REAL PROPERTY

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CONVEYANCES

The enforceability of contracts for the sale of real property is essentially a matter of basic contract law. The relative frequency with which cases involving these contracts appear is no doubt due, not to a lack of knowledge of contract law, but rather to the haste with which negotiating parties execute these contracts. Real estate brokers are prone to submit to the prospective buyer a new contract to replace the original one every time a new subject of discussion comes up during the period of preliminary negotiation. This laxity probably accounts for the fact that the contract is frequently loosely drawn. *Cole v. Cutler*[1] is an illustration. The contract in this case obligated the purchaser "to secure a first loan on said property in the sum of at least $12,500." The failure to specify some such details as the interest rate or the schedule and amounts of payments impelled the court to hold that the contract was too indefinite to be enforceable.

The same requirement of definiteness applies, of course, to the deed which is executed. A conveyance to a county of "a 28 foot strip" alongside a road was held void for indefiniteness.[2] It developed that the grantor owned land on both sides of the road; hence there was nothing in the deed indicating whether the strip was to be on one side or the other of the road or whether it was to be 14 feet on one side and 14 feet on the other.

Possession under any deed will, in most cases, prevail over the claim of another grantee under a separate deed to the same property and from the same grantor, unless the grantee out of possession can prove his priority over the grantee in possession.[3] The position of a grantee under a duly executed warranty deed would appear to be even stronger as against one claiming under no paper title. In *Adams v. Perry*[4] a grantor sought cancellation of a deed, by which she had conveyed land unconditionally to two of her grandchildren, on the ground that the father of the grantees had falsely represented to her

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1. 96 Ga. App. 891, 102 S.E.2d 82 (1958).
2. Atlanta v. Atlanta Trailer City Trailer Park, Inc., 213 Ga. 825, 102 S.E.2d 23 (1958).
3. Wright v. Pritchett, 213 Ga. 865, 102 S.E.2d 602 (1958).
4. 213 Ga. 479, 99 S.E.2d 881 (1957).

that she was reserving a life estate. The grantor's own testimony that she could have read the deed had she chosen to do so precluded cancellation. Since no evidence was offered in support of an allegation that her failure to read the deed was due to her reliance upon representations made by the father and to the fact that such reliance was the result of the confidential relationship between the grantor and the father (her son-in-law), a directed verdict in favor of the grantee was demanded.

The frequent impossibility of obtaining positive proof, where such cases contain conflicting evidence, makes the findings of the jury the only practical solution, and if there is any evidence to support the jury's finding, the appellate courts will not interfere. In *Shaw v. Miller*,[5] an action to reform a deed, there was evidence from relatives of both the grantor and the grantee that, despite the fact that the deed was absolute in form, there was an oral agreement that the grantee at his death would devise the property back to the grantor. In an appeal from a verdict for the grantor, the supreme court affirmed on the ground that the only question before it was whether there was *any* evidence to support the jury's findings.

While it does not appear necessary to a decision in the appeal in *Wright v. Pritchett*,[6] the supreme court chose to construe the language of the deed, and, in doing so, followed the general rule as to the effect of precatory language. There was a conveyance to A absolutely and in fee, subject only to a reserved life estate in the grantor. In a latter portion of the deed the grantor stated that "it is my desire" that the grantee should have the land as long as he lives and that at his death it be divided among the heirs then living of the grantor. There was also a provision that if the grantee should offer the property for sale, then the deed should be void. The expression of the desire of the grantor was held to be merely precatory, and did not reduce the fee previously granted. The forfeiture provision was held void as repugnant to the fee previously granted.

While ejectment is primarily an action involving title, the petition frequently contains a count for mesne profits. In *Brydie v. Pritchard*,[7] the plaintiff, after filing his action in fictitious ejectment and for mesne profits, sought to amend to add that he had, since filing the action, conveyed the land to another, and to pray that his original action continue merely as one for mesne profits. On his appeal to

5. 213 Ga. 511, 100 S.E.2d 179 (1957).
6. *Supra*, n. 3.
7. 213 Ga. 588, 100 S.E.2d 435 (1957).

the supreme court from an adverse judgment, that court transferred it to the court of appeals because the action no longer involved title to land. Whatever cause of action he retained after conveying away the land was one in tort for mesne profits.

Two cases decided during the past year turned, at least partially, upon the assignability of a cause of action for the wrongful cutting of timber. In one case[8] the plaintiff had acquired title after the commission of the wrong, but alleged that he had secured a written assignment of the cause of action from his predecessor in title. To defendant's argument that this was an attempt to assign a tort for trespass which, under our law, is unassignable, the court cited Georgia Code Section 85-1805 which specifically makes assignable any right of action which involves, directly or indirectly, a right to property.

The other case involved the right of an assignee of a security deed to sue for the value of timber wrongfully cut prior to the assignment.[9] While recognizing the assignability of the cause of action, the supreme court held that a mere assignment of the security title did not constitute an assignment of the cause of action. One holding a security title transfers to his grantee only the interest which he had in the land at the time of his conveyance. At that time, in this case, the cause of action for the trespass previously committed was a cause of action which the assignor could enforce or, under the code section referred to in the preceding paragraph, could transfer to his assignee. There being no transfer in this case, the assignee is powerless to enforce it.

Adverse Possession

The usual number of land line disputes were before the courts during this survey period, and the usual claim of title by adverse possession was asserted by either the plaintiff or the defendant. Since the rules of law announced by the courts are well established, the cases are considered noteworthy only in that they present new factual situations to which these rules are applied.

A title acquired by adverse possession will prevail over an unbroken recorded chain of title going back over fifty years, but such a case would be expected to be a close one. This was not so in *Hearn v. Leverette*,[10] where the supreme court reversed a verdict for the holder

8. White v. Gordon, 213 Ga. 730, 101 S.E.2d 759 (1958).
9. Rome Kraft Co. v. Davis, 213 Ga. 899, 102 S.E.2d 571 (1958).
10. 213 Ga. 286, 99 S.E.2d 147 (1957).

of the record title and ordered a verdict for the adverse claimant on the ground that, while the record title established a prima facie case, undisputed evidence of unbroken adverse possession under color of title for over seven years overcame the prima facie case and conclusively established title in the adverse claimant.

In *Dixon v. Dixon,*[11] a processioning case, the protestant claimed a fence as the line, but the evidence established that the line neither began nor ended on the line claimd by him, that it zigzagged in such a way as not to indicate that it was a property line, and that it was down in places and in a general state of disrepair. Some evidence to prove the line as claimed by the applicant was sufficient to support a verdict in his favor. On the protestant's claim of adverse possession, the court emphasized the importance of the element of notoriousness by holding that mere use of land as a cattle range and occasional cutting of timber do not establish this element. Since the applicant did not know of the existence of the fence, no acquiescense by him could be found.

In *Crews v. Stokes*[12] the plaintiff sued for damages for trespass (timber cutting) and later, by amendment, attached an abstract to his petition. At the trial, however, he made out a case for title by adverse possession. This latter evidence was objected to and an appeal was taken from a verdict for the plaintiff. The supreme court affirmed on the ground that plaintiff predicated his petition on a claim of ownership and did not limit his claim to the abstract. Evidence that he had attempted to buy defendant's claim, after adverse possession had ripened, did not defeat his adverse title, especially in view of the fact that he acquired knowledge of his claim after the prescriptive period had run.

A deed which was void because it did not adequately describe the premises was held admissible, nevertheless, for the special purpose of showing the good faith of one's claim to land by adverse possession.[13]

Easements and Covenants

The riparian rights of the owner of land along a non-navigable stream are governed by fairly clear general rules, but the application of these rules may be fraught with technicalities. Such a case is *Moul-*

11. 97 Ga. App. 54, 102 S.E.2d 74 (1958).
12. 213 Ga. 397, 99 S.E.2d 159 (1957).
13. Turner v. McKee, 97 Ga. App. 531, 103 S.E.2d 658 (1958).

ton v. Bunting McWilliams Post.[14] The owner of lower riparian land sued for damages allegedly caused by an upper owner's damming up the stream. When the suit was filed, P was occuping the land as tenant of his father, but when the case came to trial he had purchased the land. The supreme court affirmed the dismissal of the action on general demurrer on the ground that Code Section 85-1301 is stated in terms of the rights of an "owner" of lower riparian land; since plaintiff was admittedly not the "owner" at the time the alleged trespass was committed, he failed to state a cause of action.[15] There was no question of assignability of a cause of action for trespass to property; so it is presumed that P's deed from his former landlord was not sufficient to constitute an assignment.[16]

The right of ingress and egress of the owner of property abutting a public highway was discussed in considerable detail in *State Highway Department v. Strickland*[17] and *State Highway Department v. Harris*[18] (companion cases). These cases involved the effect of erection of curbs which were entirely upon the highway right of way but which nevertheless restricted the points at which the abutting owner could enter and leave his property. Loading platforms which the owner had used prior to erection of the curbs were now so situated that trucks backing up to them would extend out over the curb and onto the highway. In affirming a general demurrer to the abutting owner's bill for an injunction against erection of the curb, the court held that the abutting owner had no absolute right of access to his property at all points along the highway, and where it appears that he had convenient access at some points, the erection of curbs at others does not deprive him of any property right.

The effectiveness of restrictive covenants in controlling the use and ownership of property is attested to by their widespread use in conveyancing. Their very presence in a recorded chain of title serves to accomplish their object, even though there may be serious doubts as to their validity or, if admittedly valid, as to their applicability. Their value to a real estate developer is illustrated by *Roberts v. Carlos.*[19] There, the covenant forbade the erection in the subdivision of any building other than a dwelling house, but reserved to the developer the right to permit one or more owners to use their property

14. 213 Ga. 859, 102 S.E.2d 593 (1958).
15. Chief Justice Duckworth dissented on the ground that, in his opinion, the word "owner," in the code section referred to, included a lawful lessee of the owner.
16. See n. 8 *supra.*
17. 213 Ga. 785, 102 S.E.2d 3 (1958).
18. 213 Ga. 790, 102 S.E.2d 7 (1958).
19. 213 Ga. 662, 100 S.E.2d 735 (1957).

for business purposes. An owner sued to enjoin erection of a shopping center by one who had secured the developer's assent. The action was dismissed on general demurrer, and the supreme court affirmed. While such covenants are for the benefit of all the owners in the subdivision, the retention by the common grantor of the right to except lots from the restriction is a right which the grantor may retain, and the retention is binding upon those who purchase lots in the subdivision.

In *Seckinger v. City of Atlanta*[20] a covenant forbidding the "use or occupancy" of any lot in a subdivision by any other than the white race was held not violated by construction of a shopping center and accompanying parking areas. The fact that this shopping center and parking areas would be open to all races would not constitute use and occupancy of the land. The court cited Webster's International Dictionary, which defined "use" as "to convert to one's services", and "occupancy" as "to take or enter into possession of".

LANDLORD AND TENANT

The noteworthy cases involving the law of landlord and tenant do not follow any pattern; so they will be mentioned and considered only with reference to the points of law involved in the factual situation of the particular case.

The validity of a renewal lease is not affected by the fact that it does not describe the property, so long as it clearly incorporates by reference the complete description found in the prior lease under which the tenant had been holding.[21]

The rights of a judgment creditor against the judgment debtor's lessee and against the property subject to the lease were discussed in some detail in *Estridge v. Janko*.[22] The lessee found himself as garnishee, and alleged that he was not indebted to the judgment debtor because his damages resulting from a levy and sale of some of the leased property and from his having purchased some of the personalty to prevent loss of possession exceeded the amount of rent then owed by him to the judgment debtor. It developed that, despite the levy and sale, the garnishee's possession had not been interfered with in any way. The court held that a tenant is not concerned with who has paramount title to personalty leased to him so long as his possession and enjoyment of it are not interfered with. The fact that the tenant chose to purchase some of the personalty to prevent his being deprived of it goes only to reduce his rent obligation.

20. 213 Ga. 566, 100 S.E.2d 192 (1957).
21. Hardin v. Homeyer, 213 Ga. 321, 99 S.E.2d 136 (1957).
22. 96 Ga. App. 246, 99 S.E.2d 682 (1957).

A case involving a common law profit turned upon whether the instrument created a present interest in land or only an option,[23] because if it were the latter the instrument would violate the rule agains perpetuities. The "lease" purported to convey the right to remove sand, gravel and other minerals and was to remain in force so long as the lessee should pay a minimum of (1) $400 per year, or (2) 10 cents per cubic yard for material actually removed. The lessee sued to enjoin threatened interference by defendant, to whom the lessor had conveyed a similar right to remove sand and gravel. It was held that a present interest passed to P, and that since he was absolutely obligated to pay a minimum annual rental, he had a present interest as distinguished from an option. The case was distinguished from *Brown v. Mathis*[24] in that in the latter case while the grantor had reserved a right to take sand and to pay a stipulated amount for all sand taken, he had not obligated himself to take any sand or to make any payment; consequently, the agreement lacked mutuality.

In *Trust Co. of Ga. v. S. & W. Cafeteria*[25] the lessee of premises for a term of 36 years was held to have acquired only the usufruct, and not an estate for years, because the contract expressly so provided. The tenant paid a tax on the premises after the taxing authorities had assessed taxes separately against the interest of the tenant and against that of the landlord. Since the contract provided that the landlord would pay all taxes assessed against the "premises", and since the tenant's usufruct is included in the term "premises", the tenant's payment of a part of the taxes to prevent disturbance of its possession resulted in an unjust enrichment of the landlord. The action is similar to one for money had and received, and a tenant in such a situation may recover even though the landlord did not come into possession of any money or property belonging to the tenant. All that is necessary is that he be unjustly enriched by obtaining some financial advantage to which he is not rightfully entitled.

On the subject of usufructs, a statute passed at the 1958 session of the General Assembly deserves mention.[26] It provides simply that "leases or usufructs" of land or any interest in land, when executed with the formality required for the execution of deeds to land, as well as the assignment of such leases or usufructs, shall be admissible to record, and shall constitute notice from the date of filing.

23. Smith v. Aggregate Supply Co., 214 Ga. 20, 102 S.E.2d 539 (1958).
24. 201 Ga. 740, 41 S.E.2d 137 (1947).
25. 97 Ga. App. 268, 103 S.E.2d 63 (1958).
26. Ga. Laws 1958, p. 413.