EQUITY

By JAMES B. O'CONNOR*

Cases in equity followed, in general, well beaten paths during the survey year. However, again and again, new factual complications make the decisions in this field provocative and cause the practicing attorney to study all prospective law suits with the idea of making new applications of old concepts in equity.

SPECIFIC PERFORMANCE

Each survey year unfolds at least one case in which specific performance of a contract respecting land is denied because of a defective description of land. The blue ribbon this year is awarded to *Williams v. Manchester Building Supply Co.*[1] In this case specific performance was sought of a contract to sell land. The contract gave the seller the option "to reserve the home house where the seller now lives, together with Fifty (50) acres of land lying East of said house and Fifty (50) acres of said land lying West of said house." The court was compelled to rule that the excepted portion could not be sufficiently identified and the entire contract fell.

In another suit,[2] the defendant sought specific performance of an oral contract by plaintiff to sell plaintiff's interest in a farm. During the trial, the defendant requested the trial judge to charge the jury as follows: "A parol contract upon which specific performance is sought must be certain, definite and clear, and so precise in its terms that neither party can reasonably misunderstand it." The charge as requested was given except the word "should" was substituted for the word "must." The supreme court, in holding this to be error justifying the grant of a new trial, commented " . . . any layman can see the difference in meaning and possible hurtful consequence of such charge."

It was held in another case[3] that the presence of all three tenants in common under a deed (against whom specific performance was sought) would be necessary before the court would consider a decree, since a decree against only one of them could not result in any substantial benefit to the vendee.

---

*A.B., 1948, Duke University; LL.B., 1951, Walter F. George School of Law, Mercer University; Member Oconee, Georgia and American Bar Associations.

1. 213 Ga. 99, 97 S.E.2d 129 (1957).
2. Vaughan v. Vaughan, 212 Ga. 485, 93 S.E.2d 743 (1956).
3. Smith v. Robinson, 212 Ga. 761, 95 S.E.2d 798 (1956).

RESCISSION, REFORMATION AND CANCELLATION OF INSTRUMENTS

The rule that equity will not reform an instrument to the prejudice of a bona fide purchaser without notice was appropriately applied in *Ayers v. Carden*.[4] Petitioner and one defendant were purchasers of adjoining lots from the other defendant. The deed to petitioner's lot antedated the deed to the defendant grantee, but the later deed actually described the strip of land in dispute. Further, the grantee defendant measured off his property in the presence of petitioner who made no contention at the time that he owned the strip in question. Under these facts, reformation will not be permitted against the defendant grantee.

Cancellation of a deed made under power of sale in a security deed was sought in one case.[5] The action of the trial court in sustaining a general demurrer to the petition was affirmed. The court quoted the maxim that he who would have equity must do equity. It appeared that at least a portion of the secured debt was past due when the suit was filed and there was no allegation of payment or tender of the portion in arrears to the holder of the note.

One of the most interesting cases decided in equity during the survey period is *Sutton v. McMillan*.[6] A sister sued the personal representative and heirs of her deceased brother for cancellation of three deeds. In affirming the trial court's decision overruling a general demurrer to the petition, the supreme court found several different reasons why cancellation was in order. The most interesting basis for relief was that the court held a confidential relationship between the petitioner and her brother existed at the time of the transaction, which relationship required utmost good faith and fair dealing on the brother's part. The court based this holding not on the relationship of the parties alone, but on the relationship coupled with well-pleaded and peculiar facts which caused the sister to trust explicitly in her brother's advice and judgment. It was strongly suggested that the brother took advantage of his sister's distraught feelings caused by her responsibilities toward the parties' 87 year old mother, whose support was alleged to be the sole consideration for the deeds from petitioner to her brother.

However, in spite of the interesting construction of the brother-sister relationship and the consequent confidential relationship found by the court, the holding of the court loses most of its glamor, since there were three other sound theories under any one of which cancella-

4. 212 Ga. 510, 93 S.E.2d 694 (1956).
5. Miller v. Levenson, 212 Ga. 496, 93 S.E.2d 753 (1956).
6. 213 Ga. 90, 97 S.E.2d 139 (1957).

tion would have been entirely proper. (1) Fraud was alleged in that the grantee brother's promise to support the mother was the consideration inducing execution of the deeds and this promise was made with an existing intention not to comply with it; (2) there was a breach of covenant which was the sole consideration of an absolute deed and the covenantor was insolvent; and (3) the facts alleged indicated great inadequacy of consideration, coupled with a disparity of mental ability in the contracting parties.

Another equity principle reiterated by this case is that a person is not charged with laches where he is in peaceable possession of property under a claim of ownership.

In a suit closely akin to the remedy afforded by specific performance, it was held[7] that a purchaser was entitled to have title to real property decreed by the court to be in him where he had paid the purchase price agreed upon by contract and all that remained to be done was the execution of a deed by the seller.

Receiver

In *Cozzolino v. Colonial Stores, Inc.*,[8] it was held that under extraordinary circumstances a receiver may be appointed *ex parte*. In this case an escaped convict robbed petitioner's store, and when apprehended, he still had a part of petitioner's money and an automobile purchased with part of the stolen money. Equitable relief against the robber who had been incarcerated in federal prison and the chief of police who had taken possession of the property was held proper.

Enjoining Actions at Law

The established rule that equity will not interfere with the normal administration of estates was applied in *Marlowe v. Moss*.[9] Petitioner, alleging that he had purchased a portion of an estate at private sale and made substantial improvements thereon, sought to remove the handling of the estate from the court of ordinary, and effect an administration of the estate by a court of equity through a receiver and partitioning proceedings. Since an administrator is without authority to sell land of his intestate at private sale, petitioner was denied relief. There was an absence of allegations that the other heirs at law participated in or even had knowledge of the sale, and, hence,

7. Stembridge v. Smith, 213 Ga. 227, 98 S.E.2d 609 (1957).
8. 213 Ga. 225, 98 S.E.2d 613 (1957).
9. 212 Ga. 781, 95 S.E.2d 796 (1956).

the substantial improvements made did not justify interference through equity.

That an accounting may be classed as "intricate" is not a sufficient justification for an equitable accounting, there being no showing that an accounting at law would be inadequate.[10]

It was held[11] that a suit to cancel a year's support proceeding as a cloud on petitioner's title is not a suit respecting titles to land but was a suit in equity which must be brought in the county of residence of a defendant against whom substantial relief is sought.

The validity of a justice court judgment which is not void, but merely irregular, may not be set aside in a direct proceeding for that purpose in equity.[12]

Enjoining Special Proceedings

It was sought in *Sandersville Railroad Co. v. Gilmore,*[13] to enjoin a railroad from condemning certain property. The right of the railroad under its charter to condemn land was raised at the interlocutory hearing in the case and a ruling favorable to the railroad was rendered and an injunction was refused. This ruling, not appealed from, became the law of the case, and the right of the railroad to condemn could not be questioned at the final hearing.

Injunctions Against Torts

As usual, this area was most prolific of litigation.

There were two cases which sought the abatement of alleged nuisances. In *Stephens v. Bacon Park Commissioners,*[14] the erection of a "half-way house" on a public golf course was sought to be enjoined. In denying relief the court held that it is not enough to allege a mere apprehension of injury based upon the assumption that a lawful business, not yet in being, will be operated in an improper manner and thus become a nuisance. In such cases, it must be made to appear with reasonable certainty that such operation will necessarily constitute a nuisance which will be irreparable in damages.

The jury's finding that a dog kennel was being operated as a nuisance and the trial court's order abating it were affirmed in *Miller v. Coleman.*[15]

10. McDonough Construction Co. of Georgia v. Ormewood Apartments, Inc., 212 Ga. 620, 94 S.E.2d 733 (1956).
11. Sweatman v. Roberts, 213 Ga. 112, 97 S.E.2d 320 (1957).
12. Stewart Oil Co., Inc. v. Schell, 212 Ga. 459, 93 S.E.2d 700 (1956).
13. 212 Ga. 481, 93 S.E.2d 696 (1956).
14. 212 Ga. 426, 93 S.E.2d 351 (1956).
15. 213 Ga. 125, 97 S.E.2d 313 (1957).

One case sought to enjoin the use of certain property as a cemetery while another sought to prevent the use of a cemetery for private purposes. In *Arlington Cemetery Corporation v. Bindig*[16] it was alleged that the use of certain property by defendant as a cemetery would be a violation of the zoning ordinances of Fulton County. The court found that the land had been dedicated to public use as a cemetery, and had not been abandoned as such. The zoning ordinance was ineffective as to such land, and defendant could properly utilize the property as a burial place.

In *Greenwood Cemetery, Inc. v. MacNeil*,[17] the erection of a mortuary upon property admittedly dedicated as a public burial ground was properly enjoined, since a cemetery may not be put to private use.

Vaguely drawn legal descriptions of real property produced cases in this field also. In *Prescott v. Herring*,[18] it was sought to restrain defendant from cutting certain timber. The deed which defendant depended upon to sustain the cutting described the land as being covered by a mill pond, containing 100 acres, more or less, in the Northeast corner of a certain lot. The timber in question was located in the mill pond but it was in a different lot from the one recited. The court decided that it was the intention of the parties for the defendant to cut timber from all land covered by the mill pond whether or not located in the Northeast corner of the named lot.

The case of *Savannah River Lumber Co. v. Sharpe*[19] made its second appearance. In its first appearance, it was ruled that the words "swamp land" furnished a key in a description through which parol evidence would be admissible for the purpose of identifying the particular land in question. Upon the trial, petitioner's evidence failed to establish any line of demarcation between swamp land and other land. The court stated, "descriptive words in a deed to be sufficient as a key must lead unerringly to the land in question . . . " If such words, when aided by extrinsic evidence, fail to locate and identify the particular tract of land, the description fails.

A motor club affiliate of the American Automobile Association engaged in the selling of insurance and financing of automobiles sought to enjoin defendant from utilizing the letters "AAA" in advertisements in a similar business.[20] It was alleged that the letters

16. 212 Ga. 698, 95 S.E.2d 378 (1956).
17. 213 Ga. 141, 97 S.E.2d 121 (1957).
18. 212 Ga. 571, 94 S.E.2d 417 (1956).
19. 213 Ga. 72, 97 S.E.2d 303 (1957). See Sharpe v. Savannah River Lumber Company, 211 Ga. 570, 87 S.E.2d 398 (1955).
20. East Georgia Motor Club v. AAA Finance Company, 212 Ga. 408, 93 S.E.2d 337 (1956).

"AAA" was the trade name of the American Automobile Association. The action of the trial judge in sustaining defendant's general demurrer to the petition was upheld. The court did not feel that petitioner's allegations showed an exclusive right to use the advertising symbol.

An interesting question of contract interpretation arose in *Jones v. Tri-State Electric Cooperative.*[21] A contract by the terms of which the right to maintain telephone lines upon poles erected as electric power lines was held to apply only to such poles as were erected at the time the contract was executed. Defendant was properly enjoined from maintaining telephone lines on poles subsequently erected and rights of was subsequently acquired by the electric power company.

Injunctions were held properly granted in several cases as follows: to prevent the erection of a building on property dedicated as public street;[22] to prevent the razing of a building held under valid lease;[23] and to prevent unlawful picketing.[24]

In a suit to[25] enjoin a newspaper from advertising petitioner's property as being for sale to colored persons, it appeared that such advertisement had on one occasion appeared in defendant's paper, but there were no allegations that such act was threatened or planned for the future, nor any facts from which such conduct might be inferred. A mere apprehension of injury will not justify an injunction. Another case during the survey period also stated this same rule.[26]

Enforcement of Equitable Decrees

In an equitable proceeding[27] a temporary receiver was appointed to take charge of certain properties. The holder of a junior security deed on a portion of the property subsequently foreclosed his security deed and purchased the property. It was sought to hold him in contempt of court. The trial judge's ruling that the defendant was in contempt of court was affirmed by the supreme court. It was stated that a receiver of property is an executive officer of the court appointing him and the property received by him is *in custodia legis.* Such property may not be disposed of without court permission and an attempted sale without such permission is void and the would be seller may be punished for contempt.

21. 212 Ga. 577, 94 S.E.2d 497 (1956).
22. Holmes v. Bruce, 212 Ga. 805, 96 S.E.2d 251 (1957).
23. Elzey v. Nash, 212 Ga. 663, 94 S.E.2d 874 (1956).
24. Powers v. Courson, 213 Ga. 20, 96 S.E.2d 577 (1957).
25. Anderson v. Atlanta Newspapers, Inc., 212 Ga. 776, 95 S.E.2d 847 (1956).
26. United States Casualty Co. v. Georgia Southern & Florida Railway Co., 212 Ga. 569, 94 S.E.2d 422 (1956).
27. Erikson v. Hewlett, 212 Ga. 423, 93 S.E.2d 563 (1956).

Petitioner obtained an injunction against defendant enjoining him from interfering in any manner with the peaceable enjoyment of a certain tract of land. Thereafter, the defendant served written notice on petitioner that he would have certain lands adjoining petitioner's property surveyed. A surveyor employed by defendant then walked upon certain of petitioner's land in making his survey. No acts in disregard of or hostile toward the petitioner appearing, it was held[28] that defendant was not in contempt of court.

MISCELLANEOUS

It was held in *Kirchman v. Kirchman*[29] that, in aid of a judgment of a court awarding a wife a monthly sum for the support of herself and two minor children, it was proper for the trial court to appoint a receiver to take charge of her non-resident husband's property. In a well-reasoned opinion which discussed in detail the plaintiff's rights at law in such cases, the court concluded that the wife's remedies at law were inadequate for enforcement of the judgment, and if relief were denied, she would be subjected to a multiplicity of actions.

In another domestic relations case,[30] a divorce decree and alimony award were set aside in equity. It was shown that the decree was taken subsequent to an interlocutory hearing in a divorce suit after which hearing the parties cohabited as man and wife. Without notice to the husband, and after he had been led to believe that the case had been abandoned and dismissed, the wife procured the disputed decree.

The difficulty encountered by members of the bar in determining for appeal purposes whether a case is one in equity is indicated by the fact that three cases[31] were transferred by the supreme court to the court of appeals for lack of jurisdiction. It is not felt appropriate to discuss the holdings of these cases under the topic of equity.

It was emphasized in three cases[32] that the general allegation that a multiplicity of suits will be avoided is a conclusion of the pleader and an insufficient basis for equitable interference. There must be allegations of fact to support such conclusions.

---

28. Poss v. Guy, 212 Ga. 393, 93 S.E.2d 565 (1956).
29. 212 Ga. 488, 93 S.E.2d 685 (1956).
30. Wallace v. Wallace, 213 Ga. 96, 97 S.E.2d 155 (1957).
31. Simonton Construction Co. v. Pope, 212 Ga. 456, 93 S.E.2d 712 (1956); United States Casualty Co. v. Georgia Southern & Florida Railway Co., *supra* note 26; Douglas-Guardian Warehouse Corporation v. Todd, 212 Ga. 791, 96 S.E.2d 275 (1957).
32. United States Casualty Co. v. Georgia Southern & Florida Railway Co., *supra* note 26; Liner v. City of Rossville, 212 Ga. 664, 94 S.E.2d 862 (1956); McDonough Construction Co. of Georgia v. Ormewood Apartments, Inc., *supra*, note 10.