REAL PROPERTY

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ESTATES

The rights and duties incident to many of the common types of estates in land are illustrated in several cases decided during the current survey period. Since these cases do not warrant extensive discussion, they will be mentioned only with reference to the principal rules of property law passed upon in them.

A conveyance to a wife for life or during widowhood, remainder to the heirs of the bodies of grantor and the wife, creates in the latter a life estate subject to termination by her remarriage.[1] Immediately upon her remarriage, the heirs are entitled to possession of the land, and if they delay in asserting that right, it will not estop them, but will only go toward establishing a prescriptive title in the wife.

Likewise, a devise in fee to a widow, with a proviso that if she remarries the property should then be equally divided among herself and testator's children then living, vests in the widow a defeasible fee subject to an executory devise in herself and the children.[2] Such a limitation is no more repugnant to the estate granted than are any other executory limitations, all of which have been recognized, subject only to the rule against perpetuities, as valid ever since the passage of the Statute of Uses.

A deed quitclaiming and surrendering all interest, right and title which the grantor may have at the time in any part of his father's estate is sufficient, either to convey all interest he had at the time, or to estop him and his privies from ever denying the conveyance.[3]

A vested remainder, subject to successive reserved life estates in the grantor and his wife, is sufficient interest to support an action of waste by the remainderman against one of the life tenants.[4] This case restated the duty of care owed by a life tenant to the vested remainder-

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1. McCray v. Caves, 211 Ga. 770, 88 S.E.2d 373 (1955).
2. McDonald v. Suarez 212 Ga. 360, 93 S.E.2d 16 (1956).
3. Ison v. Travis, 212 Ga. 335, 92 S.E.2d 518 (1956).
4. Graham v. Bryant, 211 Ga. 856, 89 S.E.2d 640 (1955).

man: i.e., he must exercise the care of the prudent man and commit no acts tending to a permanent injury to the remainder interest.

A question of construction which frequently arises was before the supreme court in *Jackson v. Sorrells*.[5] A deed conveying to a railroad the fee simple title to a 100-foot right of way was held to have created only an easement. The determining facts of the case were: (1) The nominal consideration, (2) the retention by the grantor of the right to cultivate all the strip not actually used by the railroad, and (3) the fact that the strip was across the middle of grantor's land, leaving no access between the two retained portions.

The validity of restraints on the alienation or the use of conveyed property was involved in two cases. In *Gerhart v. West Lumber Co.*,[6] a conveyance of the fee simple contained a provision that if the property ever ceased being used for county school purposes, then the grantor should have a right to purchase the property for a stated amount. The provision was held to violate the rule against perpetuities. The grantor could have easily accomplished his purpose by conveying only a determinable fee and retaining a possibility of reverter, which is not subject to the rule.

In *Johnson v. Flanders*[7] a mother had conveyed undivided one-third interests in land to her three children, subject to a reserved life estate. The deeds provided for a forfeiture of his interest if either grantee should attempt to sell or encumber his interest without the consent of the other two grantees. After the death of the mother and one of the children, the widow of the deceased child sued to partition the property. The forfeiture restriction was held void as repugnant to the legal vested remainders. At the death of the mother, the three children became tenants in common. The widow of the deceased child succeeded to her husband's interest as tenant in common, and as such was entitled to a partition.

CONVEYANCES

Several cases during the year were concerned with the rights of the parties during the period between the execution of the contract to sell and the execution of the deed. Where the sales contract is made specifically subject to the buyer's securing an F. H. A. loan of a certain amount, and through no fault of his own he is unable to secure such

5. 212 Ga. 333, 92 S.E.2d 513 (1956).
6. 212 Ga. 25, 90 S.E.2d 10 (1955).
7. 92 Ga. App. 697, 89 S.E.2d 829 (1955).

loan, then failure of this contingency entitles the prospective buyer to a return of the down payment.[8]

A broker's petition for his commission is sufficient to withstand a general demurrer if it alleges an open listing with him, and that he, prior to cancellation of the contract, procured a purchaser ready, willing and able to comply with the stipulated terms, and who in fact actually purchased the property.[9] The broker is not estopped by the fact that he had returned the earnest money to the prospective purchaser after being notified by the vendor that the purchaser would not consummate the deal.

A contract for the sale of realty is not invalid because it fails to specify how the stated purchase money is to be paid. In the absence of such specification, and in the absence of a custom of trade to the contrary, there is a presumption that the purchase price is to be paid upon delivery of the deed.[10]

The question of merger of a contract into a deed is always a close one, and must be determined by the peculiar facts of each transaction. In *Shetzen v. Aycock Realty Co.*[11] the realty company, in its contract to handle the purchase of land for a prospective buyer, had been given exclusive rental rights in an apartment house to be completed on the land which was to be bought. The deed which was later executed, and to which the realty company was not a party, contained no reference to the agreement. The court of appeals held that the agreement was a distinct and separate one, not essential or germane to the deed itself, and therefore not merged into the deed.

A grantee may recover for breach of warranty of title where part of the land is held by one who had a title superior to that of the vendor at the time he executed the deed.[12] It is not necessary that the paramount title of the third person be adjudicated before suit is brought against the vendor.

Adverse Possession

If the purpose of the rules of law on adverse possession is to add certainty to the ownership of land, then these rules served their purpose admirably during the past year. The appellate courts passed upon

8. Chappas v. Sandefur, 93 Ga. App. 67, 91 S.E.2d 46 (1955).
9. Hegidio v. Catron, 93 Ga. App. 131, 91 S.E.2d 107 (1955).
10. Allen v. Home Service and Construction, Inc., 93 Ga. App. 438, 92 S.E.2d 36 (1956).
11. 93 Ga. App. 477, 92 S.E.2d 114 (1956).
12. Sanders v. Callaway, 92 Ga. App. 510, 88 S.E.2d 632 (1955).

what appears to be an unusually large number of such cases, and the adverse possessors were quite successful. These cases are of interest to the profession, not because they state any rules of law which are not of common knowledge, but because they illustrate the unlimited types of situations to which these rules are applicable.

In *Miles v. Blanton*[13] a widow had applied for a year's support, but if any action was ever taken, it did not appear on the record. By alleging that she continued in possession of the land for more than twenty years, claiming the land as her own, and that she redeemed it for taxes and secured a quitclaim deed from the county, under which deed she had been in continuous possession for more than seven years, she was held to have pleaded two distinct grounds for prescriptive title. Even though her possession may have originated in a mistake as to what her rights as a surviving widow were, such possession can nevertheless ripen into title.

One claim made by the plaintiffs in this case is especially interesting: that is, that when the widow redeemed the land, she did so as tenant in common with the other heirs of decedent, hence, her possession enures to the benefit of all, and is not adverse to any of the heirs. The court held, however, that the parties were never tenants in common, that when a man dies leaving a widow and children, title vests in the latter subject only to the widow's right to claim a child's part or her dower. If she does neither, she acquires no interest whatsoever in the land. It follows that any interest she did acquire had to be by adverse possession.

In *Davis v. Harnesberger*,[14] at the death of a father, the land had been set apart to the widow and children as year's support. Two of the children took possession under a mutual agreement whereby they could have the land if they supported the widow. The widow executed a deed to them, but without first obtaining leave to sell. The children by continuing in possession for more than seven years were held to have acquired title by adverse possession. Whether the deed was valid or not, it could serve as color of title. As distinguished from the preceding case, the parties here were tenants in common by virtue of the setting apart of year's support, and where one tenant in common executes a deed purporting to convey the entire property, such deed, if followed by actual adverse possession of the entire property, will serve as color of title against the other tenants in common.

13. 211 Ga. 754, 88 S.E.2d 273 (1955)
14. 211 Ga. 625, 87 S.E.2d 841 (1955)

An easement over a right of way was established in *Burk v. Tyrrell*,[15] not by adverse user as claimed by the plaintiff, but as an easement appurtenant. Plaintiff had gone into possession of the dominant tenement under an oral contract of purchase, but did not acquire title by deed until four years later. Neither plaintiff's deed, nor that by which the owner conveyed to defendant the land over which the right of way passed, contained any reference to the right of way. Plaintiff's use of the way from the time of the oral contract to the time he acquired a deed was held to have been only permissive. Its adverse characteristic was not present until he acquired his deed. Seven years not having elapsed since that time, his claim by adverse user had not ripened into an easement. As previously pointed out, however, he had acquired the same easement, as one appurtenant to the land conveyed to him.

The remaining adverse possession cases were boundary disputes. A city acquired by deed a fifty-foot right of way, only twenty feet of which had ever been actually possessed. Actual use of the twenty-foot strip under color of title for over seven years was held to constitute constructive possession of the entire strip described in the deed constituting such color.[16] The plaintiff's claim that he had acquired all except the twenty-foot strip by adverse possession prior to the conveyance to the city was rejected, the court holding that a title acquired by adverse possession may itself be divested by adverse possession.

In three cases decided during the past year, boundary lines between contiguous owners were held to have been established by aquiescence for over seven years. Some of the acts held to constitute such aquiescence were: (1) The cutting of weeds and timber up to the disputed line;[17] (2) Acquiescence to a fence upon the line,[18] (3) General reputation in the neighborhood plus other acts and declarations of the owners.[19]

CONDEMNATION

The building of more and better highways has necessarily forced the state to acquire more land. In the process, the number of condemnation cases going to the appellate courts has increased—a trend which is likely to continue since both state and federal governments are appropriating more and more highway funds. Challenges of the

15. 212 Ga. 239, 91 S.E.2d 744 (1956).
16. Thurston v. City of Forest Park, 211 Ga. 910, 89 S.E.2d 509 (1955).
17. Railey v. Heath, 92 Ga. App. 123, 88 S.E.2d 194 (1955).
18. McGinty v. Interstate Land and Improvement Co., 92 Ga. App. 770, 90 S.E.2d 42 (1955).
19. Banks v. Lane, 92 Ga. App. 155, 88 S.E.2d 312 (1955).

exercise of the power of eminent domain are likely to be based upon the question of reasonableness rather than upon the existence of the power.

In *Barrett v. State Highway Department*[20] the supreme court held that under the general power of eminent domain granted by the legislature to the Highway Department, the latter may condemn what land is reasonably necessary to afford a clear view to motorists using an off-ramp to leave an expressway. A constitutional attack on the Limited-Access Highway Act[21] was blunted by a holding that the Highway Department had sufficient power under other acts to make the condemnation involved here.

Whether the state can condemn for a public purpose land which has already been condemned for another public purpose was answered in the affirmative in *Elberton Southern Railway Co. v. State Highway Department*.[22] Here the Highway Department condemned part of a right of way which had previously been condemned for railway purposes. The added expense to which the railway might thus be put by such things as being deprived of storage space is only an element to be considered in determining consequential damages.

When the Highway Department condemns land on which there is a valid subsisting lease, the condemnation is of the entire interest of both lessor and lessee.[23] The lessee has no further claim against his lessor. His remedy lies in proving his damages in the condemnation proceeding, not in seeking to compel his lessor to give him other land fronting on the same highway.

While property devoted to a public use may be condemned for a different public use,[24] property devoted to a public park and playground may not be sold by the municipality to private parties if the public user has continued for such a period of time that public accommodation would be materially affected by its discontinuance.[25] This ruling is not affected by the fact that the proceeds were to be used for other similar recreational facilities.

Admitting the general rule that a city has no power to sell land dedicated to a public square or common, this decision seems an undue hindrance to municipalities in their efforts to improve public recrea-

20. 211 Ga. 876, 89 S.E.2d 652 (1955).
21. Ga. Laws 1955, p. 559, amending Ga. Laws 1949, p. 1875, GA. CODE ANN. § 95-1701a *et seq.* (Supp. 1955).
22. 211 Ga. 838, 89 S.E.2d 645 (1956).
23. Winn v. Morton, 212 Ga. 282, 92 S.E.2d 97 (1956).
24. Note 22 *supra*.
25. City Council of Augusta v. Newsome, 211 Ga. 899, 89 S.E.2d 485 (1955).

tional facilities and, at the same time, promote the expansion of private enterprises. Public accommodation would probably be affected to some extent by any interruption of public use of a park. A municipality would thus seem to be confronted with a judicial proceeding to determine to what extent public convenience would be interrupted before it would be free to sell one park, which through changing condition is seldom used, in order to establish another in a newer section of the city where the need for a park may be much more pressing.

Hames v. City of Marietta[26] involved an implied acceptance and an implied abandonment of a street laid out in a sub-division. On a portion of the street the city had made improvements, but on another portion nothing whatever had been done since 1922 when the street was first laid out. The present action was brought to enjoin the city from using the part on which no improvements had ever been made. The supreme court held that the petition was sufficient to show an implied acceptance of the dedication, but that there could be no implied acceptance of that part of the street on which the city had made no improvements. The opinion seems to indicate that the decision is based upon either of two theories: (1) That there was never an acceptance of the unimproved portion; therefore, that portion remained the property of the abutting owners; (2) That there may have been an acceptance, but, even so, the city had lost its right in the street by long continued nonuser. While prescription will not run against a municipality, it may lose an easement by nonuser for such a length of time that a presumption arises that either there never was an acceptance, or that there was an abandonment.

In condemnation to acquire an easement for transmission lines, the court of appeals held that the jury, in determining the "prospective and consequential damages" referred to in Georgia Code, section 35-504, 506 (1933) may consider prospective future use of the condemned property—in this case, prospective use for subdivision development.[27]

LANDLORD AND TENANT

Most of the cases under this title turned on the type of tenancy existing between the parties. One who remains in possession of land after his title has been divested under a power of sale contained in a bond for title[28] or in a security deed[29] is a tenant at sufferance of the new owner. As such, he is liable for the reasonable rental value of the

26. 212 Ga. 331, 92 S.E.2d 534 (1956).
27. Georgia Power Co. v. Pittman, 92 Ga. App. 673, 89 S.E.2d 577 (1955).
28. Bible v. Allday, 93 Ga. App. 231, 91 S.E.2d 306 (1956).
29. Miron Motel, Inc. v. Smith, 211 Ga. 864, 89 S.E.2d 643 (1955).

premises, is subject to distress for rent, and is subject to being dispossessed.

The same relationship was held to exist in *Kenner v. Kenner*[30] where a father had sold his land to his son but had remained in possession under no agreement as to the payment of rent. After the death of the father, his wife and daughter also continued in possession without any contractual agreement with the owner. It was held that after the sale by the father, he remained in possession as a tenant at sufferance; when he died, his wife and daughter likewise remained as tenants at sufferance, and as such were liable to summary eviction.

In another case[31] a tenant testified, first, that he had an oral tenancy for two years, and, second, that there was no agreement as to the duration of his tenancy. The court of appeals held that in either event, he was only a tenant at will. An oral lease for more than one year creates only a tenancy at will.[32] If there was no agreement as to the duration of the term, then another code section specifically provides that a tenancy at will results.[33]

In the case of a tenancy at will, if the tenant denies any landlord and tenant relationship and, hence, any demand if made would have been ignored, then no demand is necessary prior to the filing of dispossessory proceedings.[34]

A lease provision that written notice of defects must be given to establish any landlord liability does not preclude oral waivers in specific instances; it merely means that prior waivers will not obligate the lessor to give notice that strict compliance with the requirement will be demanded in future instances.[35]

Covenants and Zoning

A restrictive covenant limiting the use of property solely to residential purposes was contained in a deed, which also provided that this covenant would be satisfied when the grantee "erects" a residential structure on the premises. The court of appeals held that the remodelling of a dilapidated double garage into a garage apartment satisfied

30. 92 Ga. App. 851, 90 S.E.2d 33 (1955).
31. City Council of Augusta v. Henry, 92 Ga. App. 408, 88 S.E.2d 576 (1955).
32. Ga. Code § 61-102 (1933).
33. Ga. Code, § 61-104 (1933), as amended, Ga. Laws 1952, p. 201, Ga. Code Ann., § 61-104 (Supp. 1955). Prior to the 1952 amendment, there would have been a presumption of a tenancy for the calendar year.
34. Craig v. Day, 92 Ga. App. 339, 88 S.E.2d 451 (1955).
35. Overstreet v. Rhodes, 93 Ga. App. 422, 91 S.E.2d 863 (1956).

the provision as to the erection of a residential structure, and that the restrictive covenant was no longer in effect.[36]

About once or twice a year, the courts are called upon to hold that a filling station is not a nuisance per se. The latest such holding is *Hadden v. Pierce*,[37] where evidence of noise, danger and depressing property values was held insufficient to justify denial of a building permit. The report of the case does not make it clear whether the area was residential; presumably it was, because the questions could hardly have arisen elsewhere.

While a mandatory injunction will not lie in Georgia, the supreme court, in effect, ordered removal of three pre-fabricated houses which had been put up within thirty days on a lot on which there was a recorded covenant permitting erection of only one house per lot.[38] The court made much of the fact that the houses could be hauled off as easily as they were hauled on. It would seem that the court is merely balancing the equities, without regard to our statutory prohibition against mandatory injunctions.[39] The ease with which an affirmative act may be performed does not render the order to perform it any the less mandatory.

36. Burch v. Ragan, 92 Ga. App. 605, 89 S.E.2d 541 (1955).
37. 212 Ga. 45, 90 S.E.2d 405 (1955).
38. Ellis v. Campbell, 211 Ga. 699, 88 S.E.2d 389 (1955).
39. GA. CODE, § 55-110 (1933).