REAL PROPERTY

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ESTATES

The most detailed exposition and delineration of estates, legal and equitable, found in Georgia cases in recent years appeared in two trust cases decided last year. Trusts are becoming increasingly popular in estate planning for a variety of reasons. In addition to the generally good economic conditions prevailing today, Georgia law has been, since 1950,[1] more favorable to trusts than theretofore. Indications are that more and more questions of substantive trust law will find their way into the courts.

After this digression, let us turn now to the estates feature of the two cases. In *Erskine v. Kline*[2] the crucial question was whether a testatrix (*T*) had a devisable interest in certain property at the time of her death. A rather detailed statement of the background facts is necessary in order to focus attention on this question. At his death in 1899, T's grandfather devised the realty to T's mother for life, remainder to the life tenant's children who survived her. In 1911 the life tenant and her eight children (including T) conveyed the property to trustees for the following purposes: (1) to pay the net income to T's mother for life and then to pay it in equal amounts to the children for life; (2) at the end of fifty years, to sell and distribute the proceeds among the settlors or their descendants. The trustee's power of sale was restricted by a requirement that substituted property be capable of producing a minimum income. In 1922 the life tenant died survived by all eight of her children. In 1960 *T*, one of these children, died and in her will purported to dispose of her interest in the trust proptry to named devisees in a manner inconsistent with the terms of the trust. These devisees sued for a declaration of their rights. The trial court held that the trust was valid in all respects, that *T* had no devisable interest in the property at the time of her death and, further, that since the

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1. Ga. Laws, 1950, p. 310, 311. GA. CODE ANN., §108-111.1. Two articles on this section appeared in the GEORGIA BAR JOURNAL within the past year. They are, Coleman, *A Trust is a Trust is a Trust (is a Trust?)*, 25 Ga. B. J. 43 (Aug., 1962) and Smith, *A Positive View of Section* 108-111.1, 25 Ga. B. J. 142 (Nov., 1962). It appears to the writer that the Smith article thoroughly refutes the narrow construction placed on this section by the Coleman article.
2. 218 Ga. 112, 126 S.E.2d 755 (1962).

fifty-year term of the trust is up *T's* interest passed, according to the terms of the trust, to the remaining living children of the life tenant. The Supreme Court reversed, holding in favor of *T's* devisees.

The Supreme Court's reasoning was that under the 1899 will the children (including *T*) received remainders contingent upon their surviving the life tenant.[3] Since life estates and contingent remainders are alienable, the 1911 agreement was a valid conveyance to trustees, but it was subject to general trust law rather than to the provisions of Ga. Code sections 108-601-602-603-604, dealing with trusts for the improvement of realty. Under general trust law then in force the trustee received only a 50-year term, leaving the reversion in the settlors. Under pre-1950 law the trust could remain executory only so long as the remainders remained contingent; hence, when the life tenant died in 1922 and the identity of the remaindermen was ascertained, the trust was executed by the statute of uses and the legal and equitable titles merged in the beneficiaries free of trust.[4] Thus, since at the time of her death *T* was absolute owner of her undivided interest, she could dispose of it by will.

The other trust case referred to was *Lanier v. Lanier*,[5] involving the validity of an executory interest under the rule against perpetuities and the efficacy of an *in terrorem* clause. The will and codicil created a discretionary support trust for testator's widow, his son, his son's named wife and any of the son's children. It was then provided that after the death of the widow, the death of the son and the death or remarriage "of his widow *if any survive him*" the estate was to be "distributed equally share and share alike *among the children of my son*" (italics added). Provision was made for takers in default in the event of failure of devisees or in the event of caveat by any of the devisees. The son sued for a declaratory judgment that the ultimate gifts over were void for remoteness. He lost in both the trial court and the Supreme Court.

The discretionary support trust did not create any estate in its beneficiaries; it was purely a discretionary trust which created only a charge upon the property. Since no prior supporting estate was ever created, the gift over to "the children of my son" could not be a remainder, but was instead an executory devise. Ga. Code section 85-702 (1933), which repealed the common law destructibility rule as to contingent

3. A stipulation by the litigants that the remainders were vested was held ineffective. They cannot change the law by stipulation.
4. The operative portion of the Statute of Uses is codified in GA. CODE §108-112 (1933).
5. 218 Ga. 137, 126 S.E.2d 776 (1962). An excellent comment on this case, Payson, *A Study of Lanier v. Lanier*, appeared in 14 MERCER L. REV. 275 (Fall, 1962).

remainders, applies only to remainders and not to executory interests; hence it is inapplicable here.[6]

The court then labeled as "vested executory interests" the interests of the son's children who were in being at testator's death. Any children born after the testator's death would take a similar interest. These would not be too remote because the son's life was the measuring life, by implication, and the class would have to close at his death. Since the rule against perpetuities is only a rule against remote vesting and these interests must "vest" at the end of a life in being (the son's), it is immaterial that there is a possibility that enjoyment may be postponed beyond the period of the rule. This possibility is that the son's present wife may die and he may remarry, have children by, and predecease a woman not in being at the time of testator's death. This is the typical "unborn widow" situation, which would make the executory interests void under the rule were it not for the court's finding that the executory interests were "vested."[7]

The difficulty with this line of reasoning (at least under the traditional common law view) is that an executory interest by its very nature cannot be vested. The entire estate is in the owner of the particular estate until the occurrence of a specified future event. The moment the particular estate is cut short by the occurrence of the shifting event, the interest vests as a possessory estate in the person who until that time owned the executory interest. Since prior to that time the particular estate was entire, until that time there could be no interest to be vested in the executory devisee.

The court in the instant case, however, indicates that if the executory interest is in identified individuals and the possibility of remoteness lies only in such unusual situations as the "unborn widow" situation, then that technical possibility may be disregarded and the interest

6. The court, however,—and here appears to be the weakest link in its argument—then proceeded to cite such cases as Irvin v. Porterfield, 126 Ga. 729, 55 S.E. 946 (1906), all of which cited cases seem to have involved remainders and not executory interests and all of which were decided on the strength of the preference for an early vesting. The preference for early vesting has always been limited to remainders; as a matter of fact, it probably originated as a device to avoid the harsh common law rule of destructibility of contingent remainders. The only direct authority cited by the court was a statement in the Irvin case that, "In a devise to children as a class by way of remainder, children in esse at the death of the testator take vested interest." and a later statement that "This rule applies to an executory devise as well as to a remainder." The latter statement was clearly only dictum.

It would seem that the only situation in which an executory devise would not, under Georgia law, violate the rule is this: To A in fee, but if he die without issue, to B in fee. Here B's executory devise would have to vest, if ever, at the end of A's life, but this is true only because GA. CODE §85-506 (1933) requires a definite failure of issue construction.

7. The court then held that the son's caveat brought into operation the *in terrorem* clause, which resulted in a forfeiture of his interest.

held valid. If the decision, on the other hand, is taken as a holding that executory devises are not subject to the rule against perpetuities if the executory devisee is ascertained within the period of the rule—even though the event terminating the prior estate may occur beyond the period of the rule—then the decision marks a radical departure from the common law[8] and from prior Georgia law.[9]

The will in this case also made the interest of each child of the son defeasible in favor of another ultimate taker if the child did not survive to the time of actual enjoyment. This ultimate gift over was held to be in violation of the rule because the shifting event may occur at the death of a child of the son which child was not in being at testator's death. This holding, in view of the fact that this ultimate executory devisee was also identified, is hard to reconcile with the holding that the executory interest of the children in being at testator's death is vested. The only difference between the gift over after the interest of the children then in being and that after the death of those born thereafter is that the former is subject to the "unborn widow" problem only and the latter is subject to that plus the "unborn children" problem. The very fact that this distinction was made indicates that the court will in the future construe this case narrowly rather than broadly.

Despite this fact the writer fears that the decision raised more problems than it settled. Justice Duckworth dissented strongly. He felt that the inevitable tying up of the property for such a (possibly) long period flies in the face of the fundamntal policy behind the rule against perpetuities.

The other cases decided during the survey period, involving a categorizing of estates, may seem anti-climatic, but they are worthy of mention. In one of them[10] defendant had conveyed to Mrs. *A* for life, but subject "to this condition and limitation, that if she and her family move away or vacate . . . as long as three months, the property reverts to the parcel of land from which it is deeded, and will belong to the owner of the land adjacent to it on the east and south." The life tenant executed a security deed, defaulted, vacated the premises for over three months and the propery was sold (under power of sale) to plaintiff. When the latter was denied possession, he sued in equity either for recovery of the land or for the value of improvements placed thereon. The sustaining of a general demurrer was affirmed on appeal. Mrs. *A* had only a determinable life estate, which estate ended three months

8. GRAY, THE RULE AGAINST PERPETUITIES, 4th ed., §114.
9. MITCHELL, REAL PROPERTY IN GEORGIA, 2d ed., pp. 366-367; REDFEARN, WILLS AND ADMINISTRATION OF ESTATES IN GEORGIA, Rev. ed., §165.
10. Mid-State Homes, Inc. v. Johnson, 218 Ga. 397, 128 S.E.2d 197 (1962).

after her vacation of the premises. Plaintiff, who purchased at the foreclosure sale, took the interest of the life tenant burdened with the determining qualification and thus has nothing now. Nor is he entitled to compensation for the value of improvements, because the defeasible nature of the life estate was at all times a matter of record. The argument that the limitation over "to the owner of the lands adjacent to it on the east and south" was void as a reservation in favor of a stranger was invalid. It was not a reservation, but a limitation over to a person described with reference to the other parcel, and it was immaterial that the person could not be identified at the time the deed was executed.

Three cases were concerned with the nature and incidents of remainders. In *Gay v. Graham*[11] there was a devise to *W* for life and an order to the executor, at her death, to sell and divide the proceeds "among my surviving children and the children of my deceased children, per stirpes." One child who survived testator, but predeceased *W*, left a widow but no children. The widow was held entitled to the share of her husband. The latter had a vested remainder; "surviving children" referred to those who survived testator, not *W*. This case contained the typical situation in which the statutory preference for an early vesting is useful. The will in *Scott v. Scott*[12] devised to a trustee in trust for testator's sister for life, and then provided that at her death the property "shall be that of said [trustee] in fee simple." The trustee predeceased the life cestui. The heirs of the testatrix then claimed that the trustee was given a remainder contingent on surviving the life cestui and that since that interest now can never vest the property is theirs. The trustee was held to have acquired a vested remainder which at his death descended to his heirs. There was no necessity for appointment of an administrator on the estate of testatrix—her will completely disposed of her interest. Since the life cestui is still alive, what is needed is the appointment of a new trustee. Though the point was not involved in this case, the language of the court seems to recognize that, as trustee, the original trustee had only a life estate; no larger estate was necessary to accomplish the purpose of the trust. Obviously, there was no necessity for his holding his vested remainder in trust for himself. *Oliver v. Irvin*[13] held that a vested remainderman has a present estate and that, while not a concurrent owner with the life tenant, he is a "present" owner and as such is a necessary party to a processioning proceeding. He may be joined either as applicant or as defendant.

11. 218 Ga. 745, 130 S.E.2d 591 (1963).
12. 218 Ga. 732, 130 S.E.2d 499 (1963).
13. 105 Ga. App. 844, 125 S.E.2d 695 (1962).

CONVEYANCES

The contract with a real estate broker is just that—a contract—and two cases serve to illustrate that the broker's rights must be determined by contract law. In both cases the broker was suing for his commission. In *Goldgar v. North Fulton Realty Company*[14] the contract provided that the purchaser would pay the commission unless the seller was unable to convey a marketable title. On the day before the closing date the purchaser wrote the seller that, since he was moving to another state, it would be "imprudent" to purchase a home here in Georgia; so the two agreed to rescind the contract to purchase (which the broker proved was procured by him). A directed verdict for the broker was affirmed. The purchaser sought to show that seller could not perform because title was in seller and his wife jointly, but this evidence would not help him. Lack of marketable title was the only thing which would prevent his being liable and, to show this, it was incumbent on him to show not only that seller did not have good title at the time of the contract but also that he would have been unable to deliver good title at the closing.

In another action brought to recover a broker's commission[15] it was held that, where the listing with the broker obligated him to "secure a commitment for a first loan" and the offer to purchase obtained by him obligated him to "secure a first mortgage loan," there is a fatal variance. An agreement to *secure* a loan is vastly different from one to *secure a commitment* for a loan. A general demurrer was thus sustained and, since the owner died before the broker showed that he was entitled to the commission, the death terminated the agency by operation of law.

Where the contract to purchase provided that the sale "is subject to purchaser's ability to obtain" a $10,000 loan, specific performance could not be obtained. The contract was too indefinite in that it did not say upon what terms the loan was to be obtained or at what rate of interest.[16]

In two cases the grantor was held to have stated a cause of action for cancellation of his deed. In *Pirkle v. Gurr*[17] a majority of the Supreme Court held that the mere failure on the part of an 85-year-old, blind grantor to have the deed read to her is not necessarily such negligence as will bar her suit to cancel the deed. Her petition alleged

14. 106 Ga. App. 459, 127 S.E.2d 189 (1962).
15. Thornton v. Lewis, 106 Ga. App. 328, 126 S.E.2d 869 (1962).
16. Bonner v. Jordan, 218 Ga. 129, 126 S.E.2d 613 (1962). See Nalley v. Schoen, 215 Ga. 513, 111 S.E.2d 40 (1959), in which the court suggested the details which are necessary to entitle such a contract to specific performance.
17. 218 Ga. 424, 128 S.E.2d 490 (1962); noted in 14 MERCER L. REV. 440 (Spring, 1963).

that she was told by the attorney for the grantee (a church) that it was a deed of trust, revocable at will by her, but in fact it turned out to be an unconditional warranty deed. Three justices dissented, citing *West v. Carolina Housing and Mortgage Company*[18] as controlling. The majority alluded to the *West* case but distinguished it by saying that in it the court relied upon two other cases[19] in both of which the complaining party could read but failed to do so.

As against all but a bona fide purchaser without notice, equity will cancel the record of an undelivered deed where the grantor remains in possession and shows that the recording was made by mistake. A judgment creditor of the grantee is not such a bona fide purchaser without notice.[20]

The description in a partition deed may not be sufficient to effectuate the partition, but a subsequent conveyance by one of the parties, purporting to convey the portion allotted to him by the partition deed, still may be sufficient to transfer his undivided interest in the entire tract. Such was the effect of *Swindle v. Curry*.[21] The partition deed, dated October 16, 1958, describing the dividing line as " . . . a line beginning on the north line of said tract at an agreed point and running across said land in a southerly direction to the south line of said tract." This description was held void because there was no reference to the location of the beginning point or the ending point; nor was there any statement as to acreage. Thus, the partition deed left the original parties as they were; *i.e.*, equal tenants in common. Then the one to whom the partition deed had purported to convey the west portion executed a deed to this west portion "as described in a certain partition deed" [the one referred to above] to defendant *X*, who then conveyed to defendant *Y* an undivided one-half interest in the land acquired by *X* in the deed just referred to. Then, to round out the circle, the grantor of the partition deed quitclaimed his entire interest in the entire tract to his tenant in common. This quitclaim passed no interest because the grantor had none, having parted with it by his deed to defendant *X*.

EASEMENTS AND SERVITUDES

In those areas where zoning and planning laws are not in force the doctrine of equitable servitudes continues to serve a very useful purpose, and subdivision developers in such areas will find two recent

18. 211 Ga. 789, 89 S.E.2d 188 (1955).
19. Truitt-Silvey Hat Co. v. Callaway and Truitt, 130 Ga. 637, 61 S.E. 481 (1908); Lewis v. Foy, 189 Ga. 596, 6 S.E.2d 788 (1940).
20. W. L. Schautz Co. v. Duncan Hosiery Mills, Inc., 218 Ga. 729, 130 S.E.2d 496 (1963).
21. 218 Ga. 552, 129 S.E.2d 144 (1962).

cases instructive. Covenants running with the land at law are binding only on the original convenantor and covenantee and their privies and, hence, are of limited effect as land use controls in a subdivision. How the doctrine of equitable servitudes supplements covenants running with the land at law is illustrated by one of these cases; the limitations of the doctrine, by the other.

In *Groves Lakes Subdivision, Inc. v. Hollingsworth*[22] an owner had conveyed to defendant five acres out of a larger tract, the deed expressly restricting use of the property conveyed to residential purposes. The grantor in that deed then conveyed the balance of the larger tract to plaintiff corporation, of which he was president and principal stockholder. The balance of the larger tract was then subdivided and over thirty lots sold, including one to defendant and one to the individual plaintiff in this case. Plaintiffs sued to enjoin violation by defendant of the restrictive covenant in the deed of the five acres to the latter, alleging that defendant is using the conveyed land as a cow pasture. The petition also alleged that in selling lots the developer had represented that the entire tract was restricted to residential uses. The trial court granted a motion to strike the individual plaintiff as a party plaintiff on the ground that he had never had any interest in the five-acre tract. While it is not stated, the trial court apparently reasoned on the basis that the covenant was one running with the land at law. The trial court then dismissed the petition.

The Supreme Court reversed, one justice dissenting (without writing an opinion). The restrictive covenant in the conveyance to defendant created an equitable servitude or, as the court called it, a "servitude in the nature of an easement." This servitude burdened defendant's tract in favor of other property owners in the subdivision, including remote grantees of the original covenantee. The only requisites for enforcement of such a covenant in equity are: (1) It concerns the land, (2) the covenantor and covenantee intend that it run with the land, and (3) the owner of the servient property takes with notice of the restriction. Privity of estate or of contract (essentials in the case of a covenant running with the land at law) are not required in equity.

The plaintiff in *Reid v. Standard Oil Company of Kentucky*[23] was not as successful, but the cases are quite distinguishable. In the *Reid* case a lot purchaser sued for a declaratory judgment that certain other lots were subject to use restrictions. Here the subdivider prepared a plan for development for residential and commercial purposes. The

22. 218 Ga. 443, 128 S.E.2d 499 (1962).
23. 107 Ga. App. 497, 130 S.E.2d 777 (1963).

tract was then surveyed and divided into three sections, a separate plat being recorded for each section. Plaintiffs purchased lots in section 1, their deeds restricting the land use to residential purposes but also reciting that these restrictions "are applicable to and only to the numbered lots shown in said plat." Defendant subsequently purchased a lot in section 2 for the purpose of constructing and operating thereon a service station. The recorded Plat 2 contained no restriction on the use of the land in that section; as the matter of fact, the lot purchased by defendant was in an area marked on the plat "reserved." Plaintiffs, as owners of lots in section 1 claimed that defendant's lot, in section 2, was subject to the same restrictions as were their own.

The sustaining of a general demurrer was affirmed. The court discussed the theory of equitable servitudes, but pointed out that the theory is applicable only where the restrictions are mutually beneficial and mutually burdensome upon all the lots in a single area, which single area is the subject-matter of a general scheme of development. The court then cited as an example the plan for the subdivision in the *Groves Lake Subdivision* case[24] where a single, general plan existed for the entire area. The *Reid* case, however, involved a much larger total area, and in it three plats were prepared and recorded for three different portions of the total area, some of which authorized uses forbidden in others. This was sufficient to negative the existence of any single plan for the entire area.

In an appeal from the granting of an interlocutory injunction, a city argued that it had acquired by prescription the right to use certain drains and ditches for the drainage of surface water from the public streets. The Supreme Court affirmed.[25] Admitting that the city had acquired such an easement, the alleged overflow upon plaintiff's land would exceed the scope of that easement unless the city went further and proved that there had also been this continuous *overflow* for the prescriptive period.

Disputes over private ways reached the appellate courts in at least four cases that deserve some mention. In *Sams v. Seaboard Air Line Railroad Company*[26] plaintiff sued to enjoin the railroad from closing a roadway and bridge across a cut in the terrain, but he alleged too much. He alleged all the elements of a prescriptive way, but he also alleged that the bridge was built and maintained by the railroad. The petition was dismissed. Under the statute[27] it is necessary that the *claimant* repair and maintain the way during the prescriptive period.

24. *Supra*, n. 22.
25. City of Atlanta v. Williams, 218 Ga. 379, 128 S.E.2d 41 (1962).
26. 218 Ga. 569, 129 S.E.2d 859 (1963).
27. GA. CODE §83-102, Acts 1953, Nov. Sess., p. 98.

As indicated in the case last mentioned, the burden is on the prescriber to prove that he complied with the statute. He failed to carry this burden, also, in *Bedingfield v. McCullough.*[28] The maximum width of a private way was, prior to 1953, 15 feet; in that year it was raised to 20 feet. Claimant's evidence was that prescription began in 1947 or 1948 and that the way was over 15 but under 16 feet in width. Thus, until 1953 no prescription ran because the maximum width was exceeded; since 1953 the prescription right cannot accrue because in 1958, when the way was closed by the owner, the necessary period had not yet run and has now been interrupted.

Claimant failed to carry his burden in *Moore v. McConnell,*[29] also. He failed to prove that he had kept the way open and in repair for a seven-year period. In spelling out the requirement as to the quantum of such proof, the court said that it must be "sufficient to put the owner on notice that the applicant claims the right to use the way adversely to the owner." In disapproving *Hardin v. Smith*[30] (on the ground that the Supreme Court itself has disapproved it), the court implies that the primary object of the requirement as to repairs on the private way is to give notice of the adverse claim, not merely to make the way usable.

Where a private way has been acquired by prescription and the servient land is then sold, a petition for an injunction against the new owner's interference with the way need not allege that the new owner purchased with notice of the easement.[31]

While it does not fit neatly into the subject matter of this section, one zoning case can still be appropriately discussed at this point. It is *Hill v. Busbia,*[32] a case which illustrates that no matter how well-prepared a zoning scheme may be there must still be left some room for variances. The zoning ordinance required use for residences only and called for the average set-back line of the existing structures as the minimum set-back for any new structures. The trouble arose because, as applied to defendant's lot, the set-back and side-yard requirements would allow him to construct only a resident of, at most, 30 feet by 3 feet. Such a three-foot wide residence would not allow much elbow room but, fortunately, the court concluded that, since the ordinance allowed a variance for "lots of record" which were too small to meet the general requirements, the owner could build his house with only a 25-foot set-back (rather than a 58.6-foot setback called for by the let-

28. 106 Ga. App. 759, 128 S.E.2d 374 (1962).
29. 105 Ga. App. 758, 125 S.E.2d 675 (1962).
30. 201 Ga. 58, 38 S.E.2d 836 (1946).
31. Croker v. Lewis, 217 Ga. 762, 125 S.E.2d 50 (1962).
32. 217 Ga. 781, 125 S.E.2d 34 (1962).

ter of the ordinance). The court avoided a ruling on the constitutionality of the ordinance by holding that a failure to grant the variance would be an unconstitutional taking of the property in view of the fact that the property would be useless for any purpose other than residential.[33]

LANDLORD AND TENANT

The landlord-tenant cases do not fall into any pattern. In *State Highway Department v. Western Union Telegraph Company*[34] Western Union had by contract acquired the right to occupy part of certain land with its telegraphic equipment. The contract gave the landowner the option to cancel. While this contract remained in force the highway department acquired the land for a right of way, with notice of the contract and expressly subject to it, and then sought to exercise the owner's option to cancel. Western Union was successful in enjoining the cancellation. The contract created a tenancy at will and a definite term of 60 days because of the statutory notice requirements for termination of tenancies.[35] Technically, the position of Western Union seems to be only that of licensee, but this would not affect the outcome of the case. It has been held that destruction of a license, by the exercise of eminent domain, is a taking of a property interest.[36]

In *Bonner v. Frazier*[37] a distress warrant for rent raised the question of whether the storing of a trailer on land of another was a space-letting or a bailment. There was some evidence in favor of each; so the Court of Appeals simply affirmed on the ground that there was substantial evidence to support the trial court's finding that it was a space-letting.

In *Richardson v. Lampley*[38] a lessee sued his lessor for money had and received. The petition alleged a written lease and an extension thereof, that under the lease lessee had a right at termination of the term to remove buildings, that lessor had sold the buildings to the United States Government and had refused, on demand, to pay over the proceeds to the lessee. The Court of Appeals affirmed a dismissal on general demurrer. Construing the petition most strongly against the lessee, he was still in possession under a written extension and the buildings were still attached to the land. In such case, admitting

33. For an instance of denial of a variance, on the ground that there was no showing of "unnecessary hardship" or "great practical difficulty" in conforming with the ordinance, see B. L. Ivey, Inc. v. Allen, 105 Ga. App. 728, 125 S.E.2d 549 (1962).
34. 218 Ga. 663, 129 S.E.2d 872 (1963).
35. GA. CODE §61-105; Acts 1962, p. 463.
36. State Highway Dept. v. Morton, 104 Ga. App. 106, 121 S.E.2d 275 (1961).
37. 107 Ga. App. 277, 129 S.E.2d 878 (1963).
38. 107 Ga. App. 395, 130 S.E.2d 268 (1963).

that the Government purchased and paid for the buildings, it took subject to the rights of the lessee in possession. In short, the lessee has not shown that he has been damaged.

The right of a lessor to terminate a lease depends not only upon the terms of the lease but also upon how the parties, by their actions, have interpreted it. In *Scruggs v. Purvis*[39] the written lease, executed in 1955, gave the lessee the right to mine and remove sand for one year and also the right "to renew and extend" at the same consideration. The lessee sued to enjoin the lessor's interference with enjoyment of the lease. The lessee had not defaulted, but the lessor claimed that the contract required a written renewal and that, there have been no such renewal, the lessor could terminate at the end of any year. The trial court's dismissal on general demurrer was reversed. "Renew and extend" in the context of this contract meant merely "to extend," but without regard to this construction the acts of the parties in allowing the lease to continue several years without either insisting upon a written renewal showed the interpretation they themselves were putting upon these words.

CONDEMNATION

Recent condemnation cases indicate that the basic constitutional and procedural questions so commonly raised a few years back are receding into the background. The noteworthy cases decided during the past year were concerned with two questions: (1) Has there been a "taking"? (2) If so, what is the measure of damages?

The first of these questions appeared in both the appellate courts and, in the Court of Appeals, received different answers from different judges. That question has to do with whether the owner of property abutting on a street one end of which is closed by highway improvements (thus making it a dead-end, or *cul-de-sac*) has been specially damaged, or is he merely being inconvenienced by the exercise of the police power and thus not entitled to compensation. In the situation envisioned here it should be remembered that no part of the claimant's property is physically taken or interfered with, nor is his access to the road upon which his property abuts obstructed in any way.

In *Tift County v. Smith*[40] the claimant owned a farm abutting on a country road which crossed a highway not far from his property. When the highway was made a part of the interstate system, the road on which his farm abutted was dead-ended at the interstate highway, at a point about fifty feet from his property. The resulting circuity of

39. 218 Ga. 40, 126 S.E.2d 208 (1962).
40. 107 Ga. App. 140, 129 S.E.2d 172 (1962).

travel from his home to the nearest town (making it almost three miles further) was the cause of the special damages alleged. In reversing the trial court's sustaining of a general demurrer, the Court of Appeals held that a cause of action was stated. Four judges joined in the principal opinion, one wrote a concurring opinion and four joined in a dissenting opinion. The principal opinion relied upon the so-called "cul-de-sac" rule, to the effect that dead-ending the streets upon which one's property abuts constitutes a damage peculiar to that property and not shared by other property on the same street but not abutting the *cul-de-sac.* This rule was first recognized in Georgia in *Ward v. Georgia Terminal Company,*[41] and first apllied in *Felton v. State Highway Board.*[42] In *Ward* the court relied upon the "first block" rule, which limits recovery to property owners between the obstruction and the first intersecting street, the logic being that they are in reality the only ones abutting a *cul-de-sac.* In the *Felton* case recovery was allowed because the property was within the same block as the obstruction.

The principal opinion in *Tift County v. Smith* recognized that the *Ward* and *Felton* cases arose within municipalities while this case involved rural property, but said that no distinction on this ground could constitutionally be made. The concurring opinion stressed this point. The dissenting opinion, however, pointed out that the "first block" rule is meaningless as applied to rural property, where the next intersecting road may be a few feet away or ten miles away, that the damage sustained by plaintiff here was not special but only a part of that suffered by the public in general, and that a contrary holding would severely hinder the progress of the interstate highway program the promotion of which has been recognized as a part of the public policy of the state.[43] The dissenting opinion closed by suggesting the "legal quagmire" which would result from giving legal sanction to such claims as those of the plaintiff in this case.

To complete the story, we must go beyond the current survey period. The case went to the Supreme Court on certiorari, and the judgment of the Court of Appeals was reversed, all the justices concurring.[44] The Supreme Court said that since all the cases mentioning the *cul de sac* rule involved property within municipally incorporated areas, where the "one block" rule would have some significance, their facts are not comparable to those of this case. What it deemed controlling was that no part of the plaintiff's property was taken or dam-

41. 143 Ga. 80, 84 S.E. 374 (1915).
42. 47 Ga. App. 615, 171 S.E. 198 (1933).
43. Acts 1955, p. 559, GA. CODE ANN., §95-1703a, 1705a.
44. 219 Ga. 68, 131 S.E.2d 527 (1963).

aged (in any way different in kind from that suffered by other property abutting the same road) and no part of the road on which the property abutted was interfered with.

As the dissent in the Court of Appeals said, this precise question was a new one in Georgia "but the question will soon be forthcoming in all the states as the construction of the interstate limited access highways progresses." Whether a workable set of rather precise rules will evolve or whether it will be necessary to decide each case on the basis of its own facts, governed only by a rule of reason, remains to be seen.[45]

Another area in which there promises to be increased activity (and more litigation) is that of slum-clearance and urban renewal. To accomplish their purposes, these programs, of necessity, must cover a rather large area, and in most large areas will be found some pieces of property which individually are neither slums nor otherwise undesirable. These pieces must also be condemned, as illustrated by *Housing Authority of Swainsboro v. Hall*,[46] if the general plan for the area is to be effectuated. The specific ruling in this case was that a mere showing that the condemned land is vacant (hence, not slum) and that there are other areas in the city which are slum and which are not being condemned is insufficient to show an abuse of discretion. As a matter of fact, the very act under which the authority was created[47] specifies as its objective the clearing out of slum areas *or* the providing of decent housing for low-income groups *or* a combination of the two.

LEGISLATION

A new concept of apartment ownership received legislative recognition in Georgia with the passage of the "Apartment Ownership Act."[48] While the concept has been made to fit into the common law of estates, express legislative authorization has been deemed necessary. The concept, called the "condominium," recognizes that an an apartment owner may own his apartment in fee simple absolute, along with co-ownership with the other apartment owners in the project of the common areas and facilities. The fourteen-page act provides in de-

45. For a case in which the "one block" rule was enforced and recovery denied because there was an intersecting road between the claimant's property and the obstruction, see Decatur County v. Settles, 107 Ga. App. 150, 129 S.E.2d 212 (1962). There the claimant raised an interesting point (but to no avail) by his argument that, since his business necessitated access by large trucks which could not use the narrow intersecting streets, there was—at least as far as he was concerned—a *cul de sac*.
46. 217 Ga. 856, 126 S.E.2d 223 (1962).
47. Acts 1937, p. 210, GA. CODE ANN. §99-1103 (i).
48. Acts 1963, p. 561.

tail for such things as compliance with covenants, the effect of liens on particular apartments or on the entire project, the sharing of profits and expenses, the recording of a "declaration" covering the entire project and of deeds and other instruments affecting particular apartments, priority of liens against the entire project or against individual apartments, separate taxation of the apartments and the undivided interests in the common areas, and the removal of the project from the provisions of the act.

In authorizing the "condominium" Georgia is following the lead of several other states some of which have had years of experience with it.[49] As of August 18, 1963 there was no evidence that a "condominium" had yet been started in Georgia.[50]

Ga. Laws, 1963, p. 276 provides for an additional method for recording cancellation of a mortgage. Georgia Code section 67-117 is amended to provide that the cancellation order may be recorded in the deed records along with a reference on the page of the record of the mortgage to show where the order is recorded. The word "satisfied" may be written either on the face of the record of the mortgage or on the page of the record. The provision allowing the clerk a fee of 15 cents for the cancellation was stricken, but another act[51] amended Georgia Code section 24-2720 to authorize the clerk to demand payment prior to recording mortgages or other instruments which are legally entitled to record.

Ga. Laws 1963, p. 524 repealed Georgia Code section 60-512, which required approval by the superior court judge of transfers of registered land between husband and wife. This section—a part of the original land registration law in Georgia[52]—apparently was left in the Code through oversight when Code section 53-504, requiring such approval for all sales by a married woman to her husband, was repealed in 1950.[53]

49. For an excellent recent treatment of the subject, see Cribbet, *Condominium—Home Ownership for Megalopolis?*, 61 MICH. L. REV. 1207-1244 (May, 1963).
50. ATLANTA JOURNAL, August 18, 1963, p. 58.
51. ACTS 1963, p. 367.
52. ACTS 1917, p. 130, GA. CODE §60-512 (1933).
53. ACTS 1950, p. 174.