EQUITY

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The field of equity was dominated by decisions in the areas of specific performance, cancellations and injunctions.

SPECIFIC PERFORMANCE

Before a contract may be specifically performed, rather stringent requirements must be met as to definiteness and fairness. An effort[1] to enforce an oral contract for the erection of a retaining wall was successfully blocked by general demurrer where neither the cost of construction of the wall, nor the value of complainant's land taken in the process of grading the embankment were indicated. It was, therefore, not possible to determine whether the contract was unfair, unjust and against good conscience.

Relief was denied to a vendee in a contract for the sale of land purportedly owned by a vendor-corporation and executed by the latter as follows: Holiday Builders, Inc., by: James L. Wiggins, President. It developed, however, that this land was owned by James L. Wiggins individually. The petition[2] of the vendee for specific performance was held subject to oral motion to dismiss. Equity cannot enforce an agreement to sell the land of another. The court noted an absence of fraud or collusion.

Enforcement of a contract to devise realty as compensation for personal services by a non-relative was denied where the petition failed to show the value of the property involved so that a determination of fairness could be made.[3] The agreement under scrutiny was distinguished from those involving the services of a near relative where personal, affectionate, and considerate attention is the consideration, the value of which cannot be readily computed. Nevertheless, the court allowed to stand a count seeking damages added by amendment over the objection that it added a new and different cause of action.

Indefiniteness was fatal to a petition to enforce an agreement to form a corporation to deal generally in real estate development between a landowner and a contractor.[4] Briefly, the landowner was to convey land to the corporation and, without pay, the contractor was to develop it following which they would share in the profits. However, the improvements to be constructed were described as "apartment buildings and related structures,"

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1. Keappler v. Miller, 222 Ga. 666, 151 S.E.2d 771 (1966).
2. Jolles v. Holiday Builders, Inc., 222 Ga. 358, 149 S.E.2d 814 (1966).
3. Couch v. Bioust, 222 Ga. 836, 152 S.E.2d 886 (1967).
4. Green v. Zaring, 222 Ga. 195, 149 S.E.2d 115 (1966).

with financing to be obtained "at the best obtainable rates." The corporation was to assume all obligations for costs, with the contractor and landowner personally endorsing any note evidencing any such loan. Pointing out the obvious uncertainties, the court held that requirements of certainty extend not only to the subject matter and purpose of the contract, but also to the parties, consideration and even the time, place and details of performance, where these are essential. The court will not indulge a conjecture as to the intent of the parties.

In a suit[5] for specific performance of an oral agreement by complainant's aunt to convey him certain property in return for his moving onto and operating a farm until she died, the court found that the trial court properly overruled a general demurrer to the petition but erred in not granting a new trial. To justify specific performance the contract must be certain and so precise in its terms that neither party can reasonably misunderstand it and proof must be made out in a parol agreement situation so clearly, strongly and satisfactorily as to leave no reasonable doubt as to the agreement. The burden of proof is as onerous as that imposed in a criminal case. Under these standards the testimony in the case was reviewed and found to be inadequate as to the time of performance contended for by the plaintiff.

Action of the trial court in sustaining demurrers to an answer and granting a complainant a decree of specific performance of a contract for the sale of realty was reversed[6] where the answer denied the value of the land asserted by plaintiff to be $3,715 per acre and the answer further alleged a value of $5,000 per acre, or $1,000 more per acre than the contract price of $4,000. The court held that this alleged inadequacy alone made an issue as to whether the contract was unfair or against good conscience. It was further suggested that in such a case, even if the answer had been properly stricken, the plaintiff must affirmatively prove the contract to be fair and the consideration adequate.

In another action for specific performance where the issues were submitted in the form of four questions requiring a special verdict, it was held not to be error for the trial court to refuse to submit to the jury a contention asserted in the answer of the defendant but not suppored by the evidence.[7]

Rescission And Cancellation

A summary judgment was held properly granted against a complainant seeking cancellation of a deed on the basis of mental incapacity and a promise to reconvey the property upon request.[8] Plaintiff did not support

5. Harp v. Bacon, 222 Ga. 478, 150 S.E.2d 655 (1966).
6. Anthony v. Morris Hyles, Inc., 221 Ga. 847, 148 S.E.2d 326 (1966).
7. Anthony v. Morris Hyles, Inc., 222 Ga. 628, 151 S.E.2d 450 (1966).
8. Daniell v. Collins, 222 Ga. 1, 148 S.E.2d 295 (1966).

by proof the claimed mental incapacity and the proof showed that the purpose of the conveyance was to allow the defendant to claim a homestead exemption, thus lowering the county ad valorem taxes. This illegal scheme to evade taxes amounts to unclean hands, precluding relief in a court of equity.

The grantor and grantee are essential parties in a suit for cancellation of a deed and failure to join them subjects the complaint to general demurrer.[9] But even where cancellation is denied for failure to join necessary parties, a complaint is still sufficient to withstand a general demurrer if some other entitlement to equitable relief exists.[10] In the latter case a defendant, the daughter of a testatrix, had caused certain real estate consisting of the only asset of the estate to be foreclosed fradulently as to other heirs of the estate in order to obtain title in herself. Under such circumstances the court will impose a constructive trust and decree the defendant-co-tenant to hold as trustee for the other heirs.

Mental incapacity to contract is, of course, a basis for cancellation of a contract for the sale of real estate,[11] and in the same proceeding those who induced the sale are liable for unjust enrichment as equity will grant full and complete relief, legal or equitable, as to all purposes relating to the subject matter.

In another case[12] involving mental incapacity of an intestate where cancellation of a deed was desired, a new trial was granted on questions of evidence. Among other evidentiary rulings, the court held that heirs at law may testify as to the mental condition of their intestate although they could not testify as to transactions with him. Also reviewed were guidelines relating to an attorney who testifies about the circumstances surrounding execution of a deed witnessed by him.

The rules spelling out when threats of criminal prosecution constitute duress were reviewed in a case seeking cancellation of a loan deed.[13] Affirming dismissal of the complaint on motion, the court held that the mere threat of criminal prosecution where neither warrant has been issued nor proceedings commenced do not constitute duress. Also the threatened prosecution must be for an act either criminal or which the party thinks is criminal. The alleged threat here was quite general in nature relating to business dealings and the threat was that the matter would be submitted to a grand jury and that petitioner would probably have to serve time in the penitentiary. The court was also impressed adversely to complainant because of the fact that there was a delay of four months before he signed

9. Assurance Co. of America v. Southeastern Brick Co., 222 Ga. 638, 151 S.E.2d 708 (1966).
10. Lanier v. Dyer, 222 Ga. 30, 148 S.E.2d 432 (1966).
11. Simmons v. Watson, 221 Ga. 775, 147 S.E.2d 322 (1966).
12. Smith v. Smith, 222 Ga. 694, 152 S.E.2d 560 (1966).
13. Yearwood v. National Bank of Athens, 222 Ga. 709, 152 S.E.2d 360 (1966).

notes after execution of the loan deed. Thus he was afforded ample opportunity to confer with counsel.

Laches subjected a petition for cancellation based on forgery to a general demurrer.[14] The complainants' father, the maker of the deed, was deceased and the grantee therein was incompetent. The deed was executed in 1944, recorded in 1956, and suit was instituted in 1965. Reciting the provisions of GA. CODE ANN. sections 37-119 and 3-712 (1962 Rev.), the court held the delay to be so unreasonable that a satisfactory explanation of a 21-year delay had to appear affirmatively.

Applying the rule of insurance law that where one who undertakes to procure insurance for another is guilty of fraud or negligence in his undertaking, he is liable for loss or damage to the limit of the agreed policy, it was held that a borrower wife was entitled to cancellation of a loan deed and note to a savings and loan association which had over the years arranged for term life insurance on the life of the borrower's husband sufficient to pay the loan balance and collected the premium therefrom.[15] The association failed to notify petitioner of the cancellation of the term insurance and continued to charge petitioner for the premium which it retained.

A petition[16] brought to cancel an inadvertently executed satisfaction of a note and loan deed and the public record thereof was held to state a cause of action. The satisfaction was signed during the course of transactions with a bank which had held the note and deed as security.

INJUNCTIONS

Two suits against local school boards, one to prevent implementation of a reorganization plan,[17] and the other to enjoin assessment and collection of an alleged illegal fee[18] failed because the complainants had not exhausted their administrative appeal provided by GA. CODE ANN. section 32-910 (Supp. 1967).

In spite of the rule that zoning ordinances not only must be non-discriminatory and reasonable, but must be applied in a non-discriminatory and reasonable manner and are to be strictly construed in favor of the landowner, the location of recreational facilities in restrictively zoned areas received a boost in two cases. A fairground development was held to be proper in a zoned area where location of recreational facilities was permitted.[19]

Construction and operation of a community swimming pool was allowed

14. Hillis v. Clark, 222 Ga. 604, 150 S.E.2d 922 (1966).
15. Beiter v. Decatur Fed. Sav. & Loan Ass'n, 222 Ga. 516, 150 S.E.2d 687 (1966).
16. Finch v. McAloney, 222 Ga. 174, 149 S.E.2d 100 (1966).
17. Boatwright v. Brown, 222 Ga. 497, 150 S.E.2d 680 (1966).
18. Carter v. Board of Educ. of Richmond County, 221 Ga. 775, 147 S.E.2d 315 (1966).
19. Hopping v. Cobb Fair Ass'n, Inc., 222 Ga. 704, 152 S.E.2d 356 (1966).

in a real estate subdivision restrictly zoned "Single Family Residential District" where the court found the use consistent with the general zoning scheme and protective covenants applicable.[20]

Restrictive covenants in employment contracts preventing the employee from engaging in competitive activity received favorable treatment in equity during the survey year. Where the employee sought to justify his conduct by claiming the employer had also violated the employment contract, the defense was unavailing where the contract provided the covenant would be valid regardless of who was at fault in terminating the employment, and where this is the only defense and a violation is shown, a temporary injunction is mandatory.[21] In two other cases[22] such covenants were held enforceable by injunctive aid where the court found them reasonable as to time and territory and not otherwise unreasonable.

Modification of a restraining order to permit sale of a church edifice was held proper where the undisputed evidence showed complainants had not attended church for five years and the church by-laws provided that only active members who had attended worship during the past six months had a right to vote and that the congregation had approved the sale after notice to its active members.[23]

A suit to enjoin interference with rights of sepulcher in a family burial lot was subject to general demurrer due to indefiniteness of the description of the 30 x 10½ feet plot in a three-acre tract and no title or easement was alleged.[24] The court pointed out, however, that the ruling would not apply to four lots where family members had already been buried.

Another suit[25] for injunctive and other relief against a church and its officers for fraudulently inducing petitioner to contribute funds to the church was held barred by the four-year statute of limitations prescribed by GA. CODE section 3-706 (1933). Although GA. CODE section 3-807 (1933) provides that where the cause of action arises in consequences of a fraud, the statute does not begin to run until the fraud is discovered, this statute avails not where the petition does not negate knowledge for such time as to toll the statute. Further, knowledge of an act constituting fraud just prior to filing suit does not negate earlier knowledge.

Although the trial in the lower court was reversed on a point of evidence, a railroad's suit to enjoin a continuing trespass by defendant city in using and improving as a street a portion of the plaintiff's real property

20. Hood v. Winding-Vista Recreation, Inc., 222 Ga. 384, 149 S.E.2d 784 (1966).
21. Mansfield v. B & W Gas, Inc., 222 Ga. 259, 149 S.E.2d 482 (1966); Orkin Exterminating Co. v. Gill, 222 Ga. 760, 152 S.E.2d 411 (1966).
22. Spalding v. Southeastern Personnel of Atlanta, Inc., 222 Ga. 339, 149 S.E.2d 794 (1966); Thomas v. Orkin Termite Co., 222 Ga. 207, 149 S.E.2d 85 (1966).
23. Rogers v. Robertson, 222 Ga. 519, 150 S.E.2d 634 (1966).
24. Windom v. Robinson, 222 Ga. 803, 152 S.E.2d 743 (1966).
25. Church of God of the Union Assembly, Inc. v. Isaacs, 222 Ga. 243, 149 S.E.2d 466 (1966).

was found to state a cause of action.[26] Similarly, where a city had ordered abatement of a claimed nuisance by obstructing a street by an individual plaintiff, the latter was entitled to injunctive relief pending a determination of her claim that the land in question was owned by her, that neither she nor her predecessors had ever conveyed to the city any right title or interest therein, that it had not been dedicated to public use as a street, and that the alleged street existed only on a plan of the city and had never been opened.[27] Summary abatement proceedings are available to a city only in the case of streets actively opened and in use by the public.

In a suit[28] against a defendant to enjoin a trespass, the defense prevailed in establishing his contention that he had acquired a prescriptive way over the complainant's land. It was not error on the trial for the trial judge to refuse to charge GA. CODE section 85-402 (1933) dealing with cessation of rights to a way of necessity upon an alternate way being available to the owner, as that principle is not applicable to the defense that the right to use the way is based on prescription.

Pending litigation by a grandmother against her grandson and another on the basis of fraud relating to a deed, it was held proper for the trial court to issue an interlocutory order enjoining the plowing of land and placing the land in "soil bank" program.[29]

Injunctions were held properly issued against illegal storage and sale of alcoholic beverages in a municipality in a dry county under GA. CODE ANN. section 58-109 (1965 Rev.),[30] to prevent forceable eviction from the leased premises of the lessee who in response to a dispossessory warrant and proceeding to remove him had filed the statutory counter-affidavit and bond,[31] and to protect the interest of a landowner whose title was based solely upon a well-pleaded title by adverse possession for 20 years pursuant to GA. CODE section 85-406 (1933).[32]

Injunction and other relief were refused to a corporate officer claiming he was duped out of his land where it appeared that he and the corporation had received large loan sums from the defendant which they had not offered to restore.[33]

An effort to require the governor and other state officials to submit to the voters a proposed constitutional amendment in a certain manner was denied on the basis that the judicial power of the state will not be used to enjoin the enactment of legislation or proposed amendments to the constitution.[34]

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26. Central of Ga. Ry. v. City of Metter, 222 Ga. 74, 148 S.E.2d 661 (1966).
27. Sharp v. Rives, 222 Ga. 204, 149 S.E.2d 70 (1966).
28. Wagnon v. Keith, 222 Ga. 859, 152 S.E.2d 865 (1967).
29. Byrd .v Byrd, 222 Ga. 702, 152 S.E.2d 386 (1966).
30. Cronic v. State, 222 Ga. 623, 151 S.E.2d 448 (1966).
31. Ward v. Walker, 221 Ga. 451, 151 S.E.2d 228 (1966).
32. Reid v. Wilkerson, 222 Ga. 282, 149 S.E.2d 700 (1966).
33. Budreau v. Crawford, 222 Ga. 716, 152 S.E.2d 398 (1966).
34. Wilson v. Sanders, 222 Ga. 681, 151 S.E.2d 703 (1966).

Since final adjudication of factual issues cannot be accomplished on an interlocutory hearing, the grant or refusal of interlocutory relief is not res judicata to a determination on the merits of the case. This rule was affirmed where it was sought to impose the plea of res judicata as the result of interlocutory relief afforded in a prior suit which had been dismissed after the hearing.[35]

A complainant who had successfully obtained cancellation of a satisfaction to a security deed which had been entered in error was denied injunctive relief with respect to another security deed taken by an innocent party while the complainant's erroneous satisfaction was of record.[36] That the defendant had notice was of no consequence, since under GA. CODE ANN. section 37-114 (1962 Rev.) an innocent purchaser may sell to one with notice and convey good title.

A suit was brought against a local hospital authority and board of county commissioners to enjoin the erection of a hospital on a particular site.[37] The action was predicated mainly on the authority's alleged refusal to consider and investigate other available sites and its alleged erroneous finding that use of the site selected would save a large sum of money. It was also claimed that certain of the defendants acted in the interest of promoting a hospital with its related developments as near their homes as possible. With three justices dissenting, the supreme court reversed the trial court in sustaining an oral motion to dismiss the complaint. Where the purchase or erection of public improvement has been confided to a public authority, at the instance of taxpayers equity will restrain the authority from proceeding in a matter when it is not exercising its discretion, but rather is arbitrarily wasting the public funds, since such conduct is a gross and manifest abuse of authority amounting to legal fraud on the taxpayers. The recitals of the complaint, if proved, were held to show gross and manifest abuse of power on the part of the defendant authority.

ENFORCEMENT OF EQUITABLE DECREES

Whether an equitable order has been violated and, if so, how it shall be treated are largely questions for the discretion and judgment of the issuing court and its decision will not be interfered with unless there is an abuse of discretion. Thus, a respondent was not relieved of an order not to remove certain property from an apartment although his lease to the apartment had expired; he should have sought a modification of the order before acting in violation thereof.[38]

Similarly, no valid complaint may be made of a trial court's order finding a city had violated a nuisance abatement order but in allowing it to

35. Smith v. Davis, 222 Ga. 839, 152 S.E.2d 870 (1967).
36. Murray v. Johnson, 222 Ga. 788, 152 S.E.2d 739 (1966).
37. Veal v. Hospital Auth. of Putnam County, 222 Ga. 291, 149 S.E.2d 652 (1966).
38. Rhodes v. Bowden, 114 Ga. App. 283, 151 S.E.2d 179 (1966).

purge itself by taking prescribed action.[39] The second order could subject defendant to further contempt if not complied with. Also, the action of a trial court, for violating an order not to make telephone calls, in first imposing a suspended jail sentence on condition that the prohibited acts not be repeated, could, for further violations be vacated and the sentence fully executed.[40]

EQUITABLE PARTITIONING

A trial of an equitable partitioning proceeding between former marriage partners was reversed on a question of evidence since the material circumstances of the plaintiff, not in issue in this case, were admitted by the trial court.[41]

Erroneous distribution of funds in a prior condemnation proceeding does not cause such estoppel by judgment that it controls an equitable partitioning proceeding subsequently filed.[42]

MISCELLANEOUS

Under GA. CODE ANN. sections 30-105 and 30-118 (Supp. 1967), full settlement of all property rights may be effected in a divorce action. Thus, it was permissible to join in a divorce action a claim for specific performance of a contract to convey real estate as well as a request for division of jointly owned property.[43]

Where a complainant holds a claimed later will for more than a year after probate proceedings are completed, he has not exercised reasonable diligence and will be denied an attempt to set aside a probate in solemn form.[44]

39. Hobbs v. City of Dublin, 222 Ga. 858, 152 S.E.2d 866 (1967).
40. Stevenson v. Stevenson, 222 Ga. 47, 148 S.E.2d 388 (1966).
41. Brackin v. Brackin, 222 Ga. 226, 149 S.E.2d 485 (1966).
42. Doeschner v. Wilson, 222 Ga. 269, 149 S.E.2d 659 (1966).
43. Goodwill v. Goodwill, 221 Ga. 757, 147 S.E.2d 313 (1966).
44. Vinson v. Citizens & Southern Nat'l Bank of Valdosta, 223 Ga. 54, 153 S.E.2d 436 (1967).