Stevens Supply Co. v. Stamm, 41 Ga. App. 239, 152 S.E. 602, 1930 Ga. App. LEXIS 515 (1930).

O.C.G.A. § 44-14-361 provides a lien only to materialmen who may have supplied the materials directly to the owner of the realty, or to a contractor or a subcontractor engaged in making the improvement. Sims' Crane Serv., Inc. v. Reliance Ins. Co., 514 F. Supp. 1033, 1981 U.S. Dist. LEXIS 9561 (S.D. Ga. 1981), aff'd, 667 F.2d 30, 1982 U.S. App. LEXIS 22211 (11th Cir. 1982).

Materialmen must establish that the materials furnished actually were used in the improvement itself for the benefit of the owner of the realty. Taverrite v. Lowe's of Franklin, Inc., 166 Ga. App. 346, 304 S.E.2d 78, 1983 Ga. App. LEXIS 2161 (1983).

The inclusion of nonlienable items, easily separable from lienable items, does not defeat the entire lien. Taverrite v. Lowe's of Franklin, Inc., 166 Ga. App. 346, 304 S.E.2d 78, 1983 Ga. App. LEXIS 2161 (1983).

Remedies available to materialmen. — The remedies afforded a particular materialman under (1) the lien statute, (2) the bond statute for public contractors, and (3) the contractual rights appurtenant to a private payment bond, are distinct and separate, and, even though certain terminology may overlap, the judicial construction of that terminology is not uniform for all remedies. Sims' Crane Serv., Inc. v. Reliance Ins. Co., 514 F. Supp. 1033, 1981 U.S. Dist. LEXIS 9561 (S.D. Ga. 1981), aff'd, 667 F.2d 30, 1982 U.S. App. LEXIS 22211 (11th Cir. 1982).

Because O.C.G.A. § 44-14-361.1(a)(4) provided that where a contractor was adjudicated bankrupt or, if after an action was filed, no final judgment could be ob-

Materialmen (Cont'd)

tained against the contractor because of its adjudication in bankruptcy, the materialman was not required to file an action or obtain judgment against the contractor before enforcing a lien against the improved property; moreover, the materialman could enforce the lien directly against the property by filing an action against the owner within 12 months from the time the lien became due. SAKS Assocs., LLC v. Southeast Culvert, Inc., 282 Ga. App. 359, 638 S.E.2d 799, 2006 Ga. App. LEXIS 1388 (2006).

Notice adequate. — In the general contractor's action against the materials provider relating to the provider's request for payment under a payment bond, the general contractor's notice of commencement and the provider's notice to contractor complied with O.C.G.A. § 10-7-31; although the notice of commencement stated that it was pursuant to O.C.G.A. § 44-14-361.5 and the notice to contractor stated that it was sent under O.C.G.A. § 44-14-361, O.C.G.A. § 10-7-31 did not require that either of the notices be expressly labeled as being provided under the statute, the notices contained the pertinent information contemplated by O.C.G.A. § 10-7-31, including that the general contractor had provided a payment bond and that the provider had provided materials for the project through improvements made by the subcontractor, and the notice of commencement was not misfiled under O.C.G.A. § 10-7-31(d) because it was labeled as provided under O.C.G.A. § 44-14-361.5, as the indexing requirements of both statutes were substantially identical. Sierra Craft, Inc. v. T. D. Farrell Constr., Inc., 282 Ga. App. 377, 638 S.E.2d 815, 2006 Ga. App. LEXIS 1398 (2006), cert. denied, No. S07C0460, 2007 Ga. LEXIS 145 (Ga. Feb. 5, 2007).

Material must be furnished under contract. — O.C.G.A. § 44-14-361 has been construed to mean that the material so furnished must be under contract with a contractor or with some person occupying a similar relation to the owner as that of contractor. Stevens Supply Co. v. Stamm, 41 Ga. App. 239, 152 S.E. 602, 1930 Ga. App. LEXIS 515 (1930).

Mere knowledge that improvements are to be made will not subject the title of the true owner to a lien for material. Bryant v. Ellenburg, 106 Ga. App. 510, 127 S.E.2d 468, 1962 Ga. App. LEXIS 749 (1962).

Who must contract with materialman. — There need not be a contract between the materialman and the true owner, but there must be a contract for material with a person who has contracted with the true owner for the erection of the improvements. Marshall v. Peacock, 205 Ga. 891, 55 S.E.2d 354, 1949 Ga. LEXIS 600 (1949).

Contract necessary to fix liability of owner and establish a privity between the owner and the materialman. Marshall v. Peacock, 205 Ga. 891, 55 S.E.2d 354, 1949 Ga. LEXIS 600 (1949).

Agreement between owner and contractor does not affect materialman's lien. — The lien of a materialman is not affected by any private arrangement between the property owner and the contractor. Tuck v. Moss Mfg. Co., 127 Ga. 729, 56 S.E. 1001, 1907 Ga. LEXIS 469 (1907).

Suppliers' entitled to lien under section generally. — O.C.G.A. § 44-14-361 provides a lien only to materialmen who may have supplied the materials directly to the owner of the realty, or to a contractor or a subcontractor engaged in making the improvement. Georgia-Pacific Corp. v. Dan Austin Properties, Inc., 126 Ga. App. 191, 190 S.E.2d 131, 1972 Ga. App. LEXIS 1096, aff'd, 229 Ga. 803, 194 S.E.2d 472, 1972 Ga. LEXIS 778 (1972).

O.C.G.A. § 44-14-361 does not, by its terms, permit a materialman's lien for the cost of repairs. Sims' Crane Serv., Inc. v. Reliance Ins. Co., 514 F. Supp. 1033, 1981 U.S. Dist. LEXIS 9561 (S.D. Ga. 1981), aff'd, 667 F.2d 30, 1982 U.S. App. LEXIS 22211 (11th Cir. 1982).

Seller of building equipment and tools not entitled to lien. — One who sells shovels, shovel handles, gloves, tape, rope, files, matches, pulley and hook, hammers, brushes, sand screen, lamp chimney, and saw files to a contractor who has a contract for improving realty is not entitled to a lien for those items. D.H. Overmyer Whse. Co. v. W.C. Caye & Co.,

116 Ga. App. 128, 157 S.E.2d 68, 1967 Ga. App. LEXIS 720 (1967).

No lien for one who furnishes equipment and tools, but performs no labor or services. — The owner of horses, equipment or machinery, who furnishes them to another to aid in construction or improvements, or in any work for which a lien is given, but who performs no manual labor or other services in connection therewith, is not entitled to a lien. D.H. Overmyer Whse. Co. v. W.C. Caye & Co., 116 Ga. App. 128, 157 S.E.2d 68, 1967 Ga. App. LEXIS 720 (1967).

No lien for supplier of supplier. — The supplier of a supplier of materials to be used in the improvement of realty is not entitled to a claim of lien therefor under O.C.G.A. § 44-14-361. Georgia-Pacific Corp. v. Dan Austin Properties, Inc., 126 Ga. App. 191, 190 S.E.2d 131, 1972 Ga. App. LEXIS 1096, aff'd, 229 Ga. 803, 194 S.E.2d 472, 1972 Ga. LEXIS 778 (1972).

A supplier to a supplier is not entitled to claim a lien under O.C.G.A. § 44-14-361. Porter Coatings v. Stein Steel & Supply Co., 157 Ga. App. 260, 277 S.E.2d 272, 1981 Ga. App. LEXIS 1769, aff'd, 247 Ga. 631, 278 S.E.2d 377, 1981 Ga. LEXIS 820 (1981).

No lien for material furnished subcontractor. — A materialman furnishing material for the improvement of real estate to a subcontractor who has no contractual relation with the owners of such realty does not thereby acquire a lien upon the property so improved. General Supply Co. v. Hunn, 126 Ga. 615, 55 S.E. 957, 1906 Ga. LEXIS 483 (1906); George W. Muller Bank Fixture Co. v. Georgia State Sav. Ass'n, 143 Ga. 840, 85 S.E. 1018, 1915 Ga. LEXIS 630 (1915).

Debt incurred whether or not material used. — A finding that the realty ought not be charged with a debt for the reason that the realty as finally improved does not contain the material furnished is not a finding that the debt is not owing and may go unpaid. The debt itself does not depend upon the nicety of whether the material was or was not finally incorporated into the improvement. The debt exists if materials were furnished and not paid for. United Bonding Ins. Co. v. Good-Wynn Elec. Supply Co., 124 Ga. App. 545, 184 S.E.2d 508, 1971 Ga. App. LEXIS 1015 (1971).

Georgia law recognizes the constructive trust fund doctrine with respect to payments owed materialmen by their contractors for improvements made to a third party's realty. Bethlehem Steel Corp. v. Tidwell, 66 B.R. 932, 1986 U.S. Dist. LEXIS 18107 (M.D. Ga. 1986).

Constructive trust in favor of a materialman does not automatically exist as a result of O.C.G.A. § 44-14-361 with regard to funds transferred by a payor to a construction contractor/debtor. In re Sun Belt Elec. Constructors, Inc., 56 B.R. 686, 1986 Bankr. LEXIS 6886 (Bankr. N.D. Ga. 1986).

Materialmen having a beneficial interest in a contractor's bond may bring an action on the bond in their own name rather than in the name of the nominal obligee. Sims' Crane Serv., Inc. v. Reliance Ins. Co., 514 F. Supp. 1033, 1981 U.S. Dist. LEXIS 9561 (S.D. Ga. 1981), aff'd, 667 F.2d 30, 1982 U.S. App. LEXIS 22211 (11th Cir. 1982).

When materialman of subcontractor may bring action on payment bond. — If the general contractor's payment bond defines a claimant under the bond as one supplying material to a subcontractor, then a materialman of a subcontractor may bring an action on the bond for the subcontractor's nonpayment; if the bond expressly limits a right of action on the bond to the named obligees or is conditioned on the general contractor's payment of only those materialmen having a direct relationship with the general contractor, then a materialman of a subcontractor may not bring action on the payment bond; and if the bond is conditioned on the general contractor's payment of all persons furnishing labor and material under or for the contract, then, at a minimum, materialmen of the general contractor may maintain an action on the bond. Sims' Crane Serv., Inc. v. Reliance Ins. Co., 514 F. Supp. 1033, 1981 U.S. Dist. LEXIS 9561 (S.D. Ga. 1981), aff'd, 667 F.2d 30, 1982 U.S. App. LEXIS 22211 (11th Cir. 1982).

Materials delivered are presumed to have been used. — A materialman is not required to show that the materials

Materialmen (Cont'd)

for which the materialman claims a lien were actually used on the job of the owner against whose interest the materialman is asserting the lien. It is the general rule that there is a presumption of the use of materials in a building or improvement arising from the fact of their delivery thereto for that purpose, and the burden is then on the property owner to prove that the material was not so used. Maloy v. Planter's Whse. & Lumber Co., 142 Ga. App. 69, 234 S.E.2d 807, 1977 Ga. App. LEXIS 1478 (1977).

Improvements on separate pieces of property. — Where there is a single contract for improvements on separate pieces of property the lien for materials furnished attaches to each piece of property. Lyon v. Cedartown Lumber Co., 13 Ga. App. 450, 79 S.E. 236, 1913 Ga. App. LEXIS 191 (1913).

Materialman need not show what material went into each house. — To entitle a materialman to a single lien on several houses, being simultaneously built under one operation, for material furnished generally for them all, and to be used indiscriminately among them as needed, it is not necessary for such materialmen to prove just what material went into any particular house, provided it is shown that the material was delivered under such order. Christian v. Bremer, 199 Ga. 285, 34 S.E.2d 40, 1945 Ga. LEXIS 303 (1945).

All charges made by materialman for use of equipment are nonlienable items. Sears Roebuck & Co. v. Superior Rigging & Erecting Co., 120 Ga. App. 412, 170 S.E.2d 721, 1969 Ga. App. LEXIS 796 (1969).

When vendor liable for liens on vendee's improvements. — The liens of laborers and materialmen do not rest upon contract but upon the law, and the title of the true owner cannot be subjected to liens for materials or labor done in its improvement unless the owner expressly or impliedly consents to the contract under which the improvements are made. However, when the vendor has in some way consented to the improvements of real estate by the vendee, or has expressly or impliedly authorized it, or has cooperated with the vendee in the plans for the improvements, or has been active and instrumental in having the improvements made, such liens will attach to the property. West Lumber Co. v. Gignilliat, 77 Ga. App. 336, 48 S.E.2d 688, 1948 Ga. App. LEXIS 549 (1948).

A vendor of real estate, who induces one who has a contract to purchase land, to expend labor and material in improving the land, cannot defeat the claims for liens by those who contribute their labor and material to enhance the value of the property. In such a case, in the absence of a controlling agreement, the vendor cannot insist that the mechanic's lien shall be subordinated to the vendor's title or interest in the realty. Williams v. Brewton, 170 Ga. 164, 152 S.E. 441, 1930 Ga. LEXIS 412 (1930).

Vendee who approves vendor's improvements after contract liable for materialman's lien. — Where a vendor improves real estate and the vendee, under a contract to purchase, consents to and cooperates in the improving of the property subsequently to the executory contract of sale, the lien of a materialman for materials furnished to the vendor for the improvement of the property, properly prepared and recorded and foreclosed in time, binds the interests of both vendor and vendee in the property even though the vendee receives a deed to the property and records it before the materialman's lien is filed for record and recorded. West Lumber Co. v. Gignilliat, 77 Ga. App. 336, 48 S.E.2d 688, 1948 Ga. App. LEXIS 549 (1948).

O.C.G.A. § 44-14-361 does not operate in favor of contractor paving a sidewalk in a street adjacent to a lot. Seeman v. Schultze, 100 Ga. 603, 28 S.E. 378, 1897 Ga. LEXIS 112 (1897).

Contractor's lien attaches from time work is commenced or material is furnished under the contract. Old Stone Mtg. & Realty Trust v. New Ga. Plumbing, Inc., 140 Ga. App. 686, 231 S.E.2d 785, 1976 Ga. App. LEXIS 1601 (1976), aff'd, 239 Ga. 345, 236 S.E.2d 592, 1977 Ga. LEXIS 910 (1977).

When materialman's lien attaches. — The lien of a materialman on real estate, arising under O.C.G.A. §§ 44-14-

361 and 44-14-380, attaches from the time the work under the contract is commenced or the material is furnished. Spirides v. Victory Lumber Co., 76 Ga. App. 78, 45 S.E.2d 65, 1947 Ga. App. LEXIS 374 (1947).

The lien of a materialman upon property, for the improvement of which the material was furnished, as provided in O.C.G.A. §§ 44-14-361 and 44-14-361.1, attaches when the material is furnished in accordance with the contract. This is true notwithstanding the lien may become divested in favor of a bona fide purchaser of the property without notice of the lien. Davis v. Stone, 48 Ga. App. 532, 173 S.E. 454, 1934 Ga. App. LEXIS 121 (1934).

Perfected materialmen's liens relate back to time work begins. — Liens under O.C.G.A. § 44-14-361 relate back to the time the work under the contract commenced, provided that the lien is properly perfected. Marietta Baptist Tabernacle v. Tomberlin Assocs., 576 F.2d 1237, 1978 U.S. App. LEXIS 9984 (5th Cir. 1978).

Lien covers all items delivered if last item lienable. — A materialman's lien rights attach following the first delivery of materials to be used on a job and expire 90 days following the date of the last delivery. Assuming the last item delivered is a lienable item, then the subsequently perfected lien relates back to cover all items delivered, including those items delivered more than 90 days prior to filing the lien. Mullins v. Noland Co., 406 F. Supp. 206, 1975 U.S. Dist. LEXIS 14649 (N.D. Ga. 1975).

Materialman may pursue lien rights prior to payment and despite subcontractor's bankruptcy. — Prior to payment, and notwithstanding the intervening bankruptcy of the subcontractor, a materialman may enforce inchoate lien rights against the owner. Mullins v. Noland Co., 406 F. Supp. 206, 1975 U.S. Dist. LEXIS 14649 (N.D. Ga. 1975).

Materialman's lien was void. — Subcontractor's O.C.G.A. § 44-14-361 special lien was void because the subcontractor failed to comply with the perfection requirements in O.C.G.A. § 44-14-361.5(a), (c); the fact that the general contractor on a construction project had failed to post a notice of commencement at the construction site did not absolve the subcontractor from complying with the perfection requirements. Rey Coliman Contrs., Inc. v. PCL Constr. Servs., 296 Ga. App. 892, 676 S.E.2d 298, 2009 Ga. App. LEXIS 344 (2009).

Lost profits not lienable. — Contractor's estimated lost profits were not lienable because lost profits did not relate to work performed, or any value added, to the client's property. Duke Builders, Inc. v. Massey, 351 Ga. App. 535, 831 S.E.2d 172, 2019 Ga. App. LEXIS 445 (2019), aff'd, 310 Ga. 152, 849 S.E.2d 186, 2020 Ga. LEXIS 653 (2020).

Jury instructions. — Trial court did not err in refusing to give a jury instruction on privileged communications under O.C.G.A. § 51-5-7(3), where the materialman's lien claimant's claim of lien was not properly limited in scope; the lien claimant's lien was almost eight times the amount the claimant supplied in labor and materials for improvement of the property. Amador v. Thomas, 259 Ga. App. 835, 578 S.E.2d 537, 2003 Ga. App. LEXIS 273 (2003).

Machinists and Manufacturers of Machinery

Machinery which cannot be basis of lien. — The general rule is that machinery not totally depreciated by use on the property or incorporated into the improvement, or in connection with which labor was also supplied cannot be the basis of a valid lien. Air Serv. Co. v. Cosmo Invs., Inc., 115 Ga. App. 596, 155 S.E.2d 413, 1967 Ga. App. LEXIS 1179 (1967).

Equipment or machinery rented or leased to contractors to perform their work nonlienable. Mableton Erectors, Inc. v. Dunn Properties of Ga., Inc., 135 Ga. App. 504, 218 S.E.2d 175, 1975 Ga. App. LEXIS 1718 (1975).

No machinist's lien on realty unless machine becomes fixture. — Machinists and manufacturers of machinery have no lien on real estate for machinery furnished, unless the machinery furnished is attached to, and becomes incorporated with, the realty for which it was furnished. J.S. Schofield & Son v. Stout, Mills & Temple, 59 Ga. 537, 1877 Ga. LEXIS

Machinists and Manufacturers of Machinery (Cont'd)

326 (1877); D.H. Overmyer Whse. Co. v. W.C. Caye & Co., 116 Ga. App. 128, 157 S.E.2d 68, 1967 Ga. App. LEXIS 720 (1967).

Lessor of machinery not attached to realty not entitled to lien. — A mere lessor of machinery to a contractor does not come within the class in favor of whom the lien is granted, nor does the machinery itself, not being something in the order of a steam mill or other mechanical device intended to be attached to and used on the realty. D.H. Overmyer Whse. Co. v. W.C. Caye & Co., 116 Ga. App. 128, 157 S.E.2d 68, 1967 Ga. App. LEXIS 720 (1967).

Lessor of air compressor and drill to contractor has no lien on realty improved. — O.C.G.A. § 44-14-361 does not give a lessor of machinery consisting of an air compressor and drill a lien on real estate for the rental value of the machinery leased to a contractor who uses it in improving the real estate of the owner against whom the lien is sought. Air Serv. Co. v. Cosmo Invs., Inc., 115 Ga. App. 596, 155 S.E.2d 413, 1967 Ga. App. LEXIS 1179 (1967).

Rental on company's scaffolding not lienable. D.H. Overmyer Whse. Co. v. W.C. Caye & Co., 116 Ga. App. 128, 157 S.E.2d 68, 1967 Ga. App. LEXIS 720 (1967).

Furnishing machinery for sawmill comes under section. — The furnishing of machinery for a steam sawmill, to improve or enlarge the mill or to keep it efficient, entitles the machinist to a lien under O.C.G.A. § 44-14-361 and not O.C.G.A. § 44-14-515. Filer & Stowell Co. v. Empire Lumber Co., 91 Ga. 657, 18 S.E. 359, 1893 Ga. LEXIS 300 (1893).

Priority of Liens

To be superior to other liens, lienholder must comply with every condition. — O.C.G.A. § 44-14-361 is in derogation of the common law, and must be construed strictly. Before the lien which it creates in favor of certain persons, under certain circumstances, which overrides all other liens, can be allowed, the party must show compliance with all the conditions, and be personally brought within all the requirements and limitations of the statute. Kwilecki v. Young, 180 Ga. 602, 180 S.E. 137, 1935 Ga. LEXIS 501 (1935).

There is a presumption of no notice to the grantee in a warranty deed, security deed or even a quitclaim deed. Bryant v. Ellenburg, 106 Ga. App. 510, 127 S.E.2d 468, 1962 Ga. App. LEXIS 749 (1962).

Priority as between security deed and materialman's lien. — The bona fide holder of a security deed executed before the first material was furnished, and therefore necessarily prior to the record of the materialman's claim of lien, will take priority over the materialman's claim of lien, although the security deed was itself not recorded until after the first material was furnished. The rule would be different where the holder of the security deed had actual notice of the furnishing of the material prior to the execution of the deed; and might be different where the holder of the security deed had such actual notice prior to the record of the security deed. Caldwell v. Northwest Atlanta Bank, 194 Ga. 370, 21 S.E.2d 619, 1942 Ga. LEXIS 571 (1942).

An architect's lien attaches from the time the first work is done or the first material provided. Murray v. Chulak, 250 Ga. 765, 300 S.E.2d 493, 1983 Ga. LEXIS 599 (1983).

When grantee of deed loses priority over materialman's lien. — Grantee in a deed may lose priority over a materialman's lien where the grantee: has actual notice of the claim of lien, has constructive notice because the lien has been previously recorded, has consented to the making of the improvement either expressly or impliedly, or has misled the materialman as to the ownership of the property, giving rise to an estoppel. Bryant v. Ellenburg, 106 Ga. App. 510, 127 S.E.2d 468, 1962 Ga. App. LEXIS 749 (1962).

When contractor's lien takes priority over grantee of deed to secure debt. — The lien of a contractor on real estate improved under a contract with the owner thereof, as provided by law, if and when created and declared as required by law, attaches from the time the work under the contract is commenced, and will

take priority over the title acquired after the commencing of work by the contractor and with actual notice of the contractor's claim by a grantee of a deed to secure debt from the owner of the real estate although the deed to secure debt was executed and recorded before the completion of the contract and before the claim of lien was formally filed of record. Gellis v. B.L.I. Constr. Co., 148 Ga. App. 527, 251 S.E.2d 800, 1978 Ga. App. LEXIS 3217 (1978).

Purchaser subject to lien if aware of unrecorded claim which is later properly perfected. — A contractor's lien attaches from the time the work under the contract is commenced, although it lacks, certainly until it is recorded, the quality of constructive notice, but one who takes a deed to the property or purchases it while work is in progress, with knowledge of the contract and notice of the contractor's claim of lien, though imperfect or unrecorded at that time, must be held to take the property subject to the lien, provided that the contract is completed and the lien is declared and enforced within the time prescribed by Georgia law. Gellis v. B.L.I. Constr. Co., 148 Ga. App. 527, 251 S.E.2d 800, 1978 Ga. App. LEXIS 3217 (1978).

Purchaser at foreclosure sale under security deed who records before improvements not liable for lien. — The title of the true owner of land cannot be subjected to a lien for improvements, unless the owner expressly or impliedly assents to the contract under which the improvements are made. The grantee in a security deed is the true owner of the legal title. Where such deed is duly recorded before improvements are made, the purchaser at a foreclosure sale under the security deed holds title free from any lien for improvements placed upon the land subsequent to the execution and record of the security deed. Rutland Contracting Co. v. Gay Estate, 193 Ga. 468, 18 S.E.2d 835, 1942 Ga. LEXIS 416 (1942).

Where security deed is executed before delivery of any material, and therefore necessarily before the record of the materialmen's claim of lien, no question of notice to the grantee as to the materialmen's claims of lien at the time the security deed was executed would be involved. Caldwell v. Northwest Atlanta Bank, 194 Ga. 370, 21 S.E.2d 619, 1942 Ga. LEXIS 571 (1942).

When materialman's lien prevails over vendor's lien. — A materialman's lien will prevail over that of a vendor, and attaches to the property improved, if the contract of sale provided that the vendor should go on and build upon the premises. Williams v. Brewton, 170 Ga. 164, 152 S.E. 441, 1930 Ga. LEXIS 412 (1930).

Architect's lien dated from time defendant later acquired interest in property. — Where defendant did not own the property at the time the defendant's architect commenced work and defendant was seeking to acquire the property from the property's owner and was not acting as agent for the property's owner, the architect's lien dated only from the time the defendant later acquired an interest in the property. Murray v. Chulak, 250 Ga. 765, 300 S.E.2d 493, 1983 Ga. LEXIS 599 (1983).

A purchase money security deed or mortgage had priority over an architect's liens against the purchaser of the property where the purchaser had simultaneously executed a security deed or mortgage for the purchase money and the provider of the purchase money did not have knowledge of the architect's lien. Murray v. Chulak, 250 Ga. 765, 300 S.E.2d 493, 1983 Ga. LEXIS 599 (1983).

Owner's Liability and Defenses

O.C.G.A. § 44-14-361 does not require filing of notice at time of commencement of action against the owner. D & T Glass, Inc. v. Barrow Enters., Inc., 172 Ga. App. 797, 325 S.E.2d 170, 1984 Ga. App. LEXIS 2668 (1984).

Amendment of materialmen's lien. — Georgia Supreme Court held that the Georgia Court of Appeals properly held that amendment of a materialmen's lien was authorized by O.C.G.A. § 44-14-361.1(a.1) and that the lien amount may be reduced at any time. Massey v. Duke Builders, Inc., 310 Ga. 152, 849 S.E.2d 186, 2020 Ga. LEXIS 653 (2020).

Owner need not pay more than contract price to materialmen and laborers. — A lien given by O.C.G.A. § 44-14-361 attaches to the real estate improved

Owner's Liability and Defenses (Cont'd)

but the owner is not required to pay more than the contract price of the improvement to materialmen and laborers. Thompson v. Brannen Bldg. Supply, 153 Ga. App. 4, 264 S.E.2d 498, 1980 Ga. App. LEXIS 1651 (1980).

Owner who pays contractor protected against materialmen's claims after contractor pays claims. — Where an owner of real estate, upon which improvements have been erected by a contractor, has paid the full contract price to the contractor, and the contractor has applied the whole amount so received by the contractor to the payment of valid claims for material and labor employed in constructing the improvements, the owner will be protected against claims of lien for material furnished to the contractor, filed subsequently to payment and application of the full contract price as above indicated. Jones Brick Co. v. Seagler Bros., 146 Ga. 19, 90 S.E. 473, 1916 Ga. LEXIS 558 (1916).

Owner protected against claims recorded after payment and disbursement of contract price. — The owner is protected as against claims for liens which may have been filed and recorded subsequent to the full payment and proper disbursement of the contract price. Short & Paulk Supply Co. v. Dykes, 120 Ga. App. 639, 171 S.E.2d 782, 1969 Ga. App. LEXIS 889 (1969).

Owner may apply cost of completion to lien when contractor abandons project. — Where a contractor abandons the contract without paying the materialman, who then files lien against owner for materials furnished the contractor and the owner, in order to obtain its completion engages others to furnish material and labor, the cost of completion may be applied by the owner, up to the contract price, as against the lien. Roberts v. Georgia S. Supply Co., 92 Ga. App. 303, 88 S.E.2d 554, 1955 Ga. App. LEXIS 583 (1955).

Amount owner owes lienholders when completing building abandoned by contractor. — Where a contractor, under a definite contract containing a stipulated price for the entire work, undertakes to erect a building on a lot of land and abandons the construction of the building, the owner may complete the work; and if the owner does so, the necessary cost of so doing may be deducted from the contract price, and the property will be subject to the liens of materialmen and laborers to the extent only of the balance. Young v. Harley-Mitchell Hdwe. Co., 173 Ga. 35, 159 S.E. 567, 1931 Ga. LEXIS 252 (1931); Wooten v. Ford, 46 Ga. App. 50, 166 S.E. 449, 1932 Ga. App. LEXIS 35 (1932).

Owner not liable for amount in excess of contract price when contractor abandons project. — Under O.C.G.A. § 44-14-361, the owner is in no event liable for an amount in excess of the contract price, and if the contractor abandons the contract, the owner may have it completed and charge the necessary cost of completion against the contract price, before being liable either to the contractor or to the materialman. Spirides v. Victory Lumber Co., 76 Ga. App. 78, 45 S.E.2d 65, 1947 Ga. App. LEXIS 374 (1947).

What owner must show when contractor abandons. — Where a contractor abandons the contract, the cost of completing the work is to be deducted from the contract price in order to ascertain the amount up to which the subcontractors may claim liens. If such deductions, together with payments previously made to the contractor, equal or exceed the entire contract price, then the subcontractors, mechanics, and materialmen have no lien, since there is nothing due under the contract. The owner is required to show that the sums paid to the contractor were properly appropriated to materialmen and laborers or that the contractor's statutory affidavit concerning such indebtedness had been obtained. Jones Mercantile Co. v. Lyn-Har, Inc., 245 Ga. 812, 267 S.E.2d 251, 1980 Ga. LEXIS 945 (1980); Thompson v. Brannen Bldg. Supply, 153 Ga. App. 4, 264 S.E.2d 498, 1980 Ga. App. LEXIS 1651 (1980).

Where owner contracts to pay by installments the owner does so at the owner's own risk as to claims of subcontractors. Massachusetts Bonding & Ins. Co. v. Realty Trust Co., 142 Ga. 499, 83

S.E. 210, 1914 Ga. LEXIS 442 (1914), writ of error dismissed, 241 U.S. 687, 36 S. Ct. 451, 60 L. Ed. 1237, 1916 U.S. LEXIS 1857 (1916).

Estoppel against owner's denial that materialman performed contract. — Where the owner receives and uses the materials furnished by a subcontractor and has paid the contractor more than the amount claimed by the materialman, the owner is estopped to deny that the materialman had performed the contract. Koppe & Steinichen v. Rylander, 33 Ga. App. 686, 128 S.E. 68, 1925 Ga. App. LEXIS 682 (1925), aff'd, 162 Ga. 300, 133 S.E. 236, 1926 Ga. LEXIS 167 (1926).

Estoppel by representations that materials to be used in building. — Where materials are furnished on representation of the owner of real estate that it is to be used in building thereon, the owner is estopped from setting up that some of it was not so used. Howell v. Cordray, 22 Ga. App. 195, 95 S.E. 762, 1918 Ga. App. LEXIS 237 (1918).

Consent of owner to contract necessary. — The title of the true owner of land cannot be subjected to a lien for material or labor done in its improvement unless the owner expressly or impliedly consents to the contract under which the improvements are made. Reppard, Snedeker & Co. v. Morrison, 120 Ga. 28, 47 S.E. 554, 1904 Ga. LEXIS 436 (1904); Williams v. Brewton, 170 Ga. 164, 152 S.E. 441, 1930 Ga. LEXIS 412 (1930).

Section permits materialman's lien only if owner contracts for or assents to improvements. — The purpose of O.C.G.A. § 44-14-361 is to charge the owner of real estate with a lien for material furnished only when there was a specific contract for the improvements made, either made by the owner or assented to by the owner. Marshall v. Peacock, 205 Ga. 891, 55 S.E.2d 354, 1949 Ga. LEXIS 600 (1949).

Lien applies only where owner authorizes improvements. — O.C.G.A. § 44-14-361 is dependent upon consent of the true owner, and subsection (b) is predicated upon the existence of authority from the owner to the contractor or other person to have the improvement made. This is shown by the provision therein that in no event shall the aggregate of liens exceed the contract price. Where a stranger to title or other person contracts or employs a third person to make improvements, the owner of the land is not bound to disclose to such third person the fact of ownership, and such third person has no lien on the land. Rutland Contracting Co. v. Gay Estate, 193 Ga. 468, 18 S.E.2d 835, 1942 Ga. LEXIS 416 (1942).

No lien against owner where no contract between owner and recipient of materials. — Where there is an absence of a showing of a contractual relationship between the owner and the person to whom the materials were furnished, no enforceable lien is created against the owner's property. Liggett v. Harper, 151 Ga. App. 616, 260 S.E.2d 735, 1979 Ga. App. LEXIS 2662 (1979).

Individuals who may not contract for improvements to bind true owner. — A stranger may not order work done upon real estate and thus charge the true owner. Neither may a tenant, unless there is some relation existing between the tenant and the landlord other than that of lessor and lessee. Marshall v. Peacock, 205 Ga. 891, 55 S.E.2d 354, 1949 Ga. LEXIS 600 (1949).

Lessee cannot bind owner absent agreement. — One who furnishes material for the improvement of real estate, upon the employment of a contractor whose contract for the improvement is with a lessee, and who sustains no contractual relation with the owner of the fee, is not entitled to a lien as against such owner of the premises under the provisions of O.C.G.A. § 44-14-361. Reppard, Snedeker & Co. v. Morrison, 120 Ga. 28, 47 S.E. 554, 1904 Ga. LEXIS 436 (1904); Pittsburgh Plate Glass Co. v. Peters Land Co., 123 Ga. 723, 51 S.E. 725, 1905 Ga. LEXIS 586 (1905); Stevens Supply Co. v. Stamm, 41 Ga. App. 239, 152 S.E. 602, 1930 Ga. App. LEXIS 515 (1930).

Lessee cannot bind the owner even where the owner authorized the improvement, nor where the owner reimbursed the lessee, nor where the lessor owns a majority of the stock of the lessee. Central of Ga. Ry. v. Shiver, 125 Ga. 218, 53 S.E. 610, 1906 Ga. LEXIS 94 (1906); Consolidated Lumber Co. v. Ocean S.S. Co., 142

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Ga. 186, 82 S.E. 532, 1914 Ga. LEXIS 644 (1914).

Where the lessee is acting on own behalf alone in contracting to have the improvements made, the lessee is not the agent of the lessor in that transaction. If there is no contractual relation between the contractor and the lessor as to the making of the repairs, there is no materialman's lien. Stevens Supply Co. v. Stamm, 41 Ga. App. 239, 152 S.E. 602, 1930 Ga. App. LEXIS 515 (1930).

A contract for improvements between a lessee and a materialman does not subject the interest of the lessor to a lien unless a contractual relationship exists between the lessor and the materialman as well. Accurate Constr. Co. v. Dobbs Houses, Inc., 154 Ga. App. 605, 269 S.E.2d 494, 1980 Ga. App. LEXIS 2308 (1980).

A tenant cannot order work done upon the demised premises and charge the owner with the cost, unless there is some relation existing between the tenant and the landlord other than that of lessor and lessee, by virtue of which the landlord expressly or impliedly consents to the contract under which the improvements are made. Stevens Supply Co. v. Stamm, 41 Ga. App. 239, 152 S.E. 602, 1930 Ga. App. LEXIS 515 (1930).

Where a lessee contracted to make improvements to leased property and was obligated by the terms of the lease to be solely responsible for the costs thereof, a subcontractor had no right to impose a lien against the owner's reversionary interest in the property based on unpaid labor and materials because the lessee was not acting as an agent for the owner pursuant to O.C.G.A. § 44-14-361(b). Worley v. Cowper Constr. Co., 259 Ga. App. 263, 576 S.E.2d 645, 2003 Ga. App. LEXIS 71 (2003).

Landlord must expressly or impliedly authorize tenant's improvements. — The mere knowledge of the landlord that the improvements are being made by the tenant is insufficient to charge the landlord or the landlord's premises with their cost. The landlord must either expressly or impliedly authorize the tenant to make the improvements for the former's benefit. Stevens Supply Co. v. Stamm, 41 Ga. App. 239, 152 S.E. 602, 1930 Ga. App. LEXIS 515 (1930).

Mere knowledge by lessor of improvements does not give rise to lien. Accurate Constr. Co. v. Dobbs Houses, Inc., 154 Ga. App. 605, 269 S.E.2d 494, 1980 Ga. App. LEXIS 2308 (1980).

Materialman's lien was enforceable against the landlord if the amount due under the lien was payable by the landlord to the tenant under the tenant improvement allowance in the lease. Corley Communications, Inc. v. Northwinds Ctr., L.P., 250 Ga. App. 775, 552 S.E.2d 131, 2001 Ga. App. LEXIS 814 (2001), cert. denied, No. S01C1736, 2002 Ga. LEXIS 329 (Ga. Apr. 15, 2002).

Owner's consent to improvement required. — Where there was no evidence showing that the owner had expressly or impliedly consented to the improvements made on its property, the superior court did not err in granting summary judgment to the owner. Anatek, Inc. v. CSX Realty Dev., L.L.C., 243 Ga. App. 552, 532 S.E.2d 115, 2000 Ga. App. LEXIS 385 (2000).

Notice of lien unnecessary where party consents to improvements. — The rule of actual notice of claim of lien does not apply except as to those who do not consent to or cooperate in the making of improvements. The law charges with notice those who consent or cooperate. West Lumber Co. v. Gignilliat, 77 Ga. App. 336, 48 S.E.2d 688, 1948 Ga. App. LEXIS 549 (1948).

Landlord not liable for excess costs of improvement. — Where a landlord approved a construction contract only to the extent of the $59,400 allowance for improvements it granted to the tenant, the tenant became the agent of the landlord for up to $59,400 in contract costs. However, although the landlord consented to improvements made in excess of the allowance, it could not be said that the landlord became a party to the contract for any improvements exceeding that amount. Thus, it could not be said that these additional improvements were furnished at the instance of the owner or some person acting for the owner. F.S.

Assocs. v. McMichael's Constr. Co., 197 Ga. App. 705, 399 S.E.2d 479, 1990 Ga. App. LEXIS 1451 (1990).

Owner not estopped by silence on improvements made by stranger. — The true owner, though cognizant that a stranger to the title is having improvements made on the premises, is under no legal duty to give to a materialman any information touching the ownership of the property; and the owner will not be estopped from setting up title thereto, as against a materialman, when nothing has been done by anyone to mislead the materialman as to the ownership of the premises improved. Rice v. Warren, 91 Ga. 759, 17 S.E. 1032, 1893 Ga. LEXIS 484 (1893); Reaves v. Meredeth, 123 Ga. 444, 51 S.E. 391, 1905 Ga. LEXIS 489 (1905); Bryant v. Ellenburg, 106 Ga. App. 510, 127 S.E.2d 468, 1962 Ga. App. LEXIS 749 (1962).

How owner bound by third party's improvements. — In some instances a true owner may be bound where improvements are made on the owner's property if the owner consents to the contract under which the improvements are made; still, before the owner can ratify the acts of the party who procured the improvements to be made, that party must have acted as or attempted to act as agent of and on the behalf of the owner. Morgan v. May Realty Co., 86 Ga. App. 261, 71 S.E.2d 438, 1952 Ga. App. LEXIS 928 (1952).

O.C.G.A. § 44-14-361 applies only so long as relation of owner and contractor continues. The contractor cannot bind the owner by ordering additional materials after the relation has ceased to exist. Sheehan v. South River Brick Co., 111 Ga. 444, 36 S.E. 759, 1900 Ga. LEXIS 558 (1900).

Mere payment of contract price to contractor is insufficient. — An owner's mere payment of the full contract price to the contractor, standing alone, is not and has never been a complete defense to foreclosure of a materialman's lien. An owner must not only show that full payment was actually made to the contractor, but also that the sums paid to the contractor were properly appropriated to materialmen and laborers or that the contractor's statutory affidavit concerning such indebtedness had been obtained. D & N Elec., Inc. v. Underground Festival, Inc., 202 Ga. App. 435, 414 S.E.2d 891, 1991 Ga. App. LEXIS 1782 (1991).

Owner must ensure lienholders are paid when lien recorded. — If a claim of lien has been filed and recorded, it is incumbent upon the owner of the improved real estate to see that payments to the contractor are, to the full amount of the contract price, appropriated to the materialmen and laborers. Thompson v. Brannen Bldg. Supply, 153 Ga. App. 4, 264 S.E.2d 498, 1980 Ga. App. LEXIS 1651 (1980).

Subcontractors' liens satisfied even after paying contractor. — Under O.C.G.A. § 44-14-361 the owner who pays the contractor must see to it that subcontractors having liens are satisfied, even though the liens have not been filed at the time of the payment. Green v. Farrar Lumber Co., 119 Ga. 30, 46 S.E. 62, 1903 Ga. LEXIS 11 (1903).

Only one affidavit by a contractor is contemplated by O.C.G.A. § 44-14-361. Short & Paulk Supply Co. v. Dykes, 120 Ga. App. 639, 171 S.E.2d 782, 1969 Ga. App. LEXIS 889 (1969).

What general contractor's affidavit must show. — The affidavit of the general contractor contemplated by O.C.G.A. § 44-14-361 requires the statement by the contractor that the agreed price has been paid; and it must appear that the owner has fulfilled the duty placed upon the owner by law by requiring the full contract price to be appropriated to materialmen and laborers to the extent of their claims. Whatley v. Alto Corp., 211 Ga. 718, 88 S.E.2d 398, 1955 Ga. LEXIS 440 (1955).

"Agreed price or reasonable value thereof" defined. — The "agreed price or reasonable value thereof" refers not to the contract price between the owner and the contractor for completing the improvement, but to the price agreed upon between the contractor and the supplier of labor, services, or materials, or the value of those. Short & Paulk Supply Co. v. Dykes, 120 Ga. App. 639, 171 S.E.2d 782, 1969 Ga. App. LEXIS 889 (1969).

Sworn statement is a single statement made after completion of work and before final settlement. Massachu-

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setts Bonding & Ins. Co. v. Realty Trust Co., 142 Ga. 499, 83 S.E. 210, 1914 Ga. LEXIS 442 (1914), writ of error dismissed, 241 U.S. 687, 36 S. Ct. 451, 60 L. Ed. 1237, 1916 U.S. LEXIS 1857 (1916). See also Waldon v. Maryland Cas. Co., 155 Ga. 76, 116 S.E. 838 (1923); Bankston v. Smith, 134 Ga. App. 882, 216 S.E.2d 634, 1975 Ga. App. LEXIS 2207 (1975), rev'd, 236 Ga. 92, 222 S.E.2d 375, 1976 Ga. LEXIS 775 (1976).

Affidavit applies to realty, not personalty. — The protective affidavit under O.C.G.A. § 44-14-361 relates to the improvement of real estate, and is not for application in respect to a lien on personal property. Gibbs v. Griffin, 123 Ga. App. 385, 181 S.E.2d 285, 1971 Ga. App. LEXIS 1234 (1971).

Affidavit by corporation. — Where the affidavit provided for in O.C.G.A. § 44-14-361(b) is offered in evidence, and it appears that the contractor is a corporation, such affidavit need not contain a sworn averment that the person executing the affidavit is the president of such corporation. It is sufficient if such affidavit was in fact executed by the president as a personal affidavit, and such affidavit should be admitted in evidence. Gignilliat v. West Lumber Co., 80 Ga. App. 652, 56 S.E.2d 841, 1949 Ga. App. LEXIS 896 (1949) (decided prior to 1983 amendment).

When owner has paid, owner needs only contractor's affidavit of payment to lienholders. — If the owner has paid the full construction contract price the owner should have ample evidence of that and the owner would not need the contractor's affidavit as to it to comply with O.C.G.A. § 44-14-361; what the owner does need from the contractor is an affidavit as to the contractor's payment of the price or value of labor, services, and materials, which is something about which the owner may hold no other evidence of payment. Short & Paulk Supply Co. v. Dykes, 120 Ga. App. 639, 171 S.E.2d 782, 1969 Ga. App. LEXIS 889 (1969); Certified Elec., Inc. v. Jerome, 161 Ga. App. 456, 288 S.E.2d 359, 1982 Ga. App. LEXIS 1913 (1982).

Owner need not show more than contractor's sworn affidavit. — Where proof of a proper affidavit under O.C.G.A. § 44-14-361(b) is made, it is not incumbent upon defendant to produce, in addition to the contractor's sworn affidavit, evidence that the owner made full payment to the contractor and that the contractor in turn properly disbursed payment to all valid claims of materialman. Lowe's of Ga., Inc. v. Merwin, 156 Ga. App. 876, 275 S.E.2d 812, 1981 Ga. App. LEXIS 1638 (1981) (decided prior to 1983 amendment, which rewrote subsection (b)).

Owner who improves realty cannot relieve another from lien by affidavit. — There is no provision of law for one who improves real estate while the legal title or its equivalent is in that person, to relieve another from a lien on the property by the making of an affidavit as is authorized under O.C.G.A. § 44-14-361. Old Stone Mtg. & Realty Trust v. New Ga. Plumbing, Inc., 140 Ga. App. 686, 231 S.E.2d 785, 1976 Ga. App. LEXIS 1601 (1976), aff'd, 239 Ga. 345, 236 S.E.2d 592, 1977 Ga. LEXIS 910 (1977) (decided prior to 1983 amendment, which rewrote subsection (b)).

No requirement that owner investigate whether affidavit properly executed, absent evidence of irregularity. — In the absence of any evidence indicating that the owner was aware of the irregularity, or allegations and proof of fraud or collusion, the owner is not required to make an independent investigation to determine that the proper procedures were followed in the execution of the affidavit. Jackson's Atlanta Ready Mix Concrete Co. v. Industrial Tractor Parts Co., 139 Ga. App. 422, 228 S.E.2d 324, 1976 Ga. App. LEXIS 1830 (1976) (decided prior to 1983 amendment, which rewrote subsection (b)).

Materialman's claim cannot be perfected when owner produces contractor's affidavit. — Under O.C.G.A. § 44-14-361(b), when the owner produces the affidavit of the contractor in compliance with that section, stating that all bills for

labor and material have been paid, the materialman's claim against the owner by command of the statute cannot be perfected into a lien upon the property of the owner. Gignilliat v. West Lumber Co., 80 Ga. App. 652, 56 S.E.2d 841, 1949 Ga. App. LEXIS 896 (1949); Short & Paulk Supply Co. v. Dykes, 120 Ga. App. 639, 171 S.E.2d 782, 1969 Ga. App. LEXIS 889 (1969) (decided prior to 1983 amendment, which rewrote subsection (b)).

Contractor's sworn statement of full payment dissolves liens. — The liens provided for in O.C.G.A. § 44-14-361 are dissolved where the owner produces a sworn statement of the contractor, or other person, at whose instance the work was done or material furnished, or such services furnished or rendered, that the agreed price or reasonable value thereof has been paid. Jackson's Atlanta Ready Mix Concrete Co. v. Industrial Tractor Parts Co., 139 Ga. App. 422, 228 S.E.2d 324, 1976 Ga. App. LEXIS 1830 (1976) (decided prior to 1983 amendment, which rewrote subsection (b)).

When owner can raise certificate from contractor that price was paid. — O.C.G.A. § 44-14-361(b), which gives an owner a defense against the obtaining of a lien by a laborer or materialman where the owner has obtained a certificate from the contractor or other person at whose instance the work was done that the agreed price or the reasonable value of the material and labor furnished has been paid, contemplates a relationship between the contractor and owner wherein the contractor contracts for material and labor singularly and independently and for which the owner could not and would not be liable in the first instance. Fitts v. Addis, 83 Ga. App. 696, 64 S.E.2d 466, 1951 Ga. App. LEXIS 942 (1951) (decided prior to 1983 amendment, which rewrote subsection (b)).

How owners may defend against action to foreclose materialman's lien. — In an action by a materialman to foreclose a lien for material furnished a contractor for the improvement of real estate of others, the owners of such real estate may defend by showing that they have paid the full contract price to the contractor and that the money paid has been applied by the contractor to the settlement of debts incurred in the performance of the contract, which would have been liens upon the property improved. Ingram v. Barfield, 80 Ga. App. 276, 55 S.E.2d 725, 1949 Ga. App. LEXIS 821 (1949).

How owner may defeat liens when independent contractor erects building. — When an independent contractor, in fact as well as in name, erects a building the owner may defeat liens by showing that the owner has paid in good faith the full amount of the contract price in discharge of valid liens against the premises. Robinson v. Reese, 175 Ga. 574, 165 S.E. 744, 1932 Ga. LEXIS 293 (1932).

Owner may defend by showing full payment to contractor. — In a suit by a materialman to foreclose a lien for material furnished a contractor for the improvement of real estate of others, the owners of such real estate may defend by showing that they have paid the full contract price to the contractor and that the money paid has been applied by the contractor to the settlement of debts incurred in the performance of the contract, which would have been liens upon the property improved. Davenport Bros. v. Pepper, 108 Ga. App. 372, 133 S.E.2d 54, 1963 Ga. App. LEXIS 648 (1963).

Mistake in contract between contractor and lessee not a defense. — Where corporate lessee ratified a contract executed by its president with the unpaid contractor and had used the equipment installed, the lien of the contractor attached to lessor's property even though the president had mistakenly signed the contract as president of a nonexistent entity. Underground Festival, Inc. v. McAfee Eng'r Co., 214 Ga. App. 243, 447 S.E.2d 683, 1994 Ga. App. LEXIS 849 (1994), cert. denied, No. S94C1816, 1994 Ga. LEXIS 1181 (Ga. Dec. 2, 1994).

No defense that total of liens exceeds contract price. — It is no defense to the foreclosure of a materialman's lien that other materialmen may claim liens which, if added to the amount claimed in the foreclosure suit and the payments made to the contractor, and properly ap-

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plied by him, would exceed the contract price. Tuck v. Moss Mfg. Co., 127 Ga. 729, 56 S.E. 1001, 1907 Ga. LEXIS 469 (1907).

Presence of other liens no defense until such other liens are paid. — The fact that, in an action to foreclose on a materialman's lien, there are other such liens outstanding is not a defense unless and until such liens have been paid. Roberts v. Georgia S. Supply Co., 92 Ga. App. 303, 88 S.E.2d 554, 1955 Ga. App. LEXIS 583 (1955).

Possible additional claims in excess of contract price no defense. — That there may be other claims of lien in an amount in excess of that portion of the contract price not applied to payment of valid claims for labor and materials is no defense to a lien properly asserted. Solomon v. Robert Spector Lumber Co., 109 Ga. App. 801, 137 S.E.2d 473, 1964 Ga. App. LEXIS 998 (1964).

For case where owner's compliance with O.C.G.A. § 44-14-361 justified summary judgment, see Lowe's of Ga., Inc. v. Merwin, 156 Ga. App. 876, 275 S.E.2d 812, 1981 Ga. App. LEXIS 1638 (1981).

Foreclosure

Requirements for foreclosure of materialman. — A materialman or subcontractor, in order to foreclose a lien must have a judgment against the contractor or join the contractor in the suit to foreclose. Lombard v. Trustees of Young Men's Library Ass'n Fund, 73 Ga. 322, 1884 Ga. LEXIS 123 (1884); Royal v. McPhail, 97 Ga. 457, 25 S.E. 512, 1895 Ga. LEXIS 503 (1895); Clayton v. Farrar Lumber Co., 119 Ga. 37, 45 S.E. 723, 1903 Ga. LEXIS 13 (1903); Buck v. Tifton Mfg. Co., 4 Ga. App. 695, 62 S.E. 107, 1908 Ga. App. LEXIS 511 (1908).

No foreclosure against owner without judgment against contractor. — Where a lien upon the premises improved by the furnishing of materials by a materialman to a contractor is claimed by the materialman, under O.C.G.A. § 44-14-361, it is necessary, in order to foreclose such lien, that the materialman have a judgment against the contractor. Gibbs v. Carolina Portland Cement Co., 50 Ga. App. 229, 177 S.E. 760, 1934 Ga. App. LEXIS 714 (1934).

There can be no valid foreclosure of a materialman's lien for material furnished to a contractor and used in improving the real estate of another person against which the lien is claimed in the absence of a judgment in favor of the materialman against the contractor for the price or value of such material. Smith v. Walker, 194 Ga. 586, 22 S.E.2d 160, 1942 Ga. LEXIS 630 (1942).

Except when owner brings action in equity against both. — In general, judgment against the contractor or action against the contractor is a necessary incident to the foreclosure of a materialman's lien. This is not true where the owner has brought an action in equity against both contractor and materialman to enjoin foreclosure. Massachusetts Bonding & Ins. Co. v. Realty Trust Co., 142 Ga. 499, 83 S.E. 210, 1914 Ga. LEXIS 442 (1914), writ of error dismissed, 241 U.S. 687, 36 S. Ct. 451, 60 L. Ed. 1237, 1916 U.S. LEXIS 1857 (1916).

Lack of title in defendant not bar to foreclosure. — Want of title in the defendant to the premises on which the lien is claimed, and alleged title in a third person who is no party to the action will not bar an action for foreclosing and enforcing the lien under O.C.G.A. § 44-14-361. Ford v. Wilson & Co., 85 Ga. 109, 11 S.E. 559, 1890 Ga. LEXIS 5 (1890).

Time limit for materialman's action. — One of the conditions precedent to the foreclosure of the liens specified in O.C.G.A. § 44-14-361 is that action must be brought by the laborer or materialman against the person with whom the debt was contracted, either the owner or the contractor, as the case may be, within 12 months from the time when the debt became due. Jordan Co. v. Adkins, 105 Ga. App. 157, 123 S.E.2d 731, 1961 Ga. App. LEXIS 583 (1961); Allied Asphalt Co. v. Cumbie, 134 Ga. App. 960, 216 S.E.2d 659, 1975 Ga. App. LEXIS 2228 (1975).

Lien must be recorded and foreclosed within statutory periods. — In giving to the materialman a lien, O.C.G.A. § 44-14-361 expressly states that in order

to make good a lien the materialman must both record and foreclose within the statutory periods. The record of the lien in time is no more essential to its creation than its foreclosure in time, and the lien comes into potential existence only when the statute is satisfied. Kwilecki v. Young, 180 Ga. 602, 180 S.E. 137, 1935 Ga. LEXIS 501 (1935).

Proceedings and averment should reflect one-year time limit. — O.C.G.A. § 44-14-361 requires that the materialman should make demand, and prosecute the collection of the claim, within 12 months after the same shall become due and payable. The materialman should aver that demand was made within the time, and the materialman's proceedings to collect should be, on their face, within the time limited. Kwilecki v. Young, 180 Ga. 602, 180 S.E. 137, 1935 Ga. LEXIS 501 (1935).

Effect on title of failure to pursue action for claim within year. — Where no action predicated upon the claim of lien is instituted in 12 months, no lien is created upon the real estate and building as against the title of the claimant. Kwilecki v. Young, 180 Ga. 602, 180 S.E. 137, 1935 Ga. LEXIS 501 (1935).

Materialman's lien inchoate until perfected by judgment. — The lien provided for in favor of a materialman is not absolute, but must be completed, made good, or perfected in accordance with the provisions of O.C.G.A. § 44-14-362. It is only inchoate or incipient until a judgment finally perfects it. Carter-Moss Lumber Co. v. Short, 66 Ga. App. 338, 18 S.E.2d 61 (1941).

Delivery dates under one contract cannot be used to perfect lien under other contract. — Where an owner of real estate makes an express contract with a contractor for heating equipment, and before the work is finished makes a separate and distinct contract for plumbing, the items furnished under each are separate and distinct, and the delivery dates under one contract may not be used for the purpose of perfecting a lien under the other; aliter, if all the material be furnished under one and the same contract. Crane Co. v. Hirsch, 61 Ga. App. 632, 7 S.E.2d 83, 1940 Ga. App. LEXIS 200 (1940).

Where tenant makes a contract for plumbing, ratification thereof by the owner does not make the plumbing contract a part of earlier heating contract. Therefore, the delivery date of an article under the plumbing contract cannot be used to determine the time when the lien for the heating material should be filed. Crane Co. v. Hirsch, 61 Ga. App. 632, 7 S.E.2d 83, 1940 Ga. App. LEXIS 200 (1940).

Failure to perfect vitiates lien. — Before the rendition of a judgment in favor of a materialman's lien claimant the claimed lien is only inchoate, and the failure of the claimant to perfect the lien as provided by O.C.G.A. § 44-14-361.1 vitiates it, not only as against third persons, but as against the claimant. Carter-Moss Lumber Co. v. Short, 66 Ga. App. 330, 18 S.E.2d 61, 1941 Ga. App. LEXIS 209 (1941).

Justice of the peace court is without jurisdiction to enforce lien given by O.C.G.A. § 44-14-361. McAuliffe v. Baum, 142 Ga. 590, 83 S.E. 239, 1914 Ga. LEXIS 464 (1914).

Lien cannot be divided into portions for separate actions in justice of the peace court. — An entire lien claimed by a materialman, and recorded in accordance with O.C.G.A. § 44-14-361, cannot be enforced by dividing the amount and giving notes of less than $100.00 each and suing them in a court. O.C.G.A. § 44-14-361 contemplates but a single lien as to each transaction and a single action to enforce it. Bell & Bro. v. Rich, 73 Ga. 240, 1884 Ga. LEXIS 108 (1884).

Enforcement of property lien when recipient of supplies is not owner. — Where a materialman undertakes to foreclose a lien for material furnished to a contractor or some person other than the owner for the improvement of the owner's real property, it is necessary for the materialman to obtain a money verdict against the contractor or person to whom the materials are supplied in order to enforce the lien against the property improved. Spector v. Model Constr. Co., 95 Ga. App. 14, 96 S.E.2d 900, 1957 Ga. App. LEXIS 700 (1957).

Foreclosure proceedings differ from those for condominium assessments. — The foreclosure proceedings set forth in O.C.G.A. § 44-3-109 for condo-

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minium assessments are simplified, and distinct from the proceedings for the creation and enforcement of other types of liens. Propes v. Stonington Homeowners Ass'n, 149 Ga. App. 135, 253 S.E.2d 813, 1979 Ga. App. LEXIS 1755 (1979).

Only foreclosure proceedings in lien for assessments must be same as for other improvement liens. — The sole requirements for creation of the lien for assessments are contained in O.C.G.A. § 44-3-109, and it is only the actual foreclosure proceedings which must be in the same manner as other liens for the improvement of real property. Thus, the judgment and execution of the lien must be entered by the appropriate superior court. Propes v. Stonington Homeowners Ass'n, 149 Ga. App. 135, 253 S.E.2d 813, 1979 Ga. App. LEXIS 1755 (1979).

Materialman's failure to file notice of action against contractor renders claim unenforceable. — Insofar as O.C.G.A. § 44-14-361.1 provides that, notwithstanding certain exceptions, it is incumbent upon the party asserting the lien to file an action or obtain judgment against the contractor as a prerequisite to enforcing a lien against the property so improved, following which said party may, subject to the provision of O.C.G.A. § 44-14-361, enforce lien directly against the property so improved, in an action against the owner thereof, materialman's failure to file notice of an action against the contractor renders its claim of lien unenforceable. Hancor, Inc. v. Fleming Farms, Inc., 155 Ga. App. 579, 271 S.E.2d 712, 1980 Ga. App. LEXIS 2685 (1980).

Proper to join owner and contractor when enforcing lien against owner. — It is proper practice for one seeking to enforce against the owner of real estate a lien for labor and material, arising under O.C.G.A. § 44-14-361, to join in an action the owner of the realty and the person who contracted with the latter for the erection of the building thereon. Millers Nat'l Ins. Co. v. Hatcher, 194 Ga. 449, 22 S.E.2d 99, 1942 Ga. LEXIS 614 (1942).

What complaint for foreclosure must show. — A complaint seeking to foreclose the lien of a laborer and materialman created under the provisions of O.C.G.A. § 44-14-361 must affirmatively show that all of the conditions precedent set forth in O.C.G.A. § 44-14-361.1 have been complied with or that the case is within one of the exceptions made by the various amendments to O.C.G.A. § 44-14-361.1(3). Jordan Co. v. Adkins, 105 Ga. App. 157, 123 S.E.2d 731, 1961 Ga. App. LEXIS 583 (1961).

In order to render real property subject to foreclosure for material supplied, it must appear that the articles alleged to be lienable under O.C.G.A. § 44-14-361 have become fixtures. Accordingly, the furnishing of chattels used as loose, movable articles will not entitle a person to a lien, even though they were furnished under a contract which included materials for the construction of the building in which they are used. Skandia Draperies Mfg. Co. v. Augusta Innkeepers, Ltd., 157 Ga. App. 279, 277 S.E.2d 282, 1981 Ga. App. LEXIS 1781 (1981).

Proof needed to foreclose lien for improvement of realty. — Where materials for improvement of real estate are furnished to the owner, the materialman may foreclose the lien by alleging and proving that the materials were supplied the owner for that purpose. Spector v. Model Constr. Co., 95 Ga. App. 14, 96 S.E.2d 900, 1957 Ga. App. LEXIS 700 (1957).

What supplier must show to recover on mechanic's lien for material furnished. — In order to recover on a mechanic's lien for material furnished, it is necessary to show that specific material of the value alleged was delivered on the property and that it was consumed in the construction of the improvement. United Bonding Ins. Co. v. Good-Wynn Elec. Supply Co., 124 Ga. App. 545, 184 S.E.2d 508, 1971 Ga. App. LEXIS 1015 (1971).

Complaint for foreclosure insufficient unless contract with owner shown. — Complaint which fails to show that there was a contract with the owner of the property, or that the owner adopted the contract as one made for the owner, so as to bring the owner into contractual relations with the contractor furnishing the materials, does not state a cause of

action for the foreclosure of a materialman's lien. Marshall v. Peacock, 205 Ga. 891, 55 S.E.2d 354, 1949 Ga. LEXIS 600 (1949).

Complaint which does not allege contract or amount subject to dismissal. — In the absence of allegations of a contract, and the amount to be paid under the contract for materials, a complaint in an action to establish a materialman's lien fails to state a cause of action for any affirmative relief and a trial judge does not err in sustaining the general demurrers (now motions to dismiss). Lumber Fabricators, Inc. v. Gregory, 213 Ga. 356, 99 S.E.2d 145, 1957 Ga. LEXIS 382 (1957).

Where complaint does not allege any contractual relation between individual and real estate company in connection with improvements alleged to have been made, so as to allege that the individual comes within the meaning of "some person other than the owner," the complaint alleges that the individual was a stranger as to the company. Morgan v. May Realty Co., 86 Ga. App. 261, 71 S.E.2d 438, 1952 Ga. App. LEXIS 928 (1952).

Failure to allege claim recorded. — A complaint, by a materialman, does not set out a cause of action for a judgment establishing a lien upon the property improved, where it is not alleged that a claim of lien has been filed and recorded as required by O.C.G.A. §§ 44-14-361 and 44-14-361.1. King v. Rutledge, 208 Ga. 172, 65 S.E.2d 801, 1951 Ga. LEXIS 315 (1951).

Averment of delivery insufficient to show notice that materials were furnished. — A mere averment, that a materialman on a certain date "furnished and delivered material on the premises," without any other fact, will not suffice to support a bare legal conclusion by the pleader that "such delivery constituted actual implied notice" to the security-deed holder that material was being furnished. Caldwell v. Northwest Atlanta Bank, 194 Ga. 370, 21 S.E.2d 619, 1942 Ga. LEXIS 571 (1942).

Materialmen who give wrong premises in claim despite knowledge of error cannot recover in equity. — Materialmen are charged with knowledge of the premises upon which they filed their claim of lien, and they are charged with knowledge of the premises to which they delivered the materials and where they knew that these premises differed, in plenty of time to properly record a claim of lien as required by law, they cannot seek the aid of a court of equity to relieve them from their own negligence. King v. Rutledge, 208 Ga. 172, 65 S.E.2d 801, 1951 Ga. LEXIS 315 (1951).

Owner has burden of showing contractor properly paid claims. — It is the owner's responsibility to see to it that the payments which the owner makes on the construction contract price are properly disbursed by the contractor to those having valid claims for labor and materials, and in establishing the owner's defense to the foreclosure the owner has the burden of showing that this was done. Short & Paulk Supply Co. v. Dykes, 120 Ga. App. 639, 171 S.E.2d 782, 1969 Ga. App. LEXIS 889 (1969).

Burden on materialman to show amount claimed falls within total contract price. — In a proceeding to foreclose a materialman's lien, it is incumbent upon the plaintiff-materialman to show that the amount for which the materialman asserts a lien comes, in whole or in part, within the contract price agreed on between the contractor and the owner of the property improved. Young v. Harley-Mitchell Hdwe. Co., 173 Ga. 35, 159 S.E. 567, 1931 Ga. LEXIS 252 (1931).

Subcontractor has burden of showing claim less than total contract amount. — The burden of showing that the amount for which a lien is claimed by a subcontractor, is not more than the contract price of the improvements, lies on the subcontractor. Stevens v. Georgia Land Co., 122 Ga. 317, 50 S.E. 100, 1905 Ga. LEXIS 193 (1905); Georgia Steel Co. v. White, 136 Ga. 492, 71 S.E. 890, 1911 Ga. LEXIS 116 (1911).

Satisfactory evidence of "furnishing." — A showing by the materialmen of actual use of the material in the improvement of the real estate will satisfy the statutory requirement of "furnishing." Bryant v. Ellenburg, 106 Ga. App. 510, 127 S.E.2d 468, 1962 Ga. App. LEXIS 749 (1962).

Variation of contract makes price jury question. — In suit by materialman

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to foreclose a lien, where the owner and the contractor had varied the terms of the original contract so as to include additional construction, for which additional work no price was agreed upon, and subsequently defendant owner caused the contractor to cease work and employed other workmen to complete the construction, because of the variation of the written agreement, it was for the jury to say what the contract price for the complete work was. Spirides v. Victory Lumber Co., 76 Ga. App. 78, 45 S.E.2d 65, 1947 Ga. App. LEXIS 374 (1947).

Form of verdict. — While it is true that the purpose of a foreclosure suit is to establish a special lien against the property involved, and no general verdict and judgment can be obtained therein against the owner, the better practice in such cases is for the verdict to show a distinct finding by the jury that the plaintiff-materialman is entitled to a lien and to a given amount. But where, in such a proceeding, the verdict is for the full amount claimed, it can have no other construction than that the jury intended to find in favor of the lien claimed. Spirides v. Victory Lumber Co., 76 Ga. App. 78, 45 S.E.2d 65, 1947 Ga. App. LEXIS 374 (1947).

No general verdict against landowner for materials furnished to contractor. — Where a materialman seeks to foreclose a lien against real estate which has been improved with material furnished by the materialman to a contractor for such purpose, the materialman cannot recover a general verdict and judgment against the owner of the land for the value of the material furnished. Gignilliat v. West Lumber Co., 80 Ga. App. 652, 56 S.E.2d 841, 1949 Ga. App. LEXIS 896 (1949).

A materialman cannot recover a general judgment against the owner of the land for the material furnished, for the simple reason that the owner is no party to the contract for the purchase of the material. Gignilliat v. West Lumber Co., 80 Ga. App. 652, 56 S.E.2d 841, 1949 Ga. App. LEXIS 896 (1949).

Unless owner shown party to contract to buy material. — A materialman cannot recover a general personal judgment against the owner of the land for the material furnished in placing improvements thereon, unless it is shown that the owner is a party to the contract for the purchase of the material. Gignilliat v. West Lumber Co., 80 Ga. App. 652, 56 S.E.2d 841, 1949 Ga. App. LEXIS 896 (1949).

Foreclosure of surety bond unavailable for off-site work. — Although sewer work was required by a city for the completion of a subdivision, a subcontractor's off-site work was not an "improvement to the property" pursuant to O.C.G.A. § 44-14-361; consequently, the trial court properly granted summary judgment to the surety in the subcontractor's action to foreclose on a bond. Trench Shoring Servs. of Atlanta, Inc. v. Westchester Fire Ins. Co., 274 Ga. App. 850, 619 S.E.2d 361, 2005 Ga. App. LEXIS 839 (2005), cert. denied, No. S05C2055, 2006 Ga. LEXIS 58 (Ga. Jan. 17, 2006).

Judgment in rem against landowner. — While a personal judgment cannot be entered against a defendant landowner who is not a party to a contract for a purchase of material and labor in which a lien has been filed against the landowner's property, it is not necessary that there be a contract between the landowner and the materialman to obtain a judgment in rem. Chambers Lumber Co. v. Hagan, 118 Ga. App. 392, 163 S.E.2d 847, 1968 Ga. App. LEXIS 1408 (1968); Columbus Square Shopping Ctr. v. B & H Steel Co., 150 Ga. App. 774, 258 S.E.2d 600, 1979 Ga. App. LEXIS 2372 (1979).

Waiver of Lien

Lienholders who do not waive lien by taking personal security. — Contractors, materialmen, machinists, and manufacturers of machinery do not by the taking of personal security waive the lien given them under O.C.G.A. § 44-14-361. J.M. Wells Supply Co. v. Shiels, 103 Ga. App. 822, 121 S.E.2d 36, 1961 Ga. App. LEXIS 1068 (1961); Rembrant, Inc. v. Phillips Constr. Co., 500 F. Supp. 766, 1980 U.S. Dist. LEXIS 14642 (S.D. Ga. 1980).

Mechanics, but not materialmen, waive lien by taking personal security. — While mechanics who have taken personal security thereby waive their

right to a lien, materialmen have a lien as well when they take personal security as when they do not. J.M. Wells Supply Co. v. Shiels, 103 Ga. App. 822, 121 S.E.2d 36, 1961 Ga. App. LEXIS 1068 (1961).

Taking of personal security does not constitute waiver of lien given materialmen under O.C.G.A. § 44-14-361. Southwire Co. v. Metal Equip. Co., 129 Ga. App. 49, 198 S.E.2d 687, 1973 Ga. App. LEXIS 873, cert. denied, 414 U.S. 1092, 94 S. Ct. 723, 38 L. Ed. 2d 550, 1973 U.S. LEXIS 1757 (1973).

Materialman waives lien by applying payments to general account. — Where an owner makes payments to a contractor and the latter makes payments to a materialman, the materialman by applying the payments to a general account waives right to a lien. It is the materialman's duty to keep the accounts in such shape as to be able to make out a right to a lien. Williams v. Willingham-Tift Lumber Co., 5 Ga. App. 533, 63 S.E. 584, 1909 Ga. App. LEXIS 55 (1909).

No implied waiver of a materialman's statutory lien results from accepting other collateral security. — O.C.G.A. § 44-14-361 is silent as to other security, in case of materialmen, not mechanics. Ford v. Wilson & Co., 85 Ga. 109, 11 S.E. 559, 1890 Ga. LEXIS 5 (1890).

Promissory note not waiver of lien. — The taking by the materialman of a promissory note from the person to whom the material was furnished, is not, in the absence of an express agreement, an extinguishment of the materialman's right to a lien for the indebtedness represented by the note. Pippin v. Owens, 29 Ga. App. 789, 116 S.E. 549, 1923 Ga. App. LEXIS 194 (1923).

Contractor's agreement to indemnify materialman not waiver as to owner without notice. — Contract between materialmen and a contractor that the former will indemnify the latter against liens is not a waiver as between the materialmen and the owner who has no notice of the contract. Massachusetts Bonding & Ins. Co. v. Realty Trust Co., 142 Ga. 499, 83 S.E. 210, 1914 Ga. LEXIS 442 (1914), writ of error dismissed, 241 U.S. 687, 36 S. Ct. 451, 60 L. Ed. 1237, 1916 U.S. LEXIS 1857 (1916).

Materialman's refusal of the contractor's tender of partial payment did not constitute a waiver of a special lien otherwise properly created on property to which materials were supplied. Sanford v. Hodges Bldrs. Supply, Inc., 166 Ga. App. 86, 303 S.E.2d 280, 1983 Ga. App. LEXIS 2073 (1983).

Waiver of lien by subcontractor. — A subcontractor contractually waives its right to file a lien on property by agreeing that a general contractor's contract with the property owner, which contains a lien waiver, be made part of its subcontract with the general contractor. MCC Powers v. Ford Motor Co., 184 Ga. App. 487, 361 S.E.2d 716, 1987 Ga. App. LEXIS 2273 (1987).

Effect of discharge of lien by bond. — When contractor and insurance company posted a bond to discharge supplier's liens, the bond served as a replacement for the lien and supplier's later execution of waiver and release of lien did not affect its contract claims against the bond. Benning Constr. Co. v. All-Phase Elec. Supply Co., 206 Ga. App. 279, 424 S.E.2d 830, 1992 Ga. App. LEXIS 1601 (1992).

OPINIONS OF THE ATTORNEY GENERAL

Nothing in this section indicates an intention to bind the state thereby. O.C.G.A. § 44-14-361 is in derogation of the common law, must be strictly construed, and one claiming thereunder must be brought clearly within the law. 1957 Ga. Op. Att'y Gen. 179.

O.C.G.A. § 44-14-361 not applicable to public works. — The provisions of O.C.G.A. § 44-14-361.5 pertaining to the filing of a Notice of Commencement of work are not applicable to a state authority with regard to construction projects on public property; however, a contractor performing a public works contract for a state authority is required to file a notice in

accordance with former O.C.G.A. § 36-82-104(f). 1995 Op. Att'y Gen. No. 95-43.

Architect's lien cannot be filed against public property, and armories are public property. 1957 Ga. Op. Att'y Gen. 179.

Lien laws are intended for benefit of materialmen furnishing material to the contractor with the owner of the property whose property is being improved. 1957 Ga. Op. Att'y Gen. 180.

When materialman's liens on property owner are discharged. — Liens of a materialman are discharged as to the owner of property when the owner receives an affidavit of the constructor that all claims have been paid. 1957 Ga. Op. Att'y Gen. 180.

RESEARCH REFERENCES

Am. Jur. 2d.

5 Am. Jur. 2d, Architects, §§ 21, 22. 53 Am. Jur. 2d, Mechanics' Liens, §§ 5, 6, 60 et seq., 111, 93 et seq., 112, 179, 187, 242-244, 253-256.

C.J.S.

56 C.J.S., Mechanics' Liens, §§ 1 et seq., 37 et seq., 96 et seq., 133, 196 et seq., 211 et seq.

ALR.

Validity and effect of provision in contract against mechanic's lien, 13 A.L.R. 1065; 102 A.L.R. 356; 76 A.L.R.2d 1087.

Elements bearing directly upon the quality of a contract as affecting the character of one as independent contractor, 20 A.L.R. 684.

Construction of contract for compensation of architect, 20 A.L.R. 1356.

Requisites and sufficiency of notice of mechanic's lien in case of "cost plus" contract, 26 A.L.R. 1328.

Freight charges on material as within mechanic's lien statute giving lien for labor or material, or within contractor's bond securing such claims, 30 A.L.R. 466.

Mechanic's lien for material specially fabricated for and adapted to building, but not used therein, 33 A.L.R. 320.

Mechanic's lien: owner's right to deduction on account of damages sustained through contractor's delay, 37 A.L.R. 766.

Independence of contract considered with relation to the scope and construction of statutes, 43 A.L.R. 335.

Mechanic's lien for building erected by licensee, 45 A.L.R. 581.

After-acquired title as supporting mechanic's lien, 52 A.L.R. 693.

Substitution or replacement of material as affecting time for filing mechanics' lien, 52 A.L.R. 984.

Interest of vendor under executory contract for sale of realty as subject to mechanics' lien for labor or materials furnished to purchaser, 58 A.L.R. 911; 102 A.L.R. 233.

Mechanics' lien for services of person supervising construction of building, architect, etc., 60 A.L.R. 1257.

Right to benefit of contractor's bond or mechanic's lien statute for labor or material furnished to contractor or subcontractor, as affected by acceptance from him of written obligation, 66 A.L.R. 342.

Mechanic's lien for labor or material for improvement of easement, 77 A.L.R. 817.

Mechanic's lien as affected by agreement to pay with property other than money, 81 A.L.R. 766.

Priority as between lien of corporation and rights of pledgee or bona fide purchaser of corporate stock, 81 A.L.R. 989.

Right of one other than contractor, laborer, or materialman to file mechanics' lien, 83 A.L.R. 11.

Who is a "contractor" within provisions of Mechanics' Lien Law which limit liens for material or labor furnished to contractor to amount earned but unpaid on contract, or give such liens by subrogation, 83 A.L.R. 1152.

Construction, application, and effect of provision of mechanic's lien statute as to quantity or area of land around improvement which may be subjected to the lien, 84 A.L.R. 123.

Material or labor employed in construction of concrete forms as basis of mechanics' lien or claim under contractors' bond, 84 A.L.R. 460.

Lien on vendee's or optionee's interest in respect of real property as attaching to title acquired by completion of contract or exercise of option, 85 A.L.R. 927.

Church property as subject of mechanic's lien, 85 A.L.R. 953.

Canals, drains, ditches, and wells as within term of Mechanics' Lien Law descriptive of improvement, 92 A.L.R. 753.

Right to mechanics' lien against fee for work or material furnished under contract with, or consent of, life tenant, 97 A.L.R. 870.

Principal contractor as necessary party to suit to enforce mechanic's lien of subcontractor, laborer, or materialman, 100 A.L.R. 128.

Remedy available to holder of mechanic's lien which has priority over antecedent mortgage or vendor's title or lien as regards improvement, but not as regards land, where it is impossible or impractical to remove the improvement, 107 A.L.R. 1012.

Character of service contemplated by statutes giving a lien or preference, in event of insolvency, to servants, employees, laborers, etc., 111 A.L.R. 1453; 142 A.L.R. 362.

Existence and extent of lien or claim for labor and materials furnished to subcontractor, against money due principal contractor for public improvement, 112 A.L.R. 815.

Right of one who contracts with, or furnishes labor or material to, public contractor's surety after latter has taken overwork, in respect of part of contract price retained by public agency, 122 A.L.R. 511.

Time for filing claim for mechanic's lien as affected by removal by, or return to, claimant of part of material furnished, 122 A.L.R. 755.

Time limitation in mechanic's lien statute as a limitation of the right or only of the remedy, 139 A.L.R. 903.

Who is contractor or subcontractor, as distinguished from materialman, for purposes of mechanic's lien, contractor's bond or other provision for securing compensation under construction contract, 141 A.L.R. 321.

Existence of more than one contract between owner and contractor as affecting notice or filing of mechanic's lien by materialman or subcontractor, 175 A.L.R. 330.

Right to mechanic's lien as for "labor" or "work," in case of preparatory or fabricating work done on materials intended for use and used in particular building or structure, 25 A.L.R.2d 1370.

Mechanic's lien for grading, clearing, filling, landscaping, excavating, and the like, 39 A.L.R.2d 866.

Right to mechanic's lien upon leasehold for supplying labor or material in attaching or installing fixtures, 42 A.L.R.2d 685.

Amount for which mechanic's lien may be obtained where contract has been terminated or abandoned by consent of parties or without fault on contractor's part, 51 A.L.R.2d 1009.

Validity of statute making private property owner liable to contractor's laborers, materialmen, or subcontractors where owner fails to exact bond or employ other means of securing their payment, 59 A.L.R.2d 885.

Priority as between mechanic's lien and purchase-money mortgage, 73 A.L.R.2d 1407.

Time for filing notice or claim of mechanic's lien where claimant has contracted with general contractor and later contracts directly with owner, 78 A.L.R.2d 1165.

Sufficiency of notice under statute making notice by owner of nonresponsibility necessary to prevent mechanic's lien, 85 A.L.R.2d 949.

Mechanic's lien for services in connection with subdividing land, 87 A.L.R.2d 1004.

Taking or negotiation of unsecured note of owner of contractor as waiver of mechanic's lien, 91 A.L.R.2d 425.

What constitutes "commencement of building or improvement" for purposes of determining accrual of mechanic's lien, 1 A.L.R.3d 822.

Charge for use of machinery, tools, or appliances used in construction as basis for mechanic's lien, 3 A.L.R.3d 573.

Failure of artisan or construction contractor to comply with statute or regulation requiring a work permit or submission of plans as affecting his right to recover compensation from contractee, 26 A.L.R.3d 1395.

Surveyor's work as giving rise to right to mechanic's lien, 35 A.L.R.3d 1391.

Labor in examination, repair, or servicing of fixtures, machinery, or attachments in building, as supporting a mechanics' lien, or as extending time for filing such a lien, 51 A.L.R.3d 1087.

Building and construction contracts: contractor's equitable lien upon percentage of funds withheld by contractee or lender, 54 A.L.R.3d 848.

Assertion of statutory mechanic's or materialman's lien against oil and gas produced or against proceeds attributable to oil and gas sold, 59 A.L.R.3d 278.

Garageman's lien: modern view as to validity of statute permitting sale of vehicle without hearing, 64 A.L.R.3d 814.

Enforceability of single mechanic's lien upon several parcels against less than the entire property liened, 68 A.L.R.3d 1300.

Effect of bankruptcy of principal contractor upon mechanic's lien of subcontractor, laborer, or materialman as against owner of property, 69 A.L.R.3d 1342.

Enforceability of mechanic's lien attached to leasehold estate against landlord's fee, 74 A.L.R.3d 330.

Removal or demolition of building or other structure as basis for mechanic's lien, 74 A.L.R.3d 386.

Release or waiver of mechanic's lien by general contractor as affecting rights of subcontractor or materialman, 75 A.L.R.3d 505.

Right of vendee under executory land contract to lien for amount paid on purchase price as against subsequent creditors of or purchasers from vendor, 82 A.L.R.3d 1040.

Garageman's lien for towing and storage of motor vehicle towed from private property on which vehicle was parked without permission, 85 A.L.R.3d 240.

Right of subcontractor's subcontractor or materialman, or of materialman's materialman, to mechanic's lien, 24 A.L.R.4th 963.

Delivery of material to building site as sustaining mechanic's lien — modern cases, 32 A.L.R.4th 1130.

Construction and effect of statutes requiring construction fundholder to withhold payments upon "stop notice" from subcontractor, materialman, or other person entitled to funds, 4 A.L.R.5th 772.

Architect's services as within mechanics' lien statute, 31 A.L.R.5th 664.

Landlord's liability to third party for repairs authorized by tenant, 46 A.L.R.5th 1.

Subjection of municipal property, or alleged municipal property, to mechanics' liens, 81 A.L.R.6th 363.

44-14-361.1. How liens declared and created; amendment; record; commencement of action; notice; priorities; parties; limitation on aggregate amount of liens.

(a) To make good the liens specified in paragraphs (1) through (8) and (10) of subsection (a) of Code Section 44-14-361, they must be created and declared in accordance with the following provisions, and on failure of any of them the lien shall not be effective or enforceable:

(1) A substantial compliance by the party claiming the lien with his or her contract for building, repairing, or improving; for architectural services furnished; for registered forester services furnished or performed; for registered land surveying or registered professional engineering services furnished or performed; for materials or machinery furnished or set up; or for registered interior design services furnished or performed;

(2) The filing for record of his or her claim of lien within 90 days after the completion of the work, the furnishing of the architectural services, or the furnishing or performing of such surveying, engineering services, or interior design services or within 90 days after the material or machinery is furnished in the office of the clerk of the

superior court of the county where the property is located. The lien shall include a statement regarding its expiration pursuant to Code Section 44-14-367 and a notice to the owner of the property on which a claim of lien is filed that such owner has the right to contest the lien; the absence of such statement or notice shall invalidate the lien. The claim shall be in substance as follows:

> "A.B., a mechanic, contractor, subcontractor, materialman, machinist, manufacturer, registered architect, registered for ester, registered land surveyor, registered professional engineer, registered interior designer, or other person (as the case may be) claims a lien in the amount of (specify the amount claimed) on the house, factory, mill, machinery, or railroad (as the case may be) and the premises or real estate on which it is erected or built, of C.D. (describing the houses, premises, real estate, or railroad), for satisfaction of a claim which became due on (specify the date the claim was due, which is the same as the last date the labor, services, or materials were supplied to the premises) for building, repairing, improving, or furnishing material (or whatever the claim may be)."

No later than two business days after the date the claim of lien is filed of record, the lien claimant shall send a true and accurate copy of the claim of lien by registered or certified mail or statutory overnight delivery to the owner of the property or, if the owner's address cannot be found, the contractor, as the agent of the owner; provided, however, that if the property owner is an entity on file with the Secretary of State's Corporations Division, sending a copy of the claim of lien to the entity's address or the registered agent's address shall satisfy this requirement. In all cases in which a notice of commencement is filed with the clerk of the superior court pursuant to subsection (b) of Code Section 44-14-361.5, a lien claimant shall also send a copy of the claim of lien by registered or certified mail or statutory overnight delivery to the contractor at the address shown on the notice of commencement;

(3) The commencement of a lien action for the recovery of the amount of the party's claim within 365 days from the date of filing for record of his or her claim of lien. In addition, within 30 days after commencing such lien action, the party claiming the lien shall file a notice with the clerk of the superior court of the county wherein the subject lien was filed. The notice shall contain a caption referring to the then owner of the property against which the lien was filed and referring to a deed or other recorded instrument in the chain of title of the affected property. The notice shall be executed, under oath, by the party claiming the lien or by such party's attorney of record, but failure to execute the notice under oath shall be an amendable defect which may be cured by the party claiming the lien or by such party's

attorney without leave of court at any time before entry of the pretrial order and thereafter by leave of court. An amendment of notice pursuant to this Code section shall relate back to the date of filing of the notice. The notice shall identify the court or arbitration venue wherein the lien action is brought; the style and number, if any, of the lien action, including the names of all parties thereto; the date of the filing of the lien action; and the book and page number of the records of the county wherein the subject lien is recorded in the same manner in which liens specified in Code Section 44-14-361 are filed. The clerk of the superior court shall enter on the subject lien so referred to the book and page on which the notice is recorded and shall index such notice in the name of the then purported owner as shown by the caption contained in such notice. A separate lis pendens notice need not be filed with the commencement of this action; and

(4) In the event any contractor or subcontractor procuring material, architect's services, registered forester's services, registered land surveyor's services, registered interior designer's services, or registered professional engineer's services, labor, or supplies for the building, repairing, or improving of any real estate, building, or other structure shall abscond or die or leave the state during the required time period for filing a lien action, so that personal jurisdiction cannot be obtained on the contractor or subcontractor in a lien action for the services, material, labor, or supplies, or if the contractor or subcontractor shall be adjudicated a bankrupt, or if, after the filing of a lien action, no final judgment can be obtained against him or her for the value of such material, services, labor, or supplies because of his or her death, adjudication in bankruptcy, or the contract between the party claiming the lien and the contractor or subcontractor includes a provision preventing payment to the claimant until after the contractor or the subcontractor has received payment, then and in any of these events, the person or persons furnishing material, services, labor, and supplies shall be relieved of the necessity of filing a lien action or obtaining judgment against the contractor or subcontractor as a prerequisite to enforcing a lien against the property improved by the contractor or subcontractor. Subject to Code Section 44-14-361, the person or persons furnishing material, services, labor, and supplies may enforce the lien directly against the property so improved in a lien action against the owner thereof, if filed within the required time period for filing a lien action, with the judgment rendered in any such proceeding to be limited to a judgment in rem against the property improved and to impose no personal liability upon the owner of the property; provided, however, that in such lien action for recovery, the owner of the real estate improved, who has paid the agreed price or any part of same, may set up the payment in any lien action brought and prove by competent and relevant evi-

dence that the payments were applied as provided by law, and no judgment shall be rendered against the property improved. Within 30 days after filing such lien action, the party claiming the lien shall file a notice with the clerk of the superior court of the county wherein the subject lien was filed. The notice shall contain a caption referring to the then owner of the property against which the lien was filed and referring to a deed or other recorded instrument in the chain of title of the affected property. The notice shall be executed, under oath, by the party claiming the lien or by his or her attorney of record. The notice shall identify the court or arbitration venue wherein the lien action is brought; the style and number of the lien action, if any, including the names of all parties thereto; the date of the filing of the lien action; and the book and page number of the records of the county wherein the subject lien is recorded in the same manner in which liens specified in Code Section 44-14-361 are filed. The clerk of the superior court shall enter on the subject lien so referred to the book and page on which the notice is recorded and shall index such notice in the name of the then purported owner as shown by the caption contained in such notice. A separate lis pendens notice need not be filed with the commencement of this action.

(a.1) A claim of lien may be amended at any time to reduce the amount claimed, and such amended claim of lien shall relate back to the date of filing for record of the original claim of lien. An amended claim of lien filed for record pursuant to this subsection shall be in substance as follows:

"That certain claim of lien filed by A.B. against property of C.D. on (date) and recorded at book (book#), page (page#) in the lien index of (name of county) County is hereby amended by reducing the amount of such claim of lien to (specify reduced amount claimed). The remaining terms of such original claim of lien are hereby incorporated by reference into this amended claim of lien. This amended claim of lien relates back to the date that such original claim of lien was filed for record."

and shall be sent to the owner of the property in the same manner as required for a claim of lien in paragraph (2) of subsection (a) of this Code section.

(b) As between themselves, the liens provided for in Code Section 44-14-361 shall rank according to the date filed; but all of the liens mentioned in this Code section for repairs, building, or furnishing materials or services, upon the same property, shall, as to each other, be of the same date when declared and filed for record within 90 days after the work is done or before that time.

(c) The liens specified in Code Section 44-14-361 shall be inferior to liens for taxes, to the general and special liens of laborers, to the

general lien of landlords of rent when a distress warrant is issued out and levied, to claims for purchase money due persons who have only given bonds for titles, and to other general liens when actual notice of the general lien of landlords and others has been communicated before the work was done or materials or services furnished; but the liens provided for in Code Section 44-14-361 shall be superior to all other liens not excepted by this subsection.

(d) In any proceeding brought by any materialman, by any mechanic, by any laborer, by any subcontractor, or by any mechanic of any sort employed by any subcontractor or by any materialmen furnishing material to any subcontractor, or by any laborer furnishing labor to any subcontractor, to enforce such a lien, the contractor having a direct contractual relationship with the subcontractor shall not be a necessary party; but he or she may be made a party. In any proceedings brought by any mechanic employed by any subcontractor, by any materialmen furnishing material to any subcontractor, or by any laborer furnishing labor to any subcontractor, the subcontractor shall not be a necessary party; but he or she may be made a party. The contractor or subcontractor or both may intervene in the proceedings at any time before judgment for the purpose of resisting the establishment of the lien or of asserting against the lienor any claim of the contractor or subcontractor growing out of or related to the transaction upon which the asserted lien is based.

(e) In no event shall the aggregate amount of liens set up by Code Section 44-14-361 exceed the contract price of the improvements made or services performed.

(f) The filing fees for a claim of materialman's or mechanic's lien and any related document created pursuant to this Code section, including but not limited to a notice of commencement of action, shall be the amount set by Code Section 15-6-77 for liens on real estate and personal property.

History.

Ga. L. 1873, p. 42, § 7; Code 1873, § 1980; Ga. L. 1874, p. 45, § 1; Code 1882, § 1980; Civil Code 1895, § 2804; Civil Code 1910, § 3353; Code 1933, § 67-2002; Ga. L. 1941, p. 345, § 1; Ga. L. 1952, p. 291, § 1; Ga. L. 1953, Jan.-Feb. Sess., p. 582, §§ 3-5; Ga. L. 1956, p. 185, §§ 2, 3; Ga. L. 1956, p. 562, § 3; Ga. L. 1960, p. 103, § 1; Ga. L. 1967, p. 456, § 1; Ga. L. 1968, p. 317, § 1; Ga. L. 1977, p. 675, § 1; Ga. L. 1981, p. 846, § 1; Code 1981, § 44-14-362; Code 1981, § 44-14-361.1, enacted by Ga. L. 1983, p. 1450, § 1; Ga. L. 1984, p. 22, § 44; Ga. L. 1985, p. 1322, § 3; Ga. L. 1989, p. 438, § 1; Ga. L. 1991, p. 639, § 1; Ga. L. 1997, p. 829, § 1; Ga. L. 1998, p. 860, § 1; Ga. L. 2000, p. 1589, § 3; Ga. L. 2008, p. 1063, § 2/SB 374; Ga. L. 2010, p. 859, § 1/SB 362; Ga. L. 2019, p. 1056, § 44/SB 52; Ga. L. 2021, p. 674, § 4/HB 480.

The 2021 amendment, effective May 10, 2021, inserted "and (10)" near the beginning of subsection (a); in paragraph (a)(1), deleted "or" following "engineering services furnished or performed;" and added "; or for registered interior design services furnished or performed" at the end; in paragraph (a)(2), substituted "sur-

veying, engineering services, or interior design services" for "surveying or engineering services" in the introductory paragraph and inserted "registered interior designer," in the first undesignated paragraph; inserted "registered interior designer's services," near the beginning of paragraph (a)(4). See Editor's notes for applicability.

Editor's notes.

Ga. L. 1998, p. 860, § 3, not codified by the General Assembly, provides that this Act is applicable to claims of lien filed on or after July 1, 1998.

Ga. L. 2000, p. 1589, § 16, not codified by the General Assembly, provides that this Act is applicable with respect to notices delivered on or after July 1, 2000.

Ga. L. 2021, p. 674, § 7/HB 480, not codified by the General Assembly, provides: "This Act shall become effective upon its approval by the Governor or upon its becoming law without such approval and Sections 2 through 8 of this Act shall apply to labor, services, or materials performed or furnished by registered interior designers on or after such date" This Act was approved by the Governor on May 10, 2021.

Law reviews.

For article discussing status of lienor at time of bankruptcy, see 10 Ga. B.J. 181 (1947).

For article discussing failure of consideration, see 4 Mercer L. Rev. 327 (1953).

For comment on Victory Lumber Co. v. Ellison, 95 Ga. App. 105, 97 S.E.2d 334 (1957), holding "that unless a materialman files suit against a contractor prior to the contractor's discharge in bankruptcy, he cannot enforce his lien against the property upon which the materials were used," see 21 Ga. B.J. 91 (1958).

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).

For article advocating more protection of subcontractor's interest by modification of lien laws, see 14 Ga. St. B.J. 88 (1977).

For article discussing role of attorney in representing subcontractor and available enforcement mechanisms, see 14 Ga. St. B.J. 104 (1978).

For article, "Lien Claimants and Real Estate Lenders — The Struggle For Priority," see 16 Ga. St. B.J. 187 (1980).

For article on construction law, see 42 Mercer L. Rev. 25 (1990).

For annual survey of construction law, see 43 Mercer L. Rev. 141 (1991).

For article, "Caveat Venditor: The Material Supplier's Dilemma on a Construction Project," see 28 Ga. St. B.J. 154 (1992).

For article, "Recent Developments in Construction Law," see 5 Ga. St. B.J. 24 (1999).

For annual survey article discussing developments in construction law, see 51 Mercer L. Rev. 181 (1999).

For annual survey on commercial law, see 53 Mercer L. Rev. 153 (2001).

Construction Law, see 53 Mercer L. Rev. 173 (2001).

For annual survey of construction law, see 57 Mercer L. Rev. 79 (2005).

For survey article on construction law, see 60 Mercer L. Rev. 59 (2008).

For survey article on real property law, see 60 Mercer L. Rev. 345 (2008).

For annual survey on construction law, see 61 Mercer L. Rev. 65 (2009).

For annual survey of construction law, see 67 Mercer L. Rev. 23 (2015).

For article with annual survey on construction law, see 73 Mercer L. Rev. 59 (2021).

JUDICIAL DECISIONS

Analysis

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General Consideration

Editor's notes. — The pre-1984 cases noted below were decided under former Code Section 44-14-362. See, also, the annotations under that Code Section for decisions applicable to present Code Section 44-14-361.1.

Purpose. — The purpose of the recording statutes is to protect both the lienholder and innocent persons acting in good faith but without means of discovering the lien of another. An attorney is given the privilege of protecting a lien by recording the attorney's claim thereto, and the attorney's failure to utilize such privilege brings upon the attorney the same disaster that befalls other lienholders who neglect to record the lien as authorized by law. Anderson v. Burnham, 12 B.R. 286, 1981 Bankr. LEXIS 3524 (Bankr. N.D. Ga. 1981).

The purpose of the former statutory provision (now O.C.G.A. § 44-14-361.1(c)), which required that notice of a subcontractor's suit against the contractor to recover the claim on which the lien was based need only be filed within 12 months of the time the claim for materials became due, was primarily to provide potential purchasers of the property with constructive notice to enable them to determine whether or not the claim of lien was still extant. Amafra Enters., Inc. v. All-Steel Bldgs., Inc., 169 Ga. App. 388, 313 S.E.2d 110, 1984 Ga. App. LEXIS 1560 (1984).

The intent of O.C.G.A. § 44-14-361.1 as to timely filing of liens is to establish a time certain beyond which liens cannot be filed, for the protection of the contracting parties and innocent third parties. Womack Indus., Inc. v. B & A Equip. Co., 199 Ga. App. 660, 405 S.E.2d 880, 1991 Ga. App. LEXIS 618 (1991), cert. denied, No. S91C1117, 1991 Ga. LEXIS 517 (Ga. Sept. 6, 1991).

O.C.G.A. § 44-14-361.1 is to be strictly construed. Ballard v. Grubbs, 9 B.R. 499 (M.D. Ga. 1981).

O.C.G.A. § 44-14-361.1 is in derogation of common law and is to be strictly construed against the materialman, and strict compliance is required. Womack Indus., Inc. v. B & A Equip. Co., 199 Ga. App. 660, 405 S.E.2d 880, 1991 Ga. App. LEXIS 618 (1991), cert. denied, No. S91C1117, 1991 Ga. LEXIS 517 (Ga. Sept. 6, 1991).

The creation of liens under O.C.G.A. § 44-14-361.1 is in derogation of the common law, and strict compliance with the requirements of the statute is required. Consolidated Sys. v. AMISUB, Inc., 261 Ga. 590, 408 S.E.2d 109, 1991 Ga. LEXIS 415 (1991).

A materialman's lien effectively permits the transfer of liability from the person who actually contracted with the materialman for materials to be used on improving real estate to the owner of the improved property, even though that property owner usually will have no relationship with the materialman, contractual or otherwise. Consequently, the court has long recognized that statutes involving materialman's liens must be strictly construed in favor of the property owner and against the materialman. Palmer v. Duncan Whsle., Inc., 262 Ga. 28, 413 S.E.2d 437, 1992 Ga. LEXIS 146 (1992).

Failure to prove lien amount. — Trial court erred by granting summary judgment to a subcontractor because the subcontractor failed to prove the lien amount, if any, the subcontractor was entitled to and the subcontractor was not entitled to a lien for the attorney fees and interest allegedly owed since there was no agreement for such amounts. Hill v. VNS Corp., 329 Ga. App. 274, 764 S.E.2d 876, 2014 Ga. App. LEXIS 666 (2014).

No damages available. — O.C.G.A. § 44-14-361.1 does not provide for an action for damages for its violation, as it explicitly states that failure to comply with its provisions will result in the unenforceability of the lien. Hicks v. McLain's Bldg., Materials, Inc., 209 Ga. App. 191, 433 S.E.2d 114, 1993 Ga. App. LEXIS 819 (1993).

Prejudgment interest. — Owners were not insulated against the payment of prejudgment interest since an award of such interest is distinct and separate from and not to be included in the calculation of the "aggregate amount of liens" within the

meaning of O.C.G.A. § 44-14-361.1(e). Gaster Lumber Co. v. Browning, 219 Ga. App. 435, 465 S.E.2d 524, 1995 Ga. App. LEXIS 1053 (1995), cert. denied, No. S96C0583, 1996 Ga. LEXIS 397 (Ga. Mar. 8, 1996), aff'd, 267 Ga. 72, 475 S.E.2d 576, 1996 Ga. LEXIS 536 (1996).

"Properly appropriate" payment construed. — Where liens were filed prior to payment of the full contract price to the general contractor, payment that is thereafter made to any other materialman as a potential lien claimant is not payment which is "properly appropriate" and may not be set up by the owner in defense of the subsequent foreclosure of those previously filed liens. Electrical Distrib., Inc. v. Turner Constr. Co., 196 Ga. App. 359, 395 S.E.2d 879, 1990 Ga. App. LEXIS 935 (1990), cert. denied, No. S90C1456, 1990 Ga. LEXIS 573 (Ga. Sept. 4, 1990).

One seeking to foreclose a contractor's lien for labor and materials must show a substantial compliance with the contract and, if the completion of the contract was prevented by the defendant, this is equivalent to a completion of the contract as a remedial element. Summit-Top Dev., Inc. v. Williamson Constr., Inc., 203 Ga. App. 460, 416 S.E.2d 889, 1992 Ga. App. LEXIS 450 (1992).

Failure to follow statutory procedure renders lien unenforceable. — Where a party fails to follow the mandatory procedure established in O.C.G.A. § 44-14-361.1, and where a suit against the contractor is mandatory, the party's lien is unenforceable and the trial court would be correct in granting summary judgment to the opposing party. D & T Glass, Inc. v. Barrow Enters., Inc., 172 Ga. App. 797, 325 S.E.2d 170, 1984 Ga. App. LEXIS 2668 (1984).

Failure to comply with the statutory mandate of filing notice of a lien under oath renders the lien unenforceable. Allied Elec. Contractors v. Kern & Co., 184 Ga. App. 747, 362 S.E.2d 452, 1987 Ga. App. LEXIS 2361 (1987).

Failure to file lien notice. — Homeowner was entitled to summary judgment on the contractor's claim for foreclosure of a lien because the contractor failed to file the notice required by O.C.G.A. § 44-14-361.1(a)(3). Wagner v. Robinson, 329 Ga. App. 169, 764 S.E.2d 189, 2014 Ga. App. LEXIS 646 (2014).

Notice of lien untimely. — Trial court erred in denying the property owners' motion to dismiss a subcontractor's complaint for lien foreclosure because the subcontractor's notice of its lien action was not timely filed, having been filed 110 days after the complaint was filed and, thus, the lien was not effective and enforceable. Cook Sales v. Concrete Enterprises, 356 Ga. App. 899, 849 S.E.2d 734, 2020 Ga. App. LEXIS 553 (2020), cert. denied, No. S21C0333, 2021 Ga. LEXIS 322 (Ga. May 3, 2021).

Effect of discharge of lien by bond. — When contractor and insurance company posted a bond to discharge supplier's liens, the bond served as a replacement for the lien and supplier's later execution of waiver and release of lien did not affect its contract claims against the bond. Benning Constr. Co. v. All-Phase Elec. Supply Co., 206 Ga. App. 279, 424 S.E.2d 830, 1992 Ga. App. LEXIS 1601 (1992).

A lien is not a pleading for purposes of O.C.G.A. § 51-5-8 and statements made within a surveyor's lien are not afforded absolute privilege until the lien becomes attached to a lawsuit and verified notice of the suit is filed under O.C.G.A. § 44-14-361.1, at which point, the lien becomes an act of legal, or judicial process, and achieves the formality, solemnity, and status of a sworn statement. Simmons v. Futral, 262 Ga. App. 838, 586 S.E.2d 732, 2003 Ga. App. LEXIS 1050 (2003).

Pre-lien payments. — An owner is not entitled to credit under O.C.G.A. § 44-14-361.1(a)(4) where pre-lien payments to the contractor are disbursed post-lien by the contractor in payment of inferior-ranked, inchoate claims of materialmen and laborers. Browning v. Gaster Lumber Co., 267 Ga. 72, 475 S.E.2d 576, 1996 Ga. LEXIS 536 (1996).

What an owner must show to defeat a materialmen's lien. — An owner must not only show that full payment was actually made to the contractor, the owner is also required to show that the sums paid to the contractor were properly appropriated to materialmen and laborers or that the contractor's statutory affidavit con-

General Consideration (Cont'd)

cerning such indebtedness had been obtained. Freeman v. Fulton Concrete Co., 204 Ga. App. 465, 419 S.E.2d 536, 1992 Ga. App. LEXIS 854 (1992).

The defense provided in O.C.G.A. § 44-14-361.1(e) requires that the owner show the sums paid to the contractor were properly appropriated, i.e., paid before the filing of the lien, to materialmen and laborers or that the contractor's affidavit concerning such indebtedness has been obtained. Gaster Lumber Co. v. Browning, 219 Ga. App. 435, 465 S.E.2d 524, 1995 Ga. App. LEXIS 1053 (1995), cert. denied, No. S96C0583, 1996 Ga. LEXIS 397 (Ga. Mar. 8, 1996), aff'd, 267 Ga. 72, 475 S.E.2d 576, 1996 Ga. LEXIS 536 (1996).

Owners failed to produce any lien waiver or other documentary proof that paving subcontractor paid paving company for the labor and materials it furnished, and therefore failed to rebut the paving company's prima facie showing that it was entitled to summary judgment on its materialman's lien claim. Little Tallapoosa Dev., Inc. v. Baldwin Paving Co., 251 Ga. App. 238, 553 S.E.2d 860, 2001 Ga. App. LEXIS 974 (2001).

An abandonment of the work before compliance with the contract upon a mere apprehension that payment will not be received is unauthorized and defeats the contractor's claim of lien. Summit-Top Dev., Inc. v. Williamson Constr., Inc., 203 Ga. App. 460, 416 S.E.2d 889, 1992 Ga. App. LEXIS 450 (1992).

Contractor unable to complete job. — Where the contractor was prevented from completing the job due to the developer's inability to pay, the contractor's cessation of work was not an abandonment of the contract. Summit-Top Dev., Inc. v. Williamson Constr., Inc., 203 Ga. App. 460, 416 S.E.2d 889, 1992 Ga. App. LEXIS 450 (1992).

No enforceable lien absent contract between owner and person furnished materials. — In the absence of a showing of a contractual relationship between the property owner and the person to whom the materials were furnished, no enforceable lien is created against the owner's property. Ben Hill Ready Mix Concrete Co. v. Prather, 160 Ga. App. 149, 286 S.E.2d 481, 1981 Ga. App. LEXIS 2942 (1981); Frank Woods Constr. Co. v. Randi, 177 Ga. App. 438, 339 S.E.2d 406, 1986 Ga. App. LEXIS 1425 (1986).

No entitlement to claim in full amount of creditor's materialman's liens. — Creditor would not necessarily be entitled to a claim in the full amount of the creditor's materialman's liens under O.C.G.A. § 44-14-361 but rather, would only be entitled to recover the damages the creditor suffered pursuant to O.C.G.A. § 51-1-6 due to the debtor's crime of false swearing, which would be the value of liens lost, which in turn depended on the value of the properties to which the liens attached and the existence of any superior liens on those properties. In the absence of an established underlying claim, summary judgment in the creditor's favor on the creditor's nondischargeability claims was not warranted. Thomas Concrete of Ga., Inc. v. Osbourne (In re Osbourne), No. 10-82440-WLH, No. 10-06621, 2017 Bankr. LEXIS 2414 (Bankr. N.D. Ga. Aug. 24, 2017).

Invoices for materials create presumption of receipt by contractor. — Invoices showing that materials were shipped by the supplier to the contractor for use at the job site created a rebuttable presumption that the materials were received and used by the contractor for the benefit of the property owner. Williamscraft Dev., Inc. v. Vulcan Materials Co., 196 Ga. App. 703, 397 S.E.2d 122, 1990 Ga. App. LEXIS 1071 (1990).

Materialman relieved from obtaining judgment before enforcing lien where contractor adjudicated bankrupt. — A building contractor who filed a bankruptcy petition was "adjudicated a bankrupt" within the meaning of O.C.G.A. § 44-14-361.1 though the contractor was not discharged in bankruptcy; therefore, a materialman was relieved from obtaining a judgment against the contractor before enforcing a materialman's lien against the improved property. Reid v. Harbin Lumber Co., 172 Ga. App. 615, 323 S.E.2d 845, 1984 Ga. App. LEXIS 2607 (1984).

Where part of a construction contract is sublet to a subcontractor by a prime contractor, the owner may not be

subjected to a lien for any claim or amount which the main contractor could not assert against the owner. Troup Enters. v. Mitchell, Carrington & Rayfield, Inc., 199 Ga. App. 173, 404 S.E.2d 337, 1991 Ga. App. LEXIS 395 (1991).

Subcontractor not eligible for lien. — Because a subcontractor did not actually comply with O.C.G.A. § 43-14-8(f) as the evidence indicated that a Georgia-licensed electrician that the subcontractor affiliated itself with through an alleged joint venture only presented electrical contracting licenses when permits for the work were applied for and took no action to inspect others' electrical work or to verify that the work complied with the applicable codes, the subcontractor could not enforce the subcontract with the contractor, could not recover in quantum meruit under O.C.G.A. § 9-2-7 as the express contract violated public policy, and could not file a subcontractor's lien under O.C.G.A. §§ 44-14-361.1 and 44-14-367. JR Construction/Electric, LLC v. Ordner Constr. Co., 294 Ga. App. 453, 669 S.E.2d 224, 2008 Ga. App. LEXIS 1214 (2008).

Completion of contract as question of fact. — When the record does not disclose as a matter of law whether the work performed by a contractor should be considered as completion of the original contract, the matter rests with the fact-finders. Troup Enters. v. Mitchell, Carrington & Rayfield, Inc., 199 Ga. App. 173, 404 S.E.2d 337, 1991 Ga. App. LEXIS 395 (1991).

Evidence demanded a conclusion that a subcontractor substantially completed its contract work on the date when the work was approved as substantially complete, or on the date when the subcontractor gave its warranty, or in all events no later than the date when the subcontractor said that its employees were last on the job. Womack Indus., Inc. v. B & A Equip. Co., 199 Ga. App. 660, 405 S.E.2d 880, 1991 Ga. App. LEXIS 618 (1991), cert. denied, No. S91C1117, 1991 Ga. LEXIS 517 (Ga. Sept. 6, 1991).

Materialman's lien statute not applicable to attorney's lien. — O.C.G.A. § 44-14-361.1 did not apply to the enforcement of an attorney's lien. Hester v. Chalker, 222 Ga. App. 783, 476 S.E.2d 79, 1996 Ga. App. LEXIS 1010 (1996).

Applicability to supplier of equipment. — Under O.C.G.A. §§ 44-14-360(3) and 44-14-361.1(a), a supplier of equipment for a construction project was a supplier of material and thus had to furnish its equipment for the improvement of the project in order for its lien to arise. Cent. Atlanta Tractor Sales, Inc. v. Athena Dev., LLC, 289 Ga. App. 355, 657 S.E.2d 290, 2008 Ga. App. LEXIS 87 (2008).

Compliance

Compliance with section unnecessary as to issue between attorney and client. — O.C.G.A. § 44-14-361.1 is applicable to attorney's liens only when the struggle is between the attorney and an innocent third party; as to an issue between the attorney and client only, it is not necessary to show compliance with that section in order to recover. Griner v. Foskey, 158 Ga. App. 769, 282 S.E.2d 150, 1981 Ga. App. LEXIS 2412 (1981).

Affidavit. — Trial court did not err by granting partial summary judgment to a buyer on its claim that the seller's mechanic's lien was invalid for failure to record an affidavit for the commencement of an action so as to establish the lien as required by O.C.G.A. § 44-14-361.1(a)(3). Krut v. Whitecap Hous. Group, LLC, 268 Ga. App. 436, 602 S.E.2d 201, 2004 Ga. App. LEXIS 945 (2004).

Description of property. — Where the description of real property in a materialman's lien inaccurately described the property and did not contain an adequate "key" to remedy the deficiency, the lien was unenforceable. Mull v. Mickey's Lumber & Supply Co., 218 Ga. App. 343, 461 S.E.2d 270, 1995 Ga. App. LEXIS 716 (1995), cert. denied, No. S95C1956, 1995 Ga. LEXIS 1245 (Ga. Nov. 17, 1995).

Home purchasers and a mortgagee were entitled to summary judgment on a contractor's materialmen's liens because the property descriptions in each of the liens did not accurately describe the purchasers' property as they differed from the description in the warranty and security deeds and, thus, the liens did not comply O.C.G.A. § 44-14-361.1(a). Bollers v. Noir

Compliance (Cont'd)

Enters., 297 Ga. App. 435, 677 S.E.2d 338, 2009 Ga. App. LEXIS 284 (2009).

Compliance with copy requirement. — Trial court did not err in granting a subcontractor summary judgment in the subcontractor's action against a property owner and surety to recover under a lien discharge bond for monies allegedly owed for materials, services, and labor the subcontractor supplied to a construction project because the subcontractor complied with the copy requirement of O.C.G.A. § 44-14-361.1(a)(2); the subcontractor's claim of lien was not ineffective by reason of the slight variance to be found in the copy supplied to the owner because the copy of the claim of lien the subcontractor sent to the owner clearly served the purpose of the claim of lien provisions found in § 44-14-361.1(a)(2) of ensuring that the owner timely received notice of its lien, even though one word of the owner's name was omitted. Madison Retail Suwanee, LLC v. Orion Enters. Sales & Serv., 309 Ga. App. 712, 711 S.E.2d 71, 2011 Ga. App. LEXIS 388 (2011).

Effect of unperfecting on claim for money damages. — Filing of imperfect notice rendered a materialman's lien unenforceable, but was not a defense to the materialman's complaint for money damages for the value of materials. Consolidated Sys. v. AMISUB, Inc., 261 Ga. 590, 408 S.E.2d 109, 1991 Ga. LEXIS 415 (1991).

Liens in excess of remaining contract price were invalid. — Although a contractor's claim for lost profits in the contractor's materialman's lien was invalid under O.C.G.A. § 44-14-361(c) and (e), because the lost profits amount was easily determined, the trial court erred by invalidating the entire lien, instead of amending the lien to exclude non-lienable amounts as permitted by § 44-14-361.1(a) and (a.1). Duke Builders, Inc. v. Massey, 351 Ga. App. 535, 831 S.E.2d 172, 2019 Ga. App. LEXIS 445 (2019), aff'd, 310 Ga. 152, 849 S.E.2d 186, 2020 Ga. LEXIS 653 (2020).

Materialmen's lien cannot include anticipated profits. — Georgia Supreme Court held that the Georgia Court of Appeals was correct to hold that a materialmen's lien may not include anticipated profits, and the Supreme Court affirmed that holding. Massey v. Duke Builders, Inc., 310 Ga. 152, 849 S.E.2d 186, 2020 Ga. LEXIS 653 (2020).

Identity of real person whose interest in premises subject to lien. — Where a lien claim was filed solely against the owner's reversionary interest and not against the leasehold interest in the premises, the lien document failed to reveal affirmatively the identity of the real person whose interest in the premises was being subjected to the lien, the lien claim was not effective. Meco of Atlanta, Inc. v. Super Valu Stores, Inc., 215 Ga. App. 146, 449 S.E.2d 687, 1994 Ga. App. LEXIS 1102 (1994).

The general contractor was not an indispensable party in an action by an insolvent subcontractor's supplier against the contractor's surety where the supplier satisfied the statutory requirements to prevail on the underlying lien. Hendricks v. Blake & Pendleton, Inc., 221 Ga. App. 651, 472 S.E.2d 482, 1996 Ga. App. LEXIS 600 (1996), cert. denied, No. S96C1578, 1996 Ga. LEXIS 1029 (Ga. Sept. 20, 1996).

Owner as "contractor." — There was no reason why an owner could not also have been a contractor for purposes of a materialman's lien; because a property owner listed itself as "general contractor" in its notices of commencement, and because a materials supplier was not in privity with the owner, the supplier was required to provide the owner with the O.C.G.A. § 44-14-361(a) notice to contractor; since the supplier failed to give the proper notice, its materialman's liens were invalid. Roofing Supply of Atlanta, Inc. v. Forrest Homes, Inc., 279 Ga. App. 504, 632 S.E.2d 161, 2006 Ga. App. LEXIS 629 (2006).

Subcontractor satisfied requirements and did not refer to owners as contractors. — Dismissal of the petitions was affirmed because the subcontractor's claims of liens included statements that the liens were against specific properties for materials furnished to the respective property owner or owners, and at no point in the claims of liens did the subcontractor describe the owners as con-

tractors. Robertson v. Ridge Envtl., LLC, 319 Ga. App. 570, 737 S.E.2d 578, 2013 Ga. App. LEXIS 14 (2013).

Filing of Claims

Failure to meet filing requirement. — Georgia law requires that a contractor suing an owner directly file a notice of the suit brought against the owner with the clerk of the superior court in which the subject property is located. Where this is not done, the requirements of O.C.G.A. § 44-14-361.1 have not been met; the lien has not been "made good"; and there can be no "relation back" concerning either the lien or any judgment arising out of said lien. Opportunities Industrialization Ctr. of Atlanta, Inc. v. T & B-Scottdale Contractors, 26 B.R. 394, 1983 Bankr. LEXIS 7073 (Bankr. N.D. Ga. 1983).

Failure of materialman to comply with the notice provisions of O.C.G.A. § 44-14-361.1(a)(3) extinguished the materialman's right to a lien against the improved real estate. The contractor's subsequent bankruptcy filing could not breathe new life into the extinguished right to a lien so as to give the materialman another bite at the apple it had missed on its first bob. Palmer v. Duncan Whsle., Inc., 262 Ga. 28, 413 S.E.2d 437, 1992 Ga. LEXIS 146 (1992).

Materialmen's filing of notice against the contractor did not satisfy the requirement for filing a notice of subsequent action against property owners. Northside Wood Flooring, Inc. v. Borst, 232 Ga. App. 569, 502 S.E.2d 508, 1998 Ga. App. LEXIS 752 (1998), cert. denied, No. S98C1487, 1998 Ga. LEXIS 965 (Ga. Oct. 2, 1998).

Before a materialman's lien can be allowed, the lien claimant must show compliance with all conditions of O.C.G.A. § 44-14-361.1, and filing the notice of commencement of the action is a prerequisite to the enforceability of the lien; at the time the lien holder fails to file the notice, the lien becomes unenforceable. Gwinnett-Club Assocs., L.P. v. Southern Elec. Supply Co., 242 Ga. App. 507, 529 S.E.2d 636, 2000 Ga. App. LEXIS 186 (2000), cert. dismissed, No. S00C1137, 2000 Ga. LEXIS 586 (Ga. July 14, 2000).

When a Chapter 7 debtor raised two counterclaims to a nondischargeability complaint that both involved state law issues (breach of contract and whether the creditor failed to timely file a notice of action under O.C.G.A. § 44-14-361.1(a)(3) and (4)), a bankruptcy court determined sua sponte that discretionary abstention under 28 U.S.C. § 1334(c)(1) was appropriate. While dischargeability was a bankruptcy matter, the state law liability issues were not so closely related that the dischargeability issue could not be severed, and it was in the best interest of the parties that the debtor's liability under state law be determined in a pending state court lien action. K.A.P., Inc. v. Hardigan (In re Hardigan), No. 12-40484, No. 12-4069, 2013 Bankr. LEXIS 277 (Bankr. S.D. Ga. Jan. 18, 2013).

Constructive trust not imposed. — Georgia law does not impose a constructive trust in favor of a subcontractor on funds paid by an owner to a contractor when the subcontractor has not filed a lien, even when the owner has paid the contractor in full during the time the subcontractor could have filed a lien. Wachovia Bank v. American Bldg. Consultants, Inc., 138 B.R. 1015, 1992 Bankr. LEXIS 384 (Bankr. N.D. Ga. 1992).

Reliance on verbal promises to pay. — A materialman is not excused from filing a claim of lien in reliance on the contractor's verbal promises to pay. Wachovia Bank v. American Bldg. Consultants, Inc., 138 B.R. 1015, 1992 Bankr. LEXIS 384 (Bankr. N.D. Ga. 1992).

The three-month deadline for filing a mechanic's lien cannot be excused, relaxed, or extended by the actions of either the debtor or the creditor. Ballard v. Grubbs, 9 B.R. 499 (M.D. Ga. 1981).

Strict construction of three-month time limit for filing lien. — The method of time computation in O.C.G.A. § 1-3-1(d)(3), which would allow plaintiff to file its materialman's lien after the three-month period expired because the period expired on a weekend, did not apply to extend the filing requirement of O.C.G.A. § 44-14-361.1(a)(2). United States Filter Distrib. Group, Inc. v. Barnett, 241 Ga. App. 759, 526 S.E.2d 912, 1999 Ga. App. LEXIS 1649 (1999), aff'd, 273 Ga. 254, 538 S.E.2d 739, 2000 Ga. LEXIS 868 (2000).

Subcontractor was not required to file notice of lien under O.C.G.A. § 44-

Filing of Claims (Cont'd)

14-361.1(a)(3) in order to recover on a bond obtained by a general contractor which discharges a lien against property. Burgess v. Travelers Indem. Co., 185 Ga. App. 82, 363 S.E.2d 308, 1987 Ga. App. LEXIS 2424 (1987).

Commencement of Action

The purpose of former O.C.G.A. § 44-14-362(3) (now O.C.G.A. § 44-14-361.1(a)(3)) is to provide notice that a statutory lien has been perfected by the filing of a suit. Opportunities Industrialization Ctr. of Atlanta, Inc. v. T & B-Scottdale Contractors, 26 B.R. 394, 1983 Bankr. LEXIS 7073 (Bankr. N.D. Ga. 1983).

The purpose of the notice provision is directed toward providing notice to interested third parties rather than property owners. Ragsdale v. Chiu (In re Harbor Club), 185 B.R. 959, 1995 Bankr. LEXIS 1226 (Bankr. N.D. Ga. 1995).

Filing of notice prerequisite to enforceability of lien. — The notice required to be filed is the notice of the commencement of action against the contractor and is a prerequisite to the enforceability of the lien. Statham Mach. & Equip. Co. v. Howard Constr. Co., 160 Ga. App. 466, 287 S.E.2d 249, 1981 Ga. App. LEXIS 2988 (1981).

A supplier's failure to file, in county wherein property is located, notice of commencement of action against contractor in another county renders the supplier's claim of lien unenforceable. Bettis v. McClure, 160 Ga. App. 412, 287 S.E.2d 291, 1981 Ga. App. LEXIS 3134 (1981).

Where actions to enforce a materialman's lien against the property owner are commenced beyond the statutory 12-month period by virtue of the bankruptcy exception, failure properly to file a notice of the claim or action with the superior court clerk of the county wherein the subject lien was filed extinguishes said claim of lien and renders it unenforceable. Newton Lumber Supply, Inc. v. Crumbley, 161 Ga. App. 741, 290 S.E.2d 114, 1982 Ga. App. LEXIS 2026 (1982).

Filing notice is a prerequisite to enforcement of a lien. Frank Woods Constr. Co. v. Randi, 177 Ga. App. 438, 339 S.E.2d 406, 1986 Ga. App. LEXIS 1425 (1986).

Filing notice of commencement of the action is a prerequisite to enforceability of the lien. Eurostyle, Inc. v. Jones, 197 Ga. App. 188, 397 S.E.2d 620, 1990 Ga. App. LEXIS 1225 (1990).

Because a notice under O.C.G.A. § 44-14-361.1(a)(3) was not filed within 14 days of a lien claimant's suit being initiated, the lien was unenforceable, and the trial court did not err in granting a developer's motion for partial summary judgment against the lien claimant; while the appeals court sympathized with the lien claimant's argument that the claimant received a file-stamped copy and as a result believed no fee was due, ultimately it was the responsibility of plaintiff and plaintiff's counsel to see that the appropriate fees were paid in a timely manner. Kendall Supply, Inc. v. Pearson Cmtys., Inc., 285 Ga. App. 863, 648 S.E.2d 158, 2007 Ga. App. LEXIS 664 (2007).

When a subcontractor filed a proof of claim in a general contractor's bankruptcy action, but did not file a notice of commencement of the action as required by O.C.G.A. § 44-14-361.1(a)(3), the subcontractor's lien claim was extinguished and could not be revived in an action by the subcontractor against the property owner. Action Concrete v. Portrait Homes - Little Suwanee Point, LLC, 285 Ga. App. 650, 647 S.E.2d 353, 2007 Ga. App. LEXIS 614 (2007).

Materialmen's lien creditor was required to file a notice of commencement within 14 days of filing the creditor's proof of claim under O.C.G.A. § 44-14-361.1(a)(3), and the creditor's failure to do so rendered the creditor's claim unperfected under 11 U.S.C. § 546(b)(2), and unsecured, so that the creditor's lien could be avoided under 11 U.S.C. § 545(2). In re R & B Constr., No. 08-62023-CRM, No. 08-62029, 2010 Bankr. LEXIS 2546 (Bankr. N.D. Ga. Aug. 17, 2010).

Lien rights lost where notice not filed. — Because filing notice is a prerequisite to enforcing a lien, a party's right to enforce a lien based on that action is forever lost as of the fifteenth day after it commences its action without filing notice. The filing of a subsequent action does not

revive the party's lien rights. Metromont Materials Corp. v. Cargill, Inc., 221 Ga. App. 853, 473 S.E.2d 498, 1996 Ga. App. LEXIS 603 (1996), cert. denied, No. S96C1689, 1997 Ga. LEXIS 115 (Ga. Jan. 17, 1997); Weber Air Conditioning, Inc. v. Triple-R Pooler, Inc., 245 Ga. App. 590, 538 S.E.2d 499, 2000 Ga. App. LEXIS 1023 (2000), cert. denied, No. S00C2076, 2001 Ga. LEXIS 85 (Ga. Jan. 19, 2001).

Notice requirement applies whether claim brought against contractor or owner. — The notice requirement of O.C.G.A. § 44-14-361.1(a)(3) applies whether the recovery of the amount of the materialman's claim be properly brought against the contractor or the owner, whichever one is contractually responsible for the debt. Beall v. F.H.H. Constr., Inc., 193 Ga. App. 544, 388 S.E.2d 342, 1989 Ga. App. LEXIS 1554 (1989).

All recovery suits, including those against a property owner, are subject to the requirements set forth in O.C.G.A. § 44-14-361.1(a)(3) because application of its provisions is dependent upon whether the defendant is the one primarily or contractually liable for the alleged debt, not upon whether the defendant is a contractor. Ragsdale v. Chiu (In re Harbor Club), 185 B.R. 959, 1995 Bankr. LEXIS 1226 (Bankr. N.D. Ga. 1995).

Facsimile not effective as notice. — Trial court properly granted summary judgment to property owner after the subcontractor sued the property owner so that the subcontractor could perfect its materialman's lien against the property owner's property, as the subcontractor's method of providing notice of the lien to the property owner did not comply with applicable statutory law, O.C.G.A. § 44-14-361.1(a)(2), since that statute expressly allowed the lien notice to be provided to the property owner by registered mail, certified mail, or statutory overnight delivery, and not though the facsimile transmission that the subcontractor used, especially since the facsimile transmission was not the equivalent method of providing notice as those methods set forth in the statute. Phillips, Inc. v. Historic Props. of Am., 260 Ga. App. 886, 581 S.E.2d 389, 2003 Ga. App. LEXIS 504 (2003).

Notice of commencement defective. — Grant of summary judgment to the property owner on a materialman's lien was reversed because it failed to identify or provide contact information for its construction lender in its Notice of Commencement, rendering it fatally defective under O.C.G.A. § 44-14-361.5(d) and because the Notice of Commencement did not substantially comply with § 44-14-361.5(b), the material supplier's failure to file its Notice to Contractor within the prescribed time was excused under § 44-14-361.5(d). Capitol Materials, Inc. v. JLB Buckhead, LLC, 337 Ga. App. 848, 789 S.E.2d 803, 2016 Ga. App. LEXIS 351 (2016).

Timely action against contractor prerequisite. — Lien claimant had to commence a timely action against a contractor under the statute as a prerequisite to suing the owner on the bond, as such, the property owner did not create a new cause of action for the lien claimant by filing a bond under O.C.G.A. § 44-14-364; the bond stood in the place of the real property as security for the lien claimant and because no new action was created, the lien claimant in an action on the bond still had to comply with the statutory requirements for perfecting a lien. Few v. Capitol Materials Inc., 274 Ga. 784, 559 S.E.2d 429, 2002 Ga. LEXIS 20 (2002).

Reasonable time for filing notice. — A period of 16 days between the date of the filing of the foreclosure suit in one county, where the foreign corporate defendant maintained its registered office, and the date of the filing of the notice of suit, with reference to giving notice to the bona fide purchasers of the property subject to the lien, was not so unreasonable so as to render the claim unenforceable, in that the language of O.C.G.A. § 44-14-361.1(a)(3) requires only a reasonable time for the filing of the notice after the suit had been filed. American Hosp. Supply Corp. v. Starline Mfg. Corp., 171 Ga. App. 790, 320 S.E.2d 857, 1984 Ga. App. LEXIS 2339 (1984) (decided prior to 1991 amendment).

Three months meant three calendar months, not 90 days. — The 1991 version of O.C.G.A. § 44-14-361.1, requiring a contractor to file the contractor's claim of lien three months from the completion of the work, governed and was

Commencement of Action (Cont'd)

satisfied by the contractor's filing the claim of lien on September 12 following the completion of work on June 13. The court rejected the owner's argument that "three months" meant 90 days. Fed. Trust Bank v. C. W. Matthews Contr. Co., 312 Ga. App. 200, 718 S.E.2d 63, 2011 Ga. App. LEXIS 922 (2011).

Recording a judgment on real property records some months after commencing a suit does not satisfy the requirement of former O.C.G.A. § 44-14-362(3) (now O.C.G.A. § 44-14-361.1(a)(3)) that notice be filed "at the time of filing such action," and is fatal to a claim of a statutory lien. Opportunities Industrialization Ctr. of Atlanta, Inc. v. T & B — Scottdale Contractors, 31 B.R. 119, 1983 Bankr. LEXIS 5854 (Bankr. N.D. Ga. 1983) (decided prior to 1991 amendment).

Section deals with actions against contractors, not owners. — The requirement of O.C.G.A. § 44-14-361.1(a)(3) as to the time within which an action may be commenced relates to the materialman's action against the contractor and not to the action against the owner of the real estate. Opportunities Industrialization Ctr. of Atlanta, Inc. v. T & B-Scottdale Contractors, 26 B.R. 394, 1983 Bankr. LEXIS 7073 (Bankr. N.D. Ga. 1983).

Application of Bankruptcy Automatic Stay

Exception to the automatic stay pursuant to 11 U.S.C. § 362(b)(3) did not apply to a post-petition mechanic's lien because the lien was not properly perfected and enforceable as the Chapter 7 trustee did not authorize any of the work listed in the lien. Scarver v. Ellis (In re McKeever), 567 B.R. 652, 2017 Bankr. LEXIS 435 (Bankr. N.D. Ga. 2017).

Collection action not required where lessee in bankruptcy. — Bankruptcy of the lessee who had contracted for the leasehold improvements with the unpaid contractor relieved the contractor from the requirement that a collection action against the lessee be commenced before a lien enforcement action could be brought against the lessor. Underground Festival, Inc. v. McAfee Eng'r Co., 214 Ga. App. 243, 447 S.E.2d 683, 1994 Ga. App. LEXIS 849 (1994), cert. denied, No. S94C1816, 1994 Ga. LEXIS 1181 (Ga. Dec. 2, 1994).

Creditor's time for action tolled under bankruptcy provisions. — Bankruptcy court held that the procedure under O.C.G.A. § 44-14-361.1 to "make good" a mechanic's or materialman's lien involved creating the lien, not mere perfection, and these acts were subject to an automatic stay; accordingly, because the automatic stay prevented the creditor from complying with O.C.G.A. § 44-14-361.1, the creditor's failure to take further action under that statute was tolled under 11 U.S.C. § 108. In re Durango Ga. Paper Co., 297 B.R. 316, 2003 Bankr. LEXIS 1170 (Bankr. S.D. Ga. 2003).

Creditor's action not tolled under bankruptcy provisions. — Chapter 11 trustee could avoid a creditor's mechanic's lien pursuant to 11 U.S.C. § 545(2) because the requirements of the Georgia Lien Statute, O.C.G.A. § 44-14-360 et seq., were acts of perfecting rather than creating or enforcing a lien and, therefore, 11 U.S.C. § 108(c)(2) did not toll creditor's obligation to timely comply with the statute; the creditor's failure to comply with the Georgia Lien Statute's requirements within the statute's time limits and receive the protection of relation back perfection under 11 U.S.C. § 546(b) permitted the trustee to avoid the lien under 11 U.S.C. § 545(2). Durango Ga. Paper Co. v. Milton J. Wood Fire Prot., Inc., 356 B.R. 305, 2005 Bankr. LEXIS 3131 (Bankr. S.D. Ga. 2005).

Avoidance of mechanic's lien in bankruptcy. — Chapter 7 trustee's right to avoid mechanic's lien on estate property, which attached post-petition and without the trustee's consent or authorization by the court, was not limited by relevant state law because at no point since assuming duties as trustee had the trustee consented to any work being done by the transferee on the property, which was required for a lien to attach. Scarver v. Ellis (In re McKeever), 567 B.R. 652, 2017 Bankr. LEXIS 435 (Bankr. N.D. Ga. 2017).

Where action against contractor timely, action against owner need not be commenced within 12 months. — An action to enforce the lien against the

owner need not be instituted within the 12-month statutory period if a claim has been filed by the materialman in the contractor's bankruptcy proceedings during that time, and the filing of the bankruptcy claim satisfies the requirement of former O.C.G.A. § 44-14-362(3) (now O.C.G.A. § 44-14-361.1(a)(3)) of commencing an action within 12 months. Newton Lumber Supply, Inc. v. Crumbley, 161 Ga. App. 741, 290 S.E.2d 114, 1982 Ga. App. LEXIS 2026 (1982); Galbreath v. Vondenkamp, 197 Ga. App. 284, 398 S.E.2d 278, 1990 Ga. App. LEXIS 1240 (1990).

Determination of when claims become due. — The "due date" for purposes of O.C.G.A. § 44-14-361.1(a)(3) does not include an inspection period, but is determined from the last date the equipment was provided for the improvement of the real estate. In accordance with the mandate that Georgia's materialmen's lien law should be dealt with according to the strictest rules of strict construction, the three month period contemplated by O.C.G.A. § 44-14-361.1(a)(2) commences on the last date materials are furnished; there is no reason to treat the calculation of the 12-month period contemplated by O.C.G.A. § 44-14-361(a)(3) differently. Cent. Atlanta Tractor Sales, Inc. v. Athena Dev., LLC, 289 Ga. App. 355, 657 S.E.2d 290, 2008 Ga. App. LEXIS 87 (2008).

In a mechanic's lien foreclosure action brought by a construction company against a property owner, the trial court erred by dismissing the action as untimely since the lien, although stating that the debt became due on a date more than three months from the date the lien was filed, also stated that the construction company provided services, labor, and/or materials to the property owner within three months of the filing of the complaint. D. C. Ecker Constr., Inc. v. Ponce Inv., LLC, 294 Ga. App. 833, 670 S.E.2d 526, 2008 Ga. App. LEXIS 1322 (2008), cert. denied, No. S09C0486, 2009 Ga. LEXIS 184 (Ga. Feb. 23, 2009).

Failure to state date claim became due did not render lien invalid. — Summary judgment for an owner in a supplier's suit to enforce a materialman's lien was improper because O.C.G.A. § 44-14-361.1(a)(2) tempered the principle of strict construction with respect to the form of the claim of lien, and the fact that the lien failed to state the date the supplier's claim became due did not render the lien invalid; the claim of lien complied "in substance" with the required form. Vulcan Constr. Materials, LP v. Franklin Builders Props., Inc., 298 Ga. App. 120, 679 S.E.2d 356, 2009 Ga. App. LEXIS 621 (2009).

Amendment of pleadings. — O.C.G.A. § 9-11-15(c), which permits amendments to relate back to the time of the original pleading, is applicable to an action to enforce a lien under O.C.G.A. § 44-14-361.1. Coe & Payne Co. v. Foster & Kleiser, Inc., 258 Ga. 161, 366 S.E.2d 292, 1988 Ga. LEXIS 103 (1988).

No amendment of expired claims. — O.C.G.A. § 9-11-15(c) which permits amendments to relate back to the time of the original pleading, is inapplicable to an expired action to enforce a lien under O.C.G.A. § 44-14-361.1(a)(2)'s three-month limitations period. Tri-City Constr. Co. v. Sandy Plains Partnership, 206 Ga. App. 506, 426 S.E.2d 57, 1992 Ga. App. LEXIS 1700 (1992).

Amendment of materialmen's lien authorized. — Georgia Supreme Court held that the Georgia Court of Appeals properly held that amendment of a materialmen's lien was authorized by O.C.G.A. § 44-14-361.1(a.1) and that the lien amount may be reduced at any time. Massey v. Duke Builders, Inc., 310 Ga. 152, 849 S.E.2d 186, 2020 Ga. LEXIS 653 (2020).

Lis pendens proper where specific performance requested. — Where purchasers requested specific performance of a contract requiring the property involved to be sold to them, the property was "directly involved," lis pendens was proper, the pleadings were privileged, and its filing was simply notice of the suit, not defamation of the title. Panfel v. Boyd, 187 Ga. App. 639, 371 S.E.2d 222, 1988 Ga. App. LEXIS 858 (1988).

Materialman's allegedly inadequate notice. — Trial court properly granted summary judgment to the materialman on its action to recover on a lien release bond after an electrical subcontractor did not pay for materials supplied to it by the materialman, and despite the

Application of Bankruptcy Automatic Stay (Cont'd)

claim of the general contractor and the surety that the materialman did not comply with a lien statute notice requirement; the lien statute notice requirement was meant to protect prospective purchasers from unknowingly buying property encumbered by liens and did not apply to the materialman's situation because the materialman, acting as a lien claimant, was attempting to recover on a lien discharge bond that the general contractor and the surety had filed to discharge the lien against the electrical contractor. Washington Intl Ins. Co. v. Hughes Supply, Inc., 271 Ga. App. 50, 609 S.E.2d 99, 2004 Ga. App. LEXIS 1342 (2004), cert. denied, No. S05C0709, 2005 Ga. LEXIS 323 (Ga. Apr. 26, 2005).

Action untimely filed. — A supplier of equipment had not brought its claim against a contractor within 12 months of when the claim became due, as required by O.C.G.A. § 44-14-361.1(a)(3); the 12-month period did not include a period for the inspection of the returned equipment, but was determined from the last date the equipment was furnished for the improvement of the real estate. Cent. Atlanta Tractor Sales, Inc. v. Athena Dev., LLC, 289 Ga. App. 355, 657 S.E.2d 290, 2008 Ga. App. LEXIS 87 (2008).

Concurrent action. — Subcontractor did not fail to comply with the lien statute in filing a concurrent action against a general contractor on the underlying contract and against the property owner and the surety on the discharge bond because the concurrent action filed by the subcontractor against the general contractor, the owner, and the surety was permitted by the decision of the court of appeals in a prior case; in that case, the court of appeals determined that the subcontractor's action against the general contractor and its action against the owner to enforce the lien could be brought concurrently and could be combined in the same petition. Madison Retail Suwanee, LLC v. Orion Enters. Sales & Serv., 309 Ga. App. 712, 711 S.E.2d 71, 2011 Ga. App. LEXIS 388 (2011).

Insolvency, Absconding, and Other Actions of Contractor or Subcontractor

Notice in action against property owner. — The fact that a materialman timely filed notice of claim to enforce a lien against the bankrupt general contractor pursuant to O.C.G.A. § 44-14-361.1(a)(3) did not mean that it was not required to file a second notice pursuant to O.C.G.A. § 44-14-361.1(a)(4) in connection with an action against the property owner. Calhoun/Johnson Co. v. Houston Family Trust No. 1, 236 Ga. App. 793, 513 S.E.2d 759, 1999 Ga. App. LEXIS 335 (1999).

Because O.C.G.A. § 44-14-361.1(a)(4) provided that where a contractor was adjudicated bankrupt or, if after an action was filed, no final judgment could be obtained against the contractor because of its adjudication in bankruptcy, the materialman was not required to file an action or obtain judgment against the contractor before enforcing a lien against the improved property; moreover, the materialman could enforce the lien directly against the property by filing an action against the owner within 12 months from the time the lien became due. SAKS Assocs., LLC v. Southeast Culvert, Inc., 282 Ga. App. 359, 638 S.E.2d 799, 2006 Ga. App. LEXIS 1388 (2006).

A property owner is entitled to credit for any payments made to the contractor which are shown by competent and relevant evidence to have been applied to valid claims for material or labor. Taverrite v. Lowe's of Franklin, Inc., 166 Ga. App. 346, 304 S.E.2d 78, 1983 Ga. App. LEXIS 2161 (1983).

Cost of completing work deducted from contract price when contractor abandons contract. — Where a contractor, under a definite contract containing a stipulated price for the entire work, undertakes to erect a building on a lot of land and abandons the construction of the building, the owner may complete the work; and if the owner does so, the necessary cost of so doing may be deducted from the contract price, and the property will be subject to the liens of materialmen and laborers to the extent only of the balance.

Adams v. W.P. Stephens Lumber Co., 158 Ga. App. 761, 282 S.E.2d 217, 1981 Ga. App. LEXIS 2409 (1981).

The trial court correctly granted the property owner's motion for summary judgment as the $59,928 applied under the contract plus the $123,974 spent to complete the house, totaled $183,902, which was $1,902 in excess of the contract price. Maverick Materials, Inc. v. Kauffman, 227 Ga. App. 102, 488 S.E.2d 690, 1997 Ga. App. LEXIS 792 (1997), cert. denied, No. S97C1770, 1997 Ga. LEXIS 907 (Ga. Nov. 21, 1997).

Contractor's liability for materials where subcontractor abandons project. — Where, before construction of a building was completed, a materialman filed its claim of lien for unpaid materials supplied to a subcontractor, and the owner continued to make payments to the contractor who continued to pay the subcontractor, the subcontractor's eventual bankruptcy and abandonment of the project were the responsibility of the contractor. That abandonment had no bearing on the materialman's right to foreclose its lien for such materials as were furnished to the subcontractor and actually used in the project. Mayer Elec. Supply Co. v. Federal Ins. Co., 195 Ga. App. 191, 393 S.E.2d 270, 1990 Ga. App. LEXIS 425 (1990), cert. denied, No. S90C0959, 1990 Ga. LEXIS 829 (Ga. May 2, 1990).

Foreclosure Proceedings

In a lien foreclosure materialman must distinguish between an individual and the individual's corporation and must bring an action against the correct account debtor. Ben Hill Ready Mix Concrete Co. v. Prather, 160 Ga. App. 149, 286 S.E.2d 481, 1981 Ga. App. LEXIS 2942 (1981); D & N Elec., Inc. v. Underground Festival, Inc., 202 Ga. App. 435, 414 S.E.2d 891, 1991 Ga. App. LEXIS 1782 (1991).

Materialman or subcontractor not entitled to judgment in rem where entire contract price expended. — Where it is necessary to expend the entire contract price in completing the construction called for by the contract, the materialman or subcontractor is not entitled to a judgment in rem against the property. Adams v. W.P. Stephens Lumber Co., 158 Ga. App. 761, 282 S.E.2d 217, 1981 Ga. App. LEXIS 2409 (1981).

Procedural error made error in lien draft irrelevant. — An attorney was properly granted summary judgment in a legal malpractice suit as to an issue of whether the attorney inadequately drafted a lien as the lien foreclosure action was filed by another attorney, who failed to comply with the notice requirement of O.C.G.A. § 44-14-361.1(a), which made the adequacy of the legal description in the lien irrelevant due to that procedural error. Bonner Roofing & Sheet Metal Co. v. Karsman, 285 Ga. App. 586, 646 S.E.2d 763, 2007 Ga. App. LEXIS 589 (2007).

Dormancy of judgment on materialman's lien. — Trial court erred in granting summary judgment to the lumber company in the company's suit against the property owner to foreclose on a materialman's lien to recover the price of materials sold to the contractor and used to construct the owner's home because the dormancy statute barred foreclosure on the lien more than seven years after the lien was perfected because, when the lumber company failed to take action on the default judgment against the contractor, and the judgment became unenforceable at the end of seven years, the lien was no longer valid and there was nothing to foreclose upon. Lang v. Brand-Vaughan Lumber Co., Inc., 339 Ga. App. 710, 792 S.E.2d 461, 2016 Ga. App. LEXIS 591 (2016), cert. denied, No. S17C0792, 2017 Ga. LEXIS 498 (Ga. June 5, 2017).

Required showing. — To establish and foreclose a lien on the owner's property it must be shown that the owner contracted with someone for these supplies to be furnished, that the person to whom the plaintiff furnished them was connected with that contract, and that the value of the material was within the contract price to which the owner agreed. Spicewood, Inc. v. Dykes Paving & Constr. Co., 199 Ga. App. 165, 404 S.E.2d 305, 1991 Ga. App. LEXIS 401 (1991).

RESEARCH REFERENCES

Am. Jur. Pleading and Practice Forms.

17B Am. Jur. Pleading and Practice Forms, Mechanics' Liens, § 97.

ALR.

Delivery of material to building site as sustaining mechanic's lien — modern cases, 32 A.L.R.4th 1130.

Application of relation-back doctrine permitting change in party after statute of limitations has run in state court action — construction cases, 104 A.L.R.6th 1.

44-14-361.2. Dissolution of lien.

(a) The special lien specified in subsection (a) of Code Section 44-14-361 shall be dissolved if the owner, purchaser from owner, or lender providing construction or purchase money or any other loan secured by real estate shows that:

(1) The lien has been waived in writing by lien claimant; or

(2)(A) They or any of them have obtained the sworn written statement of the contractor or person other than the owner at whose instance the labor, services, or materials were furnished, or the owner when conveying title in a bona fide sale or loan transaction, that the agreed price or reasonable value of the labor, services, or materials has been paid or waived in writing by the lien claimant; and

(B) When the sworn written statement was obtained or given as a part of a transaction:

(i) Involving a conveyance of title in a bona fide sale;

(ii) Involving a loan in which the real estate is to secure repayment of the loan; or

(iii) Where final disbursement of the contract price is made by the owner to the contractor

there was not of record, at the time of the settlement of the transaction a valid preliminary notice or claim of lien which had not been previously canceled, dissolved, or expired.

(b) As used in paragraph (2) of subsection (a) of this Code section, the term:

(1) "Person other than the owner" shall not include a subcontractor.

(2) "Final disbursement" of the contract price means payment of the agreed price between the owner and contractor for the improvements made upon the real estate or the reasonable value of the labor, services, and materials incorporated in the improvements upon the real estate and shall include payment of the balance of the contract price to an escrow agent.

History.

Code 1981, § 44-14-361.2, enacted by Ga. L. 1983, p. 1450, § 1; Ga. L. 1984, p. 22, § 44.

Code Commission notes.

Pursuant to Code Section 28-9-5, in 1999, "has" was substituted for "have" near the end of subparagraph (a)(2)(A).

Law reviews.

For annual survey on law of real property, see 42 Mercer L. Rev. 389 (1990).

For annual survey on construction law, see 64 Mercer L. Rev. 71 (2012).

JUDICIAL DECISIONS

O.C.G.A. § 4-14-361.2 contemplates a single affidavit that the agreed price or reasonable value of all the labor, services, or materials employed in the completed project have been paid and not periodic affidavits that the agreed price or reasonable value of some of the labor, services, or materials employed to date in the ongoing project have been paid. CC & B Indus., Inc. v. Stroud, 198 Ga. App. 658, 402 S.E.2d 527, 1991 Ga. App. LEXIS 232 (1991).

After reviewing the affidavit, the court determined that in the absence of any evidence of collusion, fraud, or actual knowledge of any irregularity by the acceptance corporation, the affidavit of debtor's principal was sufficient to dissolve the inchoate materialmans' liens. Under the circumstances, the affidavit signed by debtor's principal was valid and enforceable against two creditors; thus, the acceptance corporation's lien was entitled to first priority status. RWD Real Estate, LLC v. Nissan Motor Acceptance Corp. (In re RWD Real Estate, LLC), No. 09-41061, 2010 Bankr. LEXIS 1896 (Bankr. M.D. Ga. May 24, 2010).

Sufficiency of affidavit. — A contractor's affidavit will dissolve a lien only if the conditions in both O.C.G.A. § 44-14-361.2(a)(2)(A) and (a)(2)(B) are met. Balest v. Simmons, 201 Ga. App. 605, 411 S.E.2d 576, 1991 Ga. App. LEXIS 1509 (1991).

Contractor's affidavit reciting that it was made for the purpose of "inducing" a lender to disburse the final construction proceeds and "inducing" homeowners to make final payment was sufficient to dissolve the lien, where it was undisputed that the lender made such a disbursement, that the homeowners paid the entire proceeds to the contractor, and that upon receiving this payment the contractor had been paid the entire sum contemplated by the construction contract. Balest v. Simmons, 201 Ga. App. 605, 411 S.E.2d 576, 1991 Ga. App. LEXIS 1509 (1991).

Affidavit held sufficient. — A general contractor's affidavit which states that the general contractor "has paid in full or has otherwise satisfied all obligations for all materials and equipment furnished" by the materialman is in substantial if not complete compliance with O.C.G.A. § 44-14-361.2(a)(2)(A), and the materialman's lien should be dissolved. Dixie Concrete Serv., Inc. v. Life Ins. Co., 174 Ga. App. 866, 331 S.E.2d 889, 1985 Ga. App. LEXIS 1983 (1985).

In the absence of evidence that an owner's sale of property to the construction lender was not bona fide, the owner's affidavit served to dissolve the materialman's lien even though it contained false information; it was the written document, rather than the acts or intentions of the affiant in executing it, that operated to extinguish the lien. Shockley Plumbing Co. v. NationsBank, 229 Ga. App. 60, 493 S.E.2d 227, 1997 Ga. App. LEXIS 1357 (1997).

Affidavit not properly sworn to or notarized. — A contractor's affidavit regular on its face, but challenged on the ground it was not properly sworn to or notarized, is as a matter of law sufficient if there is an absence of any evidence indicating that the owner was aware of the irregularity, or allegations and proof of fraud and/or collusion. Walk Softly, Inc. v. Hyzer, 188 Ga. App. 230, 372 S.E.2d 500, 1988 Ga. App. LEXIS 922 (1988).

Inadequate statement of payment. — Subcontractor's lien filed before a lender's security deed was superior to the deed pursuant to O.C.G.A. § 44-2-2(b). The

general contractor's affidavit that the subcontractors had been or will be paid was insufficient to satisfy the plain language of O.C.G.A. § 44-14-361.2(a), requiring a statement that payment had been made, and did not extinguish the lien. Ga. Primary Bank v. Atlanta Paving, Inc., 309 Ga. App. 851, 711 S.E.2d 409, 2011 Ga. App. LEXIS 474 (2011).

Sworn written statement of contractor. — O.C.G.A. § 44-14-361.2(a)(2)(B), which includes the language "as a part of a transaction," tacitly appears to require only that the sworn statement will be obtained or given both in conjunction with the final disbursement and within such a reasonable time thereof so as to constitute "a part of" the final disbursement transaction. Whether a sworn contractor's statement has been timely obtained or given will depend on the circumstances of each case. Star Mfg., Inc. v. Edenfield, 191 Ga. App. 665, 382 S.E.2d 706, 1989 Ga. App. LEXIS 772 (1989).

An unsworn statement executed by general contractor for the owners of the property was not sufficient to dissolve materialman's lien. Southern Concrete Constr. Co. v. Hall, 205 Ga. App. 516, 422 S.E.2d 663, 1992 Ga. App. LEXIS 1245 (1992).

Waiver of lien by subcontractor. — A subcontractor contractually waives its right to file a lien on property by agreeing that a general contractor's contract with the property owner, which contains a lien waiver, be made part of its subcontract with the general contractor. MCC Powers v. Ford Motor Co., 184 Ga. App. 487, 361 S.E.2d 716, 1987 Ga. App. LEXIS 2273 (1987).

Subcontract lien waiver clause sufficiently expressed intent to waive. — Where the subcontract lien waiver clause provided that "the subcontractor waives his right to file a mechanic's lien and agrees that no mechanic's lien or other claims in the nature of a lien or charge against the lands and premises . . . shall be filed or maintained by the subcontractor," the language of such a clause sufficiently expressed an intention to waive a claim of lien against the improved property that the subcontractor otherwise would have been entitled to establish and to maintain under the mechanic's lien laws. AAS Plastering Co. v. TPM Contractors, Inc., 247 Ga. 601, 277 S.E.2d 910, 1981 Ga. LEXIS 813 (1981) (decided under O.C.G.A. § 44-14-361 prior to 1983 amendment).

Waivers of lien rights must be distinguished from contractor's affidavits which in the usual course of business are sworn statements by the contractor that the contractor has paid the subcontractors the reasonable value or agreed price of work done or material furnished. Anderson v. Golden, 569 F. Supp. 122, 1982 U.S. Dist. LEXIS 10282 (S.D. Ga. 1982) (decided under former O.C.G.A. § 44-14-361).

Bankruptcy court denied a motion filed by a paving company and an electric company, pursuant to Fed. R. Bankr. P. 9023 and 9024 and Fed. R. Civ. P. 59 and 60, which asked the court to alter, amend, and reconsider an order which found that a lien an acceptance corporation held on real property a Chapter 11 debtor owned was entitled under O.C.G.A. § 44-14-361.2(a) to first priority status. The paving company and the electric company were not entitled to relief under Fed. R. Civ. P. 60 because the companies had not presented evidence that the acceptance corporation engaged in misconduct, misrepresentation, or fraud, and the court refused to grant relief under Fed. R. Civ. P. 59(e) because the paving company and the electric company failed in the first hearing to recognize the significance of an affidavit executed by the debtor's owner in conjunction with a loan the debtor obtained from the acceptance corporation, which falsely stated that no work had been done on the property within 90 days of closing. RWD Real Estate, LLC v. Nissan Motor Acceptance Corp. (In re RWD Real Estate, LLC), No. 09-41061, 2010 Bankr. LEXIS 2420 (Bankr. M.D. Ga. July 23, 2010).

44-14-361.3. Preliminary notice of lien; form; notice to contractor; filing; necessity of preliminary notice.

(a) Prior to filing a claim of lien, a person having a lien under paragraphs (1) through (8) and (10) of subsection (a) of Code Section 44-14-361 may at such person's option file a preliminary notice of lien rights. The preliminary notice of lien rights in order to be effective shall:

(1) Be filed with the clerk of superior court of the county in which the real estate is located within 30 days after the date a party delivered any materials or provided any labor or services for which a lien may be claimed;

(2) State the name, address, and telephone number of the potential lien claimant;

(3) State the name and address of the contractor or other person at whose instance the labor, services, or materials were furnished;

(4) State the name of the owner of the real estate and include a description sufficient to identify the real estate against which the lien is or may be claimed; and

(5) Include a general description of the labor, services, or materials furnished or to be furnished.

(b) A party filing a preliminary notice of lien rights except a contractor shall, within seven days of filing the notice, send by registered or certified mail or statutory overnight delivery a copy of the notice to the contractor on the property named in the notice or to the owner of the property. The lien claimant may rely on the building permit issued on the property for the name of the contractor.

(c) The clerk of each superior court shall maintain within the records of that office a record separate from all other real estate records in which preliminary notices specified in subsection (a) of this Code section and affidavits specified in subsection (c) of Code Section 44-14-361.4 shall be filed. Each such notice and affidavit shall be indexed under the name of the owner as contained in the preliminary notice. The clerk shall collect a filing fee of $5.00 for the filing of each preliminary notice.

(d) A person having a lien under paragraphs (1) through (8) and (10) of subsection (a) of Code Section 44-14-361 may enforce the lien without filing a preliminary notice of lien.

History.
Code 1981, § 44-14-361.3, enacted by Ga. L. 1983, p. 1450, § 1; Ga. L. 1985, p. 1322, § 4; Ga. L. 2000, p. 1589, § 3; Ga. L.

2021, p. 674, § 5/HB 480.

The 2021 amendment, effective May 10, 2021, inserted "and (10)" near the beginning of subsection (a) and in subsection (d). See Editor's notes for applicability.

Editor's notes.

Ga. L. 2000, p. 1589, § 16, not codified by the General Assembly, provides that this Act is applicable with respect to notices delivered on or after July 1, 2000.

Ga. L. 2021, p. 674, § 7/HB 480, not codified by the General Assembly, provides: "This Act shall become effective upon its approval by the Governor or upon its becoming law without such approval and Sections 2 through 8 of this Act shall apply to labor, services, or materials performed or furnished by registered interior designers on or after such date" This Act was approved by the Governor on May 10, 2021.

JUDICIAL DECISIONS

Filing a preliminary notice of lien is optional, and it is not a prerequisite for filing a claim of lien in Georgia. Wachovia Bank v. American Bldg. Consultants, Inc., 138 B.R. 1015, 1992 Bankr. LEXIS 384 (Bankr. N.D. Ga. 1992).

44-14-361.4. Cancellation or expiration of preliminary notice; demand for filing of claim of lien.

(a) A preliminary notice of lien rights filed pursuant to Code Section 44-14-361.3 shall be dissolved if it is canceled and a preliminary notice also expires and is dissolved under any of the following conditions:

(1) The lien has been waived in writing by the lien claimant;

(2) The time has expired for filing the claim of lien as required in Code Section 44-14-361.1;

(3) On residential property, a demand for filing of a claim of lien has been sent by registered or certified mail or statutory overnight delivery to the potential lien claimant at the address specified in the preliminary notice of lien rights and at least ten days have elapsed since the date of such mailing without the filing of a claim of lien; or

(4) On all property except residential property, a demand for filing of a claim of lien has been sent by registered or certified mail or statutory overnight delivery to the potential lien claimant at the address specified in the preliminary notice of lien rights and at least ten days have elapsed since the date of such mailing without the filing of a claim of lien; provided, however, the demand for filing of a claim of lien shall not be sent until the contractor's contract is substantially complete or until the potential lien claimant's contract has been terminated or the potential lien claimant has abandoned the contract.

(b) A demand for filing of claim of lien shall contain the same information required to be contained in the preliminary notice of lien rights and shall contain the following statement addressed to the potential lien claimant:

"This demand was mailed to you on _____ pursuant to Code Section 44-14-361.4. You are notified that unless you file a claim of lien with respect to this claim on or before the tenth day after said date of mailing your right to claim a lien will be dissolved."

(c) If a demand for filing of a claim of lien is mailed as provided in this Code section and no claim of lien is filed within ten days after said date of mailing, the preliminary notice of lien rights may be canceled as provided in this subsection. In order to obtain cancellation, the person who mailed the demand or his attorney shall file with the clerk of superior court a copy of the demand and his or her affidavit that the demand was mailed as provided in paragraph (3) or (4) of subsection (a) of this Code section and that ten days have elapsed since said date of mailing without the filing of a claim of lien by the potential lien claimant. Upon such filing, the clerk of superior court shall cancel of record the preliminary notice of lien rights.

History.
Code 1981, § 44-14-361.4, enacted by Ga. L. 1983, p. 1450, § 1; Ga. L. 1984, p. 22, § 44; Ga. L. 2000, p. 1589, § 3.

Editor's notes.
Ga. L. 2000, p. 1589, § 16, not codified by the General Assembly, provides that this Act is applicable with respect to notices delivered on or after July 1, 2000.

44-14-361.5. Liens of persons without privity of contract.

(a) To make good the liens specified in paragraphs (1), (2), and (6) through (9) of subsection (a) of Code Section 44-14-361, any person having a right to a lien who does not have privity of contract with the contractor and is providing labor, services, or materials for the improvement of property shall, within 30 days from the filing of the notice of commencement or 30 days following the first delivery of labor, services, or materials to the property, whichever is later, give a written notice to contractor as set out in subsection (c) of this Code section to the owner or the agent of the owner and to the contractor for a project on which there has been filed with the clerk of the superior court a notice of commencement setting forth therein the information required in subsection (b) of this Code section.

(b) Not later than 15 days after the contractor physically commences work on the property, a notice of commencement shall be filed by the owner, the agent of the owner, or by the contractor with the clerk of the superior court in the county in which the project is located. A copy of the notice of commencement shall be posted on the project site. The notice of commencement shall include:

(1) The name, address, and telephone number of the contractor;

(2) The name and location of the project being constructed and the

legal description of the property upon which the improvements are being made;

(3) The name and address of the true owner of the property;

(4) The name and address of the person other than the owner at whose instance the improvements are being made, if not the true owner of the property;

(5) The name and the address of the surety for the performance and payment bonds, if any; and

(6) The name and address of the construction lender, if any.

The contractor shall be required to give a copy of the notice of commencement to any subcontractor, materialman, or person who makes a written request of the contractor. Failure to give a copy of the notice of commencement within ten calendar days of receipt of the written request from the subcontractor, materialman, or person shall render the provision of this Code section inapplicable to the subcontractor, materialman, or person making the request.

(c) A notice to contractor shall be sent by registered or certified mail or statutory overnight delivery to the owner or the agent of the owner and to the contractor at the addresses set forth in the notice of commencement setting forth:

(1) The name, address, and telephone number of the person providing labor, services, or materials;

(2) The name and address of each person at whose instance the labor, services, or materials are being furnished;

(3) The name of the project and location of the project set forth in the notice of commencement; and

(4) A description of the labor, services, or materials being provided and, if known, the contract price or anticipated value of the labor, services, or materials to be provided or the amount claimed to be due, if any.

(d) The failure to file a notice of commencement shall render the provisions of this Code section inapplicable. The filing of a notice of commencement shall not constitute a cloud, lien, or encumbrance upon or defect to the title of the real property described in the notice of commencement, nor shall it alter the aggregate amounts of liens allowable, nor shall it affect the priority of any loan in which the property is to secure payment of the loan filed before or after the notice of commencement, nor shall it affect the future advances under any such loan. Nothing contained in this Code section shall affect the provisions of Code Section 44-14-361.2.

(e) The clerk of each superior court shall file the notice of commencement within the records of that office and maintain an index separate from other real estate records or an index with the preliminary notices specified in subsection (a) of Code Section 44-14-361.3. Each such notice of commencement shall be indexed under the name of the true owner and the contractor as contained in the notice of commencement.

History.

Code 1981, § 44-14-361.5, enacted by Ga. L. 1993, p. 1008, § 1; Ga. L. 1995, p. 672, § 1; Ga. L. 2008, p. 1063, § 3/SB 374; Ga. L. 2013, p. 141, § 44/HB 79; Ga. L. 2014, p. 866, § 44/SB 340.

Law reviews.

For note on 1993 enactment of this section, see 10 Ga. St. U. L. Rev. 211 (1993).

For survey article on construction law, see 59 Mercer L. Rev. 55 (2007).

For survey article on construction law, see 60 Mercer L. Rev. 59 (2008).

For annual survey on construction law, see 61 Mercer L. Rev. 65 (2009).

For article, "Non-Privity Lien Rights on Private Construction Projects: The Court of Appeals of Georgia Provides Clarity," see 15 (No. 5) Ga. St. B.J. 20 (2010).

For annual survey on construction law, see 64 Mercer L. Rev. 71 (2012).

For annual survey on construction law, see 69 Mercer L. Rev. 63 (2017).

JUDICIAL DECISIONS

Notice not required when filing lien. — A Notice of Commencement that failed to identify the true owner of the property upon which improvements were being made and failed to include a legal description of the property was fatally deficient, and therefore, under O.C.G.A § 14-44-361.5(d), a sub-subcontractor that provided labor services to the project was relieved of the obligations regarding Notice to Contractor outlined in § 14-44-361.5(a), (c) when filing a materialman's lien. Harris Ventures, Inc. v. Mallory & Evans, Inc., 291 Ga. App. 843, 662 S.E.2d 874, 2008 Ga. App. LEXIS 655 (2008), cert. denied, No. S08C1725, 2008 Ga. LEXIS 790 (Ga. Sept. 22, 2008).

Time requirement for filing notice of commencement. — O.C.G.A. § 44-14-361.5(a) and (d) do not require the filing of a Notice of Commencement within the 15-day deadline as a general condition to providing a Notice to Contractor. The failure to file a Notice of Commencement as provided in § 44-14-361.5(d) applies when there has been a total failure to file a Notice of Commencement at the time when a materialman must give a written Notice to Contractor to perfect its lien under § 44-14-361.5(a). Beacon Med. Prods. v. Travelers Cas. & Sur. Co., 292 Ga. App. 617, 665 S.E.2d 710, 2008 Ga. App. LEXIS 825 (2008).

Filing of notice to contractor. — A supplier was not entitled to recover on a materialman's lien discharge bond because it had not perfected the lien by filing a Notice to Contractor under O.C.G.A. § 44-14-361.5(a). The fact that the general contractor did not file its Notice of Commencement within 15 days did not relieve the supplier of its duty to file the Notice to Contractor; moreover, because the supplier did have record notice of the Notice of Commencement, which was filed nearly four months before the supplier first provided materials for the project, the purpose of the statute was satisfied. Beacon Med. Prods. v. Travelers Cas. & Sur. Co., 292 Ga. App. 617, 665 S.E.2d 710, 2008 Ga. App. LEXIS 825 (2008).

Supplier to a subcontractor on a construction project was not entitled to recover on a materialman's lien under O.C.G.A. § 44-14-361.5 because the supplier failed to file a Notice to Contractor as required. The contractor's late filing of the Notice of Commencement did not relieve the supplier of the supplier's duty to provide notice. Southeast Culvert, Inc v. Hardin Bros., LLC, 312 Ga. App. 158, 718 S.E.2d 28, 2011 Ga. App. LEXIS 858

(2011), cert. denied, No. S12C0377, 2012 Ga. LEXIS 233 (Ga. Feb. 27, 2012).

Notice to contractor deficient. — Trial court did not err in granting a general contractor and the contractor's surety summary judgment in a supplier's action to recover under a payment bond and a lien discharge bond for monies a subcontractor owed the contractor for materials it supplied to a construction project because the supplier's notice to the contractor failed to comply with O.C.G.A. §§ 10-7-31(a) and 44-14-361.5(c) because the notice wholly omitted required information; although the supplier's notice to the contractor set forth the subcontractor's name, it failed to provide any address for the subcontractor as required under §§ 10-7-31(a)(2) and 44-14-361.5(c)(2), and although the notice set forth the name of the project, the notice failed to state the location of the construction project pursuant to §§ 10-7-31(a)(3) and 44-14-361.5(c)(3). Consol. Pipe & Supply Co. v. Genoa Constr. Servs., 302 Ga. App. 255, 690 S.E.2d 894, 2010 Ga. App. LEXIS 104 (2010).

Substantial compliance with notice of commencement. — As a general contractor's notice of commencement under O.C.G.A. § 44-14-361.5(b) substantially complied when the contractor's notice only omitted the contractor's telephone number, a supplier still had a duty to file a notice to the contractor under § 44-14-361.5(a) and (c); accordingly, summary judgment to the supplier was error on the supplier's lien-discharge bond claim as the supplier had failed to file the notice with the contractor. Fid. & Deposit Co. v. Lafarge Bldg. Materials, Inc., 312 Ga. App. 821, 720 S.E.2d 288, 2011 Ga. App. LEXIS 1045 (2011).

Failure to post notice of commencement at job site. — General contractor's failure to post a notice of commencement at a job site as required by O.C.G.A. § 44-14-365.1(b) did not absolve a subcontractor from compliance with the special lien perfection requirements in § 44-14-361.5(a), (c); while the statute specifically stated that a failure to file a notice of commencement with the clerk of the superior court where a construction project was located would result in a subcontractor not having to comply with § 44-14-361.5(a), (c), no such language was included in the statute regarding the failure to post a notice of commencement at a job site. Rey Coliman Contrs., Inc. v. PCL Constr. Servs., 296 Ga. App. 892, 676 S.E.2d 298, 2009 Ga. App. LEXIS 344 (2009).

Judgment on the pleadings reversed. — Construing the pleadings in a light most favorable to showing a question of fact, in an action in which: (1) the pleadings did not disclose with certainty that a supplier would not be entitled to relief in its action against a general contractor and the contractor's surety; and (2) the appeals court did not consider the supplier's averments that its "Notice to Owner/Contractor" complied with O.C.G.A. §§ 10-7-31 and 44-14-361.5 or its admission that it received a copy of the notice of commencement to establish that the general contractor's notice of commencement was otherwise proper and timely filed as required by the statutes, the general contractor and its surety were not entitled to judgment on the pleadings. Consol. Pipe & Supply Co. v. Genoa Constr. Servs., Inc., 279 Ga. App. 894, 633 S.E.2d 59, 2006 Ga. App. LEXIS 731 (2006).

Owner as "contractor." — There was no reason why an owner could not also have been a contractor for purposes of a materialman's lien; because a property owner listed itself as "general contractor" in its notices of commencement, and because a materials supplier was not in privity with the owner, the supplier was required to provide the owner with the O.C.G.A. § 44-14-361(a) notice to contractor; since the supplier failed to give the proper notice, its materialman's liens were invalid. Roofing Supply of Atlanta, Inc. v. Forrest Homes, Inc., 279 Ga. App. 504, 632 S.E.2d 161, 2006 Ga. App. LEXIS 629 (2006).

Indexing requirements. — In the general contractor's action against the materials provider relating to the provider's request for payment under a payment bond, the general contractor's notice of commencement and the provider's notice to contractor complied with O.C.G.A. § 10-7-31; although the notice of com-

mencement stated that it was pursuant to O.C.G.A. § 44-14-361.5 and the notice to contractor stated that it was sent under O.C.G.A. § 44-14-361, O.C.G.A. § 10-7-31 did not require that either of the notices be expressly labeled as being provided under the statute, the notices contained the pertinent information contemplated by O.C.G.A. § 10-7-31, including that the general contractor had provided a payment bond and that the provider had provided materials for the project through improvements made by the subcontractor, and the notice of commencement was not misfiled under O.C.G.A. § 10-7-31(d) because it was labeled as provided under O.C.G.A. § 44-14-361.5, as the indexing requirements of both statutes were substantially identical. Sierra Craft, Inc. v. T. D. Farrell Constr., Inc., 282 Ga. App. 377, 638 S.E.2d 815, 2006 Ga. App. LEXIS 1398 (2006), cert. denied, No. S07C0460, 2007 Ga. LEXIS 145 (Ga. Feb. 5, 2007).

Notice of commencement defective. — A contractor's notice of commencement that described the property by street address only, without a legal description, and that did not list the name of the property's true owner, but the name under which the owner did business, was fatally defective under O.C.G.A. § 44-14-361.5, thus relieving a lien claimant of the duty to file a notice to contractor. GE v. North Point Ministries, Inc., 289 Ga. App. 382, 657 S.E.2d 297, 2008 Ga. App. LEXIS 94 (2008).

The requirement to furnish a legal description of the property and the name of the true owner are matters of substance, not mere technicalities, and providing merely the property's street address and an "a/k/a" name for the owner amounts to neither actual nor substantial compliance with the provisions of O.C.G.A. § 44-14-361.5. Either of these defects on the face of a notice of commencement will render the notice insufficient to trigger the provisions of O.C.G.A. § 44-14-361.5, so that a lien claimant is relieved of the obligation to provide a notice to contractor in order to preserve its lien. GE v. North Point Ministries, Inc., 289 Ga. App. 382, 657 S.E.2d 297, 2008 Ga. App. LEXIS 94 (2008).

Grant of summary judgment to the property owner on a materialman's lien was reversed because it failed to identify or provide contact information for its construction lender in its Notice of Commencement, rendering it fatally defective under O.C.G.A. § 44-14-361.5(d) and because the Notice of Commencement did not substantially comply with § 44-14-361.5(b), the material supplier's failure to file its Notice to Contractor within the prescribed time was excused under § 44-14-361.5(d). Capitol Materials, Inc. v. JLB Buckhead, LLC, 337 Ga. App. 848, 789 S.E.2d 803, 2016 Ga. App. LEXIS 351 (2016).

OPINIONS OF THE ATTORNEY GENERAL

Section not applicable to public works. — The provisions of O.C.G.A. § 44-14-361.5 pertaining to the filing of a Notice of Commencement of work are not applicable to a state authority with regard to construction projects on public property; however, a contractor performing a public works contract for a state authority is required to file a notice in accordance with former O.C.G.A. § 36-82-104(f). 1995 Op. Att'y Gen. No. 95-43.

44-14-362. Cancellation of preliminary notice upon final payment; form of cancellation.

(a) Upon final payment after all labor, services, or materials have been furnished, a person who has filed a preliminary notice of lien rights shall either deliver a cancellation of the preliminary notice of lien rights at the time of final payment or cause the notice to be canceled of record within ten days after final payment. Any person who fails to so cancel a preliminary notice shall be liable to the owner for all actual

damages, costs, and reasonable attorney's fees incurred by the owner in having the preliminary notice canceled.

(b) The cancellation required under this Code section shall be in the following form:

"Clerk, Superior Court

of _____ County

You are authorized and directed to cancel of record the preliminary notice of lien rights which we filed on the property owned by (state name of owner) on (give date) and recorded by you in Book _____, Page _____, of preliminary notices kept by you.

This _____ day of _____, _____.

_____

Lien claimant
or attorney"

History.

Code 1981, § 44-14-362, enacted by Ga. L. 1983, p. 1450, § 1; Ga. L. 1999, p. 81, § 44.

Code Commission notes.

Pursuant to Code Section 28-9-5, in 2022, punctuation was modified at the beginning and ending of the form in subsection (b).

Editor's notes.

Ga. L. 1983, p. 1450, § 1, effective July 1, 1983, renumbered former Code Section 44-14-362, relating to creation and declaration of liens, as present Code Section 44-14-361.1.

JUDICIAL DECISIONS

Analysis

General Consideration
Compliance
Filing of Claims
Commencement of Action
Insolvency, Absconding, and Other Actions of Contractor or Subcontractor
Foreclosure Proceedings
Priority of Liens

General Consideration

Editor's notes. — The pre-1984 annotations below were taken from decisions decided under former § 44-14-362. See editor's note, above.

Constitutionality. — The materialmen's lien statutes do not deprive property owners of a significant property interest without notice and hearing; they serve an important public interest and the statutes are not unconstitutional. Tucker Door & Trim Corp. v. Fifteenth St. Co., 235 Ga. 727, 221 S.E.2d 433, 1975 Ga. LEXIS 976 (1975).

History of section. — This section originated in an Act of the General Assembly passed in 1841. Kwilecki v. Young, 180 Ga. 602, 180 S.E. 137, 1935 Ga. LEXIS 501 (1935).

Historical requirements. — Prior to the passage of the amendments of 1941

and 1952 to former paragraph (3) of this section it was, without exception, a condition precedent to the enforcement of a materialman's lien against the property of the owner, for materials furnished a contractor, that the plaintiff materialman obtain a valid judgment against the contractor for the price of the materials under the decisions if the contractor had been adjudged a bankrupt, so that no judgment in personam could be had against him, the liability of the contractor was annulled and the materialman's lien could not thereafter be foreclosed against the property of the owner. Victory Lumber Co. v. Ellison, 95 Ga. App. 105, 97 S.E.2d 334, 1957 Ga. App. LEXIS 727 (1957).

Intent. — It was the intention of the General Assembly to deal only with the subject matter of lien and mortgage establishment and foreclosure as affecting subcontractors and persons claiming against or under subcontractors. Athens Elec. Supply Co. v. Delta Oil, Inc., 101 Ga. App. 515, 114 S.E.2d 289, 1960 Ga. App. LEXIS 917 (1960).

It was the intention of the General Assembly that when an owner of property entered into a contract with contractors to improve the real estate of the owner, that the owner of the real estate would have the responsibility of contracting with reliable contractors for such improvements and if such owner failed to do so and the contractors would not be served because they were beyond the jurisdiction of the court that it would not be necessary to do the impossible and bring action against such contractors within 12 months before subjecting the property improved to a lien for the amount of such improvements. Cowart v. Reeves, 80 Ga. App. 161, 55 S.E.2d 911, 1949 Ga. App. LEXIS 798 (1949).

The purpose of the materialman's lien statutes in every state is, in substance, the same: to give the furnisher of labor and material a claim upon the owner, to compel the owner at the owner's peril to withhold final payment until the owner has received assurance from the contractor that the owner has paid all material and labor claims, which are or which may be perfected into liens. Gignilliat v. West Lumber Co., 80 Ga. App. 652, 56 S.E.2d 841, 1949 Ga. App. LEXIS 896 (1949); Scott v. Williams, 111 Ga. App. 735, 143 S.E.2d 16, 1965 Ga. App. LEXIS 1079 (1965).

Section strictly construed. — This section is in derogation of the common law, and must be construed strictly. Before the lien which it creates in favor of certain persons, under certain circumstances, which overrides all other liens, can be allowed, the party must show compliance with all the conditions, and bring himself within all the requirements and limitations of this section. Kwilecki v. Young, 180 Ga. 602, 180 S.E. 137, 1935 Ga. LEXIS 501 (1935).

If there are degrees of strict construction, certainly an Act of the General Assembly which has for its purpose the giving of a lien upon property of one in favor of the creditor of another should be dealt with according to the strictest rules of strict construction. It is well established that the statute with reference to establishing liens against real estate for improvements made must be strictly construed. Cowart v. Reeves, 80 Ga. App. 161, 55 S.E.2d 911, 1949 Ga. App. LEXIS 798 (1949).

Lien statutes, being in derogation of the common law, must be strictly construed. Fowler v. Roxboro Homes, Inc., 98 Ga. App. 829, 107 S.E.2d 285, 1959 Ga. App. LEXIS 990 (1959).

The liens of laborers and materialmen do not rest upon contract, but upon the law which gives to them liens of labor performed and material furnished in the improvement of real estate. These liens are creatures of statute and must be strictly construed as they relate to classes of persons who may claim a lien and the improvements and kind of property on which it may be obtained. Atlanta Jewish Community Ctr., Inc. v. Tom Barrow Co., 130 Ga. App. 608, 203 S.E.2d 921, 1974 Ga. App. LEXIS 1200 (1974).

Strict compliance required. — O.C.G.A. § 44-14-361 and this section provide a method of effecting a lien for materials furnished for the purpose of improving real estate, and strict compliance with these sections is required. King v. Rutledge, 208 Ga. 172, 65 S.E.2d 801, 1951 Ga. LEXIS 315 (1951).

General Consideration (Cont'd)

When cancellation required. — Former subsection (a) only requires a cancellation of the preliminary notice of lien by the lien claimant if the lien claimant has received final payment after all labor services and materials have been furnished. Therefore, where subcontractor contended that it did not receive any such final payment, it would not have been required to cancel a preliminary notice of lien if it had filed one. Wachovia Bank v. American Bldg. Consultants, Inc., 138 B.R. 1015, 1992 Bankr. LEXIS 384 (Bankr. N.D. Ga. 1992).

Only way that liens against personalty may be created is in accordance with O.C.G.A. § 44-14-362. Meders v. Wirchball, 83 Ga. App. 408, 63 S.E.2d 674, 1951 Ga. App. LEXIS 877 (1951).

Difference between liens on money and liens on land. — The money, as it becomes due, is charged with a lien as against the contractor, in favor of the subcontractor, materialmen, and laborers. On the other hand, the land is charged with a lien as against the owner, for the purpose of securing the payment of the contract price, and creating the fund out of which the subcontractors and laborers may be paid. Scott v. Williams, 111 Ga. App. 735, 143 S.E.2d 16, 1965 Ga. App. LEXIS 1079 (1965).

Statutory requirements are mere conditions precedent to asserting lien. — Recording of the lien within three months from the date when the material was furnished, and the institution of an action within one year from that date, merely preserves the lien and the right to establish it against the property. Marietta Baptist Tabernacle v. Tomberlin Assocs., 576 F.2d 1237, 1978 U.S. App. LEXIS 9984 (5th Cir. 1978).

Requirements for preservation or perfection of materialman's lien. — To make good or perfect the materialman's lien specified in O.C.G.A. § 44-14-361, it is essential, under this section, not only that there be (1) a substantial compliance by the alleged lienor with the contract, and (2) the recording of the claim of lien within three months, but, (3) that an action for recovery of the amount of the claim be commenced within 12 months from the time the same became due. Kwilecki v. Young, 180 Ga. 602, 180 S.E. 137, 1935 Ga. LEXIS 501 (1935); Carter-Moss Lumber Co. v. Short, 66 Ga. App. 330, 18 S.E.2d 61, 1941 Ga. App. LEXIS 209 (1941).

In giving to the materialman a lien, the statute expressly states that in order to make good on the lien the materialman must both record and foreclose within the statutory periods. The record of the lien in time is no more essential to its creation than its foreclosure in time, and the lien comes into potential existence only when the statute is satisfied. Kwilecki v. Young, 180 Ga. 602, 180 S.E. 137, 1935 Ga. LEXIS 501 (1935).

In order to preserve a materialman's lien, it is essential to show that (1) the plaintiff completed the contract, (2) the plaintiff filed for record the claim of lien within three months after completion of the contract, and (3) the plaintiff brought suit to recover the amount of the claim within 12 months after the debt became due. Old Stone Mtg. & Realty Trust v. New Ga. Plumbing, Inc., 140 Ga. App. 686, 231 S.E.2d 785, 1976 Ga. App. LEXIS 1601 (1976), aff'd, 239 Ga. 345, 236 S.E.2d 592, 1977 Ga. LEXIS 910 (1977).

Materialman's lien only inchoate until perfected by judgment. — The lien provided for in favor of a materialman is not absolute, but must be completed, made good, or perfected in accordance with the provisions of O.C.G.A. § 44-14-362. It is only inchoate or incipient until a judgment finally perfects it. Carter-Moss Lumber Co. v. Short, 66 Ga. App. 330, 18 S.E.2d 61, 1941 Ga. App. LEXIS 209 (1941).

Approval of engineer condition precedent to foreclosure if in contract. — A stipulation in a building contract to the effect that the compensation of a builder shall be due and payable only on the certificate of a named engineer is a condition precedent to the foreclosure of the contractor's lien. Southern Mfg. Co. v. R.L. Moss Mfg. Co., 13 Ga. App. 847, 81 S.E. 263, 1913 Ga. App. LEXIS 374 (1913).

Uses of property permitted by materialman's lien statutes despite lien. — The materialmen's lien statutes do not deprive property owners of a significant

property interest without notice and hearing. Although some use of property may be curtailed, the owner is not legally prevented from selling, encumbering, renting or otherwise dealing with the property as the owner chooses. Fayetteville-85 Assocs. v. Samas, Inc., 241 Ga. 119, 243 S.E.2d 887, 1978 Ga. LEXIS 892 (1978).

Foreclosure proceedings for condominium assessments. — It is clear that the foreclosure proceedings set forth in O.C.G.A. § 44-3-109 are simplified, and distinct from the proceedings for the creation and enforcement of other types of liens. Propes v. Stonington Homeowners Ass'n, 149 Ga. App. 135, 253 S.E.2d 813, 1979 Ga. App. LEXIS 1755 (1979).

The sole requirements for creation of the lien for assessments are contained in O.C.G.A. § 44-3-109, and it is only the actual foreclosure proceedings which must be "in the same manner as other liens for the improvement of real property." Thus, the judgment and execution of the lien must be entered by the appropriate superior court. Propes v. Stonington Homeowners Ass'n, 149 Ga. App. 135, 253 S.E.2d 813, 1979 Ga. App. LEXIS 1755 (1979).

Materials must be used in improvement for materialman's claim to arise. — Where a materialman delivered materials to the job site and the subcontractor to whom the materials were consigned did not keep them, but the materials were returned to the materialman and placed in the materialman's stock, the materialman has no claim of lien for such materials as against the owner of the property being improved, as it is necessary that the materials be used in the improvement itself for the benefit of the owner before such materials are lienable. Downtowner of Atlanta, Inc. v. Dunham-Bush, Inc., 120 Ga. App. 342, 170 S.E.2d 590, 1969 Ga. App. LEXIS 774 (1969).

Materialman cannot recover against landowner on basis of unjust enrichment instead of remedy under section. — The purpose of this section is to give to materialmen a lien, and the mode for enforcing the lien is also prescribed, and the object of this section would be frustrated and virtually defeated if a materialman who failed to pursue a statutory remedy was allowed to recover against the landowner under a concept of unjust enrichment. Lynn v. Miller Lumber Co., 146 Ga. App. 230, 246 S.E.2d 137, 1978 Ga. App. LEXIS 2307 (1978).

Lien in favor of masons and carpenters not enforceable in equity absent impediment to legal remedy. — Where a statute creates a specific lien, in favor of masons and carpenters, on buildings erected by them, and also gives them a specific remedy for the enforcement of such lien, a court of equity has no jurisdiction to enforce it, unless there is some impediment or difficulty charged to exist, which would render the remedy given by the statute unavailable. King v. Rutledge, 208 Ga. 172, 65 S.E.2d 801, 1951 Ga. LEXIS 315 (1951).

Basis for requirement that plaintiff and defendant be in privity. — Requirement of privity between a plaintiff and a defendant in an action under this section can be drawn from the section only by the negative inference that the enumeration of certain instances in which the contractor need not be sued, gives rise to the necessary implication that the contractor must be sued in all other circumstances. Ben O'Callaghan Co. v. Schmincke, 376 F. Supp. 1361, 1974 U.S. Dist. LEXIS 8116 (D. Ga. 1974).

Defendant and plaintiff must be in privity in actions under section. — An action under this section must be brought against a defendant in direct privity with the plaintiff. In the normal case this requires the subcontractor to bring an action against the general contractor, and thus ensures that the subcontractor will seek compensation from the general contractor before the subscontractor will be allowed to foreclose on the owner's real property. Ben O'Callaghan Co. v. Schmincke, 376 F. Supp. 1361, 1974 U.S. Dist. LEXIS 8116 (D. Ga. 1974).

Agreement between landowner and lessee sufficient to charge owner with lien. — An agreement between a landowner and a lessee for a rent credit or payment in cash if necessary in exchange for permanent improvements is sufficient to charge the owner with a lien for material used pursuant to that agreement under former paragraph (3) of this section.

General Consideration (Cont'd)

Bennett Iron Works, Inc. v. Underground Atlanta, Inc., 130 Ga. App. 653, 204 S.E.2d 331, 1974 Ga. App. LEXIS 1218 (1974).

Requirements for subcontracts linking owner and materialmen indirectly through contractors. — There need be no contract between the materialman and the true owner, but there must be a contract for material between the true owner and some person for the erection of the improvements and, if the materialman has not sold directly to such person, then there must also be shown a contract between that person and the person to whom the materialman furnished the materials, and it must further appear that the subject matter of this subcontract is a part of the owner's original contract and within the owner's contractual commitment. Athens Elec. Supply Co. v. Delta Oil, Inc., 101 Ga. App. 515, 114 S.E.2d 289, 1960 Ga. App. LEXIS 917 (1960).

Materialman may obtain personal judgment against owner for materials sold to owner. — Where materials are sold to an owner either directly or through another as his agent, the materialman may, upon proper pleadings and evidence, obtain a personal judgment against the owner for the price or value of such materials, but the materialman is not obliged to seek or obtain such a judgment in order to maintain foreclosure proceedings. Robinson v. Reese, 175 Ga. 574, 165 S.E. 744, 1932 Ga. LEXIS 293 (1932).

Wife not liable for improvements made by materialman in contract with her husband. — A wife is not liable for services rendered or materials used in improving her property when such services and materials are furnished under a contract between her husband and the materialmen to which she is not a party. Nix v. Luke, 96 Ga. App. 123, 99 S.E.2d 446, 1957 Ga. App. LEXIS 519 (1957).

Compliance

Lien does not arise upon failure to complete on time. — Where the contractor agrees that the improvements shall be completed by a certain date, the lien under this section does not arise if there is a failure to perform such agreement. D.A. Tompkins Co. v. Monticello Cotton Oil Co., 137 F. 625, 1905 U.S. App. LEXIS 5007 (C.C.D. Ga. 1905).

Contractor need not show compliance if owner prevents completion. — One seeking to foreclose a contractor's lien for labor and materials must show a substantial compliance with the contract, but if the completion of the contract was prevented by the owner, this is equivalent to a completion of the contract as a remedial element. MacLeod v. Belvedale, Inc., 115 Ga. App. 444, 154 S.E.2d 756, 1967 Ga. App. LEXIS 1133 (1967).

Contractor may be entitled to equitable lien. — Where the contractor is by the act of the owner prevented from compliance, the contractor may be entitled to an equitable lien for the improvements made on a quantum meruit theory. Jones v. Ely, 95 Ga. App. 4, 96 S.E.2d 536, 1957 Ga. App. LEXIS 695 (1957).

Substantial compliance unnecessary if party with right to require architect's certificate prevents completion. — While one seeking to foreclose a contractor's lien for labor and materials must show substantial compliance with the contract, if the completion of the contract was prevented by the party otherwise having the right to insist on the architect's certificate, this is equivalent to completion of the contract as a remedial element. Gellis v. B.L.I. Constr. Co., 148 Ga. App. 527, 251 S.E.2d 800, 1978 Ga. App. LEXIS 3217 (1978).

Abandonment defeats contractor's claim of lien. — An abandonment of work before compliance with the contract, upon a mere apprehension that the contractor will not be paid at the time for payment, is unauthorized and defeats contractor's claim of lien. MacLeod v. Belvedale, Inc., 115 Ga. App. 444, 154 S.E.2d 756, 1967 Ga. App. LEXIS 1133 (1967).

The law does not allow a contractor, mechanic or materialman to violate a contract and claim a lien for work done, because of an apprehension or fear that the contractor will not receive pay. Rome Hotel Co. v. Warlick, 87 Ga. 34, 13 S.E. 116, 1891 Ga. LEXIS 89 (1891).

Where subcontractor has fully performed, nonperformance by contrac-

tor will not defeat subcontractor's lien. Massachusetts Bonding & Ins. Co. v. Realty Trust Co., 142 Ga. 499, 83 S.E. 210, 1914 Ga. LEXIS 442 (1914), writ of error dismissed, 241 U.S. 687, 36 S. Ct. 451, 60 L. Ed. 1237, 1916 U.S. LEXIS 1857 (1916); Holmes v. Venable, 27 Ga. App. 431, 109 S.E. 175, 1921 Ga. App. LEXIS 948 (1921).

Death of the owner shortly before completion of a house will not prevent the perfection of a contractor's lien, when the house was completed by agreement with the administration. Boynton v. Westbrook, 74 Ga. 68, 1885 Ga. LEXIS 287 (1885).

Claim of lien need not show compliance. — It is not required that the claim of lien as recorded should show on its face that the materialman has complied with the contract. Ford v. Wilson & Co., 85 Ga. 109, 11 S.E. 559, 1890 Ga. LEXIS 5 (1890).

Filing of Claims

Filing lien as provided by this section is essential to validity of foreclosure of a materialman's lien against realty. Nix v. Luke, 96 Ga. App. 123, 99 S.E.2d 446, 1957 Ga. App. LEXIS 519 (1957).

Form of materialman's claim. — The materialman's claim of lien filed for record must be in substance in the language of former paragraph (2) of this section. Fowler v. Roxboro Homes, Inc., 98 Ga. App. 829, 107 S.E.2d 285, 1959 Ga. App. LEXIS 990 (1959).

Section operates as a sort of automatic garnishment, which, without summons or service impounds the fund due by the owner, and requires it to be held up until the expiration of the time named in the statute. Scott v. Williams, 111 Ga. App. 735, 143 S.E.2d 16, 1965 Ga. App. LEXIS 1079 (1965).

Lien which fails to comply with section is ineffective. — When the claim of lien as filed fails to comply with the provisions of this section, the purported lien is ineffective. J.H. Morris Bldg. Supplies v. Brown, 151 Ga. App. 522, 260 S.E.2d 358, 1979 Ga. App. LEXIS 2620 (1979), rev'd, 245 Ga. 178, 264 S.E.2d 9, 1980 Ga. LEXIS 731 (1980).

Lien cannot constitute abuse of process. — Under O.C.G.A. § 44-14-361 et seq., a lien attaches when a laborer performs work on real property; however, under former subsections (2) and (3) of this section, it must be perfected within three months after either the completion of the work or the date materials are furnished and an action to recover the amount of the claim must be instituted within 12 months from the time labor or materials were last furnished. Thus, a lien is not civil process and plaintiff materialmen do not state a claim upon which relief can be granted when they contend that the filing of a lien constitutes abuse of process. Carl E. Jones Dev., Inc. v. Wilson, 149 Ga. App. 679, 255 S.E.2d 135, 1979 Ga. App. LEXIS 1982 (1979).

Claim must be recorded. — The mere filing of a claim for record is not sufficient compliance with this section. It must be actually recorded. Jones v. Kern, 101 Ga. 309, 28 S.E. 850, 1897 Ga. LEXIS 222 (1897); Ohio Blower Co. v. Savannah Lighting Co., 21 Ga. App. 464, 94 S.E. 636, 1917 Ga. App. LEXIS 640 (1917).

Effect of recording lien and instituting action. — The record of the lien, as provided by this section, within three months from the date when the material was furnished, and the institution of an action within one year from that date, merely preserves the lien and the right to establish it against the property. Davis v. Stone, 48 Ga. App. 532, 173 S.E. 454, 1934 Ga. App. LEXIS 121 (1934).

Recordation within three months must be alleged in complaint for foreclosure. Hinkle v. Reid, 16 Ga. App. 788, 86 S.E. 411, 1915 Ga. App. LEXIS 228 (1915).

Computation of three-month period. — From May 6, to August 6 in a given year, is more than three months. Jones v. Kern, 101 Ga. 309, 28 S.E. 850, 1897 Ga. LEXIS 222 (1897).

When materialman's lien attaches generally. — The lien of a materialman on real estate, arising under O.C.G.A. § 44-14-361 and this section, attaches from the time the work under the contract is commenced or the material is furnished. Spirides v. Victory Lumber Co., 76 Ga. App. 78, 45 S.E.2d 65, 1947 Ga. App. LEXIS 374 (1947).

Lien attaches unless owner affirmatively shows waiver or sworn statement of contractor. — This section does not require that the owner shall

Filing of Claims (Cont'd)

"take" an affidavit from the contractor in order to prevent the materialman's lien from attaching. It provides that the lien shall attach unless the true owner shows that such lien has been waived in writing or produces the sworn statement of the contractor, etc. Chambers Lumber Co. v. Gilmer, 60 Ga. App. 832, 5 S.E.2d 84, 1939 Ga. App. LEXIS 186 (1939).

Account becomes due upon the delivery of the last item constituting a part of the account. Dixie Lime & Stone Co. v. Ryder Truck Rental, Inc., 140 Ga. App. 188, 230 S.E.2d 322, 1976 Ga. App. LEXIS 1397 (1976).

Claim of lien becomes due upon the date of delivery of the last item included in the claim. Vulcan Materials Co. v. D.H. Overmyer Whse. Co., 115 Ga. App. 792, 156 S.E.2d 213, 1967 Ga. App. LEXIS 1259 (1967).

Inclusion of nonlienable items with lienable items does not defeat the whole. Sears Roebuck & Co. v. Superior Rigging & Erecting Co., 120 Ga. App. 412, 170 S.E.2d 721, 1969 Ga. App. LEXIS 796 (1969).

Unless lienable and nonlienable items cannot be separately charged. — Where lienable and nonlienable items are included in one contract for a specific sum, and it cannot be determined what proportion is chargeable to each, the benefit of lien law is lost. Jackson's Mill & Lumber Co. v. Holliday, 108 Ga. App. 663, 134 S.E.2d 563, 1963 Ga. App. LEXIS 742 (1963).

When running accounts fall due. — Although it may be a custom for running accounts to fall due and become payable on January 1, following, yet for the purpose of foreclosing a lien arising out of such an account, the account will be regarded as falling due upon the delivery of the last item constituting a part of the running account covered by the contract. McCluskey v. Still, 32 Ga. App. 641, 124 S.E. 548, 1924 Ga. App. LEXIS 574 (1924).

Requirements for perfecting special lien for running account. — The lien for materials furnished under an entire contract is recorded in time if it is recorded within three months after the last item is furnished. New Ebenezer Ass'n v. Gress Lumber Co., 89 Ga. 125, 14 S.E. 892, 1892 Ga. LEXIS 284 (1892).

A materialman may not perfect a special lien on the owner's property without first showing that it had filed its claim of lien within three months from the date of the last delivery of one or more specific items on the particular job and had obtained a judgment against the contractor based on all of the items shown in the running account or bill of particulars involved in that action. It could not try, in an action to foreclose a lien, the question whether or not it had furnished any item not appearing in the running account presented in the action against the contractor. Chambers Lumber Co. v. Gilmer, 60 Ga. App. 832, 5 S.E.2d 84, 1939 Ga. App. LEXIS 186 (1939).

If the claim of lien is recorded within three months from the date of the last item listed on the running account, charged upon the open account against the purchaser, it is recorded in time, even though such particular item has been paid for. Chambers Lumber Co. v. Gilmer, 60 Ga. App. 832, 5 S.E.2d 84, 1939 Ga. App. LEXIS 186 (1939).

In cases involving a claim of lien for material furnished by a materialman, if the lien is recorded within three months from the delivery or furnishing of the last item of material which constitutes a part of the open or running account covered by the contract, then the claim is timely filed as the whole. Sears Roebuck & Co. v. Superior Rigging & Erecting Co., 120 Ga. App. 412, 170 S.E.2d 721, 1969 Ga. App. LEXIS 796 (1969).

A lien recorded within three months after the last item is furnished is recorded in time although the items unpaid for and for which the materialman claims a lien were all furnished more than three months prior to the recording of the lien, and all the other items, including those representing material furnished within three months of the recording of the lien, had been paid for. Stewart Bros. v. Randall Bros., 138 Ga. 796, 76 S.E. 352, 1912 Ga. LEXIS 716 (1912); Pippin v. Owens, 29 Ga. App. 789, 116 S.E. 549, 1923 Ga. App. LEXIS 194 (1923). But see Downtowner of Atlanta, Inc. v. Dunham-Bush,

Inc., 120 Ga. App. 342, 170 S.E.2d 590, 1969 Ga. App. LEXIS 774 (1969).

Last item must be lienable in running account extending over three months. — While a claim of lien for material furnished for building purposes from time to time under one and the same contract is recorded in time if the record of the claim of lien is made within three months from the delivery of the last item constituting a part of the running account covered by the contract, although many items of the account have been furnished many months before the date in the record, yet, for this rule to apply, the last item constituting the running account covered by the contract must be a lienable item. Downtowner of Atlanta, Inc. v. Dunham-Bush, Inc., 120 Ga. App. 342, 170 S.E.2d 590, 1969 Ga. App. LEXIS 774 (1969). But see Stewart Bros. v. Randall Bros., 138 Ga. 796, 76 S.E. 352, 1912 Ga. LEXIS 716 (1912); Pippin v. Owens, 29 Ga. App. 789, 116 S.E. 549, 1923 Ga. App. LEXIS 194 (1923).

Lien not timely recorded where last lienable materials delivered over three months before recording. — Where the recording of the lien is done within three months of the furnishing of the last material, and the said last material furnished is not lienable material, and the last lienable materials were delivered more than three months prior to the recording of the lien, the lien is not timely recorded. Downtowner of Atlanta, Inc. v. Dunham-Bush, Inc., 120 Ga. App. 342, 170 S.E.2d 590, 1969 Ga. App. LEXIS 774 (1969). But see Stewart Bros. v. Randall Bros., 138 Ga. 796, 76 S.E. 352, 1912 Ga. LEXIS 716 (1912); Pippin v. Owens, 29 Ga. App. 789, 116 S.E. 549, 1923 Ga. App. LEXIS 194 (1923).

Period when account becomes due begins when last materials furnished, regardless of agreement. — The period when the account becomes due begins on the date that the last materials were furnished regardless of an agreement to the contrary when the materials are purchased between the materialman or laborer, etc., and the contractor. Dixie Lime & Stone Co. v. Ryder Truck Rental, Inc., 140 Ga. App. 188, 230 S.E.2d 322, 1976 Ga. App. LEXIS 1397 (1976).

Supplier to a supplier of materials is not entitled to claim lien under this section. Associated Distribs., Inc. v. De La Torre, 138 Ga. App. 71, 225 S.E.2d 462, 1976 Ga. App. LEXIS 2058 (1976), overruled, Adair Mortg. Co. v. Allied Concrete Enterprises, Inc., 144 Ga. App. 354, 241 S.E.2d 267, 1977 Ga. App. LEXIS 2698 (1977).

What materialman must do when furnishing material for several properties. — When a materialman is furnishing at the same time material to one contractor for the improvement of property belonging to different persons, and has full knowledge of the separate contracts, and money is paid to the materialman by the contractor from time to time on account of the material so furnished, it is incumbent upon the materialman to keep separate accounts and to find out from the contractor on what contract the money is paid, and to what account it should be applied. If the materialman does not do so, but applies the money as a credit on a general account against the contractor, the materialman thereby waives the right to a lien on the owner's property, and must look alone to the contractor. Grigsby v. Fleming, 96 Ga. App. 664, 101 S.E.2d 217, 1957 Ga. App. LEXIS 657 (1957).

Delivery dates under one contract cannot perfect lien under different contract by same parties. — Where an owner of real estate makes an express contract with a contractor for heating equipment, and before the work is finished makes a separate and distinct contract for plumbing, the items furnished under each are separate and distinct, and the delivery dates under one contract may not be used for the purpose of perfecting a lien under the other; aliter, if all the material be furnished under one and the same contract. Crane Co. v. Hirsch, 61 Ga. App. 632, 7 S.E.2d 83, 1940 Ga. App. LEXIS 200 (1940).

Furnishing of material to contractor for improvement of contractor's and third party's separate properties. — Where a materialman at the same time furnishes material to one contractor for the improvement of properties belonging to different persons, and money is paid by

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the contractor from time to time for the material so furnished, the materialman waives the right to a lien on all properties not owned by the contractor by not keeping separate accounts, by not finding out from the contractor on what contract the money is paid, and to what account it should be applied, and by applying the money paid by the contractor on a general account against the contractor. The fact that the materialman has no knowledge as to whether the improved property is owned by the contractor or by third persons is immaterial. Building Material Supply Co. v. North, 116 Ga. App. 348, 157 S.E.2d 497, 1967 Ga. App. LEXIS 808 (1967).

Filing of claim against individual landowner and against corporation. — Where a materialman files a claim of lien for work done and materials furnished on certain described real estate, alleging that it was the premises of a certain corporation and that the materialman is claiming this lien against the corporation, an action filed thereon to foreclose the lien, and naming as defendants the corporation, alleged to be the entity with which the plaintiff materialman, contracted, and an individual, alleged to be the owner of the premises, the complaint does not, against general demurrer (now motion to dismiss) of the defendant individual, state any cause of action as to defendant. Fowler v. Roxboro Homes, Inc., 98 Ga. App. 829, 107 S.E.2d 285, 1959 Ga. App. LEXIS 990 (1959).

Placement of property in receivership no excuse for failure to record. — A failure to claim and record is not excused by the fact that the property on which the lien would have attached is put into the hands of a receiver. Filer & Stowell Co. v. Empire Lumber Co., 91 Ga. 657, 18 S.E. 359, 1893 Ga. LEXIS 300 (1893).

A defendant may be estopped to deny recordation by an admission in defendant's plea. Royal v. McPhail, 97 Ga. 457, 25 S.E. 512, 1895 Ga. LEXIS 503 (1895).

Sufficient information in claim of lien generally. — Where it appears that the claim of lien upon which the action is partly based was recorded in the records of the superior court of the proper county, and the claim recites that the lien is claimed on the property of the defendant, naming defendant, and giving the address of the property, the property on which the lien is sought to be attached is sufficiently described to constitute a compliance with the requirements, concerning the description of the premises upon which the lien is sought. Love v. Hockenhull, 91 Ga. App. 877, 87 S.E.2d 352, 1955 Ga. App. LEXIS 895 (1955).

Materialman must state exact date claim is due. — A claim which states that the lien is filed and recorded within 90 days after said materials and supplies were furnished by the undersigned is not sufficient under the new law since lien laws are strictly construed. The materialman must state the exact date the claim is due. Lowe's of Savannah, Inc. v. Jarrell, 150 Ga. App. 220, 257 S.E.2d 341, 1979 Ga. App. LEXIS 2124 (1979).

Complaint which does not allege claim was properly recorded sets out no cause of action. — A complaint, by a materialman, does not set out a cause of action for a judgment establishing a lien upon the property improved, where it is not alleged that a claim of lien has been filed and recorded as required by O.C.G.A. § 44-14-361, and this section. King v. Rutledge, 208 Ga. 172, 65 S.E.2d 801, 1951 Ga. LEXIS 315 (1951).

Claim which does not specify amount claimed and date claim was due. — If the claim of lien fails to specify both the amount claimed due and the date the claim was due, someone purchasing or acquiring an interest in the property after the claim of lien was filed would not take subject to the lien absent actual notice of the existence of the lien, but the lien can still be enforced against the owner of the property, if the owner has consented to the contract under which the improvements to real estate were made or if the owner has taken action estopping the owner from denying such consent. J.H. Morris Bldg. Supplies v. Brown, 245 Ga. 178, 264 S.E.2d 9, 1980 Ga. LEXIS 731 (1980).

Allegation of ownership. — It is not required that a claim of lien shall allege ownership of the house and premises

more distinctly than that they are the house and premises of the person named. Ford v. Wilson & Co., 85 Ga. 109, 11 S.E. 559, 1890 Ga. LEXIS 5 (1890).

Erroneous allegation as to premises. — Materialmen are charged with knowledge of the premises upon which they filed their claim of lien, and they are charged with knowledge of the premises to which they delivered the materials and where they knew that these premises differed, in plenty of time to properly record a claim of lien as required by law, they cannot seek the aid of a court of equity to relieve them from their own negligence. King v. Rutledge, 208 Ga. 172, 65 S.E.2d 801, 1951 Ga. LEXIS 315 (1951).

Party claiming lien need not sign it nor have it attested. — It is not necessary for a party claiming a lien to sign it, from which it follows that a signature on a lien need not be attested. New London Square, Ltd. v. Diamond Elec. & Supply Corp., 132 Ga. App. 433, 208 S.E.2d 348, 1974 Ga. App. LEXIS 1715 (1974).

While section requires name of claimant to appear, it requires no signature. Southwire Co. v. Metal Equip. Co., 129 Ga. App. 49, 198 S.E.2d 687, 1973 Ga. App. LEXIS 873, cert. denied, 414 U.S. 1092, 94 S. Ct. 723, 38 L. Ed. 2d 550, 1973 U.S. LEXIS 1757 (1973).

No affidavit required to file or foreclose lien against real estate. Southwire Co. v. Metal Equip. Co., 129 Ga. App. 49, 198 S.E.2d 687, 1973 Ga. App. LEXIS 873, cert. denied, 414 U.S. 1092, 94 S. Ct. 723, 38 L. Ed. 2d 550, 1973 U.S. LEXIS 1757 (1973).

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Former paragraph (3) not a statute of limitation. — Since O.C.G.A. §§ 44-14-360 through 44-14-367 creates a new liability, gives an action to enforce it unknown to the common law, and fixes the time within which that action may be commenced, former paragraph (3) of this section is not a statute of limitation. Lee v. Stokes, 135 Ga. App. 642, 218 S.E.2d 654, 1975 Ga. App. LEXIS 1768 (1975).

Former paragraph (3) of this section is not a statute of limitations as to the foreclosure or assertion of the lien, but a condition precedent to the establishment of the lien. Logan Paving Co. v. Liles Constr. Co., 141 Ga. App. 81, 232 S.E.2d 575, 1977 Ga. App. LEXIS 1773 (1977).

Former paragraph (3) of this section relates to action against person creating debt and not to a subsequent action to foreclose the lien against the property improved. Logan Paving Co. v. Liles Constr. Co., 141 Ga. App. 81, 232 S.E.2d 575, 1977 Ga. App. LEXIS 1773 (1977).

Meaning of "if filed within 12 months from the time the lien shall become due." — The words in this section "if filed within 12 months from the time the lien shall become due" simply allow the plaintiff materialman an equal amount of time to commence plaintiff's in rem proceeding against the property improved as plaintiff would have had to file an action against the contractor if plaintiff had been compelled to file such action in the first instance. Adair Mtg. Co. v. Allied Concrete Enters., Inc., 144 Ga. App. 354, 241 S.E.2d 267, 1977 Ga. App. LEXIS 2698 (1977), aff'd, 241 Ga. 121, 243 S.E.2d 888, 1978 Ga. LEXIS 893 (1978).

Meaning of "notice of a claim of lien." — "Notice of a claim of lien" is not notice of the perfected or recorded lien, although this is sufficient, but rather is notice of the furnishing of material or performance of labor. Gellis v. B.L.I. Constr. Co., 148 Ga. App. 527, 251 S.E.2d 800, 1978 Ga. App. LEXIS 3217 (1978).

Notice of claim of lien is not effected only upon demand for payment or filing of claim of lien. Gellis v. B.L.I. Constr. Co., 148 Ga. App. 527, 251 S.E.2d 800, 1978 Ga. App. LEXIS 3217 (1978).

Time limit refers to commencement of action, not enforcement of lien. — The requirement of this section that the action for the recovery of the amount of the materialman's claim within 12 months from the time the same shall become due refers to an action against the contractor and has no reference to the time within which the lien must be enforced. Chandler v. Pennington, 89 Ga. App. 676, 80 S.E.2d 843, 1954 Ga. App. LEXIS 546 (1954); Gellis v. B.L.I. Constr. Co., 148 Ga. App. 527, 251 S.E.2d 800, 1978 Ga. App. LEXIS 3217 (1978).

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The 12-month time limit has reference to the time within which an action must be brought against the person primarily liable to the laborer or materialman and has no reference to the time within which the lien must be enforced. Jordan Co. v. Adkins, 105 Ga. App. 157, 123 S.E.2d 731, 1961 Ga. App. LEXIS 583 (1961).

Time limit as essential as other lien requirements. — Commencement of an action within 12 months is just as essential to the establishment of a lien as any other of the requirements of this section. Cowart v. Reeves, 80 Ga. App. 161, 55 S.E.2d 911, 1949 Ga. App. LEXIS 798 (1949).

Requirement for action against debtor before enforcement of mechanic's lien generally. — One of the conditions of a mechanic's statutory right to enforce a lien upon real property for the repair or improvement of which the mechanic has supplied labor or materials or both is that the mechanic must bring an action on the claim against the person with whom the debt was contracted, either the owner or the contractor, as the case may be, within 12 months from the time when the debt became due. Bryant v. Jones, 90 Ga. App. 314, 83 S.E.2d 46, 1954 Ga. App. LEXIS 695 (1954).

Action against debtor within 12 months after debt becomes due is condition precedent. — One of the conditions precedent to the foreclosure of the liens specified in O.C.G.A. § 44-14-361 is that action must be brought by the laborer or materialman against the person with whom the debt was contracted, either the owner or the contractor, as the case may be, within 12 months from the time the debt became due. Allied Asphalt Co. v. Cumbie, 134 Ga. App. 960, 216 S.E.2d 659, 1975 Ga. App. LEXIS 2228 (1975).

Section must be followed in commencing action on lien. — Where the plaintiff materialman does not commence an action on its lien according to the provisions and requirements of this section, one of the conditions precedent to foreclosing a lien under O.C.G.A. § 44-14-530 is absent and the plaintiff materialman cannot prevail. Ben O'Callaghan Co. v. Schmincke, 376 F. Supp. 1361, 1974 U.S. Dist. LEXIS 8116 (D. Ga. 1974).

Where no action predicated upon claim of lien instituted in 12 months, no lien created upon the real estate and building as against the title of the claimant. Kwilecki v. Young, 180 Ga. 602, 180 S.E. 137, 1935 Ga. LEXIS 501 (1935).

Plaintiffs failure to file notice of action against contractor renders its claim of lien unenforceable. Hancor, Inc. v. Fleming Farms, Inc., 155 Ga. App. 579, 271 S.E.2d 712, 1980 Ga. App. LEXIS 2685 (1980).

Materialman's failure to file notice of action against contractor in county in which claim of lien was filed when action was brought in another county, in accordance with this section, renders claim of lien unenforceable. Hancor, Inc. v. Fleming Farms, Inc., 155 Ga. App. 579, 271 S.E.2d 712, 1980 Ga. App. LEXIS 2685 (1980).

Failure to perfect lien vitiates lien. — Before the rendition of a judgment in favor of a materialman's lien claimant the claimed lien is only inchoate, and the failure of the claimant to perfect the lien as provided by this section vitiates it, not only as against third persons, but as against the claimant. Carter-Moss Lumber Co. v. Short, 66 Ga. App. 330, 18 S.E.2d 61, 1941 Ga. App. LEXIS 209 (1941).

Section deals with actions against contractors, not owners. — The provisions of this section relate to the action against the contractor rather than an action against the owner to enforce the lien. Montgomery v. Richards Bldg. Materials, Inc., 122 Ga. App. 472, 177 S.E.2d 507, 1970 Ga. App. LEXIS 910 (1970).

Former paragraph (3) of this section relates only to an action against the contractor, so far as recovery of a personal judgment is concerned. Robinson v. Reese, 175 Ga. 574, 165 S.E. 744, 1932 Ga. LEXIS 293 (1932).

The beginning of former paragraph (3) of this section, which sets forth the time limitations for the commencement of actions, applies only to actions brought against contractors and not to actions against the owner of the real estate. The notice required to be filed in regard to the

commencement of such action is notice of the commencement of an action against the contractor, not the landowner. Hancor, Inc. v. Fleming Farms, Inc., 155 Ga. App. 579, 271 S.E.2d 712, 1980 Ga. App. LEXIS 2685 (1980).

The requirement of former paragraph (3) of this section as to the time within which an action may be commenced relates to the materialman's action against the contractor and not to the action against the owner of the real estate. Buck v. Tifton Mfg. Co., 4 Ga. App. 695, 62 S.E. 107, 1908 Ga. App. LEXIS 511 (1908); Adair Mtg. Co. v. Allied Concrete Enters., Inc., 241 Ga. 121, 243 S.E.2d 888, 1978 Ga. LEXIS 893 (1978).

The requirement of this section as to the time within which the action shall be commenced relates to the action in personam against the contractor and not to the subsequent proceeding against the landowner. Southern Ry. v. Crawford & Slaten Co., 46 Ga. App. 424, 167 S.E. 756, 1933 Ga. App. LEXIS 82 (1933), aff'd, 178 Ga. 450, 173 S.E. 91, 1934 Ga. LEXIS 73 (1934).

Where action against contractor timely, action against owner need not be commenced within 12 months. — Where material for the improvement of real estate was furnished, not directly to the owner, but to a contractor, and where the materialman, after complying with the contract and recording the lien as prescribed by law, instituted against the contractor an action for the recovery of the claim within 12 months from the time the same became due, and recovered a judgment in such action, it is not essential to the foreclosure of the lien against the real estate that the materialman should also institute an action against the owner for that purpose within 12 months from the maturity of the claim. Southern Ry. v. Crawford & Slaten Co., 178 Ga. 450, 173 S.E. 91, 1934 Ga. LEXIS 73 (1934).

Reason time limitation does not apply to foreclosure against owner. — The requirement of this section as to the time within which the action shall be commenced relates to the action in personam against the contractor, and not to the action against the owner of the real estate. If this were not true, the right of the materialman to foreclose the lien against the real estate might be wholly defeated, without fault on the materialman's part, by such delay in the trial of the action against the contractor as to make it impossible to commence foreclosure proceedings against the owner within 12 months from the time when the claim became due. Southern Ry. v. Crawford & Slaten Co., 178 Ga. 450, 173 S.E. 91, 1934 Ga. LEXIS 73 (1934).

Timely action against one party does not stop running of limit as to other parties. — The 12-month limitation in this section applies against the owner of the land, and not merely other contractors who become indebted with respect to work on the land, so that a timely action against one individual does not stop the 12-month limit running with respect to the remaining parties. Whitley Constr. Co. v. Carlyle Real Estate Ltd. Partnership-72, 137 Ga. App. 113, 222 S.E.2d 895, 1975 Ga. App. LEXIS 1216 (1975).

Where work as well as supplies are provided, timeliness of lien depends on completion date. — Where a company was more than a mere supplier in that it is engaged to do a certain specified job or work, the decisive factor in whether or not it files a timely lien is the point in time it completes its work. Sears Roebuck & Co. v. Superior Rigging & Erecting Co., 120 Ga. App. 412, 170 S.E.2d 721, 1969 Ga. App. LEXIS 796 (1969).

Agreement cannot extend time for bringing action. — A mere agreement to extend the date by which an action must be brought, once established, will not operate to extend the time for bringing the action for recovery of the amount of the claim. Home Mart Bldg. Ctrs., Inc. v. Jones, 133 Ga. App. 822, 212 S.E.2d 476, 1975 Ga. App. LEXIS 2303 (1975), overruled, Dixie Lime & Stone Co. v. Ryder Truck Rental, Inc., 140 Ga. App. 188, 230 S.E.2d 322, 1976 Ga. App. LEXIS 1397 (1976).

Date by which action on running account must be brought. — A debt for work done and materials furnished by a mechanic becomes "due," within the meaning of the lien laws, when the mechanic has completed performance of the

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contract, or after the last item of work and materials has been entered on a running account, and, unless actual or constructive notice is given of any contractual provisions for an extension of credit to the owner, or for some other time when the debt shall become due, such provisions are ineffective to extend the time within which action must be brought against the person with whom the debt was contracted, in order to enforce the lien against the property itself in the possession of subsequent purchasers. Bryant v. Jones, 90 Ga. App. 314, 83 S.E.2d 46, 1954 Ga. App. LEXIS 695 (1954).

Renewal of dismissed action. — If a materialman forecloses within 12 months and dismisses the action, it cannot be renewed within six months thereafter, unless the renewal is also within 12 months of the maturity of the claim. Chamblee Lumber Co. v. Crichton, 136 Ga. 391, 71 S.E. 673, 1911 Ga. LEXIS 554 (1911).

Day on which claim for materials comes due is to be counted in computing the 12 months. David v. Marbut-Williams Lumber Co., 32 Ga. App. 157, 122 S.E. 906, 1924 Ga. App. LEXIS 319 (1924).

For case where exact date of completion unknown, see Young v. Landers, 31 Ga. App. 59, 119 S.E. 464, 1923 Ga. App. LEXIS 724 (1923).

When notice of filing of action against contractor not mandatory. — In some instances, notice of the filing of an action against the contractor would not be mandatory, e.g., where the contractor has died, absconded or is otherwise not subject to service of process, or where the contractor has been adjudicated a bankrupt, or where after the filing of the action no final judgment can be obtained by reason of death or adjudication of bankruptcy. Hancor, Inc. v. Fleming Farms, Inc., 155 Ga. App. 579, 271 S.E.2d 712, 1980 Ga. App. LEXIS 2685 (1980).

The remedy of the materialman is complete and it is immaterial whether or not the contractor returns to the jurisdiction of the court within 12 months. In such event, it is not incumbent upon the materialman to serve such returning contractor. Cowart v. Reeves, 80 Ga. App. 161, 55 S.E.2d 911, 1949 Ga. App. LEXIS 798 (1949).

Insolvency, Absconding, and Other Actions of Contractor or Subcontractor

Purpose of former paragraph (4) of section. — The history of former paragraph (4) of this section evinces a legislative intent to avoid the harsh result of a materialman being deprived of a lien through no fault of the materialman's own by virtue of the bankruptcy, etc., of the contractor. Melton v. Pacific S. Mtg. Trust, 241 Ga. 589, 247 S.E.2d 76, 1978 Ga. LEXIS 1054 (1978).

Meaning of amendment adding term "subcontractor." — Former paragraph (4) of this section was amended by adding the word "subcontractor" after "contractor" in each of the instances therein set out, thus indicating the intention to keep the language of the paragraph intact but to extend it both to contractors and subcontractors. Athens Elec. Supply Co. v. Delta Oil, Inc., 101 Ga. App. 515, 114 S.E.2d 289, 1960 Ga. App. LEXIS 917 (1960).

"Owner" includes owner of leasehold estate. — The word "owner," as used in former paragraph (4) of this section, is sufficiently comprehensive to include the owner of a leasehold estate. Bennett Iron Works, Inc. v. Underground Atlanta, Inc., 130 Ga. App. 653, 204 S.E.2d 331, 1974 Ga. App. LEXIS 1218 (1974).

Judgment generally prerequisite to foreclosure. — There can be no valid foreclosure of a materialman's lien for material furnished to a contractor and used in improving the real estate of another person against which the lien is claimed in the absence of a judgment in favor of the materialman against the contractor for the price or value of such material. Smith v. Walker, 194 Ga. 586, 22 S.E.2d 160, 1942 Ga. LEXIS 630 (1942).

Except as provided in former paragraph (4) of this section, there can be no valid foreclosure of a materialman's lien without a judgment against the contractor. Ayers v. Baker, 216 Ga. 132, 114 S.E.2d 847, 1960 Ga. LEXIS 409 (1960).

Without a judgment against the general contractor, liens cannot be foreclosed on

the owner's property. McDonough Constr. Co. v. McLendon Elec. Co., 242 Ga. 510, 250 S.E.2d 424, 1978 Ga. LEXIS 1270 (1978).

In the absence of certain specified exceptions, the plaintiff materialman in an action to foreclose a materialman's lien must bring an action against the contractor to whom the labor and materials were furnished as a condition precedent to establishing a right to foreclosure. Liggett v. Harper, 151 Ga. App. 616, 260 S.E.2d 735, 1979 Ga. App. LEXIS 2662 (1979).

Judgment must be alleged. — Where material has been furnished to a contractor or subcontractor for the improvement of real estate, in an action against the owner to foreclose a materialman's lien on such real estate, the plaintiff materialman must allege, in addition to other essentials, that the materialman has brought an action against the contractor or subcontractor, as the case may be, to whom the material was furnished, and, unless the case is one within the exceptions enumerated under this section, that a judgment against such contractor has been obtained. Chambers Lumber Co. v. Martin, 112 Ga. App. 826, 146 S.E.2d 529, 1965 Ga. App. LEXIS 844 (1965).

Unless the case falls within one of the exceptions enumerated under this section, in an action to foreclose a materialman's lien on real estate, plaintiff materialman must show that plaintiff has brought an action against the contractor or subcontractor, as the case may be, to whom the material was furnished. Tri-State Culvert Mfg., Inc. v. Crum, 139 Ga. App. 448, 228 S.E.2d 403, 1976 Ga. App. LEXIS 1840 (1976); Rochester v. Dixon's Concrete Prods., Inc., 154 Ga. App. 239, 267 S.E.2d 819, 1980 Ga. App. LEXIS 2103 (1980).

Must be express judgment for price of materials. — An express judgment for the price of materials must be shown in order to comply with the provisions of former paragraph (4) of this section, rather than a judgment on a note which includes the purchase price of the materials. Brooks v. West Lumber Co., 88 Ga. App. 510, 77 S.E.2d 43, 1953 Ga. App. LEXIS 1124 (1953).

Section is unambiguous as to requisites for foreclosing lien directly against owner's property without the necessity of judgment against the contractor and does not provide that before a materialman can proceed directly against the property of the owner, it must also appear that the contractor is either insolvent or does not have assets within the jurisdiction of the court. Levin v. O'Neill Mfg. Co., 96 Ga. App. 43, 99 S.E.2d 343, 1957 Ga. App. LEXIS 500 (1957).

Effect of former paragraph (7) on former paragraph (4) of section. — Former paragraph (7) of this section, which deals with making contractors or subcontractors parties, and with interventions by these persons when not named as parties, had the effect of repealing the provisions of former paragraph (4) as to the requirement that except in the situations therein set out the owner of property could not be sued without first or concurrently suing the contractor. Athens Elec. Supply Co. v. Delta Oil, Inc., 101 Ga. App. 515, 114 S.E.2d 289, 1960 Ga. App. LEXIS 917 (1960).

Section applies to resident and nonresident contractors who abscond. — Former paragraph (4) of this section does not apply only to resident contractors of this state who abscond, but also applies to a nonresident and one who has no permanent residence. Cowart v. Reeves, 80 Ga. App. 161, 55 S.E.2d 911, 1949 Ga. App. LEXIS 798 (1949).

Contractor to whom materials are furnished can be owner. — Under former paragraph (4) of this section there is no requirement that the contractor to whom the materials are furnished be a person other than the owner. Reynolds v. Magbee Bros. Lumber & Supply Co., 117 Ga. App. 252, 160 S.E.2d 531, 1968 Ga. App. LEXIS 1051, rev'd, 224 Ga. 379, 162 S.E.2d 327, 1968 Ga. LEXIS 788 (1968).

Extent of owner's liability to materialman after contractor abandons contract. — In an action by a materialman, who has furnished materials to a contractor to improve real estate of an owner to foreclose a lien, the maximum liability of such owner to such materialman is fixed by the contract price between such owner and such contractor. The abandonment by the contractor of the contract does not constitute a defense on

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behalf of the defendant owner as to materials actually used in the improvement of the premises, unless the owner after such abandonment by the contractor has the improvements provided for in the contract completed, thus forming the basis for an additional lien to attach against the owner's property. Tumlin v. Wilson, 108 Ga. App. 273, 132 S.E.2d 815, 1963 Ga. App. LEXIS 605 (1963).

Where contractor absconds, materialman need not obtain judgment before enforcing lien. — Where the contractor to whom materials are furnished for the improvement of an owner's property absconds from the state within 12 months from the date the materials were furnished, so that personal jurisdiction cannot be obtained of the contractor in an action for the cost of the materials, the materialman is relieved of the necessity of obtaining judgment against the contractor as a prerequisite to enforcing a lien against the property improved. Levin v. O'Neill Mfg. Co., 96 Ga. App. 43, 99 S.E.2d 343, 1957 Ga. App. LEXIS 500 (1957).

Materialman need not allege that contractor is insolvent. — In a proceeding where it is alleged that the contractor within 12 months of the furnishing of the material has absconded from the limits of the state and was at the time of the filing of the complaint still without the limits of the state so that no personal jurisdiction can be had of the contractor, it is not necessary for the plaintiff materialman to also allege, that the contractor is insolvent or that the contractor does not have property and assets in the jurisdiction of the court sufficient to pay the plaintiff the amount alleged to be due. Levin v. O'Neill Mfg. Co., 96 Ga. App. 43, 99 S.E.2d 343, 1957 Ga. App. LEXIS 500 (1957).

Marshal's nun est inventus not proof of abscondence. — One of the prerequisites for enforcing a lien directly against the property is a showing that the contractor has absconded, died, left the state or gone bankrupt. A marshal's non est inventus is not proof that contractor has absconded. Q.S. King Co. v. Minter, 124 Ga. App. 517, 184 S.E.2d 594, 1971 Ga. App. LEXIS 1001 (1971).

Cost of completing work deducted from contract price when contractor abandons contract. — Where a contractor abandons a contract, the cost of completing the work is to be deducted from the contract price in order to ascertain the amount up to which the subcontractors may claim liens. If such deductions, together with payments previously made to the contractor, equal or exceed the entire contract price, then the subcontractors and materialmen have no lien, since there is nothing due under the contract. The owner is required to show that the sums paid to the contractor were properly appropriated to materialmen and laborers or that the contractor's statutory affidavit concerning such indebtedness had been obtained. Jones Mercantile Co. v. Lyn-Har, Inc., 245 Ga. 812, 267 S.E.2d 251, 1980 Ga. LEXIS 945 (1980).

Effect of bankruptcy under subsection. — Under former paragraph (4) of this section, bankruptcy relieves the lienholder from the necessity of obtaining a judgment against the contractor prior to proceeding against the "owner of the property." Bennett Iron Works, Inc. v. Underground Atlanta, Inc., 130 Ga. App. 653, 204 S.E.2d 331, 1974 Ga. App. LEXIS 1218 (1974).

Bankruptcy does not discharge valid inchoate liens. — The purpose of lien statutes is to give the furnisher of labor and material a claim upon the owner; to compel the owner at the owner's peril to withhold final payment until the owner has received assurance from the contractor that the owner has paid all material and labor claims, which are or which may be perfected into liens, and bankruptcy does not discharge valid liens any more when, though inchoate and in the process of completion, they are in good standing when bankruptcy comes, than when every required step has already been taken. When bankruptcy supervenes, it does not take from laborers and materialmen funds devoted to their claims, to appropriate them to the general creditors, merely because of some step in the procedure, which there is still time to take, has not been taken. Cutler-Hammer,

Inc. v. Wayne, 101 F.2d 823, 1939 U.S. App. LEXIS 4457 (5th Cir.), cert. denied, 307 U.S. 635, 59 S. Ct. 1031, 83 L. Ed. 1517, 1939 U.S. LEXIS 1072 (1939).

Lienholder need not file prior to bankruptcy. — The portion of this section which states "if such contractor . . . shall be adjudicated a bankrupt" does not require that action be filed by the lienholder against the contractor prior to the contractor's bankruptcy if further action is to be maintained. Taylor v. Mateer & Co., 117 Ga. App. 565, 161 S.E.2d 394, 1968 Ga. App. LEXIS 1140 (1968).

Lien is preserved when materialman timely files claim in bankruptcy court. — Materialman commences an action within the meaning of former paragraph (4) of this section when the materialman files a claim in a bankruptcy proceeding. Where a lien claim is asserted in bankruptcy proceedings under state statutes which provide that the lien is not preserved unless positive action to enforce it has been commenced in the state court within a definite period, it is not necessary for the claimant to file action in the state court if the lien is asserted in the bankruptcy court within the statutory time. The assertion of the claim in the bankruptcy court within the period requisite under the state statute is the equivalent of filing other proceedings for enforcement. Melton v. Pacific S. Mtg. Trust, 241 Ga. 589, 247 S.E.2d 76, 1978 Ga. LEXIS 1054 (1978).

Materialman may bring action against bankrupt contractor in lieu of foreclosure. — Where a contractor is adjudicated a bankrupt within the 12-month period following the date that the claim becomes due, the materialman is not relegated to foreclosure against the property in an action against the owner commenced within the 12 months. By allowing the materialman to bypass the requirement of commencing an action against the contractor when such an action is not feasible and to proceed directly to foreclosure of the lien, the General Assembly did not intend to deprive the materialman of the right to proceed under the basic statutory provision to perfect a lien by commencing an action against the contractor within 12 months. Melton v. Pacific S. Mtg. Trust, 241 Ga. 589, 247 S.E.2d 76, 1978 Ga. LEXIS 1054 (1978).

Claims not invalid merely because actions were not begun before contractor went bankrupt. — Where materialmen and laborers complied with provisions of section, except for commencement of an action for the recovery of the amount of their claims within 12 months from the time the same became due, at the time of the bankruptcy of the contractor the claims to liens were not invalid because the claimants had not commenced such action, prior to the supervention of bankruptcy. Cutler-Hammer, Inc. v. Wayne, 101 F.2d 823, 1939 U.S. App. LEXIS 4457 (5th Cir.), cert. denied, 307 U.S. 635, 59 S. Ct. 1031, 83 L. Ed. 1517, 1939 U.S. LEXIS 1072 (1939).

When contractor bankrupt, claim filed within 12 months after amount due satisfies requirements. — The filing by a materialman of a claim in the contractor's bankruptcy proceeding within 12 months from the time the amount becomes due satisfies the requirement of former paragraph (4) of this section for commencement of an action for the recovery of the amount of the claim of lien. Melton v. Pacific S. Mtg. Trust, 241 Ga. 589, 247 S.E.2d 76, 1978 Ga. LEXIS 1054 (1978).

Effect of owner's deposit of contract price in bankruptcy court. — The statutory provision for commencing an action for the recovery of amounts claimed for provision of material and labor within 12 months from time claim becomes due is for the benefit and security of the owner, and where, upon bankruptcy of contractors to whom materials and labor provided the owner has deposited the contract price in the bankruptcy court, under an agreement that the owner and the building should be released and the deposit funds should be claimed against in lieu of the building and the owner, the owner has given to the filing of claims against the deposit in the bankruptcy court the effect of an action against the contractor, or at least, by consenting to and arranging for that procedure, the owner has waived the requirement of such action. Cutler-Hammer, Inc. v. Wayne, 101 F.2d 823, 1939 U.S. App. LEXIS 4457 (5th

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Cir.), cert. denied, 307 U.S. 635, 59 S. Ct. 1031, 83 L. Ed. 1517, 1939 U.S. LEXIS 1072 (1939).

Twelve-month period for commencing proceedings not tolled by bankruptcy provisions. — The 12-month period for commencing proceedings for enforcement of liens provided by this section is a condition precedent to perfecting a substantive right and hence not affected by the Bankruptcy Act of 1898, 11 U.S.C. § 29(e) (see Bankruptcy Reform Act of 1978, 11 U.S.C. § 108) regarding tolling of statutes of limitations. Lee v. Stokes, 135 Ga. App. 642, 218 S.E.2d 654, 1975 Ga. App. LEXIS 1768 (1975).

Foreclosure Proceedings

Function of a foreclosure action is not to establish for the first time when and what materials were furnished for a particular job. It is not an action in personam, when the contractor is not a party and the purpose is merely to absolutely establish a special lien against the property involved, and no general verdict and judgment can be obtained therein against the owner. Although the initial action against the contractor is in personam, the foreclosure suit against the owner is strictly in rem. Chambers Lumber Co. v. Gilmer, 60 Ga. App. 832, 5 S.E.2d 84, 1939 Ga. App. LEXIS 186 (1939).

Pleadings and evidence relating to judgment need not be set out in foreclosure proceedings. — Although a judgment is a condition precedent to recovery against the property owner, under the provisions of this section, it is not the cause of action, nor the basis of the relief prayed, in such manner as to make it necessary to set out the pleadings, evidence, or judgment of such former action in the foreclosure proceedings. Brooks v. West Lumber Co., 88 Ga. App. 510, 77 S.E.2d 43, 1953 Ga. App. LEXIS 1124 (1953).

Liability for obligation created in first action against contractor. — It is only in the required first action by a materialman against the contractor that the adjudication is made as to items furnished and the amount due with respect to a particular contract. As to the contractor, the obligation is primary. As to the owner, it is collateral only and conditioned on the recording by the materialman of a claim of lien within the statutory period, unless privity exists between the materialman and the owner which allows the materialman to establish a lien and foreclose in same action. Ben O'Callaghan Co. v. Schmincke, 376 F. Supp. 1361, 1974 U.S. Dist. LEXIS 8116 (D. Ga. 1974).

Effect of provisions as to proper, but not necessary, parties. — That part of former paragraph (7) of this section which designates a subcontractor as a proper but not a necessary party, and another clause which designates a contractor as a proper but not a necessary party, does not mean that the materialman may sue the owner directly without joining either the contractor or subcontractor, and without having obtained a prior judgment against either the contractor or subcontractor, and without having shown any of the reasons for the materialman's failure to do so sanctioned by former paragraph (4) of this section. Athens Elec. Supply Co. v. Delta Oil, Inc., 101 Ga. App. 515, 114 S.E.2d 289, 1960 Ga. App. LEXIS 917 (1960).

Owner's contention that pleadings omitted other parties defendant. — Where under defendant owner's pleadings, in an action by a materialman seeking payment for material furnished for use in improving real estate, it was admitted that the materialman contracted with defendant contractor and such pleadings were not withdrawn, the contention on appeal that contractor had a partner who was neither sued or shown to be in that class of persons which the plaintiff materialman need not have sued, is without merit. Grigsby v. Fleming, 96 Ga. App. 664, 101 S.E.2d 217, 1957 Ga. App. LEXIS 657 (1957).

Objection to new parties in foreclosure proceeding waived if not raised until appeal. — While a lien foreclosure proceeding is strictly statutory, and the requirements of this section must be substantially followed, and while in a purely legal proceeding new parties cannot be

added over objection unless the statute specifically provides for such procedure, it is also the rule that where a new party has in fact been added without objection, the court, on appeal, will not consider an objection on this ground raised for the first time but will consider it to have been waived. Athens Elec. Supply Co. v. Delta Oil, Inc., 101 Ga. App. 515, 114 S.E.2d 289, 1960 Ga. App. LEXIS 917 (1960).

In lien foreclosure materialman must distinguish between an individual and the individual's corporation and must bring an action against the correct account debtor. Tri-State Culvert Mfg., Inc. v. Crum, 139 Ga. App. 448, 228 S.E.2d 403, 1976 Ga. App. LEXIS 1840 (1976).

Elements of contract which materialman must show to obtain lien. — To establish and foreclose a lien on the owner's property it is never enough merely to show that the supplies which the materialman furnished were furnished for the purpose of, and in fact used in improving the owner's property. It must be shown also that the owner contracted with someone for these supplies to be furnished; that the person to whom the plaintiff furnished them was connected with that contract, and that the value of the material was within the contract price to which the owner agreed. Athens Elec. Supply Co. v. Delta Oil, Inc., 101 Ga. App. 515, 114 S.E.2d 289, 1960 Ga. App. LEXIS 917 (1960).

Amount due lienholder is essential element to be proved to recover on lien. — One of the things most necessary to be proved in order for the lien to be perfected, foreclosed, and the judgment enforced, is the amount, by which is meant not just the amount of money owing by the lienee to the lienholder, but the amount to which the lienholder is entitled as a lien on the property as improved. Jackson's Mill & Lumber Co. v. Holliday, 108 Ga. App. 663, 134 S.E.2d 563, 1963 Ga. App. LEXIS 742 (1963).

Action on personal note provides no basis for calculating amount due on foreclosure. — Although the action required by this section can take any form which will give a legitimate basis for calculation of a particular sum which the lienor is entitled to foreclose, an action on a personal note does not provide such a basis. Proof of the personal note gives no basis for a determination of what amount, if any, of the note is attributable to the defendant's property. Ben O'Callaghan Co. v. Schmincke, 376 F. Supp. 1361, 1974 U.S. Dist. LEXIS 8116 (D. Ga. 1974).

Lienholder must show materials delivered were used in construction. — Where it is shown that the materials were delivered to the premises of the owner, a lienholder may recover only if the lienholder shows the specific material was actually used in the construction of the building. Jackson's Mill & Lumber Co. v. Holliday, 108 Ga. App. 663, 134 S.E.2d 563, 1963 Ga. App. LEXIS 742 (1963).

Effect of claim which shows material delivered to different person than party named in complaint. — Where a materialman's claim of lien attached to a complaint shows that plaintiff materialman furnished materials to a party different from the party named on the face of the complaint, action against the party named in the claim of lien is a condition precedent to foreclosure against the party named on the face of the complaint. Brockett Rd. Apts. v. Georgia Pac. Corp., 138 Ga. App. 198, 225 S.E.2d 771, 1976 Ga. App. LEXIS 2103 (1976).

Contractor's complaint not dismissed for failure to allege that contractor paid for labor and materials. — In an action by a contractor to foreclose a materialman's lien against the owner of real estate under the provisions of this section, the complaint is not subject to demurrer (now motion to dismiss) because the contractor fails to allege that the contractor has paid for all labor and materials used in the construction of the house which the contractor erected under contract with the owner. Scott v. Williams, 111 Ga. App. 735, 143 S.E.2d 16, 1965 Ga. App. LEXIS 1079 (1965).

Allegations which are not required in foreclosure proceedings. — In a proceeding to foreclose a materialman's lien for material furnished a contractor in the improvement of real estate, it is not necessary to allege that the contractor had completed the contract with the owner of the premises, or that such owner

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had not paid the contractor for the improvements made, upon the sworn statement that the contractor had paid for the materials used. Arnold v. Farmers' Exch., 123 Ga. 731, 51 S.E. 754, 1905 Ga. LEXIS 588 (1905).

Proper situs for foreclosure and process. — While a laborer can foreclose a statutory lien either in the county of the employer's residence or where the employer's property upon which the lien is to be foreclosed may be, the process should be made returnable to the proper court of the county of the defendant's residence, if the defendant resides in this state, and the issue made by a counteraffidavit of the defendant employer should be returned to and tried in that court. Jackson v. Taylor, 49 Ga. App. 261, 175 S.E. 259, 1934 Ga. App. LEXIS 353 (1934).

Property owner can force all similar lienholders to interplead. — A property owner may not defend against the lien of a laborer or materialman by showing that there are existing claims or liens of others in like circumstances, but the owner may force all such materialmen to interplead, placing the owner in the position of a stakeholder to the fund. Scott v. Williams, 111 Ga. App. 735, 143 S.E.2d 16, 1965 Ga. App. LEXIS 1079 (1965).

Foreclosure may be joined to action against contractual debtor. — It is permissible in the action against the contractual debtor described in former paragraph (3) of this section to join therein the foreclosure of the lien either originally or by amendment thereto, provided venue is obtainable. Logan Paving Co. v. Liles Constr. Co., 141 Ga. App. 81, 232 S.E.2d 575, 1977 Ga. App. LEXIS 1773 (1977).

Foreclosure action can be brought concurrently with action against contractor. — Before a lien can be foreclosed for materials furnished to a contractor, there must be a valid judgment against the contractor for the price of the material, but the two actions may be brought concurrently. West Lumber Co. v. Aderhold, 90 Ga. App. 255, 82 S.E.2d 670, 1954 Ga. App. LEXIS 676 (1954).

Owner's defenses. — In an action by a materialman to foreclose a lien for material furnished a contractor for the improvement of real estate of others, the owners of such real estate may defend by showing that they have paid the full contract price to the contractor and that the money paid has been applied by the contractor to the settlement of debts incurred in the performance of the contract, which would have been liens upon the property improved. Ingram v. Barfield, 80 Ga. App. 276, 55 S.E.2d 725, 1949 Ga. App. LEXIS 821 (1949).

Immediate payment is only defense to proper claim. — This section seems clearly to require that the only defense possible against a lien that is properly filed is actual payment, not a commitment for payment in the future. Melton v. Lowe, 117 Ga. App. 783, 161 S.E.2d 912, 1968 Ga. App. LEXIS 1234 (1968).

Materialman need not negate owner's defenses when enforcing lien. — The materialman derives a lien from the statute, and in its enforcement the materialman is not required to allege anything more than that the claim comes within the provisions of the statute and that the materialman has complied with its terms in asserting the lien. It is not essential that the plaintiff materialman should negate the defenses which the statute permits to be interposed by the owner of the premises improved. Scott v. Williams, 111 Ga. App. 735, 143 S.E.2d 16, 1965 Ga. App. LEXIS 1079 (1965).

Proper method for objection to premature action. — Where an action is prematurely brought, if the defect appears on the fact of the complaint objection may be made by specific demurrer (now motion to dismiss) or by a plea in abatement, and, if it does not so appear, by a proper plea in abatement, or by motion for nonsuit at the proper time. It is not a matter for general demurrer (now motion to dismiss) which merely asserts that the complaint sets out no cause of action. Brandwein v. Greenfield, 104 Ga. App. 608, 122 S.E.2d 316, 1961 Ga. App. LEXIS 748 (1961).

Where waiver of owner's right to object to lien presumed. — An owner who resists foreclosure upon the ground that the material was not such as provided for by the contract may waive the right to assert this defense, and thereby

be estopped to dispute evidence on the part of the materialman to the contrary. Acceptance and use of such material without objection or complaint, and payment therefor to another instead of to the materialman, will authorize the conclusion that the owner waived the right and was estopped. Rylander v. Koppe & Steinichen, 162 Ga. 300, 133 S.E. 236, 1926 Ga. LEXIS 167 (1926).

Estoppel of owner to contend materials not used to improve property. — Where a materialman furnishes and delivers materials to the owner's premises in reliance on the owner's representation that the material is intended to be used for the improvement of the property, the owner is estopped, as between the parties, to contend that it was not in fact so used. Jackson's Mill & Lumber Co. v. Holliday, 108 Ga. App. 663, 134 S.E.2d 563, 1963 Ga. App. LEXIS 742 (1963).

Lienholder need not allege precise date and time material or labor was provided. — It is not absolutely necessary for the plaintiff supplier, suing to foreclose a materialmen's and laborer's lien, to allege the precise minute or hour or day the labor and materials were furnished and materials installed, but it is sufficient to allege that these things took place within such a definite period as would show that the lien was recorded in time, even though the exact date or hour cannot be alleged. Pickard v. Gregory, 88 Ga. App. 475, 76 S.E.2d 860, 1953 Ga. App. LEXIS 1113 (1953).

Effect of payment of judgment obtained by materialman or subcontractor. — As between the owner and the prime contractor all payments under the contract are credited to the owner, and payment of a judgment obtained by a materialman or subcontractor who has first recovered in an action against the prime contractor and then foreclosed a lien against the premises is the equivalent of payment to the contractor in determining whether the owner has paid the contract price. Scott v. Williams, 111 Ga. App. 735, 143 S.E.2d 16, 1965 Ga. App. LEXIS 1079 (1965).

Facts in written instrument prevail over party's allegations in pleading. — Where a party relies on a written instrument as the basis of an action, and attaches a copy of the instrument as an exhibit, the facts shown in the exhibit will prevail over the allegations of the party in the pleading. Brockett Rd. Apts. v. Georgia Pac. Corp., 138 Ga. App. 198, 225 S.E.2d 771, 1976 Ga. App. LEXIS 2103 (1976).

Effect of invoices showing materials shipped for use on realty in question. — Where the invoices in evidence clearly exhibit that the materials for which a lien foreclosure was sought were shipped to the subcontractor for use in construction on the realty in question, this creates the presumption in absence of evidence to the contrary that the materials were received and used by the subcontractor in accordance with the purpose for which they were supplied. Horne-Wilson, Inc. v. Smith, 109 Ga. App. 676, 137 S.E.2d 356, 1964 Ga. App. LEXIS 952 (1964).

Judgment perfecting claimed lien may become dormant. — A judgment perfecting a claimed lien of a materialman is within O.C.G.A. § 9-12-60, providing that a judgment shall become dormant under circumstances therein named. Carter-Moss Lumber Co. v. Short, 66 Ga. App. 330, 18 S.E.2d 61, 1941 Ga. App. LEXIS 209 (1941).

There is no provision for summary judgment where lien is sought against real property. Zappa v. Ewing, 116 Ga. App. 152, 156 S.E.2d 510, 1967 Ga. App. LEXIS 728 (1967).

No right to attorney's fees for defense by contractor of unnecessary party. — A general contractor cannot recover the costs of attorney's fees in defending property owners against the claims of lien by a company which supplied material to a bankrupt supplier of the contractor, if the bankrupt supplier is not a required defendant in the foreclosure action and is not advantaged in any way by the contractor's defense. Ronfra Dev. Corp. v. Pennington, 131 Ga. App. 195, 205 S.E.2d 448, 1974 Ga. App. LEXIS 1369 (1974).

Priority of Liens

Lien under section when perfected relates back to completion of work. — The lien under this section, if perfected within the time presented, is superior to the claim of a purchaser with notice of the lien, even though the purchase is made

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before the lien was recorded. The lien relates back to the completion of the work. Oglethorpe Sav. & Trust Co. v. Morgan, 149 Ga. 787, 102 S.E. 528, 1920 Ga. LEXIS 406 (1920). See also Wager v. Carrollton Bank, 156 Ga. 783, 120 S.E. 116, 1923 Ga. LEXIS 332 (1923).

One who subordinates first to third lien makes it inferior to both second and third liens. Thus, where a first mortgagee subordinates interest to a second mortgagee, the prior mortgage is necessarily inferior to an intervening materialman's lien. Old Stone Mtg. & Realty Trust v. New Ga. Plumbing, Inc., 140 Ga. App. 686, 231 S.E.2d 785, 1976 Ga. App. LEXIS 1601 (1976), aff'd, 239 Ga. 345, 236 S.E.2d 592, 1977 Ga. LEXIS 910 (1977).

Where security deed executed before delivery of any material, and therefore necessarily before the record of the materialmen's claim of lien, no question of notice to the grantee as to the materialmen's claims of lien at the time the security deed was executed would be involved. Caldwell v. Northwest Atlanta Bank, 194 Ga. 370, 21 S.E.2d 619, 1942 Ga. LEXIS 571 (1942).

Priority of holder of security deed over lien depends on date of recordation and notice. — The bona fide holder of a security deed executed before the first material was furnished, and therefore necessarily prior to the record of the materialman's claim of lien, will take priority over the materialman's claim of lien, although the security deed was itself not recorded until after the first material was furnished. The rule would be different where the holder of the security deed had actual notice of the furnishing of the material prior to the execution of the deed; and might be different where the holder of the security deed had such actual notice prior to the record of the security deed. Caldwell v. Northwest Atlanta Bank, 194 Ga. 370, 21 S.E.2d 619, 1942 Ga. LEXIS 571 (1942).

Recorded deed to secure debt superior to materialman's lien recorded afterwards. — Where title to real estate is conveyed by duly recorded deed to secure debt, and the grantee takes the deed and advances the money loaned, without notice of a materialman's claim of lien upon the property, and before the record thereof, the title thus acquired is superior to such lien. Harris v. Parham, 213 Ga. 725, 101 S.E.2d 722, 1958 Ga. LEXIS 260 (1958).

Notice required of grantee who records security deed after first material furnished. — Even if the failure of the grantee to record a security deed until between the time the first material was furnished and the record of the materialmen's claims of lien could suffice to make relevant the rule as to actual notice of such a claim, then the "actual notice" required of the grantee in the deed in such a case would be such notice as is positively proved to have been given to the grantee directly and personally, or such as the grantee is presumed to have received personally, because the evidence within the grantee's knowledge was sufficient to put the grantee on inquiry. Caldwell v. Northwest Atlanta Bank, 194 Ga. 370, 21 S.E.2d 619, 1942 Ga. LEXIS 571 (1942).

Unrecorded lien inferior to security deed taken without notice. — An unrecorded claim of a materialman's lien is inferior to a security deed on the property improved, taken without actual notice of the unrecorded claim of lien. Builders Supply Co. v. Pilgrim, 115 Ga. App. 85, 153 S.E.2d 657, 1967 Ga. App. LEXIS 1013 (1967).

Title conveyed by recorded deed to secure debt inferior to lien when lender has notice. — Where title to real property is conveyed to a lender by a duly recorded deed to secure debt, and the lender takes the deed with actual notice of a materialman's claim of lien upon the property, the title acquired by the lender is inferior to the lien, provided that the lien is subsequently perfected within the time prescribed by law. Old Stone Mtg. & Realty Trust v. New Ga. Plumbing, Inc., 140 Ga. App. 686, 231 S.E.2d 785, 1976 Ga. App. LEXIS 1601 (1976), aff'd, 239 Ga. 345, 236 S.E.2d 592, 1977 Ga. LEXIS 910 (1977).

Mere averment that materialman "furnished and delivered material on the premises" insufficient as notice. — A mere averment that a materialman on a certain date "furnished and delivered

material on the premises," without any other fact, will not suffice to support a bare legal conclusion by the pleader that "such delivery constituted actual implied notice" to the security-deed holder that material was being furnished. Caldwell v. Northwest Atlanta Bank, 194 Ga. 370, 21 S.E.2d 619, 1942 Ga. LEXIS 571 (1942).

Mortgage is not one of liens expressly made prior to lien given by this section. Tanner v. Bell, 61 Ga. 584, 1878 Ga. LEXIS 188 (1878).

When materialman's lien superior to lien of prior mortgage for purchase money. — A materialman's lien is superior to the lien of a prior mortgage for purchase money, where the material has been furnished without actual notice of the mortgage. Baisden & Co. v. Holmes-Hartsfield Co., 4 Ga. App. 122, 60 S.E. 1031, 1908 Ga. App. LEXIS 224 (1908).

Contractor's lien superior to lien for trust funds. — A contractor's lien on the property of a decedent is superior to the claim of the widow on account of a debt for trust funds. Boynton v. Westbrook, 74 Ga. 68, 1885 Ga. LEXIS 287 (1885).

Lien for improvements is not charge upon premises as against incumbrances by prior owner. — The lien of a contractor or mechanic for improvements is not a charge upon the premises or the improvements as against prior liens or incumbrances put upon the property by a previous owner, and duly recorded. National Bank v. Danforth, 80 Ga. 55, 7 S.E. 546, 1887 Ga. LEXIS 322 (1887).

One who derived title from innocent purchaser is protected, although that person may have notice of the lien. Ashmore v. Whatley, 99 Ga. 150, 24 S.E. 941, 1896 Ga. LEXIS 262 (1896).

If purchaser assents to furnishing of materials, lien will attach. Elmore v. Southern Bank & Trust Co., 28 Ga. App. 72, 110 S.E. 334, 1922 Ga. App. LEXIS 315 (1922).

Lien is not valid against bona fide purchaser until notice of claim of lien is filed. Marietta Baptist Tabernacle v. Tomberlin Assocs., 576 F.2d 1237, 1978 U.S. App. LEXIS 9984 (5th Cir. 1978).

Bona fide purchaser's claim of title superior to lien unrecorded at time of purchase. — The claim of a bona fide purchaser of real property is superior to the claim of a materialman whose lien was not recorded at the time of the purchase. The purchaser has title, not a lien. Ashmore v. Whatley, 99 Ga. 150, 24 S.E. 941, 1896 Ga. LEXIS 262 (1896); Bennett Lumber Co. v. Martin, 132 Ga. 491, 64 S.E. 484, 1909 Ga. LEXIS 340 (1909).

Purchaser with notice of unrecorded claim is subject to lien if subsequently perfected. — A contractor's lien attaches from the time the work under the contract is commenced, although it lacks, certainly until it is recorded, the quality of constructive notice, but one who takes a deed to the property or purchases it while work is in progress, with knowledge of the contract and notice of the contractor's claim of lien, though imperfect or unrecorded at that time, must be held to take the property subject to the lien, provided that the contract is completed and the lien is declared and enforced within the time prescribed by Georgia law. Gellis v. B.L.I. Constr. Co., 148 Ga. App. 527, 251 S.E.2d 800, 1978 Ga. App. LEXIS 3217 (1978).

Lien attaches when material furnished notwithstanding divestment in favor of bona fide purchaser without notice. — The lien of a materialman upon property, for the improvement of which the material was furnished, as provided in O.C.G.A. § 44-14-361 and this section, attaches when the material is furnished in accordance with the contract. This is true notwithstanding the lien may become divested in favor of a bona fide purchaser of the property without notice of the lien. Davis v. Stone, 48 Ga. App. 532, 173 S.E. 454, 1934 Ga. App. LEXIS 121 (1934).

Lien may attach to estate for years. — The liens provided for in this section may attach to the interest of a lessee who has an estate for years in the demised premises, subject to the conditions of the lease. Bennett Iron Works, Inc. v. Underground Atlanta, Inc., 130 Ga. App. 653, 204 S.E.2d 331, 1974 Ga. App. LEXIS 1218 (1974).

RESEARCH REFERENCES

Am. Jur. 2d.

53 Am. Jur. 2d, Mechanics' Liens, §§ 191, 195 et seq., 217, 265, 266, 346, 348 et seq., 358-360, 384-386, 388, 389, 408-410.

Am. Jur. Pleading and Practice Forms.

17B Am. Jur. Pleading and Practice Forms, Mechanics' Liens, § 31.

C.J.S.

56 C.J.S., Mechanics' Liens, §§ 103, 133, 139 et seq., 157 et seq., 220 et seq., 322 et seq., 343.

ALR.

Validity and effect of provision in contract against mechanic's lien, 13 A.L.R. 1065; 102 A.L.R. 356; 76 A.L.R.2d 1087.

Right of subcontractor or materialman to mechanic's lien for labor or material entering into work rejected as not in compliance with principal contract, 16 A.L.R. 981.

Elements bearing directly upon the quality of a contract as affecting the character of one as independent contractor, 20 A.L.R. 684.

Construction of contract for compensation of architect, 20 A.L.R. 1356.

Freight charges on material as within mechanic's lien statute giving lien for labor or material, or within contractor bond securing such claims, 30 A.L.R. 466.

Priority as between landlord's lien on chattels and chattel mortgage, 37 A.L.R. 400; 52 A.L.R. 935.

Mechanic's lien: owner's right to deduction on account of damages sustained through contractor's delay, 37 A.L.R. 766.

Independence of contract considered with relation to the scope and construction of statutes, 43 A.L.R. 335.

After-acquired title as supporting mechanics' lien, 52 A.L.R. 693.

Interest of vendor under executory contract for sale of realty as subject to mechanics' lien for labor or materials furnished to purchaser, 58 A.L.R. 911; 102 A.L.R. 233.

Interest of owner of land as subject to lien for material or service engaged by holder of mineral rights, 59 A.L.R. 548.

Contractor's bond as covering clothing, food, or lodging for laborers, 65 A.L.R. 260.

What amounts to waiver of right to mechanics' lien, 65 A.L.R. 282.

Priority as between mechanics' lien and purchase-money mortgage, 72 A.L.R. 1516; 73 A.L.R.2d 1407.

What amounts to bringing of suit within limited time required by mechanics' lien statute, 75 A.L.R. 695.

Mechanic's lien for labor or material for improvement of easement, 77 A.L.R. 817.

Mechanics' lien as affected by agreement to pay with property other than money, 81 A.L.R. 766.

Right of one other than contractor, laborer, or materialman to file mechanic's lien, 83 A.L.R. 11.

Time when contractor commenced work or time when labor or material for which lien is claimed was furnished as date of mechanic's lien, 83 A.L.R. 925.

Failure to raise by demurrer or answer failure to bring suit to enforce lien within time prescribed by mechanics' lien law a waiver, 93 A.L.R. 1462.

When contract, transaction, or account deemed a "continuing" one as regards time for filing mechanics' lien, 97 A.L.R. 780.

Effect of bankruptcy of contractor or subcontractor upon mechanics' liens of his subcontractors, laborers, and materialmen, 98 A.L.R. 323.

Priority of statutory lien on automobile for storage or repairs as against the rights of purchasers, attaching creditor or trustee in bankruptcy which arose while car was in possession of owner after accrual of storage or completion of repairs, 100 A.L.R. 80.

Principal contractor as necessary party to suit to enforce mechanic's lien of subcontractor, laborer, or materialman, 100 A.L.R. 128.

Remedy available to holder of mechanic's lien which has priority over antecedent mortgage or vendor's title or lien as regards improvement, but not as regards land, where it is impossible or impractical to remove the improvement, 107 A.L.R. 1012.

Constitutionality of statute giving to lien for alteration of property pursuant to public requirement, mechanics' lien or

similar lien, preference over preexisting mortgage or other lien, 121 A.L.R. 616; 141 A.L.R. 66.

Right of one who contracts with, or furnishes labor or material to, public contractor's surety after latter has taken work, in respect of part of contract price retained by public agency, 122 A.L.R. 511.

Time for filing claim for mechanic's lien as affected by removal by, or return to, claimant of part of material furnished, 122 A.L.R. 755.

Right or interest subject to, and priority of, statutory lien for labor or material in developing property for oil and gas, 122 A.L.R. 1182.

Priority of lien of sales or consumers' tax, 136 A.L.R. 1015.

Time limitation in mechanic's lien statute as a limitation of the right or only of the remedy, 139 A.L.R. 903.

Who is contractor or subcontractor, as distinguished from materialman, for purposes of mechanic's lien, contractor's bond other provision for securing compensation under construction contract, 141 A.L.R. 321.

Personal judgment as essential to enforcement of mechanic's lien, 147 A.L.R. 1099.

Estoppel of mechanic's lien claimant as predicable upon his representations to owner as to payment made to claimant by contractor or subcontractor, 155 A.L.R. 350.

Formal requisites of notice of intention to claim mechanic's lien, 158 A.L.R. 682.

Existence of more than one contract between owner and contractor as affecting notice or filing of mechanic's lien by materialman or subcontractor, 175 A.L.R. 330.

Sufficiency of notice, claim, or statement of mechanic's lien with respect to nature of work, 27 A.L.R.2d 1169.

Bankruptcy court's injunction against mortgage or lien enforcement proceedings commenced, before bankruptcy, in another court, 40 A.L.R.2d 663.

Sufficiency of notice, claim, or statement of mechanic's lien with respect to description or location of real property, 52 A.L.R.2d 12.

Sale of real property as affecting time for filing notice of or perfecting mechanic's lien as against purchaser's interest, 76 A.L.R.2d 1163.

Time for filing notice or claim of mechanic's lien where claimant has contracted with general contractor and later contracts directly with owner, 78 A.L.R.2d 1165.

Priority between mechanics' liens and advances made under previously executed mortgage, 80 A.L.R.2d 179.

Amendment of statement of claim of mechanic's lien as to designation of owner of property, 81 A.L.R.2d 681.

Sufficiency of notice under statute making notice by owner of nonresponsibility necessary to prevent mechanic's lien, 85 A.L.R.2d 949.

What constitutes "commencement of building or improvement" for purposes of determining accrual of mechanic's lien, 1 A.L.R.3d 822.

Sufficiency of designation of owner in notice, claim, or statement of mechanic's lien, 48 A.L.R.3d 153.

Abandonment of construction or of contract as affecting time for filing mechanic's liens or time for giving notice to owner, 52 A.L.R.3d 797.

Building and construction contracts: contractor's equitable lien upon percentage of funds withheld by contractee or lender, 54 A.L.R.3d 848.

Assertion of statutory mechanic's or materialman's lien against oil and gas produced or against proceeds attributable to oil and gas sold, 59 A.L.R.3d 278.

Garageman's lien: modern view as to validity of statute permitting sale of vehicle without hearing, 64 A.L.R.3d 814.

Effect of bankruptcy of principal contractor upon mechanic's lien of subcontractor, laborer, or materialman as against owner of property, 69 A.L.R.3d 1342.

Demand for or submission to arbitration as affecting enforcement of mechanic's lien, 73 A.L.R.3d 1042.

Enforceability of mechanic's lien attached to leasehold estate against landlord's fee, 74 A.L.R.3d 330.

Removal or demolition of building or other structure as basis for mechanic's lien, 74 A.L.R.3d 386.

Release or waiver of mechanic's lien by general contractor as affecting rights of subcontractor or materialman, 75 A.L.R.3d 505.

Who is the "owner" within mechanic's lien statute requiring notice of claim, 76 A.L.R.3d 605.

Liability of purchaser of real estate on mechanic's lien based on goods or labor supplied to vendor but filed after title passed, 33 A.L.R.4th 1017.

Architect's services as within mechanics' lien statute, 31 A.L.R.5th 664.

44-14-363. Special liens on personalty; notice; enforcement; priorities; maximum claims for storage; recordation.

(a) All mechanics of every sort shall have a special lien on personal property for work done and material furnished in manufacturing or repairing the personal property and for storage of the personal property after its manufacture or repair, which storage begins accruing after 30 days' written notice to the owner of the fact that storage is accruing and of the daily dollar amount thereof; and said notice shall be mailed to the owner by certified mail or statutory overnight delivery addressed to the owner at his last known address. Such special liens may be asserted by the retention of the personal property or the mechanic may surrender the personal property and give credit when the lien is enforced in accordance with Code Section 44-14-550; and if such special liens are asserted by retention of the personal property, the mechanic shall not be required to surrender the property to the holder of a subordinate security interest or lien. Such liens shall be superior to all liens except liens for taxes and, except as provided in subsection (2) of Code Section 11-9-310, such other liens as the mechanic may have had actual notice of before the work was done or material furnished.

(b) The maximum amount of storage that may be charged shall be $1.00 per day. Nothing contained in this Code section shall allow a fee for storage to be charged on any item with a fair market value in excess of $200.00. Storage charges pursuant to this Code section shall not apply to motor vehicles now or hereafter covered by Chapter 3 of Title 40 nor shall the storage fee be charged if there is a bona fide dispute between the customer and the mechanic as to the manner of repair or the charges for repair.

(c)(1) When possession of the property is surrendered to the debtor, the mechanic shall record his or her claim of lien within 90 days after the work is done and the material is furnished or, in the case of repairs made on or to farm machinery, within 180 days after the work is done and the material is furnished. The claim of lien shall be recorded in the office of the clerk of the superior court of the county where the owner of the property resides. The claim shall be in substance as follows:

> "A.B., mechanic, claims a lien on _____ (here describe the property) of C.B., for work done, material furnished, and storage accruing (as the case may be) in manufacturing, repairing, and storing (as the case may be) the same."

(2) If possession of the personal property subject to a special lien as provided in this Code section is surrendered to the debtor and if such special lien is not preserved by recording the claim of lien as provided in paragraph (1) of this subsection, the mechanic acquires a special lien on other personal property belonging to the debtor which comes into the possession of the mechanic, except that this sentence shall not apply to consumer goods which are being used by a consumer for personal, family, or household purposes or which have been bought by a consumer for use for personal, family, or household purposes. The special lien created by this paragraph shall be subject to the provisions of this Code section as to foreclosure and recording.

History.

Ga. L. 1873, p. 42, § 8; Code 1873, § 1981; Code 1882, § 1981; Ga. L. 1884-85, p. 43, § 1; Civil Code 1895, § 2805; Civil Code 1910, § 3354; Code 1933, § 67-2003; Ga. L. 1953, Nov.-Dec. Sess., p. 275, § 1; Ga. L. 1960, p. 912, § 1; Ga. L. 1972, p. 415, § 1; Ga. L. 1979, p. 902, § 1; Ga. L. 1980, p. 831, § 2; Ga. L. 1984, p. 561, § 1; Ga. L. 1985, p. 1107, § 2; Ga. L. 2000, p. 1589, § 3; Ga. L. 2010, p. 776, § 1/HB 1147.

Cross references.

Liens for work done or materials furnished with regard to motor vehicles, § 40-3-54.

Editor's notes.

Ga. L. 2000, p. 1589, § 16, not codified by the General Assembly, provides that this Act is applicable with respect to notices delivered on or after July 1, 2000.

Ga. L. 2010, p. 776, § 3/HB 1147, not codified by the General Assembly, provides that the amendment of this Code section shall apply to all liens filed on or after July 1, 2010.

Law reviews.

For note discussing the Motor Vehicle Certificate of Title Act (Ch. 3, T. 40) and its impact, see 13 Mercer L. Rev. 258 (1961).

For comment on United States v. Crittenden, 563 F.2d 678 (5th Cir. 1977), see 12 Ga. L. Rev. 692 (1977).

For comment on United States v. Crittenden, 600 F.2d 478 (5th Cir. 1979), discussing the priority of a mechanic's lien in Georgia, see 14 Ga. L. Rev. 628 (1980).

JUDICIAL DECISIONS

O.C.G.A. § 44-14-363 applies to perfection of mechanic's liens against personal property in general. Gwinnett Sales & Serv. v. Trust Co., 130 Ga. App. 31, 202 S.E.2d 255, 1973 Ga. App. LEXIS 1211 (1973).

What affidavit must show. — The affidavit for the foreclosure of a mechanic's lien under O.C.G.A. § 44-14-363 must allege facts sufficient to show that the work was done in the manufacture or repair of personal property. Cook v. Bowden, 32 Ga. App. 498, 124 S.E. 60, 1924 Ga. App. LEXIS 501 (1924).

Mechanic may assert general laborer's lien. — A mechanic who performs labor is not limited to a remedy under O.C.G.A. § 44-14-363 but may assert a general laborer's lien under O.C.G.A. § 44-14-380. Hilley v. Lunsford, 29 Ga. App. 398, 115 S.E. 667, 1923 Ga. App. LEXIS 29 (1923).

How mechanic may enforce lien. — Whether the mechanic asserts a lien by retention of the property or by surrendering possession and recording the lien, the mechanic may enforce payment by foreclosure proceedings according to the provisions of O.C.G.A. § 44-14-550. Fitzgerald Trust Co. v. Burkhart, 12 Ga. App. 222, 77 S.E. 7, 1913 Ga. App. LEXIS 506 (1913).

Mechanic may arrest by claim proceedings to levy property. — While a foreclosure of a lien is necessary before sale under it, yet where another levies on the property, it is proper for the mechanic

to arrest the proceeding by claim. Hurley & Smith v. Epps, 69 Ga. 611, 1882 Ga. LEXIS 275 (1882).

Foreclosure not grounds for trover. — Where a mechanic has asserted a lien on personal property for repairs thereon and has enforced payment thereof by foreclosure proceedings, the owner cannot bring trover against the mechanic. Fitzgerald Trust Co. v. Burkhart, 12 Ga. App. 222, 77 S.E. 7, 1913 Ga. App. LEXIS 506 (1913).

Holding car for payment. — Where defendant mechanic holds plaintiff's automobile in assertion of a special lien for repairs, the mechanic's refusal to redeliver the automobile to the plaintiff in trover upon demand, without payment of the repair bill, constitutes no conversion of the property, and plaintiff cannot maintain action in trover for its recovery. Truscott v. Garner, 92 Ga. App. 95, 88 S.E.2d 197, 1955 Ga. App. LEXIS 530 (1955).

Retention is not conversion. — Where one receives possession of an automobile for the purpose of making repairs and holds the vehicle in assertion of a special lien for making such repairs, the holder's refusal to deliver the automobile upon demand does not constitute a conversion. Boatright v. Padgett Motor Sales, Inc., 117 Ga. App. 578, 161 S.E.2d 402, 1968 Ga. App. LEXIS 1149 (1968).

Where there is agreement to balance accounts from time to time, the right to hold the property is waived and the lien is lost unless a claim of lien is filed. Gearreld v. Woodruff, 13 Ga. App. 450, 79 S.E. 355, 1913 Ga. App. LEXIS 192 (1913).

Where a mechanic does work on open account repairing several articles the mechanic cannot at the end of a year of such transactions record a claim of lien for all of them. Palin v. Cooke, 125 Ga. 442, 54 S.E. 90, 1906 Ga. LEXIS 187 (1906).

Possession of car irrelevant where vendor title superior to mechanic's lien. — Although the retention of the automobile is the proper method of asserting the mechanic's lien under O.C.G.A. § 44-14-363, the allegation of possession is irrelevant where a mechanic's lien for repair work and material of the credit of a vendee is inferior to the vendor's contract retaining the title, regardless of who has possession of the automobile at the time of the levy. Dixon v. GMAC, 105 Ga. App. 413, 124 S.E.2d 660, 1962 Ga. App. LEXIS 939 (1962).

Legal title takes precedence over mechanic's lien. — There is nothing contained or implied in O.C.G.A. § 44-14-363 or the decisions thereunder that would indicate that a mechanic's lien, any more than any other lien, was intended to operate, or by any possible construction could be made to operate, in such a manner as to exert priority over an outstanding and valid legal title. Manchester Motors, Inc. v. F & M Bank, 91 Ga. App. 811, 87 S.E.2d 342, 1955 Ga. App. LEXIS 870 (1955).

O.C.G.A. § 44-14-363 has never at any time been construed to extend beyond mere liens, as such, and to effect a priority over a legal title in another. There is a clear distinction between a lien and a legal title. Manchester Motors, Inc. v. F & M Bank, 91 Ga. App. 811, 87 S.E.2d 342, 1955 Ga. App. LEXIS 870 (1955).

Unrecorded bill of sale to secure debt 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 Ga. App. LEXIS 870 (1955).

Failure to record. — The mechanic's lien of an aircraft repair company which was not recorded with the Federal Aviation Administration (FAA) was not valid, thus the security interest of a bank which was recorded with the FAA after the mechanic initiated lien foreclosure proceedings was superior. Southern Horizons Aviation v. F & M Bank, 231 Ga. App. 55, 497 S.E.2d 637, 1998 Ga. App. LEXIS 323 (1998).

Perfected security interest under former O.C.G.A. § 11-9-310 superior to mechanic's lien. — Under former O.C.G.A. § 11-9-310 (see now O.C.G.A. § 11-9-333), a perfected security interest takes priority over all liens described in O.C.G.A. § 44-14-320, including mechanic's lien as provided for in O.C.G.A. § 44-14-363. Newton Ford Tractor Co. v. JI

Case Credit Corp., 163 Ga. App. 497, 294 S.E.2d 723, 1982 Ga. App. LEXIS 2550 (1982).

A bank's security interest in the inventory of a carpet manufacturer took priority over a mechanic's lien. Nationsbank v. Hardwick Carpets Int'l, Inc., 233 Ga. App. 894, 506 S.E.2d 174, 1998 Ga. App. LEXIS 1096 (1998).

Perfected security interest under O.C.G.A. § 40-3-54 superior to mechanic's lien. — A security interest on a vehicle which is perfected pursuant to O.C.G.A. § 40-3-54 is superior to a mechanic's lien on a vehicle which is perfected under the provisions of O.C.G.A. § 44-14-363. Gwinnett Sales & Serv. v. Trust Co., 130 Ga. App. 31, 202 S.E.2d 255, 1973 Ga. App. LEXIS 1211 (1973).

Recorded bill of sale superior to subsequently recorded mechanic's lien. — A bill of sale properly recorded is a superior lien to a mechanic's lien subsequently duly recorded and foreclosed. Norman v. Farmers State Bank, 90 Ga. App. 763, 84 S.E.2d 207, 1954 Ga. App. LEXIS 808 (1954).

Effect of a failure to record a mortgage or bill of sale to secure debt shall be the same as is the effect of failure to record a deed of bargain and sale. This changes the prior law with reference to those securities so as to render such instruments, even though unrecorded, superior in rank to subsequent liens created by law. Manchester Motors, Inc. v. F & M Bank, 91 Ga. App. 811, 87 S.E.2d 342, 1955 Ga. App. LEXIS 870 (1955).

Vendee cannot force liability on vendor who retains title. — Where a vendor retains title to personal property the vendor's claim is superior to the lien of a mechanic who has done work at the instance of the vendee. The vendee cannot force a liability on the vendor. Baughman Auto. Co. v. Emanuel, 137 Ga. 354, 73 S.E. 511, 1912 Ga. LEXIS 18 (1912).

Bill of sale to secure debt superior to all liens, absent recording act. — A bill of sale to secure debt conveys an outright legal title, as distinguished from a mortgage lien, under law, so as to place such legal title beyond the reach of any lien, statutory or otherwise, in the absence of a recording act treating such as an equitable mortgage. Manchester Motors, Inc. v. F & M Bank, 91 Ga. App. 811, 87 S.E.2d 342, 1955 Ga. App. LEXIS 870 (1955).

Removal of illegally parked cars by police creates no lien. — Where O.C.G.A. § 40-6-206 permits police officers to remove illegally parked automobiles to a garage or other place of safety, but it does not specify whether a public or private garage, nor does it state that the owner shall be liable for the costs of such removal and storage, and no specific authority is given the officers to impound the vehicle and the law is blank as to its ultimate disposition, the law does not create an agency relation between the police officers and the owner so as to create a contract for storage or towing charges, since the owner does not assent to this disposition of property, and no person authorized by law to act for the owner assents to it. Under these circumstances, no lien arises, and detention of the property by the garage against the demands of the owner amounts to a conversion. Wilkinson v. Townsend, 96 Ga. App. 179, 99 S.E.2d 539, 1957 Ga. App. LEXIS 536 (1957).

Sawmill proprietors cannot have mechanic's lien. — A lien does not arise under O.C.G.A. § 44-14-363 when the facts show that the claimants are not mechanics, but proprietors of a sawmill. Evans v. Beddingfield, 106 Ga. 755, 32 S.E. 664, 1899 Ga. LEXIS 746 (1899).

No mechanic's lien for workman hired by another. — The lien given by O.C.G.A. § 44-14-363 does not attach in favor of a workman who is hired by another to do the work. In such a case, the possession of the lien is in the master or contractor. Quillian v. Central R.R. & Banking Co., 52 Ga. 374, 1874 Ga. LEXIS 296 (1874).

A firm engaged in operating a repair shop where others are employed to do expert mechanical work, and where material is furnished for the repair of carriages and automobiles, is entitled to a lien on the property manufactured or improved. Fox v. Smith, 143 Ga. 547, 85 S.E. 856, 1915 Ga. LEXIS 514 (1915).

Work done by those hired. — The lien provided for in O.C.G.A. § 44-14-363 is afforded to mechanics, notwithstanding

the work employed in manufacturing or repairing the property may have been performed entirely by an employee of the mechanic. Fox v. Smith, 143 Ga. 547, 85 S.E. 856, 1915 Ga. LEXIS 514 (1915).

Lien to person who controls work. — It was the intent, and it is the plain meaning of O.C.G.A. § 44-14-363 to give the lien to the manufacturer or repairer, the individual who controls the work, has the shop, and not to the workmen. Gibbs v. Griffin, 123 Ga. App. 385, 181 S.E.2d 285, 1971 Ga. App. LEXIS 1234 (1971).

For example of enforcement of lien, see Young v. Alford, 36 Ga. App. 708, 137 S.E. 914, 1927 Ga. App. LEXIS 263 (1927).

RESEARCH REFERENCES

Am. Jur. 2d.

8 Am. Jur. 2d, Bailments, §§ 190 et seq., 196. 51 Am. Jur. 2d, Liens, § 19.

C.J.S.

8 C.J.S., Bailments, § 80 et seq. 53 C.J.S., Liens, § 11.

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Validity and effect of provision in contract against mechanic's lien, 13 A.L.R. 1065; 102 A.L.R. 356; 76 A.L.R.2d 1087.

Freight charges on material as within mechanic's lien statute giving lien for labor or material, or within contractor's bond securing such claims, 30 A.L.R. 466.

Mechanics' lien for material specially fabricated for and adapted to building, but not used therein, 33 A.L.R. 320.

Mechanic's lien: owner's right to deduction on account of damages sustained through contractor's delay, 37 A.L.R. 766.

Independence of contract considered with relation to the scope and construction of statutes, 43 A.L.R. 335.

Character of service contemplated by statutes giving a lien or preference, in event of insolvency, to servants, employees, laborers, etc., 54 A.L.R. 567.

Material or labor employed in construction of concrete forms as basis of mechanics' lien or claim under contractors' bond, 84 A.L.R. 460.

Priority of statutory lien on automobile for storage or repairs as against the rights of purchasers, attaching creditors, or trustee in bankruptcy which arose while car was in possession of owner after accrual of storage or completion of repairs, 100 A.L.R. 80.

Principal contractor as necessary party to suit to enforce mechanic's lien of subcontractor, laborer, or materialman, 100 A.L.R. 128.

Remedy available to holder of mechanic's lien which has priority over antecedent mortgage or vendor's title or lien as regards improvement, but not as regards land, where it is impossible or impractical to remove the improvement, 107 A.L.R. 1012.

Priority of lien of sales or consumers' tax, 136 A.L.R. 1015.

Time for filing notice or claim of mechanic's lien where claimant has contracted with general contractor and later contracts directly with owner, 78 A.L.R.2d 1165.

Priority between mechanics' liens and advances made under previously executed mortgage, 80 A.L.R.2d 179.

What constitutes "commencement of building or improvement" for purposes of determining accrual of mechanic's lien, 1 A.L.R.3d 822.

Sufficiency of designation of owner in notice, claim, or statement of mechanic's lien, 48 A.L.R.3d 153.

Abandonment of construction or of contract as affecting time for filing mechanics' liens or time for giving notice to owner, 52 A.L.R.3d 797.

Assertion of statutory mechanic's or materialman's lien against oil and gas produced or against proceeds attributable to oil and gas sold, 59 A.L.R.3d 278.

Secured transactions: priorities as between previously perfected security interest and repairman's lien on motor vehicle under Uniform Commercial Code, 69 A.L.R.3d 1162.

Who is the "owner" within mechanic's lien statute requiring notice of claim, 76 A.L.R.3d 605.

Lien for towing or storage, ordered by public officer, of motor vehicle, 85 A.L.R.3d 199.

Garageman's lien for towing and storage of motor vehicle towed from private property on which vehicle was parked without permission, 85 A.L.R.3d 240.

Validity, construction, and effect of "Sunday closing" or "blue" laws — modern status, 10 A.L.R.4th 246.

Loss of garageman's lien on repaired vehicle by owner's use of vehicle, 74 A.L.R.4th 90.

Architect's services as within mechanics' lien statute, 31 A.L.R.5th 664.

44-14-364. Release of lien on approval of bond; amount; real property bonds; schedule, affidavit, and recordation; superior court clerk held harmless for good faith discretionary acts in connection with bond approval.

(a) When any person entitled under this part to claim a lien against any real estate located in this state files his or her lien in the office of the clerk of the superior court of the county in which the real estate is located, the owner of the real estate or the contractor employed to improve the property may, before or after foreclosure proceedings are instituted, discharge the lien upon the approval of a bond by the clerk of superior court. The bond shall be conditioned to pay to the holder of the lien the sum that may be found to be due the holder upon the trial of any lien action that may be filed by the lienholder to recover the amount of his or her claim within 365 days from the time the claim of lien is filed. The bond shall be in double the amount claimed under that lien and shall be either a bond with good security approved by the clerk of superior court or a cash bond, except in cases involving a lien against the owner's domicile, in which event the bond shall be in the amount claimed under the lien. An owner or contractor may be required to provide supporting data to the clerk to prove the value of domiciled property when such property serves as a bond to discharge a lien provided for in this Code section. Upon the approval by the clerk of the bond provided for in this Code section, the real estate shall be discharged from the lien. For purposes of this subsection, the term "domicile" means the established, fixed, permanent, or ordinary dwelling place of the owner.

(b) Within seven days of filing the bond required by subsection (a) of this Code section and any attachments, the party filing such bond shall send a notice of filing such bond and a copy of the bond by registered or certified mail or statutory overnight delivery to the lien claimant at the address stated on the lien or, if no such address is shown for the lien claimant, to the person shown as having filed such lien on behalf of the claimant at the indicated address of such person or, if the bond is filed by a contractor, to the owner of the property, provided that whenever the lien claimant or the owner is an entity on file with the Secretary of State's Corporations Division, sending the notice of filing such bond and a copy of the bond to the company's address or the registered agent's address on file with the Secretary of State shall be deemed sufficient; provided, however, that the failure to send the notice of filing the bond and copy of the bond shall not invalidate the bond for purposes of

discharge of a claim of lien under this Code section. With respect to property bonds, the clerk shall not accept any real property bond unless the real property is scheduled in an affidavit attached thereto setting forth a description of the property and indicating the record owner thereof, including any liens and encumbrances and amounts thereof, the market value, and the value of the sureties' interest therein, which affidavit shall be executed by the owner or owners of the interest; the bond and affidavit shall be recorded in the same manner and at the same cost as other deeds of real property. So long as the bond exists, it shall constitute a lien against the property described in the attached affidavit.

(c) The clerk of the superior court shall have the right to rely upon the amount specified in the claim of lien in determining the sufficiency of any bond to discharge under this Code section. The failure to specify both the amount claimed due under the lien and the date said claim was due shall result in such lien not constituting notice for any purposes.

(d) The clerk of the superior court shall be held harmless for good faith regarding any discretionary act in connection with approval of any bond provided for in this Code section.

History.

Code 1933, § 67-2004, enacted by Ga. L. 1953, Jan.-Feb. Sess., p. 544, § 1; Ga. L. 1972, p. 469, § 1; Ga. L. 1981, p. 916, § 1; Ga. L. 1983, p. 1450, § 2; Ga. L. 2008, p. 1063, § 4/SB 374; Ga. L. 2012, p. 173, § 1-37/HB 665.

Law reviews.

For note, "Benning Construction Co. v. Dykes Paving and Construction Co.: Georgia Supreme Court Redefines the Scope of Materialman's Lien Statutes," see 45 Mercer L. Rev. 1401 (1994).

For survey article on construction law, see 59 Mercer L. Rev. 55 (2007).

JUDICIAL DECISIONS

Intent. — The intent of the General Assembly was to have the bond serve as a replacement for the lien, and not to establish a new and different procedure limited to the bond. M. Shapiro & Son v. Yates Constr. Co., 140 Ga. App. 675, 231 S.E.2d 497, 1976 Ga. App. LEXIS 1599 (1976).

The intent was to provide a procedure whereby owners could alienate their property while disputes regarding claims of liens are pending. M. Shapiro & Son v. Yates Constr. Co., 140 Ga. App. 675, 231 S.E.2d 497, 1976 Ga. App. LEXIS 1599 (1976).

The General Assembly did not intend to deprive the owner or contractor of those defenses which would have been available to defeat foreclosure of the lien. M. Shapiro & Son v. Yates Constr. Co., 140 Ga. App. 675, 231 S.E.2d 497, 1976 Ga. App. LEXIS 1599 (1976).

The lien-release bond provided for by O.C.G.A. § 44-14-364 serves as a replacement for the lien to which it refers, and does not authorize a new and different procedure limited to the bond or result in additional rights. North v. Waffle House, Inc., 177 Ga. App. 162, 338 S.E.2d 750, 1985 Ga. App. LEXIS 2564 (1985), overruled, Few v. Capitol Materials Inc., 274 Ga. 784, 559 S.E.2d 429, 2002 Ga. LEXIS 20 (2002).

The effect of posting a property bond pursuant to O.C.G.A. § 44-14-364 is to serve as a replacement for the lien. After such a bond is filed, it is still incumbent

upon the lien claimant who brings suit against the principal and surety on the bond to prove entitlement to the underlying lien. Roberts v. Porter, Davis, Saunders & Churchill, 193 Ga. App. 898, 389 S.E.2d 361, 1989 Ga. App. LEXIS 1685 (1989).

Posting bond discharges lien. — Where the owner with whom the materialman has a contract posts bond, this discharges the lien so far as the owner and the property are concerned. There is no longer anything to be foreclosed on, and the plaintiff's action is from then on strictly in contract and in personam against the contractor with whom it dealt. Linco Constr. Co. v. Tri-City Concrete, Inc., 161 Ga. App. 174, 288 S.E.2d 125, 1982 Ga. App. LEXIS 1802 (1982).

Bond stands in shoes of lien to serve as security after the lien claimant has proved entitlement to the lien. M. Shapiro & Son v. Yates Constr. Co., 140 Ga. App. 675, 231 S.E.2d 497, 1976 Ga. App. LEXIS 1599 (1976).

Lienee can use defenses available against lien foreclosure. — The intention was to have the bond as a security to stand in the place of the lien so that the lienor still had to show compliance with the lien law and the lienee could in an action on the bond use as defenses those which would have been available to a lien foreclosure. M. Shapiro & Son v. Yates Constr. Co., 140 Ga. App. 675, 231 S.E.2d 497, 1976 Ga. App. LEXIS 1599 (1976).

The bonds filed with the superior court stand in place of the recorded liens as security for the claims, and in any subsequent action to collect on the bond, the defendant could present as defenses those which would be available to a foreclosure of the lien for which the bond was substituted. Hoffman Elec. Co. v. Chiyoda Int'l Corp., 203 Ga. App. 731, 417 S.E.2d 371, 1992 Ga. App. LEXIS 611 (1992), cert. denied, No. S92C0957, 1992 Ga. LEXIS 538 (Ga. May 21, 1992).

Surety can present defenses available in action on lien. — In an action on a bond under O.C.G.A. § 44-14-364, a surety is entitled to present any defenses which would have existed on an action on the lien. Apex Supply Co. v. Commercial Union Ins. Co., 143 Ga. App. 131, 237 S.E.2d 649, 1977 Ga. App. LEXIS 2214 (1977).

Whether lienee is owner or contractor. — The principal and surety under the statutory bond is entitled to present any defenses to an action on the bond that would exist if the lien for which the bond served as a substitute were being foreclosed, whether the principal be the owner or the contractor. M. Shapiro & Son v. Yates Constr. Co., 140 Ga. App. 675, 231 S.E.2d 497, 1976 Ga. App. LEXIS 1599 (1976).

Discharge of lien and judgment against contractor not enough to make owners principals. — The discharge of a materialman's lien upon the filing of a bond does not make the owners principals and the surety on the bond liable merely because a judgment was obtained against the general contractor, absent a judgment in favor of the materialman and against the owners establishing the right to a lien. Montgomery v. Richards Bldg. Materials, Inc., 122 Ga. App. 472, 177 S.E.2d 507, 1970 Ga. App. LEXIS 910 (1970).

Action by materialman against court clerk for negligence. — Where there is no foreclosure of the materialman's lien, no proceeding instituted to recover on the bond given under O.C.G.A. § 44-14-364 and no other action instituted to establish the amount of damages to which the plaintiff might be entitled, a complaint filed by a materialman against the clerk of court for negligence is premature. Atlas Supply Co. v. United States Fid. & Guar. Co., 119 Ga. App. 152, 166 S.E.2d 624, 1969 Ga. App. LEXIS 1021 (1969).

Effect of discharge of lien by bond. — When contractor and insurance company posted a bond to discharge supplier's liens, the bond served as a replacement for the lien and supplier's later execution of waiver and release of lien did not affect its contract claims against the bond. Benning Constr. Co. v. All-Phase Elec. Supply Co., 206 Ga. App. 279, 424 S.E.2d 830, 1992 Ga. App. LEXIS 1601 (1992).

Compliance with statutory requirement. — Trial court properly granted summary judgment to the materialman on its action to recover on a lien release

bond after an electrical subcontractor did not pay for materials supplied to it by the materialman, and despite the claim of the general contractor and the surety that the materialman did not comply with a lien statute notice requirement; the lien statute notice requirement was meant to protect prospective purchasers from unknowingly buying property encumbered by liens and did not apply to the materialman's situation because the materialman, acting as a lien claimant, was attempting to recover on a lien discharge bond that the general contractor and the surety had filed to discharge the lien against the electrical contractor. Washington Intl Ins. Co. v. Hughes Supply, Inc., 271 Ga. App. 50, 609 S.E.2d 99, 2004 Ga. App. LEXIS 1342 (2004), cert. denied, No. S05C0709, 2005 Ga. LEXIS 323 (Ga. Apr. 26, 2005).

In the general contractor's action against the materials provider relating to the provider's request for payment under a payment bond, the trial court erred by declaring that the payment bond obtained and recorded by the general contractor served as substituted collateral for the construction project and in discharging the materialmen's lien filed by the provider; O.C.G.A. § 10-7-31 was silent on the issue of how or whether the bond affected materialmen's liens, and, under O.C.G.A. § 44-14-364(a), the bond did not satisfy the essential requirements of a lien release bond since the bond was obtained before the provider filed its lien claim and there was nothing indicating that the bond was issued with good security approved by the clerk. Sierra Craft, Inc. v. T. D. Farrell Constr., Inc., 282 Ga. App. 377, 638 S.E.2d 815, 2006 Ga. App. LEXIS 1398 (2006), cert. denied, No. S07C0460, 2007 Ga. LEXIS 145 (Ga. Feb. 5, 2007).

RESEARCH REFERENCES

Am. Jur. 2d.

53 Am. Jur. 2d, Mechanics' Liens, § 313 et seq.

C.J.S.

56 C.J.S., Mechanics' Liens, § 263 et seq.

ALR.

Provisions of statutes or bonds to secure payment for work or labor as including use of laborer's own team, automobile, or other equipment, 71 A.L.R. 1136.

Owner's right to recover from contractor or surety on his bond amount paid or agreed to be paid by former to third person order to avoid mechanics' liens for labor or material furnished contractor, 134 A.L.R. 314.

Enforceability of mechanic's lien attached to leasehold estate against landlord's fee, 74 A.L.R.3d 330.

Removal or demolition of building or other structure as basis for mechanic's lien, 74 A.L.R.3d 386.

44-14-365. Rights as to liens of partnerships, corporations, and associations made up of or employing registered architects, foresters, land surveyors, professional engineers, or interior designers.

If services are performed or furnished with respect to any real estate by any registered architect, registered forester, registered land surveyor, registered professional engineer, or registered interior designer who is a member of a partnership or who is an agent or employee of a corporation or an association and the contract for the services is made for or on behalf of the owner with the partnership or corporation or association, the partnership, corporation, or association shall be entitled to all the privileges and benefits of Code Sections 44-14-361 and 44-14-362, just as if the partnership, corporation, or association was a

registered architect, a registered forester, a registered land surveyor, a registered professional engineer, or a registered interior designer.

History.

Ga. L. 1956, p. 185, §§ 5-8; Ga. L. 1959, p. 367, § 1; Ga. L. 1985, p. 1322, § 5; Ga. L. 2021, p. 674, § 6/HB 480.

The 2021 amendment, effective May 10, 2021, substituted "land surveyor, registered professional engineer, or registered interior designer" for "land surveyor or registered professional engineer" near the beginning and substituted "forester, a registered land surveyor, a registered professional engineer, or a registered interior designer" for "forester, a registered professional engineer, or a registered land surveyor" at the end. See Editor's notes for applicability.

Editor's notes.

Ga. L. 2021, p. 674, § 7/HB 480, not codified by the General Assembly, provides: "This Act shall become effective upon its approval by the Governor or upon its becoming law without such approval and Sections 2 through 8 of this Act shall apply to labor, services, or materials performed or furnished by registered interior designers on or after such date." This Act was approved by the Governor on May 10, 2021.

RESEARCH REFERENCES

Am. Jur. 2d.

53 Am. Jur. 2d, Mechanics' Liens, § 61.

ALR.

Right of subcontractor's subcontractor or materialman, or of materialman's materialman, to mechanic's lien, 24 A.L.R.4th 963.

Architect's services as within mechanics' lien statute, 31 A.L.R.5th 664.

44-14-366. Waiver of lien or claim upon bond in advance of furnishing labor, services, or materials void; interim waiver and release upon payment; unconditional waiver and release upon final payment; affidavit of nonpayment.

(a) Waivers and releases provided for under this Code section shall be limited to waivers and releases of lien and labor or material bond rights and shall not be deemed to affect any other rights or remedies of the claimant.

(b) A right to claim a lien or to claim upon a bond may not be waived in advance of furnishing of labor, services, or materials. Any purported waiver or release of lien or bond claim or of this Code section executed or made in advance of furnishing of labor, services, or materials is null, void, and unenforceable.

(c) No oral or written statement by the claimant purporting to waive, release, impair, or otherwise adversely affect a lien or bond claim is enforceable or creates an estoppel or impairment of claim of lien or claim upon a bond unless:

(1) It is pursuant to a waiver and release form duly executed by the claimant prescribed below; and

(2) The claimant has received payment for the claim as set forth in subsection (g) of this Code section.

(d) When a claimant is requested to execute a waiver and release in exchange for or in order to induce payment other than final payment, the waiver and release shall substantially follow the language of the following form, be in at least 12 point font, and need not be in boldface capital letters, and the priority of such claimant's lien rights, except as to retention, shall upon such payment thereafter run from the day after the date specified in such Waiver and Release of Lien and Payment Bond Rights Upon Interim Payment form:

"WAIVER AND RELEASE OF LIEN AND PAYMENT BOND RIGHTS UPON INTERIM PAYMENT

STATE OF GEORGIA

COUNTY OF _____

THE UNDERSIGNED MECHANIC AND/OR MATERIALMAN HAS BEEN EMPLOYED BY _____ (NAME OF CONTRACTOR) TO FURNISH _____ (DESCRIBE MATERIALS AND/OR LABOR) FOR THE CONSTRUCTION OF IMPROVEMENTS KNOWN AS _____ (TITLE OF THE PROJECT OR BUILDING) WHICH IS LOCATED IN THE CITY OF _____, COUNTY OF _____, AND IS OWNED BY _____ (NAME OF OWNER) AND MORE PARTICULARLY DESCRIBED AS FOLLOWS:

_____

_____

_____

(DESCRIBE THE PROPERTY UPON WHICH THE IMPROVEMENTS WERE MADE BY USING EITHER A METES AND BOUNDS DESCRIPTION, THE LAND LOT DISTRICT, BLOCK AND LOT NUMBER, OR STREET ADDRESS OF THE PROJECT.)

UPON THE RECEIPT OF THE SUM OF $_____, THE MECHANIC AND/OR MATERIALMAN WAIVES AND RELEASES ANY AND ALL LIENS OR CLAIMS OF LIENS IT HAS UPON THE FOREGOING DESCRIBED PROPERTY OR ANY RIGHTS AGAINST ANY LABOR AND/OR MATERIAL BOND THROUGH THE DATE OF _____ (DATE) AND EXCEPTING THOSE RIGHTS AND LIENS THAT THE MECHANIC AND/OR MATE-

RIALMAN MIGHT HAVE IN ANY RETAINED AMOUNTS, ON ACCOUNT OF LABOR OR MATERIALS, OR BOTH, FURNISHED BY THE UNDERSIGNED TO OR ON ACCOUNT OF SAID CONTRACTOR FOR SAID BUILDING OR PREMISES.

GIVEN UNDER HAND AND SEAL THIS _____ DAY OF _____, _____.

_____ (SEAL)

_____

_____
(WITNESS)

_____
(ADDRESS)

NOTICE: WHEN YOU EXECUTE AND SUBMIT THIS DOCUMENT, YOU SHALL BE CONCLUSIVELY DEEMED TO HAVE WAIVED AND RELEASED ANY AND ALL LIENS AND CLAIMS OF LIENS UPON THE FOREGOING DESCRIBED PROPERTY AND ANY RIGHTS REGARDING ANY LABOR OR MATERIAL BOND REGARDING THE SAID PROPERTY TO THE EXTENT (AND ONLY TO THE EXTENT) SET FORTH ABOVE, EVEN IF YOU HAVE NOT ACTUALLY RECEIVED SUCH PAYMENT, 90 DAYS AFTER THE DATE STATED ABOVE UNLESS YOU FILE AN AFFIDAVIT OF NONPAYMENT PRIOR TO THE EXPIRATION OF SUCH 90 DAY PERIOD. THE FAILURE TO INCLUDE THIS NOTICE LANGUAGE ON THE FORM SHALL RENDER THE FORM UNENFORCEABLE AND INVALID AS A WAIVER AND RELEASE UNDER O.C.G.A. § 44-14-366."

Provided, however, that the failure to correctly complete any of the blank spaces in the above form shall not invalidate said form so long as the subject matter of said release may reasonably be determined.

(e) When a claimant is requested to execute a waiver and release in exchange for or in order to induce making of final payment, the waiver and release shall substantially follow the language of the following form, be in at least 12 point font, and need not be in boldface capital letters:

"WAIVER AND RELEASE OF LIEN AND PAYMENT BOND RIGHTS UPON FINAL PAYMENT

STATE OF GEORGIA

COUNTY OF _____

THE UNDERSIGNED MECHANIC AND/OR MATERIALMAN HAS BEEN EMPLOYED BY _____ (NAME

OF CONTRACTOR) TO FURNISH _____ (DESCRIBE MATERIALS AND/OR LABOR) FOR THE CONSTRUCTION OF IMPROVEMENTS KNOWN AS _____ (TITLE OF THE PROJECT OR BUILDING) WHICH IS LOCATED IN THE CITY OF _____, COUNTY OF _____, AND IS OWNED BY _____ (NAME OF OWNER) AND MORE PARTICULARLY DESCRIBED AS FOLLOWS:

_____

_____

_____

(DESCRIBE THE PROPERTY UPON WHICH THE IMPROVEMENTS WERE MADE BY USING EITHER A METES AND BOUNDS DESCRIPTION, THE LAND LOT DISTRICT, BLOCK AND LOT NUMBER, OR STREET ADDRESS OF THE PROJECT.)

UPON THE RECEIPT OF THE SUM OF $ _____, THE MECHANIC AND/OR MATERIALMAN WAIVES AND RELEASES ANY AND ALL LIENS OR CLAIMS OF LIENS IT HAS UPON THE FOREGOING DESCRIBED PROPERTY OR ANY RIGHTS AGAINST ANY LABOR AND/OR MATERIAL BOND ON ACCOUNT OF LABOR OR MATERIALS, OR BOTH, FURNISHED BY THE UNDERSIGNED TO OR ON ACCOUNT OF SAID CONTRACTOR FOR SAID PROPERTY.

GIVEN UNDER HAND AND SEAL THIS _____ DAY OF _____, _____.

_____ **(SEAL)**

_____

_____

(WITNESS)

_____

(ADDRESS)

NOTICE: WHEN YOU EXECUTE AND SUBMIT THIS DOCUMENT, YOU SHALL BE CONCLUSIVELY DEEMED TO HAVE WAIVED AND RELEASED ANY AND ALL LIENS AND CLAIMS OF LIENS UPON THE FOREGOING DESCRIBED PROPERTY AND ANY RIGHTS REGARDING ANY LABOR OR MATERIAL BOND REGARDING THE SAID PROPERTY TO THE EXTENT (AND ONLY TO THE EXTENT) SET FORTH ABOVE, EVEN IF YOU HAVE NOT ACTUALLY RECEIVED SUCH PAYMENT, 90

DAYS AFTER THE DATE STATED ABOVE UNLESS YOU FILE AN AFFIDAVIT OF NONPAYMENT PRIOR TO THE EXPIRATION OF SUCH 90 DAY PERIOD. THE FAILURE TO INCLUDE THIS NOTICE LANGUAGE ON THE FORM SHALL RENDER THE FORM UNENFORCEABLE AND INVALID AS A WAIVER AND RELEASE UNDER O.C.G.A. § 44-14-366."

Provided, however, that the failure to correctly complete any of the blank spaces in the above form shall not invalidate said form so long as the subject matter of said release may reasonably be determined.

(f) Nothing contained in this Code section shall affect:

(1) The enforceability of any subordination of lien rights by a potential lien claimant to the rights of any other party which may have or acquire an interest in all or any part of the real estate, factories, railroads, or other property for which the potential lien claimant has furnished labor, services, or material, even though such subordination is entered into in advance of furnishing labor, services, or material and even though the claimant has not actually received payment in full for its claim;

(2) The enforceability of any waiver of lien rights given in connection with the settlement of a bona fide dispute concerning the amount due the lien claimant for labor, services, or material which have already been furnished;

(3) The validity of a cancellation or release of a recorded claim of lien or preliminary notice of lien rights; or

(4) The provisions of paragraph (2) of subsection (a) of Code Section 44-14-361.2, paragraphs (3) and (4) of subsection (a) and subsections (b) and (c) of Code Section 44-14-361.4, or Code Section 44-14-364.

(g)(1) When a waiver and release provided for in this Code section is executed by the claimant, it shall be binding against the claimant for purposes of the waiver of lien and labor or material bond rights to the extent stated in the waiver and release, subject only to the provisions of paragraphs (2) and (3) of this subsection.

(2) Such lien and labor or material bond waivers and releases shall conclusively be deemed effective upon the earliest to occur of:

(A) Actual receipt of funds in the amount set forth in the waiver and release;

(B) Execution by the claimant of a separate written acknowledgment of payment in full; or

(C) Ninety days after the date of the execution of the waiver and release, unless prior to the expiration of said 90 day period the

claimant files in the county in which the property is located an affidavit of nonpayment, using substantially the language in the following form, where such language shall be in at least 12 point font and need not be in boldface capital letters:

"AFFIDAVIT OF NONPAYMENT UNDER O.C.G.A. § 44-14-366

STATE OF GEORGIA

COUNTY OF _____

THE UNDERSIGNED MECHANIC AND/OR MATERIALMAN HAS BEEN EMPLOYED BY _____ (NAME OF CONTRACTOR) TO FURNISH _____ (DESCRIBE MATERIALS AND/OR LABOR) FOR THE CONSTRUCTION OF IMPROVEMENTS KNOWN AS _____ (TITLE OF THE PROJECT OR BUILDING) WHICH IS LOCATED IN THE CITY OF _____, COUNTY OF _____, AND IS OWNED BY _____ (NAME OF OWNER) AND MORE PARTICULARLY DESCRIBED AS FOLLOWS:

_____

_____

_____

(DESCRIBE THE PROPERTY UPON WHICH THE IMPROVEMENTS WERE MADE BY USING EITHER A METES AND BOUNDS DESCRIPTION, THE LAND LOT DISTRICT, BLOCK AND LOT NUMBER, OR STREET ADDRESS OF THE PROJECT.)

PURSUANT TO O.C.G.A. § 44-14-366 THE UNDERSIGNED EXECUTED A LIEN WAIVER AND RELEASE WITH RESPECT TO THIS PROPERTY DATED _____, _____. THE AMOUNT SET FORTH IN SAID WAIVER AND RELEASE ($_____) HAS NOT BEEN PAID IN FULL AND $_____ OF THE AMOUNT SET FORTH IN SAID WAIVER AND RELEASE REMAINS UNPAID, AND THE UNDERSIGNED HEREBY GIVES NOTICE OF SUCH NONPAYMENT.

THE ABOVE FACTS ARE SWORN TRUE AND CORRECT BY THE UNDERSIGNED, THIS _____ DAY OF _____, _____.

_____ (SEAL)
CLAIMANT'S SIGNATURE

SWORN TO AND EXECUTED IN THE PRESENCE OF:

_____

WITNESS

_____

NOTARY PUBLIC

WITHIN SEVEN DAYS OF FILING THIS AFFIDAVIT OF NONPAYMENT, THE FILING PARTY SHALL SEND A COPY OF THE AFFIDAVIT BY REGISTERED OR CERTIFIED MAIL OR STATUTORY OVERNIGHT DELIVERY TO THE OWNER OF THE PROPERTY. IF THE FILING PARTY IS NOT IN PRIVITY OF CONTRACT WITH THE PROPERTY OWNER AND A NOTICE OF COMMENCEMENT IS FILED FOR THE IMPROVEMENT ON THE PROPERTY FOR WHICH THE FILING PARTY'S LABOR, SERVICES, OR MATERIALS WERE FURNISHED, A COPY OF THE AFFIDAVIT SHALL BE SENT TO THE CONTRACTOR AT THE ADDRESS SHOWN ON THE NOTICE OF COMMENCEMENT. WHENEVER THE OWNER OF THE PROPERTY IS AN ENTITY ON FILE WITH THE SECRETARY OF STATE'S CORPORATIONS DIVISION, SENDING A COPY OF THE AFFIDAVIT TO THE COMPANY'S ADDRESS OR THE REGISTERED AGENT'S ADDRESS ON FILE WITH THE SECRETARY OF STATE SHALL BE DEEMED SUFFICIENT."

(3) A claimant who is paid, in full, the amount set forth in the waiver and release form after filing an affidavit of nonpayment shall upon request execute in recordable form an affidavit swearing that payment in full has been received. Upon recordation thereof in the county in which the Affidavit of Nonpayment was recorded, the affidavit of nonpayment to which it relates shall be deemed void.

(4) Nothing in this Code section shall shorten the time within which to file a claim of lien.

(5) A waiver and release provided in this Code section shall be suspended upon filing of an affidavit of nonpayment until payment in full has been received.

(6) The claimant may rely upon the information contained in the waiver and release form when completing for filing the affidavit of nonpayment.

History.

Code 1981, § 44-14-366, enacted by Ga. L. 1991, p. 915, § 3; Ga. L. 1999, p. 81, § 44; Ga. L. 2008, p. 1063, § 5/SB 374; Ga. L. 2012, p. 775, § 44/HB 942; Ga. L. 2020, p. 733, § 1/SB 315; Ga. L. 2021, p. 446, § 1/SB 143.

The 2020 amendment, effective January 1, 2021, rewrote this Code section.

The 2021 amendment, effective July

1, 2021, substituted "AFFIDAVIT" for "LIEN" in the middle of the last sentence of the form in paragraph (g)(2).

Law reviews.

For note on 1991 enactment of this Code section, see 8 Ga. St. U.L. Rev. 166 (1992).

For annual survey of construction law, see 57 Mercer L. Rev. 79 (2005).

For survey article on construction law, see 60 Mercer L. Rev. 59 (2008).

JUDICIAL DECISIONS

Limitations period. — Because a 30-day limitations period in a contract between a general contractor and a subcontractor for the subcontractor to request arbitration of a dispute between the parties after notice by the contractor of default by the subcontractor did not contravene O.C.G.A. § 44-14-366, the trial court did not err in enforcing the provision; the subcontractor's conduct, not the terms of the contract, impaired the subcontractor's claim and any lien rights the subcontractor would have had with respect to that claim had the subcontractor timely arbitrated the contractor's decision to a favorable result. Holt & Holt, Inc. v. Choate Constr. Co., 271 Ga. App. 292, 609 S.E.2d 103, 2004 Ga. App. LEXIS 1602 (2004), cert. denied, No. S05C0872, 2005 Ga. LEXIS 359 (Ga. May 9, 2005).

Waiver and release binding on claimant for all purposes. — Trial court erred in denying a construction company's motion for summary judgment because the subcontractor failed to file the notice of non-payment within 60 days of the date shown on the waiver, and the plain and unambiguous language of O.C.G.A. § 44-14-366(f)(1) clearly provided that the failure to so file deemed the amount at issue paid in full. ALA Construction Services, LLC v. Controlled Access, Inc., 351 Ga. App. 841, 833 S.E.2d 570, 2019 Ga. App. LEXIS 503 (2019).

Georgia Court of Appeals held that the materialman must file a notice of non-payment within 60 days of the date shown on the waiver and release or else the amount at issue shall conclusively be deemed paid in full, and the presumption of payment is binding against the claimant for all purposes. ALA Construction Services, LLC v. Controlled Access, Inc., 351 Ga. App. 841, 833 S.E.2d 570, 2019 Ga. App. LEXIS 503 (2019).

44-14-367. Notice; required statement.

Failure of a lien claimant to commence a lien action to collect the amount of his or her claim within 365 days from the date of filing the lien, or failure of the lien claimant to file the statutory notice of commencement of lien action in the county where the property is located, renders the claim of lien unenforceable. A claim of lien may be disregarded if no notice of commencement of lien action was filed within 395 days from the date the claim of lien was filed. Any lien filed after March 31, 2009, shall include on the face of the lien the following statement in at least 12 point bold font: "This claim of lien expires and is void 395 days from the date of filing of the claim of lien if no notice of commencement of lien action is filed in that time period." Failure to include such language shall invalidate the lien and prevent it from being filed. No release or voiding of such liens shall be required. A lien shall expire sooner and be disregarded once it is determined that no notice of commencement was timely filed in response to a notice of contest pursuant to Code Section 44-14-368.

History.

Code 1981, § 44-14-367, enacted by Ga. L. 1998, p. 860, § 2; Ga. L. 2000, p. 1589, § 3; Ga. L. 2008, p. 1063, § 6/SB 374.

Editor's notes.

Ga. L. 1998, p. 860, § 3, not codified by the General Assembly, provides that this Act is applicable to liens created on or after July 1, 1998.

Ga. L. 2000, p. 1589, § 16, not codified by the General Assembly, provides that this Act is applicable with respect to notices delivered on or after July 1, 2000.

Law reviews.

For survey article on construction law, see 60 Mercer L. Rev. 59 (2008).

JUDICIAL DECISIONS

Creditor's time for notice tolled under bankruptcy provisions. — Bankruptcy court held that the procedure under O.C.G.A. § 44-14-361.1 to "make good" a mechanic's or materialman's lien involved creating the lien, not mere perfection, and these acts were subject to an automatic stay; accordingly, because the automatic stay prevented the creditor from complying with O.C.G.A. § 44-14-361.1, the creditor's failure to take further action under that statute was tolled under 11 U.S.C. § 108. In re Durango Ga. Paper Co., 297 B.R. 316, 2003 Bankr. LEXIS 1170 (Bankr. S.D. Ga. 2003).

Lien not authorized. — If a county housing authority owned property, regardless of its future plans to sell the same to private parties, it remained public property; thus, a private contractor was not authorized to place a lien on the property. Vakilzadeh Enters. v. Hous. Auth. of DeKalb, Ga., 271 Ga. App. 130, 608 S.E.2d 724, 2004 Ga. App. LEXIS 1633 (2004).

Because a subcontractor did not actually comply with O.C.G.A. § 43-14-8(f) as the evidence indicated that a Georgia-licensed electrician that the subcontractor affiliated itself with through an alleged joint venture only presented electrical contracting licenses when permits for the work were applied for and took no action to inspect others' electrical work or to verify that the work complied with the applicable codes, the subcontractor could not enforce the subcontract with the contractor, could not recover in quantum meruit under O.C.G.A. § 9-2-7 as the express contract violated public policy, and could not file a subcontractor's lien under O.C.G.A. §§ 44-14-361.1 and 44-14-367. JR Construction/Electric, LLC v. Ordner Constr. Co., 294 Ga. App. 453, 669 S.E.2d 224, 2008 Ga. App. LEXIS 1214 (2008).

44-14-368. Notice of contest of lien.

(a) An owner or an owner's agent or attorney, or the contractor or contractor's agent or attorney, may elect to shorten the time prescribed in which to commence a lien action to enforce any claim of lien by recording in the superior court clerk's office a notice in substantially the following form, in boldface capital letters in at least 12 point font, along with proof of delivery upon the lien claimant:

"NOTICE OF CONTEST OF LIEN

TO: [NAME AND ADDRESS OF LIEN CLAIMANT]

YOU ARE NOTIFIED THAT THE UNDERSIGNED CONTESTS THE CLAIM OF LIEN FILED BY YOU ON _____ 20 ____, AND RECORDED IN _____ BOOK _____, PAGE _____ OF THE PUBLIC RECORDS OF _____ COUNTY, GEORGIA, AGAINST PROPERTY OWNED BY

_____, AND THAT THE TIME WITHIN WHICH YOU MAY COMMENCE A LIEN ACTION TO ENFORCE YOUR LIEN IS LIMITED TO 60 DAYS FROM RECEIPT OF THIS NOTICE. THIS _____ DAY OF _____, 20____.

THIS ABOVE-REFERENCED LIEN WILL EXPIRE AND BE VOID IF YOU DO NOT: (1) COMMENCE A LIEN ACTION FOR RECOVERY OF THE AMOUNT OF THE LIEN CLAIM PURSUANT TO O.C.G.A. SECTION 44-14-361.1 WITHIN 60 DAYS FROM RECEIPT OF THIS NOTICE; AND (2) FILE A NOTICE OF COMMENCEMENT OF LIEN ACTION WITHIN 30 DAYS OF FILING THE ABOVE-REFERENCED LIEN ACTION.

SIGNED: _____

(OWNER, CONTRACTOR, AGENT OR ATTORNEY)"

(b) The clerk of the superior court shall cross-reference the notice of contest of lien to the lien. The owner or his or her agent or attorney, or the contractor or his or her agent or attorney, shall send a copy of the notice of contest of lien within seven days of filing by registered or certified mail or statutory overnight delivery to the lien claimant at the address noted on the face of the lien. Service shall be deemed complete upon mailing.

(c) The lien shall be extinguished by law 90 days after the filing of the notice of contest of lien if no notice of commencement of lien action is filed in that time period. No release or voiding of such liens shall be required. This subsection shall not be construed to extend the time in which a lien action must begin.

History.
Code 1981, § 44-14-368, enacted by Ga. L. 2008, p. 1063, § 7/SB 374.

Law reviews.
For survey article on construction law, see 60 Mercer L. Rev. 59 (2008).

44-14-369. Computation of certain time periods.

For the purposes of this part, the computation of time shall be determined pursuant to paragraph (3) of subsection (d) of Code Section 1-3-1.

History.
Code 1981, § 44-14-369, enacted by Ga. L. 2008, p. 1063, § 7/SB 374.

PART 4

LABORERS

JUDICIAL DECISIONS

Location for process. — A laborer can sue out a process to enforce a lien for labor performed either in the county of the employer's residence, or where the prop-

erty might be, but the process should be made returnable to the proper court of the county of defendant's residence, if defendant resides in the state. Harris v. Houston, 51 Ga. App. 116, 179 S.E. 645, 1935 Ga. App. LEXIS 588 (1935).

Counter-affidavit converts proceedings to mesne process. — The filing of a counter-affidavit to the foreclosure of a laborer's lien converts the proceedings into mesne process. Law v. Hodges, 53 Ga. App. 319, 185 S.E. 584, 1936 Ga. App. LEXIS 80 (1936).

RESEARCH REFERENCES

ALR.

Common-law lien on personalty for work performed thereon, upon the owner's premises, 3 A.L.R. 862.

Right or interest subject to, and priority of, statutory lien for labor or material in developing property for oil and gas, 122 A.L.R. 1182.

Abandonment of construction or of contract as affecting time for filing mechanics' liens or time for giving notice to owner, 52 A.L.R.3d 797.

44-14-380. General lien; priorities.

Laborers shall have a general lien upon the property of their employers which is liable to levy and sale for their labor, which lien is superior to all other liens except liens for taxes, the special liens of landlords on yearly crops, and such other liens as are declared by law to be superior to them.

History.

Ga. L. 1873, p. 42, § 4; Code 1873, § 1974; Code 1882, § 1974; Civil Code 1895, § 2792; Civil Code 1910, § 3334; Code 1933, § 67-1801.

JUDICIAL DECISIONS

Section strictly construed. — Where parties resort to summary remedies to recover their demands, they must follow the very letter of O.C.G.A. § 44-14-380. Mabry v. Judkins, 66 Ga. 732, 1881 Ga. LEXIS 99 (1881); Ricks v. Redwine, 73 Ga. 273, 1884 Ga. LEXIS 115 (1884).

Section has no extraterritorial effect. — O.C.G.A. §§ 44-14-320, 44-14-380, and 44-14-382 which give to laborers a general lien upon the property of their employers for labor performed, have no extraterritorial effect, and give no lien arising out of a contract for labor, made in another state and executed by labor performed therein. Downs v. Bedford, 39 Ga. App. 155, 146 S.E. 514, 1929 Ga. App. LEXIS 231 (1929).

Trust estate is subject to lien under O.C.G.A. § 44-14-380. Ricks v. Redwine, 73 Ga. 273, 1884 Ga. LEXIS 115 (1884).

Laborer may also sue at common law. — Remedy given by O.C.G.A. §§ 44-14-380, 44-14-530, and 44-14-550 is not exclusive, and does not deprive a laborer of a common-law right to sue upon a contract, but is merely cumulative of that right. Jennings v. Lanham, 19 Ga. App. 79, 90 S.E. 1038, 1916 Ga. App. LEXIS 54 (1916).

Foreclosure proceedings on laborer's lien not a bar to action on debt. — Pendency of a foreclosure of a laborer's lien is not a bar to an action on account for the same debt, since, even where the lien is contested and the property replevied, no general judgment can be rendered in the foreclosure proceedings. In such a case,

the lien foreclosure is not converted into a proceeding in personam by the filing of a replevy bond. The actions are entirely different and each involves a different kind of judgment. McKellar v. Childs, 95 Ga. App. 237, 97 S.E.2d 616, 1957 Ga. App. LEXIS 764 (1957).

Definition of laborer. — Laborer under O.C.G.A. § 44-14-380, is one who performs manual labor. If an employee is paid to perform headwork rather than handwork, that employee is not a laborer within that section. Cole v. McNeill, 99 Ga. 250, 25 S.E. 402, 1896 Ga. LEXIS 328 (1896).

"Laborer," under O.C.G.A. § 44-14-380, is one who performs manual labor. Aronoff v. Woodard, 47 Ga. App. 725, 171 S.E. 404, 1933 Ga. App. LEXIS 627 (1933).

Laborers classified by work required under contract, not title. — In determining whether an employee is a laborer within the meaning of the law providing for laborers' lien, that person is to be classified, not according to the arbitrary designation given to the calling, but with reference to the character of the services required of that person under the contract of employment. Bell v. J.B. Withers Cigar Co., 196 Ga. 48, 26 S.E.2d 260, 1943 Ga. LEXIS 317 (1943).

Laborer does not do work requiring business skill. — Under O.C.G.A. § 44-14-380 laborers may file a lien on the property of their employers, but in order for an employee to come within the class entitled to such lien the employee's duties, in the main, must be duties not requiring business capacity, skill and discretion. Dantel Corp. v. Whidby, 98 Ga. App. 119, 105 S.E.2d 242, 1958 Ga. App. LEXIS 518 (1958).

Clerks, or persons doing general service, are not laborers within O.C.G.A. § 44-14-380. Richardson v. Langston & Crane, 68 Ga. 658, 1882 Ga. LEXIS 78 (1882). See also Hinton v. Goode & Crumbley, 73 Ga. 233, 1884 Ga. LEXIS 106 (1884); Ricks v. Redwine, 73 Ga. 273, 1884 Ga. LEXIS 115 (1884); Oliver v. Macon Hdwe. Co., 98 Ga. 249, 25 S.E. 403, 1896 Ga. LEXIS 19 (1896); Pruitt v. Pace, 10 Ga. App. 201, 72 S.E. 1098, 1911 Ga. App. LEXIS 713 (1911).

Mercantile clerk is not laborer. — Clerk in a mercantile establishment is not a "laborer" even though the proper discharge of the clerk's duties may include the performance of some amount of manual labor. Meunier v. Beck & Gregg Hdwe. Co., 52 Ga. App. 30, 182 S.E. 58, 1935 Ga. App. LEXIS 18 (1935).

Clerical employees not entitled to either general or special laborer's liens. — In a simple action by a clerical employee for an alleged unpaid salary, an employee is entitled to neither a general laborer's lien, nor a special laborer's lien, if it is shown that no manual labor is involved. United Bonded Whse., Inc. v. Jackson, 207 Ga. 627, 63 S.E.2d 666, 1951 Ga. LEXIS 493 (1951).

When employee's regular duties include actual manual labor, the employee may have lien under O.C.G.A. § 44-14-380 even though the employee is a clerk as well as a laborer. Oliver v. Boehm, Bendheim & Co., 63 Ga. 172, 1879 Ga. LEXIS 162 (1879); Rountree v. Brown, 22 Ga. App. 79, 95 S.E. 375, 1918 Ga. App. LEXIS 154 (1918).

When an employee's regular duties include actual manual labor, the employee may have a lien under O.C.G.A. § 44-14-380 although the employee performs other services for the employer which are not manual labor. Aronoff v. Woodard, 47 Ga. App. 725, 171 S.E. 404, 1933 Ga. App. LEXIS 627 (1933).

Cropper is a laborer, and, as such, may maintain a laborer's lien upon the crop as the property of the employer. Jennings v. Lanham, 19 Ga. App. 79, 90 S.E. 1038, 1916 Ga. App. LEXIS 54 (1916); Howard v. Franklin, 32 Ga. App. 737, 124 S.E. 554, 1924 Ga. App. LEXIS 617 (1924).

Waitress in a restaurant, who waits on the customers when they come into the restaurant to eat, takes their orders and serves them with their meals, and after they finish eating, cleans the table and takes the soiled dishes to the kitchen, and who also cooks some, sweeps the floors of the restaurant, changes the table linen, scrubs counters, washes mirrors, dusts, and unpacks canned goods, is a laborer within the meaning of O.C.G.A. § 44-14-380; even though the waitress frequently acts as cashier, purchases some of the groceries, and makes entries in the books of the business. Aronoff v. Woodard, 47 Ga.

App. 725, 171 S.E. 404, 1933 Ga. App. LEXIS 627 (1933).

Mechanic may assert mechanic's or laborer's lien. — A mechanic who personally performs manual labor upon property of the employer is not limited to a mechanic's lien under O.C.G.A. § 44-14-363, but may at the mechanic's option assert a laborer's lien under O.C.G.A. §§ 44-14-380 or 44-14-381. Adams v. Goodrich, 55 Ga. 233, 1875 Ga. LEXIS 387 (1875); Hilley v. Lunsford, 29 Ga. App. 398, 115 S.E. 667, 1923 Ga. App. LEXIS 29 (1923).

Working foreman limited to mechanic's lien. — A working foreman, who in addition to duties as a supervisor, is expected to perform manual type labor personally may not be in the main, a laborer so as to be entitled to a lien under O.C.G.A. § 44-14-380 but may be a mechanic within the meaning of O.C.G.A. §§ 44-14-360 and 44-14-361. Dantel Corp. v. Whidby, 98 Ga. App. 119, 105 S.E.2d 242, 1958 Ga. App. LEXIS 518 (1958).

Laborer only has a lien for work which the laborer has done personally, and not by other persons hired by the laborer to do the work. Mabry v. Judkins, 66 Ga. 732, 1881 Ga. LEXIS 99 (1881).

Laborer entitled to earnings of spouse and minor child and may assert lien in the laborer's own name and for the laborer's own use for labor contracted for and performed by the spouse and child. Howard v. Franklin, 32 Ga. App. 737, 124 S.E. 554, 1924 Ga. App. LEXIS 617 (1924).

General laborer's lien on personalty takes precedence over ordinary mortgages, even those created prior to the contract for labor. Langston & Crane v. Anderson, 69 Ga. 65, 1882 Ga. LEXIS 179 (1882); Allred v. Haile, 84 Ga. 570, 10 S.E. 1095, 1890 Ga. LEXIS 289 (1890); Georgia Loan, Sav. & Banking Co. v. Dunlop, 108 Ga. 218, 33 S.E. 882, 1899 Ga. LEXIS 218 (1899); Mathews v. Fields, 12 Ga. App. 225, 77 S.E. 11, 1913 Ga. App. LEXIS 507 (1913).

Purchase-money mortgages and other liens, except as otherwise provided. — Liens of laborers have priority over mortgages given to secure the payment of purchase money, and all other liens except those specially provided for and expressly declared by law to be superior. Bradley v. Cassels, 117 Ga. 517, 43 S.E. 857, 1903 Ga. LEXIS 280 (1903).

Lien in favor of laborers on the personalty of their employers takes precedence over mortgages, even mortgages given to secure the payment of the purchase money, and even to those created prior to the contract for labor, and all other liens except those specially provided for and specially declared by law to be superior. Aronoff v. Woodard, 47 Ga. App. 725, 171 S.E. 404, 1933 Ga. App. LEXIS 627 (1933).

Lien does not include fee for using laborer's property. — Lien given to laborers under O.C.G.A. § 44-14-380 arises only for the amount due for the work done, and does not include hire for use of laborer's property. Cox v. Cagle, 112 Ga. 157, 37 S.E. 176, 1900 Ga. LEXIS 81 (1900).

Special lien of laborers given by O.C.G.A. § 44-14-380 attaches to their employers' property only. Farrar v. Joyce, 60 Ga. App. 675, 4 S.E.2d 708, 1939 Ga. App. LEXIS 137 (1939).

Amendment of lien which effectively changes party defendant. — Laborer's special lien foreclosed against A, and levied on property alleged to be the property of A, to which property B files a claim, cannot be amended by alleging that B is the owner of the property, that the work for which the lien arose was done for B's benefit, and that B knowingly accepted such benefit, as such an amendment in effect substitutes B, of whom no demand for payment had been made within 12 months from the date the debt became due, for A as a party defendant, and this may not be done unless there is an equitable reason therefor. Farrar v. Joyce, 60 Ga. App. 675, 4 S.E.2d 708, 1939 Ga. App. LEXIS 137 (1939).

Procedure for enforcing lien. — Laborer may enforce such lien on personal property by filing an affidavit in the proper court in the county of the residence of the employer or in the county where such property of the employer is located, setting forth the essential facts necessary to constitute such lien, whereupon an execution shall issue instantly, the same being final process, unless and until arrested or controverted by a proper counter

affidavit. Harris v. Houston, 51 Ga. App. 116, 179 S.E. 645, 1935 Ga. App. LEXIS 588 (1935).

Employee has burden of showing contract required mostly manual labor. — Burden is on employee to show that the general services by an oral contract of employment are to consist mainly of manual labor, and not merely that the services which the employee did perform consisted mainly of such labor. Bell v. J.B. Withers Cigar Co., 196 Ga. 48, 26 S.E.2d 260, 1943 Ga. LEXIS 317 (1943).

Unless foreclosure collaterally attacked by stranger. — Rule that the burden of proving that one is a laborer lies upon the one asserting a laborer's lien does not apply where a judgment foreclosing a laborer's lien is collaterally attacked by a stranger. Sutton v. Bank of Oglethorpe, 33 Ga. App. 416, 126 S.E. 556, 1925 Ga. App. LEXIS 799 (1925).

Plaintiff in execution bears burden of showing possession by defendant. — Possession by the lienholder is proper, and if there is no contradiction thereof by the claimant, the plaintiff in execution carries the burden of proof to show either title or possession of defendant in execution. Jones v. Major, 83 Ga. App. 78, 62 S.E.2d 729, 1950 Ga. App. LEXIS 1031 (1950).

RESEARCH REFERENCES

Am. Jur. 2d.

51 Am. Jur. 2d, Liens, §§ 25-28, 75.

C.J.S.

56 C.J.S., Mechanics' Liens, § 98.

ALR.

Priority as between landlord's lien on chattels and chattel mortgage, 37 A.L.R. 400; 52 A.L.R. 935.

Chattel mortgage on fruit crops growing or to be grown, 54 A.L.R. 1532.

Constitutionality of statute giving a lien for, or preferring claims of employees for, wages in case of insolvency of employer, 94 A.L.R. 1287.

Character of service contemplated by statutes giving a lien or preference, in event of insolvency, to servants, employees, laborers, etc., 111 A.L.R. 1453; 142 A.L.R. 362.

Sufficiency of description of subject of lien in farm laborer's claim of statutory lien, 116 A.L.R. 1009.

Right or interest subject to, and priority of, statutory lien for labor or material in developing property for oil and gas, 122 A.L.R. 1182.

Priority of lien of sales or consumers' tax, 136 A.L.R. 1015.

State's prerogative right of preference at common law, 167 A.L.R. 640.

Validity of statute making private property owner liable to contractor's laborers, materialmen, or subcontractors where owner fails to exact bond or employ other means of securing their payment, 59 A.L.R.2d 885.

44-14-381. Special lien; priorities.

Laborers shall also have a special lien on the products of their labor, which lien shall be superior to all other liens except liens for taxes and special liens of landlords on yearly crops.

History.

Ga. L. 1873, p. 42, § 4; Code 1873, § 1975; Code 1882, § 1975; Civil Code 1895, § 2793; Civil Code 1910, § 335; Code 1933, § 67-1802.

JUDICIAL DECISIONS

O.C.G.A. § 44-14-381 is strictly construed. Richardson v. Langston & Crane, 68 Ga. 658, 1882 Ga. LEXIS 78 (1882).

Trust estate is subject to a lien under O.C.G.A. § 44-14-381. Ricks v. Redwine, 73 Ga. 273, 1884 Ga. LEXIS 115 (1884).

Laborer's lien may be asserted by mechanic. — Mechanic who personally performs manual labor upon property of employer is not limited to a mechanic's lien under O.C.G.A. § 44-14-363 but may at the mechanic's option assert a laborer's lien under O.C.G.A. §§ 44-14-380 or 44-14-381. Adams v. Goodrich, 55 Ga. 233, 1875 Ga. LEXIS 387 (1875); Hilley v. Lunsford, 29 Ga. App. 398, 115 S.E. 667, 1923 Ga. App. LEXIS 29 (1923).

O.C.G.A. § 44-14-381 does not apply to goods repaired. Lanier v. Bailey, 120 Ga. 878, 48 S.E. 324, 1904 Ga. LEXIS 731 (1904).

Independent contractors, as well as employees, may assert a special laborer's lien. Slappey v. Slappey, 296 Ga. App. 773, 676 S.E.2d 283, 2009 Ga. App. LEXIS 333 (2009).

Clerical worker not entitled to laborer's lien. — In a simple suit by a clerical employee for an alleged unpaid salary, employee is entitled to neither a general laborer's lien, nor a special laborer's lien, if it is shown that no manual labor was involved. United Bonded Whse., Inc. v. Jackson, 207 Ga. 627, 63 S.E.2d 666, 1951 Ga. LEXIS 493 (1951).

Laborer's lien applies only to employer's property. — Special lien given by O.C.G.A. § 44-14-381 to laborers, on the product of their labor, attaches to the property of their employers only. Jonas v. Central Ga. Lumber Co., 35 Ga. App. 172, 132 S.E. 236, 1926 Ga. App. LEXIS 608 (1926).

Amount does not include price for using laborer's property. — Lien given to laborers under O.C.G.A. § 44-14-381 arises only for the amount due for the work done, and does not include hire for use of laborer's property. Cox v. Cagle, 112 Ga. 157, 37 S.E. 176, 1900 Ga. LEXIS 81 (1900).

Laborer not entitled to employer's property where not product of labor. — Special lien of a laborer applies only to the products of labor, and the foreclosure of such lien will not entitle the laborer to participate in the proceeds of other personal property before the court for distribution. Boyce v. Poore, 84 Ga. 574, 10 S.E. 1094, 1890 Ga. LEXIS 290 (1890).

Plaintiff in execution must show defendant has title or possession. — Possession by the lienholder is proper, and if there is no contradiction thereof by the claimant, the plaintiff in execution carries the burden of proof to show either title or possession of defendant in execution. Jones v. Major, 83 Ga. App. 78, 62 S.E.2d 729, 1950 Ga. App. LEXIS 1031 (1950).

Landlord's crop lien superior to laborer's lien, absent contrary agreement. — Landlord's lien has priority on the proceeds of crops grown on rented premises over a laborer's lien on the same unless there be some conflicting agreement such as might operate to interfere with the general rule. Nelson v. Fuqua, 46 Ga. App. 754, 169 S.E. 206, 1933 Ga. App. LEXIS 230 (1933).

Parent who planted could not assert lien. — As a farmer's parent planted and picked cotton and did not oversee others while others performed these tasks, the parent was a "laborer" for purposes of O.C.G.A. § 44-14-381. Slappey v. Slappey, 296 Ga. App. 773, 676 S.E.2d 283, 2009 Ga. App. LEXIS 333 (2009).

Lien against a farmer's crop. — As O.C.G.A. § 44-14-550 contemplated that at the initial probable cause hearing, the trial court would inquire as to whether the plaintiff had put forth facts necessary to constitute a laborer's lien and the amount due, the trial court did not err in reviewing the facts of the case in order to determine whether there was probable cause to believe a laborer could validly assert a special lien against a farmer's crop for the debt under O.C.G.A. § 44-14-381. Slappey v. Slappey, 296 Ga. App. 773, 676 S.E.2d 283, 2009 Ga. App. LEXIS 333 (2009).

RESEARCH REFERENCES

Am. Jur. 2d.
51 Am. Jur. 2d, Liens, §§ 8, 10.

C.J.S.
53 C.J.S., Liens, § 1.

ALR.
Priority as between landlord's lien on chattels and chattel mortgage, 37 A.L.R. 400; 52 A.L.R. 935.

Priority of lien of sales or consumers' tax, 136 A.L.R. 1015.

44-14-382. When laborers' liens arise; priority of conflicting liens.

Liens of laborers shall arise upon the completion of the contract of labor but shall not exist against bona fide purchasers without notice until they have been reduced to execution and levied on by an officer. Laborers' liens which conflict with each other shall rank according to date, each dating from the completion of the contract of labor.

History.
Ga. L. 1873, p. 42, § 4; Code 1873, § 1976; Code 1882, § 1976; Civil Code 1895, § 2794; Civil Code 1910, § 3339; Code 1933, § 67-1803.

JUDICIAL DECISIONS

Section has no extraterritorial effect. — O.C.G.A. §§ 44-14-320, 44-14-380, and 44-14-382 give to laborers a general lien upon the property of their employers for labor performed, have no extraterritorial effect, and give no lien arising out of a contract for labor, made in another state and executed by labor performed therein. Downs v. Bedford, 39 Ga. App. 155, 146 S.E. 514, 1929 Ga. App. LEXIS 231 (1929).

Bona fide purchaser prevails. — A bona fide purchase of personalty in payment of an antecedent debt, before the property was seized under the levy of a laborer's general lien, will prevail over such lien. F & M Bank v. Redden, 17 Ga. App. 473, 87 S.E. 701, 1916 Ga. App. LEXIS 707 (1916).

Laborer's lien prevails over prior general rent lien. — O.C.G.A. § 44-14-382 does not, where the laborer's lien is not reduced to execution and levy until after the creation of a landlord's general lien for rent, deny to the laborer's general lien its superior dignity to the landlord's general lien for rent. That section merely denies to a laborer's lien its superiority as against a bona fide purchaser before the lien has been reduced to execution and levy. Little v. Walters, 40 Ga. App. 447, 150 S.E. 201, 1929 Ga. App. LEXIS 192 (1929).

Completion must be alleged in affidavit. — An affidavit to foreclose a laborer's lien must show affirmatively that the contract of labor has been completed. Brantley v. Rayburn, 61 Ga. 211, 1878 Ga. LEXIS 77 (1878); McDonald v. Night, 63 Ga. 161, 63 Ga. 162, 1879 Ga. LEXIS 144 (1879); Harvey v. Lewis, 19 Ga. App. 655, 91 S.E. 1052, 1917 Ga. App. LEXIS 289 (1917).

Payment presumed due when contract completed absent contrary agreement or custom. — Where a contract involving goods and services is involved, and no stipulation to the contrary is included therein, and no custom to the contrary proved in evidence, payment will be presumed due when the contract is completed. Luckie v. Max Wright, Inc., 90 Ga. App. 243, 82 S.E.2d 660, 1954 Ga. App. LEXIS 674 (1954).

No right to enforce lien absent sufficient reason for not completing contract. — One is not entitled to enforce a laborer's lien unless the laborer is for sufficient legal reason prevented from carrying out the contract. Payne v. Norris, 88

Ga. App. 850, 78 S.E.2d 351, 1953 Ga. App. LEXIS 1225 (1953).

Completion prevented by other party. — While, ordinarily, before a laborer's lien can be foreclosed, the laborer must have fully completed the contract, yet, where the laborer is prevented from doing so by the other party to the contract, the actual completion of the contract is not necessary. Cluff v. Merchants' & Mechanics' Bank, 40 Ga. App. 299, 149 S.E. 300, 1929 Ga. App. LEXIS 138 (1929).

Where before the end of the year for which a farm laborer is employed, but after the maturity of the crops, the landlord turns the crops over to a third person, a creditor, to be gathered by such third person, it is not necessary for the laborer to wait until the end of the year to foreclose the laborer's lien. Cluff v. Merchants' & Mechanics' Bank, 40 Ga. App. 299, 149 S.E. 300, 1929 Ga. App. LEXIS 138 (1929).

The burden is upon the laborer to show that the labor contract has been completed. Houser v. Cooper, 102 Ga. 823, 30 S.E. 539, 1898 Ga. LEXIS 769 (1898).

For example of case where cropper abandoned cultivation. See Payne v. Trammell, 29 Ga. App. 475, 115 S.E. 923, 1923 Ga. App. LEXIS 76 (1923).

RESEARCH REFERENCES

Am. Jur. 2d.

51 Am. Jur. 2d, Liens, §§ 9, 11, 12, 22, 23, 68-70, 75.

C.J.S.

53 C.J.S., Liens, §§ 4, 14.

ALR.

Character of service contemplated by statutes giving a lien or preference, in event of insolvency, to servants, employees, laborers, etc., 54 A.L.R. 567; 142 A.L.R. 362.

Right or interest subject to, and priority of, statutory lien for labor or material in developing property for oil and gas, 122 A.L.R. 1182.

Part 5

Pawnbrokers, Factors, Bailees, Acceptors, and Depositories

RESEARCH REFERENCES

ALR.

Right of a factor, commission merchant, or produce broker to sell property to protect advances, 40 A.L.R. 387.

Other debts or liabilities within contemplation of pledge to secure particular debt and other debts or liabilities to pledgee, 87 A.L.R. 615.

Warehouseman's or bailee's lien on property stored by officer who had seized it under attachment or execution, 95 A.L.R. 1529.

44-14-400. Liens of pawnbrokers, factors, bailees, and acceptors; priorities.

Pawnbrokers, factors, bailees, and acceptors shall have such liens as are designated in this part and in Part 5 of Article 3 of Chapter 12 of this title. Such liens shall be inferior to liens for taxes, liens of which such persons had actual notice before becoming creditors, special liens for rent, liens of laborers, liens or mortgages duly recorded, judgment liens, and other general liens reduced to execution and levied on.

History.
Ga. L. 1873, p. 42, § 14; Code 1873, § 1987; Ga. L. 1880-81, p. 63, § 2; Code 1882, § 1987; Civil Code 1895, § 2812; Civil Code 1910, § 3362; Code 1933, § 12-701.

JUDICIAL DECISIONS

Where property sold in depositor's lifetime, proceeds not part of estate. — Where a factor, with whom property had been deposited, makes advances thereon to the owner, the factor has the right and power to sell the property for the purpose of paying the indebtedness represented by the advancements, and has a lien upon the funds derived from the sale for the purpose of reimbursing the factor for the advances made. Where the factor, in the lifetime of the owner, sells the property and applies the proceeds to the indebtedness, neither the property, nor the proceeds of the sale thereof, become, upon the death of the owner, a part of the estate, and therefore the surviving spouse and minor children can assert no claim for a year's support in the property or the proceeds thereof. Philpot v. Ramsey & Hogan, 47 Ga. App. 635, 171 S.E. 204, 1933 Ga. App. LEXIS 584 (1933).

Property is part of depositor's estate if not sold before death. — Where a factor, with whom property had been deposited, who made advancements thereon during the lifetime of the owner, does not sell the property until after the owner's death, the property encumbered with the factor's lien for the advancements becomes a part of the owner's estate, and is therefore subject to the superior lien of the surviving spouse and minor children of the owner for a year's support. Philpot v. Ramsey & Hogan, 47 Ga. App. 635, 171 S.E. 204, 1933 Ga. App. LEXIS 584 (1933).

Factor's lien junior to that for year's support of depositor's survivors. — Where a factor occupies, as to the landlord, the position of a bona fide acquisitor of a mortgage lien on the property, for value and without notice, and, possesses only a lien upon the property for the advancements made, such lien, where no title passes, has no priority over the lien given by statute on the property of the deceased at the time of death to the surviving spouse and minor children for a year's support. Philpot v. Ramsey & Hogan, 47 Ga. App. 635, 171 S.E. 204, 1933 Ga. App. LEXIS 584 (1933).

Warehouseman's lien not superior to homestead exemption. — A warehouseman's lien for storage charges on property deposited with the warehouseman is not superior to the exemption rights established by setting it apart as homestead property although it be set apart after the accrual of the storage charges. Morrow Transf. & Storage Co. v. Whitson, 20 Ga. App. 149, 92 S.E. 761, 1917 Ga. App. LEXIS 759 (1917).

Bailee's lien inferior to recorded security interest. — Bailee's lien was inferior to a cooperative banks' duly recorded security interest in peanuts. Farm Credit of Northwest Fla., ACA v. Easom Peanut Co., 312 Ga. App. 374, 718 S.E.2d 590, 2011 Ga. App. LEXIS 817 (2011), cert. denied, No. S12C0444, 2012 Ga. LEXIS 315 (Ga. Mar. 19, 2012).

RESEARCH REFERENCES

Am. Jur. 2d.
8 Am. Jur. 2d, Bailments, § 190 et seq.
Am. Jur. Pleading and Practice Forms.
10A Am. Jur. Pleading and Practice Forms, Factors and Commission Merchants, § 2.
C.J.S.
8 C.J.S., Bailments, § 80 et seq.
ALR.
Right of a factor, commission merchant, or produce broker to sell property to protect advances, 40 A.L.R. 387.

Factor's right to setoff against proceeds of consignment, 52 A.L.R. 811.

Priority of lien of sales or consumers' tax, 136 A.L.R. 1015.

Lien for storage of motor vehicle, 48 A.L.R.2d 894; 85 A.L.R.3d 199.

Necessity and sufficiency of notice or statement prescribed by factor's lien law, 96 A.L.R.2d 727.

44-14-401. Depositories' liens; loss of liens under this Code section and Code Section 44-14-400; priorities.

Depositories shall have such liens as are prescribed in this part and in Part 5 of Article 3 of Chapter 12 of this title and shall, as to other liens, occupy the same position as mechanics. The liens mentioned in this Code section and in Code Section 44-14-400 shall be lost by a surrender to the debtor of the property on which the lien is claimed, and they shall rank according to date with each other and with other liens not specified in this Code section and in Code Section 44-14-400.

History.

Ga. L. 1873, p. 42, § 14; Code 1873, § 1988; Code 1882, § 1988; Civil Code 1895, § 2813; Civil Code 1910, § 3363; Code 1933, § 12-702.

RESEARCH REFERENCES

Am. Jur. 2d.

8 Am. Jur. 2d, Bailments, § 190 et seq.

C.J.S.

26B C.J.S., Depositaries, § 11 et seq.

44-14-402. Liens of depositories for hire.

Depositories for hire shall have a lien for their hire and may retain possession until it is paid.

History.

Orig. Code 1863, § 2089; Code 1868, § 2084; Code 1873, § 2110; Code 1882, § 2110; Civil Code 1895, § 2928; Code 1910, § 3501; Code 1933, § 12-703.

Law reviews.

For comment on Wilkinson v. Townsend, 96 Ga. App. 179, 99 S.E.2d 539 (1957), wherein the statutory authorization for the police to remove an abandoned automobile to a garage was held not to create an agency relationship between the police and auto owner giving rise to a lien against the auto owner by the garageman, see 9 Mercer L. Rev. 372 (1958).

JUDICIAL DECISIONS

Removal of illegally parked car does not create lien. — Where O.C.G.A. § 40-6-206 permits police officers to remove illegally parked automobiles to a garage or other place of safety, but does not specify whether a public or private garage, and does not state that the owner shall be liable for the costs of such removal and storage, and no specific authority is given the officers to impound the vehicle and the law is blank as to its ultimate disposition, the law does not create an agency relation between the police officers and the owner so as to form a contract for storage or towing charges; since the owner does not assent to this disposition of property, and no person authorized by law to act for the owner assents to it. Under these circumstances, no lien arises, and detention of the property

by the garage against the demands of the owner amounts to a conversion. Wilkinson v. Townsend, 96 Ga. App. 179, 99 S.E.2d 539, 1957 Ga. App. LEXIS 536 (1957).

RESEARCH REFERENCES

Am. Jur. 2d.
8 Am. Jur. 2d, Bailments, § 190 et seq.
C.J.S.
26B C.J.S., Depositaries, § 11 et seq.
ALR.
Lien for towing or storage, ordered by public officer, of motor vehicle, 85 A.L.R.3d 199.

44-14-403. Lien of pawnbroker; action for interference; grace period on pawn transactions; extension or continuation of maturity date; redemption of goods after maturity date.

(a) A pawnbroker shall have a lien on the pledged goods pawned for the money advanced, interest, and pawnshop charge owed but not for other debts due to him. He may retain possession of the pledged goods until his lien is satisfied and may have a right of action against anyone interfering therewith.

(b)(1) There shall be a grace period on all pawn transactions. On pawn transactions involving motor vehicles or motor vehicle certificates of title, the grace period shall be 30 calendar days; on all other pawn transactions the grace period shall be ten calendar days. In the event that the last day of the grace period falls on a day in which the pawnbroker is not open for business, the grace period shall be extended through the first day following upon which the pawnbroker is open for business. The pawnbroker shall not sell the pledged goods during the grace period.

(2) By agreement of the parties, the maturity date of the pawn transaction may be extended or continued for 30 day periods, provided that the interest rates and charges as specified in Code Section 44-12-131 are not exceeded. The grace period shall begin running on the first day following the maturity date of the pawn transaction or on the first day following the expiration of any extension or continuation of the pawn transaction, whichever occurs later. All extensions or continuations of the pawn transaction shall be evidenced in writing.

(3) Pledged goods may be redeemed by the pledgor or seller within the grace period by the payment of any unpaid accrued fees and charges, the repayment of the principal, and the payment of an additional interest charge not to exceed 12.5 percent of the principal. Pledged goods not redeemed within the grace period shall be automatically forfeited to the pawnbroker by operation of this Code section, and any ownership interest of the pledgor or seller shall automatically be extinguished as regards the pledged item.

(4) Any attempt to circumvent the interest rates and charges as specified in Code Section 44-12-131 shall be null and void. A pawn transaction shall be considered to have been extended or continued unless:

(A) All charges, fees, and the principal have actually been paid or repaid on the previous pawn transaction;

(B) The pledged goods in the previous transaction, including but not limited to a motor vehicle certificate of title, have actually been restored to the possession of the pledgor or seller; and

(C) The pledged goods in the previous transaction have been removed from the business premises of the pawnbroker and, in the case of a motor vehicle certificate of title, any lien on the motor vehicle certificate of title has been removed or released.

History.

Orig. Code 1863, § 2118; Code 1868, § 2113; Code 1873, § 2141; Code 1882, § 2141; Civil Code 1895, § 2959; Civil Code 1910, § 3531; Code 1933, § 12-704; Ga. L. 1989, p. 819, § 4; Ga. L. 1992, p. 3245, § 5.

Law reviews.

For note on 1992 amendment of this Code section, see 9 Ga. St. U.L. Rev. 323 (1992).

For annual survey on bankruptcy law, see 69 Mercer L. Rev. 1033 (2018).

JUDICIAL DECISIONS

Lien is lost upon surrender of property to debtor. — The policy of the law as to innkeepers, boardinghouse keepers, and all pawnees and depositaries for hire is that they shall have a lien on the personalty deposited or pawned with them until they are paid for their services, but that they lose such lien by a voluntary surrender to the debtor of the property on which the lien is claimed. Turner v. Priest, 48 Ga. App. 109, 171 S.E. 881, 1933 Ga. App. LEXIS 479 (1933).

Motor vehicle as subject of pawn transaction. — Bankruptcy court found that the creditor was not entitled to summary judgment regarding the debtor's repossessed vehicle action where the pawnshop agreement in issue violated the statutory requirements for automobile title pawns under Georgia law. Johnson v. Speedee Cash of Columbus, Inc., 289 B.R. 251, 2002 Bankr. LEXIS 1445 (Bankr. M.D. Ga. 2002).

Debtors were not entitled to turn over to their estate a motor vehicle that had been pledged pre-petition to a pawn company because the debtors did not exercise their right of redemption within the 30 days allowed for redemption by O.C.G.A. § 44-14-103, the time for redemption had expired before the bankruptcy petition was filed, and the pawn company thus had a valid ownership interest in the car before the petition was filed. Barnette v. Bankers Fin. Servs. (In re Barnette), No. 07-12986-WHD, No. 07-1068, 2008 Bankr. LEXIS 1912 (Bankr. N.D. Ga. Apr. 9, 2008).

LLC that seized a Chapter 13 debtor's car 16 hours before the debtor declared bankruptcy, and sold the car without keeping records, was ordered to pay the debtor $6,579.57 for loss of the car, $300 for lost personal property that was in the car, $2,356.70 in emotional distress damages, and reasonable attorney's fees, pursuant to 11 U.S.C. § 362(k), because the evidence showed that the LLC knew the debtor declared bankruptcy before the LLC sold the car. Although the LLC claimed that the LLC was not liable under § 362 because the debtor forfeited rights in the car pursuant to the Georgia Pawnshop Act (GPA), O.C.G.A. § 44-14-403, when the debtor failed to repay a debt, the

court rejected that argument because the LLC assessed interest rates over the course of the contract that exceeded the rates allowed by the GPA, such that a Motor Vehicle Pawn Contract the debtor signed was void from the contract's inception pursuant to O.C.G.A. § 44-12-131. Spinner v. Cash In A Hurry, LLC, 398 B.R. 84, 2008 Bankr. LEXIS 3620 (Bankr. N.D. Ga. 2008).

Creditor violated 11 U.S.C. § 362 when the creditor failed to turn over a truck a debtor pledged as security, and the court ordered the creditor to turn over the truck and to pay the debtor $1,400 in damages from lost income and $2,152.50 in attorney's fees. Although the parties entered into a possession pawn agreement, the court found that the agreement violated O.C.G.A. § 44-14-403(b)(1) because the agreement did not give the debtor a grace period for payment, and because the agreement violated § 44-14-403(b)(1) the creditor did not obtain title to the truck before the debtor declared bankruptcy. Ballard v. Freedom Auto Plaza (In re Ballard), No. 10-71415, 2010 Bankr. LEXIS 3933 (Bankr. M.D. Ga. Nov. 1, 2010).

In a case in which a Chapter 13 debtor filed a motion to require the turnover of a truck and the creditor argued that ownership of the truck was forfeited to the creditor prior to the filing of the debtor's first bankruptcy case and that, as owner of the truck, the creditor was entitled to take possession of the truck after the dismissal of the first bankruptcy case and was not required to return the truck to the debtor upon the filing of the current case since the debtor had not redeemed the truck prior to the expiration of the grace period under O.C.G.A. § 44-14-403, the creditor was the owner of the truck at the time the first case was filed. Property of the estate did not include the truck since the debtor had pledged the truck as collateral in a pawn and had not exercised the debtor's right to redeem the property within the time provided in the contract or state law. Crump v. TitleMax (In re Crump), No. JPS, 467 B.R. 532, 2010 Bankr. LEXIS 3932 (Bankr. M.D. Ga. 2010).

Pawned vehicles were no longer property of the bankruptcy estate at the time of the vehicles' repossession because the debtors had not taken affirmative steps to redeem the vehicles in accordance with Georgia's pawnshop laws. Consequently, the pawnbroker did not violate the prohibition on obtaining possession of property of the estate in 11 U.S.C. § 362(a)(3). Moore v. Complete Cash Holdings, LLC (In re Moore), 448 B.R. 93, 2011 Bankr. LEXIS 1145 (Bankr. N.D. Ga. 2011).

Debtor was not entitled to turnover of the debtor's vehicle, which was repossessed from the debtor by the respondent, with whom the debtor had entered into a title pawn transaction because the debtor conceded the debtor's inability to redeem the vehicle before expiration of the statutory redemption period, even as extended by the bankruptcy code. Paul v. S. Ga. Title Pawn (In re Paul), 534 B.R. 430, 2015 Bankr. LEXIS 494 (Bankr. M.D. Ga. 2015).

When a debtor failed to redeem the certificate of title of the debtor's pawned vehicle by the date as extended by the Bankruptcy Code, ownership of the vehicle transferred by operation of Georgia law to the creditor, any legal or equitable interest that the debtor possessed was extinguished, the vehicle was no longer property of the debtor's estate, and the automatic stay ceased to apply. The automatic stay did not toll the running of the redemption period and, once extinguished, the debtor's rights under the title pawn contract could not be resurrected through the debtor's Chapter 13 plan, and the plan could not be used to extend the redemption period. TitleMax of Ga. Inc. v. Stanfield (In re Stanfield), No. 15-50612, 2016 Bankr. LEXIS 499 (Bankr. S.D. Ga. Feb. 18, 2016).

The automatic stay did not apply to a pawnbroker as: (1) the debtor filed a 2016 case one day before the redemption period for a title pawn transaction expired, and the redemption period was extended to 60 days from the petition date; (2) the debtor failed to redeem the vehicle when the redemption period expired and on the redemption date, the vehicle belonged to the pawnbroker and the debtor's ownership interest in the vehicle was automatically extinguished; (3) the debtor had no interest in the vehicle when the 2018 bank-

ruptcy case was filed that could become property of the bankruptcy estate; and (4) the 2018 Chapter 13 Plan's treatment of the vehicle as the debtor's property was immaterial as the redemption period had expired pre-petition and the vehicle belonged to the pawnbroker. TitleMax of Georgia, Inc. v. Thorpe (In re Thorpe), 612 B.R. 463, 2019 Bankr. LEXIS 950 (Bankr. S.D. Ga. 2019).

OPINIONS OF THE ATTORNEY GENERAL

Stolen property acquired by a pawnshop remains the property of the original owner. 1996 Op. Att'y Gen. No. 96-24.

RESEARCH REFERENCES

Am. Jur. 2d.
8 Am. Jur. 2d, Bailments, § 190 et seq.
C.J.S.
70 C.J.S., Pawnbrokers, § 12.
ALR.
Conversion by pledgee of subject of pledge as extinguishing pledgor's entire indebtedness to him, 87 A.L.R. 586.

44-14-404. Factor's lien; extent; attachment to proceeds.

A factor's lien extends to all balances on general account and attaches to the proceeds of the sale of goods consigned as well as to the goods themselves.

History.
Orig. Code 1863, § 2090; Code 1868, § 2085; Code 1873, § 2111; Code 1882, § 2111; Civil Code 1895, § 2929; Civil Code 1910, § 3502; Code 1933, § 12-705.

RESEARCH REFERENCES

ALR.
Factor's right to setoff against proceeds of consignment, 52 A.L.R. 811.
Necessity and sufficiency of notice or statement prescribed by factor's lien law, 96 A.L.R.2d 727.

44-14-405. Satisfaction of factors' and acceptors' liens.

Liens of factors and acceptors shall be satisfied by such sale as the usage of the locality where the factors and acceptors reside has established or may establish.

History.
Ga. L. 1873, p. 42, § 17; Code 1873, § 1993; Code 1882, § 1993; Civil Code 1895, § 2819; Civil Code 1910, § 3369; Code 1933, § 12-706.

RESEARCH REFERENCES

ALR.
Factor's right to setoff against proceeds of consignment, 52 A.L.R. 811.
Necessity and sufficiency of notice or statement prescribed by factor's lien law, 96 A.L.R.2d 727.

44-14-406. Livery stable keepers; lien by retaining possession; priorities.

Livery stable keepers shall have a lien for their charges on the stock placed in their care for keeping, which lien shall be superior to other liens except liens for taxes, special liens of landlords for rent, liens of laborers, and all general liens of which they had actual notice before the property claimed to be subject to lien came into their control.

History.
Ga. L. 1873, p. 42, § 13; Code 1873, § 1986; Code 1882, § 1986; Civil Code 1895, § 2810; Civil Code 1910, § 3360; Code 1933, § 12-707.

JUDICIAL DECISIONS

Whether one is a livery stableman within O.C.G.A. § 44-14-406 is a question of fact. Elliott v. Hodgson & Jackson, 133 Ga. 209, 65 S.E. 405, 1909 Ga. LEXIS 190 (1909).

Lien includes care and feeding of horse. — The lien under O.C.G.A. § 44-14-406 includes not only the actual feeding of the horse but also such charges as are directly connected with the livery-stable keeper's keeping and as are naturally in the line of a livery-stable keeper's business. Elliott v. Hodgson & Jackson, 133 Ga. 209, 65 S.E. 405, 1909 Ga. LEXIS 190 (1909).

RESEARCH REFERENCES

ALR.
Character of legal relationship which will support statutory lien for care or feeding of animals, 107 A.L.R. 1072.

Priority of lien of sales or consumers' tax, 136 A.L.R. 1015.

44-14-407. Procedure for livery stable keepers acquriing lien; recording; enforcement.

(a) In addition to the method provided in Code Section 44-14-406, every livery stable keeper may assert the lien on stock placed in his care for keeping by writing a statement of the amount due him for the care of the stock and a description of the stock on which the lien is claimed, by making affidavit thereto, and by recording the writing and affidavit in the office of the clerk of the superior court of the county where the service was rendered.

(b) When the lien provided for in subsection (a) of this Code section is so recorded, it shall have the same dignity and effect as is given by law to the lien of livery stable keepers where they retain possession of the stock placed in their keeping. The lien shall be recorded while the property is in the possession of the livery stable keeper, as mortgages on personalty are required to be recorded; and such liens may be foreclosed as mortgages on personalty are foreclosed.

History.
Ga. L. 1889, p. 117, §§ 1, 2; Civil Code 1895, § 2820; Civil Code 1910, § 3370; Code 1933, § 12-708; Ga. L. 1982, p. 3, § 44.

RESEARCH REFERENCES

ALR.
Character of legal relationship which will support statutory lien for care or feeding of animals, 107 A.L.R. 1072.

44-14-408. Satisfaction of liens of pawnbrokers and livery stable keepers.

Liens of pawnbrokers and livery stable keepers shall be satisfied according to Code Sections 44-14-403 and 44-14-550, respectively.

History.
Ga. L. 1873, p. 42, § 17; Code 1873, § 1992; Ga. L. 1880-81, p. 63, § 4; Code 1882, § 1992; Civil Code 1895, § 2818; Civil Code 1910, § 3368; Code 1933, § 12-709; Ga. L. 1989, p. 819, § 5.

RESEARCH REFERENCES

ALR.
Character of legal relationship which will support statutory lien for care or feeding of animals, 107 A.L.R. 1072.

44-14-409. Special lien of bailee for hire of labor and service; effect of delivery of a part.

The bailee for hire of labor and service shall have a special lien for his labor and services upon the thing bailed until he parts with possession; and, if he delivers up a part of the thing bailed, the lien shall attach to the remainder in his possession for the entire claim under the same contract.

History.
Orig. Code 1863, § 2079; Code 1868, § 2074; Code 1873, § 2100; Code 1882, § 2100; Civil Code 1895, § 2918; Civil Code 1910, § 3491; Code 1933, § 12-710.

JUDICIAL DECISIONS

Mechanic who fixes car has exclusive lien against owner. — Where bailor delivers a car to bailee for repairs, when the mechanic begins the repairs and bestows labor thereon, the bailee has a lien on the car such that its possession of is exclusive even against the owner. Tyner & Blackmon v. Fryer Truck & Tractor Co., 83 Ga. App. 393, 63 S.E.2d 695, 1951 Ga. App. LEXIS 873 (1951).

RESEARCH REFERENCES

Am. Jur. 2d.
8 Am. Jur. 2d, Bailments, §§ 175, 189, 190 et seq.

C.J.S.
8 C.J.S., Bailments, § 80 et seq.

ALR.
Necessity of notice to consignor to render him liable for demurrage, 32 A.L.R. 642.

Bailee's lien for work on goods as ex-

tending to other goods of the bailor in his possession, 25 A.L.R.2d 1037.

44-14-410. Depositories of involuntary, gratuitous, or naked deposits; lien; authorization to open containers; notice to owner.

Except as provided in Code Section 44-14-411.1, involuntary, gratuitous, or naked depositories shall have a lien on the property in their possession for any expense incurred in caring for the property and any expenses incurred in the effort to locate the owner thereof. Where the property consists of closed trunks, suitcases, bags, boxes, bundles, packages, or other containers which do not on the outside contain marks from which the owner can be ascertained, such depositories are authorized, but are not required, to open such containers for the purpose of ascertaining, if possible, the name and address of the owner. Where the owner and his address are known, the depository is authorized, but is not required, to address a notice by registered or certified mail or statutory overnight delivery to the owner notifying him that the depository holds the property and that the property will be delivered to the owner upon reasonable identification and payment of any charges that have accrued in caring for the property and in giving such notice.

History.
Ga. L. 1947, p. 1165, § 1; Ga. L. 1982, p. 915, §§ 1, 4; Ga. L. 2000, p. 1589, § 3.

Editor's notes.
Ga. L. 2000, p. 1589, § 16, not codified by the General Assembly, provides that this Act is applicable with respect to notices delivered on or after July 1, 2000.

JUDICIAL DECISIONS

Lien does not extend to profit and overhead. — Naked depository is entitled to a lien only for amounts paid out or labor expended by reason of the deposit, and such lien does not extend to profit or a pro rata portion of general overhead expenses. CHEP USA v. Mock Pallet Co., 138 Fed. Appx. 229, 2005 U.S. App. LEXIS 12604 (11th Cir. 2005).

RESEARCH REFERENCES

Am. Jur. 2d.
8 Am. Jur. 2d, Bailments, § 117.

C.J.S.
8 C.J.S., Bailments, § 5.

ALR.
Duty and liability of one in possession of real property in respect to personal property which he finds thereon belonging to another, 131 A.L.R. 165.

44-14-411. Sale by depositories of property at public auction; notice.

Except as provided in Code Section 44-14-411.1, any property in the possession of an involuntary, gratuitous, or naked depository, which

property remains unclaimed or unidentified or the reasonable expense incurred in connection with which remains unpaid for the period of two months from the time the property came into the possession of the depository, may be sold at public auction to the highest bidder at such time and place as may be designated by the depository; provided, however, that the depositories shall publish a notice containing a general description of the property and the time and place of sale once a week for two successive weeks prior to the date of the sale in a newspaper of general circulation in the place of the sale or the nearest place thereto.

History. Ga. L. 1947, p. 1165, § 2; Ga. L. 1982, p. 3, § 44; Ga. L. 1982, p. 915, §§ 2, 5; Ga. L. 1982, p. 920, §§ 1, 2.

RESEARCH REFERENCES

ALR.
Withdrawal of property from auction sale, 37 A.L.R.2d 1049.

44-14-411.1. Repossessor of motor vehicle as involuntary, gratuitous, or naked depository of personal property found therein; disposition of personal property.

(a) Any person who lawfully repossesses a motor vehicle shall be an involuntary, gratuitous, or naked depository of any personal property found in such motor vehicle and shall have a lien on such property for any reasonable expenses incurred in storing such property or in giving notice to such owner.

(b) Within ten days of the date of repossession, the person repossessing such motor vehicle shall notify the owner of the motor vehicle of the intent to dispose of the personal property. Such notice must be actual notice, but may be by personal service or by service by certified mail or statutory overnight delivery.

(c) If the personal property is not redeemed within 30 days from the date of the first notice, a second notice shall be sent in the same manner as provided in subsection (b) of this Code section.

(d) If the personal property is not redeemed within 30 days from the date of the second notice, the personal property may be disposed of in the manner most expeditious to the depository without further liability and the proceeds shall be disbursed as provided in Code Section 44-14-412.

History.
Ga. L. 1982, p. 915, § 3; Code 1981, § 44-14-411.1, enacted by Ga. L. 1982, p. 915, § 6; Ga. L. 1984, p. 22, § 44; Ga. L. 2000, p. 1589, § 3.

Editor's notes.
Ga. L. 2000, p. 1589, § 16, not codified by the General Assembly, provides that this Act is applicable with respect to notices delivered on or after July 1, 2000.

44-14-412. Disposition of proceeds of sale; one-year limitation for claims of owner.

The proceeds of any sale made under Code Sections 44-14-410, 44-14-411, and 44-14-411.1 shall be applied to the payment of any expense incurred in caring for the property sold, any expense incurred in endeavoring to locate and make delivery of the property to the owner, any expense of advertising the sale, and any other necessary expenses. Should there be a balance, the balance shall be payable to the owner of the property; provided, however, that any claim of an owner shall be barred unless made within one year from the date of the sale.

History.
Ga. L. 1947, p. 1165, § 3; Ga. L. 1982, p. 915, § 7.

Part 6

Jewelers

RESEARCH REFERENCES

ALR.
Periodical use of vehicle or horse by owner as defeating lien for storage, repairs, or board, 3 A.L.R. 664.
Lien for storage of motor vehicle, 48 A.L.R.2d 894.
Loss of garageman's lien on repaired vehicle by owner's use of vehicle, 74 A.L.R.4th 90.

44-14-430. Lien for repairs; sale after one year.

In order to enforce his lien for materials furnished and work done, any jeweler or any other person, firm, or corporation engaged in the business of repairing watches, clocks, jewelry, and other articles of similar character may sell those articles upon which charges for repairs, including work done and materials furnished, have not been paid and which have remained in the possession of the jeweler, person, firm, or corporation for a period of one year following the completion of the repairs.

History.
Ga. L. 1927, p. 218, § 1; Code 1933, § 67-2101.

Cross references.
Regulation of dealers in used watches, Ch. 49, T. 43.

RESEARCH REFERENCES

Am. Jur. 2d.
8 Am. Jur. 2d, Bailments, §§ 190 et seq., 199.
C.J.S.
8 C.J.S., Bailments, § 80 et seq.
ALR.
Character of service contemplated by statutes giving a lien or preference, in event of insolvency, to servants, employees, laborers, etc., 111 A.L.R. 1453; 142 A.L.R. 362.

44-14-431. Publication and mailing of notice.

Before any sale is made as provided in Code Section 44-14-430, the person, firm, or corporation making the sale shall give 30 days' notice thereof by posting a notice of the sale before the courthouse door of the county in which the repairs were made. Such notice shall give the name of the owner of the article or articles so repaired, if known, and, if not known, the name of the person from whom the article or articles were received; a description of the article or articles to be sold; and the name of the person, firm, or corporation making the repairs and proposing to make such sale. The person, firm, or corporation shall also give written notice thereof by sending a registered or certified letter to the last known address of the owner of the article or articles or the person who left the article or articles for repairs advising such persons of the time and place of the sale, the description of the article or articles to be sold, and the amount claimed by the person, firm, or corporation for such repairs, including work done and materials furnished; and the amount so claimed for the repairs shall also be stated in the notice posted before the courthouse door.

History.
Ga. L. 1927, p. 218, § 2; Code 1933, § 67-2102.

RESEARCH REFERENCES

Am. Jur. 2d.
8 Am. Jur. 2d, Bailments, § 199.
C.J.S.
8 C.J.S., Bailments, § 80 et seq.

44-14-432. Sale at public auction before courthouse.

All sales made under this part shall be made at public auction before the courthouse door of the county where the person, firm, or corporation making the sale had its place of business at the time of receiving the article or articles to be sold and during the hours provided by law for holding sheriffs' sales.

History.
Ga. L. 1927, p. 218, § 3; Code 1933, § 67-2103.

RESEARCH REFERENCES

Am. Jur. 2d.
8 Am. Jur. 2d, Bailments, § 199.

C.J.S.
8 C.J.S., Bailments, § 80 et seq.

44-14-433. Disposition of proceeds of sale; one-year limitation for claims of owner; disposition of residue.

The proceeds of any sale made under this part shall be applied first to the payment of the lien for services rendered by the person, firm, or corporation making the sale for work done and materials furnished in repairing the article or articles sold, including the cost of the registered notice provided for in Code Section 44-14-431. Any residue shall be paid to the judge of the probate court of the county where the sale took place, who shall hold the sum for a period of one year, during which time the owner or owners of the article or articles so sold may claim the residue; but, at the end of the period of one year, if the residue has not been claimed by the owner or owners of the article or articles sold, the residue shall be placed by the judge in the educational fund of the county where the sale was made.

History.
Ga. L. 1927, p. 218, § 4; Code 1933, § 67-2104.

RESEARCH REFERENCES

Am. Jur. 2d.
8 Am. Jur. 2d, Bailments, § 199.

C.J.S.
8 C.J.S., Bailments, § 80 et seq.

44-14-434. Display of sign as to intention to sell.

Any jeweler or other person, firm, or corporation desiring to avail himself of the provisions of this part shall display a sign in his place of business notifying the public that all articles left for repairs will be sold for charges at the expiration of one year from completion of such repairs.

History.
Ga. L. 1927, p. 218, § 5; Code 1933, § 67-2105.

RESEARCH REFERENCES

Am. Jur. 2d.
8 Am. Jur. 2d, Bailments, § 199.

C.J.S.
8 C.J.S., Bailments, § 80 et seq.

PART 7

LAUNDRIES, CLEANERS, AND TAILORS

RESEARCH REFERENCES

ALR.

Lien for storage of motor vehicle, 48 A.L.R.2d 894.

Lien for towing or storage, ordered by public officer, of motor vehicle, 85 A.L.R.3d 199.

Loss of garageman's lien on repaired vehicle by owner's use of vehicle, 74 A.L.R.4th 90.

44-14-450. Creation of lien.

All persons, firms, or corporations engaged in the business of laundering, cleaning, tailoring, altering, repairing, or dyeing clothing, goods, wearing apparel, shoes, carpets, rugs, or other such articles shall, for the agreed price or the reasonable value of their services in laundering, cleaning, tailoring, altering, repairing, or dyeing any goods, clothing, wearing apparel, shoes, carpets, rugs, or other similar articles, have a lien upon the articles laundered, cleaned, tailored, altered, repaired, or dyed, whether the work of laundering, cleaning, tailoring, altering, repairing, or dyeing the articles is performed by themselves or by their employees.

History.

Ga. L. 1909, p. 151, § 1; Civil Code 1910, § 3336; Code 1933, § 67-1901; Ga. L. 1987, p. 382, § 1.

JUDICIAL DECISIONS

Applicability. — In a suit by a carpet manufacturer against a mill for breach of contract, the trial court properly granted the manufacturer's motion in limine to prevent the mill from complaining that it had a laundryman's lien on unused yarn and backing under O.C.G.A. § 44-14-450. The trial court was authorized to find that tufting the yarn was an initial manufacturing stage and that in tufting the yarn, the mill was not making alterations to carpet. Beaulieu Group, LLC v. S&S Mills, Inc., 292 Ga. App. 455, 664 S.E.2d 816, 2008 Ga. App. LEXIS 792 (2008).

RESEARCH REFERENCES

Am. Jur. 2d.

51 Am. Jur. 2d, Liens, §§ 9, 11, 12, 52, 53.

C.J.S.

53 C.J.S., Liens, § 4.

ALR.

Character of service contemplated by statutes giving a lien or preference, in event of insolvency, to servants, employees, laborers, etc., 111 A.L.R. 1453; 142 A.L.R. 362.

44-14-451. Enforcement of lien; retention of possession; attachment to articles acquired after delivery made.

Any persons, firms, or corporations shall have the right to retain possession of the articles laundered, cleaned, tailored, altered, repaired, or dyed by them until their charges have been paid; but, if any articles are delivered to the person for whom the service was performed without collecting the agreed price or reasonable value of laundering, cleaning, tailoring, altering, repairing, or dyeing the articles, the lien shall be lost upon the articles so delivered but shall attach to any other goods, clothing, wearing apparel, shoes, or other articles belonging to the person for whom the work was done, which articles may later come into the possession of such person, firm, or corporation for the purpose of being laundered, cleaned, tailored, altered, repaired, or dyed.

History.
Ga. L. 1909, p. 151, § 2; Civil Code 1910, § 3337; Code 1933, § 67-1902; Ga. L. 1987, p. 382, § 1.

RESEARCH REFERENCES

Am. Jur. 2d.
51 Am. Jur. 2d, Liens, § 79 et seq.

C.J.S.
53 C.J.S., Liens, § 29 et seq.

44-14-452. Priority; method of foreclosure.

A lien under this part shall have the same rank as the special lien of laborers on the products of their labor and may be foreclosed in the same manner.

History.
Ga. L. 1909, p. 151, § 3; Civil Code 1910, § 3338; Code 1933, § 67-1903; Ga. L. 1987, p. 382 § 1.

RESEARCH REFERENCES

Am. Jur. 2d.
51 Am. Jur. 2d, Liens, §§ 8, 10.

C.J.S.
53 C.J.S., Liens, § 1.

ALR.
Character of service contemplated by statutes giving a lien or preference, in event of insolvency, to servants, employees, laborers, etc., 54 A.L.R. 567.

44-14-453. Sale of goods after 90 days; sale of goods within 120 days where notice provided.

(a) In order to satisfy the lien of the person, firm, or corporation performing the service, whenever any clothing, goods, wearing apparel, shoes, carpets, rugs, or other such articles remain in the possession of any person, firm, or corporation engaged in the business of laundering, cleaning, tailoring, altering, repairing, or dyeing such articles for a period of 90 days after the person, firm, or corporation has performed

any services thereon without the agreed price or the reasonable value of the service being paid, the goods or articles may be sold by the person, firm, or corporation having performed the service in the manner and subject to the requirements of Code Sections 44-14-454 and 44-14-455.

(b) As an alternative to the satisfaction of the lien as provided in subsection (a) of this Code section, an establishment accepting property to provide the services described in this part may at the time of accepting the property give to the person delivering the property to the establishment notice, which may be in the form of a sign clearly visible to a person delivering property to the establishment, that, if the property is not claimed and the agreed upon price or reasonable value for the service is not paid within 120 days after the service was performed, the establishment may otherwise dispose of the property without further notice to the owner of the property or to the person who delivered the property to the establishment. A person delivering property to an establishment for the performance of services described in this part who receives notice provided for in this subsection and who does not object to the content of such notice shall be deemed to have contractually waived any additional rights that may otherwise attach to disposition of the property, and if the person delivering the property to the establishment is not its owner, the contractual waiver of rights shall extend to the owner of the property if the person who delivered the property to the establishment was in lawful possession of the property at the time it was delivered. Property subject to the provisions of this subsection may be otherwise disposed of in such manner as the establishment possessing the property shall determine.

History. Ga. L. 1925, p. 217, § 1; Code 1933, § 67-1904; Ga. L. 1987, p. 382, § 1; Ga. L. 1991, p. 1137, § 1.

RESEARCH REFERENCES

Am. Jur. 2d.
51 Am. Jur. 2d, Liens, § 94.

C.J.S.
53 C.J.S., Liens, § 33 et seq.

44-14-454. Notice of sale.

Before any sale shall be made as provided in subsection (a) of Code Section 44-14-453, the person, firm, or corporation making the sale shall give ten days' notice thereof by mail to the last known address of the owner if known, or otherwise to the last known address of the person from whom the goods were received. Such notice shall give the name of the owner of the goods, if known, and, if not known, the name of the person from whom the goods were received; a description of the goods to be sold; the time and place of the sale; the amount of the charges for which the goods or articles will be sold; and the name of the

person, firm, or corporation having possession of the goods or articles and proposing to make the sale.

History.
Ga. L. 1925, p. 217, § 2; Code 1933, § 67-1905; Ga. L. 1982, p. 3, § 44; Ga. L. 1987, p. 382, § 1; Ga. L. 1991, p. 1137, § 1.

RESEARCH REFERENCES

Am. Jur. 2d.
51 Am. Jur. 2d, Liens, § 94.

C.J.S.
53 C.J.S., Liens, § 33 et seq.

44-14-455. Disposition of proceeds of sale.

The proceeds of any sale made under subsection (a) of Code Section 44-14-453 shall be applied first to the payment of the lien for services rendered by the person, firm, or corporation making the sale for its services in laundering, cleaning, tailoring, altering, repairing, or dyeing the articles sold; and the residue, if any, shall be paid on demand to the owner of the goods sold.

History.
Ga. L. 1925, p. 217, § 4; Code 1933, § 67-1907; Ga. L. 1987, p. 382, § 1; Ga. L. 1991, p. 1137, § 1.

RESEARCH REFERENCES

Am. Jur. 2d.
51 Am. Jur. 2d, Liens, § 94.

C.J.S.
53 C.J.S., Liens, § 33 et seq.

ALR.
Redemption by creditor from execution or foreclosure sale of debtor's property worth more than the redemption cost as satisfaction in whole or part of debt to redeeming creditor, 138 A.L.R. 949.

44-14-456. Cumulative remedies for satisfaction.

The method of satisfaction of the liens referred to in this part shall be cumulative of any other remedies provided by law for the foreclosure or satisfaction of such liens.

History.
Ga. L. 1925, p. 217, § 5; Code 1933, § 67-1908; Ga. L. 1987, p. 382 § 1.

RESEARCH REFERENCES

Am. Jur. 2d.
53 Am Jur. 2d, Mechanics' Liens, §§ 338-340.

PART 7A

REPAIR OF EQUIPMENT

RESEARCH REFERENCES

Am. Jur. 2d.
53 Am. Jur. 2d, Mechanics' Liens, § 340.

C.J.S.
56 C.J.S., Mechanics' Liens, § 309.

44-14-460. Creation of lien.

All persons, firms, or corporations engaged in the business of servicing or repairing bicycles, motor scooters, mopeds, motorcycles, lawn mowers, garden equipment, or other such related equipment shall, for the agreed price or the reasonable value of their services in servicing or repairing such equipment, have a lien upon the equipment serviced or repaired, whether the work of servicing or repairing the equipment is performed by themselves or by their employees.

History.
Code 1981, § 44-14-460, enacted by Ga. L. 1989, p. 1489, § 1.

44-14-461. Right to retain possession; forfeiture of lien.

Any persons, firms, or corporations shall have the right to retain possession of the equipment repaired by them until their charges have been paid; but, if any equipment is delivered to the person for whom the service or repair was performed without collecting the agreed price or reasonable value of servicing or repairing the equipment, the lien shall be lost upon the equipment so delivered.

History.
Code 1981, § 44-14-461, enacted by Ga. L. 1989, p. 1489, § 1.

44-14-462. Priority; foreclosure.

A lien under this part shall have the same rank as the special lien of laborers on the products of their labor and may be foreclosed in the same manner.

History.
Code 1981, § 44-14-462, enacted by Ga. L. 1989, p. 1489, § 1.

44-14-463. Sale of goods after 60 days.

In order to satisfy the lien of the person, firm, or corporation performing the service or repair, whenever any bicycles, motor scooters,

mopeds, motorcycles, lawn mowers, garden equipment, or such other related equipment remains in the possession of any person, firm, or corporation engaged in the business of servicing or repairing such equipment for a period of 60 days after the person, firm, or corporation has performed any services or repairs thereon without the agreed price or the reasonable value of the service or repair being paid, the equipment may be sold by the person, firm, or corporation having performed the service or repair, provided that the requirements of Code Section 44-14-464 are satisfied.

History.
Code 1981, § 44-14-463, enacted by Ga. L. 1989, p. 1489, § 1.

44-14-464. Notice of sale.

Before any sale shall be made as provided in Code Section 44-14-463, the person, firm, or corporation making the sale shall give ten days' notice thereof by certified mail or statutory overnight delivery evidenced by return receipt to the last known address of the owner if known, or otherwise to the last known address of the person from whom the equipment was received. Such notice shall give the name of the owner of the equipment, if known, and, if not known, the name of the person from whom the equipment was received; a description of the equipment to be sold; the time and place of the sale; the amount of the charges for which the equipment will be sold; and the name of the person, firm, or corporation having possession of the equipment and proposing to make the sale. If such equipment is not claimed during the ten days following the date that notice was mailed, the equipment may be sold.

History.
Code 1981, § 44-14-464, enacted by Ga. L. 1989, p. 1489, § 1; Ga. L. 2000, p. 1589, § 3.
Editor's notes.
Ga. L. 2000, p. 1589, § 16, not codified by the General Assembly, provides that this Act is applicable with respect to notices delivered on or after July 1, 2000.

44-14-465. Disposition of proceeds of sale.

The proceeds of any sale made under this part shall be applied first to the payment of the lien for services or repairs rendered by the person, firm, or corporation making the sale for its services in repairing or servicing the equipment sold; and the residue, if any, shall be paid on demand to the owner of the equipment sold.

History.
Code 1981, § 44-14-465, enacted by Ga. L. 1989, p. 1489, § 1.

44-14-466. Cumulative remedies for satisfaction.

The method of satisfaction of the liens referred to in this part shall be cumulative of any other remedies provided by law for the foreclosure or satisfaction of such liens.

History.
Code 1981, § 44-14-466, enacted by Ga. L. 1989, p. 1489, § 1.

Part 8

Hospitals and Nursing Homes

Law reviews.
For annual survey on trial practice and procedure, see 66 Mercer L. Rev. 211 (2014).

44-14-470. Lien on causes of action accruing to injured person for costs of care and treatment of injuries arising out of such causes of action.

(a) Except where the context otherwise requires in subsection (b) of this Code section, as used in this part, the term:

(1) "Hospital" means any hospital or nursing home subject to regulation and licensure by the Department of Community Health.

(2) "Hospital care, treatment, or services" means care, treatment, or services furnished by a hospital or nursing home.

(3) "Nursing home" means any intermediate care home, skilled nursing home, or intermingled home.

(4) "Physician practice" means any medical practice that includes one or more physicians licensed to practice medicine in this state.

(5) "Traumatic burn care medical practice" means care, treatment, or services rendered by a medical practice with respect to a patient whose burn care, treatment, or services resulted in charges in excess of $50,000.00, arising out of a single accident or occurrence.

(b) Any person, firm, hospital authority, or corporation operating a hospital, nursing home, or physician practice or providing traumatic burn care medical practice in this state shall have a lien for the reasonable charges for hospital, nursing home, physician practice, or traumatic burn care medical practice care and treatment of an injured person, which lien shall be upon any and all causes of action accruing to the person to whom the care was furnished or to the legal representative of such person on account of injuries giving rise to the causes of action and which necessitated the hospital, nursing home, physician practice, or provider of traumatic burn care medical practice care,

subject, however, to any attorney's lien. The lien provided for in this subsection is only a lien against such causes of action and shall not be a lien against such injured person, such legal representative, or any other property or assets of such persons and shall not be evidence of such person's failure to pay a debt. This subsection shall not be construed to interfere with the exemption from this part provided by Code Section 44-14-474.

History.

Ga. L. 1953, Nov.-Dec. Sess., p. 105, § 1; Ga. L. 1983, p. 548, § 1; Ga. L. 1986, p. 222, § 1; Ga. L. 2002, p. 1141, § 1; Ga. L. 2002, p. 1429, § 1; Ga. L. 2004, p. 394, § 1; Ga. L. 2008, p. 12, § 2-36/SB 433.

Cross references.

Lien of Department of Community Health for payment of charges for medical assistance, § 49-4-149.

Editor's notes.

Ga. L. 1986, p. 222, § 2, not codified by the General Assembly, provided that that Act would apply to charges for care and treatment rendered on or after the effective date of the Act (March 20, 1986).

Law reviews.

For article, "An Insurer's Duty to Settle: The Law in Georgia," see 22 Ga. St. Bar J. 19 (Aug. 2016).

For article with annual survey on torts, see 73 Mercer L. Rev. 243 (2021).

JUDICIAL DECISIONS

Application of Uniform Commercial Code to creation of medical lien. — Georgia Court of Appeals held that both O.C.G.A. §§ 11-9-109(c)(2) and (d)(2) required a party asserting a medical lien to proceed under the medical lien statute, and expressly barred the creation of a medical lien through the process for creating an Article 9 security interest by agreement. Med-Care Solutions, LLC v. Bey & Assocs., LLC, 362 Ga. App. 861, 870 S.E.2d 456, 2022 Ga. App. LEXIS 107 (2022).

Construction. — Georgia's law providing for a hospital lien against a patient for services rendered, O.C.G.A. § 44-14-470 et seq., must be strictly construed. MCG Health, Inc. v. Owners Ins. Co., 302 Ga. App. 812, 692 S.E.2d 72, 2010 Ga. App. LEXIS 241 (2010), aff'd on other grounds, 288 Ga. 782, 707 S.E.2d 349, 2011 Ga. LEXIS 24 (2011).

Liable party, not patient, subject to hospital lien. — Hospital's petition fails to allege a cause arising under the hospital lien law against the defendant patient, for the reason that O.C.G.A. § 44-14-470 gives no right of action against the patient to whom hospitalization is furnished, but only against those liable to pay the patient's damages; the right created is analogous to the remedy provided by the garnishment laws. Hospital Auth. v. Boyd, 96 Ga. App. 705, 101 S.E.2d 207, 1957 Ga. App. LEXIS 668 (1957).

Whether debt obligation of patient or other person or entity. — Court of appeals erred in holding that a debt had to be owed by a patient in order for a hospital to foreclose on a lien because it was not authorized to impose a requirement to O.C.G.A. § 44-14-470 that was not expressly stated therein; the hospital lien statute is silent as to whether the debt must be the obligation of the patient or the obligation of some other person or entity. MCG Health, Inc. v. Owners Ins. Co., 288 Ga. 782, 707 S.E.2d 349, 2011 Ga. LEXIS 24 (2011).

Hospital can recover from patient merely by showing tort-feasor paid patient. — This action is purely statutory and it is only necessary to look to the terms of O.C.G.A. § 44-14-470 itself to ascertain whether the petition sets forth a cause of action. Therefore, petition need not allege more than the specific elements set forth in O.C.G.A. § 44-14-470, and where the petition shows the treatment by the hospital of an injured person, the accrual of charges pursuant thereto, the filing of the lien by the hospital, the filing

of a suit by the injured party and its subsequent dismissal on the payment of a sum of money by or on behalf of the party alleged to have been liable, and the execution of a release to such party by the injured person, all the elements of the cause of action on behalf of the hospital and against alleged to have been liable are stated, and it is unnecessary for the hospital to allege in its petition facts showing negligence or liability to the injured party, independently of the settlement and release. Dawson v. Hospital Auth., 98 Ga. App. 792, 106 S.E.2d 807, 1958 Ga. App. LEXIS 687 (1958).

Hospital could assert lien for full amount of charges, even if most were written off pursuant to managed healthcare contract. — Because a patient could have sought recovery of $24,794 from a tortfeasor of a hospital's billed charges incurred for his injuries, the hospital was entitled to assert a lien under O.C.G.A. § 44-14-471(b) for the unpaid portion of those billed charges, even though the patient's managed care insurer was not responsible to pay these charges in full. The court held that Constantine v. MCG Health, Inc., 275 Ga. App. 128, 619 S.E.2d 718 (2005), had been implicitly overruled in part. MCG Health, Inc. v. Kight, 325 Ga. App. 349, 750 S.E.2d 813, 2013 Ga. App. LEXIS 983 (2013), cert. denied, No. S14C0603, 2014 Ga. LEXIS 363 (Ga. May 5, 2014), cert. denied, No. S14C0603, 2014 Ga. LEXIS 427 (Ga. May 19, 2014), aff'd, 296 Ga. 687, 769 S.E.2d 923, 2015 Ga. LEXIS 154 (2015).

Use of chargemaster rates does not result in viable claims for fraud, negligent representation and RICO claims. — Supreme court overrules Clouthier v. Med. Center of Central Ga., Inc., 351 Ga. App. 883 (2019), and Aguila v. Kennestone Hosp., 353 Ga. App. 17 (2019), to the extent that those cases hold that viable claims for fraud, negligent representation, and violations of the Georgia Racketeer Influenced and Corrupt Organizations Act, O.C.G.A. § 16-14-1 et seq., can be maintained against hospitals that properly file liens based on standard chargemaster rates that reflect true market considerations such as hospital costs. Bowden v. Medical Ctr., Inc., 309 Ga. 188, 845 S.E.2d 555, 2020 Ga. LEXIS 464 (2020).

Use of standard chargemaster rates by hospital. — Summary judgment was improperly denied to the medical center on the plaintiffs' fraud and negligent misrepresentation claims because the center's filing of a lien at the center's chargemaster rate in compliance with Georgia's lien statutes did not amount to making a false representation; and there was nothing fraudulent about the center's using its standard chargemaster rates as the amount claimed to be due for the hospital to perfect the hopsital's lien as the plaintiff could contest the reasonableness of the amount. Bowden v. Medical Ctr., Inc., 309 Ga. 188, 845 S.E.2d 555, 2020 Ga. LEXIS 464 (2020).

Dismissal of the patient';s complaint for fraud was upheld because it could not be said that the hospital had no basis for using its charge master rates to come up with an amount claimed to be due for purposes of securing a lien. Aguila v. Kennestone Hospital, 359 Ga. App. 419, 858 S.E.2d 241, 2021 Ga. App. LEXIS 211 (2021).

Fact that the hospital's reasonable charges initially claimed due under O.C.G.A. § 44-14-471(a)(2)(A) was significantly higher than the actual amount that the hospital could collect on the hospital's lien did not establish fraudulent intent. Aguila v. Kennestone Hospital, 359 Ga. App. 419, 858 S.E.2d 241, 2021 Ga. App. LEXIS 211 (2021).

Priority of attorney's lien. — Where a hospital was an existing creditor at the time a settlement was obtained in an action brought by the hospital for payment of patient's medical bills, and, in a separate suit for damages against a third party arising out of an automobile collision, the lien of the patient's attorney on the settlement proceeds had priority over the hospital's claims. Ramsey v. Sumner, 211 Ga. App. 202, 438 S.E.2d 676, 1993 Ga. App. LEXIS 1477 (1993).

The liens established by O.C.G.A. §§ 44-14-470 and 49-4-149 are subject to any attorney's lien. Holland v. State Farm Mut. Auto. Ins. Co., 236 Ga. App. 832, 513 S.E.2d 48, 1999 Ga. App. LEXIS 283 (1999), cert. denied, No. S99C0945, 1999

Ga. LEXIS 526 (Ga. June 4, 1999), cert. denied, No. S99C0897, 1999 Ga. LEXIS 527 (Ga. June 4, 1999).

Uninsured motorist insurance. — A hospital could enforce its lien against money paid by a patient's uninsured motorist carrier. Thomas v. McClure, 236 Ga. App. 622, 513 S.E.2d 43, 1999 Ga. App. LEXIS 273 (1999).

Under O.C.G.A. §§ 33-7-11(b)(1)(D)(ii) (underinsured motorist coverage) and 44-14-470(b) (hospital liens), a tortfeasor's insurer's payment of a hospital lien represented partial satisfaction of an injured insured's claim; the injured insured's UIM carrier was entitled to a credit for the payment of the lien against the insured's coverage. State Farm Mut. Auto. Ins. Co. v. Adams, 288 Ga. 315, 702 S.E.2d 898, 2010 Ga. LEXIS 938 (2010).

TRICARE coverage impacting recovery by hospital. — Trial court did not err in dismissing for failure to state a claim upon which relief could be granted a healthcare provider's action against an insurer to collect on a hospital lien for services provided to a patient after the patient was injured in an automobile accident caused by an insured because the statutory and regulatory scheme that governed the United States Department of Defense TRICARE health insurance program did not provide any basis for allowing a contracting civilian healthcare provider to collect the provider's treatment costs from a third-party tortfeasor/payer, and any state law that interfered with the financing of healthcare claims for TRICARE beneficiaries was preempted as a matter of federal statutory and regulatory law, 10 U.S.C. § 1103 and 32 C.F.R. § 199.17(a)(7); even if the healthcare provider was not obligated to adhere to the TRICARE statutory and regulatory scheme, by attempting to collect the provider's lien from the patient's settlement funds, the healthcare provider was violating the provider's contract with a corporation, which prohibited the provider from obtaining any recourse from the TRICARE beneficiary. MCG Health, Inc. v. Owners Ins. Co., 288 Ga. 782, 707 S.E.2d 349, 2011 Ga. LEXIS 24 (2011).

Hospital may put lien on damage claim of married woman not legally liable for payment. — There is nothing in O.C.G.A. § 44-14-470 which limits the right of the hospital to the enforcement of a lien against the claim of one who would be legally liable to pay the hospital for the charges made, and the fact that the person treated in this case may have been a married woman and therefore not herself legally liable to pay for the necessary expenses of her treatment did not affect the hospital's right to enforce its lien on her claim for damages. Dawson v. Hospital Auth., 98 Ga. App. 792, 106 S.E.2d 807, 1958 Ga. App. LEXIS 687 (1958).

A hospital had a valid lien, etc. on all causes of action held by an injured party against those who allegedly caused an injury which attached at the moment the injured party received treatment. Macon-Bibb County Hosp. Auth. v. National Union Fire Ins. Co., 793 F. Supp. 321, 1992 U.S. Dist. LEXIS 9350 (M.D. Ga. 1992).

Trial court erred by granting partial summary judgment to a patient because the hospital was not precluded from filing a hospital lien in order to collect charges associated with the patient's treatment since the hospital's contract with the patient's insurer explicitly reserved the hospital's right to collect deductibles and copays directly from the patient, irrespective of the agreement to hold the patient responsible only for a discounted price of treatment. Kight v. MCG Health, Inc., 296 Ga. 687, 769 S.E.2d 923, 2015 Ga. LEXIS 154 (2015).

Hospital's lien was invalid. — Trial court erred in denying the plaintiffs' motion to strike a hospital's lien under O.C.G.A. § 44-14-470(b) for the full amount of a hospital bill; the hospital did not dispute that a patient's operation was covered by an agreement between the hospital and an insurer; thus, the hospital would be held to the terms of the bargain it struck. Constantine v. MCG Health, Inc., 275 Ga. App. 128, 619 S.E.2d 718, 2005 Ga. App. LEXIS 858 (2005), cert. denied, No. S06C0063, 2005 Ga. LEXIS 896 (Ga. Dec. 1, 2005).

Although contract provisions between the U.S. Department of Defense TRICARE health insurance program and a hospital allowed the filing of a hospital lien against a tortfeasor's insurer under O.C.G.A. § 44-14-470(b), the lien was in-

valid because other provisions of the contract negated any debt that could support it. MCG Health, Inc. v. Owners Ins. Co., 302 Ga. App. 812, 692 S.E.2d 72, 2010 Ga. App. LEXIS 241 (2010), aff'd on other grounds, 288 Ga. 782, 707 S.E.2d 349, 2011 Ga. LEXIS 24 (2011).

Children's wrongful death claims have priority over hospital's claim of lien. — Since the decedent's children filed a wrongful death complaint in relation to their mother's death in a car wreck, the available insurance proceeds were then deposited into a court registry without the mother's estate ever making a claim for medical payments, and since the available insurance proceeds were insufficient to cover both the children's wrongful death claims and the O.C.G.A. § 44-14-470(b) medical services lien of a hospital which provided medical services to the mother after the car wreck, the trial court erred in satisfying the hospital's lien from the limited funds instead of satisfying the children's claims. Nash v. Allstate Ins. Co., 256 Ga. App. 143, 567 S.E.2d 748, 2002 Ga. App. LEXIS 858 (2002).

Late filing of lien. — Even though a hospital was late in filing its lien 33 days after the discharge of a patient, the lien was not rendered unenforceable, particularly in light of the fact that the liable parties had actual notice of the lien and were not prejudiced by the late filing. Thomas v. McClure, 236 Ga. App. 622, 513 S.E.2d 43, 1999 Ga. App. LEXIS 273 (1999).

Inclusion of lien language did not invalidate settlement agreement. — Trial court properly awarded summary judgment to plaintiffs to enforce a settlement agreement because inclusion of the statutory healthcare-provider lien affidavit release information did not constitute a counteroffer and did not alter the fact that a meeting of the minds has occurred with regard to the terms of the settlement. Sherman v. Dickey, 322 Ga. App. 228, 744 S.E.2d 408, 2013 Ga. App. LEXIS 484 (2013).

Insurer's obligation to timely pay settlement demand did not impermissibly conflict with duty to satisfy hospital's lien. — An injured party's time-limited demand on an insurer to settle the injured party's claim for policy limits, and a hospital's assertion of a lien for the injured party's care, did not place the insurer in the position of being required to make payments in excess of policy limits because the insurer could create a "safe harbor" from liability for a bad faith refusal to settle when (1) the hospital promptly settled a case involving clear liability and special damages exceeding policy limits, and (2) the sole reason for an inability to settle was an injured party's unreasonable refusal to assure satisfaction of outstanding hospital liens. Southern Gen. Ins. Co. v. Wellstar Health Sys., 315 Ga. App. 26, 726 S.E.2d 488, 2012 Ga. App. LEXIS 306 (2012).

RESEARCH REFERENCES

Am. Jur. 2d.

40 Am. Jur. 2d, Hospitals and Asylums, § 5.

C.J.S.

41 C.J.S., Hospitals, §§ 13, 15.

ALR.

Liability of private noncharitable hospital or sanitarium for improper care or treatment of patient, 39 A.L.R. 1431; 124 A.L.R. 186.

Construction, operation, and effect of statute giving hospital lien against recovery from tortfeasor causing patient's injuries, 16 A.L.R.5th 262.

Physicians' and surgeons' liens, 39 A.L.R.5th 787.

Propriety and use of balance billing in health care context, 69 A.L.R.6th 317.

44-14-471. Filing of verified statement; contents; notice.

(a) In order to perfect the lien provided for in Code Section 44-14-470, the operator of the hospital, nursing home, physician practice, or provider of traumatic burn care medical practice:

(1) Shall, not less than 15 days prior to the date of filing the statement required under paragraph (2) of this subsection, provide written notice to the patient and, to the best of the claimant's knowledge, the persons, firms, corporations, and their insurers claimed by the injured person or the legal representative of the injured person to be liable for damages arising from the injuries and shall include in such notice a statement that the lien is not a lien against the patient or any other property or assets of the patient and is not evidence of the patient's failure to pay a debt. Such notice shall be sent to all such persons and entities by first-class and certified mail or statutory overnight delivery, return receipt requested; and

(2) Shall file in the office of the clerk of the superior court of the county in which the hospital, nursing home, physician practice, or provider of traumatic burn care medical practice is located and in the county wherein the patient resides, if a resident of this state, a verified statement setting forth the name and address of the patient as it appears on the records of the hospital, nursing home, physician practice, or provider of traumatic burn care medical practice; the name and location of the hospital, nursing home, physician practice, or provider of traumatic burn care medical practice and the name and address of the operator thereof; the dates of admission and discharge of the patient therefrom or with respect to a physician practice, the dates of treatment; and the amount claimed to be due for the hospital, nursing home, physician practice, or provider of traumatic burn care medical practice care, which statement must be filed within the following time period:

(A) If the statement is filed by a hospital, nursing home, or provider of traumatic burn care medical practice, then the statement shall be filed within 75 days after the person has been discharged from the facility; or

(B) If the statement is filed by a physician practice, then the statement shall be filed within 90 days after the person first sought treatment from the physician practice for the injury.

(b) The filing of the claim or lien shall be notice thereof to all persons, firms, or corporations liable for the damages, whether or not they received the written notice provided for in this Code section. The failure to perfect such lien by timely complying with the notice and filing provisions of paragraphs (1) and (2) of subsection (a) of this Code section

shall invalidate such lien, except as to any person, firm, or corporation liable for the damages, which receives prior to the date of any release, covenant not to bring an action, or settlement, actual notice of a notice and filed statement made under subsection (a) of this Code section, via hand delivery, certified mail, return receipt requested, or statutory overnight delivery with confirmation of receipt.

History.

Ga. L. 1953, Nov.-Dec. Sess., p. 105, § 2; Ga. L. 1978, p. 1371, § 1; Ga. L. 2002, p. 1141, § 2; Ga. L. 2002, p. 1429, § 2; Ga. L. 2003, p. 140, § 44; Ga. L. 2004, p. 394, § 2; Ga. L. 2006, p. 334, § 2/SB 306.

Law reviews.

For annual survey of trial practice and procedure, see 56 Mercer L. Rev. 433 (2004).

For article with annual survey on torts, see 73 Mercer L. Rev. 243 (2021).

JUDICIAL DECISIONS

"Best of the claimant's knowledge" standard. — As for the "best of the claimant's knowledge" standard of O.C.G.A. § 44-14-471(a)(1), the Georgia Court of Appeals, Fifth Division has held that the phrase describes the lienholder's knowledge and imposes upon the lienholder the requirement to exercise at least some degree of diligence in acquiring the information necessary to send the notice. Allstate Fire & Casualty Insurance Company v. Kennestone Hospital, Inc., 348 Ga. App. 335, 822 S.E.2d 832, 2019 Ga. App. LEXIS 2 (2019).

Medical lien created under Article 9 barred. — Georgia Court of Appeals held that both O.C.G.A. § 11-9-109(c)(2) and (d)(2) required a party asserting a medical lien to proceed under the medical lien statute, and expressly barred the creation of a medical lien through the process for creating an Article 9 security interest by agreement. Med-Care Solutions, LLC v. Bey & Assocs., LLC, 362 Ga. App. 861, 870 S.E.2d 456, 2022 Ga. App. LEXIS 107 (2022).

Hospital lien resembles garnishment. — Hospital's petition failed to allege a cause arising under the hospital lien law against the defendant patient, for the reason that O.C.G.A. § 44-14-471 gives no right of action against the patient to whom hospitalization is furnished, but only against those liable to pay the patient damages; the right created is analogous to the remedy provided by the garnishment laws. Hospital Auth. v. Boyd, 96 Ga. App. 705, 101 S.E.2d 207, 1957 Ga. App. LEXIS 668 (1957).

Late filing still valid where actual notice. — A hospital lien not filed within the 30-day statutory time period was enforced against defendants who had actual notice of the lien. Macon-Bibb County Hosp. Auth. v. National Union Fire Ins. Co., 793 F. Supp. 321, 1992 U.S. Dist. LEXIS 9350 (M.D. Ga. 1992).

Hospital could assert lien for full amount of charges, even if most were written off pursuant to managed healthcare contract. — Because a patient could have sought recovery of $24,794 from a tortfeasor of a hospital's billed charges incurred for his injuries, the hospital was entitled to assert a lien under O.C.G.A. § 44-14-471(b) for the unpaid portion of those billed charges, even though the patient's managed care insurer was not responsible to pay these charges in full. The court held that Constantine v. MCG Health, Inc., 275 Ga. App. 128, 619 S.E.2d 718 (2005), had been implicitly overruled in part. MCG Health, Inc. v. Kight, 325 Ga. App. 349, 750 S.E.2d 813, 2013 Ga. App. LEXIS 983 (2013), cert. denied, No. S14C0603, 2014 Ga. LEXIS 363 (Ga. May 5, 2014), cert. denied, No. S14C0603, 2014 Ga. LEXIS 427 (Ga. May 19, 2014), aff'd, 296 Ga. 687, 769 S.E.2d 923, 2015 Ga. LEXIS 154 (2015).

Use of chargemaster rates does not result in viable claims for fraud, negligent representation and RICO claims. — Supreme court overrules Clouthier v. Med. Center of Central Ga.,

Inc., 351 Ga. App. 883 (2019), and Aguila v. Kennestone Hosp., 353 Ga. App. 17 (2019), to the extent that those cases hold that viable claims for fraud, negligent representation, and violations of the Georgia Racketeer Influenced and Corrupt Organizations Act, O.C.G.A. § 16-14-1 et seq., can be maintained against hospitals that properly file liens based on standard chargemaster rates that reflect true market considerations such as hospital costs. Bowden v. Medical Ctr., Inc., 309 Ga. 188, 845 S.E.2d 555, 2020 Ga. LEXIS 464 (2020).

Use of standard chargemaster rates by hospital. — Dismissal of the patient's complaint for fraud was upheld because it could not be said that the hospital had no basis for using its charge master rates to come up with an amount claimed to be due for purposes of securing a lien. Aguila v. Kennestone Hospital, 359 Ga. App. 419, 858 S.E.2d 241, 2021 Ga. App. LEXIS 211 (2021).

Fact that the hospital's reasonable charges initially claimed due under O.C.G.A. § 44-14-471(a)(2)(A) was significantly higher than the actual amount that the hospital could collect on the hospital's lien did not establish fraudulent intent. Aguila v. Kennestone Hospital, 359 Ga. App. 419, 858 S.E.2d 241, 2021 Ga. App. LEXIS 211 (2021).

No false representation regarding charges. — Summary judgment was improperly denied to the medical center on the plaintiffs' fraud and negligent misrepresentation claims because the center's filing of a lien at the center's chargemaster rate in compliance with Georgia's lien statutes did not amount to making a false representation; and there was nothing fraudulent about the center's using its standard chargemaster rates as the amount claimed to be due for the hospital to perfect the hopsital's lien as the plaintiff could contest the reasonableness of the amount. Bowden v. Medical Ctr., Inc., 309 Ga. 188, 845 S.E.2d 555, 2020 Ga. LEXIS 464 (2020).

Diligence in identifying tortfeasor and insurer. — In an action to enforce a hospital lien, the trial court erred by granting summary judgment to an insurer because there was a question as to whether the medical center effectively used all of the information in its records to affirmatively obtain the police report and identify the alleged tortfeasor and its insurer. Phoebe Sumter Med. Ctr. v. Gov't Emples. Ins. Co., 362 Ga. App. 483, 869 S.E.2d 123, 2022 Ga. App. LEXIS 58 (2022).

Hospital exercised due diligence. — The grant of summary judgment to a hospital in the hospital's action to perfect a medical services lien under O.C.G.A. § 44-14-471 against an insurance company was affirmed because in spite of the hospital's undisputed exercise of due diligence, the hospital did not know the identity of the tortfeasor or the insurer until after the hospital had filed the lien, so the hospital was not required to send notice to the insurer to perfect the insurer's lien. Allstate Fire & Casualty Insurance Company v. Kennestone Hospital, Inc., 348 Ga. App. 335, 822 S.E.2d 832, 2019 Ga. App. LEXIS 2 (2019).

RESEARCH REFERENCES

ALR.

Construction, operation, and effect of statute giving hospital lien against recovery from tortfeasor causing patient's injuries, 16 A.L.R.5th 262.

44-14-472. Duties of clerk; lien book; fee.

The clerk of the superior court shall endorse the date and hour of filing on the statement filed pursuant to Code Section 44-14-471; and, at the expense of the county, the clerk shall provide a lien book with a proper index in which the clerk shall enter the date and hour of the filing; the names and addresses of the hospital, nursing home, physician practice, or provider of traumatic burn care medical practice, the

operators thereof, and the patient; and the amount claimed. The information shall be recorded in the name of the patient. The clerk shall receive a fee as required by subparagraph (f)(1)(A) of Code Section 15-6-77 as his or her fee for such filing.

History.

Ga. L. 1953, Nov.-Dec. Sess., p. 105, § 3; Ga. L. 1981, p. 1396, § 18; Ga. L. 1992, p. 6, § 44; Ga. L. 2002, p. 1141, § 3; Ga. L. 2002, p. 1429, § 3; Ga. L. 2003, p. 140, § 44; Ga. L. 2004, p. 394, § 3; Ga. L. 2006, p. 334, § 3/SB 306.

Code Commission notes.

Pursuant to Code Section 28-9-5, in 2002, "or she" was deleted preceding "shall" twice in the first sentence.

OPINIONS OF THE ATTORNEY GENERAL

The general provision of O.C.G.A. § 15-6-77 should not be construed to include the recording of hospital liens, which is explicitly provided for by O.C.G.A. § 44-14-472. 1980 Op. Att'y Gen. No. U80-40.

RESEARCH REFERENCES

ALR.

Construction, operation, and effect of statute giving hospital lien against recovery from tortfeasor causing patient's injuries, 16 A.L.R.5th 262.

44-14-473. Effect of covenant not to bring an action; action to enforce lien; limitation; affidavit of payment.

(a) No release of the cause or causes of action or of any judgment thereon or any covenant not to bring an action thereon shall be valid or effectual against the lien created by Code Section 44-14-470 unless the holder thereof shall join therein or execute a release of the lien; and the claimant or assignee of the lien may enforce the lien by an action against the person, firm, or corporation liable for the damages or such person, firm, or corporation's insurer. If the claimant prevails in the action, the court may allow reasonable attorney's fees. The action shall be commenced against the person liable for the damages or such person's insurer within one year after the date the liability is finally determined by a settlement, by a release, by a covenant not to bring an action, or by the judgment of a court of competent jurisdiction.

(b) No release or covenant not to bring an action which is made before or after the patient was discharged from the hospital, nursing home, or provider of traumatic burn care medical practice or, with respect to a physician practice, which is made after the patient first sought treatment from the physician practice for the injuries shall be effective against the lien perfected in accordance with Code Section 44-14-471, if such lien is perfected prior to the date of the release, covenant not to bring an action, or settlement unless consented to by the lien claimant; provided, however, that any person, firm, or corpo-

ration which consummates a settlement, release, or covenant not to bring an action with the person to whom hospital, nursing home, physician practice, or traumatic burn care medical practice care, treatment, or services were furnished and which first procures from the injured party an affidavit as prescribed in subsection (c) of this Code section shall not be bound or otherwise affected by the lien except as provided in subsection (c) of this Code section, regardless of when the settlement, release, or covenant not to bring an action was consummated.

(c) The affidavit shall affirm:

(1) That all hospital, nursing home, physician practice, or provider of traumatic burn care medical practice bills incurred for treatment for the injuries for which a settlement is made have been fully paid; and

(2) The county of residence of such affiant, if a resident of this state;

provided, however, that the person taking the affidavit shall not be protected thereby where the affidavit alleges the county of the affiant's residence and the lien of the claimant is at such time on file in the office of the clerk of the superior court of the county and is recorded in the name of the patient as it appears in the affidavit.

History.

Ga. L. 1953, Nov.-Dec. Sess., p. 105, § 4; Ga. L. 1982, p. 3, § 44; Ga. L. 2002, p. 1141, § 4; Ga. L. 2002, p. 1429, § 4; Ga. L. 2004, p. 394, § 4; Ga. L. 2006, p. 334, § 4/SB 306; Ga. L. 2021, p. 922, § 44/HB 497.

The 2021 amendment, effective May 10, 2021, part of an Act to revise, modernize, and correct the Code, substituted "Code Section 44-14-471" for "Code Section 44-4-471" in subsection (b).

Law reviews.

For annual survey on insurance law, see 66 Mercer L. Rev. 93 (2014).

For annual survey on trial practice and procedure, see 66 Mercer L. Rev. 211 (2014).

JUDICIAL DECISIONS

Action filed before limitations period ran. — Hospitals' action to recover on liens related to medical treatment was not barred by the limitations period in O.C.G.A. § 44-14-473(a) as the statute of limitations began to run on the date that the release was executed, as that was the date liability was finally determined, and the action was filed less than one year after that date. Hosp. Auth. of Clarke County v. Geico Gen. Ins. Co., 294 Ga. 477, 754 S.E.2d 358, 2014 Ga. LEXIS 105 (2014).

Section allows hospital lien on tortfeasor, not patient. — Hospital's petition failed to allege a cause arising under the hospital lien law against the defendant patient, for the reason that O.C.G.A. § 44-14-473 gives no right of action against the patient to whom hospitalization is furnished, but only against those liable to pay the patient damages; the

right created is analogous to the remedy provided by the garnishment laws. Hospital Auth. v. Boyd, 96 Ga. App. 705, 101 S.E.2d 207, 1957 Ga. App. LEXIS 668 (1957).

Lien not enforceable against tortfeasor's insurer. — Hospital could not enforce its medical lien against the tortfeasor's insurer on the ground that insurer settled the injured driver's claims without the hospital's knowledge and consent, since insurer was not one against whom an action could be brought under O.C.G.A. § 44-14-473, and it was not liable for the driver's damages under the policy, by any other statute, or by agreement. Integon Indem. Corp. v. Henry Medical Ctr., Inc., 235 Ga. App. 97, 508 S.E.2d 476, 1998 Ga. App. LEXIS 1415 (1998).

Insurer's obligation to timely pay settlement demand did not impermissibly conflict with duty to satisfy hospital's lien. — An injured party's time-limited demand on an insurer to settle the injured party's claim for policy limits, and a hospital's assertion of a lien for the injured party's care, did not place the insurer in the position of being required to make payments in excess of policy limits because the insurer could create a "safe harbor" from liability for a bad faith refusal to settle when (1) the hospital promptly settled a case involving clear liability and special damages exceeding policy limits, and (2) the sole reason for an inability to settle was an injured party's unreasonable refusal to assure satisfaction of outstanding hospital liens. Southern Gen. Ins. Co. v. Wellstar Health Sys., 315 Ga. App. 26, 726 S.E.2d 488, 2012 Ga. App. LEXIS 306 (2012).

Inclusion of lien language did not invalidate settlement agreement. — Trial court properly awarded summary judgment to plaintiffs to enforce a settlement agreement because inclusion of the statutory healthcare-provider lien affidavit release information did not constitute a counteroffer and did not alter the fact that a meeting of the minds has occurred with regard to the terms of the settlement. Sherman v. Dickey, 322 Ga. App. 228, 744 S.E.2d 408, 2013 Ga. App. LEXIS 484 (2013).

Parol evidence may negate words in release indicating payment on security instrument. — Words in a release placed upon a recorded security instrument importing payment of the secured indebtedness are not a contract but constitute only prima facie evidence of payment and may be denied or explained by parol evidence. Ford Motor Credit Co. v. Parsons, 155 Ga. App. 46, 270 S.E.2d 230, 1980 Ga. App. LEXIS 2450 (1980).

Hospital's lien was invalid. — Although contract provisions between the U.S. Department of Defense TRICARE health insurance program and a hospital allowed the filing of a hospital lien against a tortfeasor's insurer under O.C.G.A. § 44-14-470(b), the lien was invalid because other provisions of the contract negated any debt that could support it. MCG Health, Inc. v. Owners Ins. Co., 302 Ga. App. 812, 692 S.E.2d 72, 2010 Ga. App. LEXIS 241 (2010), aff'd on other grounds, 288 Ga. 782, 707 S.E.2d 349, 2011 Ga. LEXIS 24 (2011).

RESEARCH REFERENCES

ALR.

Liability of private noncharitable hospital or sanitarium for improper care or treatment of patient, 39 A.L.R. 1431; 124 A.L.R. 186.

Construction, operation, and effect of statute giving hospital lien against recovery from tortfeasor causing patient's injuries, 16 A.L.R.5th 262.

44-14-474. Exemptions from part.

This part shall not apply to any moneys becoming due under Chapter 9 of Title 34.

History.
Ga. L. 1953, Nov.-Dec. Sess., p. 105, § 6; Ga. L. 1977, p. 277, § 1; Ga. L. 1991, p. 1608, § 2.3.

Law reviews.
For note on 1991 amendment of this Code section, see 8 Ga. St. U.L. Rev. 99 (1992).

RESEARCH REFERENCES

ALR.
Construction, operation, and effect of statute giving hospital lien against recovery from tortfeasor causing patient's injuries, 16 A.L.R.5th 262.

44-14-475. Effect of part on settlement before entry into hospital, nursing home, or traumatic burn care medical facility.

No settlement or release entered into or executed prior to the entry of the injured party into the hospital, nursing home, or facility which provides traumatic burn care medical practice or prior to the time the patient first sought treatment from the physician practice for the injuries shall be affected by or subject to the terms of this part.

History.
Ga. L. 1953, Nov.-Dec. Sess., p. 105, § 7; Ga. L. 2002, p. 1141, § 5; Ga. L. 2004, p. 394, § 5; Ga. L. 2006, p. 334, § 5/SB 306.

RESEARCH REFERENCES

ALR.
Construction, operation, and effect of statute giving hospital lien against recovery from tortfeasor causing patient's injuries, 16 A.L.R.5th 262.

44-14-476. No independent right of action.

This part shall not be construed to give any hospital, nursing home, physician practice, or provider of traumatic burn care medical practice referred to in this part an independent right of action to determine liability for injuries sustained by a person or firm.

History.
Ga. L. 1953, Nov.-Dec. Sess., p. 105, § 8; Ga. L. 2002, p. 1141, § 6; Ga. L. 2004, p. 394, § 6.

RESEARCH REFERENCES

ALR.
Construction, operation, and effect of statute giving hospital lien against recovery from tortfeasor causing patient's injuries, 16 A.L.R.5th 262.

44-14-477. False swearing in affidavits under Code Section 44-14-473.

Any person who gives any false affidavit as provided by Code Section 44-14-473 commits the offense of false swearing.

History.
Ga. L. 1953, Nov.-Dec. Sess., p. 105, § 5.

Cross references.
Penalty for false swearing, § 16-10-71.

RESEARCH REFERENCES

Am. Jur. 2d.
60 Am. Jur. 2d, Perjury, §§ 41, 45, 48.

C.J.S.
70 C.J.S., Perjury, § 22.

PART 9

VETERINARIANS AND BOARDERS OF ANIMALS

44-14-490. Lien for treatment, board, or care of animal; right to retain possession.

(a) Every licensed veterinarian shall have a lien on each animal or pet treated, boarded, or cared for by him or her while in his or her custody and under contract with the owner of the animal or pet for the payment of charges for the treatment, board, or care of the animal or pet; and the veterinarian shall have the right to retain the animal or pet until the charges are paid.

(b)(1) As used in this subsection, the term:

(A) "Charges" means:

(i) Any charges, fees, expenses, and reimbursements which have been contracted for, agreed to, or otherwise mutually acknowledged by written agreement, course of conduct, or understanding, including but not limited to:

(I) Board, care, services, and treatment of the animal or pet, whether provided by the operator or by a third party and incurred by the operator;

(II) Farrier and veterinary fees and expenses incurred by the operator for or on behalf of the boarded animal or pet; and

(III) Fees and expenses for transportation of the animal or pet; and

(ii) Late payment fees, returned check fees, and all costs of collection, including but not limited to reasonable attorney's fees and expenses of litigation and costs of sale.

Charges shall not include fees, expenses, or commissions of any kind relating to purchase, sale, or lease of such animal or pet, other than a sale pursuant to Code Section 44-14-491.

(B) "Facility for boarding animals or pets" shall include, but not be limited to, veterinary hospitals, boarding kennels, stables, livestock sales barns, and humane societies.

(2) Every operator of a facility for boarding animals or pets which facility is licensed by the Department of Agriculture, other than a licensed veterinarian, shall have a lien on each animal or pet in his or her care for the payment of all charges of such operator; and the operator of such a facility shall have the right to retain the animal or pet until the charges are paid in full.

(c) Any person granted a lien by this Code section may waive such lien in writing.

History.
Ga. L. 1974, p. 330, § 1; Ga. L. 2005, p. 58, § 1/HB 201.

Cross references.
Regulation of veterinary practice generally, § 43-50-1 et seq.

JUDICIAL DECISIONS

Retaining animals until charges paid. — Trial court did not err in granting summary judgment in favor of the veterinarian because the owner of the dog agreed to have the veterinarian treat the dog for the parvo virus in exchange for payment of at least the estimated costs; the owner did not cite any evidence creating a genuine issue of material fact as to the accuracy or validity of any of the charges on the itemized bill; and the veterinarian acted properly in relying on the veterinary lien statute to retain the dog when the owner failed to pay the bills. Gomez v. Innocent, 330 Ga. App. 260, 765 S.E.2d 405, 2014 Ga. App. LEXIS 710 (2014), cert. denied, No. S15C0646, 2015 Ga. LEXIS 219 (Ga. Mar. 30, 2015).

RESEARCH REFERENCES

Am. Jur. 2d.
8 Am. Jur. 2d, Bailments, §§ 190 et seq., 194 et seq.

C.J.S.
8 C.J.S., Bailments, § 80 et seq.

44-14-491. Notice to owner; sale or disposal of animal; liability.

(a)(1) If the charges due for any services enumerated in Code Section 44-14-490 are not paid within ten days after the demand therefor on the owner of the animal or pet or if the animal or pet is not picked up within ten days after the demand therefor on the owner of the animal or pet, which demand shall be made in person or by registered or certified mail or statutory overnight delivery with return receipt requested and addressed to the owner at the address given when the animal or pet was delivered, the animal or pet shall be deemed to be abandoned and the licensed veterinarian or operator of a facility is authorized to dispose of the animal or pet in such manner as such veterinarian or operator shall determine. Such ten-day period will begin to run on the date the demand is postmarked or the date the verbal command is communicated in person and shall be noted on the veterinarian's or operator's file on the animal or pet. For purposes of this subsection, the term "dispose of " means selling the animal or pet at public or private sale, giving the animal or pet away, or turning the

animal or pet over to any humane society or animal shelter or other such facility. Where no such shelter facility exists within a 50 mile radius of the veterinarian or operator of a facility's place of business and the veterinarian or operator has been unable to sell or give the animal away, then the veterinarian or operator is authorized to euthanize the animal in a humane manner.

(2) On the day of the disposal of the animal or pet, the veterinarian or operator of a facility shall notify the owner in person, by telephone, or by registered or certified mail or statutory overnight delivery with return receipt requested at the address given when the animal or pet was delivered, of the date of the disposal and the manner in which the animal was disposed.

(3) The disposal of an animal or pet as provided in this Code section shall not relieve the owner or owner's agent of any financial obligations incurred for treatment, boarding, or care by a veterinarian or operator of a facility for boarding animals or pets.

(b) The giving of notice to the owner as provided for in subsection (a) of this Code section shall relieve the licensed veterinarian, the operator of a facility for boarding animals or pets, or any custodian who disposes of such animal or pet of any further liability for such disposal.

(c) Failure of the owner of any such animal or pet to receive the demand by registered or certified mail or statutory overnight delivery provided for in paragraph (1) of subsection (a) of this Code section shall not render the licensed veterinarian or operator of a facility liable to the owner of such animal or pet for the disposal thereof in any manner provided in this Code section.

History.
Ga. L. 1974, p. 330, § 2; Ga. L. 1984, p. 572, § 1; Ga. L. 1993, p. 1044, § 1; Ga. L. 2000, p. 1589, § 3.

Editor's notes.
Ga. L. 2000, p. 1589, § 16, not codified by the General Assembly, provides that this Act is applicable with respect to notices delivered on or after July 1, 2000.

RESEARCH REFERENCES

Am. Jur. 2d.
8 Am. Jur. 2d, Bailments, § 199.

C.J.S.
8 C.J.S., Bailments, § 80 et seq.

44-14-492. Disposition of sale proceeds.

When any animal or pet is sold as authorized in this part to satisfy a lien for any of the services enumerated in Code Section 44-14-490, any surplus realized from the sale after payment of the charges and any expenses incurred in making the demand for payment thereof in connection with the sale shall be paid to the owner of the animal or pet.

History.
Ga. L. 1974, p. 330, § 3.

RESEARCH REFERENCES

Am. Jur. 2d.
8 Am. Jur. 2d, Bailments, § 199.

C.J.S.
8 C.J.S., Bailments, § 80 et seq.

44-14-493. Necessity of other legal proceedings.

Other than compliance with the requirements of this part, no legal proceedings shall be necessary for the enforcement of the lien created by this part.

History.
Ga. L. 1974, p. 330, § 4.

RESEARCH REFERENCES

Am. Jur. 2d.
8 Am. Jur. 2d, Bailments, § 199.

C.J.S.
8 C.J.S., Bailments, § 80 et seq.

44-14-494. Criminal liability under Code Section 44-14-491.

It shall not constitute a violation of Code Section 16-12-4 if a licensed veterinarian or an operator of a facility for boarding animals or pets disposes of an animal or pet as provided in Code Section 44-14-491.

History.
Code 1981, § 44-14-494, enacted by Ga. L. 1984, p. 572, § 2; Ga. L. 1985, p. 149, § 44.

Part 10

Miscellaneous Liens

RESEARCH REFERENCES

ALR.
Common-law lien on personalty for work performed thereon, upon the owner's premises, 3 A.L.R. 862.

Dredge, pumper, or the like as subject of maritime lien, 59 A.L.R. 1343.

Character of service contemplated by statutes giving a lien or preference, in event of insolvency, to servants, employees, laborers, etc., 111 A.L.R. 1453; 142 A.L.R. 362.

Sale of standing timber as affecting judgment or other lien upon the land, 122 A.L.R. 517.

Lien for storage of motor vehicle, 48 A.L.R.2d 894.

Lien for towing or storage, ordered by public officer, of motor vehicle, 85 A.L.R.3d 199.

Loss of garageman's lien on repaired vehicle by owner's use of vehicle, 74 A.L.R.4th 90.

44-14-510. Lien of officers and employees on watercraft; priorities.

Every officer and employee or guardian of any employee on any

watercraft engaged in the navigation of any river within the borders or forming the boundary of this state shall have a lien upon the boat or craft for any debts, dues, wages, or demands that they may have against the owner or lessee of the boat or craft, for personal services in connection with the boat, or for wood or provisions furnished the boat, which lien shall be superior to all liens except liens for taxes and such other liens as the claimant had actual notice of before the debt was created.

History.
Orig. Code 1863, § 1979; Code 1868, § 1968; Ga. L. 1873, p. 42, § 9; Code 1873, § 1982; Code 1882, § 1982; Civil Code 1895, § 2806; Civil Code 1910, § 3355; Code 1933, § 67-2201.

RESEARCH REFERENCES

Am. Jur. 2d.
70 Am. Jur. 2d, Shipping, §§ 292, 321, 550 et seq., 561, 562, 568, 572-575, 579, 580, 596, 598, 607-611.

44-14-511. Liens on offspring of stallions, jacks, bulls or boars; necessity of recordation; recording fee; priorities.

The owner or keeper of any stallion, jack, or blooded or imported bull or boar shall have a lien upon the offspring thereof for the service of the stallion, jack, or blooded or imported bull or boar for the period of one year from the birth of the offspring, which lien shall be superior to all other liens except the lien for taxes, provided that the owners shall keep their animals enclosed in their own pastures or otherwise. The lien provided for in this Code section shall not become operative unless it is recorded in the office of the clerk of the superior court of the county where the owner of the mother resides within six months after the performance of the service. The clerk shall keep a book in which all such liens are to be recorded and shall receive a fee as required by subparagraph (f)(1)(A) of Code Section 15-6-77 for recording such liens.

History.
Ga. L. 1882-83, p. 131, § 1; Ga. L. 1884-85, p. 147, § 1; Civil Code 1895, § 2811; Civil Code 1910, § 3361; Code 1933, § 67-2202; Ga. L. 1981, p. 1396, § 5; Ga. L. 1992, p. 6, § 44.

JUDICIAL DECISIONS

Foreclosure of lien on mare. — Trial court properly granted summary judgment pursuant to O.C.G.A. § 9-11-56 to colt possessors in a tortious interference with a contract claim by a horse trainer, wherein the trainer alleged that the trainer had a contract to keep the recently born colt in exchange for continued services to the mare's owner; the court found that there was no showing that the possessors were aware of a contract regarding the ownership of the colt, the possessors had followed the necessary procedures for filing a financing statement under O.C.G.A. § 11-9-501 et seq., they had allegedly foreclosed on their lien on the mare by the time that they became aware of the trainer's claim, pursuant to O.C.G.A. § 44-14-490, and the trainer did not record a lien against the colt pursuant

to O.C.G.A. § 44-14-511. Medlin v. Morganstern, 268 Ga. App. 116, 601 S.E.2d 359, 2004 Ga. App. LEXIS 737 (2004).

Owner has lien, not title. — The owner of a stallion or jack does not obtain title to the get thereof, for the service of the animal, but has merely a lien thereon. Strickland v. Smith, 17 Ga. App. 505, 87 S.E. 718, 1916 Ga. App. LEXIS 733 (1916).

RESEARCH REFERENCES

Am. Jur. 2d.
4 Am. Jur. 2d, Animals, § 89.
C.J.S.
3A C.J.S., Animals, § 35.
ALR.
Priority of lien of sales or consumers' tax, 136 A.L.R. 1015.

44-14-512. Lien for hauling lumber, stocks, or logs.

Any person hauling stocks, logs, or lumber for another person shall have a lien against the personalty so hauled by him to the extent of the amount of the indebtedness, if by contract, and to the extent of the value of the services so rendered, if the price to be paid for the hauling is not agreed upon.

History.
Ga. L. 1901, p. 80, § 1; Civil Code 1910, § 3359; Code 1933, § 67-2203.

JUDICIAL DECISIONS

Lien under O.C.G.A. § 44-14-512 does not arise unless the employer owns the logs. Williams v. Herrington, 12 Ga. App. 76, 76 S.E. 757, 1912 Ga. App. LEXIS 30 (1912).

Lien stands against beneficiary with notice. — The lien under O.C.G.A. § 44-14-512 cannot be defeated by one who has knowledge of the performance of the labor and who accepts the benefit thereof, otherwise than by proof that the lien was waived or has been discharged by payment. Sattes & Wimer Lumber Co. v. Hales, 11 Ga. App. 569, 75 S.E. 898, 1912 Ga. App. LEXIS 105 (1912).

Lien against bona fide purchaser without notice. — The lien of a laborer upon logs hauled by the laborer for another does not exist against a bona fide purchaser without notice of the lien, until it is reduced to execution and levy. Williams v. Herrington, 12 Ga. App. 76, 76 S.E. 757, 1912 Ga. App. LEXIS 30 (1912).

RESEARCH REFERENCES

Am. Jur. 2d.
52 Am. Jur. 2d, Logs and Timber, § 87 et seq.
Am. Jur. Pleading and Practice Forms.
17 Am. Jur. Pleading and Practice Forms, Logs and Timber, § 43.
C.J.S.
54 C.J.S., Logs and Logging, § 31 et seq.
ALR.
Sale of standing timber as affecting judgment or other lien upon the land, 122 A.L.R. 517.

44-14-513. Liens in favor of planing mills and similiar establishments.

Proprietors of planing mills and other similar establishments shall have the same lien as provided in Code Section 44-14-363 for work done on material furnished by others; and, when they furnish material, they shall have the same liens provided for in Code Section 44-14-361 for materialmen. Proprietors of sawmills, when furnishing material for the improvement of real estate to purchasers from them for that purpose, shall be entitled to the lien provided for in Code Section 44-14-361, said lien to be governed by the rules laid down in Code Section 44-14-361 when the same are applicable.

History.
Ga. L. 1873, p. 42, § 10; Code 1873, § 1983; Code 1882, § 1983; Civil Code 1895, § 2807; Civil Code 1910, § 3356; Code 1933, § 67-2204.

JUDICIAL DECISIONS

Sawmill is within meaning of words "other similar establishments." Newman v. Cash, 47 Ga. App. 39, 169 S.E. 520, 1933 Ga. App. LEXIS 282 (1933).

What constitutes retention. — Assertion of a lien by retention of the property, under O.C.G.A. § 44-14-513, is not shown where lumber is hauled from the plaintiff's sawmill and placed on the right of way of the railroad for the defendant. Daniel v. Blackwell, 30 Ga. App. 786, 119 S.E. 447, 1923 Ga. App. LEXIS 688 (1923).

Sawmill has lien on product. — The proprietor of a sawmill as well as a planing mill has a lien under O.C.G.A. § 44-14-513 on the product of the mill for work done on material furnished by others. Murphey v. McGough, 105 Ga. 816, 31 S.E. 757, 1898 Ga. LEXIS 718 (1898).

Completion of contract necessary for lien. — The proprietor of a sawmill who makes a contract to saw the lumber of another, and substantially complies with the contract, is entitled to a lien, but not otherwise. Hawkins v. Chambliss, 116 Ga. 813, 43 S.E. 55, 1902 Ga. LEXIS 282 (1902).

Lien procedures owner must follow. — In order for the proprietor of a sawmill to acquire a lien upon the lumber sawed under a contract with the owner of the lumber, after the lumber sawed has been surrendered to the owner thereof, it is necessary for the proprietor to file and record a lien within ten days from the time of the completion of the work. Richardson v. Mallory, 13 Ga. App. 496, 79 S.E. 362, 1913 Ga. App. LEXIS 234 (1913); Jones v. Newsome, 27 Ga. App. 386, 108 S.E. 558, 1921 Ga. App. LEXIS 919 (1921).

Jurisdiction of city court to foreclose lien. — A city court has jurisdiction to foreclose a lien in favor of the proprietor of a sawmill on the product of the mill, for work done on material furnished by another, at least where the principal of the amount claimed does not exceed the jurisdiction of the county court. Chambliss v. Hawkins, 123 Ga. 361, 51 S.E. 337, 1905 Ga. LEXIS 468 (1905).

44-14-514. Liens of laborers at mills and similar establishments.

Laborers in mills and other establishments mentioned in Code Section 44-14-513 shall have the same lien as is provided for laborers in Code Sections 44-14-380 and 44-14-381.

History.
Ga. L. 1873, p. 42, § 11; Code 1873, § 1984; Code 1882, § 1984; Civil Code 1895, § 2808; Civil Code 1910, § 3357; Code 1933, § 67-2205.

JUDICIAL DECISIONS

Sawmills treated as personalty. — All sawmills, whether they be in fact fixtures or not, are treated as personalty under O.C.G.A. § 44-14-514. Empire Lumber Co. v. Kiser & Co., 91 Ga. 643, 17 S.E. 972, 1893 Ga. LEXIS 298 (1893).

Plaintiff in execution has burden of proof. — Possession by the lienholder is proper, and this being true, and if there is no contradiction thereof by the claimant, the plaintiff in execution carries the burden of proof to show either title or possession of defendant in execution. Jones v. Major, 83 Ga. App. 78, 62 S.E.2d 729, 1950 Ga. App. LEXIS 1031 (1950).

Enforcement by laborer at sawmill. — A laborer employed about a sawmill with the knowledge of the owner of lumber may enforce a lien under O.C.G.A. § 44-14-514 against the lumber although the laborer is employed by the proprietor of the sawmill. McCook v. Brown, 28 Ga. App. 525, 112 S.E. 151, 1922 Ga. App. LEXIS 654 (1922).

No lien where owner rents facilities and labor to another. — The proprietor of a sawmill who contracts to saw timber and to furnish for that purpose a mill and a fireman at a stipulated price per day, such price to cover the rent of the mill as well as the proprietor's own labor and the labor of the fireman, does not acquire, a lien under O.C.G.A. § 44-14-514. Jones v. Newsome, 27 Ga. App. 386, 108 S.E. 558, 1921 Ga. App. LEXIS 919 (1921).

44-14-515. Liens for articles furnished to sawmills; priorities.

All persons furnishing sawmills with timber, logs, provisions, or any other thing necessary to carry on the work of sawmills shall have liens on the mills and their products, which liens shall, as between themselves, rank according to date, and the date of each shall be from the time when the debt was created. The liens shall be superior to all liens except liens for taxes; liens for labor as provided for in Code Sections 44-14-380, 44-14-381, and 44-14-514; and all general liens of which they have actual notice before their debts were created.

History.
Ga. L. 1873, p. 42, § 12; Code 1873, § 1985; Code 1882, § 1985; Civil Code 1895, § 2809; Civil Code 1910, § 3358; Code 1933, § 67-2206.

JUDICIAL DECISIONS

O.C.G.A. § 44-14-515 is in derogation of the common law, and therefore is to be strictly construed. Joseph Hull & Co. v. Anderson Lumber Co., 17 Ga. App. 40, 86 S.E. 257, 1915 Ga. App. LEXIS 245 (1915).

Lien unaffected by employment of laborers to do work. — O.C.G.A. § 44-14-515 creates a lien against property of the kind specified in it, although the person claiming the lien may have employed laborers to do the actual physical work incident to the hauling. Bruton & Wade v. Beasley, 135 Ga. 412, 69 S.E. 561, 1910 Ga. LEXIS 559 (1910).

Sawmill as personalty. — All sawmills, whether they be in fact fixtures or not, are treated as personalty under O.C.G.A. § 44-14-515. Empire Lumber Co. v. Kiser & Co., 91 Ga. 643, 17 S.E. 972, 1893 Ga. LEXIS 298 (1893).

Sash and door factory is not a saw-

mill within O.C.G.A. § 44-14-515. In re Gosch, 121 F. 604, 1903 U.S. Dist. LEXIS 339 (D. Ga. 1903).

Parts of mill included in definition. — The word "mill," comprehends all engines, boilers, machinery of every kind, and all hardware, implements, tools, etc., connected with and used, or proper for use, in the mill establishment. Empire Lumber Co. v. Kiser & Co., 91 Ga. 643, 17 S.E. 972, 1893 Ga. LEXIS 298 (1893).

"Mill" does not include detached personalty. — O.C.G.A. § 44-14-515 does not provide for a lien on any property except sawmills and their products. The word sawmill "does not include any detached personalty such as vehicles, draft animals, etc." Empire Lumber Co. v. Kiser & Co., 91 Ga. 643, 17 S.E. 972, 1893 Ga. LEXIS 298 (1893); Joseph Hull & Co. v. Anderson Lumber Co., 17 Ga. App. 40, 86 S.E. 257, 1915 Ga. App. LEXIS 245 (1915).

Provider of feed for mill mules entitled to lien. — One who furnishes a sawmill with corn, oats, hay, bran, etc., with which to feed the mules of the owner of the mill used in carrying on the work thereof, has a lien under O.C.G.A. § 44-14-515. Empire Lumber Co. v. Kiser & Co., 91 Ga. 643, 17 S.E. 972, 1893 Ga. LEXIS 298 (1893).

Provider of oil can maintain lien, but not provider of tools. — One who furnishes tools, etc., not ejusdem generis with timber, logs, and provisions is not entitled to a lien under O.C.G.A. § 44-14-515, but oil is included in the word provisions. Balkcom v. Empire Lumber Co., 91 Ga. 651, 17 S.E. 1020, 1893 Ga. LEXIS 299 (1893); Filer & Stowell Co. v. Empire Lumber Co., 91 Ga. 657, 18 S.E. 359, 1893 Ga. LEXIS 300 (1893).

Possessor of land under bond for title who furnishes sawmill with logs cut from the land may foreclose the lien; and the fact that the owner of the sawmill has paid the purchase price of the logs to the holder of the legal title to the land, affords no defense to the foreclosure of the lien. Guin v. Hilton & Dodge Lumber Co., 6 Ga. App. 484, 65 S.E. 330, 1909 Ga. App. LEXIS 348 (1909).

Seller of uncut trees not entitled to lien. — It is not intended by O.C.G.A. § 44-14-515 to give a lien to the vendor of standing trees, though sold to be severed from the realty by the purchaser and converted into timber or logs for the mill. Giles v. Gano, 102 Ga. 593, 27 S.E. 730, 1897 Ga. LEXIS 650 (1897); Balkcom v. Empire Lumber Co., 91 Ga. 651, 17 S.E. 1020, 1893 Ga. LEXIS 299 (1893); Loud & Beugnot v. Pritchett & Co., 104 Ga. 648, 30 S.E. 870, 1898 Ga. LEXIS 389 (1898); Ray v. Schmidt & Co., 7 Ga. App. 380, 66 S.E. 1035, 1910 Ga. App. LEXIS 302 (1910).

Lien provided for by O.C.G.A. § 44-14-515 applies to timber or logs that have been severed from the soil, and does not apply to standing trees, although sold to the purchaser to be severed from the soil and converted into lumber for the sawmill. Davis v. Cox, 13 Ga. App. 509, 79 S.E. 383, 1913 Ga. App. LEXIS 243 (1913).

Lien given under O.C.G.A. § 44-14-515 to persons who furnish sawmills with "timber and logs" applies to such timber and logs as have been severed from the soil by human agency. It is not intended by O.C.G.A. § 44-14-515 to give a lien to the vendor of standing trees, though sold to be severed from the realty by the purchaser and converted into timber or logs for the mill. Walraven v. DeFoor, 89 Ga. App. 479, 79 S.E.2d 585, 1954 Ga. App. LEXIS 488 (1954).

No lien for cutter and hauler of miller's logs. — There is no lien under O.C.G.A. § 44-14-515 for cutting timber belonging to the mill owner and for hauling and delivering the logs at the mill, this work not being embraced in the terms "furnishing sawmills with timber, logs," etc. Balkcom v. Empire Lumber Co., 91 Ga. 651, 17 S.E. 1020, 1893 Ga. LEXIS 299 (1893).

One who merely cuts and hauls logs to a sawmill, and claims no title to such timber, cannot enforce a lien for furnishing supplies to a sawmill. Trapp v. Watters, 6 Ga. App. 480, 65 S.E. 306, 1909 Ga. App. LEXIS 346 (1909); Cook v. Bowden, 32 Ga. App. 500, 124 S.E. 61, 1924 Ga. App. LEXIS 502 (1924).

No lien for furnisher of family supplies. — No lien arises against a sawmill from furnishing to the owner of the mill family supplies. Slappey v. Charles, 7 Ga. App. 796, 68 S.E. 308, 1910 Ga. App. LEXIS 525 (1910).

No lien for money lender. — Creditors furnishing money to sawmills have no lien thereon under O.C.G.A. § 44-14-515. Dart v. Mayhew & Co., 60 Ga. 104, 1878 Ga. LEXIS 383 (1878); Slappey v. Charles, 7 Ga. App. 796, 68 S.E. 308, 1910 Ga. App. LEXIS 525 (1910).

Lien does not attach against third party to supply contract. — Lien under O.C.G.A. § 44-14-515 will not attach as against the title of a third person who is an entire stranger to the contract under which the supplies are furnished. McCrimmon v. National Bank, 25 Ga. App. 825, 105 S.E. 44, 1920 Ga. App. LEXIS 230 (1920); Tallent v. Hunter, 32 Ga. App. 656, 124 S.E. 361, 1924 Ga. App. LEXIS 581 (1924).

Supply lien does not defeat recorded contract of sale. — Claim based on a duly executed and recorded contract of sale reserving title in the claimant cannot be defeated by a lien for necessary supplies furnished a sawmill under O.C.G.A. § 44-14-515. Tift & Peed v. Moultrie Lumber Co., 1 Ga. App. 608, 57 S.E. 1053, 1907 Ga. App. LEXIS 50 (1907).

Absent notice, purchase-money mortgage not superior to lien for supplies. — The lien of a mortgage given to secure the purchase-money of a sawmill is not one of the liens enumerated in O.C.G.A. § 44-14-515 as superior to the lien for articles furnished sawmills, unless the holder of the latter lien has actual notice of the existence of the same before the holder's debt is created. Bradley v. Cassels, 117 Ga. 517, 43 S.E. 857, 1903 Ga. LEXIS 280 (1903).

Agency not created by payments from timber owner to keep mill from closing. — Direct periodic payments by the owner of the timber of wages to the laborers at the sawmill made to prevent a shutting down of the mill and advances in money made to the person operating the mill are not such acts as would authorize any one dealing with the person operating the mill to infer that the latter was acting as agent for the owner of the lumber. Tallent v. Hunter, 32 Ga. App. 656, 124 S.E. 361, 1924 Ga. App. LEXIS 581 (1924).

Owner estopped by representations that supplies are for mill. — When the owner in giving orders for articles represents to the seller that they are wanted as supplies for the owner's sawmill the owner will be estopped by the representation, and cannot set up in resistance to the lien claimed that some of the provisions were not in fact so applied. Empire Lumber Co. v. Kiser & Co., 91 Ga. 643, 17 S.E. 972, 1893 Ga. LEXIS 298 (1893).

Sufficiency of allegations in affidavit to foreclose lien. — An affidavit to foreclose a lien, under O.C.G.A. § 44-14-515 which alleged that provisions, etc., were furnished "to the sawmill of" B. instead of to B., is sufficient. Bennett & Co. v. Gray, 82 Ga. 592, 9 S.E. 469, 1889 Ga. LEXIS 302 (1889).

Plaintiff in execution must show defendant in execution has title or possession. — Possession by the lienholder is proper, and there is no contradiction thereof by the claimant, the plaintiff in execution carries the burden of proof to show either title or possession of defendant in execution. Jones v. Major, 83 Ga. App. 78, 62 S.E.2d 729, 1950 Ga. App. LEXIS 1031 (1950).

RESEARCH REFERENCES

ALR.

Priority of lien of sales or consumers' tax, 136 A.L.R. 1015.

44-14-516. Liens on merchandise because of bad checks or stop payment orders.

(a) For the purposes of this Code section, the term "bad check" means a check drawn for payment of money on any bank or other depository in

exchange for merchandise or for services rendered on merchandise when:

(1) The drawer had no account with the drawee at the time the check was drawn;

(2) Payment was refused by the drawee for lack of funds in the account of the drawer upon presentation within 30 days after delivery and the drawer or someone for him shall not have paid the payee the amount due thereon within ten days after receiving written notice mailed by certified or registered mail or statutory overnight delivery that payment was refused upon such instrument; or

(3) Notice mailed by certified or registered mail or statutory overnight delivery as provided in paragraph (2) of this subsection is returned undelivered to the sender when such notice was mailed within a reasonable time of dishonor to the address printed on the check or given by the drawer at the time of issuance of the check.

(b) The payee of any bad check written in full or partial payment for merchandise or for services rendered on merchandise, delivered at the time of the acceptance of the check, shall have a lien for the face amount of the check on the merchandise so delivered. Such liens shall occupy the same position as mechanics' liens and shall be perfected in the same manner as mechanics' liens.

(c) The payee of any check written in full or partial payment for merchandise or for services rendered on merchandise, delivered at the time of the acceptance of the check and on which the payer subsequently issues a stop payment order, shall have a lien for the face amount of the check on the merchandise so delivered if the stop payment order was issued within five days after the delivery of the merchandise. Such liens shall occupy the same position as mechanics' liens and shall be perfected in the same manner as mechanics' liens.

History.

Ga. L. 1972, p. 342, § 1; Ga. L. 1982, p. 3, § 44; Ga. L. 1983, p. 3, § 33; Ga. L. 1989, p. 805, § 1; Ga. L. 2000, p. 1589, § 4.

Cross references.

Liability of parties on negotiable instruments generally, § 11-3-401 et seq.

Editor's notes.

Ga. L. 2000, p. 1589, § 16, not codified by the General Assembly, provides that this Act is applicable with respect to notices delivered on or after July 1, 2000.

44-14-517. Filing liens imposed under federal Superfund Amendments and Reauthorization Act of 1986.

Pursuant to the authority granted to states by Section 107 of Title I of the federal Superfund Amendments and Reauthorization Act of 1986, P.L. 99-499, 100 STAT. 1613, 1630, all liens imposed pursuant to such federal act shall be filed in the office of the clerk of the superior court of

the county in this state in which the real property subject to the lien is located and shall be filed in the same manner as deeds are recorded.

History. Code 1981, § 44-14-517, enacted by Ga. L. 1987, p. 1023, § 7; Ga. L. 1988, p. 13, § 44.

44-14-518. Liens on aircraft or aircraft engines for labor and materials and for contracts of indemnity.

(a) Any person engaged in repair, storage, servicing, or furnishing supplies or accessories for aircraft or aircraft engines or providing contracts of indemnity for aircraft shall have a lien on such aircraft or aircraft engines for any reasonable charges therefor, including charges for labor, for the use of tools, machinery, and equipment, and for all parts, accessories, materials, oils, lubricants, storage fees, earned premiums, and other supplies furnished in connection therewith. Such lien shall be superior to all liens except liens for taxes, subject to compliance with subsection (b) of this Code section.

(b) Such lien may be asserted by the retention of the aircraft or aircraft engines, and if such lien is asserted by retention of the aircraft or aircraft engines, the lienor shall not be required to surrender the aircraft or the aircraft engine to the holder of a subordinate security interest or lien. When possession of the aircraft or aircraft engine is surrendered by the person claiming the lien, the person claiming the lien shall, within 90 days after such repair, storage, service, supplies, accessories, or contracts of indemnity are furnished:

(1) Provide written notice, subscribed and sworn to by such person or by some person in his or her behalf, giving a just and true account of the demands claimed to be due, with all just credits and the name of the person to whom the repair, storage, service, supplies, accessories, or contracts of indemnity were furnished, the name of the owner of the aircraft or aircraft engines, if known, and a description of the aircraft sufficient for identification, by personal delivery, certified mail, or statutory overnight delivery, return receipt requested, to the following:

(A) The registered owner and others holding recorded interests in the aircraft or aircraft engines at the addresses listed in the Federal Aviation Administration's Aircraft Registry; or

(B) If not a United States registered aircraft or if the aircraft engine is not subject to recordation by the Federal Aviation Administration, to the owner, if known, at his or her last known address, or, if not known, to the person to whom the repair, storage, service, supplies, accessories, or contracts of indemnity were furnished; and

(2) File such written notice for recording in the Federal Aviation Administration's Aircraft Registry in the manner prescribed by federal law under 49 U.S.C. Section 44107 for the filing of such liens for recordation, or, if not a United States registered aircraft or if the aircraft engine is not subject to recordation by the Federal Aviation Administration, with the Georgia Superior Court Clerks' Cooperative Authority or the appropriate recording authority, established by applicable state law, international treaty, or foreign law, in the manner prescribed for the filing of such liens for recordation.

History.

Code 1981, § 44-14-518, enacted by Ga. L. 1994, p. 798, § 1; Ga. L. 2010, p. 776, § 2/HB 1147.

Editor's notes.

Ga. L. 2010, p. 776, § 3/HB 1147, not codified by the General Assembly, provides that the amendment of this Code section shall apply to all liens filed on or after July 1, 2010.

Part 11

Foreclosure of Liens on Realty

RESEARCH REFERENCES

ALR.

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 A.L.R. 135.

Unaccepted tender as affecting lien of real estate mortgage, 93 A.L.R. 12.

Enforceability of single mechanic's lien upon several parcels against less than the entire property liened, 68 A.L.R.3d 1300.

44-14-530. Manner of foreclosure; attachment of lien; proceeds of judicial sale; trial of claim; damages; effect of delivery of possessions.

(a) Liens on real property which are provided for in this chapter, other than mortgages, shall be foreclosed, when not otherwise provided for, by a compliance with his contract by the person claiming the lien and recording his claim and the commencement of an action therefor according to the provisions and requirements of Code Section 44-14-361.1. In declaring for such debt or claim, the claimant of the lien shall set forth his lien and the premise on which he claims it; and, if the lien is allowed, the verdict of the jury, if tried by a jury, or a decision of the court, if the parties consent to trial by the court without a jury, shall set it forth and the judgment and execution shall be awarded accordingly. All such executions shall, however, be subject to all prior encumbrances.

(b) If any real property on which there is a lien is sold by any process from the courts, the purchaser shall obtain the full title; and the lien shall attach to the proceeds of the sale upon a notice by the party claiming the lien to the officer to hold the money for that purpose until

the next session of the superior court. If the claim of lien is disputed by either the plaintiff or the defendant in the process or decree on which the money was raised, an issue shall be ordered and tried as in other cases; and, if it is determined against the claimant, he shall pay such damages, not exceeding 20 percent, as the jury may assess, with interest from the date of the notice to retain, and costs.

(c) The delivery of possession by the person claiming the lien shall not affect his lien.

History.

Ga. L. 1873, p. 42, § 17; Code 1873, § 1990; Code 1882, § 1990; Civil Code 1895, § 2815; Civil Code 1910, § 3365; Code 1933, § 67-2301; Ga. L. 1982, p. 1144, § 2; Ga. L. 1983, p. 1450, § 3.

Editor's notes.

Ga. L. 1982, p. 1144, § 2, which was to have taken effect April 1, 1983, was repealed by Ga. L. 1983, p. 1450, § 4, effective March 31, 1983. However, the 1983 amendment incorporated the revisions contained in the 1982 Act.

JUDICIAL DECISIONS

For a discussion of the need for legislative action to enforce liens, see Lombard v. Trustees of Young Men's Library Ass'n Fund, 73 Ga. 322, 1884 Ga. LEXIS 123 (1884).

Lien laws are in derogation of the common law and must be strictly construed. Montford v. Cordell Lumber Co., 147 Ga. App. 720, 250 S.E.2d 173, 1978 Ga. App. LEXIS 2919 (1978).

Laborer also has common-law right to sue upon contract. — The remedy given by O.C.G.A. §§ 44-14-380, 44-14-530, and 44-14-550 is not exclusive, and does not deprive a laborer of common-law right to sue upon a contract, but is merely cumulative of that right. Jennings v. Lanham, 19 Ga. App. 79, 90 S.E. 1038, 1916 Ga. App. LEXIS 54 (1916).

Function of foreclosure action. — The function of a foreclosure action is not to establish for the first time when and what materials were furnished for a particular job. It is not an action in personam, when the contractor is not a party. The purpose is merely to absolutely establish a special lien against the property involved, and no general verdict and judgment can be obtained therein against the owner. Ben O'Callaghan Co. v. Schmincke, 376 F. Supp. 1361, 1974 U.S. Dist. LEXIS 8116 (D. Ga. 1974).

Nature of actions by materialmen against contractors and owners. — The initial action by a materialman against the contractor is in personam, the foreclosure action against the owner is strictly in rem. Ben O'Callaghan Co. v. Schmincke, 376 F. Supp. 1361, 1974 U.S. Dist. LEXIS 8116 (D. Ga. 1974).

O.C.G.A. § 44-14-362 must be followed in commencing lien action. — Where the plaintiff does not commence an action on its lien according to the provisions and requirements of O.C.G.A. § 44-14-361.1, one of the conditions precedent to foreclosing a lien under O.C.G.A. § 44-14-530 is absent and the plaintiff cannot prevail. Ben O'Callaghan Co. v. Schmincke, 376 F. Supp. 1361, 1974 U.S. Dist. LEXIS 8116 (D. Ga. 1974).

Mechanic's lien void if O.C.G.A. § 44-14-530 not strictly followed. — The procedure for asserting a lien on real estate for labor and materials by a mechanic is a statutory right and must be followed strictly to be made available, and when done otherwise, it wants legal sanction and is without legal effect. Peters v. Thompson, 114 Ga. App. 228, 150 S.E.2d 842, 1966 Ga. App. LEXIS 692 (1966).

Denial of a builder's motion for partial summary judgment on a lien foreclosure claim was proper as a contract was a condition precedent to foreclosing a lien under O.C.G.A. § 44-14-530(a) and a fact issue remained as to whether there was a contract or that the parties assented to the contract. Dan J. Sheehan Co. v. Fairlawn on Jones Homeowners Ass'n, 312 Ga. App. 787, 720 S.E.2d 259, 2011 Ga. App. LEXIS 1041 (2011).

Section inapplicable unless property sold and lien transferred to proceeds. — O.C.G.A. § 44-14-530 has no application to the original foreclosure of the lien against the owner but only to cases where the property has been sold, the lien transferred to the proceeds, and the lien claimant files to claim to the proceeds. Bankston v. Smith, 134 Ga. App. 882, 216 S.E.2d 634, 1975 Ga. App. LEXIS 2207 (1975), rev'd, 236 Ga. 92, 222 S.E.2d 375, 1976 Ga. LEXIS 775 (1976).

Absent rule nisi, mortgage foreclosure action fails. — Where there is a total absence of a rule nisi in a mortgage foreclosure, the action fails, and the mere filing of the petition will not suffice to authorize the action to be treated as commenced and pending. York v. Edwards, 52 Ga. App. 388, 183 S.E. 339, 1936 Ga. App. LEXIS 646 (1936).

Laborer need not describe property specifically. — That a laborer desires to claim a general lien on all the property of the employer and is unable to describe such property specifically, does not prevent the laborer from asserting a lien and enforcing it as such. The laborer need not do an impossible thing. Love v. Cox, 68 Ga. 269, 1881 Ga. LEXIS 365 (1881).

Laborer may enforce a lien on employer's personalty and realty in separate actions. Love v. Cox, 68 Ga. 269, 1881 Ga. LEXIS 365 (1881).

Where sale proceeds stand in lieu of property sold lienholders must assert lien against proceeds. — Where liens are being asserted against real estate, and the property is ordered sold by the trial judge, with the proviso that the funds shall stand in lieu of the real estate, neither of the lienholders may thereafter assert a lien against the real estate, but must proceed against the funds derived from such sale. Parker v. Cherokee Bldg. Supply Co., 207 Ga. 710, 64 S.E.2d 51, 1951 Ga. LEXIS 509 (1951).

No affidavit is required to file or foreclose a lien against real estate. Southwire Co. v. Metal Equip. Co., 129 Ga. App. 49, 198 S.E.2d 687, 1973 Ga. App. LEXIS 873, cert. denied, 414 U.S. 1092, 94 S. Ct. 723, 38 L. Ed. 2d 550, 1973 U.S. LEXIS 1757 (1973).

Laborer's lien must be under section not affidavit. — A laborer's lien upon realty can only be foreclosed by action under O.C.G.A. § 44-14-530, not by affidavit. Allred v. Haile, 84 Ga. 570, 10 S.E. 1095, 1890 Ga. LEXIS 289 (1890).

Foreclosure proceedings for condominium assessments distinct from other lien proceedings. — It is clear that the foreclosure proceedings set forth in O.C.G.A. § 44-3-109 are simplified, and distinct from the proceedings for the creation and enforcement of other types of liens. Propes v. Stonington Homeowners Ass'n, 149 Ga. App. 135, 253 S.E.2d 813, 1979 Ga. App. LEXIS 1755 (1979).

Condominium foreclosure need not meet standards for mechanics' liens. — O.C.G.A. § 44-3-109 does not require procedural compliance with O.C.G.A. § 44-14-530 which provides for the enforcement of mechanics' liens. Propes v. Stonington Homeowners Ass'n, 149 Ga. App. 135, 253 S.E.2d 813, 1979 Ga. App. LEXIS 1755 (1979).

Assessment foreclosure proceedings resemble other real property lien proceedings in superior court. — The sole requirements for creation of the lien for assessments are contained in O.C.G.A. § 44-3-109, and it is only the actual foreclosure proceedings which must be in the same manner as other liens for the improvement of real property. Thus, the judgment and execution of the lien must be entered by the appropriate superior court. Propes v. Stonington Homeowners Ass'n, 149 Ga. App. 135, 253 S.E.2d 813, 1979 Ga. App. LEXIS 1755 (1979).

Proceeding to foreclose attorney's lien upon real property. — A proceeding to foreclose an attorney's lien upon real property is to be brought as is a proceeding to foreclose a mortgage upon

land. The process is a rule nisi issued by the court, and not a process issued by the clerk as in ordinary cases. York v. Edwards, 52 Ga. App. 388, 183 S.E. 339, 1936 Ga. App. LEXIS 646 (1936).

County court has jurisdiction to render a judgment foreclosing a mechanics' lien on realty where the amount is within its jurisdiction. Wheatley v. Blalock, 82 Ga. 406, 9 S.E. 168, 1889 Ga. LEXIS 390 (1889).

Action enjoining foreclosure brought where defendant resides. — An action to enjoin a foreclosure under a power of sale must be brought in the county where the defendant resides. Nylen v. Barbaris, 232 Ga. 79, 205 S.E.2d 303, 1974 Ga. LEXIS 870 (1974).

Any writing importing assertion of lien is sufficient notice. — Any writing importing an assertion of a lien, which comes to the hands of an officer at or before the sale, is a sufficient notice to hold up the money, if the purpose of a more regular and direct notice is accomplished. Loudon v. Coleman, 59 Ga. 653, 1877 Ga. LEXIS 365 (1877).

Correction of mere irregularities in process or service. — Where valid process has been issued with a suit setting out a cause of action, and there has been no sufficient service through no fault or laches of the plaintiff or plaintiff's attorney, the judge may by order provide for the correction of any mere irregularity in the process or service; and after the perfection of service, even though subsequent to the return term, such service will relate to the date of the filing of the petition, which will be treated as the time of commencement of the suit. York v. Edwards, 52 Ga. App. 388, 183 S.E. 339, 1936 Ga. App. LEXIS 646 (1936).

Service of uncertified copy of rule nisi not void. — In the service of a rule nisi issued by the judge in proceedings to foreclose an attorney's lien on land, analogous to a rule nisi in mortgage foreclosure proceedings, the service of an ordinary copy instead of a certified copy of the rule nisi, especially when in effect so provided in the rule nisi, does not render the service and proceedings void. York v. Edwards, 52 Ga. App. 388, 183 S.E. 339, 1936 Ga. App. LEXIS 646 (1936).

Service may be corrected. — Although service of a certified copy of the rule nisi is the better practice, the service of an uncertified copy is at most an irregularity, and if properly corrected when objected to, under an amendatory order taken during the return term of the original rule nisi requiring service of certified copies of the original rule nisi and the amendatory order, the amended proceedings are not subject to the motion to dismiss. The subsequent service relates back to the original petition when filed within the period of the statute of limitations, and the proceedings are not barred by the statute. York v. Edwards, 52 Ga. App. 388, 183 S.E. 339, 1936 Ga. App. LEXIS 646 (1936).

Judgment where no jury must follow same requirements. — When in a proceeding under O.C.G.A. § 44-14-530, the judge awards judgment without a jury, the judgment so awarded should contain all that the verdict, of which it is a substitute, should show. J.S. Schofield & Son v. Stout, Mills & Temple, 59 Ga. 537, 1877 Ga. LEXIS 326 (1877).

When judgment conclusive as to defendant's right to assert lien against property. — Where the court had jurisdiction of the parties and of the subject matter, and the issue was before the court as to whether or not the property should be sold, and the judgment directing the sale of proceed, with the funds to stand in lieu of the property, has not been reversed, vacated, or set aside, that judgment is conclusive on the right of the defendant to thereafter undertake to assert a lien against the property. Parker v. Cherokee Bldg. Supply Co., 207 Ga. 710, 64 S.E.2d 51, 1951 Ga. LEXIS 509 (1951).

Materialman's lien inchoate until judgment perfects it. — The lien provided for in favor of a materialman is not absolute, but must be completed, made good, or perfected in accordance with the provisions of O.C.G.A. § 44-14-361.1. It is only inchoate or incipient until a judgment finally perfects it. Carter-Moss Lumber Co. v. Short, 66 Ga. App. 330, 18 S.E.2d 61, 1941 Ga. App. LEXIS 209 (1941).

Failure to perfect voids lien. — Before the rendition of a judgment in favor of

a materialman's lien claimant the claimed lien is only inchoate, and the failure of the claimant to perfect the lien as provided by O.C.G.A. § 44-14-361.1 vitiates it, not only as against third persons, but as against the claimant. Carter-Moss Lumber Co. v. Short, 66 Ga. App. 330, 18 S.E.2d 61, 1941 Ga. App. LEXIS 209 (1941).

Verdict creating lien is prerequisite to judgment and execution. — O.C.G.A. § 44-14-530 requires that the jury specifically render a verdict creating a lien before judgment and execution may be awarded thereon. Montford v. Cordell Lumber Co., 147 Ga. App. 720, 250 S.E.2d 173, 1978 Ga. App. LEXIS 2919 (1978).

Judgment void if no jury verdict. — Where there appears in the record no jury verdict setting forth the claim of lien, there is nothing upon which judgment and execution may be awarded accordingly. Therefore, the judgment of a trial court in which a lien is created is void. Montford v. Cordell Lumber Co., 147 Ga. App. 720, 250 S.E.2d 173, 1978 Ga. App. LEXIS 2919 (1978).

Setting aside void judgment is not error. — Where no proof was offered in support of the lien and no verdict of the jury was had thereon, there is nothing upon which the judgment and execution could be "awarded accordingly." Subsequent judgment and execution are, respectively, illegally entered and issued, and the trial court does not err in setting aside the judgment and directing the clerk to mark the execution issued thereon canceled of record. Peters v. Thompson, 114 Ga. App. 228, 150 S.E.2d 842, 1966 Ga. App. LEXIS 692 (1966).

Verdict cannot designate amount if not specified in petition. — Where a petition contains only a prayer that a lien be set up and established, a verdict finding a designated amount in the plaintiff's favor is unauthorized. Ryals v. Smith, 102 Ga. 768, 29 S.E. 968, 1898 Ga. LEXIS 753 (1898). But see Spirides v. Victory Lumber Co., 76 Ga. App. 78, 45 S.E.2d 65, 1947 Ga. App. LEXIS 374 (1947).

Where verdict gives full amount claimed, jury presumably finds for lien. — While it is true that the purpose of a foreclosure suit is to establish a special lien against the property involved, and no general verdict and judgment can be obtained therein against the owner, the better practice in such cases is for the verdict to show a distinct finding by the jury that the plaintiff is entitled to a lien and to a given amount. But where, in such a proceeding, the verdict was for the full amount claimed, it could have no other construction than that the jury intended to find in favor of the lien claimed. Spirides v. Victory Lumber Co., 76 Ga. App. 78, 45 S.E.2d 65, 1947 Ga. App. LEXIS 374 (1947). But see Ryals v. Smith, 102 Ga. 768, 29 S.E. 968, 1898 Ga. LEXIS 753 (1898).

Judge may order sale to proceed although judgment vacated. — Although property is advertised for sale under a judgment which is later vacated and set aside, the trial judge has authority to order that the sale proceed as advertised and that the funds be held in lieu of the property. Parker v. Cherokee Bldg. Supply Co., 207 Ga. 710, 64 S.E.2d 51, 1951 Ga. LEXIS 509 (1951).

Purchaser at such sale obtains full title. Parker v. Cherokee Bldg. Supply Co., 207 Ga. 710, 64 S.E.2d 51, 1951 Ga. LEXIS 509 (1951).

Dormancy of judgment on materialman's lien. — A judgment perfecting a claimed lien of a materialman is within O.C.G.A. § 9-12-60, providing that a judgment shall become dormant under circumstances therein named. Carter-Moss Lumber Co. v. Short, 66 Ga. App. 330, 18 S.E.2d 61, 1941 Ga. App. LEXIS 209 (1941).

Trial court erred in granting summary judgment to the lumber company in the company's suit against the property owner to foreclose on a materialman's lien to recover the price of materials sold to the contractor and used to construct the owner's home because the dormancy statute barred foreclosure on the lien more than seven years after the lien was perfected because, when the lumber company failed to take action on the default judgment against the contractor, and the judgment became unenforceable at the end of seven years, the lien was no longer valid and there was nothing to foreclose upon. Lang v. Brand-Vaughan Lumber Co., Inc., 339

Ga. App. 710, 792 S.E.2d 461, 2016 Ga. App. LEXIS 591 (2016), cert. denied, No. S17C0792, 2017 Ga. LEXIS 498 (Ga. June 5, 2017).

RESEARCH REFERENCES

Am. Jur. 2d.
51 Am. Jur. 2d, Liens, § 79 et seq.
C.J.S.
53 C.J.S., Liens, § 29 et seq.
ALR.
Right of purchaser at foreclosure sale to have taxes paid out of proceeds, 43 A.L.R. 100.

Vendor's remedy by foreclosure of contract for sale of real property, 77 A.L.R. 270.

Interest subject to a homestead right in others as subject to lien of judgment or to attachment or execution, 122 A.L.R. 1150.

Constitutional validity of statute providing for in rem or summary foreclosure of delinquent tax liens on real property, 160 A.L.R. 1026.

Demand for or submission to arbitration as affecting enforcement of mechanic's lien, 73 A.L.R.3d 1042.

Judgment lien or levy of execution on one joint tenant's share or interest as severing joint tenancy, 51 A.L.R.4th 906.

44-14-531. Right of transferee to foreclose.

Upon the simple transfer or assignment of any rent note, mortgage note, or other such evidence of debt as mentioned in Code Sections 44-14-325 and 44-14-326, the person to whom the same may be transferred or assigned shall, without more, have full power and authority to foreclose or enforce the evidences of debt in his own name.

History.
Ga. L. 1899, p. 90, § 3; Civil Code 1910, § 3347; Code 1933, § 67-2302.

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Rights of assignee of security deed. — Where one becomes owner of title conveyed by security deed and of indebtedness secured thereby, and power of sale not expressed in said deed as limited to grantee, but having been conferred upon grantee or "assigns," the owner is entitled to exercise the power to same extent as grantee. Universal Chain Theatrical Enters., Inc. v. Oldknow, 176 Ga. 492, 168 S.E. 239, 1933 Ga. LEXIS 207 (1933).

A transferee of rent note may foreclose landlord's lien by distress. Beall v. Patterson, 146 Ga. 233, 91 S.E. 71, 1916 Ga. LEXIS 677 (1916); International Agric. Corp. v. Powell, 31 Ga. App. 348, 120 S.E. 668, 1923 Ga. App. LEXIS 942 (1923).

How holder of mortgage note may foreclose. — The simple endorsement of the name of the payee in a mortgage note payable to order, on the back thereof, gives the holder for value the right to foreclose in own name. Setze v. First Nat'l Bank, 140 Ga. 603, 79 S.E. 540, 1913 Ga. LEXIS 195 (1913).

No need to charge section. — It is not error for the trial court to fail to charge the substance of O.C.G.A. § 44-14-531 in the absence of a request. First Nat'l Bank v. Vinson, 102 Ga. App. 828, 118 S.E.2d 225, 1960 Ga. App. LEXIS 759 (1960).

RESEARCH REFERENCES

Am. Jur. 2d.
6 Am. Jur. 2d, Assignments, § 50.
C.J.S.
6A C.J.S., Assignments, § 76.

ALR.
Interest subject to a homestead right in others as subject to lien of judgment or to attachment or execution, 122 A.L.R. 1150.

Part 12

Foreclosure of Liens on Personalty

44-14-550. Manner of foreclosure; demand; forfeiture of lien; affidavit; notice; petition for and conduct of probable cause hearing; possession; bond; petition for full hearing; authorization of foreclosure; damages; limitation.

Liens on personal property, other than mortgages, when not otherwise provided for, shall be foreclosed in accordance with the following provisions:

(1) There shall be a demand on the owner, agent, or lessee of the property for payment and a refusal to pay; and such demand and refusal shall be averred. If, however, no such demand can be made on account of the absence from the county of his residence of the party creating the lien on personal property, by reason of his moving or absconding from the county of his residence, or other acts which show an intention to be absent from the county so as to defeat the demand, the party holding the lien shall not be obliged to make a demand but may foreclose without such demand; provided, however, that, if possession is retained or the lien recorded, the owner-debtor may contest the validity of the amount claimed to be due by making written demand upon the lienholder. If, upon receipt of the demand, the lienholder fails to institute foreclosure proceedings within ten days, where possession has been retained, or within 30 days, where possession has been surrendered, the lien is forfeited;

(2) A person asserting the lien, either for himself or as a guardian, administrator, executor, or trustee, may move to foreclose the lien by making an affidavit to a court of competent jurisdiction showing all the facts necessary to constitute a lien and the amount claimed to be due. The plaintiff shall verify the statement by oath or affirmation and shall affix his signature thereto;

(3) Upon the affidavit being filed, the clerk or a judge of the court shall serve notice upon the owner, the recorded lienholders, and the lessee of the property of a right to a hearing to determine if reasonable cause exists to believe that a valid debt exists. The hearing must be petitioned for within five days after the receipt of the

notice; and, if no petition for the hearing is filed within the time allowed, the lien will conclusively be deemed a valid one and foreclosure thereof allowed;

(4) If a petition for a hearing is filed within the time allowed, the court shall set the hearing within ten days of the filing of the petition. If at the probable cause hearing the court determines that reasonable cause exists to believe that a valid debt exists, the person asserting the lien shall be given possession of the property or the court shall obtain possession of the property as ordered by the court. The defendant may retain possession of the property by giving bond and security for the amount determined to be due and for costs of the action;

(5) Within five days of the probable cause hearing, the defendant must petition the court for a full hearing on the validity of the debt if a further determination of the validity of the debt is desired. If no such petition is filed, the lien on the amount determined reasonably due shall conclusively be deemed a valid one and foreclosure thereof allowed. If such a petition is filed, the court shall set a full hearing thereon within 30 days of the filing of the petition. Upon the filing of the petition by the defendant, neither the prosecuting lienholder nor the court may sell the property, although possession of the property may be retained;

(6) If after a full hearing the court finds that a valid debt exists, the court shall authorize the foreclosure upon and the sale of the property subject to the lien to satisfy the debt if the debt is not otherwise immediately paid;

(7) If the court finds the actions of the person asserting the lien in retaining or seeking possession of the property were not taken in good faith, the court in its discretion may award damages to the owner, agent, or lessee due to the deprivation of the use of the property; and

(8) Any proceeding to foreclose a lien on personal property must be instituted within one year from the time the lien is recorded or is asserted by retention.

History.
Ga. L. 1980, p. 822, § 1.

Law reviews.
For note discussing the Motor Vehicle Certificate of Title Act (Ch. 40-8) and its impact, see 13 Mercer L. Rev. 258 (1961).

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Analysis

General Consideration
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General Consideration

Editor's notes. — In light of the similarity of the statutory provisions, decisions under former Code 1873, § 1991; former Code 1882, § 1991; former Civil Code 1895, § 2816; former Civil Code 1910, § 3366; former Code 1933, § 67-2401, are included in the annotations for this Code section.

1. General Applicability

Parties cannot agree to forego foreclosure at expense of other creditors. — The law does not enable the parties to dispense with foreclosure, and settle up in their own way to the prejudice of other lienors. Stallings v. Harrold, Johnson & Co., 60 Ga. 478, 1878 Ga. LEXIS 510 (1878) (decided under former Code 1873, § 1991).

General liens for supplies Code 1910, § 3348 (see O.C.G.A. § 44-14-340) are foreclosed under this section, and when so foreclosed, are equivalent to common-law distress. Turner v. Sitton, 160 Ga. 215, 127 S.E. 847, 1925 Ga. LEXIS 121 (1925) (decided under former Code 1910, § 3366).

Liens for rent are enforced by distress and not under this section. Colclough & Co. v. Mathis, 79 Ga. 394, 4 S.E. 762, 1887 Ga. LEXIS 236 (1887) (decided under former Code 1882, § 1991).

Set-offs unrelated to transaction not allowable. — In a proceeding under this section, matters in the nature of a set-off, not arising out of the transaction on which the lien is based should be excluded. White v. Steed, 25 Ga. App. 353, 103 S.E. 172, 1920 Ga. App. LEXIS 799 (1920) (decided under former Code 1910, § 3366).

Garnishment proceedings cannot be predicated upon the foreclosure of a lien under this section. Weston v. Beverly & McCollum, 10 Ga. App. 261, 73 S.E. 404, 1912 Ga. App. LEXIS 451 (1912); Lane v. Brinson, 12 Ga. App. 760, 78 S.E. 725, 1913 Ga. App. LEXIS 745 (1913) (decided under former Code 1910, § 3366).

Railway sale of stored property must conform to section. — Where a railway company has a claim for storage charges only, it is a bailee for hire, and any sale by the railway company of the property stored, for the purpose of obtaining pay for its storage charges, must be in conformity with the provisions of this section. Seaboard A.L. Ry. v. Roberds, 43 Ga. App. 558, 159 S.E. 742, 1931 Ga. App. LEXIS 457 (1931) (decided under former Code 1910, § 3366).

When corporation cannot execute replevy bond in laborer's lien foreclosure. — A corporation has no legal authority to execute a replevy bond in a laborer's lien foreclosure under this section brought against the principal on the bond, where such a contract of suretyship is not authorized by the corporate charter and the foreclosure does not concern the rights or business of the corporation. Hill v. Daniel, 52 Ga. App. 427, 183 S.E. 662, 1936 Ga. App. LEXIS 656 (1936) (decided under former Code 1933, § 67-2401).

Landlord's lien for supplies supercedes unforeclosed laborer's lien. — In contest between unforeclosed laborer's lien and a duly foreclosed landlord's lien for supplies, the latter is entitled to payment in full, without regard to rank of the respective liens. In re Empire Granite Co., 42 F. Supp. 450, 1942 U.S. Dist. LEXIS 3314 (D. Ga. 1942) (decided under former Code 1933, § 67-2401).

Laborer may also sue on contract at common law. — The remedy given by this section and Code 1910, §§ 3334 and 3365 (see O.C.G.A. §§ 44-14-380, 44-14-530) is not exclusive, and does not deprive a laborer of his common-law right to sue upon a contract, but is merely cumulative of that right. Jennings v. Lanham, 19 Ga. App. 79, 90 S.E. 1038, 1916 Ga. App.

General Applicability (Cont'd)

LEXIS 54 (1916) (decided under former Code 1910, § 3366).

All sawmills, whether they are in fact fixtures or not, are treated as personalty under this section. Empire Lumber Co. v. Kiser & Co., 91 Ga. 643, 17 S.E. 972, 1893 Ga. LEXIS 298 (1893) (decided under former Code 1882, § 1991).

Contractor for planting and picking cotton could assert lien. — Based on evidence that an independent contractor was hired to plant and pick cotton—not to oversee others while they completed the contract—the contractor met the burden under O.C.G.A. § 44-14-550 of showing reasonable cause that a valid debt existed to support the contractor's special lien. Slappey v. Slappey, 296 Ga. App. 773, 676 S.E.2d 283, 2009 Ga. App. LEXIS 333 (2009).

2. Demand

Demand for payment made on the day when payment is due is sufficient, as being made after the debt becomes due. Favors v. Johnson, 79 Ga. 553, 4 S.E. 925, 1887 Ga. LEXIS 267 (1887) (decided under former Code 1882, § 1991).

Affidavit must show demand made when payment due. — It is necessary that the affidavit of foreclosure should show affirmatively that demand for payment was made after the debt became due. Anderson v. Beard, 54 Ga. 137, 1875 Ga. LEXIS 98 (1875); Central R.R. & Banking Co. v. Sawyer, 78 Ga. 784, 3 S.E. 629, 1887 Ga. LEXIS 77 (1887) (decided under former Code 1873, § 1991; Code 1882, § 1991).

Depositary for hire must allege demand when payment due. — In order for a depositary for hire (Civil Code 1910 §§ 3494, 3501) (see O.C.G.A. §§ 44-12-90, 44-12-92, 44-14-402) to foreclose his lien under this section, it is incumbent upon him to allege in the affidavit made for that purpose, among other things, that he made demand upon the depositor for payment after the amount claimed became due. Where an attempted foreclosure was made in which the affidavit omitted such averment, a sheriff's sale made thereunder was without authority of law and void. Vandalsem v. Caldwell, 33 Ga. App. 88, 125 S.E. 716, 1924 Ga. App. LEXIS 749 (1924) (decided under former Code 1910, § 3366).

It is sufficient for affidavit to allege payment demanded from a company general superintendent. Hobbs v. Georgia Lumber Co., 74 Ga. 371, 1884 Ga. LEXIS 395 (1884) (decided under former Code 1882, § 1991).

Laborer must prove demand and refusal. — In an action to foreclose a laborer's lien the plaintiff laborer must allege and prove a demand upon the defendant employer for the amount claimed and a refusal by the defendant employer to pay. Brown v. Phillips, 90 Ga. App. 661, 83 S.E.2d 846, 1954 Ga. App. LEXIS 778 (1954) (decided under former Code 1933, § 67-2401).

Demand must be averred, proved or excused. — This section requires that the requisite demand must be both averred in the foreclosure affidavit and proved, or excused as provided therein. Cummings v. Adams, 63 Ga. App. 74, 10 S.E.2d 106, 1940 Ga. App. LEXIS 14 (1940) (decided under former Code 1933, § 3366).

Sharecropper cannot win without proof of demand when counter affidavit denies demand. — Where a sharecropper seeks to foreclose his laborer's lien and the foreclosure affidavit avers that a timely demand was made on the landlord by the sharecropper for the money alleged to be due the latter, and the counteraffidavit denies that such demand was made, and a demand is not proved, excused, or waived, the sharecropper fails to make out his case and the direction of a verdict for the landlord is not error. Cummings v. Adams, 63 Ga. App. 74, 10 S.E.2d 106, 1940 Ga. App. LEXIS 14 (1940) (decided under former Code 1933, § 67-2401).

No demand is necessary where the tenant is out of the state. Hopkins v. Pedrick, 75 Ga. 706, 1885 Ga. LEXIS 212 (1885) (decided under former Code 1882, § 1991).

Tenant removing crops. — Since a landlord's special lien on crops for supplies furnished may be foreclosed before the debt is due, if the tenant is removing

or seeking to remove crops from the premises, a demand for payment is not, in such a case, an essential prerequisite to the right to foreclose. Vaughn v. Strickland, 108 Ga. 659, 34 S.E. 192, 1899 Ga. LEXIS 317 (1899) (decided under former Code 1895, § 2816).

Effect of affidavit omitting demand and refusal when member of foreclosing firm buys item. — When the affidavit upon which a mechanic's lien on personalty is foreclosed, fails to state that demand for payment of the debt is made on the owner of the property, and payment refused, and the member of the firm of mechanics who makes such affidavit becomes the purchaser, that person obtains no title. Erskine v. Wiggins, 58 Ga. 186, 1877 Ga. LEXIS 49 (1877) (decided under former Code 1873, § 1991).

Where no evidence of demand, judgment cannot be for lien. — Where an attempt is made to foreclose a laborer's lien, a demand must be alleged, and where, on the trial of a counteraffidavit to such foreclosure, the evidence shows that no such demand was made, the judgment of the trial court finding in favor of the lien is error. Newman v. Cash, 47 Ga. App. 39, 169 S.E. 520, 1933 Ga. App. LEXIS 282 (1933) (decided under former Code 1910, § 3366).

3. Affidavit

Procedure for enforcing laborer's lien. — The laborer may enforce such lien on personal property by filing an affidavit in the proper court in the county of the residence of the employer or in the county where such property of the employer is located, setting forth the essential facts necessary to constitute such lien, whereupon an execution shall issue instanter, the same being final process, unless and until arrested or controverted by a proper counter affidavit. Harris v. Houston, 51 Ga. App. 116, 179 S.E. 645, 1935 Ga. App. LEXIS 588 (1935) (decided under Code 1933, § 67-2401).

Sale void if affidavit void. — If the affidavit is void, as where no oath was in fact taken, a sale made in pursuance thereof is void. Bryan v. Madison Supply Co., 135 Ga. 171, 68 S.E. 1106, 1910 Ga. LEXIS 463 (1910); Bertha Mineral Co. v. Buie, 27 Ga. App. 660, 109 S.E. 539, 1921 Ga. App. LEXIS 358 (1921) (decided under former Code 1895, § 2816; Code 1910, § 3366).

For sufficiency of affidavit, see Moody v. Travis, 76 Ga. 832, 1886 Ga. LEXIS 137 (1886) (decided under former Code 1882, § 1991).

Agent may make affidavit for client contesting the amount or justice of lienholder's claim in foreclosure on personalty. Jackson v. Fincher, 128 Ga. App. 148, 195 S.E.2d 762, 1973 Ga. App. LEXIS 1418 (1973) (decided under former Code 1933, § 67-2401).

Execution issued in favor of lienholder, although agent files affidavit. — Although the affidavit in proceedings under this section is made by the agent of the lienholder, the execution should issue in favor of the lienholder. Mullins v. Dowling, 20 Ga. App. 138, 92 S.E. 763, 1917 Ga. App. LEXIS 752 (1917) (decided under former Code 1910, § 3366).

Affidavits handed to clerk are properly filed. — Where affidavits to foreclose laborer's liens are made and handed to the clerk for the clerk to issue executions thereon, they are in fact filed in the clerk's office. Floyd v. Chess-Carley Co., 76 Ga. 752, 1886 Ga. LEXIS 110 (1886) (decided under former Code 1882, § 1991).

City court may foreclose sawmill lien where amount not exceed county jurisdiction. — A city court has jurisdiction to foreclose a lien in favor of the proprietor of a sawmill on the product of the mill, for work done on material furnished by another, at least where the principal of the amount claimed does not exceed the jurisdiction of the county court. Chambliss v. Hawkins, 123 Ga. 361, 51 S.E. 337, 1905 Ga. LEXIS 468 (1905) (decided under Code 1895, § 2816).

County court may issue execution. — The statutory provisions that the judges of the county courts shall have jurisdiction to foreclose mortgages on personal property and liens includes power of the judge to take the statutory affidavit and issue execution as provided in this section. Gunn v. J.M. Johnson & Co., 154 Ga. 568, 114 S.E. 709, 1922 Ga. LEXIS 420 (1922) (decided under former Code 1910, § 3366).

For case involving jurisdiction of justice of the peace. — See Gray v.

Affidavit (Cont'd)

Joiner, 127 Ga. 544, 56 S.E. 752, 1907 Ga. LEXIS 423 (1907) (decided under former Code 1895, § 2816).

Affidavit invalid where filed before justice of peace without oath. — Where, in an effort to foreclose, the person asserting the lien procures a justice of the peace to "write out the lien and the affidavit," and then "signed," and the justice of the peace "attests" the signature without the administration of any oath, the paper so executed does not constitute a valid affidavit. Bryan v. Madison Supply Co., 135 Ga. 171, 68 S.E. 1106, 1910 Ga. LEXIS 463 (1910) (decided under former Code 1895, § 2816).

Completion of contract need not be alleged or proved where lienee has waived or prevented completion. Haralson v. Speer, 1 Ga. App. 573, 58 S.E. 142, 1907 Ga. App. LEXIS 44 (1907) (decided under former Code 1895, § 2816).

Laborer need not describe employer's property perfectly in general lien. — That a laborer desires to claim a general lien on all the property of the employer and is unable to describe such property specifically, does not prevent the laborer from asserting a lien and enforcing it as such. The laborer need not do an impossible thing. Love v. Cox, 68 Ga. 269, 1881 Ga. LEXIS 365 (1881) (decided under former Code 1873, § 1991).

The affidavit, under this section, to foreclose a general laborer's lien, need not specify any particular items or articles of property. Allred v. Haile, 84 Ga. 570, 10 S.E. 1095, 1890 Ga. LEXIS 289 (1890) (decided under former Code 1882, § 1991).

Laborer with execution need not prove debt or amount in trial of claim. — An execution issued upon the foreclosure of a laborer's lien is, as to a claimant of property levied on thereunder, final process, and upon the trial of a claim case arising upon the levy of such an execution, it is not necessary for the laborer to prove either the amount of the debt, or the existence of the laborer's lien. Allen v. Middleton, 99 Ga. 758, 27 S.E. 752, 1896 Ga. LEXIS 514 (1896) (decided under former Code 1882, § 1991).

An affidavit commanding the officer to levy on immature crops is not void, nor does a return thereon showing an attempt to levy on such crops render a levy on other property at the same time void. Faircloth v. Webb, 125 Ga. 230, 53 S.E. 592, 1906 Ga. LEXIS 99 (1906) (decided under former Code 1895, § 2816).

Property claimed in landlord's supply lien is implicitly crops grown during year supplies given. — It is not necessary, in an affidavit to foreclose a landlord's lien for supplies furnished, to set out the property on which the lien is claimed. Execution is to be issued against the property subject to the lien; and the law specifies that the property so subject is the crops raised during the year when the supplies were furnished. Ware v. Blalock, 72 Ga. 804, 1884 Ga. LEXIS 323 (1884) (decided under former Code 1882, § 1991).

When claimant cannot be made defendant in fi. fa. by amendment. — Although the proceeding before the filing of a counter-affidavit and the giving of a replevy bond may, in effect, be a proceeding in rem, it is not such a proceeding as may be amended by making a claimant to the property levied on, a defendant is fi. fa. unless some equitable reason be shown therefor. Farrar v. Joyce, 60 Ga. App. 675, 4 S.E.2d 708, 1939 Ga. App. LEXIS 137 (1939) (decided under former Code 1933, § 67-2401).

Special lien cannot substitute landowner for contractor as defendant, by amendment. — Laborer's special lien foreclosed against A, and levied on property alleged to be the property of A, to which property B files a claim, cannot be amended by alleging that B is the owner of the property, that the work for which the lien arose was done for B's benefit, and that B knowingly accepted such benefit, as such an amendment in effect substitutes B (of whom no demand for payment had been made within 12 months from the date the debt became due) for A as a party defendant, and this may not be done unless there is an equitable reason therefor. Farrar v. Joyce, 60 Ga. App. 675, 4 S.E.2d 708, 1939 Ga. App. LEXIS 137 (1939) (decided under former Code 1933, § 67-2401).

4. Counteraffidavit

Filing a counteraffidavit is not a waiver of a failure to allege demand. Central R.R. & Banking Co. v. Sawyer, 78 Ga. 784, 3 S.E. 629, 1887 Ga. LEXIS 77 (1887) (decided under former Code 1882, § 1991).

The counteraffidavit cannot serve as a demurrer (now motion to dismiss). Boyce v. Day, 3 Ga. App. 275, 59 S.E. 930, 1907 Ga. App. LEXIS 617 (1907) (decided under former Code 1895, § 2816).

Counteraffidavit may be interposed anytime before sale. — A counteraffidavit to the foreclosure of a laborer's lien may be interposed at any time before the sale of the defendant-owner's there being no law requiring its interposition at the first or any other term after the foreclosure. Harris v. Houston, 51 Ga. App. 116, 179 S.E. 645, 1935 Ga. App. LEXIS 588 (1935) (decided under former Code 1910, § 3366).

A counteraffidavit to the foreclosure of a laborer's lien may be interposed at any time before the sale of the defendant's property. Bowman v. Quick, 106 Ga. App. 213, 126 S.E.2d 536, 1962 Ga. App. LEXIS 675 (1962) (decided under former Code 1933, § 67-2401).

Oath in counteraffidavit that affiant is lienee's agent unnecessary. — Only defensive matter to a foreclosure of a lien on personalty being required in a counteraffidavit filed by the lienee under this section, such an affidavit, when made by the lienee's agent, as provided in O.C.G.A. § 10-6-80, need not contain a sworn averment that the affiant is agent for the lienee. It is sufficient if such affidavit is in fact made by the lienee's duly authorized agent, and where the affidavit purports on its face to be executed by such agent, the agency is presumed and the affidavit is prima facie valid. Georgia Lumber Co. v. Thompson, 34 Ga. App. 281, 129 S.E. 303, 1925 Ga. App. LEXIS 222 (1925) (decided under former Code 1910, § 3366).

Counteraffidavit must be filed with levying officer to permit trial. — This section contemplates that the counteraffidavit to the foreclosure of a laborer's lien should be filed with the levying officer as a condition precedent to returning the case to court for trial. Harvey v. Johnson, 28 Ga. App. 287, 111 S.E. 576, 1922 Ga. App. LEXIS 455 (1922) (decided under former Code 1910, § 3366).

Filing counteraffidavit with court and notification of levying officer is sufficient. — The filing of the counteraffidavit with the court which issued the execution, and immediate notification of the levying officer is substantial compliance with any requirement, if any, that it be filed with the levying officer. Bellington v. Bryant, 45 Ga. App. 771, 165 S.E. 890, 1932 Ga. App. LEXIS 698 (1932) (decided under former Code 1910, § 3366).

Superintendent of Banks (now Commissioner of Banking and Finance) as receiver of creditor may contest foreclosure of a lien under this section. Bennett v. Green, 156 Ga. 572, 156 Ga. 573, 119 S.E. 620, 1923 Ga. LEXIS 275 (1923) (decided under former Code 1910, § 3366).

Requirements for second counteraffidavit. — A second counteraffidavit to an execution based on the foreclosure of a factor's lien cannot be filed without an allegation that the facts therein set forth were unknown to the defendant at the time the first was filed. Story v. Flournoy, McGehee & Co., 55 Ga. 56, 1875 Ga. LEXIS 327 (1875) (decided under former Code 1873, § 1991).

No amendment of issue in second counteraffidavit after return to court. — A counteraffidavit, which was the foundation of a legal proceeding, cannot be amended after it has been returned into court, either by the filing of a new affidavit or otherwise, so as to change the issue thereby presented. Jackson, Judge, dissenting. Story v. Flournoy, McGehee & Co., 55 Ga. 56, 1875 Ga. LEXIS 327 (1875) (decided under former Code 1873, § 1991).

5. Effects of Bond and Counteraffidavit

No forthcoming bond is necessary under this section. Peppers v. Coil, 113 Ga. 234, 38 S.E. 823, 1901 Ga. LEXIS 214 (1901) (decided under former Code 1895, § 2816).

Necessity for replevy bond in landlord's supply lien. — In a proceeding

Effects of Bond and Counteraffidavit (Cont'd)

under this section to foreclose a landlord's lien for supplies, a general judgment in the landlord's favor cannot be rendered unless a replevy bond is filed. Argo v. Fields, 112 Ga. 677, 37 S.E. 995, 1901 Ga. LEXIS 52 (1901) (decided under former Code 1895, § 2816).

Replevy bond without counteraffidavit insufficient to convert proceeding into mesne process. — The giving of a replevy bond will not convert foreclosure proceedings under this section into mesne process. There must be a counteraffidavit to do this. Frost Motor Co. v. Pierce, 72 Ga. App. 447, 33 S.E.2d 910, 1945 Ga. App. LEXIS 605 (1945) (decided under former Code 1933, § 67-2401).

Counteraffidavit to laborer's lien converts proceeding into mesne process. — Upon the interposition of an affidavit by an employer, denying that the laborer is due the amount claimed or denying the laborer's right to the lien claimed, the proceeding is converted into mesne process, and the issue thus formed shall be returned to the proper court for disposition as other causes. Harris v. Houston, 51 Ga. App. 116, 179 S.E. 645, 1935 Ga. App. LEXIS 588 (1935) (decided under Code 1933, § 67-2401).

The filing of a counteraffidavit to the foreclosure of a laborer's lien converts the proceedings into mesne process. Law v. Hodges, 53 Ga. App. 319, 185 S.E. 584, 1936 Ga. App. LEXIS 80 (1936) (decided under former Code 1933, § 67-2401).

Effects of omission of counteraffidavit. — Where a laborer's lien has been foreclosed, the execution issued thereon operates as final process. The purpose of the counteraffidavit is to convert this final process into mesne process and raise an issue which must then be passed upon by the proper tribunal. But until there is such an affidavit there is no case, nothing to be returned to a court, no pleading to be amended, and no issue to be tried. Kennedy v. Miller, 179 Ga. 234, 175 S.E. 588, 1934 Ga. LEXIS 260 (1934) (decided under former Code 1910, § 3366).

Foreclosure of landlord's lien is final unless an issuable counterclaim is filed, which must either deny the existence of the lien or show that the amount claimed is too large. Boyce v. Day, 3 Ga. App. 275, 59 S.E. 930, 1907 Ga. App. LEXIS 617 (1907) (decided under former Code 1895, § 2816).

Execution final unless arrested by counteraffidavit. — An execution issued on the foreclosure of a mechanic's lien, under this section, is final process until and unless arrested by a valid counteraffidavit. Frost Motor Co. v. Pierce, 72 Ga. App. 447, 33 S.E.2d 910, 1945 Ga. App. LEXIS 605 (1945) (decided under former Code 1933, § 67-2401).

Execution issued on affidavit of foreclosure against defendant in fi. fa. becomes a final process unless and until defendant files a counteraffidavit; a general judgment in such a case cannot be rendered unless a replevy bond is given. Farrar v. Joyce, 60 Ga. App. 675, 4 S.E.2d 708, 1939 Ga. App. LEXIS 137 (1939) (decided under former Code 1933, § 67-2401).

If no counteraffidavit, plaintiff may enter judgment on replevy bond. — Foreclosure proceedings under this section are final process and can only be converted into mesne process by the filing of the counteraffidavit. To replevy the property levied on is not sufficient, and in the absence of the counteraffidavit the plaintiff may enter judgment on the replevy bond. Giddens v. Gaskins, 7 Ga. App. 221, 66 S.E. 560, 1909 Ga. App. LEXIS 601 (1909); Wilson v. Griffin, 22 Ga. App. 451, 96 S.E. 395, 1918 Ga. App. LEXIS 551 (1918); Harvey v. Johnson, 28 Ga. App. 287, 111 S.E. 576, 1922 Ga. App. LEXIS 455 (1922) (decided under former Code 1895, § 2816; Code 1910, § 3366).

Effect of dismissal of counteraffidavit. — When a counteraffidavit to the foreclosure of a lien has been dismissed on motion of the lienor, the case passes out of the jurisdiction of the court, and the process is remanded to the levying officer by operation of law. Murphey v. McGough, 105 Ga. 816, 31 S.E. 757, 1898 Ga. LEXIS 718 (1898) (decided under former Code 1895, § 2816).

Unforeclosed laborer's lien cannot participate in money found brought under other process. — A laborer's lien which has not been foreclosed cannot par-

ticipate in a fund brought into court under other process which is subject of controversy in a money-rule case. In re Empire Granite Co., 42 F. Supp. 450, 1942 U.S. Dist. LEXIS 3314 (D. Ga. 1942) (decided under former Code 1933, § 67-2401).

Limitations on levying officer after counteraffidavit filed. — There is no law which authorizes the levying officer to advertise property for sale after a counteraffidavit has been filed, nor is the officer authorized to decide the validity or invalidity of the counteraffidavit; nor is there any law authorizing an ex parte order for the sale of property, without notice to property owner. Jackson v. Fincher, 128 Ga. App. 148, 195 S.E.2d 762, 1973 Ga. App. LEXIS 1418 (1973) (decided under former Code 1933, § 67-2401).

Counteraffidavit which neither denies or admits debt subject to dismissal. — A counteraffidavit interposed to the foreclosure of a lien, which in terms neither admits nor denies the indebtedness set forth in the affidavit of foreclosure, does not make an issue which can be tried, and should be dismissed on motion. Murphey v. McGough, 105 Ga. 816, 31 S.E. 757, 1898 Ga. LEXIS 718 (1898) (decided under former Code 1895, § 2816).

Counteraffidavit which admits, but does not tender, lesser amount due is nullity. — A counteraffidavit to the foreclosure of a laborer's lien which admits that an amount less than the amount claimed in the foreclosure is due and which fails to tender into court the amount admitted due is subject to dismissal and is, therefore, a nullity and no proper counteraffidavit. Bowman v. Quick, 106 Ga. App. 213, 126 S.E.2d 536, 1962 Ga. App. LEXIS 675 (1962) (decided under former Code 1933, § 67-2401).

A counteraffidavit which does not deny the plaintiff's right to the lien, but simply denies that defendant is indebted in the sum sued for, is insufficient. Boyce v. Day, 3 Ga. App. 275, 59 S.E. 930, 1907 Ga. App. LEXIS 617 (1907); Misenheimer v. Gainey, 11 Ga. App. 509, 75 S.E. 844, 1912 Ga. App. LEXIS 91 (1912) (decided under former Code 1895, § 2816; Code 1910, § 3366).

No motion to dismiss where counteraffidavit not filed. — Where no counteraffidavit has been filed as provided by law, there is no case in court to be tried, and a demurrer (now motion to dismiss) to the affidavit to foreclose a laborer's lien is properly overruled. Harvey v. Johnson, 28 Ga. App. 287, 111 S.E. 576, 1922 Ga. App. LEXIS 455 (1922) (decided under former Code 1910, § 3366).

Owner making no counteraffidavit cannot bring trover after sale. — Where a mechanic has asserted a lien on personal property for repairs, and has enforced payment thereof by foreclosure proceedings under this section, and the property has been seized and sold by the sheriff under the foreclosure proceedings, and the owner has failed to contest the right to the lien by making counteraffidavit as provided by paragraph (3), the owner cannot bring trover against the mechanic for the recovery of the property on the ground that the sale under the foreclosure proceedings, the mechanic still retaining possession of the property, amounted to a conversion thereof. Tow v. Forrester, 122 Ga. App. 718, 178 S.E.2d 692, 1970 Ga. App. LEXIS 1012 (1970) (decided under former Code 1933, § 67-2401).

6. Trial and Time Limits

When issue triable. — The issue raised by the filing of an affidavit of a contesting creditor under this section is triable at the term of court succeeding the filing of the contesting affidavit. Martin v. Nichols, 121 Ga. 506, 49 S.E. 613, 1904 Ga. LEXIS 214 (1904) (decided under former Code 1895, § 2816).

Pendency of foreclosure of laborer's lien is not bar to action on account for the same debt, since, even where the lien is contested and the property replevied, no general judgment can be rendered in the foreclosure proceedings. In such a case, the lien foreclosure is not converted into a proceeding in personam by the filing of a replevy bond; the actions are entirely different and each involves a different kind of judgment. McKellar v. Childs, 95 Ga. App. 237, 97 S.E.2d 616, 1957 Ga. App. LEXIS 764 (1957) (decided under former Code 1933, § 67-2401).

Equitable plea prevents jury trial. — Where a defendant lienee in a proceeding under this section files an equitable

Trial and Time Limits (Cont'd)

plea praying a general accounting the proceeding becomes an equitable one and the defendant lienee is not entitled to a jury trial. Mackenzie v. Flannery & Co., 90 Ga. 590, 16 S.E. 710, 1892 Ga. LEXIS 221 (1892) (decided under former Code 1882, § 1991).

Lienholder may present case to jury despite debtor's absence. — A counteraffidavit under this section is not in the nature of an affidavit of illegality, and when debtor does not appear at the trial, it is not proper for the trial judge to dismiss the affidavit, but lienholder should be allowed to make out his case before the jury. Law v. Hodges, 53 Ga. App. 319, 185 S.E. 584, 1936 Ga. App. LEXIS 80 (1936) (decided under former Code 1933, § 67-2401).

Sawmill owner must prove substantial compliance with contract to recover for services. — The proprietor of a sawmill who institutes a proceeding to foreclose a lien on material furnished by another cannot, upon a failure to prove a substantial compliance with the contract, recover a verdict in that proceeding for the value of the proprietor's services. Hawkins v. Chambliss, 116 Ga. 813, 43 S.E. 55, 1902 Ga. LEXIS 282 (1902) (decided under former Code 1895, § 2816).

No general judgment where property seized is not replevied. — Where, upon the foreclosure of a laborer's general lien as provided in this section, the property seized is not replevied, no general judgment thereon can be rendered, even though a counteraffidavit disputing the correctness of the lienor's claim is filed by the lienee. Only a judgment establishing the lien upon the property seized can be legally rendered. Downs v. Bedford, 39 Ga. App. 155, 146 S.E. 514, 1929 Ga. App. LEXIS 231 (1929) (decided under former Code 1910, § 3366).

When dismissal of affidavit of illegality justified. — Upon the trial of an issue formed by the filing of an affidavit of illegality to the foreclosure of a retention-of-title, or conditional-sale contract, where it appears from the evidence that the lienee did not tender to the sheriff the amount appearing to be due without contest and not denied in the affidavit, it is not error for the court to dismiss the affidavit of illegality upon motion of the foreclosing party. Carter v. Commercial Credit Co., 58 Ga. App. 470, 198 S.E. 792, 1938 Ga. App. LEXIS 12 (1938) (decided under former Code 1933, § 67-2401).

When issue resolved for creditor, only special judgment permitted. — When an issue made by the debtor in resistance to a summary execution sued out to enforce a lien upon personal property, is found in favor of the creditor, the latter is not entitled to a general judgment, but only to a special judgment declaring the existence and amount of the lien, and providing for its enforcement against the specific property; and this is so, whether the property has been replevied or not. Triest v. J.G. Watts & Bro., 58 Ga. 73, 1877 Ga. LEXIS 11 (1877); Argo v. Fields, 112 Ga. 677, 37 S.E. 995, 1901 Ga. LEXIS 52 (1901) (decided under former Code 1895, § 2816).

Hearing

Court should state necessity of full hearing. — In light of the difficulty in ascertaining the line between the "probable cause hearing" contemplated in O.C.G.A. § 44-14-550(3) and (4) and the "full hearing" provided in O.C.G.A. § 44-14-550(5), the trial court should make a formal statement regarding the necessity of holding a full hearing. Chambless Ford Tractor, Inc. v. McGlaun Farms, Inc., 169 Ga. App. 672, 314 S.E.2d 689, 1984 Ga. App. LEXIS 1671 (1984).

Validity of lien to be determined at probable cause hearing. — As O.C.G.A. § 44-14-550 contemplated that at the initial probable cause hearing, the trial court would inquire as to whether the plaintiff had put forth facts necessary to constitute a laborer's lien and amount due, the trial court did not err in reviewing the facts of the case in order to determine whether there was probable cause to believe a laborer could validly assert a lien against a farmer's crop for the debt under O.C.G.A. § 44-14-381. Slappey v. Slappey, 296 Ga. App. 773, 676 S.E.2d 283, 2009 Ga. App. LEXIS 333 (2009).

Time Limit

Ten-day limit on foreclosure. — Be-

cause the client failed to establish that the attorney had constructive possession of funds at the time of the client's demand that the attorney withdraw the lien, the trial court erred in holding the attorney to the ten-day limit on foreclosure under O.C.G.A. § 44-14-550(1). Autrey v. Baker, 228 Ga. App. 396, 492 S.E.2d 261, 1997 Ga. App. LEXIS 1140 (1997), aff'd, 244 Ga. App. 532, 536 S.E.2d 204, 2000 Ga. App. LEXIS 776 (2000).

Nature of 12-month requirement. — Requirement of action within 12 months is not a limitation, but a statutory condition of the existence of the lien which must be complied with. Birmingham Trust & Sav. Co. v. Atlanta, B. & Atl. Ry., 287 F. 561, 1923 U.S. Dist. LEXIS 1747 (D. Ga. 1923) (decided under former Code 1910, § 3366).

Failure to show demand within 12 months renders process voidable. — On a proceeding to foreclose a lien on personalty, a failure to show a demand within 12 months after the claim falls due does not make the process a nullity, but renders it voidable. Gladden v. Cobb, 73 Ga. 235, 6 S.E. 161, 1884 Ga. LEXIS 107 (1884) (decided under former Code 1882, § 1991).

One-year limitation not applicable to claim for rent. — The limitation of one year in this section does not apply to the prosecution and enforcement by distress warrant of a special or general claim or demand by a landlord for rent. Jones v. Blackwelder, 16 Ga. App. 345, 85 S.E. 356, 1915 Ga. App. LEXIS 620 (1915) (decided under former Code 1910, § 3366).

Construction with O.C.G.A. § 15-19-15. — Plaintiffs asserted an attorneys' fee lien and came into possession of several checks made jointly payable to plaintiffs and defendants. The defendants made written demand for those checks but plaintiffs retained possession without instituting foreclosure proceedings within ten days of holding personal property belonging to the defendant and thereby failed to comply with the explicit terms of O.C.G.A. § 15-19-15; thus, forfeiture and cancellation of the lien was proper. Ellis, Funk, Goldberg, Labovitz & Dockson v. Kleinberger, 235 Ga. App. 360, 509 S.E.2d 660, 1998 Ga. App. LEXIS 1524 (1998).

OPINIONS OF THE ATTORNEY GENERAL

Editor's notes. — In light of the similarity of the statutory provisions, opinions under former Code 1933, § 67-2401, are included in the annotations for this Code section.

Sales agreement allowing car repossessor to claim contents void. — A clause in a conditional sales financing agreement which provides that the repossessing party may take not only the car but also whatever personal effects are in it subject to their being held for return on demand, is legally unconscionable; the taking of such personal belongings would be entirely beyond the scope of any law. 1967 Op. Att'y Gen. No. 67-363 (decided under former Code 1933, § 67-2401).

RESEARCH REFERENCES

Am. Jur. 2d.

51 Am. Jur. 2d, Liens, § 79 et seq.

C.J.S.

53 C.J.S., Liens, § 29 et seq.

ALR.

Right of buyer of chattels to lien upon the property where he rescinds the contract, 7 A.L.R. 993.

Liability of purchaser of personal property for taxes assessed against former owner, 41 A.L.R. 187.

Right of conditional seller of chattels attached to realty to claim lien on the realty, 58 A.L.R. 1121.

Attachment as affected by release or modification of lien to which property was subject when attachment was levied, 128 A.L.R. 1392.

Recovery of damages in replevin for usable value of property detained, by successful party having only security interest as conditional vendor, chattel mortgagee, or the like, 33 A.L.R.2d 774.

Bankruptcy court's injunction against

mortgage or lien enforcement proceedings commenced, before bankruptcy, in another court, 40 A.L.R.2d 663.

Demand for or submission to arbitration as affecting enforcement of mechanic's lien, 73 A.L.R.3d 1042.

44-14-551. Judgment on replevy bonds.

In all foreclosure of liens on personalty in which the property levied on is replevied and in which verdicts are found for the plaintiffs, the plaintiffs shall be granted judgments against the defendants and their securities in the same manner and with the same effect as in cases of appeal.

History.
Ga. L. 1880-81, p. 110, § 1; Code 1882, § 1991; Civil Code 1895, § 2817; Civil Code 1910, § 3367; Code 1933, § 67-2402.

JUDICIAL DECISIONS

Where no counteraffidavit is filed and a replevy bond is given, the effect is the same as if a verdict were found for the plaintiff, and judgment may be entered against the defendant. Peppers v. Coil, 113 Ga. 234, 38 S.E. 823, 1901 Ga. LEXIS 214 (1901); Giddens v. Gaskins, 7 Ga. App. 221, 66 S.E. 560, 1909 Ga. App. LEXIS 601 (1909); Tipton v. Conrad & Lee, 21 Ga. App. 593, 94 S.E. 815, 1918 Ga. App. LEXIS 418 (1918).

PART 13

REGISTRATION OF LIENS FOR FEDERAL TAXES

Law reviews.
For article, "Real Property and the Federal Tax Lien Act of 1966," see 3 Ga. St. B.J. 459 (1967).

RESEARCH REFERENCES

ALR.
Constitutionality of statute impairing or postponing lien for taxes, 136 A.L.R. 328.

Interest and penalties on federal tax covered in part by prebankruptcy liens as allowable or as surviving discharge in bankruptcy, 77 A.L.R.2d 1125.

Validity, construction, and effect of statutory provision for tax lien on property not belonging to taxpayer but used in his business, 84 A.L.R.2d 1090.

Waiver of restrictions on assessment and collection of deficiency in federal tax, 115 A.L.R. Fed. 257.

44-14-570. Purpose.

It is the purpose of this part to conform to Section 6323 of the United States Internal Revenue Code as amended by Public Law 89-719, entitled the Federal Tax Lien Act of 1966.

History.
Ga. L. 1968, p. 561, § 2; Ga. L. 1987, p. 191, § 9.
Editor's notes.
Ga. L. 1987, p. 191, § 10, not codified by the General Assembly, provided that this Act is applicable to taxable years ending on or after March 11, 1987, and that a taxpayer with a taxable year ending on or after January 1, 1987, and before March

11, 1987, may elect to have the provisions of that Act apply.

Ga. L. 1987, p. 191, § 10, not codified by the General Assembly, also provided that tax, penalty, and interest liabilities and refund eligibility for prior taxable years shall not be affected by that Act.

Ga. L. 1987, p. 191, § 10, not codified by the General Assembly, also provided that provisions of the federal Tax Reform Act of 1986 and of the Internal Revenue Code of 1986 which as of January 1, 1987, were not yet effective become effective for purposes of Georgia taxation on the same dates as they become effective for federal purposes.

U.S. Code.

Section 6323 of the U.S. Internal Revenue Code, as referred to in this Code section, is codified as 26 U.S.C. 6323.

44-14-571. Filing of federal tax liens on realty and personalty.

(a) Notices of liens upon real property for taxes payable to the United States and certificates and all notices affecting such liens, including certificates of redemption, shall be filed in the office of the clerk of the superior court of the county in which the real property subject to a federal tax lien is located.

(b) Notices of liens upon personal property, whether tangible or intangible, for taxes payable to the United States and certificates and all notices affecting such liens, including certificates of redemption, shall be filed as follows:

(1) If the person against whose interest the tax lien applies is a corporation or partnership whose principal executive office is in this state, as these entities are defined in the internal revenue laws of the United States, in the office of the clerk of the superior court of the county in which the principal executive office is located; and

(2) In all other cases, in the office of the clerk of the superior court of the county where the taxpayer resides at the time of the filing of the notice of lien.

History.

Ga. L. 1924, p. 124, § 1; Code 1933, § 67-2601; Ga. L. 1967, p. 549, § 1; Ga. L. 1968, p. 561, § 1.

Cross references.

Liens for state, county, or municipal taxes generally, § 48-2-56.

RESEARCH REFERENCES

Am. Jur. 2d.

35 Am. Jur. 2d, Federal Tax Enforcement, §§ 250, 252.

C.J.S.

47 C.J.S., Internal Revenue, §§ 759, 760, 761.

U.L.A.

Uniform Federal Tax Lien Registration Act (U.L.A.) § 1.

ALR.

Sufficiency of designation of taxpayer in recorded notice of federal tax lien, 3 A.L.R.3d 633.

44-14-572. When notices and certificates affecting tax liens entitled to be filed; certification by secretary of treasury.

Certification by the secretary of the treasury of the United States or his delegate of notices of liens, certificates, or other notices affecting tax liens entitles them to be filed; and no other attestation, certification, or acknowledgment is necessary.

History.
Code 1933, § 67-2602, enacted by Ga. L. 1967, p. 549, § 1; Ga. L. 1968, p. 561, § 1; Ga. L. 1982, p. 3, § 44.

JUDICIAL DECISIONS

No standing to sue under O.C.G.A. § 9-6-24 to enforce a public duty. — Appellant's petition for a writ of mandamus did not meet the necessary prerequisites for appellant to exercise standing under O.C.G.A. § 9-6-24 where the petition did not seek to procure the enforcement of a public duty, rather it sought to compel an action to correct what appellant believed to be the wrongful filing of uncertified tax liens under O.C.G.A. § 44-14-572. Brissey v. Ellison, 272 Ga. 38, 526 S.E.2d 851, 2000 Ga. LEXIS 77 (2000).

Certification requirement in O.C.G.A. § 44-14-572 is invalid, as the Georgia General Assembly cannot dictate the requirements of federal tax lien notices. Johnson v. IRS, No. 2:04-CV-173, 2005 U.S. Dist. LEXIS 24935 (S.D. Ga. Sept. 30, 2005).

RESEARCH REFERENCES

Am. Jur. 2d.
35 Am. Jur. 2d, Federal Tax Enforcement, §§ 250, 252.

C.J.S.
47B C.J.S., Internal Revenue, § 1128 et seq.

U.L.A.
Uniform Federal Tax Lien Registration Act (U.L.A.) § 2.

44-14-573. Filing of federal tax lien, notice or revocation of certificate, or certificate of discharge.

The clerk of superior court shall file, index, and record in the general execution docket or lien book of his or her office a notice of a federal tax lien, refiling of a federal tax lien, notice or revocation of a certificate described in subsections (a) and (b) of Code Section 44-14-571, or certificate of discharge of a federal tax lien in the same manner as provided for in Code Section 9-12-86 for liens upon land.

History.
Ga. L. 1924, p. 124, §§ 2, 3; Code 1933, §§ 67-2602, 67-2603; Ga. L. 1967, p. 549, § 1; Ga. L. 1968, p. 561, § 1; Ga. L. 1993, p. 361, § 1.

RESEARCH REFERENCES

Am. Jur. 2d.
35 Am. Jur. 2d, Federal Tax Enforcement, §§ 250, 252.
C.J.S.
47 C.J.S., Internal Revenue, §§ 759, 760, 761.
U.L.A.
Uniform Federal Tax Lien Registration Act (U.L.A.) § 3.

44-14-574. Fees; billing procedure.

The fee for filing and indexing each notice of a lien or certificate or notice affecting a tax lien shall be as provided in subsection (f) of Code Section 15-6-77.

History.
Code 1933, § 67-2604, enacted by Ga. L. 1967, p. 549, § 1; Ga. L. 1968, p. 561, § 1; Ga. L. 1981, p. 1396, § 6; Ga. L. 1991, p. 1324, § 9.

RESEARCH REFERENCES

Am. Jur. 2d.
66 Am. Jur. 2d, Records and Recording Laws, § 64.
C.J.S.
76 C.J.S., Records, § 19 et seq.
U.L.A.
Uniform Federal Tax Lien Registration Act (U.L.A.) § 4.

PART 14

BANKRUPTCY PROCEEDINGS

RESEARCH REFERENCES

ALR.
Bankruptcy court's injunction against mortgage or lien enforcement proceedings commenced, before bankruptcy, in another court, 40 A.L.R.2d 663.

Action for malicious prosecution based on institution of involuntary bankruptcy, insolvency, or receivership proceedings, 40 A.L.R.3d 296.

Am. Jur. Proof of Facts.
Warranty Deed Intended as Mortgage, 4 POF2d 567.

Bankruptcy Action to Recover Preferential Pre-Petition Transfer of Property of Debtor under 11 U.S.C.A. § 547, 48 POF3d 159.

44-14-590. Recording of bankruptcy petition, decree, or order; fees.

A certified copy of a petition, with schedules omitted, commencing a proceeding under the Bankruptcy Reform Act of 1978, P.L. 95-598, codified at 11 U.S.C. Section 101, et seq., or of the decree of adjudication in the proceeding, or of the order approving the bond of the trustee appointed in the proceeding may be filed and recorded in the office of the clerk of the superior court of any county in the same manner as

deeds are filed and recorded. It shall be the duty of the clerk to docket and index, under the name of the bankrupt, and record the certified copies of the petition, decree, or order filed for record in the same manner as deeds. Clerks shall be entitled to the same fees for docketing, indexing, and recording the copies of such petitions, decrees, or orders as for docketing, indexing, and recording deeds.

History.
Ga. L. 1939, p. 242, § 1; Ga. L. 2002, p. 415, § 44.

RESEARCH REFERENCES

Am. Jur. 2d.
9 Am. Jur. 2d, Bankruptcy, §§ 31,32, 105, 379, 1840.
C.J.S.
8A C.J.S., Bankruptcy, §§ 2 et seq., 69, 291 et seq.
ALR.
Allowance or rejection of claim in bankruptcy proceedings as res judicata in independent action or proceeding between the claimant and another creditor, 135 A.L.R. 695.
Distinction between "proceedings in bankruptcy" and "controversies arising in proceedings in bankruptcy" for purposes of interlocutory appeal, 5 A.L.R.3d 1130.

44-14-591. Effect of failure to record petition, decree, or order as to bona fide purchaser or lienor of real property.

Unless a certified copy of the petition, with schedules omitted, decree, or order has been recorded in any county wherein the bankrupt owns or has an interest in real property, the commencement of a proceeding under the Bankruptcy Reform Act of 1978, P.L. 95-598, codified at 11 U.S.C. Section 101, et seq., shall not be constructive notice to nor shall it affect the title of any subsequent bona fide purchaser or lienor of real property in the county for a present fair equivalent value without actual notice of the pendency of the proceeding; provided, however, that where the purchaser or lienor has given less than fair equivalent value, he or she shall nevertheless have a lien upon the property but only to the extent of the consideration actually given by him or her. The exercise by any court of the United States or of this state of jurisdiction to authorize or effect a judicial sale of real property of the bankrupt within any county in this state shall not be impaired by the pendency of the proceeding unless the copy is recorded in the county, as provided in this Code section, prior to the consummation of the judicial sale.

History.
Ga. L. 1939, p. 242, § 2; Ga. L. 1960, p. 197, § 1; Ga. L. 1982, p. 3, § 44; Ga. L. 2002, p. 415, § 44.

RESEARCH REFERENCES

C.J.S.
8A C.J.S., Bankruptcy, § 2 et seq.
ALR.
Distinction between "proceedings in

bankruptcy" and "controversies arising in proceedings in bankruptcy" for purposes of interlocutory appeal, 5 A.L.R.3d 1130.

PART 15

COMMERCIAL REAL ESTATE BROKER LIENS

Law reviews.
For note on 1993 enactment of this part, see 10 Ga. St. U.L. Rev. 201 (1993).

RESEARCH REFERENCES

Am. Jur. 2d.
12 Am. Jur. 2d, Brokers, § 297 et seq.

44-14-600. Short title.

This part shall be known and may be cited as the "Commercial Real Estate Broker Lien Act."

History.
Code 1981, § 44-14-600, enacted by Ga. L. 1993, p. 1490, § 1.

Law reviews.
For annual survey article on real property law, see 50 Mercer L. Rev. 307 (1998).

44-14-601. Definitions.

As used in this part, the term:

(1) "Broker" means a broker as defined in paragraph (2) of Code Section 43-40-1.

(2) "Client" means a person or entity having an interest in real property that has entered into a written brokerage agreement with a real estate broker relative to such property.

(3) "Commercial real estate" means any real estate other than real estate containing one to four residential units; real estate on which no buildings or structures are located and which is not zoned for nor available for commercial, multifamily, or retail use; or real estate classified as agricultural for tax assessment purposes. Commercial real estate shall not include single-family residential units such as condominiums, townhomes, mobile homes, or homes in a subdivision when sold, leased, or otherwise conveyed on a unit by unit basis even though these units may be part of a larger building or parcel of real estate containing more than four residential units.

(4) "Conveyance" means a sale, lease, or other transfer of commercial real estate.

(5) "Real estate" means real estate as defined in paragraph (9) of Code Section 43-40-1.

History. Code 1981, § 44-14-601, enacted by Ga. L. 1993, p. 1490, § 1; Ga. L. 1995, p. 1216, § 11.

44-14-602. Lien on commercial real estate for broker's compensation.

(a) Any real estate broker who is not an employee or independent contractor of another real estate broker shall have a lien, in the amount of the compensation agreed upon by and between the broker and the landlord or seller or other client or customer, upon commercial real estate or any interest in commercial real estate:

(1) Arising out of a listing agreement or any other agreement for the management, sale, or lease of or otherwise conveying any interest in the commercial real estate as evidenced by a writing signed by the owner or its expressly authorized agent and with written notice to the party whose property may be liened, if different from the parties to the agreement;

(2) As to which the broker or broker's employees or independent contractors have provided licensed services that result in the procuring of a person or entity ready, willing, and able to enter and who actually enters into a purchase or lease or otherwise accepts a conveyance of the commercial real estate or any interest in the commercial real estate upon terms acceptable to the owner as evidenced by an agreement or conveyance signed by the owner or its expressly authorized agent and with written notice to the party whose property may be liened, if different from the parties to the agreement; or

(3) When a broker having a written agreement with a prospective buyer or tenant to represent the buyer or tenant as to the purchase, lease, or other conveyance of commercial real estate becomes entitled to compensation and with written notice to the party whose property may be liened, if different from the parties to the agreement.

(b) A lien shall attach to the commercial real estate, or any interest in commercial real estate as described in subsection (a) of this Code section, upon the broker's recording a notice of lien in the county land records in the office of the clerk of the superior court in the county in which the real property or interest in the real property is located.

(c) When payment to a broker is due in one lump sum and not paid, the claim for lien must be recorded within 90 days after the tenant takes possession of the leased premises or the transaction procured by the broker is closed.

(d) When payment to a broker is due in installments, all or a portion of which is due only after a conveyance of the commercial real estate,

any claim for lien for those payments due after conveyance may be recorded at any time subsequent to the conveyance so long as the claim for lien is recorded within 90 days of the date the payment was due and not paid.

(e) If a broker has a written agreement with a client as provided for in paragraph (3) of subsection (a) of this Code section, then the lien shall attach to the client's interest upon the client's purchasing, leasing, or otherwise accepting a conveyance of the commercial real estate and the recording of a notice of lien by the broker in the county land records, in the office of the clerk of the superior court of the county in which the real property or interest in the real property is located, within 90 days after the later of purchase, lease, or other conveyance or transfer to the buyer or tenant or the failure of the buyer or tenant to compensate the broker or to cause the broker to be compensated pursuant to its agreement.

(f) If a broker has a written management agreement for an improved property, then the claim for lien must be recorded within 90 days of the termination of the agreement.

(g) If a broker claims a lien based upon an option to purchase or lease, the lien must be filed within 90 days of the date the transaction for which a commission or other fee is due or within 90 days of the date the transaction for sale, lease, or other conveyance is closed, whichever is later.

(h) The lien notice shall state the name of the claimant, the name of the owner, a description of the property upon which the lien is being claimed, the amount for which the lien is claimed, and the real estate license number of the broker. The notice of lien shall recite that the information contained in the notice is true and accurate to the knowledge of the signatory. The lien notice shall recite that the broker has disclosed to all parties that a lien might be claimed under this part. The notice of lien shall be signed by the broker or by a person expressly authorized to sign on behalf of the broker and shall be verified.

(i) The broker shall mail a copy of the notice of lien to the owner of the commercial real estate by certified mail or statutory overnight delivery. The broker's lien shall be void and unenforceable if recording does not occur within the time and in the manner required by this Code section.

(j)(1) A broker may bring suit to enforce a lien in the superior court in the county where the property is located by filing a verified complaint and sworn affidavit that the lien has been recorded. Within one year after recording the lien, the broker claiming a lien shall commence proceedings by filing a complaint. Failure to commence proceedings within one year after recording the lien shall extinguish

the lien. A broker claiming a lien based upon an option to purchase or lease shall, within six months after the transfer or conveyance of the commercial real estate under the exercise of the option, commence proceedings by filing a complaint. Failure to commence proceedings within this time shall extinguish the lien.

(2) No subsequent notice of lien may be given for the same claim nor may that notice be asserted in any proceedings under this part.

(3) A complaint under this subsection shall contain a brief statement of the contract or agreement on which the lien is founded, the date when the contract or agreement was made, a description of the services performed, the amount due and unpaid, a description of the property that is subject to the lien, and other facts necessary to state a claim for the payment of a commission, fee, or other compensation due the broker. The plaintiff shall make all interested parties, whose interest in the real estate is affected by the action, and of whom the plaintiff is notified or has knowledge, defendants to the action, and shall issue summons and provide service as in other civil actions. Complaint, answer, summons, service, and all other particulars of suit shall be made in accordance with Chapter 11 of Title 9, the "Georgia Civil Practice Act." All liens claimed under this part shall be foreclosed as provided for in Code Section 44-14-530.

(k) The costs and expenses of all proceedings brought under this part, including reasonable attorney's fees actually incurred, costs, and prejudgment interests due to the prevailing party, shall be borne by the nonprevailing party or parties. When more than one party is responsible for costs, fees, and prejudgment interests, the costs, fees, and prejudgment interests shall be equitably apportioned by the court among those responsible parties.

History.

Code 1981, § 44-14-602, enacted by Ga. L. 1993, p. 1490, § 1; Ga. L. 2000, p. 1589, § 3.

Editor's notes.

Ga. L. 2000, p. 1589, § 16, not codified by the General Assembly, provides that this Act is applicable with respect to notices delivered on or after July 1, 2000.

JUDICIAL DECISIONS

Written listing agreement required. — An advertising brochure entitled, PROPERTY INFORMATION, bearing the vendors' signatures and including the language — "I want 15,000 net to me per [acre] base 83 approx" did not constitute a written listing agreement as required by O.C.G.A. § 44-14-602. Eva Pendley Realty, Inc. v. Bagley, 219 Ga. App. 203, 464 S.E.2d 850, 1995 Ga. App. LEXIS 988 (1995).

Lien is not limited to licensed services. — A commercial real estate broker's lien under O.C.G.A. § 44-14-602 is not limited to licensed services as defined under O.C.G.A. § 43-40-1, so long as it otherwise complies with the requirements of the lien statute. Padgett v. City of

Moultrie, 229 Ga. App. 500, 494 S.E.2d 299, 1997 Ga. App. LEXIS 1449 (1997), cert. denied, No. S98C0429, 1998 Ga. LEXIS 393 (Ga. Mar. 6, 1998), cert. denied, No. S98C0464, 1998 Ga. LEXIS 413 (Ga. Mar. 6, 1998).

44-14-603. Priority of liens.

Prior recorded liens and liens for ad valorem taxes shall have priority over a broker's lien.

History.
Code 1981, § 44-14-603, enacted by Ga. L. 1993, p. 1490, § 1.

JUDICIAL DECISIONS

A commercial real estate broker's lien had priority over a subsequently recorded deed to secure debt and also over the lien of a prior encumbrancer that had agreed to subordinate part of its debt to the subsequently recorded deed. Padgett v. City of Moultrie, 229 Ga. App. 500, 494 S.E.2d 299, 1997 Ga. App. LEXIS 1449 (1997), cert. denied, No. S98C0429, 1998 Ga. LEXIS 393 (Ga. Mar. 6, 1998), cert. denied, No. S98C0464, 1998 Ga. LEXIS 413 (Ga. Mar. 6, 1998).

44-14-604. Escrow to release claim for lien that would prevent closing of transaction or conveyance.

Except as otherwise provided in this Code section, whenever a claim for lien has been filed with the clerk of a superior court that would prevent the closing of a transaction or conveyance, an escrow account shall be established from the proceeds from the transaction or conveyance in an amount sufficient to release the claim for lien. The requirement to establish an escrow account, as provided for in this Code section, shall not be cause for any party to refuse to close the transaction. These moneys shall be held in escrow until the parties' rights to the escrowed moneys have been determined by written agreement of the parties, by a court of law, or by any other process which may be agreed to by the parties for resolution of their dispute. Upon the escrow of funds in the amount of the claimed lien, the lien or claim of lien shall be automatically dissolved. Upon the release of the commercial real estate lien by the broker, the broker shall be deemed to have an equitable lien on the escrow funds pending a resolution of the broker's claim and the escrow shall not be released until a resolution is reached and agreed to by all necessary parties or ordered by a court. The parties are not required to follow this escrow procedure if alternative procedures which would allow the transaction to close are available and are acceptable to the transferee in the transaction. If the proceeds from the transaction are insufficient to release all liens claimed against the commercial real estate, including the broker's lien, then the parties are not required to follow the escrow procedure in this Code section.

History.
Code 1981, § 44-14-604, enacted by Ga. L. 1993, p. 1490, § 1.

44-14-605. Release or satisfaction of lien on occurrence of condition precluding broker from receiving compensation; suit to enforce lien; when lien invalid; when right to file and record lien dissolved.

(a) Whenever a claim for lien has been filed with the superior court and a condition occurs that would preclude the broker from receiving compensation under the terms of the broker's written agreement, the broker shall provide to the owner of record a written release or satisfaction of the lien.

(b) Upon written demand of the owner, lienee, or other authorized agent served on the broker claiming the lien requiring that suit be commenced to enforce the lien or answer be filed in a pending suit, a suit shall be commenced or answer filed in a pending suit, within 90 days thereafter, or the lien shall be extinguished. Service of such demand shall be in the manner required by Chapter 11 of Title 9, the "Georgia Civil Practice Act," for the service of a summons and complaint.

(c) Whenever a claim for lien has been timely filed with the clerk of the superior court and is paid, or where there is failure to institute a suit to enforce the lien within the time provided by this part, the lien shall be invalid and the broker shall acknowledge satisfaction or release of the lien, in writing, on written demand of the owner within 30 days after payment or expiration of the time in which to perfect the lien. This release of the broker shall not be required to invalidate the lien.

(d) The broker's right to file and record a lien provided for in this part shall be dissolved if the owner, purchaser from owner, lender providing a loan secured by commercial real estate, or other holder of lienable interest in commercial real estate shows that:

(1) The lien has been waived in writing by the lien claimant or its expressly authorized agent; or

(2) The owner or a person at whose instance the brokerage or management services were provided has given a sworn written statement that all such compensation due or to become due has been paid or has been waived in writing by the potential lien claimant; and

(3) At the time the sworn written statement was obtained or given as part of a bona fide sale or a loan secured by the commercial real estate, the lien of record had not been previously canceled, dissolved, or expired.

History.
Code 1981, § 44-14-605, enacted by Ga. L. 1993, p. 1490, § 1.

ARTICLE 9

LIS PENDENS

Law reviews.
For note, "Georgia's Lis Pendens Statutes: Suggested Legislative Changes to Comply with Due Process," see 4 Ga. St. U.L. Rev. 79 (1988).

For annual survey on real property law, see 61 Mercer L. Rev. 301 (2009).

JUDICIAL DECISIONS

Purpose of lis pendens. — Lis pendens, whether it be from the common law as provided in O.C.G.A. § 23-1-18, or by statute (O.C.G.A. Ch. 14, T. 44), has for its purpose the protection of innocent purchasers of real property involved in pending litigation. Patent Scaffolding Co. v. Byers, 220 Ga. 426, 139 S.E.2d 332, 1964 Ga. LEXIS 574 (1964).

Lis pendens does not apply in suit for money damages. — At common law and under statutory provisions lis pendens may not be predicated upon an action which seeks merely to recover a money judgment. Watson v. Whatley, 218 Ga. 86, 126 S.E.2d 621, 1962 Ga. LEXIS 434 (1962).

Effect of lis pendens. — A lis pendens simply gives notice to prospective purchasers that lawsuit involving realty has been filed. It does not prevent sale of property, nor is it a lien on property. Aiken v. Citizens & S. Bank, 249 Ga. 481, 291 S.E.2d 717, 1982 Ga. LEXIS 859, cert. denied, 459 U.S. 973, 103 S. Ct. 307, 74 L. Ed. 2d 287, 1982 U.S. LEXIS 4159 (1982).

Lis pendens appropriate remedy for improper sale of estate. — Insofar as a resale of property alleged to be sold improperly by the administratrix to an insolvent grantee is concerned, the parties interested in the estate would have an adequate remedy by filing a proper notice of lis pendens. Conner v. Yawn, 200 Ga. 500, 37 S.E.2d 541, 1946 Ga. LEXIS 417 (1946).

Due process does not require advance notice of filing of lis pendens. Aiken v. Citizens & S. Bank, 249 Ga. 481, 291 S.E.2d 717, 1982 Ga. LEXIS 859, cert. denied, 459 U.S. 973, 103 S. Ct. 307, 74 L. Ed. 2d 287, 1982 U.S. LEXIS 4159 (1982).

RESEARCH REFERENCES

ALR.
Doctrine of lis pendens as applied against one who takes deed pending action pursuant to executory contract entered into before action commenced, 93 A.L.R. 404.

Necessity of filing notice of lis pendens in suit to contest a will, 159 A.L.R. 386.

Propriety of filing of lis pendens in action affecting leasehold interest, 67 A.L.R.3d 747.

Lis pendens in suit to compel stock transfer, 48 A.L.R.4th 731.

Lis pendens: grounds for cancellation prior to termination of underlying action, absent claim of delay, 49 A.L.R.4th 242.

Lis pendens as applicable to suit for separation or dissolution of marriage, 65 A.L.R.4th 522.

44-14-610. Necessity of recordation for operation of lis pendens as to real property.

No action, whether seeking legal or equitable relief or both, as to real property in this state shall operate as a lis pendens as to any such real property involved therein until there shall have been filed in the office of the clerk of the superior court of the county where the real property is located and shall have been recorded by the clerk in a book to be kept by him for the purpose a notice of the institution of the action containing the names of the parties, the time of the institution of the action, the name of the court in which it is pending, a description of the real property involved, and a statement of the relief sought regarding the property.

History.

Ga. L. 1939, p. 345, § 1; Ga. L. 1982, p. 3, § 44.

Law reviews.

For annual survey of zoning and land use law, see 58 Mercer L. Rev. 477 (2006).

For annual survey of law on real property, see 62 Mercer L. Rev. 283 (2010).

For annual survey of law on trial practice and procedure, see 62 Mercer L. Rev. 339 (2010).

JUDICIAL DECISIONS

Lis pendens may not be predicated upon action which seeks merely to recover money judgment. Rather, its purpose is to notify prospective purchasers that the property in question is directly "involved" in a pending suit, in the sense that the suit seeks some relief respecting that particular property. Evans v. Fulton Nat'l Mtg. Corp., 168 Ga. App. 600, 309 S.E.2d 884, 1983 Ga. App. LEXIS 2863 (1983).

In an action seeking to rescind a contract or sale of a residence based on fraud, the trial court properly ordered the removal of the notice of lis pendens erroneously filed by plaintiff against other property of the defendant. Quill v. Newberry, 238 Ga. App. 184, 518 S.E.2d 189, 1999 Ga. App. LEXIS 760 (1999).

A lis pendens becomes effective upon filing in the office of the superior court clerk. Kennedy v. W.M. Sheppard Lumber Co., 261 Ga. 145, 401 S.E.2d 515, 1991 Ga. LEXIS 103 (1991).

Lis pendens not improper when filed in regular course of proceeding involving real property. — Filing of notice of lis pendens cannot be said to be improper when such notice is filed in regular course of proceeding involving real property to which notice refers. Ferguson v. Atlantic Land & Dev. Corp., 248 Ga. 69, 281 S.E.2d 545, 1981 Ga. LEXIS 914 (1981).

Lis pendens not proper for investment right. — Right of first refusal to invest in a limited liability company's development of real estate held by an LLC member was not a sufficient interest for the filing of a lis pendens because the member's interest in the LLC was a right to invest in the development of real estate, which was an interest in personalty, not an interest in real estate. Meadow Springs, LLC v. IH Riverdale, LLC, 286 Ga. 701, 690 S.E.2d 842, 2010 Ga. LEXIS 225 (2010).

Cancelling notice of lis pendens. — Trial court erred in granting motion to cancel lis pendens based on merits of underlying claim. Scroggins v. Edmondson, 250 Ga. 430, 297 S.E.2d 469, 1982 Ga. LEXIS 1255 (1982).

A court may order the removal of a lis pendens not entitled to be recorded, but such action is generally preceded by a motion to cancel the lis pendens. Kennedy v. W.M. Sheppard Lumber Co., 261 Ga. 145, 401 S.E.2d 515, 1991 Ga. LEXIS 103 (1991).

Trial court did not err in failing to cancel, sua sponte, a lis pendens. Kennedy v. W.M. Sheppard Lumber Co., 261 Ga. 145, 401 S.E.2d 515, 1991 Ga. LEXIS 103 (1991).

Because a federal lawsuit seeking to restore the owners' land to its original condition and to address changes in the flow of water underneath the land "involved" the land for purposes of a lis pendens notice under O.C.G.A. § 44-14-610, the trial court properly denied a bank's motion to cancel the lis pendens in whole or in part. Colony Bank Southeast v. Brown, 275 Ga. App. 807, 622 S.E.2d 7, 2005 Ga. App. LEXIS 1014 (2005), cert. denied, No. S06C0411, 2006 Ga. LEXIS 193 (Ga. Feb. 27, 2006).

Although a trial court improperly considered the merits of certain out-of-state litigation in determining that a lis pendens required cancellation, the cancellation was upheld as the out-of-state court no longer had subject matter jurisdiction over the Georgia property. Boca Petroco, Inc. v. Petroleum Realty II, LLC, 292 Ga. App. 833, 666 S.E.2d 12, 2008 Ga. App. LEXIS 663 (2008), aff'd, 285 Ga. 487, 678 S.E.2d 330, 2009 Ga. LEXIS 303 (2009).

A lis pendens concerning real property in Georgia alleged to be involved in litigation in Florida should have been involuntarily cancelled. For there to be a valid lis pendens, the court before which the underlying litigation was filed had to have subject matter jurisdiction, and the Florida court lacked subject matter jurisdiction over the Georgia property. Petroleum Realty II v. Boca Petroco, Inc., 292 Ga. App. 896, 666 S.E.2d 49, 2008 Ga. App. LEXIS 729 (2008), aff'd, 285 Ga. 487, 678 S.E.2d 330, 2009 Ga. LEXIS 303 (2009).

Trial court properly removed a notice of lis pendens placed on certain real property that was the subject of a suit brought by a property investment company against various related business entities asserting claims for breach of contract, fraud, punitive damages, attorney's fees, and declaratory judgment as the related business entities obtained summary judgment, which thereby entitled the entities to cancellation of the lis pendens notice. Triple Net Props., LLC v. Burruss Dev. & Constr., Inc., 293 Ga. App. 323, 667 S.E.2d 127, 2008 Ga. App. LEXIS 931 (2008).

Trial court erred in cancelling a record notice of lis pendens because it was alleged that the subject property was fraudulently transferred by a former partner to defeat the claims of the plaintiff and that the transfer should be set aside; thus, it could not be said that the subject property was not involved in the lawsuit. Meljon v. Sonsino, 325 Ga. App. 719, 753 S.E.2d 456, 2014 Ga. App. LEXIS 59 (2014), cert. denied, No. S14C0850, 2014 Ga. LEXIS 691 (Ga. Sept. 8, 2014).

Lis pendens as notice. — With respect to an objection to the debtor's motion to sell property free and clear of liens and other interests, one objector's claimed interest in a road was resolved by a state court order because the objector had actual and constructive knowledge of the state court litigation and the claims asserted therein by virtue of two lis pendens filed, and the objector's president's actual knowledge. In re Flyboy Aviation Props., LLC, 501 B.R. 828, 2013 Bankr. LEXIS 4533 (Bankr. N.D. Ga. 2013).

Definition of "involved." — The word "involved" as used in O.C.G.A. § 44-14-610 refers only to the realty actually and directly brought into litigation by the pleadings in a pending suit and as to which some relief is sought respecting that particular property. Kenner v. Fields, 217 Ga. 745, 125 S.E.2d 44, 1962 Ga. LEXIS 377 (1962); Hill v. L/A Mgt. Corp., 234 Ga. 341, 216 S.E.2d 97, 1975 Ga. LEXIS 1126 (1975); Jay Jenkins Co. v. Financial Planning Dynamics, Inc., 256 Ga. 39, 343 S.E.2d 487, 1986 Ga. LEXIS 690 (1986); South River Farms v. Bearden, 210 Ga. App. 156, 435 S.E.2d 516, 1993 Ga. App. LEXIS 1110 (1993).

An action for wrongful foreclosure against a bank by the grantors of security deeds was a classic example of a suit in which real property was "involved" within the meaning of O.C.G.A. § 44-14-610. Moore v. Bank of Fitzgerald, 266 Ga. 190, 465 S.E.2d 445, 1996 Ga. LEXIS 42 (1996).

Only parties to pending suit must be listed in notice. — While O.C.G.A. § 44-14-610 does not explicitly state that only parties to the pending suit must be

listed in the notice, if the purpose of O.C.G.A. § 44-14-610 is to notify "persons who are not parties to a pending suit" of the binding effect of any judgment or decree rendered therein, then "parties" as used in O.C.G.A. § 44-14-610 must relate only to actual parties to the pending suit. FDIC v. McCloud, 478 F. Supp. 47, 1979 U.S. Dist. LEXIS 9236 (N.D. Ga. 1979).

Failure to file notice of suit outside county does not affect second action within county. — The failure to file a lis pendens notice in one county as to an action in a second county has no effect on the right, or lack of right, of a complainant to a contractor's lien against property in the first county. Grand Atlanta Corp. v. Chenggis, 142 Ga. App. 375, 235 S.E.2d 779, 1977 Ga. App. LEXIS 1621 (1977).

Litigation pending outside of Georgia involving Georgia property. — Lis pendens cannot be filed in Georgia to give notice of litigation pending outside of Georgia that involves the Georgia property. Thus, notices of lis pendens were invalid because a Florida court lacked subject matter jurisdiction over the properties located in Georgia. Boca Petroco, Inc. v. Petroleum Reality II, LLC., 285 Ga. 487, 678 S.E.2d 330, 2009 Ga. LEXIS 303 (2009).

Lis pendens notice unnecessary if lien claim notice properly filed. — A notice of a claim for lien properly and timely filed and recorded performs the function of notifying all parties of the claim of lien, and a notice of lis pendens under O.C.G.A. § 44-14-610 is neither necessary nor applicable. Grand Atlanta Corp. v. Chenggis, 142 Ga. App. 375, 235 S.E.2d 779, 1977 Ga. App. LEXIS 1621 (1977).

Because the lis pendens was filed when defendant did not have record title to the land, even though defendant's financing arrangement included a wrap around provision containing defendant's deed to secure debt, the lis pendens filed after defendant's warranty deed was outside the chain of title and did not constitute constructive notice to a purchaser. Marietta Recovery Group, Inc. v. Financial Properties Developers, Inc., 256 Ga. 238, 347 S.E.2d 596, 1986 Ga. LEXIS 797 (1986).

Buyer who purchases land pending action subject to judgment if lis pendens filed. — The pending action seeking to declare plaintiff's deed null and void is general notice to all the world, provided notice of the pending suit is filed on the lis pendens docket in the office of the clerk of the superior court where the land lies, and one who purchases the property pending the suit would be affected by the decree rendered therein. Wilson v. Blake Perry Realty Co., 219 Ga. 57, 131 S.E.2d 555, 1963 Ga. LEXIS 365 (1963).

Lis pendens is not a "seizure" for purposes of a malicious prosecution action, as lis pendens does not prevent the sale of property and does not constitute a lien. Bell v. King, Phipps & Assocs., 176 Ga. App. 702, 337 S.E.2d 364, 1985 Ga. App. LEXIS 2522 (1985).

Duration of valid notice. — A valid notice of lis pendens, filed pursuant to O.C.G.A. § 44-14-610, remains effective as constructive notice of the action referred to therein only until a final judgment has been entered in the action and the time for appeal therefrom has expired. Vance v. Lomas Mtg. USA, Inc., 263 Ga. 33, 426 S.E.2d 873, 1993 Ga. LEXIS 313 (1993).

Lis pendens invalid. — Trial court erred in granting a limited liability company and the company's members summary judgment in an owner's action for slander of title, tortious interference with contract, and tortious interference with economic opportunities because the act of sending copies of a notice of lis pendens on the owner's property and a complaint against the owner to a bank did not fall under the absolute privilege of O.C.G.A. § 51-5-8 since the lis pendens was not valid. Meadow Springs, LLC v. IH Riverdale, LLC, 307 Ga. App. 72, 704 S.E.2d 239, 2010 Ga. App. LEXIS 1102 (2010).

RESEARCH REFERENCES

Am. Jur. 2d.
51 Am. Jur. 2d, Lis Pendens, §§ 46, 47.
Am. Jur. Pleading and Practice Forms.
17 Am. Jur. Pleading and Practice Forms, Lis Pendens, § 3.
C.J.S.
54 C.J.S., Lis Pendens, §§ 14 et seq., 31.
ALR.
Statute requiring filing of formal notice of lis pendens in certain classes of cases as affecting common-law doctrine of lis pendens in other cases, 10 A.L.R. 306.
Lis pendens as affecting property in county or district other than that in which action is pending, 71 A.L.R. 1085.
Doctrine of lis pendens as applicable to actions to avoid conveyance or transfer in fraud of creditors or to prevent such conveyance or transfer, 74 A.L.R. 690.
Necessity of filing notice of lis pendens in suit to foreclose mortgage or deed of trust, 138 A.L.R. 1454.
Decree on bill of review reversing prior decree as affecting purchaser or mortgagee of real property in the interval between original decree and the filing of the bill of review, 150 A.L.R. 676.
Right of vendee under executory land contract to lien for amount paid on purchase price as against subsequent creditors of or purchasers from vendor, 82 A.L.R.3d 1040.

44-14-611. Lis pendens docket; indexing; recording fees.

The clerks of the superior courts of this state shall keep a lis pendens docket in which they shall record all notices of lis pendens on real property filed with them, such lis pendens docket to have proper indexes arranged alphabetically both as to direct and inverse; and the clerks shall be allowed a fee, as required by subparagraph (f)(1)(A) of Code Section 15-6-77, for recording the lis pendens in the lis pendens docket.

History.
Ga. L. 1939, p. 345, § 2; Ga. L. 1981, p. 1396, § 21; Ga. L. 1992, p. 6, § 44.

JUDICIAL DECISIONS

Only those suits or actions which involve real property are to be docketed. Watson v. Whatley, 218 Ga. 86, 126 S.E.2d 621, 1962 Ga. LEXIS 434 (1962).

RESEARCH REFERENCES

Am. Jur. 2d.
51 Am. Jur. 2d, Lis Pendens, §§ 46, 47.
66 Am. Jur. 2d, Records, and Recording Laws, § 64.
C.J.S.
54 C.J.S., Lis Pendens, § 18. 76 C.J.S., Records, § 19 et seq.
ALR.
Statute requiring filing of formal notice of lis pendens in certain classes of cases as affecting common-law doctrine of lis pendens in other cases, 10 A.L.R. 306.

44-14-612. Entry of dismissal, settlement, or final judgment.

Upon the dismissal of any action by the plaintiff or plaintiffs or when a settlement or final judgment is entered therein, such dismissal,

settlement, or final judgment shall be indicated on the face of the lis pendens record by the clerk of the superior court of each county where the lis pendens is recorded; and the book and page of the records where the final order or judgment is found shall also be indicated on the lis pendens record by the clerk.

History.
Ga. L. 1939, p. 345, § 3.

JUDICIAL DECISIONS

Removal of nonrecordable lis pendens. — Although O.C.G.A. § 44-14-612 provides means for recording the removal of a properly filed notice of lis pendens, a lis pendens not entitled to be recorded may be removed by court order by means and for causes other than those prescribed in that section. Hill v. L/A Mgt. Corp., 234 Ga. 341, 216 S.E.2d 97, 1975 Ga. LEXIS 1126 (1975).

Cancelling notice of lis pendens. — Although a trial court improperly considered the merits of certain out-of-state litigation in determining that a lis pendens required cancellation, the cancellation was upheld as the out-of-state court no longer had subject matter jurisdiction over the Georgia property. Boca Petroco, Inc. v. Petroleum Realty II, LLC, 292 Ga. App. 833, 666 S.E.2d 12, 2008 Ga. App. LEXIS 663 (2008), aff'd, 285 Ga. 487, 678 S.E.2d 330, 2009 Ga. LEXIS 303 (2009).

Although O.C.G.A. § 44-14-612 now directs the clerk to indicate on the face of the recorded lis pendens notice a dismissal, settlement, or final judgment entered in the underlying action, no reversal was required based on the clerk's failure to do so because, following the appeal, the judgment releasing the lis pendens was final and no further appeal was possible. Therefore, any error was harmless. Arko v. Cirou, 305 Ga. App. 790, 700 S.E.2d 604, 2010 Ga. App. LEXIS 749 (2010), cert. denied, No. S10C2080, 2011 Ga. LEXIS 356 (Ga. Apr. 26, 2011).

Slander of title. — Summary judgment was properly granted to real property buyers in an action by the sellers, alleging slander of title under O.C.G.A. § 51-9-11, as the sellers failed to assert actionable claims where lis pendens filed against the property were proper and privileged under O.C.G.A. § 51-5-8; further, any failure to remove or properly mark the lis pendens pursuant to O.C.G.A. § 44-14-612 after the sellers voluntarily dismissed the claim did not form the basis of a slander of title claim against the buyers. Exec. Excellence, LLC v. Martin Bros. Invs., LLC, 309 Ga. App. 279, 710 S.E.2d 169, 2011 Ga. App. LEXIS 317 (2011), cert. denied, No. S11C1305, 2011 Ga. LEXIS 758 (Ga. Oct. 3, 2011).

RESEARCH REFERENCES

Am. Jur. 2d.
51 Am. Jur. 2d, Lis Pendens, §§ 46, 58.
C.J.S.
54 C.J.S., Lis Pendens, § 24 et seq.
ALR.
Statute requiring filing of formal notice of lis pendens in certain classes of cases as affecting common-law doctrine of lis pendens in other cases, 10 A.L.R. 306.

44-14-613. Effect of article on other laws.

(a) This article shall in no way affect or alter the laws of this state with respect to personal property.

(b) This article shall in no way affect or alter the laws of this state with respect to judgments, executions, and attachments; the liens they create; their enforceability; the recording of executions in general execution dockets; the notice given by the recording; or otherwise.

History.
Ga. L. 1939, p. 345, §§ 4, 5; Ga. L. 1982, p. 3, § 44.

RESEARCH REFERENCES

Am. Jur. 2d.
51 Am. Jur. 2d, Lis Pendens, §§ 5, 6, 21.
C.J.S.
54 C.J.S., Lis Pendens, § 10.
ALR.
Necessity of filing notice of lis pendens in suit to foreclose mortgage or deed of trust, 138 A.L.R. 1454.

CHAPTER 15

UNIFORM PRUDENT MANAGEMENT OF INSTITUTIONAL FUNDS

Sec.		Sec.	
44-15-1.	Short title.	44-15-5.	Delegation of management of funds.
44-15-2.	Definitions.	44-15-6.	Modification of restrictions.
44-15-3.	Considerations and standard of conduct for institutions receiving gifts.	44-15-7.	Compliance with provisions; effective date.
44-15-4.	Management of institutional funds for endowment.	44-15-8.	Uniformity with law of other states.

Cross references.
Nonprofit corporations generally, § 14-3-101 et seq.

Editor's notes.
Ga. L. 2008, p. 149, § 1, effective July 1, 2008, repealed the Code sections formerly codified at this chapter and enacted the current chapter. The former chapter consisted of Code Sections 44-15-1 through 44-15-9, relating to management of institutional funds, and was based on Ga. L. 1984, p. 831, § 1; Ga. L. 1985, p. 149, § 44; Ga. L. 1990, p. 1471, § 3.

RESEARCH REFERENCES

Am. Jur. 2d.
15 Am. Jur. 2d, Charities, § 100.

44-15-1. Short title.

This chapter shall be known and may be cited as the "Uniform Prudent Management of Institutional Funds Act."

History.
Code 1981, § 44-15-1, enacted by Ga. L. 2008, p. 149, § 1/HB 972.

Law reviews.
For survey article on wills, trusts, guardianships, and fiduciary administration, see 60 Mercer L. Rev. 417 (2008).

44-15-2. Definitions.

As used in this chapter, the term:

(1) "Charitable purpose" means the relief of poverty, the advancement of education or religion, the promotion of health, the promotion of a governmental purpose, or any other purpose the achievement of which is beneficial to the community.

(2) "Endowment fund" means an institutional fund, or any part thereof, that, under the terms of a gift instrument, is not wholly expendable by the institution on a current basis. The term shall not

include assets that an institution designates as an endowment fund for its own use.

(3) "Gift instrument" means a record or records, including an institutional solicitation, under which property is granted to, transferred to, or held by an institution as an institutional fund.

(4) "Institution" means:

(A) A person, other than an individual, organized and operated exclusively for charitable purposes;

(B) A government or governmental subdivision, agency, or instrumentality, to the extent that it holds funds exclusively for a charitable purpose; and

(C) A trust that had both charitable and noncharitable interests, after all noncharitable interests have terminated.

(5) "Institutional fund" means a fund held by an institution exclusively for charitable purposes. The term shall not include:

(A) Program related assets;

(B) A fund held for an institution by a trustee that is not an institution; or

(C) A fund in which a beneficiary who is not an institution has an interest, other than an interest that could arise upon violation or failure of the purposes of the fund.

(6) "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.

(7) "Program related asset" means an asset held by an institution primarily to accomplish a charitable purpose of the institution and not primarily for investment.

(8) "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.

History.
Code 1981, § 44-15-2, enacted by Ga. L. 2008, p. 149, § 1/HB 972.

44-15-3. Considerations and standard of conduct for institutions receiving gifts.

(a) Subject to the intent of a donor expressed in a gift instrument or

any express written agreement between the donor and the institution, an institution, in managing and investing an institutional fund, shall consider the charitable purposes of the institution and the purposes of the institutional fund.

(b) In addition to complying with the duty of loyalty imposed by law other than this chapter, each person responsible for managing and investing an institutional fund shall manage and invest such fund in good faith and with the care an ordinarily prudent person in a like position would exercise under similar circumstances, considering the purposes, terms, distribution requirements, and other circumstances of the institutional fund.

(c) In managing and investing an institutional fund, an institution:

(1) May incur only costs that are appropriate and reasonable in relation to the assets, the purposes of the institution and the institutional fund, and the skills reasonably available to the institution; and

(2) Shall make a reasonable effort to verify facts relevant to the management and investment of such fund.

(d) An institution may pool two or more institutional funds for purposes of management and investment.

(e) Except as otherwise provided by a gift instrument, the following rules apply:

(1) In managing and investing an institutional fund, the following factors, if relevant, shall be considered:

(A) General economic conditions;

(B) The possible effect of inflation or deflation;

(C) The expected tax consequences, if any, of investment decisions or strategies;

(D) The role that each investment or course of action plays within the overall investment portfolio of such fund;

(E) The expected total return from income and the appreciation of investments;

(F) Other resources of the institution;

(G) The needs of the institution and such fund to make distributions and to preserve capital; and

(H) An asset's special relationship or special value, if any, to the charitable purposes of the institution or to the donor;

(2) Management and investment decisions about an individual asset shall not be made in isolation but rather in the context of the

institutional fund's portfolio of investments as a whole and as a part of an overall investment strategy having risk and return objectives reasonably suited to the institutional fund and to the institution;

(3) An institution may invest in any kind of property or type of investment consistent with this Code section;

(4) An institution shall reasonably manage the risk of concentrated holdings of assets by diversifying the investments of the institutional fund or by using some other appropriate mechanism, except as provided in this paragraph, as follows:

(A) The duty imposed by this paragraph shall not apply if the institution reasonably determines that, because of special circumstances, or because of the specific purposes, terms, distribution requirements, and other circumstances of the institutional fund, the purposes of such fund are better served without complying with the duty. For purposes of this paragraph, special circumstances shall include an asset's special relationship or special value, if any, to the charitable purposes of the institution or to the donor;

(B) No person responsible for managing and investing an institutional fund shall be liable for failing to comply with the duty imposed by this paragraph to the extent that the terms of the gift instrument or express written agreement between the donor and the institution limits or waives the duty; and

(C) The governing board of an institution may retain property contributed by a donor to an institutional fund for as long as the governing board deems advisable;

(5) Within a reasonable time after receiving property, an institution shall make and carry out decisions concerning the retention or disposition of the property or to the rebalancing of a portfolio, in order to bring the institutional fund into compliance with the purposes, terms, and distribution requirements of the institution or the institutional fund as necessary to meet other circumstances of the institution or the institutional fund and the requirements of this chapter; and

(6) A person that has special skills or expertise, or is selected in reliance upon the person's representation that such person has special skills or expertise, has a duty to use those skills or expertise in managing and investing institutional funds.

History.
Code 1981, § 44-15-3, enacted by Ga. L. 2008, p. 149, § 1/HB 972.

44-15-4. Management of institutional funds for endowment.

(a) Subject to the intent of a donor expressed in the gift instrument or to any express written agreement between a donor and an institution, an institution may appropriate for expenditure or accumulate assets of an endowment fund as the institution determines shall be prudent for the uses, benefits, purposes, and duration for which the endowment fund is established. Unless stated otherwise in the gift instrument, the assets in an endowment fund shall be donor restricted assets until appropriated for expenditure by the institution. In making a determination to appropriate or accumulate assets, the institution shall act in good faith, with the care that an ordinarily prudent person in a like position would exercise under similar circumstances, and shall consider, if relevant, the following factors:

(1) The duration and preservation of the endowment fund;

(2) The purposes of the institution and the endowment fund;

(3) General economic conditions;

(4) The possible effect of inflation or deflation;

(5) The expected total return from income and the appreciation of investments;

(6) Other resources of the institution; and

(7) The investment policy of the institution.

(b) To limit the authority to appropriate assets for expenditure or accumulation under subsection (a) of this Code section, a gift instrument shall specifically state the limitation.

(c) Terms in a gift instrument designating a gift as an endowment, or a direction or authorization in the gift instrument to use only income, interest, dividends, or rents, issues, or profits, or to preserve the principal intact, or other words of similar meaning shall:

(1) Create an endowment fund of permanent duration, unless otherwise provided by the gift instrument for limiting the duration of such fund; and

(2) Not otherwise limit the authority to appropriate assets for expenditure or accumulation under subsection (a) of this Code section.

History.
Code 1981, § 44-15-4, enacted by Ga. L. 2008, p. 149, § 1/HB 972.

44-15-5. Delegation of management of funds.

(a) Subject to any specific limitation set forth in a gift instrument or in law other than this chapter, an institution may delegate to an external agent the management and investment of an institutional fund to the extent that an institution could prudently delegate under the circumstances. An institution shall act in good faith, with the care that an ordinarily prudent person in a like position would exercise under similar circumstances, in:

(1) Selecting an agent;

(2) Establishing the scope and terms of the delegation, consistent with the purposes of the institution and the institutional fund; and

(3) Periodically reviewing the agent's actions in order to monitor the agent's performance and compliance with the scope and terms of the delegation.

(b) In performing a delegated function, an agent owes a duty to the institution to exercise reasonable care to comply with the scope and terms of the delegation.

(c) An institution that complies with subsection (a) of this Code section shall not be liable for the decisions or actions of an agent for the performance of a delegated function.

(d) By accepting the delegation of a management or investment function from an institution that is subject to the laws of this state, an agent submits to the jurisdiction of the courts of this state in all proceedings arising from or related to the delegation or the performance of the delegated function.

(e) An institution may delegate management and investment functions to its committees, officers, or employees as otherwise authorized by law.

History.
Code 1981, § 44-15-5, enacted by Ga. L. 2008, p. 149, § 1/HB 972.

44-15-6. Modification of restrictions.

(a) If the donor or a donor's designee consents in a record, an institution may release or modify, in whole or in part, a restriction contained in a gift instrument on the management, investment, or purpose of an institutional fund. A release or modification may not allow an institutional fund to be used for a purpose other than a charitable purpose of the institution.

(b) The court, upon application of an institution, may modify a

restriction contained in a gift instrument regarding the management or investment of an institutional fund if the restriction has become impracticable or wasteful, if it impairs the management or investment of such fund, or if, because of circumstances not anticipated by the donor, a modification of a restriction will further the purposes of such fund. The institution shall notify the Attorney General of the application, and the Attorney General shall be given an opportunity to be heard. To the extent practicable, any modification shall be made in accordance with the donor's probable intention.

(c) If a particular charitable purpose or a restriction contained in a gift instrument on the use of an institutional fund becomes unlawful, impracticable, impossible to achieve, or wasteful, the court, upon application of an institution, may modify the purpose of such fund or the restriction on the use of such fund in a manner consistent with the charitable purposes expressed in the gift instrument. The institution shall notify the Attorney General of the application, and the Attorney General shall be given an opportunity to be heard.

(d) If an institution determines that a restriction contained in a gift instrument on the management, investment, or purpose of an institutional fund is unlawful, impracticable, impossible to achieve, or wasteful, the institution, 60 days after notification to the Attorney General, may release or modify the restriction, in whole or part, if:

(1) The institutional fund subject to the restriction has a total value of less than $100,000.00;

(2) More than 20 years have elapsed since the institutional fund was established; and

(3) The institution uses the property in a manner consistent with the charitable purposes expressed in the gift instrument.

History.
Code 1981, § 44-15-6, enacted by Ga. L. 2008, p. 149, § 1/HB 972.

44-15-7. Compliance with provisions; effective date.

Compliance with this chapter shall be determined in light of the facts and circumstances existing at the time a decision is made or action is taken, and not by hindsight. This chapter applies to institutional funds existing on or established after July 1, 2008. As applied to institutional funds existing on July 1, 2008, this chapter governs only decisions made or actions taken on or after that date. This chapter shall not authorize electronic delivery of any legally required notice.

History.
Code 1981, § 44-15-7, enacted by Ga. L. 2008, p. 149, § 1/HB 972.

44-15-8. Uniformity with law of other states.

In applying and construing this uniform act, consideration shall be given to the need to promote uniformity of the law with respect to its subject matter among states that enact it.

History.
Code 1981, § 44-15-8, enacted by Ga. L. 2008, p. 149, § 1/HB 972.

CHAPTER 16

UNIFORM ENVIRONMENTAL COVENANTS

Sec.		Sec.	
44-16-1.	Short title.	44-16-9.	Limitation of environmental covenant.
44-16-2.	Definitions.	44-16-10.	Amendment or termination; interest in environmental covenant not affected by amendment; role of court.
44-16-3.	Holders of environmental covenants; rights of agency; rules.	44-16-11.	Liability for violation and enforcement of environmental covenant.
44-16-4.	Requirements for environmental covenant.	44-16-12.	Maintenance of registry.
44-16-5.	Enforcement of environmental convenant.	44-16-13.	Rules and regulations; fees.
44-16-6.	Environmental covenant restrictions.	44-16-14.	Electronic signatures and delivery.
44-16-7.	Validation of environmental covenant.		
44-16-8.	Recording of amendments or termination of environmental convenant.		

44-16-1. Short title.

This chapter may be known as and may be cited as the "Uniform Environmental Covenants Act."

History.
Code 1981, § 44-16-1, enacted by Ga. L. 2008, p. 1168, § 1/HB 1132.

44-16-2. Definitions.

As used in this chapter, the term:

(1) "Activity and use limitations" means restrictions or obligations created under this chapter with respect to real property.

(2) "Agency" means the Environmental Protection Division of the Department of Natural Resources or any federal agency that determines or approves the environmental response project pursuant to which the environmental covenant is created.

(3) "Common interest community" means a condominium, cooperative, or other real property with respect to which a person, by virtue of the person's ownership of a parcel of real property, is obligated to pay property taxes or insurance premiums, or for maintenance, or improvement of other real property described in a recorded covenant that creates the common interest community.

(4) "Environmental covenant" means a servitude arising under an environmental response project that imposes activity and use limitations.

(5) "Environmental response project" means a plan or work performed for environmental remediation of real property and conducted:

(A) Under a federal or state program governing environmental remediation of real property;

(B) Incident to closure of a solid or hazardous waste management unit, if the closure is conducted with approval of an agency; or

(C) Under a state voluntary clean-up program.

(6) "Holder" means the grantee of an environmental covenant as specified in subsection (a) of Code Section 44-16-3.

(7) "Person" means an individual, corporation, business trust, estate, trust, partnership, limited liability company, association, joint venture, public corporation, government, political subdivision, agency, or instrumentality, or any other legal or commercial entity.

(8) "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.

History.
Code 1981, § 44-16-2, enacted by Ga. L. 2008, p. 1168, § 1/HB 1132.

44-16-3. Holders of environmental covenants; rights of agency; rules.

(a) Any person, including a person that owns an interest in the real property, the agency, or a municipality, county, consolidated government, or other unit of local government, may be a holder. An environmental covenant may identify more than one holder. The interest of a holder shall be an interest in real property.

(b) A right of an agency under this chapter or under an environmental covenant, other than a right as a holder, shall not be considered an interest in real property.

(c) An agency shall be bound by any obligation it assumes in an environmental covenant, but an agency shall not assume obligations merely by signing an environmental covenant. Any other person that signs an environmental covenant shall be bound by the obligations the person assumes in the covenant, but signing the covenant shall not change obligations, rights, or protections granted or imposed under law.

(d) The following rules apply to interests in real property in existence at the time an environmental covenant is created or amended:

(1) An interest that has priority under other law shall not be

affected by an environmental covenant unless the person that owns the interest subordinates that interest to the covenant;

(2) The provisions of this chapter shall not require a person that owns a prior interest to subordinate that interest to an environmental covenant or to agree to be bound by the covenant;

(3) A subordination agreement may be contained in an environmental covenant covering real property or in a separate record. If the environmental covenant covers commonly owned property in a common interest community, the record may be signed by any person authorized by the governing board of the owners' association; and

(4) An agreement by a person to subordinate a prior interest to an environmental covenant affects the priority of that person's interest but shall not by itself impose any affirmative obligation on the person with respect to the environmental covenant.

History.
Code 1981, § 44-16-3, enacted by Ga. L. 2008, p. 1168, § 1/HB 1132.

44-16-4. Requirements for environmental covenant.

(a) An environmental covenant shall:

(1) State that the instrument is an environmental covenant executed pursuant to this chapter;

(2) Contain a legally sufficient description of the real property subject to the covenant and the name of the owner of the fee simple of the real property subject to such covenant at the time such covenant is executed;

(3) Describe the activity and use limitations on the real property;

(4) Identify every holder;

(5) Be signed by the agency, every holder, and, unless waived by the agency, every owner of the fee simple of the real property subject to such covenant; and

(6) Identify the name and location of any administrative record for the environmental response project reflected in the environmental covenant.

(b) In addition to the information required by subsection (a) of this Code section, an environmental covenant may contain other information, restrictions, and requirements agreed to by the persons who signed it, including any:

(1) Requirements for notice following transfer of a specified interest in, or concerning proposed changes in use of, applications for

building permits for, or proposals for any site work affecting the contamination on, the property subject to the covenant;

(2) Requirements for periodic reporting describing compliance with the covenant;

(3) Rights of access to the property granted in connection with implementation or enforcement of the covenant;

(4) A brief narrative description of the contamination and remedy, including the contaminants of concern, the pathways of exposure, limits on exposure, and the location and extent of the contamination;

(5) Limitation on amendment or termination of the covenant in addition to those contained in Code Sections 44-16-9 and 44-16-10; and

(6) Rights of the holder in addition to the right to enforce the covenant pursuant to Code Section 44-16-11.

(c) In addition to other conditions for its approval of an environmental covenant, the agency may require those persons specified by the agency who have interests in the real property to sign the covenant.

(d) The agency shall not sign the environmental covenant without confirming that the people or entities listed in paragraphs (1) through (6) of subsection (a) of Code Section 44-16-7 have been served with a copy of the proposed final text of the environmental covenant at least 30 days prior to the agency signing such covenant.

History.
Code 1981, § 44-16-4, enacted by Ga. L. 2008, p. 1168, § 1/HB 1132.

44-16-5. Enforcement of environmental convenant.

(a) An environmental covenant that complies with this chapter runs with the land.

(b) An environmental covenant that is otherwise effective shall be valid and enforceable even if:

(1) It is not appurtenant to an interest in real property;

(2) It can be or has been assigned to a person other than the original holder;

(3) It is not of a character that has been recognized traditionally at common law;

(4) It imposes a negative burden;

(5) It imposes an affirmative obligation on a person having an interest in the real property or on the holder;

(6) The benefit or burden does not touch or concern real property;

(7) There is no privity of estate or contract;

(8) The holder dies, ceases to exist, resigns, or is replaced; or

(9) The owner of an interest subject to the environmental covenant and the holder are the same person.

(c) An instrument that creates restrictions or obligations with respect to real property that would qualify as activity and use limitations except for the fact that the instrument was recorded before July 1, 2008, shall not be invalid or unenforceable because of any of the limitations on enforcement of interests described in subsection (b) of this Code section or because it was identified as an easement, servitude, deed restriction, or other interest. This chapter shall not apply in any other respect to such an instrument.

(d) This chapter shall not invalidate or render unenforceable any interest, whether designated as an environmental covenant or other interest, that is otherwise enforceable under the law of this state.

History.
Code 1981, § 44-16-5, enacted by Ga. L. 2008, p. 1168, § 1/HB 1132; Ga. L. 2019, p. 1056, § 44/SB 52.

Code Commission notes.
Pursuant to Code Section 28-9-5, in 2008, "July 1, 2008" was substituted for "the effective date of this chapter" in the first sentence of subsection (c).

44-16-6. Environmental covenant restrictions.

This chapter shall not authorize a use of real property that is otherwise prohibited by zoning, by ordinance, by local law, by general law, or by a recorded instrument that has priority over the environmental covenant. An environmental covenant may prohibit or restrict uses of real property which are otherwise authorized by zoning, by ordinance, by local law, or by general law.

History.
Code 1981, § 44-16-6, enacted by Ga. L. 2008, p. 1168, § 1/HB 1132.

44-16-7. Validation of environmental covenant.

(a) A copy of an environmental covenant shall be provided in the manner required by the agency and shall establish proof of service to:

(1) Each person that signed the covenant;

(2) Each person holding a recorded interest in the real property subject to the covenant;

(3) Each person in possession of the real property subject to the covenant;

(4) Each municipality, county, consolidated government, or other unit of local government in which real property subject to the covenant is located;

(5) Each owner in fee simple whose property abuts the property subject to the environmental covenant; and

(6) Any other person the agency requires.

(b) The validity of an environmental covenant shall not be affected by failure to provide a copy of the covenant as required under this Code section.

History.
Code 1981, § 44-16-7, enacted by Ga. L. 2008, p. 1168, § 1/HB 1132.

44-16-8. Recording of amendments or termination of environmental convenant.

(a) An environmental covenant and any amendment or termination of the covenant shall be recorded in every county in which any portion of the real property subject to the covenant is located. For purposes of indexing, a holder shall be treated as a grantee.

(b) Except as otherwise provided in subsection (c) of Code Section 44-16-9, an environmental covenant shall be subject to the laws of this state governing recording and priority of interests in real property.

History.
Code 1981, § 44-16-8, enacted by Ga. L. 2008, p. 1168, § 1/HB 1132.

44-16-9. Limitation of environmental covenant.

(a) An environmental covenant shall be perpetual, which shall be stated in such covenant, unless it is:

(1) By its terms limited to a specific duration or terminated by the occurrence of a specific event;

(2) Terminated by consent pursuant to Code Section 44-16-10;

(3) Terminated pursuant to subsection (b) of this Code section;

(4) Terminated by foreclosure of an interest that has priority over the environmental covenant; or

(5) Terminated or modified in an eminent domain proceeding, but only if:

(A) The agency that signed the covenant is a party to the proceeding;

(B) All persons identified in subsections (a) and (b) of Code Section 44-16-10 are given notice of the pendency of the proceeding; and

(C) The court determines, after hearing, that the termination or modification will not adversely affect human health or the environment.

(b) If the agency that signed an environmental covenant has determined that the intended benefits of the covenant can no longer be realized, a court, under the doctrine of changed circumstances, in an action in which all persons identified in subsections (a) and (b) of Code Section 44-16-10 have been given notice, may terminate the covenant or reduce its burden on the real property subject to the covenant. The agency's determination or its failure to make a determination upon request of the current owner of the fee simple of the real property or by any affected member of the public shall be subject to review pursuant to Article 1 of Chapter 13 of Title 50, the "Georgia Administrative Procedure Act."

(c) Except as otherwise provided in subsections (a) and (b) of this Code section, an environmental covenant may not be extinguished, limited, or impaired through issuance of a tax deed, foreclosure of a tax lien, or application of the doctrine of adverse possession, prescription, abandonment, waiver, lack of enforcement, or acquiescence, or a similar doctrine.

(d) An environmental covenant may not be extinguished, limited, or impaired by application of Code Sections 44-5-60 and 44-5-168.

History. Code 1981, § 44-16-9, enacted by Ga. L. 2008, p. 1168, § 1/HB 1132; Ga. L. 2019, p. 1056, § 44/SB 52.

44-16-10. Amendment or termination; interest in environmental covenant not affected by amendment; role of court.

(a) An environmental covenant may be amended or terminated by consent only if the amendment or termination is signed by:

(1) The agency;

(2) The current owner of the fee simple of the real property subject to the covenant;

(3) Each person that originally signed the covenant, unless the person waived in a signed record the right to consent or a court finds that the person no longer exists or cannot be located or identified with the exercise of reasonable diligence; and

(4) Except as otherwise provided in paragraph (2) of subsection (d) of this Code section, the holder.

(b) If an interest in real property is subject to an environmental covenant, the interest shall not be affected by an amendment of the covenant unless the current owner of the interest consents to the amendment or has waived in a signed record the right to consent to amendments.

(c) Except for an assignment undertaken pursuant to a governmental reorganization, assignment of an environmental covenant to a new holder shall be an amendment.

(d) Except as otherwise provided in an environmental covenant:

(1) A holder may not assign its interest without consent of the other parties; and

(2) A holder may be removed and replaced by agreement of the other parties specified in subsection (a) of this Code section.

(e) A court of competent jurisdiction may fill a vacancy in the position of holder.

History.
Code 1981, § 44-16-10, enacted by Ga. L. 2008, p. 1168, § 1/HB 1132.

44-16-11. Liability for violation and enforcement of environmental covenant.

(a) A civil action for injunctive or other equitable relief for violation of an environmental covenant may be maintained by:

(1) A party to the covenant;

(2) The agency;

(3) Any person to whom the covenant expressly grants power to enforce;

(4) Any owner in fee simple whose property abuts the property subject to the environmental covenant, if harm occurs or is reasonably likely to occur;

(5) A person whose interest in the real property or whose collateral or liability may be affected by the alleged violation of the covenant; or

(6) A municipality, county, consolidated government, or other unit of local government in which the real property subject to the covenant is located.

(b) This chapter shall not limit the regulatory authority of the agency

under law other than with respect to an environmental response project.

(c) A person shall not be responsible for or subject to liability for environmental remediation solely because such person has the right to enforce an environmental covenant.

History.
Code 1981, § 44-16-11, enacted by Ga. L. 2008, p. 1168, § 1/HB 1132.

44-16-12. Maintenance of registry.

The agency may establish and maintain a registry that contains all environmental covenants and any amendment or termination of such covenants. The registry may also contain any other information concerning environmental covenants and the real property subject to them which the agency considers appropriate. The registry, if established, shall be a public record for purposes of Article 4 of Chapter 18 of Title 50.

History.
Code 1981, § 44-16-12, enacted by Ga. L. 2008, p. 1168, § 1/HB 1132.

44-16-13. Rules and regulations; fees.

The agency may establish rules and regulations for implementing this chapter and may provide for fees for utilizing this chapter.

History.
Code 1981, § 44-16-13, enacted by Ga. L. 2008, p. 1168, § 1/HB 1132.

44-16-14. Electronic signatures and delivery.

This chapter modifies, limits, or supersedes 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 of such Act (15 U.S.C. Section 7001(a)) or authorize electronic delivery of any of the notices described in Section 103 of such Act (15 U.S.C. Section 7003(b)).

History.
Code 1981, § 44-16-14, enacted by Ga. L. 2008, p. 1168, § 1/HB 1132.

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Trust company.
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Unit owner.
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