REAL PROPERTY

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CONTRACTS TO SELL

The legal effect of a reference to a G. I. loan in a contract for the sale of realty was the deciding factor in two cases this past year. In one, there was a provision that the purchase price would be "$8,500, to be paid as follows: Subject to G. I. loan." When it developed that the prospective buyer had already used up some of his G. I. loan benefits and hence could not procure the full loan, he sued for a refund of the $750 down payment. The court held him entitled to the refund.[1] A condition precedent to enforcement of the contract did not occur; hence there was no liability under it. The seller's contention that the buyer was guilty of a fraud in that he knew that he had already used up part of his G. I. benefits and therefore could not procure the full loan was disposed of by a holding that even if he did know that he had used a part, it was not shown that he knew the legal effect of such use. In the other case, the purchase price was held sufficiently specified where it was stated to be a definite amount, to be paid all in cash above a "G. I. loan" in an approximate value then held or serviced by a named company and payable at specified rates.[2] The consideration need not be expressly stated if the contract contains a key by which the exact amount may be ascertained.

An "exclusive sales contract" stated to be in force for a total of nine months was held to have been abandoned by the parties where the property was sold by the owner about sixteen months later—even though the sale was to one with whom the broker had unsuccessfully negotiated during the term of the contract.[3]

A contract to sell land under specified terms "at a future time when title is clear" does not constitute a muniment of title nor a color of title for purposes of adverse possession, since it does not on its face purport to convey any title.[4]

DESCRIPTION

There were the usual number of cases turning on the sufficiency of description in deeds. A deed conveying all the land covered by

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1. Roberts v. Maxwell, 94 Ga. App. 406, 94 S.E.2d 764 (1956).
2. Brewer-Head Co. v. Jackson, 95 Ga. App. 648, 98 S.E.2d 167 (1957).
3. Dowling v. Southwell, 95 Ga. App. 29, 96 S.E.2d 903 (1957).
4. Shippen v. Cloer, 213 Ga. 172, 97 S.E.2d 563 (1957).

a named mill pond, to be maintained at a stated height, and stating that the land was located in the northeast corner of a specified land lot conveyed all the land covered by the pond at that height even though part of it did not lie in the northeast corner of the land lot but instead extended all the way to the south boundary of the lot.[5]

The description of land as "one hundred acres, more or less, in the south side of lot of land no. 69" is too indefinite to pass title or to serve as color of title for purposes of adverse possession.[6] The description furnishes no key by which the exact size and shape of the tract may be determined. A similar problem was involved in *Williams v. Manchester Building and Supply Co.*,[7] where a contract to sell gave the seller the option "to reserve the home house where the seller now lives, together with 50 acres of said land lying East of said house and 50 acres of said land lying West of said house." This description was held too vague and uncertain for specific enforcement of the contract. Another uncertain provision in this contract was one providing that the seller would convey a "good and marketable title" but, at the same time, stating that the contract was made with the understanding that the land was subject to a specified security deed theretofore executed by the seller. The contract did not specify the effect of this security deed upon the purchase price nor whether the buyer was to assume the debt.

Although the supreme court had held that such a description as "all of the river swamp land," further 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, was not as a matter of law too indefinite;[8] the subsequent history of this case discloses the dangers in such inexact descriptions. At the subsequent trial and appeal of this case on its merits, the description proved to be insufficient; while "all the river swampland" could furnish the key to an exact description, it would be necessary that a clear demarcation line between swamp land and other land be established by the evidence. This the contending party was unable to do.[9]

Estates in Land

Several cases decided during the past year emphasize the importance of a thorough knowledge of the types of estates recognized

5. Prescott v. Herring, 212 Ga. 571, 94 S.E.2d 417 (1956).
6. Bennett v. Rewis, 212 Ga. 800, 96 S.E.2d 257 (1957).
7. 213 Ga. 99, 97 S.E.2d 129 (1957).
8. Sharpe v. Savannah River Lumber Corp., 211 Ga. 570, 87 S.E.2d 398 (1955), commented on in 7 Mercer L. Rev. 143 (Fall, 1955).
9. Savannah River Lumber Co. v. Sharpe, 213 Ga. 72, 97 S.E.2d 303 (1957).

by law, what language is necessary to create them and what characteristics each of them has. In *Callaway v. Faust*[10] a husband and wife had executed a joint will devising to the survivor in fee simple all property owned by the first to die. Following this, however, was a provision that at the death of the survivor all property "then owned or held" by the survivor should pass to another named person. During the life of the survivor, he conveyed to his second wife in fee simple some of the property which he had acquired from his first wife under the joint will. Thus the question was what type of estate the husband acquired under the joint will at the death of his first wife. The court held that the gift over at the death of the survivor did not reduce the estate he held during his life from a fee to a life estate. Assuming that the terms of the devise were ambiguous, any doubt should be resolved in favor of an absolute estate.

A verdict awarding as alimony money which may come from a sale of property did not vest in the one to whom it was awarded any interest in that property. In *Lawrence v. Smith*[11] a divorce decree awarded plaintiff one-half the net profits from the operation of her husband's business as a going concern, or 30 per cent of the net proceeds from his property if sold. This was held not to have vested any interest in the property in her. Even her interest in the proceeds of a sale was conditioned upon cessation of the business and upon a sale of the property.

A quitclaim deed conveying land in fee but upon the "express condition and limitation" that upon cessation of its use for public school purposes it would revert to the grantor conveyed a determinable fee. A later release of the grantor's possibility of reverter enlarged the grantee's interest to a fee simple.[12] A dedication of land to cemetery purposes by a cemetery corporation sharply limits the uses to which the land may subsequently be put. While it is uniformly held that adjoining landowners cannot, in the absence of a nuisance, enjoin dedication of land to cemetery purposes,[13] nevertheless, after it is so dedicated, they may enjoin its use for any other purpose. Thus, in *Greenwood Cemetery, Inc. v. MacNeill*[14] adjoining owners were allowed to enjoin construction of a mortuary on the cemetery property.

In *Marshall v. Cozart*[15] a testatrix had devised her home to her

10. 212 Ga. 596, 94 S.E.2d 379 (1956).
11. 213 Ga. 57, 96 S.E.2d 579 (1957).
12. Moore v. Wells, 212 Ga. 446, 93 S.E.2d 731 (1956).
13. Harper v. City of Nashville, 136 Ga. 141, 70 S.E.2d 1102 (1911); followed in Hollman v. Atlanta Child's Home, 161 Ga. 247, 130 S.E. 814 (1925).
14. 213 Ga. 141, 97 S.E.2d 121 (1957).
15. 94 Ga. App. 614, 95 S.E.2d 729 (1956).

mother for life, remainder to her son. Following this devise, however, was a statement that despite this devise it was testatrix's wish that her husband be permitted to reside in the house as long as he should live and remain unmarried. The devise was held to make the mother and the husband life tenants in common; consequently one who purchased the interests of the mother and son became a tenant in common with the husband. Periodic payments made by the husband to the purchaser were held not to be rent, but rather payments in lieu of the right of the other tenant in common to control part of the house.

The phrase "death without issue" continues to live up to its reputation as a fertile source of lawsuits. Any draftsman who uses it in a deed or will should stop everything at that point and reflect upon the possible constructions that could be put upon it. If more than one construction is conceivable, then he should redraft that part of the instrument. In *Montgomery v. Pierce*[16] the testator devised land to his widow for life, remainder to his four children, but then provided for a gift over in case either child died without issue. Relying upon Code section 85-708 which favors the vesting of remainders in case of doubt, the court held that the interest of one of the children who had survived both the testator and the life tenant was indefeasibly vested; his subsequent "death without issue" would not affect his interest.

The grant of a right of way over one's land to a railroad does not limit the latter's use of the land to main line purposes alone; it may also be used for side tracks for delivery and receipt of freight.[17] The case holds merely that the grant did not sufficiently limit the burdens which could be imposed upon the servient tenement.

Allegations that a decedent orally promised to devise land in a certain way in return for another's agreement to live with and care for him during the remainder of his life, and that the other had fully performed, stated a cause of action for equitable relief. The cause of action arises at the death of decedent, not at the making of the oral contract.[18] This case also held that when a life tenant whose duty it was to pay taxes reacquires the land from a purchaser at a tax sale, he reacquires only his life estate. Such reacquisation cannot be used as a basis of a claim of adverse possession.

Since a filling station is not a nuisance per se, a subdivision developer

16. 212 Ga. 545, 93 S.E.2d 758 (1956).
17. Tompkins v. Atlantic Coast Line Railroad Co., 213 Ga. 48, 96 S.E.2d 603 (1957).
18. Myers v Grant, 212 Ga. 677, 95 S.E.2d 9 (1956).

may, by recorded restriction, forbid the use for business purposes of all of the land except that which he retains.[19]

Cancellation and Estoppel by Deed

Two cases illustrate the willingness of the courts to cancel a deed when it is shown that there has been fraud or an honest mistake going to the essence of the transaction. In *Lominick v. Lominick*[20] plaintiff borrowed from defendant a small part of the purchase price of a piece of land and, as security, had the deed name both parties as purchasers. After defendant's refusal to accept repayment of the loan, plaintiff sued for reformation of the deed and for an order requiring defendant to execute a quitclaim deed to plaintiff upon the latter's repayment of the loan. The lower court's dismissal of the action on general demurrer was reversed. The allegations were sufficient to show that defendant held legal title with plaintiff solely as security for a debt and that an implied trust thus arose. Although the deed was executed in 1943, defendant was held not guilty of laches because he had been in peaceable possession of the land at all times since that date.

In *Sutton v. McMillan*,[21] another suit to cancel deeds, plaintiff alleged that she executed deeds to her brother in consideration of his promise to assume with plaintiff the responsibility of caring for their aged mother, and that her brother's promise was made with a present intention on his part not to comply with it. These allegations were held to state a cause of action for cancellation. The confidential relationship was stressed as showing a requirement of utmost good faith and fair dealings.

The doctrine of estoppel by deed was applied in *Guy v. Poss*[22] where a grantee was declared owner of land described in her deed, which land was not then owned but was subsequently acquired by her grantor. In the absence of a prayer by the grantor for reformation of the deed, his testimony, that he did not intend to include this land, will not bar operation of the doctrine of estoppel by deed.

Condemnation

The exercise of the power of eminent domain, with its attendant problem of just compensation, is bringing to the court of appeals a

19. Davis v. Miller, 212 Ga. 836, 96 S.E.2d 498 (1957).
20. 213 Ga. 53, 96 S.E.2d 587 (1957).
21. 213 Ga. 90, 97 S.E.2d 139 (1957).
22. 212 Ga. 724, 95 S.E.2d 682 (1956).

large number of cases. Most of them turn upon the correctness of the lower court's charge as to the proper measure of damages.

While consequential damages or benefits to the condomnee's remaining land are relevant in determining the amount of the award,[23] proof of such damage or benefit must be definite enough to justify the jury in ascertaining a specific sum. Several cases decided during the past year illustrate the problem. Evidence that the remaining land will be just as valuable, or "more valuable per square foot" as a result of the building of a highway is no evidence whatsoever as to the amount of enhancement, and the giving of a charge on consequential benefits was erroneous where there was no other evidence as to the extent of enhancement.[24] A charge on consequential benefits and damages is likewise erroneous where there is no evidence as to these matters, even though the jury inspected the premises and presumably could draw therefrom their own conclusions as to benefits and damages; their award must be supported by "evidence"—presumably the kind that can be verified or refuted by cross-examination.[25]

While comparisons are odious, they may still be the most reliable basis for a fair evaluation of land which has not been on the market for many years. Thus the trial judge did not abuse his discretion in permitting a witness to testify as to the prices for which his real estate company sold three houses similar to that being condemned, and in the same neighborhood.[26] The court pointed out, however, the danger in attempting to lay down a general rule; the decision must necessarily be governed by the location and the character of the property as well as the difference in the time of the two sales.

If there is not a marked similarity in the location and character of the properties being compared, then it is error to allow such comparison.[27] Thus evidence as to the value of nearby land which has been sub-divided and built upon is inadmissible in valuation of property being condemned which has not been developed or built upon.[28]

One of the most difficult condemnation cases was *Southern Ry. v. Miller,*[29] where it was held reversible error to allow evidence of the specific value of land as a source of commercial sand. It was held, instead, that the jury must determine the value of the land taken

23. GA. CODE §§ 35-504, 506. (1933).
24. Stanfield v. State Highway Department, 95 Ga. App. 452, 98 S.E.2d 40 (1957).
25. State Highway Department v. Andrus, 212 Ga. 737, 95 S.E.2d 781 (1956).
26. West v. Fulton County, 95 Ga. App. 320, 97 S.E.2d 785 (1957).
27. Aycock v. Fulton County, 95 Ga. App. 541, 98 S.E.2d 133 (1957).
28. Vann v. State Highway Department, 95 Ga. App. 243, 97 S.E.2d 550 (1957).
29. 94 Ga. App. 701, 96 S.E.2d 297 (1956).

as a single subject-matter; otherwise, the condemnee might recover the value of the land *and* the value of the sand deposits which were a part of the land. The possible danger in allowing the jury to hear that each of the possible uses to which the land might be put has a specified value is that they may conclude that the total award should be the sum total of all these values. As a matter of fact, some of these uses to which the property is adaptable may be mutually exclusive; for example, land containing a large amount of excellent sand may be developed as a swimming resort, or the sand may be sold commercially and thus forever removed from the land. To add the value of these two possible uses in determining the value of the land would be unrealistic, because either of the uses would necessarily exclude the other. The dissenting judge, however, would rely upon the good sense of the jury in hearing all the possible uses of the land and then arriving at a fair market value of the land as a single subject-matter.

When property upon which there is a subsisting lease is condemned, both the lessor and the lessee are entitled to an award. The measure of damages to the lessee in such a situation was involved in *McGhee v. Floyd County*,[30] where it was held to be the dimunition in the market value of the unexpired part of the term less any rents which the lessee would have been obligated to pay had the condemnation not taken place.

The more frequent and the more extensive exercise of the power of eminent domain led to the passage by the 1957 session of the General Assembly of an act designed to provide a simpler, speedier and more effective method of condemnation.[31] The procedure under this act differs from that heretofore followed principally in the provision for the appointment of a single special master rather than of a board of assessors. The new procedure, however, is expressly made supplementary to and cumulative of that which has heretofore been in effect.

Dedication of Land

Since the two essentials of a dedication are (1) intent on the part of the owner to dedicate the land to a public use, and (2) acceptance of the dedication by the governing authorities, every case involving an alleged dedication must be decided upon its own facts. This ques-

30. 95 Ga. App. 221, 97 S.E.2d 529 (1957).
31. Ga. Laws 1957, p. 387.

tion was before the supreme court in three cases during the past year. In *Lowry v. Rosenfeld*[32] allegations that a parking area near a shopping center had been used by the general public for over 26 years and that during that time the area had been paved and kept in repair by the county were held sufficient to show a dedication; it was error to temporarily enjoin a member of the general public from using the area for parking. Where a license to establish a cemetery has been granted, it remains a mere license until burials have been made. Then the license becomes a right which runs with the land, and the fact that there has been a dedication of the land to cemetery purposes becomes conclusively established. If a large tract has been so dedicated, the fact that only a part of it has been used for burials does not show abandonment of the unused area; this is especially true where it is shown that the unused area is being held in good faith for cemetery purposes and has not been used, since the dedication, for any other purpose.[33] In an action to enjoin obstruction of a street, allegations that a recorded plat of the subdivision showed the street as a public way and that it has been used by the public for many years are sufficient to take to the jury the question of whether there has been a dedication of the street.[34]

Property which has been dedicated to a public use may be put to all customary uses within the common understanding of that use. The owner of the fee under a county road is not therefore, entitled to additional compensation when the road is used for the laying of sewers or gas and water lines.[35] These are customary uses to which road-beds are put.

In 1955 the supreme court held that it was not error to temporarily enjoin a city from disposing of property which had been dedicated to use as a public park because there had been no abandonment of the public use.[36] The only means whereby a city may terminate such use is by express consent of the General Assembly. Such consent was obtained by the City of Augusta at the next session,[37] and the validity of this grant of permission was upheld by the supreme court.[38]

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32. 213 Ga. 60, 96 S.E.2d 581 (1957).
33. Arlington Cemetery Corp. v. Bindig, 212 Ga. 698, 95 S.E.2d 378 (1956).
34. Holmes v. Bruce, 212 Ga. 805, 96 S.E.2d 251 (1957).
35. Franklin v. Board of Lights and Water Works, 212 Ga. 757, 95 S.E.2d 685 (1956).
36. City Council of Augusta v. Newsome, 211 Ga. 899, 89 S.E.2d 485 (1955), discussed in 8 MERCER L. REV. 140-141 (Fall, 1956).
37. Ga. Laws 1956, pp. 22, 2406.
38. Harper v. City Council of Augusta, 212 Ga. 605, 94 S.E.2d 690 (1956).

LANDLORD AND TENANT

The distinction between the relationship of landlord and tenant and that of lessor and lessee has been before the Georgia courts with remarkable frequency ever since the first Georgia Code adopted from the civil law what is now Ga. Code section 61-101 (1933). Under this section a letting for less than five years is presumed to convey only a usufruct, while one for five years or more is presumed to create an estate for years. The distinction is of great importance primarily in connection with the duty to repair and the right to assign. In *Ginsburg v. Wade*[39] the lease was for exactly five years, but it contained no statement of the intention of the parties as to the type of interest created. It did, however, specify that the lessee could "make such additions, alterations, replacements and improvements . . . as should seem best for the conduct of its business," and at the expense of the lessee. The presence of this provision and evidence that the lessor had made some repairs during the term led the court to the conclusion that the relationship was that of landlord and tenant and not that of lessor and lessee.

Where the relationship is admittedly one of landlord and tenant, and the premises become untenantable because of the landlord's failure to repair, then there has been a constructive eviction which is a complete defense to an action for rents falling due after such eviction.[40]

Where the tenant offers to surrender the premises, pending the tenancy, and the landlord thereafter retakes possession and exercises a degree of control which is inconsistent with the tenant's right to possession, then there has been a surrender and the tenant is discharged from liability for future rent.[41]

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39. 95 Ga. App. 475, 97 S.E.2d 915 (1957).
40. Overstreet v. Rhodes, 213 Ga. 181, 97 S.E.2d 561 (1957).
41. Wright v. Kilgo, 212 Ga. 712, 95 S.E.2d 7 (1956).