EQUITY

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Cases in equity for the survey year were varied and interesting. As was the case last year, many petitions for equitable relief failed to stand up against demurrers. The cases in the area of specific performance are particularly noteworthy this year.

SPECIFIC PERFORMANCE

Fundamental rules relating to the remedy of specific performance were reviewed in a number of cases. Perhaps the most comprehensive of these was *Treadwell v. Treadwell*,[1] in which a nephew sued the executors and beneficiary of his aunt's will to specifically perform an alleged oral agreement to devise land to him in consideration of his moving from the state of Washington to Atlanta, remodeling at his expense a little home near that of his aunt, and living in the little home in order that the aunt would not be alone during her declining years. Petitioner then set out numerous acts of compliance with the agreement and acts of personal attention and service to the aunt. Reversing the trial court in overruling the defendants' general demurrers, the court restated the principle that to justify specific performance the contract must be certain, definite and clear, and so precise in its terms that neither party can reasonably misunderstand it. Further, since specific performance is an altogether equitable remedy, not available as a matter of right merely by virtue of a proven agreement, it must be made to appear that the contract is equitable and just. Reviewing the allegations of the petition, the court concluded that the contract alleged did not show sufficient preciseness regarding the value of the services and the value of the land, nor was any specific data alleged from which such relative values could be determined. In addition, the court did not find that the numerous acts of personal service alleged to have been performed were required under the terms of the contract. If such personal service was to have been included in the contract, petitioner did not set them out as a part of such contract and therefore the contract was not certain, definite and clear. Thus, defendants' demurrers should have been sustained.

The requirement that to justify specific performance the contract must be fair, just and not against good conscience was also emphasized in *Seven*

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1. 216 Ga. 156, 115 S.E.2d 535 (1960).

Fifty, Inc., v. Hunter.[2] Specific performance is not available as a matter of right, and will not be granted unless strictly equitable and just, and mere inadequacy of the purchase price may justify a court in refusing a decree. In this case petitioner was asking for specific performance of a contract for the purchase of real estate, but the petition failed to allege the value of the lands covered by the contract. The trial court was affirmed in dismissing the petition on demurrer, since there was no basis for determining whether the contract was fair, just and not against good conscience.

An action for specific performance of an oral repurchase option for sale of corporate stock was dismissed on demurrer because the contract violated the statute of frauds.[3]

Another suit for specific performance of an oral promise by a decedent to give petitioner a part of such decedent's estate was disposed of on a plea to the jurisdiction.[4]

Banes v. Derricotte[5] was an action by a foster child to recover a part of a decedent's estate under a parol agreement of adoption. The court repeated the rule that a parol agreement by a person to adopt the child of another as his own, accompanied by a virtual, though not a statutory adoption, and acted upon by all parties concerned for many years and during the obligor's life, may be enforced in equity upon the death of the obligor, by decreeing the child entitled as a child to the property of the obligor undisposed of by will. However, relief was denied here because the decedent left a will and because the statute of limitations had run with respect to any relief sought against the defendant executor.

Relief was granted for specific performance in four cases. In *Kinney v. Youngblood,*[6] the petitioner asked for specific performance of an oral agreement that if petitioner would pay certain notes made by petitioner's husband, the defendant would transfer to her the notes and the deed securing them. The defendant admitted the agreement, but claimed that certain interest was still in arrears. The evidence showed that of five notes, petitioner had paid four and defendant had transferred them to her, but defendant refused payment of the final note and transfer of the security deed. The trial judge was affirmed in directing a verdict for petitioner, as the contract was found to be fair, just and equitable and had been so far performed by petitioner that a fraud would result if defendant were not forced to comply.

2. 216 Ga. 407, 116 S.E. 2d 552 (1960).
3. Samford v. Citizens and Southern National Bank, 216 Ga. 215, 115 S.E.2d 517 (1960).
4. Spiller v. Chapman, 216 Ga. 456, 117 S.E. 2d 536 (1960).
5. 215 Ga. 892, 114 S.E. 2d 12 (1960).
6. 216 Ga. 354, 116 S.E. 2d 608 (1960).

Although the first two cases under this sub-topic of specific performance[7] state that specific performance is an altogether equitable remedy not available as a matter of right merely by virtue of a proven agreement, it was stated in two cases that where the contract in question concerns the sale of land, is in writing, signed by both parties, is certain and fair, is for an adequate consideration, and capable of being performed, it is as much a matter of course for a court of equity to decree specific performance of it as it is for a court of law to give damages for its breach. In the first of these cases,[8] petitioner sought performance of an option to purchase land in spite of the fact that the defendant had conveyed a portion of the property described in the option to the State Highway Department, petitioner being agreeable to an abatement of the purchase price in accordance with GA. CODE ANN. §37-806. Affirming the action of the trial court in directing a verdict for petitioner except the amount of the abatement of the purchase price which was submitted to a jury, the Supreme Court reviewed the evidence and contract and found that petitioner met all requirements for specific performance. A proper tender of the purchase price was made, the contract was found definite, fair and capable of performance, and, because of improvements by petitioner, it was concluded that it would be unconscionable to refuse performance.

In the other case,[9] the "matter of course" rule was applied to a contract for the lease of real estate, it being pointed out that the same rules apply in such cases.

Irwin v. Dailey[10] was an action to obtain specific performance with respect to hotel and hotel apartment properties. The court, with two justices dissenting, found the description of the land contained in the contract was legally sufficient when aided by extrinsic evidence. It is of particular interest to note that the contract involved the sale of various personal property as well as the real estate. On this point the court stated that although normally equity will not decree specific performance of a contract relating to personal property, the fact that real property is involved in the same contract and the purchaser would be unable to enforce the parts of the contract relating to the land independently of the parts relating to the personalty constituted valid reasons in equity to authorize specific performance of the entire agreement.

7. *Supra,* notes 1 and 2.
8. Chatham Amusement Co., Inc., v. Perry, 216 Ga. 445, 117 S.E. 2d 320 (1960).
9. Friedsam v. Underwood, 216 Ga. 508, 117 S.E. 2d 530 (1960).
10. 216 Ga. 630, 118 S.E. 2d 827 (1961).

In the remaining case in this topic,[11] suit was instituted to specifically perform an alleged contract by a deceased person to make a will naming petitioner beneficiary and, the jury being unable to agree upon a verdict, a mistrial was declared. On appeal from a denial of a motion by the defendant administrator for a judgment in his favor notwithstanding the mistrial, the evidence was reviewed and found not to demand a verdict in favor of the administrator.

Restrictions on Use of Property

An interesting, and apparently difficult, question of the construction of a restrictive covenant was presented in *Williams v. Waldrop*.[12] Petitioners, purchasers of lots in a real estate subdivision, sought to enforce a restriction as to the use of the lots by the owner of the unsold lots in the subdivision. The restrictive covenant was contained in a document, duly filed for record, providing:

> "the following restrictions are hereby set up and shall apply to all sales of land by Manse Waldrop when said restrictions are specifically referred to in deeds from Manse Waldrop to purchaser."[13]

One of the restrictions was that no apartment shall be erected or maintained. All of petitioners' deeds were made subject to this restriction. The owner of the unsold lots zoned them for multi-unit apartments and otherwise set about to use them as sites for apartment buildings. The Supreme Court upheld the trial court in sustaining a general demurrer to the petition holding that restrictions imposed were limited to those lots where the deeds to purchasers specifically incorporated the restrictions and not to the lots retained. Limitations on restrictions are not favored and must be strictly construed. A dissenting opinion of a vigorous and convincing nature pointed out that the effect of the majority opinion was to permit the developer to take money from the purchasers by means of a trick document.

Rescission, Cancellation and Reformation of Instruments

Relief was granted in one case seeking cancellation of instruments, and denied in two others. In *Paden v. Matthews*,[14] suit was brought to cancel a note and security deed and other relief, the petitioners alleging tender of payment prior to foreclosure and a conspiracy to foreclose fraudulently. The suit was filed over ten years following a sale of the

11. DeLoach v. Myers, 216 Ga. 578, 118 S.E. 2d 372 (1961).
12. 216 Ga. 623, 118 S.E. 2d 465 (1961).
13. *Id.* at 624, 118 S.E.2d 467 (1961).
14. 216 Ga. 458, 117 S.E. 2d 346 (1960).

property under the power of sale. Applying by analogy the rule that an action to recover land can be defeated by a prescriptive title acquired by seven years' possession under color of title, the court ruled that the period of limitation applicable to an equitable suit for cancellation of a deed is seven years from the date of its execution.

The petitioner in *Sammons v. Tingle*[15] was not permitted cancellation of a security deed from her estrangled husband to a third person in violation of his alleged agreement to reconvey the property to her. The petition showed that the property had been conveyed to the husband in order to obtain a loan from the Veterans Administration after which the property was to be reconveyed to her. Since the petitioner conveyed the property to her husband for a fraudulent purpose, she came into court with unclean hands and was not entitled to equitable relief.

Relief was allowed in *Carter v. Bush*,[16] which was an equitable action by petitioner to cancel, as a cloud on her title, conveyances made by her former husband allegedly for the purpose of fraudulently defeating her claim for alimony in a pending divorce suit. The property had been awarded to the wife in an in rem action against the husband for divorce and alimony. The suit showed the conveyances to have been made without consideration and with all persons concerned having actual knowledge of the fraudulent purpose. Affirming the trial court in overruling general demurrers to the petition, the court stated that generally one must allege and prove possession in himself in order to maintain an action to remove a cloud on his title, but an exception exists when the alleged conveyances sought to be cancelled were obtained by fraud or other illegal means.

Enjoining Actions at Law

An interesting factual situation was presented in *Crowe v. State Highway Department*.[17] The highway department brought separate condemnation cases against seven property owners for the purpose of acquiring additional right-of-way footage in fee simple. Awards were made pursuant to law fixing the value of the property and the highway department filed an appeal to superior court in each case without depositing the amount of the awards with the clerk of court. On March 14, 1957, the highway department dismissed the appeals. It was determined that the additional right-of-way footage was not needed and the contemplated improvements on the existing right-of-way were completed without taking or damaging the property of the condemnees.

15. 216 Ga. 509, 117 S.E. 2d 531 (1960).
16. 216 Ga. 429, 116 S.E. 2d 568 (1960).
17. 216 Ga. 464, 117 S.E. 2d 158 (1960).

Subsequent to the completion of improvements, and in March, 1960, each defendant condemnee filed a motion in the appeal cases for a judgment for the amount of the award. The petition in equity was then filed by the highway department seeking to restrain the defendants from prosecuting their several motions for judgment and to consolidate the various motions for trial. Reversing the trial court which had overruled general demurrers to the petition, the Supreme Court held that to justify enjoining a suit at law, there must be some intervening equity or other proper defense of which the party seeking relief without his fault cannot avail himself at law. All defenses to the motions allegedly available to the highway department here would likewise be available at law in the pending proceedings. Further, consolidation in equity is improper unless the several suits could have been joined originally. Here there were several separate condemnation actions with different awards and, obviously, appeals from the cases could not have been consolidated originally. The several motions of the defendants for judgment likewise may not be consolidated.

Three other cases in this topic area sought to enjoin actions pending in the Civil Court of Fulton County. In *Ayers v. Baker*,[18] property owners brought suit against a contractor and a materialman alleging that the defendants were partners, but that, before completing the work and after collecting a greater portion of the contract price, they denied the partnership arrangement. The materialman then filed liens against the owners and filed suit in the Civil Court of Fulton County against the contractor for judgment for the materials. Petitioners desired to enjoin the action at law by the materialman against the contract and have it consolidated with the suit in equity. Holding the petition good as against demurrer, the court stated that if, as alleged, the materialman and the contractor conspired to defraud the property owners, there could be no valid judgment for the contractor for materials. However, if the suit in civil court proceeded to judgment, not being void on its face, such judgment would not be subject to collateral attack by petitioners in a proceeding by the materialman to foreclose the lien. Further, petitioners could not intervene in equity in civil court and they could not later question such judgment by an affidavit of illegality. Since the rules of law are deficient to protect petitioners from an anticipated wrong, equity will grant relief.

Relief was also granted in *Self v. Smith*,[19] wherein it was shown that additional parties were probably liable on the contract which was the basis of the action in civil court, since new parties may not be made

18. 216 Ga. 132, 114 S.E. 2d 847 (1960).
19. 216 Ga. 151, 115 S.E. 2d 355 (1960).

in that court. In the equitable action in superior court, all parties at interest may be joined in one action, their contentions heard, and their liabilities determined.

Relief was denied in *Gordy Tire Co. v. Dayton Rubber Co.*[20] In this case, the petitioner asked for an injunction to keep defendant from further prosecuting a civil court action on contract against petitioner and for leave to assert a claim ex delicto against defendant, less a credit admittedly owed by petitioner on contract. The pleading showed that defendant was a foreign corporation which, in compliance with statute, had designated an agent in Georgia upon whom service may be perfected and which had an office and place of doing business in Georgia. It was stated that a tort claim cannot be pleaded as a set-off to an action ex contractu except upon equitable grounds. Non-residency is normally a sufficient reason to permit set-off under such circumstances, but the reason for such exception does not exist where the non-resident may be sued in this state on either of two theories. Thus, petitioner was not allowed to enjoin the pending action.

Injunctions Against Torts

This was by far the most fertile field for suits in equity. Injunctions were sought against a large variety of torts. Since many of these cases depend on peculiar factual situations, only those cases pronouncing rules of general interest will be discussed with some detail.

Injunctions were declined in the following cases: an action against corporate directors who, it was alleged, were personally purchasing stock in the corporation to gain control to the detriment of the corporation;[21] a suit to enjoin foreclosure of a security deed allegedly given without consideration, but which the petitioner admitted giving in satisfaction of earlier disputed debts between the parties;[22] and an action to prohibit an insurance company from paying the proceeds of a life insurance policy to the designated beneficiary who it was alleged had no insurable interest in the life of the deceased insured when the insured was the party who in fact contracted for the policy.[23]

Injunctions were granted against the following torts: an encroachment on a road which had been reserved by a common grantor of the parties and used by petitioners and their predecessors as a road for sixty years;[24] the digging of a drainage ditch which concentrated the

20. 216 Ga. 83, 114 S.E. 2d 529 (1960).
21. King Manufacturing Co. v. Clay, 216 Ga. 581, 118 S.E. 2d 581 (1961).
22. Williams v. Ruben, 216 Ga. 431, 117 S.E.2d 456 (1960).
23. Theus v. Bankers Health & Life Insurance Co., 216 Ga. 377, 116 S.E. 2d 573 (1960).
24. Clark v. Baety, 216 Ga. 42, 114 S.E. 2d 527 (1960).

flow of surface water from defendants' property onto the property of petitioners;[25] the erection by others of a fence around property acquired through prescription by a church;[26] and an illegal conspiracy to injure and destroy petitioner's printing business.[27]

In *Bodin v. Gill*,[28] petitioning property owner filed suit for damages and injunctive relief against a church, a contractor and an architectural firm for so changing the surface of the church's property that the natural flow of surface water onto petitioner's lot was changed, causing described damages. On appeal from an order granting a temporary injunction, the Supreme Court ruled that the injunction was improper as to the architects as the evidence showed that their contract with the church was terminated, giving the church exclusive possession, and therefore the architects had no legal right to go upon the church property for the purpose of terminating the cause of injury. The court did hold, however, by affirming the overruling of the architects' general demurrers to the petition, that the architects would be liable in damages to petitioner.

Seaboard Air Line Railroad Co. v. Wilkinson[29] was a case restating some of the basic requirements for equitable relief against torts. Petitioner had filed an action under the Federal Employers' Liability Act against the defendant railroad. Subsequently, he filed an ancillary motion for injunctive relief seeking to enjoin the railroad from harassment and intimidation by lodging fictitious charges against him with respect to his employment contract. The Supreme Court, reversing the trial court, held the ancillary motion subject to general demurrer. Injunctive relief will not normally be granted to enjoin a trespass unless damages afford insufficient relief, the trespasser is insolvent, or there exist other circumstances which, in the discretion of the court, render equitable interference necessary and proper. Further, a bare threat of injury, which is followed by an overt act which would work irreparable injury, affords no basis for equitable relief. Averments of conclusions are insufficient, and a full and detailed statement of the facts must be given to enable the court to determine the necessity for an injunction. Presumably, the charges against petitioner for violation of his employment contract will be properly heard and a legal result thereon reached, therefore no entitlement to an injunction is shown.

One case[30] was brought to enjoin a continuing trespass to land alleged to be owned by petitioner and to which he showed a chain of title

25. Morris v. Cummings, 216 Ga. 426, 116 S.E.2d 592 (1960).
26. Bridges v Henson, 216 Ga. 423, 116 S.E. 2d 570 (1960).
27. Cook v. Robinson, 216 Ga. 328, 116 S.E. 2d 742 (1960).
28. 216 Ga. 467, 117 S.E. 2d 325 (1960).
29. 216 Ga. 338, 116 S.E. 2d 588 (1960).
30. Laws v. Oakey, 216 Ga. 408, 116 S.E. 2d 575 (1960).

into him going back to 1907. In his answer and cross-bill the defendant relied on a tax deed to his predecessors to establish in him either a good paper title or a prescriptive title. But the description contained in the tax deed was insufficient to operate either as a conveyance or as color of title, and the trial court was affirmed in granting petitioner's motion for a summary judgment.

Some of the rules pertaining to the circumstances under which equity will interfere with the normal administration of estates were stated in *Gaines v. Johnson*.[31] Petitioner wanted to restrain the defendant executor from dissipating funds held by him and to be awarded his share of the estate being administered. It appeared from the petition that there was outstanding a life estate in all the property of the estate, and for this reason the prayer for award to petitioner of his share of the estate was premature. Affirming the trial court in sustaining the executor's motion to dismiss the petition, the Supreme Court stated that equity will not interfere with the regular administration of estates except in suits for construction and direction, marshaling the assets, or upon application of any person where there is danger of loss or injury to his interests, and then only in those cases where the remedies available in the Court of Ordinary are inadequate to afford complete relief. Petitioner here seeks no relief which he could not obtain in the Court of Ordinary.

Two cases involving applications for injunctive relief had to do with elections. In *Hamilton v. Smith*,[32] a recount had been carried out following a primary election as provided by law and the County Democratic Executive Committee and the recount committee had properly promulgated, published and certified the result of such recount, showing petitioner to be the party nominee for the office of sheriff. Petitioner alleged in his suit, however, that the defendant executive committee was about to entertain and hear a contest filed by the other candidate involved in the recount. The Supreme Court held that any such action by the executive committee would be a mere nullity since the findings of the recount committee are final and conclusive, and hence the petition failed to state a cause of action.

In *Kemp v. Mitchell County Democratic Executive Committee*,[33] petitioner sought injunctive relief to restrain defendant executive committee from allowing voters in an independent school district to vote in a primary election to nominate a candidate for county superintendent of schools. A temporary restraining order was denied by the trial judge and the voters of the independent district were permitted to vote, making it

31. 216 Ga. 668, 119 S.E. 2d 28 (1961).
32. 216 Ga. 345, 116 S.E. 2d 565 (1960).
33. 216 Ga. 276, 116 S.E. 2d 321 (1960).

impossible to determine which votes were legal and which were illegal, and it could not be determined which candidate received the highest number of legal votes. After deciding that the voters in the independent district were prohibited by law from voting in the primary and that it was impossible to determine who actually received the highest number of qualified votes, it was held that injunctive relief was proper and the primary election was ultra vires and void.

Enforcement of Equitable Decrees

In *Martin v. Harris*,[34] the defendant was adjudged in contempt for violating a restraining order which had been served personally upon him. Where the defendant's only defense was that the court had been without jurisdiction to grant the restraining order, the Supreme Court ruled that the trial court did not abuse its discretion in holding the defendant in contempt.

Interpleader

In *Gunby v. Harper*,[35] petitioners, retired ordinaries, brought suit against several savings and loan associations and one bank alleging that they retired pursuant to an act of the legislature which was repealed by a subsequent act. The repealing act did not provide for the handling of the retirement fund set up in the earlier act, which fund had been deposited with the defendant institutions, and numerous persons were claiming the fund and the right to control and manage it. The court was asked to appoint a receiver to administer the fund. The defendant institutions answered that they were mere stakeholders of the disputed fund and asked that all interested parties be required to interplead. The court issued a temporary restraining order and a rule nisi ordering various parties at interest to interplead. On appeal from the denial of a motion to dismiss the restraining order, the court held that the peculiar facts involved justified equitable interpleader. The defendant institutions were in justifiable doubt concerning the proper party to receive the funds and it was proper to require all possible claimants to intervene.

Equitable Set-off

In *McLendon v. Galloway*,[36] the defendant was permitted to set off a claim in tort against the plaintiff's action on contract because of insolvency of the plaintiff.

Equitable set-off was also discussed in *Gordy Tire Co. v. Dayton Rubber Co.*,[37] mentioned earlier in this article.

34. 216 Ga. 350, 116 S.E. 2d 558 (1960).
35. 216 Ga. 94, 114 S.E. 2d 856 (1960).
36. 216 Ga. 261, 116 S.E. 2d 208 (1960).
37. *Supra*, note 19.