REAL PROPERTY

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LEGISLATION

The 1964 session of the General Assembly enacted four pieces of legislation which are of interest in the field of real property law. A statute was passed in 1961[1] to provide that a married person who has reached the age of eighteen may execute and will be fully bound by any instrument executed by him for the purpose of securing a loan on real estate. This statute was amended in 1964[2] to extend its coverage to any instrument conveying any interest in real estate. The purpose to be accomplished by the conveyance is presumably immaterial. The effect of the statute seems to be to take such a minor completely out from under the disability protection of GA. CODE section 29-106 (1933) in transactions involving the conveyance of a real property interest.

The other three statutes are concerned with recording. Ga. Laws, 1943, p. 400, dealing with voluntary deeds and the effect of their recording, was placed by the publisher in GA. CODE, section 96-205. This section was repealed (apparently by inadvertance) when Georgia adopted the UNIFORM COMMERCIAL CODE. A 1964 act[3] repassed the 1943 act, almost verbatim, and specifically directed that it be placed in Title 29 of the GA. CODE as section 29-401.1. An amendment to the UNIFORM COMMERCIAL CODE, as adopted in Georgia, added to the formal requirements of a financing statement by requiring that, in addition to a description of the real estate on which crops covered by the statement are growing or are to be grown, or on which goods covered by the statement are or are to become fixtures, there be listed the name of the record owner or record lessee of such realty.[4] The same act also added to the duties of the filing officer a duty to index such a financing statement in the real estate mortgage records under the name of the record owner or record lessee. The other statute affecting recording of instruments authorized clerks of superior courts to provide a cross-reference card index system for instruments recorded in their offices, in

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1. GA. LAWS, 1961, p. 453, GA. CODE ANN., §67-1318.
2. GA. LAWS, 1964, p. 212.
3. GA. LAWS, 1964, p. 471.
4. GA. LAWS, 1964, p. 70, amending GA. CODE ANN., §§109A-9-402, 403.

lieu of a duplicate index book, as previously required by GA. CODE section 24-2715, as amended.[5]

CONVEYANCING

A number of cases involved disputes arising between the making of the initial contract for the sale of real property and the actual closing. Most such cases are disposed of simply by construing the language of the contract. For example, *Ffarner v. Poston Realty and Insurance Agency*[6] was concerned with a contract giving the agent the exclusive right to sell and entitling him to his commission whether the sale be made by an agent or the owner or by anyone acting for the owner or in the owner's behalf. On demurrer it was held that the agent was entitled to his commission even though the property was sold by the owner to a purchaser not secured by the agent, provided the agent performed his part of the contract by listing the property and making an endeavor to sell it. The case was distinguished from some others where, though there was an exclusive listing, there was no express agreement to pay a commission on sales made by the owner.

In two cases the contract to sell was unsuccessfully attacked on the ground of vagueness. In one of them[7] the contract was expressly made "contingent upon the purchaser's ability" to obtain a loan of a specified amount and on specified terms. This was held to be a valid contract, obligating the purchaser to seek in good faith to obtain such a loan, and not lacking in mutuality, as would be the case where the contract is merely "subject to" the purchaser's obtaining such a loan. The action was specifically one by the purchaser to recover earnest money paid to a broker. In order to recover, he must allege and prove a good faith effort resulting in an inability to obtain the loan. Until such a showing neither is free to withdraw at will from the contract. In the other case[8] the contract was held sufficiently specific in that it provided that the purchaser would pay a named amount at closing and would secure a first mortgage at not more than a specified interest rate, to be amortized over a specified period. The contract was not unilateral, there being an implied covenant of good faith and fair dealing in attempting to obtain such a loan. The question of this good faith, plus other issues of fact, made it error for the trial court to grant summary judgment for the purchaser.

The exact nature of an optionee's interest had to be spelled out in

5. GA. LAWS, 1964, p. 412.
6. 109 Ga. App. 14, 134 S.E.2d 835 (1964).
7. Sheldon Simms Co. v. Wilder, 108 Ga. App. 4, 131 S.E.2d 854 (1963).
8. Carmichael v. Gonzalez, 107 Ga. App. 746, 131 S.E.2d 149 (1963).

more detail than ever before in *Ingram v. Methodist Church District Board of Missions*.[9] After execution of the option agreement, but before exercise of the option, a building on the property was destroyed by fire. After the fire, but before the option had expired, the optionee elected to exercise it, and the optionor refused to accept tender. After this refusal the optionee sought specific performance with an abatement in the purchase price. On appeal from the overruling of the optionor's demurrers, the Supreme Court (one justice dissenting) held that GA. CODE section 37-806 was broad enough to cover this situation and to entitle the optionee to the requested relief. The section is stated in terms of the rights of a "vendor" and a "vendee"; so here, for the first time, the court holds that it applies also to optionor and optionee. Several cases cited from other jurisdictions denied the optionee such relief on the ground that an option does not vest any property interest in him and therefore lacks mutuality until exercise of the option, but the court felt that the Code section referred to made the difference. Such a section was not in force in those other jurisdictions.

In *Tally v. Council*[10] the vendor, after executing a contract to convey by warranty deed, and mentioning no incumbrances, sold a portion of the tract to the county to be used for installation of a sewer trunk line. It was held that since the contract was still executory the vendee may elect to rescind and recover the amount paid in an action for money had and received. The vendor's allegation that the sewer in fact made the property more valuable was disposed of by a reference to the vendee's testimony that it made it less valuable for the actual use intended.

The trite, but true, statement that recording acts do not solve all priority questions that can arise finds new support in two recent decisions. In *Minor v. Georgia Kraft Company*[11] defendant's deed was prior in time to that of plaintiff and was supported by a valuable consideration, but plaintiff's deed, which recited only a consideration of love and affection, was recorded first. In holding that defendant's deed had priority, the court pointed out that GA. CODE sections 29-401 and 67-2501 are to be construed together and do not apply unless the *junior* grantee is a bona fide purchaser for value. The holding, in this precise factual situation, accords with the old common law rule of "first in time, in first in right" and is supportable by the same logic, namely, that after the prior conveyance the grantor had nothing to convey to the junior grantee. It would seem, as the outcome of this case illustrates, that the only justification for a recording act's departure from this

9. 219 Ga. 100, 131 S.E.2d 848 (1963).
10. 109 Ga. App. 100, 135 S.E.2d 515 (1964).
11. 219 Ga. 434, 134 S.E.2d 19 (1963).

common law rule would be for the purpose of protecting a subsequent bona fide purchaser for value.[12]

The other case involving the priority of conflicting claims[13] was decided upon the fact of possession and the rights arising therefrom by virtue of GA. CODE section 48-106. In this case (one of fictitious ejectment) a wife had conveyed the land to her husband by deed of gift in 1946, and this deed was immediately recorded. In the same year the parties separated, but later came back together, and as a part of the reconciliation the husband agreed in writing to convey the property to their two sons, who immediately went into and have since remained in possession. In 1947 the husband deserted the wife and the two sons, and then died in 1954. His executor sold the land (record title to which was still in the husband) to the plaintiff in this action. In affirming the trial court's finding of title in the two sons, the Supreme Court relied upon GA. CODE section 48-106.[14] The possession referred to in that section may begin during minority and was not interrupted by the fact that the husband returned and lived in the house for a few weeks. Nor could plaintiff claim as a bona fide purchaser for value and without notice, because the possession by the sons afforded notice of whatever claim they had.

While several well settled rules of conveyancing were involved (on demurrer) in *Morris v. Johnson*,[15] their application to the facts of the case was, in the minds of several of the justices, open to dispute. The deed, cancellation of which was sought, recited a consideration of "One dollar and other valuable considerations." An allegation that the deed should be cancelled because the valuable consideration referred to therein was not paid was held to be only an allegation of non-payment, not lack of consideration; the proper remedy for non-payment would be a suit for the consideration, not for cancellation of the deed. The question of delivery was also raised on demurrer, the court holding that an

12. The reader's attention is directed to the 1964 act of the General Assembly cited in footnote 3, *supra*, and the textual discussion of it. The *Minor* case is not affected by the 1964 act, which act presupposes that it is the voluntary deed which was prior in time; as stated in the text, in the *Minor* case it was the deed supported by a valuable consideration which was prior in time.
13. Whitton v. Whitton, 218 Ga. 845, 131 S.E.2d 189 (1963).
14. This section reads as follows:
"The exclusive possession by a child of lands belonging originally to the father, without payment of rent, for the space of seven years, shall create conclusive presumption of a gift, and convey title to the child, unless there shall be evidence of a loan, or of a claim of dominion by the father acknowledged by the child, or of a disclaimer of title by the child."
Mitchell v. Gunter, 170 Ga. 135, 152 S.E. 466 (1930) states that this section is not placed in the portion of the Code dealing with prescription because it is not a part of the law of prescripion. It seems, though, that there is a more appropriate title than "Gifts" in which to place it.
15. 219 Ga. 81, 132 S.E.2d 45 (1963).

allegation that a physical transfer of the deed to the grantee was not accompanied by an intention to deliver but was merely for safekeeping was good as against the demurrer. The court distinguished this from a delivery on condition, or true escrow situation, in which there is an intention to deliver for the very purpose of effecting a transfer of a property interest.

In *Harden v. Orr*[16] an attempt was made to cancel two quitclaim deeds, containing no restrictions or conditions, on the ground that the parties had entered into a collateral agreement imposing some conditions, and that these conditions failed to materialize. Cancellation was denied. Since the deeds did not refer to the collateral agreement, and vice versa, the conditions cannot be added to the deeds by parol.

It is elementary that before a cause of action can arise there must have been a breach of duty, and that before there can be a breach of duty there must have been a duty. In the last analysis, that was the basis of the holding in *Walton v. Petty*.[17] There a purchaser sued his vendor for property damage sustained when wind raised the carport roof and damaged the walls of the house. The house had been constructed by the vendor more than four years prior to this action. The petition alleged negligence on the part of the vendor in that he failed to comply with a building code ordinance requiring the securing of such a carport to the walls of the house. The conveyance of the house had been by general warranty deed. Dismissal of the petition was sustained. GA. CODE section 29-302 relates solely to warranties of title and there is no implied warranty of soundness. There was no cause of action in negligence because the negligence, if any, occurred when the house was constructed; since the vendor and purchaser had no relationship contractual or otherwise at that time, the vendor owed no duty to the purchaser at that time. Admitting that the vendor violated the building code when he constructed the house, that would give rise to a cause of action in the city only, not in the purchaser.

ESTATES

Problems of construction frequently get into court because of the testator's understandable desire to accomplish completely two objectives which are almost necessarily inconsistent. On the one hand he wants to assure his widow of everything that, within reason, his estate can supply; on the other, he wants to assure that something will remain for their children when the widow passes on. The two objectives can be most nearly accomplished by the use of powers of appointment, but their

16. 219 Ga. 54, 131 S.E.2d 545 (1963).
17. 107 Ga. App. 753, 131 S.E.2d 655 (1963).

use calls for most careful draftsmanship and even that will not assure that the will will not be dragged into court for construction.

Osborn v. Morrison[18] was such a case. The will left all the property to the widow for life and then provided that "if she should so wish and is in need of funds for her support and maintenance" she should have the power to dispose of the property as she saw fit without accountability to anyone or to any court. The next item of the will left all the property not disposed of at the time of the widow's death to the children of testator and his widow. The trial court, without hearing any evidence, ruled in favor of the widow to the effect that she had a life estate and an *absolute* power of disposal. The Supreme Court reversed, holding that there were issues of fact which must go to a jury. The will created a life estate and a power of appointment, but a power itself is not property, and its existence along with a life estate in the donee of the power does not enlarge the life estate into a fee. A power should be strictly construed when its exercise will have the effect of completely cutting out remaindermen who are likewise objects of the testator's bounty. Here the exercise of the power was subject to the condition precedent that the donee be in need of funds for her support and maintenance. Allegations that no such need existed, that the proposed sale was to be for less than half the value of the property and that its real purpose was to defeat the interest of the remaindermen raised questions of fact which must go to the jury. The "estates" feature of the holding is that the widow had a life estate and a power of appointment and that the children had a vested remainder subject to divestment only by a valid exercise of the power.

What the court referred to as "those litigious characters, John Doe and Richard Roe" appeared in *Evans v. Elder*,[19] bringing with them an unusual question. The petition in fictitious ejectment laid two separate demises from two separate lessors. No demise was laid from the real plaintiff. The evidence offered by plaintiff showed title in plaintiff, but failed to show title in either of the named lessors at the time suit was filed. The jury found for plaintiff, after being charged to so find if they found that plaintiff had title. On appeal the charge was held erroneous. In order for a plaintiff to recover in fictitious ejectment, the jury must find that title was, at the time suit was filed, in one of the persons from whom a demise was laid. Evidence of title in plaintiff, even though by virtue of a deed from one of the alleged lessors, is not evidence of a demise from plaintiff to John Doe; it is this latter which is essential. The court pointed out that fictitious ejectment is highly

18. 219 Ga. 169, 132 S.E.2d 58 (1963).
19. 219 Ga. 566, 134 S.E.2d 803 (1964).

technical in nature, and one who resorts to it necessarily assumes the risk of a highly technical holding. All was not lost, however; the court volunteered the information that amendments laying additional demises may be added at any stage before verdict.

One who purchases timber from a life tenant and subsequently cuts and removes it assumes the risk of having to show that, as between the life tenant and the remainderman, such action was not waste. He failed to do so in *Campion v. McLeod*[20] where, in reversing the trial court, the Court of Appeals said that a verdict for the remainderman in some amount was demanded.

LANDLORD AND TENANT

A good cross-section of the problems that can arise in the landlord-tenant relationship is displayed by the cases referred to in this section. They range all the way from the part performance which will take an oral, executory contract to lease out of the Statute of Frauds, through judicial statements of the rights of the parties under subsisting leases, to the final question of forfeiture or other termination of valid leases.

In a case involving an action for breach of an oral, executory contract to lease, the plaintiff-lessor alleged the terms of the contract with sufficient particularity, that one of these terms obligated the lessor to make certain alterations and additions to the building (which was then under construction), that these were made, but that defendant-lessee, nevertheless, repudiated the agreement. On demurrer, it was held that the petition stated a cause of action. Admitting that the contract was parol, the allegations were sufficient to show such part performance as would take the contract out from under the Statute of Frauds.[21]

Hodges v. Georgia Kaolin Company[22] illustrated the uncertainties attendant upon a mineral lease. The action was for damages based upon the amount of kaolin which could have been removed but was not. The terms of the lease called for a minimum annual rent plus royalties on the kaolin actually removed. The lessee had caused timber to be cut and overburden to be removed, but then proceeded no further. In reversing a dismissal of the action on general demurrer the Court of Appeals held that when the lessee cut timber and removed overburden, thus rendering the land unusable for other purposes, there then arose an implied obligation to pursue the mining with reasonable diligence. Especially does such an implied obligation arise when the rent is

20. 108 Ga. App. 261, 132 S.E.2d 848 (1963).
21. Nash v. Greenig, 108 Ga. App. 763, 134 S.E.2d 483 (1963).
22. 108 Ga. App. 115, 132 S.E.2d 86 (1963).

based primarily on the amount of minerals removed. While it may turn out that there are not sufficient minerals to make the mining commercially feasible, that point has not yet been reached because the lessee has not proceeded to the point at which it can determine commercial feasibility.

The shopping center lease promises to add considerably to the law of landlord and tenant. This year's contribution in this area was *Moorhead v. Luther*,[23] where a lessee sued to enjoin his lessor from permitting another lessee to sell merchandise of a specified kind and to enjoin the other lessee from selling such merchandise. It was alleged that, as an inducement for execution of the lease, the lessor orally agreed not to lease space to or permit anyone else to sell such merchandise. In sustaining dismissal of the action the court held: (1) As against the lessor, injunction is not the proper remedy because the wrong, if any, has already been committed; and (2) As against the other lessee, there was no contractual relationship between him and plaintiff-lessee out of which a duty owed by the former to the latter could arise, nor was there any showing that the former had anything to do with the alleged breach by defendant-lessor.

The objective designed to be accomplished by a lease provision against competition should be clearly spelled out. The lessee in *American Service Company v. Berry*[24] apparently thought that such a provision imposed a covenant obligation on his lessor, while in fact it only spelled out a limitation on his (lessee's) leasehold estate. In this case a letter, which was construed as a part of the lease, provided that if the lessee were unable to secure a beer license, or if beer were sold on the adjoining premises (also owned by the lessor), then the lease agreement should be null and void. When beer was sold on the adjoining premises and the lessor, on demand, refused to force its discontinuance, the lessee moved out and sued for damages for breach of his lease. The Court of Appeals held that a general demurrer should have been sustained. The lease provision did not create a covenant or warranty; it only spelled out a condition subsequent, the occurrence of which would terminate the lease but would not create any liability on the part of the lessor.

The difficulty in a lessee's protecting himself lies in the fact that lessors, not lessees, draft leases. A classic illustration of the truth of this statement appears in *Abrams v. Joel*.[25] Here, in an action for rent, the lessee claimed a reduction of the rent due because of the lessor's breach

23. 219 Ga. 242, 132 S.E.2d 669 (1963).
24. 108 Ga. App. 413, 133 S.E.2d 433 (1963).
25. 108 Ga. App. 662, 134 S.E.2d 480 (1963).

of his covenant to repair. A demurrer to this claim was sustained because of the following clause in the lease:

> No claim for damages shall be made by lessee nor delay in payment of rent for the want of repair in these premises.

The opinion assumes that the duty of repair lay on the lessor, stating that on breach of this duty the lessee ordinarily has the option of making the repairs himself and looking to the lessor for reimbursement or, when sued for rent, recouping damages for the diminution of the value of the premises caused by the failure to repair. The above-quoted clause was held to constitute a waiver of this last-mentioned remedy.

If the court is implying that the first remedy would have been available, *i.e.,* that of making the repairs and looking to the lessor for reimbursement, then one wonders how it would handle the "no claim for damages shall be made" portion of the clause. The holding comes close to saying that a lessor can expressly assume the duty of repair and, in the same lease, deprive the lessee of a right to enforce that covenant.

Since the law abhors a forfeiture, a lessor will be held strictly to the letter of a forfeiture provision in the lease. A clause providing for a forfeiture if the lessee should "fail and refuse" to comply with all the covenants of the lease was held to contemplate more than a mere failure to comply; hence, a demand for compliance plus a refusal to correct the breach was required before the lessor could declare a forfeiture.[26]

In a suit on a fire insurance policy covering a filling station which was destroyed by fire,[27] the insurer moved for summary judgment on the ground that plaintiff-lessor had in fact suffered no loss because the lessee, without cost (or notice) to the lessor, had fully restored the premises. A judgment granting this motion was reversed. The lessor suffered the loss at the time of the fire, and that was the time at which the insurer's liability attached. The fact that the lessee fully restored the premises constituted only a gift to the lessor; it did not affect the insurer's liability to the insured.

CONDEMNATION

The number of new questions that can arise in condemnation proceedings seems limitless. The past year witnessed several. The most interesting, and one which could prove to be among the costliest, appeared

26. Mendel v. Pinkard, 108 Ga. App. 128, 132 S.E.2d 217 (1963).
27. Alwood v. Commercial Union Assur. Co., 107 Ga. App. 797, 131 S.E.2d 594 (1963).

in *Hard v. Housing Authority of the City of Atlanta*.[28] When this case reached the Court of Appeals of Georgia in 1962,[29] it was held that evidence showing that general knowledge for a number of years that a large area would eventually be taken for urban renewal had enhanced the market value of the subject property could not be taken into consideration in fixing the value for actual condemnation purposes. The Supreme Court of Georgia reversed this decision, holding that since valuation must constitutionally be made at the time of taking it is proper to consider all the purposes for which the land may be appropriated, including urban renewal. If in fact this prospective use did enhance the market value, then that fact may not be ignored in determining market value at the time of taking. The court recognized the great amount of authority to the contrary in other states, but disregarded it because of what it deemed controlling authority in Georgia, stating: " . . . all the decision are against what we hold—all except the controlling decision of the courts of Georgia."

In a proceeding under the "special master" law,[30] an appeal to a jury resulted in a reduction in the amount of the special master's award, and the trial court ordered the condemnee to pay interest on the amount of the excess from the time of payment under the special master's findings. Section 36-615a specifically required this. On appeal the Supreme Court held this part of the 1957 act unconstitutional, as a denial of both due process and equal protection of the law.[31]

What a condemning authority actually does with the property after it is taken appears immaterial in the determination of value as of the time of taking. Thus, the value of dirt which had to be removed by the condemnor in cutting through an elevated area of the condemned highway right of way, which dirt was used to make a fill in another part of the right of way, is irrelevant to the issue of market value of the land taken.[32] By analogy, an instruction that the jury is not concerned with the ultimate disposition of land taken for urban renewal

28. 219 Ga. 74, 132 S.E.2d 25 (1963). For an extensive comment on the ramifications of this decision, see *Enhanced Value Resulting from Proposed Improvement—Condemnation*, 15 MERCER L. REV. 488 (1964).
29. Housing Authority of the City of Atlanta v. Hard, 106 Ga. App. 854, 128 S.E.2d 533 (1962).
30. Acts 1957, p. 387, GA. CODE ANN., ch. 36-6A (Supp. 1961).
31. First Nat'l. Bank of Atlanta v. State Highway Dep't., 219 Ga. 144, 132 S.E.2d 263 (1963). The constitutionality of such an interpretation of §36-615a as was put upon it by the trial court in the instant case had previously been questioned by the Court of Appeals. See City of Atlanta v. Lunsford, 105 Ga. App. 247, 124 S.E.2d 493 (1962).
32. Barnwell v. State Highway Dep't., 108 Ga. App. 335, 132 S.E.2d 842 (1963).

and slum clearance, nor with whether the condemnor intends to resell the property, was held not erroneous.[33]

A charge that the jury may consider uses, other than agricultural, to which the condemned land might be put is reversible error when there is no evidence that such other use is possible.[34] On a point of first impression in Georgia it was held that, in view of the liberality of our courts in admitting evidence which sheds any light on the true value of property, it is proper to consider present zoning regulations; and if there is an appreciable possibility that these regulations will be changed so as to allow other uses not presently allowed, then that possibility may be considered—subject only to the qualification that it must not be too remote or speculative.[35] The property involved in this case adjoined an airport and was suitable for public airport purposes.

33. Freedman v. Housing Authority of Atlanta, 108 Ga. App. 418, 136 S.E.2d 544 (1963).
34. State Highway Dep't. v. Allen, 108 Ga. App. 388, 133 S.E.2d 64 (1963).
35. Civils v. Fulton County, 108 Ga. App. 793, 134 S.E.2d 453 (1963).