REAL PROPERTY

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VENDOR AND PURCHASER

The number of cases involving contracts for the sale of real property serves to emphasize the importance of the contract to sell as distinguished from the conveyance itself. Many of the preliminary steps leading up to a conveyance must be performed with as much attention to detail as is required in the deed. The contract in *Williams v. Gottlieb*[1] provided that the purchase price was to be paid as follows: "Buyer to secure $10,000 loan, balance of $4,000 cash." In a suit to recover the earnest money which had been paid, the prospective buyer recovered on the ground that the contract was too vague and indefinite to be enforaceable.

Preliminary agreements used by some auctioneers in handling the sale of real estate were likewise held too vague or incomplete to establish legal obligations. In one such case,[2] the "auctioneer's memorandum and sales contract" provided for a cash down payment and "balance to be agreed upon." Because the memorandum in this case was not signed by the auctioneer, it was held not to come within the provisions of Georgia Code section 96-114 (1933), which makes duly signed auctioneers' memoranda sufficient compliance with the Statute of Frauds. The memorandum in *Pierce v. Rush*[3] was signed only by the purchaser and did not contain the name of the seller. The seller's effort to get specific performance against the buyer failed because the memorandum referred to in the above-mentioned Code section must contain sufficient information to afford a mutuality of remedies to the parties.

An option to purchase real estate must be in writing and, since an extension of time (time being of the essence) is in effect a new option, such extension of time must satisfy the Statute of Frauds in order to be enforceable.[4] Nor does the rule against forfeitures apply to options, because the option vests no property right in the optionee. In the ordinary contract for the sale of land, however, even though a closing date is set, an oral agreement to extend it for a short while to enable

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1. 90 Ga. App. 438, 83 S.E.2d 245 (1954).
2. Rush v. Autry, 210 Ga. 732, 82 S.E.2d 866 (1954).
3. 210 Ga. 718, 82 S.E.2d 649 (1954).
4. Gulf Oil Corp. v. Willcoxon, 211 Ga. 462, 86 S.E.2d 507 (1955).

the buyer to secure a loan, will not defeat a cause of action for specific performance, even as against a subsequent purchaser of the land if he bought with notice of the contract.[5] The mere statement of the closing date did not make time of the essence.

Two cases decided during the period under study show the almost inexorable application of the doctrine of merger of agreements to real estate transactions. In *Kiser v. Godwin*[6] defendant's written offer to purchase certain property was accepted only after he agreed that if he resold the property before the due date of the last purchase money note he would pay the seller an additional sum. The contract of sale was duly executed under the original terms, making no mention of the additional sum, and containing a statement that the contract of sale constituted "the sole and entire agreement." The merger provision was held sufficient to defeat plaintiff's claim for the additional sum. Likewise, in *Willingham v. Anderson*,[7] a provision in the sales contract that the seller would pay for all improvements except sewage was held inoperative after execution of the deed which made no mention of improvements. The court held also that, totally apart from the doctrine of merger, the obligation to pay for improvements, being indefinite as to time, was too vague for enforcement.

The sale of realty by a wife to her husband prior to 1950 is still subject to being avoided by a wife (or her executor) if it can be shown that approval of the superior court was not obtained as required prior to that date by Georgia Code section 53-504 (1938).[8] The subsequent repeal of this section[9] did not validate a theretofore void transaction.

DEEDS

The cases which, though they involved deeds to realty, were decided solely on procedural points will not be discussed here. The inadequacy of the description in the deeds involved in two cases determined their outcome. Where a conveyance is by metes and bounds and the quantity of land is specified, the metes and bounds description will prevail over the quantity, and the "more or less" phrase will not alter this rule.[10] A description by metes and bounds which does not specify a definite starting point, however, is ineffective as a description.[11] Defendant's alternative claim through adverse possession in the

5. Scheer v. Doss, 211 Ga. 7, 83 S.E.2d 612 (1954).
6. 90 Ga. App. 825, 84 S.E.2d 474 (1954).
7. 90 Ga. App. 799, 84 S.E.2d 471 (1954).
8. Payne v. Jones, 211 Ga. 322, 86 S.E.2d 3 (1955).
9. Ga Laws 1950, p. 174.
10. McConnell v. White, 91 Ga. App. 92, 85 S.E.2d 75 (1954).
11. Floyd v. Carswell, 211 Ga. 36, 83 S.E.2d 586 (1954).

last case was fatally defective because Georgia Code section 84-404 (1933) provides that even though adjoining owners may be in constructive possession of the same land at the same time (under paper titles), still prescription will not run in favor of either.

The deed involved in *Sharpe v. Savannah River Lumber Corp.*[12] presented two close questions: (1) Was it intended to convey the fee? (2) If so, was the description of the land definite enough to do so? The warranty deed was to the grantee, "its successors and assigns," and purported to convey "all of the river swamp land," described as 125 acres more or less and bounded on one side by a river, on two sides by lands of named persons, and on the fourth side by other lands of the grantor. Following the conveying clause was a statement that the grantor also sells and conveys "all the timber and trees standing on said land and that the grantee, its successors and assigns should have 30 years in which to remove said timber and trees from the land." In answering the two questions, the court held (1) The deed conveyed a fee and not just a 30-year term. The granting clause first used was to defendant "its successors and assigns;" if there is inconsistency between this clause and the later one granting a 30-year term, the former will prevail. (2) As for the description, the court refused to rule that land described as "the river swamp land," considered with the rest of the deed, was not sufficiently described to justify the use of extraneous evidence to identify the land.[13]

Fuller v. Fuller [14] is the type of case which, though obviously decided correctly, nevertheless leaves one with a fleeting suspicion that some inequitable conduct is going unrebuked. In this case plaintiff administratrix alleged that deceased had executed and had had recorded some security deeds to his brother with the intent of putting the property beyond the reach of his creditors if they should have occasion to levy on it for payment of debts owed them by deceased. The instant case was to cancel these deeds on the ground that they were executed without consideration and with a fraudulent intent, and that there was in fact no delivery of the deeds, although they were recorded. The supreme court held that since deceased fell short of executing his fraudulent purpose, no wrong was done to his creditors. Since a showing of non-delivery of the deeds alone would destroy their legal effectiveness, their cancellation would work no injury to the grantee who paid nothing for them. The presumption of delivery which attaches at the recording of the deeds is subject to rebuttal.

12. 211 Ga. 570, 87 S.E.2d 398 (1955).
13. Citing A. C. Alexander Lumber Co. v. Bagley, 184 Ga. 352, 191 S.E. 466 (1937), which had ruled similarly with respect to land described as "the pond site."
14. 211 Ga. 201, 84 S.E.2d 665 (1954).

While it is true that no wrong was done to the defendant (grantee), is it not at least speculative that the mere fact that the fraudulently intended deed was recorded may have tended to deceive the grantor's creditors as to what recourse they might take in enforcing claims against him? As has been said, however, since no creditors were involved the court correctly decided the case on the single point of non-delivery of the deeds.

EASEMENTS AND RESTRICTIVE COVENANTS

At common law an easement of light and air could be acquired by prescription, but this doctrine has not been accepted in Georgia or in most states of the union.[15] Such an easement must be acquired either by an express grant, or by one implied by necessity. In *S. A. Lynch Corp. v. Stone*[16] it is held that even if the original building on plaintiff's site acquired such an implied easement by necessity, it was destroyed when the building was torn down, and no such easement re-attached to the new building put up on the same site. For these reasons, plaintiff could not enjoin the adjacent land owner from constructing a building which would close off windows in parts of plaintiff's hotel. The court had occasion, also, to restate the law, as it applies here, on the question of title to a party wall. The adjacent owners here are not tenants in common of the wall, but owners in severalty to its center, each with an easement of support from the other.[17]

In *Walker v. Sims Estates,*[18] an easement in an alley having been acquired by implied grant, it was held the doctrine of non-user did not apply and, consequently, proof of non-use alone is not evidence of an intent to abandon.

A somewhat similar situation was presented by *Hannah v. Kenny,*[19] where plaintiffs and defendants were owners of lots shown by their deeds and recorded plats as being separated by a named street. It was established by the evidence, however, that this street had never been opened or used by the public, or by the owners for ingress and egress. One of the defendants, who had owned one of the lots separated from plaintiff's lot by this street, had conveyed his lot to one of the other defendants, purporting in his deed to convey the street also. There was evidence that the defendant conveyor had used the street for over

15. 2 WALSH, COMMENTARIES ON THE LAW OF REAL PROPERTY, § 240 (1947); see also GA. CODE, § 85-1201 (1933).
16. 211 Ga. 516, 87 S.E.2d 57 (1955).
17. Citing Wilensky v. Robinson, 203 Ga. 423, 47 S.E.2d 270 (1948), which contains a lucid discussion of this question.
18. 211 Ga. 472, 86 S.E.2d 281 (1955).
19. 210 Ga. 824, 83 S.E.2d 1 (1954).

20 years as a garden and chicken yard, from which evidence the jury found that plaintiff had abandoned the area included in the street. The supreme court reversed the case on this point, holding that, since defendants' occupation of the street had been with knowledge that their deeds showed their lots as being bound by the street, they were mere squatters, holding under no claim of right, and, consequently, their occupancy of the street area could not ripen into prescriptive title.

Hannah v. Jacobs[20] held only that plaintiff had not met one of the requirements set out in Georgia Code section 84-112 (1933) for establishment of an easement for a private way by prescription.

The cases construing proposed restrictions on the use of property by the fee simple owner show that the courts are approaching this subject wisely. Uppermost in the mind of the courts is the fundamental notion that a man may do with his property as he pleases so long as he does not harm other owners or the public in general. Often opposed to this notion is the laudable desire that an owner—through caprice or otherwise—shall not thwart the desire of all his neighbors to make their neighborhood a better one in which to live.

In deciding these cases, the courts have forced the parties to live up to their agreements, but if it is found that there is in fact no agreement, then individual liberty is restrained only by the laws dealing with nuisances. In *Davis v. Deariso*[21] an attempt was made to enjoin erection of a filling station in a residential section. The supreme court held that in the absence of a restrictive covenant or a zoning ordinance, an owner is free to construct a filling station on his property. It was noted that this court had always held that a filling station in a residential section does not constitute a nuisance per se. It was admitted however, that most of its decisions on this question have been by divided courts, a fact that emphasizes the necessity (in the absence of a zoning ordinance) of properly drafted restrictive covenants dealing with this problem.

That such covenants will be enforced is shown by the case of *Mitchell v. Denson*.[22] Here the restrictive covenant forbade the erection of more than one dwelling and garage upon a 60-foot lot. Defendant, owner of a 60-foot lot, purchased another 30-foot lot next to his and was proceeding to erect another dwelling on his then 90-foot lot. The court held that defendant's proposed plan was in violation of the covenant, that a covenant forbidding more than *one* dwelling on a 60-foot lot is not

20. 92 Ga. App. 44, 87 S.E.2d 645 (1955).
21. 210 Ga. 717, 82 S.E.2d 509 (1954).
22. 211 Ga. 345, 86 S.E.2d 101 (1955)

circumvented by *two* dwellings on a 90-foot lot. The intent of the covenant was clearly to require for each dwelling a 60-foot lot.

In a similar case[23] involving roughly the same facts, both plaintiff and defendant derived their titles from a common grantor and their deeds contained the following restriction: "No commercial buildings to be erected thereon, same conveyed for residential purposes." Plainer language could not have been used. The case is noteworthy only because of the rather ingenious argument of defendant that, due to changed conditions, the particular subdivision property would be more valuable and would yield more taxes to the government if this covenant were nullified. Equity has not yet assumed such power over the individual ownership of property.

Future Interests

The most interesting case involving future interests was *Atlanta v. Fulton County*.[24] In 1874 the city had condemned some land under the authority of a charter provision giving it the power to condemn and to obtain thereby a fee simple. The condemnation decree (no deed being drawn) specified that the land was being condemned "for waterworks purposes." The city had discontinued using the land for waterworks purposes, and filed this petition to register the land. The county interposed a claim against the land for taxes about which there is no dispute if private parties still have an interest in the land. The supreme court held that the city obtained by condemnation only what amounted to a determinable fee and that limitation was specified in the condemnation itself. When the city ceased using the land for the purpose it specified in its condemnation, its interest ceased and title reverted to the person (or his heirs) from whom it had been taken. While it is fundamental that in a condemnation there is a presumption that no greater interest is taken than is necessary to accomplish the purpose of the condemnation, it would seem that since the city had authority to condemn the fee simple, a mere statement of the immediate purpose of the condemnation would not reduce the fee simple to a determinable fee.[25] In deeds between private parties, it is generally recognized that a mere statement of the purpose of the conveyance, without words of reverter or of rights of re-entry, will not reduce a fee simple to a

23. Cawthon v. Anderson, 211 Ga. 77, 84 S.E.2d 66 (1954).
24. 210 Ga. 784, 82 S.E.2d 850 (1954).
25. One textwriter argues that if a conveyance is made to a state or a subdivision thereof for a stated purpose, the result reached in the case under discussion should follow. Burby, Handbook on the Law of Real Property, § 172 (2d ed., 1954). Although he states that the cases do not in general support this view, the cases he cites are not quite identical in facts with the case under discussion.

determinable fee. The decision in this case may raise doubts as to exactly what interests other cities may now own in lands condemned by them. It would raise doubts, of course, only in those instances where the condemnation was stated to be for a specified purpose.

Two cases turned upon whether the primary grantee or devisee was vested with a fee or only with a life estate. In *Hill v. Lang*[26] land was conveyed (reserving a life estate in the grantor) to A, B and C "to remain theirs during their natural life and after their death to pass to their legal heirs at law." After the death of the grantor, A conveyed his interest to defendant and subsequently died intestate. The action was to have plaintiffs (A's children) recognized as owners of the land. While recognizing that a conveyance to one and his heirs (or heirs of his body), without more, will vest the fee simple in the grantee, the supreme court held that here there was a specific limitation to the class constituting the legal heirs of the life tenant (A). This limitation was not defeated by the fact that the life tenant had no children at the time of the conveyance. The remainder in fee was to the class, contingent until birth of a child to the life tenant, it is true, but thereafter it was vested in the first-born child subject to open and let in later-born children.

The other case referred to in the preceding paragraph was *Butler v. Citizens & Southern Bank*.[27] There a devise was to the bank in trust for the wife of testator for her life and giving her a general power of appointment by will. There was no provision in default of appointment. When the wife died without having exercised the power, the bank as trustee sought a construction of the will. It was held that (1) the trust completely divested testator of all interest, (2) the general power of appointment by will did not enlarge the wife's life estate into a fee, and (3) at the wife's death without her having exercised the power, title revested in testator's estate by a resulting trust. The last-mentioned point raised the question as to whether testator's heirs at his death or at the death of the life tenant were entitled to the property. The court held that, since there was no property in testator's estate until the death of the life tenant (when it went back to his estate by resulting trust), the heirs entitled to the property should be determined at that moment. Presumably, had this not been in trust, the reversion would have remained in testator during the life estate subject to being cut off at the termination of the life estate by exercise of the power of appointment, and upon failure of the life tenant to exercise the power, the heirs of testator entitled to the property

26. 211 Ga. 484, 86 S.E.2d 498 (1955).
27. 211 Ga. 414, 86 S.E.2d 520 (1955).

would have been determined at his death rather than at that of the life tenant.

LANDLORD AND TENANT

The only case under this heading calling for more than a brief mention is *Ory v. Tate*,[28] which raised a point of first impression in this state. Here the tenant had occupied premises under a five-year lease from 1945 to 1950 and in the latter year the lease was renewed for another five years. In 1953 the lessor sold the premises, subject to the lease, to plaintiff and shortly thereafter the lumber mill and brick kiln of the tenant, which had been constructed during the first lease term, were destroyed by fire. When the tenant started to remove reclaimed brick and roofing salvaged from the fire, plaintiff brought this action to enjoin him, alleging that such removal constituted waste. The court had no difficulty holding that these items were trade fixtures. The difficult point of first impression was whether the lumber mill and brick kiln remained trade fixtures of the tenant in view of the fact that the second lease contained no reservation of a right in the tenant to remove them. The supreme court held for the tenant and, in a full discussion of the two sides into which the courts of other states have been divided on this question, placed Georgia among those following the "non-forfeiture rule" which holds that a tenant does not lose his right to remove trade fixtures by a renewal lease which does not specifically reserve the right in him.[29]

The other landlord and tenant cases were of only minor interest. Where a rental specifies an expiration date which falls on Sunday and specifies liquidated damages for any holding over, the tenant is liable for the damages if he holds over until Monday following the expiration date.[30]

A landlord does not forfeit his right of distraint for rent by accepting from the tenant an assignment of choses in action, if it can be shown that the assignment was made only as additional security and not as an accord and satisfaction of the rent debt.[31]

STATUTES

The following statutes, affecting real property, were passed at the 1955 regular session of the General Assembly:

28. 211 Ga. 256, 85 S.E.2d 36 (1954).
29. For a full discussion of the so-called "forfeiture rule" and "non-forfeiture rule," see 110 A.L.R. 480 (1937).
30. Fulton County v. Atlanta Envelope Co., 90 Ga. App. 623, 83 S.E.2d 866 (1954).
31. Metalcraft Engineering Corp. v. Moses, 90 Ga. App. 714, 84 S.E.2d 125 (1954).

Georgia Laws 1955, p. 731 (Act No. 417)—The right of a widow or minor child to year's support shall be barred by a sale under authority of a court of competent jurisdiction or under power of sale in a will prior to setting apart of year's support. Only the property sold is affected.

Georgia Laws 1955, p. 616 (Act No. 385)—This act removed the 12 month limitation after death of the husband to allow a sale by an administrator or executor under order of court or power in a will at any time prior to application for dower, provided that the widow is given 30 days written notice. The executor or administrator shall attach a copy of an affidavit of such notice to the deed and same shall be recorded with the deed.

Georgia Laws 1955, p. 626 (Act No. 388)—The right of a widow to year's support shall be barred: (1) By remarriage prior to the setting apart of year's support; or (2) By death after 12 months from date of death of decedent husband, but prior to filing of application for year's support.

Georgia Laws 1955, p. 638 (Act No. 397)—The right of a minor to year's support shall be barred by either his death or his attaining the age of 21 prior to the filing of application for year's support.

Georgia Laws 1955, p. 122 (Act No. 11)—The benefits of the homestead exemption were extended to those holding under occupancy agreements as stockholders of a nonprofit cooperative ownership housing corporation, which either owns or holds the property under a 99-year lease subject to a mortgage insured by F.H.A. under section 213 (a) (1) of the National Housing Act.

Georgia Laws 1955, p. 430 (Act No. 222)—This act provides that a power of sale, unless limited in the instrument creating it, authorizes a private sale by the donee and that the power may be exercised by a successor of the donee, unless the instrument provides otherwise. This act does not apply to powers created by instruments given to secure debt.

Georgia Laws 1955, p. 614 (Act No. 382)—This act provides for the recording of affidavits showing facts affecting title to land so that same may be brought to the attention of persons searching titles in grantor and grantee indexes. These affidavits or certified copies are made admissible in evidence as rebuttal presumptions of the truth of statements in the affidavits.