REAL PROPERTY

By CARL COFER*

During the survey period, Georgia's courts underwent the annual flood of condemnation cases and an unusual number of boundary line disputes. However, there was a dearth of significant cases. Legislative action in the real property area appeared to have the most significant affect. For example, there was an attempt to remedy the abuses of certain lenders in making second mortgages. Also, the new "deed stamp act" imposed by the past legislature will produce an immediate impact on real estate practice in Georgia.

CONDEMNATION

In *State Highway Dep't v. Lumpkin*[1] the condemnor sought to condemn a limited access highway that divided the lands of the condemnee into separate parcels situated on opposite sides of the proposed highway. The petition of the condemnor stated that it sought to acquire "any and all right of access in, to, and upon the right of way" being condemned. The petition went on to allege that the condemnor stood ready to pay just and adequate compensation for the "right of way, easement, and access rights" to the property being so taken. The trial judge charged the jury as follows:

> It is your duty in this case to award to the condemnee fair and adequate compensation for the three tracts of land taken and for the *easements of access taken* . . . .[2]

Upon condemnor's motion, a new trial was granted on the ground that this charge was erroneous due to its implication that the loss of access to a highway not then in existence was compensable. The condemnee appealed and the court of appeals reversed the trial judge, holding that the condemnor's reference to the "access rights" in its petition precluded any objection to the challenged charge. On certiorari, the Georgia Supreme Court affirmed.

Ostensibly, the *Lumpkin* case stands for the proposition that a condemnor cannot complain where the language of its own petition offers an invitation to the court to include the same phraseology in its charge to the jury. However, an implication exists that the court is approving compensation for "loss of access" to a newly planned limited access highway.

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1. 222 Ga. 727, 152 S.E.2d 557 (1966), *granting cert.* on Lumpkin v. State Highway Dep't. 114 Ga. App. 145, 150 S.E.2d 266 (1966).
2. *Id.* at 728, 152 S.E.2d at 558 (emphasis added).

This is contrary to the general rule as ably stated by Judge Pannell in his dissent.[3] The condemnee may demand severance damages based on the harm such limited access highway may do to his retained property, but the owner should not be compensated for loss of access per se where no prior access existed. In contrast, Judge Nichols concurring specially with the majority[4] felt that the act authorizing the condemnation of property for limited access highways could not and did not contain any guidelines for determining just and adequate compensation for the property taken or damaged for such highways. He further reasoned that the right of access accrues simultaneously with the taking, and if the right of access is also condemned, just and adequate compensation therefor must be paid. Furthermore, Judge Nichols felt that the decision in *State Highway Dep't v. Ford*[5] should be overruled.

In the *Ford* case, the landowner sought to recover damages for the loss of right of access to a limited access road passing over his property. The court held that the landowner is not entitled to damages, actual or consequential, for lack of access to a new limited access highway by reason of any right of easement for ingress to or egress from the highway. The rationale of the court was that no damages can be obtained where there was no previous right of access prior to construction of the new highway.

The holding of the *Ford* case appears to be opposed to the holding in *State Highway Bd. v. Baxter.*[6] However, a careful reading of the *Baxter* case will show that the plaintiff there sought an injunction against the State Highway Board's erection of a fence and other obstructions on a highway running in front of the plaintiff's residence, store and lunch room. In affirming the trial court's temporary injunction against the condemnor, the supreme court held that owners of property contiguous to a highway own rights which do not belong to the public generally, and that included in these rights is an easement of access which

> includes the right of ingress, egress and regress, a right of way from a *locus a quo* to the *locus ad quem,* and from the latter forth to any other spot to which the party may lawfully go, or back to the *locus a quo.*[7]

It should be noted, however, that in the *Baxter* case the highway was in existence prior to the condemnation and that the condemnee had previously enjoyed free access thereto. Moreover the statute[8] establishing the limited access program in Georgia, was enacted after the *Baxter* case.

If this analysis of the *Lumpkin* case is correct, a new property right will

3. 114 Ga. App. 145, 148, 150 S.E.2d 266, 269.
4. *Id.* at 146, 150 S.E.2d at 267.
5. 112 Ga. App. 270, 144 S.E.2d 924 (1965).
6. 167 Ga. 124, 144 S.E. 796 (1928).
7. *Id.* at 133, 144 S.E. at 800.
8. GA. CODE ANN. §95-17a (Supp. 1967).

hereafter be recognized by the Georgia courts in condemnation proceedings. This property right will allow the condemnee to receive compensation for loss of access to a limited access highway where no highway previously existed and, where, in fact, such right only arose by virtue of the very condemnation then at issue.

LANDLORD AND TENANT

One case occurring during the survey period should remind real estate practitioners not to forget the fundamentals of real property law.[9] The landlord leased property for a period of six years. The tenant then assigned the lease to a third party. Subsequently, the third party ceased to do business on the leased premises and the defendant entered on the premises and paid rent for several months. Then the defendant abandoned the premises and the landlord sought to recover the rent due under the original lease agreement. The lease contained the usual verbage stating that the tenant could not, without the prior written consent of the landlord endorsed thereon, assign the lease. The trial court overruled the defendant's general demurrer to the petition. The court of appeals reversed the trial court, holding that since the landlord had taken no affirmative action toward the defendant to indicate that he considered the defendant his tenant, the landlord, therefore, had no right of action against the defendant under the lease where the defendant no longer occupied the premises. The court went on to point out that there is no privity of estate between a landlord and a subtenant not in possession under a usufruct as there is where an estate for years exists. Thus, since the lease was a usufruct and the subtenant no longer occupied the premises, the relationship of the landlord and tenant did not exist. A fortiori, there was no cause of action against the defendant based on the original lease. It would appear that the landlord could have protected himself by having the subtenant acknowledge in writing his assumption of the lease agreement.

> The landlord's mere failure to object and his acceptance of payment of rent from the subtenant, without more, are not together sufficient to constitute an election by the landlord to accept the subtenant as his immediate tenant.[10]

Gay v. American Oil Co.[11] has some important implications to commercial tenants who must live with Georgia's severe summary dispossessory law.[12] Georgia's dispossessory law allows the landlord to oust his tenant for nonpayment of rent within three days following service of a disposses-

9. Liberty Loan Corp. of Lakewood v. Leftwich, 115 Ga. App. 113, 153 S.E.2d at 596 (1967).
10. *Id.* at 115, 153 S.E.2d at 598.
11. 115 Ga. App. 18, 153 S.E.2d 612 (1967).
12. GA. CODE ANN. §61-301, *et. seq.* (1966 Rev.).

sory warrant. Under the common law, the landlord must make demand for the rent before he can enforce a forfeiture because of failure to pay rent.[13] Moreover, the lease must contain a forfeiture clause before the landlord can terminate the lease for tenant's breach of a covenant to pay rent. Furthermore, under the common law, equity will strictly construe any lease stipulation calling for a forfeiture.

The summary dispossessory proceedings as effective in Georgia run counter to these common law rules. The harsh results of summary dispossession are applicable in a commercial lease situation involving thousands of dollars as well as in the usual apartment lease situation. The Georgia courts consider the counter affidavit as an adequate remedy at law under the Georgia statute. Therefore, equity will not interfere with the dispossessory process under the statute. To prevent dispossession, the tenant must file a counter affidavit and bond within three days of receipt of the dispossessory warrant. The bond must be adequate to pay double the amount of rent accruing while the matter is in dispute. Thus, if the case is tied up in court for six months, the bond would equal one year's rent.

In the *Gay* case, the rent was not received on its normal due day by reason of the tenant's failure properly to stamp the envelope containing the rent check. However, the landlord had assigned part of the rent to a mortgage lender imposing a duty on the tenant to pay directly to the bank an assigned portion of the rentals. The assigned rentals were paid to the bank and accepted by the bank. However, due to the stamp omission the landlord received her portion of the rent five days after its due date. Refusing to accept the rent, she sought to dispossess the tenant for failure to pay the rent. The court of appeals upheld the lower court's dismissal of the dispossessory warrant holding that the irrevocable assignment of the rentals and continued acceptance of a portion of the rentals by the landlord's assignee precluded the landlord from dispossessing the tenant.

The *Gay* case is the first case in Georgia holding that where the landlord accepts a portion of the rent (acceptance by landlord's agent in the instant case) the dispossessory statute is not available to oust the tenant for failure to tender the remaining portion of the rent. The landlord cannot assert a forfeiture for nonpayment of rent while obtaining the benefits of a portion of the rent. The court did state in dictum that the omission of a stamp from an otherwise timely payment should not be grounds for applying the dispossessory proceedings, since the court took judicial notice of the likelihood of such a mistake where the sender is a large corporation handling thousands of letters monthly.

13. 51 C.J.S. §114, *Landlord and Tenant,* p. 695.

LEGISLATIVE ACTS

Chapter 67-26 of the Georgia Code[14] was amended to conform to the Federal Tax Lien Act of 1966. Federal tax liens upon real property and all notices affecting the liens are to be filed in the clerk of the superior court's office where the property is located. Notices of liens on personal property are filed in the county where the taxpayer resides in the case of individuals, and in the county where the principal executive office is located in the case of a corporation or partnership. No attestation of such liens is necessary other than the certification by the Secretary of the Treasury. Notices of federal tax liens are to be indexed both in real estate mortgage records and as if they were financing statements. A certificate of release, non-attachment, or subordination of any tax liens is indexed as if the certificate were a termination statement under the UNIFORM COMMERCIAL CODE. Upon request, anyone may get a certificate from the clerk of the court indicating whether or not there is a federal tax lien or any notice affecting the lien naming a particular person. The fee for such a certificate is $1.00. The act also established a fee schedule for the filing of federal tax liens on different types of property.

GA. CODE ANN. section 29-102 (1952 Rev.)[15] has been amended by deleting the requirement that a grantee must enter the premises under a deed before being bound by the covenants in the deed. It is now necessary only that he accept the deed.

GA. CODE ANN. section 57-201 (1960 Rev.)[16] has been amended with the apparent purpose of clarifying the maximum interest charged on a second security deed where there is a renewal or additional loan made by the same borrowers within a 36-month period. The new provision requires a rebate to the borrower of any previously charged "rate of charge" in accordance with the Standard Rule of 78.

GA. CODE ANN. section 37-601[17] dealing with the power of sale in trust deeds has been amended to allow transferees of deeds of trust, mortgages and other instruments to exercise the power of sale or other powers in such instruments whether or not the transfer specifically included such powers or conveyed title to the property described.

A new section of chapter 67-13 was enacted as GA. CODE ANN. section 67-1305.1 (1967 Rev.).[18] This new section requires that all transfers of security deeds must be in writing, signed by the grantee or the last previous transferee, and must be witnessed as required for deeds. Such transfers can be effected by endorsement on the original security deed or by a

14. Ga. Laws 1967, p. 549.
15. Ga. Laws 1967, p. 592.
16. Ga. Laws 1967, p. 637.
17. Ga. Laws 1967, p. 735.
18. Ga. Laws 1967, p. 737.

separate instrument which identifies the security deed. Such a transfer transfers the property described and the indebtedness secured, together with any powers granted, without specifically mentioning such.

Lenders have for some time transferred and assigned security deeds by separate instrument. However, it is usually necessary to present the original security deed to the clerk when recording the assignment, since the clerk must satisfy himself that the Georgia Intangibles Tax[19] has been paid.[20] In the event the original security deed is not immediately available, it is advisable to set forth the due date and some means of identifying the property in those cases where a separate writing is used to transfer the security deed.

GA. CODE ANN. section 61-107 (1966 Rev.)[21] has been amended to broaden the circumstances under which a tenant may not dispute his landlord's title. This proscription now applies at any time the tenant is in physical occupation of the premises, while he performs an act or takes a position which either expressly or impliedly recognizes the landlord's title, or while he takes any position that is inconsistent with a claim that the landlord's title is defective.

Perhaps the most important piece of real property legislation during the 1967 session imposes a tax on instruments which convey interests in land when the value of the interest conveyed is in excess of $100, exclusive of the value of any lien or encumbrance at the time of sale.[22] The rate of tax is $0.50 for the first $500 or fractional part thereof and $0.10 for each additional $100 or fractional part thereof. The tax is to be paid by the person who executes the instrument or for whose use the same is executed. However, the tax imposed by the act does not apply to any instrument given to secure a debt.

The tax so imposed is to be collected by the clerk of the superior court when the instrument is filed for record. The clerk is then to affix a certificate to the instrument indicating the tax has been paid. The $0.25 fee paid to the clerk for this service is to be paid by the State Revenue Commissioner from funds collected pursuant to the tax.

The act prohibits the recording of any instrument until the tax imposed has been paid. The clerk is to attach a certification indicating the date the tax was paid and the amount of the tax paid. The certificate must be recorded with the instrument and must bear the signature of the clerk. Where the instrument is to be recorded in more than one county, the tax

19. GA. CODE ANN. §92-164 (1961 Rev.).
20. Where an exempt holder transfers to a non-exempt assignee, the new holder must pay the tax. (OP. ATT'Y GEN. 791, 808 (1954-1956)). If the tax has already been paid, no additional tax is due upon an instrument of transfer or assignment. (GA. CODE ANN. §92-175 (1961 Rev.)).
21. Ga. Laws 1967, p. 774.
22. Ga. Laws 1967, p. 788.

is paid to the county in which the property is located. Where the property itself is located in more than one county, the tax is to be paid to the clerk of the county in which the instrument is first recorded.

The State Revenue Commissioner is given the power to promulgate rules and regulations as he deems necessary and to appoint employees for the purpose of administering the act. Revenues collected pursuant to the provisions of the act are to be distributed among the state, municipalities, and the county in which such real estate is situated in the same proportion that revenues derived from the tax on intangible personal property are now distributed. Anyone who willfully fails to collect, pay over, or evades the tax shall be guilty of a misdemeanor. The act itself becomes effective on January 1, 1968. However, the act is to be null and void if the federal documentary stamp tax law is extended past January 1, 1968.

A new "building-construction safeguards act"[23] has been passed dealing with safety requirements for scaffolding, hoists, etc. used in building construction.

Homestead exemption[24] for disabled veterans has been extended slightly to include those veterans who have lost the use of both lower extremities so as to preclude locomotion without the aid of braces, crutches, canes or a wheelchair. However, as this is a constitutional amendment, it cannot become effective until ratified during the general election of 1968.

The definition of "condemning body"[25] in GA. CODE ANN. section 36-601 (a) (Supp. 1967) has been expanded to include all persons, firms or corporations possessing the right or power of eminent domain or which are hereafter given the right or power of eminent domain.

23. Ga. Laws 1967, p. 792.
24. Ga. Laws 1967, p. 813.
25. Ga. Laws 1967, p. 825.