

ADVERSE POSSESSION

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The concept of squatter's rights might seem like an antiquated notion, but the law continues to recognize adverse possession as a method by which one may obtain legal title to property. This article examines the criteria to establish title by adverse possession.

“The burden of establishing prescriptive title lies on the party claiming it.”² In order for possession to be the foundation of prescriptive title, it: “(1) Must be in the right of the possessor and not of another; (2) Must not have originated in fraud except as provided in Code Section 44-5-162; (3) Must be public, continuous, exclusive, uninterrupted, and peaceable; and (4) Must be accompanied by a claim of right.”³ “Prescriptive rights are to be strictly construed, and the prescriber must give some notice, actual or constructive, to the landowner he or she intends to prescribe against.”⁴

“While courts delineate what facts are sufficient to constitute adverse possession, whether such facts exist is generally a jury question.”⁵ “A trial court is not justified in directing a verdict as to an adverse possession defense when there is some evidence or fact which could possibly support a jury's findings as to the elements of prescription under O.C.G.A. § 44-5-161.”⁶ If there is any evidence to support a trial court's determination that a party acquired prescriptive title to

¹ The authors gratefully acknowledge the prior work of Ashley Nunneker, portions of which are incorporated into this article.

² *Kelley v. Randolph*, 295 Ga. 721, 722 (2014) (citation omitted).

³ O.C.G.A. § 44-5-161(a).

⁴ *Bailey v. Moten*, 289 Ga. 897, 899 (2011) (citation omitted).

⁵ *Byrd v. Shelley*, 279 Ga. App. 886, 887 (2006) (citation omitted).

⁶ *Guagliardo v. Jones*, 238 Ga. App. 668, 668 (1999) (citations omitted).

disputed land, it will not be disturbed on appeal, even if there is evidence to support a contrary determination.⁷

A. Claim Cannot Have Originated In Fraud

“In order for fraud to prevent the possession of property from being the foundation of prescription, such fraud must be actual or positive and not merely constructive or legal.”⁸ A person who claims title by virtue of adverse possession under color of title must have actual notice of any alleged fraud before that fraud will defeat his adverse possession claim.⁹ Where the person claiming title by virtue of adverse possession had no notice of alleged fraud concerning the document in question, there could be no “actual or positive fraud” as required by the statute.¹⁰

Additionally, when “actual or positive fraud prevents or deters another party from acting, prescription shall not run until such fraud is discovered.”¹¹ But, if the alleged fraud does not “prevent or deter” a party from acting, the alleged fraud cannot bar a claim of title by adverse possession.¹²

B. Hostile Possession

“Actual possession of lands may be evidenced by enclosure, cultivation, or any use and occupation of the lands which is so notorious as to attract the attention of every adverse claimant and so exclusive as to prevent actual occupation by another.”¹³ “During the time required for the

⁷ Williamson v. Fain, 274 Ga. 413, 415 (2001) (citing Nebb v. Butler, 257 Ga. 145 (1987)).

⁸ O.C.G.A. § 44-5-162(a).

⁹ Goodrum v. Goodrum, 283 Ga. 163, 163 (2008).

¹⁰ Id. at 164. See also Gigger v. White, 277 Ga. 68, 71 (2003) (“To defeat prescriptive title, the fraud of the party claiming thereunder must be such as to charge his conscience. He must be cognizant of the fraud, not by constructive but by actual notice.”).

¹¹ O.C.G.A. § 44-5-162(b).

¹² Goodrum, 283 Ga. at 164 (where the appellants were unaware of the alleged fraud from 1989 to 2002, it could not be said that they failed to act based upon it).

¹³ O.C.G.A. § 44-5-165.

ripening of prescription, it is necessary that ‘there shall be something to give notice that another is doing such acts or holding out such signs as to indicate the existence of a possession adverse to the true owner.’”¹⁴ Possession “denotes the corporeal control of property, a state of actual occupancy, evidenced by things capable of being seen by the eye or of being ascertained by the use of the primary senses.”¹⁵

A review of Georgia case law shows what fact patterns the courts have determined to comprise adverse or hostile possession sufficient for prescriptive title to arise:

- Railroad tie terraces constructed in a backyard to raise and level the yard, and which encroached onto neighboring property along with construction debris, constituted adverse possession of the neighboring property. “It is undisputed that the terraces and construction debris encroaching onto [defendants’] property have remained in the same place continuously since at least 1990 when the terraces were built, thus satisfying the statutory 20-year prescriptive period. The building of the terraces changed the nature and appearance of the property and gave notice to all that the [plaintiffs] were exercising possession over the property in question.”¹⁶ “Construction of the terraces also demonstrated [plaintiffs’] exercise of exclusive dominion over the property and an appropriation of it for their own use and benefit.”¹⁷
- The disputed land contained a pond created by a dam, which broke, resulting in the pond being drained. The adverse possessors entered onto the disputed land in order to

¹⁴ Ga. Power Co. v. Irvin, 267 Ga. 760, 764 (1997) (quoting Clark v. White, 120 Ga. 957, 959 (1904)).

¹⁵ Byrd v. Shelley, 279 Ga. App. 886, 888 (2006) (quoting Burgin v. Moye, 212 Ga. 370, 374 (1956)).

¹⁶ Kelley, 295 Ga. at 723.

¹⁷ Id.

reconstruct the dam at a substantial cost borne only by them, and the neighboring property owner did not object to this act of actual possession and ownership. The work on the dam was visible from the public road that crossed the neighbors' property, and this evidence alone was "sufficient to establish open and notorious occupation to put the world on notice of actual possession of the disputed land."¹⁸ The reconstruction of the dam also supported actual possession of all the disputed land, even though some of it was wild land that was not enclosed or cultivated, because "possession under a duly recorded deed shall be construed to extend to all the contiguous property embraced in such deed."¹⁹

- Mowing and occasionally cleaning up a disputed area is not generally sufficient to constitute actual possession; where the disputed area adjoins the property of the party claiming adverse possession, "other claimants could have interpreted such mowing and occasional clean-up as having a merely aesthetic objective and not as an intent to exercise dominion."²⁰
- Occasional visits to property are not sufficient to establish possession.²¹
- Clearing an area of vegetation or timber cutting have little value as evidence of possession.²²
- Whether a disputed area is enclosed is an issue for the trier of fact.²³
- Where a community homeowners association permitted residents of the community to enjoy a disputed area as common property but did not permit them to take over the property

¹⁸ Matthews v. Cloud, 294 Ga. 415, 418 (2014).

¹⁹ Id. (quoting O.C.G.A. § 44-5-167).

²⁰ Bailey, 289 Ga. at 899 (citation omitted).

²¹ Id. (citing Robertson v. Abernathy, 192 Ga. 694, 699 (1941)).

²² Id.

²³ Id. (citing Brookman v. Rennolds, 148 Ga. 721, 731-32 (1919)).

for their own personal use and consistently impeded their attempts to do personal construction projects on the disputed area, the residents could not show they had adverse possession of the property.²⁴

- Installing a sprinkler system, by itself, would not establish adverse possession.²⁵
- Actual “adverse possession by one claimant is inconsistent with and will prevail over mere constructive possession by another claimant.”²⁶
- In a dispute over the rear portion of the second floor of a building, the tenant who rented the adjacent front portion of the second floor was determined to have title to the disputed space where he: replaced the door at the base of the stairwell leading to the second floor and did not provide a key to anyone; used the disputed space to store material for the renovation of the front portion; did not observe anyone other than himself and his agents either possessing the disputed space or maintaining it; and posted “No Trespassing” signs. This evidence showed that the owner of the first floor of the building, which had claimed the disputed space by adverse possession, could not prevail because it was not in continuous, exclusive, and uninterrupted actual possession of the space.²⁷ The owner of the first floor showed that it repaired the roof of the building on several occasions, but the purpose of those repairs seems to have been to protect its interest in the first floor, and even assuming the repairs could be considered as maintenance of the disputed space on the

²⁴ Campbell v. The Landings Assoc., Inc., 289 Ga. 617, 620 (2011).

²⁵ Id.

²⁶ Sacks v. Martin, 284 Ga. 712, 714 (2008) (quoting Shahan v. Watkins, 194 Ga. 164, 167 (1942)).

²⁷ MEA Family Inv., LP v. Adams, 284 Ga. 407, 408-09 (2008).

second floor, such sporadic efforts were not generally sufficient to constitute actual possession.²⁸

- A “mere entry, unaccompanied by an actual occupancy, is no possession at all”²⁹
- “To constitute adverse possession, the [claimant] must either remain permanently upon the land, or else occupy it in such a way, as to leave no doubt in the mind of the true owner, not only who the adverse claimant was, but that it was his purpose to keep him out of his land. ... Adverse possession is to be made out by acts which are open, visible, notorious, and continuous; and does not depend upon the secret purpose or intention of the intruder; that he will return at his convenience, sooner or later, and reoccupy the land.”³⁰
- Plaintiff established prescriptive title over disputed property by adverse possession where she showed that she exclusively used and occupied the property for more than 20 years by mowing, maintaining, fencing, and placing old cars, boats, a chicken coop, basketball goals, and a driveway on it. She also showed that the defendants never crossed a natural boundary line to use the property in question.³¹ Although a neighbor testified that over the years he saw both plaintiff and defendants mowing the property, the credibility of that witness and the weight to be accorded his testimony were matters for the jury to resolve.³²
- Church acquired property by adverse possession where it used the property as church property regularly since 1957 and regularly maintained the property, mowing it approximately every two weeks, removing downed tree limbs, and cleaning up the cemetery twice per year. Church also presented evidence which established that the

²⁸ Id. at 409.

²⁹ Id.

³⁰ Id. at 409-10 (quoting Denham v. Holeman, 26 Ga. 182, 191 (1858)).

³¹ Murray v. Stone, 283 Ga. 6 (2008).

³² Id. at 7.

adjacent property owner had personal knowledge of the church's claim to the property in question dating back to August 1972. Trial court was authorized to conclude from the evidence presented that the church had acquired prescriptive title to the portion of the disputed property used and possessed by the church for church and cemetery purposes.³³

- In contrast, where a church received rental payments from a sign company which maintained billboards on a disputed lot and where the church occasionally cleaned up the area, these things were insufficient to constitute actual possession. The billboards would give notice of nothing more than an easement and would not evidence actual possession by the church which was so exclusive as to prevent the occupation by others of the entire lot or even the area beneath the signs.³⁴
- Payment of taxes is not evidence of title and ownership.³⁵
- “Declarations by a person in favor of his own title shall be admissible to prove his adverse possession.” Where the claimant's declarations and occupancy “left no doubt on the mind of the true owner, not only as to who the adverse claimant is, but that it was his purpose to keep him out of the land,” his possession was adverse and without permission.³⁶

C. **Exclusivity**

“Adverse possession, in order to ripen into title, must be exclusive. ‘Exclusive possession’ means that the disseizor must show an exclusive dominion over the land and an appropriation of it to his own use and benefit.”³⁷ “And while ‘[t]wo persons cannot hold one piece of property adversely to each other at the same time,’ it has been recognized that ‘an adverse claimant’s

³³ Mobley v. Jackson Chapel Church, 281 Ga. 122, 123-24 (2006).

³⁴ Friendship Baptist Church, Inc. v. West, 265 Ga. 745, 745-46 (1995).

³⁵ Byrd, 279 Ga. App. at 887 (citing Brown v. Williams, 259 Ga. 6 (1989)).

³⁶ Georgia Power Co., 267 Ga. at 367-68.

³⁷ Ga. Power Co. v. Irvin, 267 Ga. at 366 (quoting Carter v. Becton, 250 Ga. 617, 618 (1983)).

possession need not be absolutely exclusive, it need only be a type of possession which would characterize an owner's use.”³⁸ Thus, Georgia Power's use of certain land in a limited area above and below the earth's surface for the limited purpose of generating hydroelectric power, including its occasional entry onto the land to maintain its lines and tunnel, was consistent with the surface use of the property by the plaintiffs seeking title by adverse possession and did not attempt to interrupt their occupancy.³⁹ Even though plaintiffs' continuous and open possession for almost 100 years was subject to Georgia Power's limited use and was therefore not “absolutely exclusive,” it was consistent with ownership and was sufficiently exclusive to satisfy O.C.G.A. § 44-5-161 (a)(3).⁴⁰ Georgia Power's limited use of the property did not constitute joint possession which would negate the exclusivity of the plaintiffs' possession and defeat their ability to acquire title by prescription.⁴¹

D. Continuity

To perfect prescriptive title to property, a claimant must show that his adverse possession was continuous over the required statutory period. *See Smith v. Stacey*, 281 Ga. 601, 603 (2007) (where possession of the claimant and his predecessors was not ever continuous for seven years or more, but rather was intermittent, with the property being vacant for various periods of time and interrupted by acts of possession of others, the jury was authorized to find that claimant failed to prove his claim of prescriptive title). However, the “rule requiring continuity of possession is one of substance and not of absolute mathematical continuity. ... Thus, there may be ‘slight intervals’ in which the prescriber or his agent is not actually upon the land or there may be ‘short intervals

³⁸ *Id.* (quoting *Carter*, 250 Ga. at 618 and 3 Am. Jur. 2d 170, 171, Adverse Possession § 75).

³⁹ *Id.* at 367.

⁴⁰ *Id.*

⁴¹ *Id.*

of temporary absence' of such persons."⁴² "But it is necessary that, during the whole time required for the ripening of such prescription, there should be something to give notice that another is doing acts or holding out such signs as to indicate the existence of a possession adverse to the true owner."⁴³ Therefore, simply passing through a disputed tract of land on one occasion and marking drill rods and pins on the property did not constitute continuous possession.⁴⁴

In *Jackson v. Turner*, 277 Ga. 58 (2003), as support for his ownership by adverse possession of a disputed tract, Jackson claimed that he grazed cattle, that he grew and cut hay, and that he built a barn partially located on the land. But the evidence established that Jackson's use of the tract was not continuous, exclusive, or uninterrupted for the required statutory period.⁴⁵ "Until the mid-1980's when Jackson constructed a gate, the property was accessible to the general public and was used regularly by local teenagers for parties, drinking, and carousing. It was also shown that Jackson did not keep cattle on the property during the entire prescriptive period"⁴⁶ The jury could have reasonably decided that this evidence demonstrated interruption of possession or lack of continuity and exclusivity such that Jackson's claim for prescriptive title failed.⁴⁷

⁴² *Henson v. Tucker*, 278 Ga. App. 859, 862 (2006) (quoting *Walker v. Steffes*, 139 Ga. 520, 521 (1913)).

⁴³ *Id.* at 862-63 (citing *Walker*, 139 Ga. at 521-22).

⁴⁴ *Id.* at 863.

⁴⁵ *Id.* at 59.

⁴⁶ *Id.*

⁴⁷ *Id.* See also *Gurley v. East Atlanta Land Co.*, 276 Ga. 749, 750 (2003) (sporadic use of the property by some of claimant's tenants was insufficient to show uninterrupted and continuous possession to establish adverse possession).

E. Claim of Right

The “term ‘claim of right’ is synonymous with ‘claim of title’ and ‘claim of ownership.’ While this does not mean that the possession must be accompanied by a claim of title out of some predecessor, it does mean that there must be some claim of title in the sense that the possessor claims the property as his own.”⁴⁸ Where there are no allegations that the possession originated in fraud, the good faith of the adverse possessor is presumed.⁴⁹ Indeed, “no prescription runs in favor of one who took possession of land knowing that it did not belong to him.”⁵⁰

In *Walker*, the Georgia Supreme Court addressed whether the evidence allowed the reasonable inference that the plaintiffs performed acts on the property in question “under some claim that the property was theirs.”⁵¹ The plaintiffs produced an affidavit showing that: although Charles Walker, their predecessor in interest, lived on a different piece of property, the lot in question was known as the Charlie Walker tract; Charles Walker used the property to raise crops and livestock from at least 1937 onward; Charles Walker fenced the property and erected storage buildings on it; one of the plaintiffs assisted Charles Walker in maintaining the lot in question; and he continued to maintain it after the 1957 death of Charles Walker until 1969.⁵² The Court concluded that “[c]ontinuous farming of property, the erection of fences, and the construction of buildings are indicia of possession” sufficient to support the plaintiffs’ adverse possession claim to the property.⁵³ Accordingly, the plaintiffs produced evidence raising a material question of fact

⁴⁸ *Walker v. Sapelo Island Heritage Auth.*, 285 Ga. 194, 196 (2009) (quoting *Ewing v. Tanner*, 184 Ga. 773, 780 (1937)).

⁴⁹ *Kelley v. Randolph*, 295 Ga. 721, 723 (2014) (citing *Childs v. Sammons*, 272 Ga. 737, 739 (2000)).

⁵⁰ *Id.* at 723 n.1 (quoting *Ellis v. Dasher*, 101 Ga. 5, 9-10 (1897)).

⁵¹ *Id.* at 197.

⁵² *Id.*

⁵³ *Id.* at 198 (citations omitted).

as to whether they possessed the property under a claim of right, and the trial court erred in granting summary judgment against them.⁵⁴

F. Lack of Permissive Use

“Permissive possession cannot be the foundation of a prescription until an adverse claim and actual notice to the other party.”⁵⁵ In *Congress Street Properties, LLC v. Garibaldi’s, Inc.*, the Georgia Court of Appeals addressed the argument that a plaintiff claiming title to property by adverse possession is required to prove lack of permissive use as part of its case. The parties owned adjacent property lots.⁵⁶ Plaintiff acquired its property in 1979 and constructed a ventilation system on the outside of the west wall of its building which encroached onto the airspace above the adjoining property, owned by defendant’s predecessors in interest.⁵⁷ The ventilation system has been in place since March 1980.⁵⁸ Defendant purchased the adjacent property in 2002.⁵⁹ Prior to closing, plaintiff received a request from defendant’s predecessors in interest to sign a document acknowledging that the ventilation system encroached onto the neighboring property and agreeing to remove it if requested to do so.⁶⁰ Plaintiff declined this request.⁶¹ In June 2009, defendant demanded that plaintiff remove the ventilation system, and plaintiff filed a declaratory judgment action, asserting that it had adversely possessed the space occupied by the ventilation system through its open and continuous use for more than 29 years.⁶² Plaintiff filed an affidavit from its

⁵⁴ Id. See also *Congress Street Properties, LLC v. Garibaldi’s, Inc.*, 314 Ga. App. 143, 145 (2012) (holding that a claim of right “will be presumed from the assertion of dominion, particularly where the assertion of dominion is made by the erection of valuable improvements”).

⁵⁵ O.C.G.A. § 44-5-161(b).

⁵⁶ 314 Ga. App. at 144.

⁵⁷ Id.

⁵⁸ Id.

⁵⁹ Id.

⁶⁰ Id.

⁶¹ Id.

⁶² Id.

CFO, asserting that her father was responsible for acquiring its property and that she was unaware of any agreement reached between him and defendant's predecessors in interest regarding the encroachment of the ventilation system onto the latter's property.⁶³ The trial court granted summary judgment to plaintiff, holding that its use of the airspace occupied by its ventilation system since 1980 had been public, continuous, exclusive, uninterrupted, peaceable, and did not originate in fraud.⁶⁴ The trial court further held that there was no evidence in the record that demonstrates plaintiff had permission from the adjoining landowner when the ventilation system was originally built.⁶⁵

The Georgia Court of Appeals held that there was no dispute that for a period of more than 20 years, plaintiff's possession of the airspace occupied by its ventilation system had been public, continuous, exclusive, uninterrupted, and peaceable.⁶⁶ Possession under a claim of right was presumed because of plaintiff's assertion of dominion, and there was no allegation that the possession originated in fraud.⁶⁷ The court further held that plaintiff did not have the burden to prove that its use of the airspace was not permissive as part of its prima facie case. Rather, in accordance with the plain language of O.C.G.A. § 44-5-161 and applicable Georgia law, plaintiff satisfied its burden once it established by a preponderance of the evidence each of the elements explicitly set forth in O.C.G.A. § 44-5-161(a).⁶⁸ Once it did so, the burden then shifted to defendant to rebut the presumption of adverse possession with evidence of permissive use.⁶⁹ "To hold otherwise would not only inject into O.C.G.A. § 44-5-161(a) an additional essential element

⁶³ Id.

⁶⁴ Id. at 145.

⁶⁵ Id.

⁶⁶ Id. at 146.

⁶⁷ Id. at 146.

⁶⁸ Id.

⁶⁹ Id.

of the claim that was not included by the legislature, but also would place upon the adverse possessor the burden of proving a negative fact.”⁷⁰ Because defendant was unable to present any evidence of permissive use sufficient to rebut plaintiff’s evidence of adverse possession, the trial court did not err in granting plaintiff’s motion for summary judgment.⁷¹

G. Cotenants

“A party who asserts a claim of title by adverse possession against a cotenant has the burden of proving not only the usual elements of prescription ... but also at least one of the elements of O.C.G.A. § 44-6-123, which provides as follows: ‘There may be no adverse possession against a cotenant until the adverse possessor effects an actual ouster, retains exclusive possession after demand, or gives his cotenant express notice of adverse possession.’”⁷² Where one cotenant submitted an affidavit that a fellow cotenant claiming adverse possession took no action to oust his cotenants, to demand and retain exclusive possession, or to give actual notice of adverse possession, the burden then shifted to the cotenant claiming adverse possession to point to facts giving rise to a conflict on the issue.⁷³ But the cotenant claiming adverse possession submitted an affidavit showing only that he paid taxes on the property, that his cotenants did not use the property, and that they never questioned his right to be on the property; these averments did not

⁷⁰ Id. at 146-47.

⁷¹ Id. at 147. See also Goodson v. Ford, 290 Ga. 662, 664 (2012) (defendants did not acquire title to a street, a rectangular strip of land running between properties and connecting to highway, by adverse possession, where their use of the street for anything other than access to the highway was occasional and permissive at most, with no adverse claim and actual notice to the property owners or their predecessors).

⁷² Ward v. Morgan, 280 Ga. 569, 571 (2006) (quoting Wright v. Wright, 270 Ga. 530, 532 (1999)).

⁷³ Id.

suffice to establish an ouster or to satisfy an “express notice” of a “hostile claim” criterion.⁷⁴ The Georgia Supreme Court explained:

The entry and possession of one joint tenant or tenant in common being, prima facie, in support of his cotenant’s title, to constitute an adverse possession there must be some notorious and unequivocal act indicating an intention to hold adversely, or an actual disseisin or ouster. The silent and peaceable possession of one tenant, with no act which can amount to an ouster of his cotenants is not adverse; so either actual notice of the adverse claim must be brought home to the latter, or there must have been unequivocal acts, open and public, making the possession so visible, hostile, exclusive, and notorious that notice may fairly be presumed, and the statute of limitations will begin to run only from the time of such notice. Exclusive possession, therefore, by a cotenant alone will be presumed not an adverse holding, but simply one in support of the common title.⁷⁵

H. Predecessors in Interest

The Georgia courts have consistently considered the actions of predecessors in interest of a party seeking title to property through adverse possession in determining if the statutory requirements are met.⁷⁶

For example, in *Crawford v. Simpson*, 279 Ga. 280 (2005), the plaintiff brought a quiet title action in 2003 against his neighbor to establish ownership of a disputed 1.32 acre tract. The evidence showed that a 1950 deed showed a boundary line between the two properties which placed the disputed tract in the property owned by the plaintiff’s predecessor in title.⁷⁷ However, aerial photographs taken in 1963 and 1979 showed that the disputed tract was being maintained in

⁷⁴ Id.

⁷⁵ Id. at 572 (quoting *Hardin v. Council*, 200 Ga. 822, 831-32 (1946)) (emphasis in original). But see Gigger v. White, 277 Ga. 68, 71 (2003) (“But when a person claiming prescriptive title does not enter possession as a cotenant but as owner of the entire estate under color of title, such possession is adverse to those who might be otherwise treated as cotenants, and the party in possession is not subject to the conditions of O.C.G.A. § 44-6-123.”) (citation and internal punctuation omitted).

⁷⁶ See Norton v. Holcomb, 285 Ga. App. 78, 81 (2007) (“Possession by different predecessors in interest may be added together when the previous possession also satisfies the other elements of adverse possession.”).

⁷⁷ Id. at 281.

a manner consistent with defendant's predecessor's property, and the county taxed him accordingly for the disputed tract.⁷⁸ A witness familiar with the disputed tract since 1967 testified that defendant's predecessor grew hay and later planted pine trees on the tract.⁷⁹ Defendant's immediate predecessor in interest acquired the tract in a 1992 warranty deed.⁸⁰ In 1996, when plaintiff acquired his property, the seller did not warranty the disputed boundary line as shown by the 1950 deed, and when plaintiff in 2001 installed a fence along the 1950 boundary line, defendant had it removed.⁸¹ The trial court adopted the special master's award and findings that defendant owned the disputed tract through adverse possession.⁸²

On appeal, the Georgia Supreme Court noted that the evidence demonstrated that under defendant's predecessors in interest, the disputed property was cultivated beginning by at least 1963, the taxes were paid yearly, ownership of the property was warranted when it was conveyed in 1992, and plaintiff's fence was removed from the property in 2001.⁸³ The disputed tract was under cultivation for years and was neither remote nor incapable of actual possession without enclosure.⁸⁴ The evidence authorized the trial court and the special master to find that defendant's predecessors in interest maintained public, exclusive, and continuous possession of the disputed tract and that their hostile possession of the property was done in good faith under a claim of right.⁸⁵

⁷⁸ Id.

⁷⁹ Id.

⁸⁰ Id.

⁸¹ Id.

⁸² Id. at 280.

⁸³ Id. at 281-82.

⁸⁴ Id. at 282.

⁸⁵ Id. (citing Halpern v. The Lacy Inv. Corp., 259 Ga. 264 (1989)).

Likewise, in *Cooley v. McRae*, 275 Ga. 435 (2002), the plaintiff brought a quiet title action, contending that her predecessors in interest acquired title to property through adverse possession. The special master agreed, and the trial court adopted the special master's findings.⁸⁶

According to the Georgia Supreme Court, the record demonstrated that plaintiff's predecessor and his lineal descendants continuously occupied the property and openly declared to others that they owned the property from at least 1950 onward.⁸⁷ In 1951, plaintiff's predecessor sold timber rights on the property to an individual who testified that throughout the 1950s and 1960s, he and his family used the property for recreational purposes with the express permission of plaintiff's predecessor and in an honest belief that plaintiff's predecessor owned the property.⁸⁸ Since at least 1965, plaintiff's predecessor and his descendants regularly hunted on the property, cultivated the land, and constructed and maintained roads, fences, and gates on the property.⁸⁹ They frequently posted "No Trespassing" signs on the property and made trespassers on the property leave.⁹⁰ After plaintiff's predecessor's death in 1977, plaintiff claimed the property as her own, as shown by her filing of a survey plat asserting ownership of the property, her and her family's continuous and exclusive use of the property during her lifetime, and her conveyance by deed of portions of the property to her children.⁹¹ Further, defendant admitted that she knew of plaintiff's predecessors' possession of the property and that she always believed that they owned the property.⁹² Based on all the evidence, the trial court properly determined that possession of

⁸⁶ Id. at 435.

⁸⁷ Id. at 436.

⁸⁸ Id.

⁸⁹ Id.

⁹⁰ Id.

⁹¹ Id.

⁹² Id.

the property by plaintiff's predecessors was public, continuous, exclusive, uninterrupted and peaceable, and under a claim of right as required under O.C.G.A. § 44-5-161(a).⁹³

I. Length of Time of Possession Required

Generally, one claiming title to real property by adverse possession must be in possession of the property for a period of twenty years. O.C.G.A. § 44-5-163. However, possession of real property “under written evidence of title” for a period of seven years shall confer good title by prescription to the property.⁹⁴ O.C.G.A. § 44-5-164.

Color of title is a writing upon its face professing to pass title, but which does not do it, either from want of title in the person making it, or from the defective conveyance that is used – a title that is imperfect, but not so obviously so that it would be apparent to one not skilled in the law. ... [I]t must purport to convey the property to the possessor (to him holding either the corporeal or the legal possession), and not to others under whom he does not hold; it must contain such a description of the property as to render it capable of identification, and the possessor must in good faith claim the land under it.⁹⁵ An “administrator’s deed which purported to convey fee simple title, was sufficient color of title, for purposes of acquiring title to property by prescription, even though, unknown to all parties at the time of the transaction, the testatrix did not own the property at the time of her death.”⁹⁶ The Georgia Supreme Court further has “delineated

⁹³ Id. (citing Armour v. Peek, 271 Ga. 202 (1999)). See also Williamson v. Fain, 274 Ga. 413, 415 (2001) (evidence showed that plaintiff’s parents and predecessors in title had carried out acts recognized as acts of actual possession by cultivating property from 1949 through 1983 and then had changed the nature and appearance of the land by clear-cutting, wind-rowing, and replanting a pine tree plantation was sufficient to authorize the trial court’s ruling that plaintiff acquired prescriptive title to the property).

⁹⁴ In either case prescriptive title is valid against “everyone except the state and those persons laboring under the disabilities stated in Code Section 44-5-170.” O.C.G.A. §§ 44-5-163, 44-5-164.

⁹⁵ Gigger v. White, 277 Ga. 68, 70 (2003) (quoting Ponder v. Ponder, 275 Ga. 616, 619 (2002)).

⁹⁶ Id. at 70-71 (citing Smart v. Miller, 260 Ga. 88 (1990)).

numerous types of instruments that are treated as color of title, including a void deed by a husband conveying his wife's property, a sheriff's deed without an execution, a deed executed by one as attorney in fact without authority, [and] a quitclaim deed, conveying 'any rights of the grantor.'"⁹⁷

In *Gigger*, a quitclaim deed to plaintiff purported to convey the entire interest in the property and contained a full legal description as to render it capable of identification.⁹⁸ The plaintiff believed the former owner of the property to be the sole owner and other than the owner's son who executed the deed, plaintiff had no knowledge of the existence of any other children of the owner, or of any claim that they may have had to the property.⁹⁹ Plaintiff further had no knowledge of actual fraud in the quitclaim transaction and thus claimed the land in good faith.¹⁰⁰ Therefore, the writing plaintiff relied upon was sufficient color of title for purposes of acquiring prescriptive title to the property.¹⁰¹

⁹⁷ *Id.* at 71 n.3 (quoting *Smart*, 260 Ga. at 89 (internal citations omitted)).

⁹⁸ *Id.* at 71.

⁹⁹ *Id.*

¹⁰⁰ *Id.*

¹⁰¹ *Id.* See also *Matthews v. Crowder*, 281 Ga. 842, 843-45 (2007) (a deed reserving a grantor's right to live in a house for the remainder of her life was color of title for an adverse possession claim against a prior grantor's heirs claiming an interest by intestate succession due to invalid deed between the grantors, and the owners under color of title could thus establish adverse possession against the heirs, with the seven-year prescriptive period beginning to run no later than the death of the grantor). But see *Haffner v. Davis*, 290 Ga. 753, 754 (2012) (plaintiff could not claim adverse possession under color of title because his deed depicted the disputed property as outside of the property he purchased and therefore did not provide written evidence of title).