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REAL PROPERTY

By George A. Pindar*

The last year of this survey period has brought up a mass of real property activity in the courts, especially in the field of mortgages, sales contracts, and zoning; and many of the opinions are important reading for the title practitioner.

I. Actions For Land

Parties planning to bring an action to recover land have a wide choice of remedies, and this seems especially true in Georgia. If establishment of title is all that is necessary, the Land Registration Act¹ may be used, or the Quiet Title Act of 1966.² In emergencies it may be advisable to sue for damages and injunction against continued trespasses. If title is not in issue, possession may be recovered by dispossessionary proceedings otherwise known as forcible entry and detainer actions. The traditional common-law action of ejectment, with its fictitious recital of the misdeeds of Richard Roe and John Doe, has long been a favorite in the agricultural or forest areas, but the bar has been wondering whether it is still maintainable since the advent of the 1966 Civil Practice Act (CPA).³ The amendment of 1968 provides that the sufficiency of pleadings must be tested by the CPA, which requires them to state “facts,” not fictions.⁴ The Act still provides that “all special statutory proceedings” shall be governed by the CPA unless the statutes prescribe specific rules of practice and procedure in conflict with the CPA⁵ and the common law ejectment may be said to be “statutory” because it is outlined by a chapter of the code which has never been repealed.⁶ At any rate there are two recent John Doe ejectments in the recent supreme court reports which apparently have gone off on other points without question as to the form of action. They are Richard Roe v. John Doe⁷ and Doe v. Roe.⁸

II. Condominiums

A fairly substantial body of case law is building up across the country dealing with the numerous problems in the construction and operation of

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condominiums, one recent addition being *Hoover & Morris Development Co. v. Mayfield.* An apartment owner wished to sell his unit to two husband-and-wife purchasers, and, as instructed by the developer's agent, notified the association by letter of his intention, naming the purchasers, their employment, etc., and stating the date of the proposed sale. Several weeks before that date arrived, the developer sued to enjoin consummation of the sale, alleging that the declaration on file for the project required a prospective seller to furnish a copy of the offer of sale, and to afford the other owners or the association the right of first refusal. A denial of temporary injunction was unanimously affirmed by the Georgia Supreme Court. The court agreed that the apartment owner had failed to "strictly comply" with the by-laws as required by the Apartment Ownership Act. But compliance may be waived, said the court, and there was sufficient evidence of waiver to justify the denial of a temporary injunction.

The filing of a declaration of condominium under the Georgia Apartment Ownership Act of 1963 by the developer as mortgagor or security deed grantor constitutes a significant change in the title to the property, as also does a subsequent amendment of the declaration authorizing rentals in addition to sales. In *National Community Builders, Inc. v. Citizens & Southern National Bank,* the mortgage holder contended that these acts without its prior approval constituted grounds for default and acceleration of maturity. The question was never definitely decided because other grounds of default were also alleged, and the trial court's finding of default was simply affirmed as a determination of a question of fact. But it would be highly desirable for developers to avoid such a contention by submitting each phase to the mortgage holder for approval in advance.

Attention should also be called at this point to the new Condominium Act of 1975, intended as a complete revision of the original Apartment Ownership Act of 1963.

### III. Conveyancing

The general public has little or no idea of the complications and perplexities which can beset an attorney attempting to close a real estate transaction. *Arex v. Davis* is a case in point. The defendant, an attorney, was employed to close a purchase of land by the plaintiff and a co-purchaser. Each of the purchasers gave the attorney their checks payable to him for their share of the purchase price, and the attorney gave his check to the vendor. After the closing it developed that the co-purchaser's check was

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bad, and the attorney called upon the two purchasers to make good his loss. Being told that neither was able to replace the deficiency, the attorney advised them to give him a demand note in that amount, secured by a deed to the property. Later, after foreclosure was started, the plaintiff upon request conveyed the property to the attorney in lieu of foreclosure. Plaintiff (whose check was good) then brought an action to set aside the conveyance, alleging that an attorney-client relationship existed between the parties, that he was not at fault, that the attorney had no right in good conscience to acquire title from him, and that it was his duty as attorney to advise his client to seek independent advice from another attorney before accepting a conveyance from him. The court, with one dissent, reversed a summary judgment for the attorney; an issue remained whether a fiduciary relationship still existed after the closing and in the subsequent transactions.

Attorneys closing loans often obtain title insurance for their clients, the banks or other lenders, but seldom procure such policies for the borrower, who as often as not, is unrepresented by his own attorney. In Sherrill v. Louisville Title Insurance Co., the borrower was charged with the premium for the title policy, but the policy itself named only the bank as beneficiary. The closing was made in reliance upon a binder issued by the title insurance company requiring the cancellation of record of an outstanding security deed executed by the borrower against the property, and that the secured note executed by him be marked “paid” and surrendered to the company’s agent. The cancellation was obtained and recorded, but the additional requirements were waived. Later the secured note turned up among papers left by the deceased payee, and the administrator brought suit on it against the borrower, who filed a third-party cross-action naming the title company as defendant alleging liability over to him as a third-party beneficiary of the binder and title policy. The court held that since the borrower was not a named insured in the binder or the title policy, he had no right to maintain an action on the policy merely because he was charged with the premiums in the settlement statement.

The case of Harper v. Paradise is a classic opinion which every title attorney in the state should read and carefully study. In 1933 B was in possession of land owned of record by her mother, A, claiming that A had made her a deed, but it was lost, and her mother was deceased. Her attorney had obtained a 1928 deed in her favor from all the other heirs of A, reciting the making of a prior deed, now lost, from A to B as having been

17. The case raises several side questions: (1) Why was not the security-deed cancellation a complete defense to the borrower against liability on the secured note? (2) Why did the binder require production of the secured note in addition to the cancellation of record? This is not required under Georgia law. Perhaps it was the influence of the Tennessee law, since Rossville (where the closing took place) is a suburb of Chattanooga. See Prater v. Fidelity Trust Co., 161 Tenn. 626, 34 S.W.2d 205 (1930).
made in March, 1927. B then made a security deed which was foreclosed, and title came down into the present defendants, accompanied by forty years of continuous adverse possession.

In 1957 the children of B (the plaintiffs in the case) found and recorded a 1922 deed from A to B for life, with remainder to her children (the plaintiffs). They of course could not sue to recover the land as long as the life tenant lived, but soon after their mother died in 1972, they brought suit against the defendants in possession, whose chain of title began while the 1922 deed remained unrecorded. The defendants claimed the protection of the recording act. Under the Georgia statute purchasers from heirs apparently holding under a deceased landowner are entitled to the same protection against unrecorded conveyances as if they had purchased directly from the deceased owner and the security deed from B to their predecessor was recorded before the 1922 deed under which the plaintiffs claimed title. The court, with one dissent, denied their contention and entered a judgment in favor of the plaintiffs, as remaindermen in the 1922 deed. To reach this result, the court made the following ruling:

(a) The recital in the recorded 1928 deed from the heirs of A to B put all purchasers on notice that there had been a prior lost deed made by A to B (although reciting a different date).

(b) Such a deed from heirs reciting the existence of a prior deed out of their ancestor is virtually no more than a disclaimer of title, except that it also serves to put the grantee and her successors on inquiry as to the terms and conditions of the prior deed so referred to.

(c) One who is put on notice of a lost deed by a reference in the recorded chain of title must prove that he made a diligent effort to find the deed or learn its terms and conditions. Otherwise he will be charged with notice of the contents of the lost deed if it is ever found and produced.

(d) The priority given to deeds from heirs at law will be denied where such a deed reveals a prior conveyance by the ancestor in his lifetime, unless a diligent search for the lost deed or its contents can be shown. Apparently the burden is upon the grantee or his successors to show that such a search was made, since the record revealed no evidence on the point.

Harper is not a full-bench decision, and need not be followed in future deliberations of the court. But the real property bar of the state may find if imposes a tremendous burden upon purchasers and lenders, and as a matter of fact, most title lawyers would have accepted the defendants'
title, with forty years adverse possession and an unbroken chain of recorded deeds. An examiner without a title plant might never find the 1922 deed, which was not recorded until 1957, after the other chain of title was well established and supported by long possession. It is not customary to search for conveyances out of a party recorded years after the record of an apparently valid deed out of his heirs at law. 22

IV. Deeds

Delivery is the most vulnerable feature of all deeds. However formally executed, attested, acknowledged and recorded, the absence of delivery leaves them as mere “scraps of paper.”23 The other formalities may raise a presumption of delivery, but the proven fact of non-delivery will strip title even from a bona fide purchaser who relies upon an apparently valid recorded deed.24 In Stinson v. Gray25 the grantor handed one of the executed deeds to a third person with instructions not to deliver it to the grantee until after the grantor’s death. While this may have made the third person an agent, any such agency was revoked by the grantor’s death, and the court affirmed cancellation of the deed. With respect to another deed dealt with in the same opinion, the named grantee was the sole witness (the grantor being deceased) testifying that the grantor handed her the deed, and she (the grantee) placed the deed back in the grantor’s trunk after her death, where it was found. The court said that the trial judge, acting by agreement without a jury, was authorized to discredit such testimony and find non-delivery as to this deed. In title practice, any deed not recorded during the lifetime of the maker deserves to be handled with great skepticism.

Beside non-delivery there is another vulnerable spot in every deed: the consideration may always be the subject of inquiry, and the parties are not bound by the recitals of the deed on that subject. In Head v. Head26 a group of heirs made a quitclaim deed to one of their number reciting a consideration of $3,000 and assumption of an indebtedness. Later some of the heirs sought to set aside the deed, alleging that the true consideration was a parol agreement by the grantee to look after and manage the farm, and to

22. A title examiner is obliged to run through the index of grantors until he finds a conveyance by the owner of the land in question. After such conveyance, the former owner becomes a stranger to the title, and the examiner must follow down the name of the new owner to see if he has conveyed the land, and so on. It would be a hardship to require an examiner to follow in the index of grantors the names of every person who at any time, through, perhaps, a long chain of title, was the owner of the estate. Morse v. Curtis, 140 Mass. 112, 2 N.E. 929, 931 (1885).
24. Id. See also Stone v. French, 37 Kan. 145, 14 P. 530 (1887); Butler v. Butler, 169 N.C. 584, 86 S.E. 507 (1915); Williams v. Schatz, 42 Ohio St. 47 (1884).
look after and support their mother, one of which had been performed. But
the court held that though the consideration of a deed may be inquired into
where the principles of justice require it, the rule cannot be used to justify
engrafting upon the deed a new condition or covenant imposing an addi-
tional affirmative obligation upon the grantee. The alleged agreement was
of this nature; such evidence was inadmissible and formed no basis for
cancellation of the deed. There are many cases in Georgia and elsewhere
involving cancellation of “support deeds,” and the rule is well settled that
they will not be cancelled for mere breach of an agreement to support the
grantor or any other person unless fraud or insolvency is shown.27

While oral agreements made at the time of delivery of a deed are ex-
cluded under the parol evidence rule, those made prior to that time are
often excluded under the doctrine of merger. This was the rule relied upon
in Heimer v. Hegidio28 in defense of a suit against the vendor-builder for
breach of a one year guarantee on all materials and workmanship used in
the construction of the house sold. There was no consideration for the
guaranty shown other than the sale of the house, and there was no sales
contract in evidence. In upholding denial of a summary judgment for the
vendor-builder the court pointed out that merger was a matter of intention
of the parties, and omission of collateral agreements from the deed may
not evidence a deliberate intent to preclude their survival. The court did
not refer to Postell v. Hearn29 holding that a guaranty of materials and
workmanship is merged in the deed, but the case is distinguishable, and
the trend of authority is distinctly away from the former rigid doctrine of
merger, which often produces unjust results.

In Whitworth v. Whitworth,30 a father bought and paid for land, but had
the deed made to his infant son. The father occupied the land until his
death twenty years later, but the deed was not recorded until the year of
his death. The father’s administrator brought an action to cancel the origi-
nal deed to the son, who was now of age, alleging that the father intended
for title to be held by the son in trust for himself. By amendment an
implied trust was claimed. First the court sustained the validity of the
deed: delivery to the father was sufficient, and the father’s possession and
recording raised a presumption of delivery. The prayer for cancellation was
unrealistic, since annulment would revest title in the original grantor, who
was not even a party to the case. The claim of implied trust was also
rejected under the rule that one who buys land and directs that title be
put in the name of a near relative presumptively intends a gift to that
relative, and there was no evidence to rebut the presumption.

The old maxim giving priority to “the first deed and the last will”

891, 52 S.E.2d 459 (1949); Burkhalter v. Deloach, 171 Ga. 384, 155 S.E. 513 (1930). See also
appears to lose potency with every generation of lawyers and judges. The
trend is always toward weighing the entire instrument, whether it be a will
or a deed, and determining its meaning with little regard to which language
comes first and which last. But the deed in Corley v. Parson\textsuperscript{31} first granted
the land to a named grantee, "his heirs and assignees;" then added that
should the grantee die first, the land should revert to the grantor's estate.
It concluded: "[t]o have and to hold . . . [for the benefit of]" the grantee
"only so long as he lives, forever, in fee simple." The grantee did not die
first, but upon his death the grantor's heirs claimed the land as reversion-
ers after termination of a life estate. The court held, however, that the
original granting clause prevailed, passing a defeasible fee which vested
indefeasibly upon survival of the grantor. The habendum being repugnant
to the granting clause, it must be rejected. Thus we have one of those rare
decisions following the old rule, under which the grant prevails over the
habendum. As another court phrased it, "Once the fee, whether fee simple
or fee conditional, is granted subsequent or superadded words cannot cut
down the estate."\textsuperscript{32}

In Lunsford v. King,\textsuperscript{33} a landowner gave a deed to the county for widen-
ing a road. The deed was then recorded. Thereafter the same landowner
conveyed the property by warranty deed using the old description without
excepting or otherwise excluding the strip. The purchaser sued in the alter-
native, questioning the validity of the county deed for reasons not set forth
in the opinion, and asking judgment for breach of warranty against the
vendor if the county deed be adjudged valid. After sustaining the county
deed, the trial judge granted a summary judgment in favor of the vendor,
which was reversed. This was a case of failure of title to part of the land
conveyed, said the court, not simply a deficiency of acreage, and is not
defeated by the purchaser's constructive knowledge of the county deed
from the record. Even actual notice is generally not a defense to a breach
of warranty action.\textsuperscript{34}

This is justified by the business practice of entering into contracts calling
for the sale, free from all incumbrances, of land which at the time of the
contract is incumbered, the intention of the parties being that the grantor
shall rid the property of the incumbrance before conveyance.\textsuperscript{35}

In Pittman v. City of Jesup,\textsuperscript{36} a landowner conveyed a strip of land
described as "a proposed street" to the city. The deed provided for rever-
sion in the event of abandonment. After three years the landowner sued
the city for damages, claiming that it promised to construct a road and a

\begin{itemize}
\item \textsuperscript{31} 233 Ga. 845, 213 S.E.2d 693 (1975).
\item \textsuperscript{32} Antley v. Antley, 132 S.C. 306, ___, 128 S.E. 31, 33 (1925).
\item \textsuperscript{33} 132 Ga. App. 749, 209 S.E.2d 27 (1974).
\item \textsuperscript{34} GA. CODE ANN. §29-304 (Rev. 1969).
\item \textsuperscript{35} Note, Covenants—Public and Private Highways as Incumbrances, 24 COLUM. L. REV. 800 (1924).
\item \textsuperscript{36} 232 Ga. 635, 208 S.E.2d 456 (1974).
\end{itemize}
sewer line across the strip so conveyed. The court upheld a summary judgment for the city. Whether or not a city will open a street is discretionary, and those who miscalculate its final decision have no right of action. While a city can, of course, bind itself by contracts formally made, one council cannot bind its successors so as to prevent free legislation in matters of municipal government. Another view of the case would have been that the proposal for a road was a condition but not a covenant; abandonment would justify cancellation of the deed, but not a judgment in damages.

V. EASEMENTS

In Bateman v. Fordham, the supreme court reversed the court of appeals, and held that Georgia's private way condemnation statute could not be used to relieve the restrictions imposed upon the right of way for access by its own terms, by the device of condemning an unlimited easement. To quote from the court:

We do not think the private way statute was intended to authorize the cancellation of this express covenant in the deed by the grantor under the circumstances of this case. Stated affirmatively, the appellee made a contract of bargain and sale with the appellant Bateman. He must abide by the terms of that deed and perform its valid covenant as there is no contention in this case that the covenant limiting the use of this easement is invalid or unenforceable.

There were two dissents.

VI. EMINENT DOMAIN

Georgia's eminent domain practice rules are chaotic. Condemnors have a choice of at least four different methods, each more confusing than the other. In Knight v. Department of Transportation, the attorney for the defendants filed a pleading styled first as an "answer," later amended as a "notice of appeal" to a jury. The statute on the brand of taking chosen by the state allowed an "appeal to a jury" within 30 days after service. The record showed a mailing of a registered letter by the clerk to two condemnees residing out of the state, but not the contents of the letter. Nor was there a return of service by the clerk as required. The state asked dismissal of the "answer" filed on behalf of all defendants more than thirty days after service on the others. Dismissal was denied by the court: since the record did not show valid service on two of the defendants, the thirty

38. Id. at 522, 207 S.E.2d at 503.
41. GA. CODE ANN. §95A-606(h) (Supp. 1974).
day period did not run against any of them until all were served.\textsuperscript{42}

Although Georgia had not passed on the question, several neighboring states had held that in the distribution of the proceeds of condemnation the mortgage holder is not entitled to a prepayment interest penalty.\textsuperscript{43} In \textit{United Family Life Insurance Co. v. DeKalb County},\textsuperscript{44} the court of appeals agreed. Only a voluntary prepayment by the mortgagor carries the penalty, and condemnation was not in contemplation when the note was drafted.\textsuperscript{45}

But the mortgage holder claimed the item under the Georgia Relocation Assistance and Land Acquisition Policy Act\textsuperscript{46} as an expense of relocation. The Act requires condemnors to pay such expenses and expressly includes “prepayment of mortgage penalties . . . on real property acquired,” where the project is federally financed in whole or part.\textsuperscript{47} The court remanded the case for determination whether the funds to be disbursed were being paid or reimbursed by the federal government; if so, the mortgage holder should prevail. It is evident that the draftsman of the Georgia Act erroneously took for granted that prepayment penalties are collectible in condemnation cases, and should have said: “Prepayment of mortgage penalties \textit{if the same be due.”} Or perhaps this proviso could have been read into the Act by the court.

When governmental agencies in performance of their police powers are making necessary improvements or constructions for the promotion of public health and safety, a court of equity will not generally interfere by injunction at the instance of owners of damaged property, but will leave them to claim compensation or damages in an ordinary action at law, unless unnecessary injury is being inflicted on the abutting property.\textsuperscript{48}

\begin{footnotes}
\item[42] Georgia lawmakers should earnestly consider the adoption of the 1975 Uniform Eminent Domain Act, under which all takings would proceed in a consistent system borrowed from the best features of such legislation over the country and the federal system. The Act also contains many humane requirements to protect the condemnee from unreasonable dispossess and oppressive tactics.


Even the legislators have at times become quite confused on the subject. Read the very cogent opinion of Judge Clark in \textit{Fulton County v. Corporation of the Presiding Bishop of the Church of Jesus Christ of Latter Day Saints}, 133 Ga. App. 847, 212 S.E.2d 451 (1975), dealing with the automatic dismissal rule after five years of inactivity.


\end{footnotes}
in Baranan v. Fulton County,\textsuperscript{49} the court reversed a denial of injunction, and clarified the rule as follows:

(1) Extensive public improvements will not be enjoined because consequential damages have not been paid to property owners.\textsuperscript{50}

(2) Where a public improvement has the effect of creating a continuing nuisance on private property it may be enjoined.\textsuperscript{51}

(3) Although a county is not liable to suit unless made so by statute, when it violates the constitution there is an implied liability equivalent to express statutory provision.\textsuperscript{52}

No doubt some readers will be surprised to learn that a utility company cannot legally erect its lines in most public streets or highways without the consent of the abutting owners, since in the easement-type right-of-way the base fee remains vested in the adjoining proprietors.\textsuperscript{53} A distinction is recognized with regard to city streets, which by long tradition are subject to an "urban servitude" for all necessary public utilities.\textsuperscript{54} And the exception has also spread to a degree into interurban highways as well.\textsuperscript{55} In Waldrop v. Georgia Power Co.,\textsuperscript{56} the plaintiff recovered damages for the reduced value of his land because of the placing of wires and the cutting of trees in the amount of $4,000. He then filed another action for injunction against further maintenance of the lines and for $85,000 additional damages.

The trial judge decided the plaintiff had already been amply compensated, and the supreme court agreed. One who watches a public improvement being erected and put into public service without giving warning that his rights are being violated will be estopped to demand removal or discontinued use of the facilities, and relegated solely to an action for damages.\textsuperscript{57}

How conclusive is a condemnation proceeding? In Spell v. Haire,\textsuperscript{58} a

\begin{itemize}
\item \textsuperscript{49} 232 Ga. 852, 209 S.E.2d 188 (1974).
\item \textsuperscript{50} Id. at 854-55, 209 S.E.2d at 190-91.
\item \textsuperscript{51} Id. at 855, 209 S.E.2d at 191.
\item \textsuperscript{52} Id. at 856, 209 S.E.2d at 191.
\item \textsuperscript{56} 233 Ga. 851, 213 S.E.2d 847 (1975).
\item \textsuperscript{57} Georgia Power Co. v. Kelly, 182 Ga. 33, 184 S.E. 861 (1936). \textsuperscript{See also 30 C.J.S. Eminent Domain §397 (1965).}
\item \textsuperscript{58} 233 Ga. 218, 210 S.E.2d 729 (1974).}
\end{itemize}
landowner brought an equitable petition to set aside a condemnation judgment and to enjoin the county from taking over the land. He contended that the judgment was fraudulently obtained; that there was insufficient notice of what land was to be taken, and that no valid ordinance authorizing the taking was in existence at the filing of condemnation proceedings. The court upheld dismissal of the petition. Every objection taken in the petition, said the court, could and should have been raised before the special master, since the statute gives him authority "to hear and determine any legal objections raised by the parties." The judgment, even if erroneous, is binding upon all parties until reversed and cannot be collaterally attacked.

The same statute came before the court of appeals in Georgia Power Co. v. Baggarley, in which the trial judge's order appointing a special master provided that his determination of all issues "shall be reviewable upon appeal filed to the Superior Court of Monroe County, and all of said issues will be tried by a jury." The order was erroneous. Only the question of compensation goes to a jury. All other rulings of the master must be objected to before the court prior to making the award a judgment of the court.

When the state is constructing an expressway to which there will be no access from abutting lands, it had been held that damages should be given for loss of access even though no old highway was involved, and the abutting owner was being compensated for the loss of something he had never had. That decision was later overruled. In State Highway Department v. Kinsey, the case was tried before the overruling opinion was rendered. In reversing the case the court pointed out that even under the new ruling additional compensation may be recovered where the expressway divides the land and leaves one part inaccessible from the other.

In the condemnation of part of a tract, the owner is entitled not only to compensation for the part taken, but also for damages inflicted upon the remaining part. Georgia Power Co. v. Bray involved this general principle, but with a difference. The tract being taken was owned by the two defendants as tenants in common; but the adjoining land was owned individually by one of them alone. The court held, with one dissent and one

62. Id. at 399-400, 211 S.E.2d at 24.
64. Department of Transportation v. Hardin, 231 Ga. 359, 201 S.E.2d 441 (1973).
special concurrence, that the single adjoining owner could not claim damages as such in the condemnation proceeding but was relegated to a separate action thereafter for damages.68

Georgia, like several other states, has a constitution requiring that compensation be paid first before property is taken or damaged for public purposes.69 But Georgia's constitution was amended in 1960 to make an exception where land is taken by state, county or city for road, street or highway purposes.70 For this reason, prior rulings that a condemnor cannot appeal without first paying or depositing the amount of the award do not apply to highway cases.71

VII. Estates In Land

In Banister v. Bannister,72 a deed from A to B provided that B "is to have a life estate . . . and at her death the title shall vest in" C. But C died before B, the life tenant. After both are dead, who is entitled to the land? The court followed the well established rule and held that C's remainder interest was not contingent upon his survival of the life tenant, but became a vested remainder immediately upon delivery of the deed, with possession postponed. This means that there is no reversion to the grantor, but title passes to C's heirs or devisees like any other property owned by him.73

An estate in land cannot be created by carelessly phrased colloquial promises. In Day v. Tribble,74 a daughter was induced to execute a waiver of her right to contest her mother's will by her stepfather, who told her, "If you sign it, then I promise you can live up here . . . and stay there" as long as she wanted. She testified that she thought that meant a life estate. "I just thought he meant that I could live up there, have somewhere to live." The court held that such language was a mere license, and not a grant of a life estate.75 It may be commented that a license is a revocable privilege, but is recognized by the Restatement of Property, section 5, as an interest in land, although obviously one which would be personal to the licensee and not transferable. The present form of license appears to be one

68. It is generally held that unity of title, use, and contiguity are all required to justify awards in the proceeding. County of Santa Clara v. Curtner, 245 Cal. App. 2d 730, 54 Cal. Rptr. 257 (1966). It is doubtful whether a mere unity of use, without unity of ownership, would suffice. Kansas City v. Stith, 409 S.E.2d 193 (Mo. 1966). One court holds that connection of two tracts by an appurtenant easement may be sufficient but disparity of title or estate was held immaterial. State v. Nelson Sand & Gravel, Inc., 93 Idaho 574, 468 P.2d 306 (1970).
75. Id.
revocable by the licensee rather than the licensor.\textsuperscript{76}

In 1961 Delta Air Lines made a “space occupancy” agreement with the City of Atlanta for operation of its lines at Hartsfield International Airport for a period of thirty years. In \textit{Camp v. Delta Air Lines, Inc.},\textsuperscript{77} it fell to the court to analyze this agreement and determine whether it vested a taxable estate in Delta, on a valuation of more than three million dollars. The Georgia Code distinguishes between an estate for years, which is taxable, and a mere “usufruct” which is not, although it may create a landlord-tenant relationship. Under Ga. Code Ann. §61-101 (Rev. 1966), a usufruct arises “when the owner of real estate grants to another simply the right to possess and enjoy the use of such real estate, either for a fixed time or at the will of the grantor, and the tenant accepts the grant.” Such a usufruct cannot be conveyed except by the landlord’s consent, and is not subject to levy.\textsuperscript{78} Any renting for less than five years is presumed to be a usufruct.\textsuperscript{79} The courts have also established a concomitant presumption that a renting for five years or more is presumed to be an estate for years.\textsuperscript{80} But the court here was convinced that Delta has only a circumscribed and limited use of the premises and facilities, with various services to be provided by the city such as heating, hazard insurance, plumbing, and water, without full subletting and assignment rights or the right to erect signs or make improvements without the city’s approval. The question is indeed a close one, since many full-fledged leases contain all these provisions and more.\textsuperscript{81}

\section*{VIII. Landlord And Tenant}

Where the parties in the lease have agreed upon their respective obligations of repair, the landlord is absolved from his statutory duty and liable

\begin{itemize}
\item \textsuperscript{76} Permissions for lifetime occupancy have produced conflicting case-law. \textit{Compare Harper \& Brother v. Nash}, 126 Ga. 777, 55 S.E. 928 (1906), \textit{with} \textit{Marshall v. Cozart}, 94 Ga. App. 614, 96 S.E.2d 729 (1956). Occupancy of a house, whether exclusive or in common with others, is in its nature a form of possession which is more than a mere license or easement. Yet occupancy by a servant or member of the owner’s family is not regarded as possessory in the strict sense. \textit{Mackenzie v. Minis}, 132 Ga. 323, 63 S.E. 900 (1909).
\item \textsuperscript{77} 232 Ga. 37, 205 S.E.2d 194 (1974).
\item \textsuperscript{78} \textit{See} \textit{Harms v. Entelman}, 21 Ga. App. 295, 94 S.E. 276 (1917).
\item \textsuperscript{80} \textit{See} \textit{Warehouses, Inc. v. Wetherbee}, 203 Ga. 483, 46 S.E.2d 894 (1948).
\item \textsuperscript{81} The term “usufruct” is rarely used in other states relating to rental agreements, but similar conclusions have been reached. It is well recognized that a landowner may retain possession and at the same time license another to conduct a business on his land. \textit{Timmons v. Cropper}, 40 Del. Ch. 29, 172 A.2d 757 (1961). The familiar “concession” granted for the use of space in the sale of merchandise is an example. \textit{Senrow Concessions, Inc. v. Shelton Properties, Inc.}, 10 N.Y.2d 320, 329 N.Y.S.2d 178, 178 N.E.2d 726 (1961); \textit{R.H. White Co. v. Jerome H. Remick \& Co.}, 198 Mass. 41, 84 N.E. 133 (1908); \textit{Beckett v. City of Paris Dry Goods Co.}, 14 Cal. 2d 633, 96 P.2d 122 (1939). \textit{See Note}, \textit{The California Lease—Contract or Conveyance?} 4 STAN. L. REV. 244 (1952). A billboard “lease” is a mere license. \textit{Baseball Publishing Co. v. Bruton}, 302 Mass. 54, 18 N.E.2d 362 (1938); \textit{Annot.}, \textit{Contract For Use of Wall For Advertising}, 119 A.L.R. 1518 (1939).
\end{itemize}
only for such repairs as are specified in the lease. In *Browning v. Fortenberry & Sons*,\(^8^2\) the court upheld a judgment on the pleadings dismissing a counterclaim for damages arising from failure to repair, filed by the tenant in response to a dispossessory proceeding. The court also ruled that a summons in such a case may be validly issued by a deputy clerk of the Civil and Criminal Court of Cobb County under his statutory power to perform all “purely ministerial duties . . . performable by a justice of the peace.”\(^8^3\)

The death of a tenant does not ordinarily terminate a lease.\(^8^4\) In *Pittman v. Griffeth*,\(^8^5\) the lease merely provided that in the event of the lessee’s death the lessor may “if he so desires immediately terminate this contract and resume possession of the premises.” This language, said the court, does not specify any method of notice, but under general law such a notice must be sufficiently certain that the occupants cannot reasonably misunderstand it.\(^8^6\) Where the evidence of what was said is in conflict, a jury question is presented. The court then confronts one of the most esoteric of all legal problems: did the lease provide for an extension or a renewal? The lease contained a printed provision that there should be no extension or renewal unless by written agreement signed by the lessor, but there was typed in the lease the words: “Privilege to Renew This Leas [sic] (5 years).” The court construed this language as a provision for renewal on the same terms, requiring no new lease but only notice from the executor of the tenant of his intention to renew.\(^8^7\)

Where a lease permits subleasing with the landlord’s consent, and provides that the word “tenant” shall include sublessees, privity is established between the landlord and the sublessee, and a dispossessory proceeding may be maintained accordingly. However, in *Vlahos v. DeLong*,\(^8^8\) the court reasoned that privity thus established would also permit the sublessee to counterclaim for damages against the landlord. The fact that the premises have been surrendered will eliminate the issue of possession from the case, but not the counterclaim.

An exculpatory clause in a lease may be effective to protect the landlord

\(^8^3\) Id. at 500, 206 S.E.2d at 103, quoting Ga. Laws, 1953, p. 3295.
\(^8^6\) Id. at 491-92, 206 S.E.2d at 118.
\(^8^7\) The typed provision prevailed over the printed, and constituted in itself a written agreement signed by the landlord, but the courts often disregard the terminology of the lease and will hold the provision for a renewal to be one for extension, and vice versa. See, e.g., Aiken v. Less Taylor Motor Co., 110 Utah 265, 171 P.2d 676 (1946). Thus a “privilege of renewing one year more” was treated as an agreement for extension. Luthey v. Joyce, 132 Minn. 451, 157 N.W. 708 (1916). See also Orr v. Doubleday, Page & Co., 223 N.Y. 334, 119 N.E. 552 (1918); Annot., Landlord And Tenant—Option To Renew, 1 A.L.R. 338 (1919); Haddad v. Tyler Prod. Cred. Ass’n, 212 S.W.2d 1106 (Tex. Civ. App. 1948).
In Sport Shop, Inc. v. Churchwell, the rule was applied to an action by a tenant against the landlord for damages caused by a malfunctioning automatic sprinkler system, and a summary judgment for the defendant landlord was affirmed.

Specific performance cannot be obtained by a tenant seeking to enforce the landlord's covenant to make roof repairs, according to Borochoff Properties, Inc. v. Creative Printing Enterprises Inc. His remedy is to make the repairs himself and seek reimbursement.

Under a shopping center lease providing for a percentage rent and prohibiting the tenant from abandoning or vacating the premises during the term of the lease, the act of the tenant in closing the store, and so informing the landlord, constituted a default which rendered the tenant liable in damages, according to Buford-Clairmont, Inc. v. Jacobs Pharmacy Co. The court then deals with the measure of damages in such a case. The lease authorized the landlord to relet the premises upon default, but the tenant was not liable for the expense of converting the premises for a new tenant so as to provide a greater return. However, money spent by the landlord in remodelling the premises initially for the benefit of the defaulting tenant may be recovered, together with future rent from the date of default minus rent paid by new tenants.

Lopez v. Dlearo rules that although Georgia's new Dispossessory Proceeding Act of 1970 permits the landlord to make his oath before a justice of the peace that the tenant fails upon demand to deliver possession, the language of the Act clearly contemplates that subsequent proceedings shall be conducted in the superior court.

IX. MORTGAGES AND OTHER SECURITY INSTRUMENTS

A practice originated by the Federal Housing Administration of requiring the borrower to make monthly deposits in escrow covering the cost of taxes and insurance has been widely adopted by lending institutions. In Jackson v. Citizens Trust Bank, a borrower finished paying off his loan in 1959, each payment including escrow deposits of this type, which the lender never applied to the required purpose, leaving the borrower to pay these items independently as they came due. In 1973, the borrower looked through his papers and noticed that the escrow funds had never been returned to him, whereupon he filed suit, thirteen years after his final

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payment. The court held that since the bank failed to use the fund for its special purpose, it should be considered as a general deposit of the borrower, and the statute of limitations does not begin to run until a demand is made; under this rule, it is not the right to make the demand but the actual demand which starts the period running.\footnote{6}

An important opinion relating to prepayment penalties on mortgages in condemnation cases will be found in the section on eminent domain, discussing \textit{United Family Life Insurance Co. v. Dekalb County}.\footnote{7}

The constitutionality of foreclosure by sale under power continues under assault in many courts, but Georgia has held the line against all attacks. In \textit{Coffey Enterprises Realty & Development Co. v. Holmes},\footnote{8} it was claimed that the Act of 1935\footnote{9} regulating such sales violates due process in failing to provide adequate notice and opportunity to be heard, and permits a foreclosure sale without a prior judicial determination of the debtor's liability. The court again took the view that there is no meaningful governmental involvement. The power of sale is derived from the terms of the security instrument, not from the statute, which merely regulates its exercise. There is no more reason to require judicial approval of such a sale than any other private contract between consenting adults.

But the court agreed with the mortgagor that the failure of the mortgageholder to furnish a "pay-off" figure on request was equivalent to a refusal to accept a tender of payment.

Justice Gunter, concurring specially, reviewed the recent federal cases involving statutes of other states. He found that sufficient state action was involved, and ruled that

unless the owner of the property right being foreclosed has by contract waived his procedural due process rights in an intelligent, knowing and voluntary manner, divestment by foreclosure without notice and a hearing prior to the foreclosure sale is constitutionally prohibited.\footnote{10}

Current economic conditions are reflected in the numerous cases involving foreclosures. In \textit{Forester v. Young},\footnote{11} the court upheld a foreclosure as against the contention that bidding was chilled by the pendency of a suit for injunction brought by the mortgagor. The court said that the basis for former rulings in such cases has been removed with the enactment of the \textit{Lis Pendens Act of 1939} in that the mere pendency of a suit does not constitute notice to parties dealing with the property in the absence of a recorded notice on the lis pendens docket.

Contents of the published notice of sale presented the problem in

\footnotesize{96. \textit{Id.} at 373, 211 S.E.2d at 18-19.}
\footnotesize{97. 134 Ga. App. 1, 213 S.E.2d 123 (1975).}
\footnotesize{98. 233 Ga. 937, 213 S.E.2d 882 (1975).}
\footnotesize{99. \textit{GA. CODE ANN.} \&sect;67-1506 (Supp. 1974).}
\footnotesize{100. 233 Ga. at 945, 213 S.E.2d at 888.}
\footnotesize{101. 232 Ga. 365, 207 S.E.2d 9 (1974).}
\footnotesize{102. \textit{GA. CODE ANN.} \&sect;67-2801 (Rev. 1967).}
Southern Mutual Investment Corp. v. Thornton. The Georgia statute requires that a sale under power be “advertised and conducted at the time and place and in the usual manner of sheriff’s sales.” The property had been purchased from the original mortgagor, and the purchaser was not named in the advertisement as published, nor was he otherwise notified; and it was contended that the requirement in sheriff’s sales of notice naming the party in possession made it necessary to name the purchaser. The contention was rejected by the court as inapplicable to sales under power. The court’s position appears justifiable on nontechnical grounds, since it was long ago established that notice to a purchaser from the mortgagor is not constitutionally required as part of due process in Scott v. Paisley.

In Holderness v. Lands West, Inc., the mortgagor covenanted “not to demolish, destroy or remove any permanent structure now existing on the premises,” and to “keep the property and all improvements thereon in as good condition as now exists, natural wear and tear excepted.” A default was claimed on foreclosure when the mortgagor destroyed an old farmhouse on the premises. The mortgagor contended that the house was in ruins and entirely unhabitable, pointing that the release clause contained no special provision as to releasing the area on which it stood, and mortgagee had never required any fire insurance. The trial court agreed, and was affirmed. According to the court, there was no erroneous interpretation of law involved:

Here we need only ask whether “permanent structures” and “improvements” cover the building in question as a matter of law. We are not called upon to define these terms. But whatever these terms may mean, they do not as a matter of law encompass every man-made structure no matter how old or dilapidated, regardless of its condition.

The opinion falls in line with the universally accepted view that a mortgagor’s only concern with respect to the premises is that his security remain

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106. 158 Ga. 876, 124 S.E. 726 (1924), aff’d, 271 U.S. 632 (1926). The general view across the country is that subsequent grantees or junior lienors may be ignored, or that the foreclosing creditor should not be put under the burden of examining the title and inspecting the premises to determine who occupies the property and claims ownership of the equity of redemption. See Watkins v. Booth, 55 Colo. 91, 132 P. 1141 (1913); Hardwicke v. Hamilton, 121 Mo. 465, 26 S.W. 342 (1894). See also Comment, The Model Power of Sale Mortgage Foreclosure Act—An Appraisal, 27 VA. L. Rev. 926, 932 (1941). A purchaser takes subject to a recorded mortgage, whether or not he assumes it, and must see to it that payments are promptly made as due without prompting from the mortgagee. However it has been held that the published notice may properly advertise the property for sale as the property of an assuming purchaser without naming the original mortgagor. Williams v. Joel, 89 Ga. App. 329, 79 S.E.2d 401 (1953).
108. Id. at 455-56, 207 S.E.2d at 466.
The existence of default was again before the court in *Joines v. Shady Acres Trailer Court, Inc.*, involving a failure to pay taxes and maintain insurance. The security instrument required payment of these items "as agreed on," and the mortgagor contended that this language allowed him to relieve the default by reimbursing the mortgagee after the latter had paid the insurance and taxes to protect the security. The court disagreed. The failure to perform was a sufficient basis for declaring a default and accelerating the entire indebtedness. The language "as agreed on" referred to preceding covenants to insure and pay taxes, not to any outside agreements.

If a foreclosure sale without judicial process fails to bring the amount of the debt secured by the mortgage or other security instrument, no action may be taken to obtain a deficiency judgment unless there is an order of confirmation as provided in the Georgia statute. *Murray v. Hasty* dealt with the problem of which debts are barred by the sale and which are not subject to the bar. A purchaser agreed to buy for $900 cash and a $13,000 note secured by purchase money deed. However, he could not get up the $900 cash and the seller accepted his 90-day note for that amount. After an unconfirmed foreclosure sale under power in the security deed, the seller brought suit on the $900 note, which was not secured by the deed, nor mentioned therein. The court held that the statute referred only to a deficiency judgment for the debt secured by the security instrument, and the mere fact that the indebtedness in suit arises out of the same transaction does not bring it within the bar. The opinion distinguished *Langley v. Stone* in which the holder of an assumed first and also a second security deed foreclosed the first instrument by sale under power, and "[t]he two debts, secured by the same property, held by the same creditor and with the assumption of the debt, are owed by the same debtor and are inextricably intertwined [so that] a foreclosure of one affects the other."

Under *First Federal Savings & Loan Association of Atlanta v. Shepherd*, one who leases the mortgaged property after the recording of the security instrument takes with notice of its terms, and becomes a tenant at sufferance after foreclosure. A dispossessionary proceeding may be

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113. 130 Ga. App. 267, 209 S.E.2d 269.
115. Id. at 267, 209 S.E.2d at 269.
117. 130 Ga. App. 267, 209 S.E.2d 269.
118. 130 Ga. App. 267, 209 S.E.2d 269.
120. 130 Ga. App. 267, 209 S.E.2d 269.
121. 130 Ga. App. 267, 209 S.E.2d 269.
122. 130 Ga. App. 267, 209 S.E.2d 269.
123. 130 Ga. App. 267, 209 S.E.2d 269.
125. 130 Ga. App. 267, 209 S.E.2d 269.
126. 130 Ga. App. 267, 209 S.E.2d 269.
129. 130 Ga. App. 267, 209 S.E.2d 269.
130. 130 Ga. App. 267, 209 S.E.2d 269.
133. 130 Ga. App. 267, 209 S.E.2d 269.
134. 130 Ga. App. 267, 209 S.E.2d 269.
137. 130 Ga. App. 267, 209 S.E.2d 269.
139. 130 Ga. App. 267, 209 S.E.2d 269.
140. 130 Ga. App. 267, 209 S.E.2d 269.
141. 130 Ga. App. 267, 209 S.E.2d 269.
142. 130 Ga. App. 267, 209 S.E.2d 269.
143. 130 Ga. App. 267, 209 S.E.2d 269.
brought against him as a tenant holding over under the statute.\textsuperscript{119}

Subordination clauses are often inserted in mortgages and security deeds, but there has been in the past very little Georgia case law on the validity and effect of such provisions. \textit{Rivers v. Rice}\textsuperscript{120} clarified a few mooted points. A purchase money security deed required the seller to subordinate to any subsequent deed given to "any bank, savings and loan association, insurance company, or real estate investment trust" for "a construction loan and/or permanent loan . . . on such terms and in such amounts as the lender and borrower shall agree upon." Later the seller executed specific subordination agreements identifying particular lenders and amounts. The court ruled that a subordination agreement need not set forth with particularity the terms of the loan, following a similar ruling of the court of appeals.\textsuperscript{121} Moreover, the subsequent specific subordinations were amply supported by consideration in that the new construction on the property enhances the value of the security.

In \textit{Haynes v. Blackwell},\textsuperscript{122} two resident landowners faced with foreclosure by sale under a second security deed were attempting to obtain a new loan to refinance the property. A firm of accountants on being told of the situation, advanced the amount necessary to pay off the loan in question, taking from the owners an absolute warranty deed accompanied by a rental agreement and option to repurchase, both of which were recorded and occupancy continued as before. After default on the repurchase option, the accountants sold the property to a development corporation, and a bank made a loan on it. The original landowners sued in equity to set aside their deed together with those issued to the development corporation and the bank. The court, with one dissent, reversed the grant of a summary judgment against the plaintiffs, holding that a question of fact was presented whether the transaction was a loan or a sale. The opinion also states the familiar rule that possession gives constructive notice of whatever claim of title the occupant may have to the property.\textsuperscript{123}

\section*{X. Partitioning Proceedings}

In \textit{Gray v. Hall},\textsuperscript{124} the court conceded that a judgment confirming a commissioners' sale in a partitioning proceeding may be set aside in equity for fraud in certain circumstances, but where the alleged acts of fraud were or should have been known to a party prior to the confirmation hearing, it is too late to urge them in a subsequent action. It also appeared that the purchaser at the commissioners' sale was not named as a defendant in the

\begin{thebibliography}
\bibitem{119} \textit{Id.} at 693, 206 S.E.2d at 572.
\bibitem{120} 233 Ga. 819, 213 S.E.2d 678 (1975).
\bibitem{123} \textit{Id.} at 433, 207 S.E.2d at 69.
\bibitem{124} 233 Ga. 244, 210 S.E.2d 766 (1974).
\end{thebibliography}
equity suit, but the court said that the plaintiff should be given an opportunity to add parties when the court rules they are necessary.

The holder of a promissory note and security deed executed by one of several tenants in common acquires legal title to the undivided interest so conveyed, and may maintain an action for partition of the property. But not even a court of equity has power to order a division without the prescribed action by court-appointed partitioners. McCreary v. Wright held that the complaint should not have been dismissed, and the plaintiff should have been allowed to correct any defect of misjoinder of parties, since a sufficient case for relief was alleged under the new “notice pleadings.”

XI. Possession And Boundaries

In Roe v. Doe the defendant claimed title to a strip of land described as bounded by the south line of the lands of plaintiff’s predecessor, so that there could be no record encroachment or overlapping of the two chains of title. However, a survey showed that defendant’s fence and garage would necessarily encroach upon the plaintiff’s land. The court ruled that since this encroachment without color of title had continued only 17 years, it would not establish title by adverse possession. There was no evidence that the fence was erected as a boundary line so as to support an establishment of the line by acquiescence under the code.

Encroachments were also involved in Cooper v. Rosser. They were located beyond the area described in the deeds of the party claiming them, and could not ripen into title by prescription under the seven-year rule. But the court recognized that questions of title and that of boundary are sometimes impossible to separate, even where an agreed pretrial order states that there is no question of title involved in the case. The layman has never been able to see that a boundary line dispute may not involve title to land, but the distinction is thoroughly established in real property law, governing the jurisdiction of courts and liability on title policies. A boundary, like the equator, is an imaginary line, and the physical objects are merely evidence.

Brewer v. Head was also a case involving boundary rather than title.

127. Id. at 693, 212 S.E.2d at 856.
129. Id. at 598, 207 S.E.2d at 514-15.
131. “For every man’s land is in the eye of the law enclosed and set apart from his neighbor’s; and that either by a visible and material fence, as one field is divided from another by a hedge; or by an ideal invisible boundary existing only in the contemplation of law . . . .” 3 W. Blackstone, Commentaries 209 (1969).
The dividing line between the lands of the parties was a land lot line, but the parties disagreed as to its proper location on the ground. On this issue the court held that evidence of the practical location of the line by former owners was admissible, even prior to the common grantor of the two claimants.\textsuperscript{133}

\section*{XII. Real Estate Brokers}

The phrase "open listing" is a trade term which the court, in \textit{Pate v. Milford A. Scott Real Estate Co.},\textsuperscript{134} assumed to be the antonym of "exclusive listing."\textsuperscript{135} But the owner cannot undercut the broker and sell directly to a prospect obtained by the broker where he is on notice of the broker’s prior contact with such a prospect.\textsuperscript{136} In the present case the first notice given by the broker to the owner was after the latter had signed a preliminary sales contract, and a directed verdict for the owner was proper.

\section*{XIII. Restrictive Covenants}

Is the right to enforce a restrictive covenant such a vested contractual or property right in adjoining owners that a subsequent statute terminating such rights after twenty years must be construed as not applicable to pre-existing deeds? The court had said yes in two previous cases, but in \textit{House v. James},\textsuperscript{137} the whole question was re-examined. The court, without passing on the constitutional question, held that the act of 1935\textsuperscript{138} must be construed as applying to deeds dated before its passage. The effect of the act is not to invalidate restrictions purporting to run more than twenty years, but merely to limit their enforceability to the twenty year period following their date. The dissenters argue powerfully that such a construction impairs the obligation of a contract; but the majority reply that the constitutional amendment of 1928\textsuperscript{139} and the Constitution of 1945\textsuperscript{140} became an implied condition of every deed or other contract thereafter executed, and authorized zoning legislation under which land uses may be regulated.

\begin{footnotes}
\item[133] \textit{Id.} at 588, 212 S.E.2d at 774.
\item[135] Unless otherwise stipulated a listing does not prevent the owner from selling direct or through other brokers. Even an “exclusive” listing will not inhibit direct sales by the owner. Stone v. Reinhard, 124 Ga. App. 355, 183 S.E.2d 601 (1971); Hunt v. Judd, 225 III. App. 395 (1922).
\item[137] 232 Ga. 443, 207 S.E.2d 201 (1974).
\end{footnotes}
by counties and municipalities. Viewing the situation in this light, we may say that the act simply allows zoning regulations to abrogate existing deed restrictions, something which they could not do were it not for the act. The path is now clear for a constitutional onslaught on the 1935 statute, as affecting prior deeds.

XIV. Sales Contracts

Although certainty is a requirement of all contracts, it is the fate of the realty contract generally to be brought before a court of equity in actions for specific performance, where the standards are higher than those of the law courts. Many sales agreements are declared unenforceable because of indefinite terms. The most serious requirement is identification of the parties and the property to be sold. In *Plantation Land Co. v. Bradshaw* the contract description ended with the statement: “excluding however, the residential dwelling occupied by the seller together with a tract of property not exceeding 10 acres selected by seller.” It also provided for amendment of the description pursuant to a new survey within 70 days to be made and agreed upon by the parties in which the ten acre reserve shall be removed as designated by the seller “subject to the purchaser’s approval; such approval not to be unreasonably withheld.” The survey was made, and varied considerably from the description of the main tract set forth in the contract. The court applied the established rule that uncertainty of description cannot be cured by providing for a new survey, although such a survey may be effective to establish the acreage price. In the construction of deeds, the invalidity of a reservation for uncertainty leaves the main tract valid without the exception. But the rule is not applied in specific performance cases, since the court “might be guilty of erroneously decreeing what the parties never intended or contemplated.”

*Gignilliat v. Borg* involved a suit to recover earnest money paid on a sales contract which was expressly made “subject to zoning ordinances affecting” the land, alleging that the seller’s agent represented that the land was zoned for residential development when, in truth, it was zoned as F-H (flood hazard) and could not be developed. The court, with a strong dissent, took the position that zoning is a public matter equally within the knowledge of both parties. Although the opinion is supported by authorities cited from Georgia and other states, the point is a close one, and it is

141. 232 Ga. at 445, 407 S.E.2d at 202-03.
easy to find support for the contrary view.\textsuperscript{147}

In \textit{Clairmont Development Co. v. Highlands Forest, Inc.},\textsuperscript{148} the contract was made “subject to confirmation in writing from proper authorities with regard to utilities, zoning and taxes.” Suit was filed by the purchasers seeking specific performance. The vendor contended that such a stipulation makes the contract lacking in mutuality, void and unenforceable, but the court ruled that in the context of the entire contract such a provision did not prevent the grant of specific performance, although issues of fact were left for determination by a jury. The contract also provided for financing by a security deed and note, the terms of which “shall be no more burdensome to the mortgagor than the forms of same now being used by Lawyer's Title Insurance Corporation in Atlanta, Georgia.” This provision was also upheld.

“Time is of the essence” is one of those tremendous archaic phrases which are so continually reverberated through courthouses that real estate brokers print it in all their sales contract forms in the hope that it will prevent the sale from breaking down. In \textit{Belk v. Nance}\textsuperscript{149} the contract was written out in full by the parties and did not contain the magic words. It did provide for the “transaction to be closed within 90 days after acceptance by” one of the sellers. The purchaser sued for specific performance, alleging that by agreement an additional 90 days was granted for title clearances. However there was evidence that the seller did not sign the agreement for extension of time, and after six months delay refused to close. The court upheld denial of a summary judgment for the purchaser, holding that an issue of fact was presented whether the purchaser's delay was wilful, unreasonably long, or caused damage for which the seller could not be compensated. The court recognized that merely fixing a closing date in the contract does not make “time the essence,” but even so, an unreasonable delay may make it inequitable to compel the other party to close.\textsuperscript{150}


\textsuperscript{148} 232 Ga. 541, 207 S.E.2d 505 (1974).

\textsuperscript{149} 232 Ga. 264, 208 S.E.2d 449 (1974).

\textsuperscript{150} Time may be made the essence by the rise or depreciation of value of the property; by gross negligence of the party seeking enforcement; or “where one has given evidence of the abandonment of the contract by lying by to see whether it will or will not be a bargain.” \textit{Edgerton v. Peckham}, 11 Paige 352 (N.Y. Ch. 1844). In the absence of an express provision,
Surface waters, that is, unchannelled water from rains or melting snow, present a legal as well as a physical problem. The common law prohibited a landowner from throwing rocks or dirt on his neighbor's land but allowed him to cast rainwater with impunity, by pipes, ditches, gutters, or paving, so long as he committed no bodily trespass on the adjoining property. Many states, including Georgia, have adopted the so-called civil-law rule, under which the landowner may not repel the natural flow of surface waters from upper lands, but has no right to require his lower neighbor to receive anything but natural flow as it leaves his land. Artifical concentrations of surface waters may be repelled. And a landowner's liability for expulsion of surface-waters is almost universally treated, except in New Hampshire and Minnesota, as a branch of property law rather than a tort liability. In Brand v. Montega Corp. the court clarified the Georgia position. An alleged surface-water invasion may not amount to a compensable tort. Nature, gravity, velocity, and relativity all must be considered, and a jury issue is involved. The opinion quotes with approval from Restatement of Torts, that there is no liability for an unintentional and non-negligent entry on another's land. Yet a landowner seeking advice on draining, guttering, paving, and piping will receive little help from the cases in deciding what to do.

*Wright v. Lovett* was an action for damages brought by an upper riparian owner against a lower, for the erosion of his land said to be caused by a rechanneling of the stream back to its original course, undermining the plaintiff's trees and causing them to lean and fall. The court expressed doubt as to whether an upper riparian owner can sue, since erosion generally occurs downhill. Putting aside that question, the plaintiff did not show that the acts of the defendant caused the erosion on her land, and there is no question of the defendant's right to return the stream on his land to its original channel. But the trial judge erred in directing a verdict for the defendant, because there was some evidence that defendant caused the stream to overflow on plaintiff's land during the rechanneling.

\[\text{either party may declare a forfeiture after giving reasonable notice to the other. Schmidt v. Reed, 132 N.Y. 108, 30 N.E. 373 (1892); 91 C.J.S. Vendor & Purchaser §104(c) (1955).}\]
\[\text{151. Bates v. Smith, 100 Mass. 181 (1868); Bowlsby v. Spear, 31 N.J.L. 351 (1866).}\]
\[\text{152. See Walker v. New Mexico & Southern Pacific R.R., 165 U.S. 593 (1897); Mayor of Albany v. Sikes, 94 Ga. 30, 20 S.E. 257 (1894).}\]
\[\text{154. See Priest v. Boston & Maine R.R., 71 N.H. 114, 51 A. 667 (1901); Collins v. Wickland, 251 Minn. 419, 88 N.W.2d 83 (1958).}\]
\[\text{156. 233 Ga. 32, 209 S.E.2d 581 (1974).}\]
\[\text{157. RESTATEMENT OF TORTS (SECOND) §166 (1965).}\]
The passage of general zoning ordinances is a legislative act and not subject to constitutional requirements of hearing and notice, but the matter of individual rezoning and the grant of variances is quasi-judicial in nature, and carries with it the right of interested parties to be heard. In *Vaughan v. Duke* the zoning ordinance expressly required a public hearing before the adoption of any proposed zoning amendment, and the court held that such a hearing must be conducted by at least a quorum of the three county commissioners, the hearing being insufficient when attended by only two commissioners, one of whom was disqualified by interest.

In *Bowen v. Pendley*, while three applications for rezoning were pending, the objecting neighbors agreed with the applicants to withdraw their objections in reliance upon covenants establishing a buffer zone, provided any one of the three tracts was rezoned. But rezoning was denied on two of the tracts, and the favorable action on the third was rescinded two weeks after passage. The court held that the county commissioners were without authority to meet and rescind their action without the filing of a new petition followed by new notice and hearing.

*Olley Valley Estates, Inc. v. Fussell* takes the view favored by the Fifth Circuit Court of Appeals that municipal and county boards sit in a purely legislative capacity not only in zoning but in rezoning. But in any event, said the court, labeling the function as "quasi-legislative" will not terminate the inquiry into a commissioner's disqualification if he has a financial interest in the subject matter. Self-interested voting is improper in either case.

New zoning ordinances cannot be enforced against parties who have acquired vested rights in reliance upon existing land use classifications. Where the area was zoned to permit mobile home parks when purchased by the plaintiff, and during the time he expended large sums in the plan-

162. Id. at 449, 207 S.E.2d at 56.
165. 232 Ga. at 782-83, 208 S.E.2d at 804-05.
166. Voting was held valid where a board member owned property in the affected area and would profit $600,000 by the action, even though his vote was decisive. Schauer v. Miami Beach, 112 So.2d 838 (Fla. 1959); Annot., *Zoning—Inquiry Into Motive*, 71 A.L.R.2d 562 (1960). But voting was held disqualified where a councilman owned property within 200 feet of the premises. McNamara v. Saddle River, 60 N.J. Super. 367, 158 A.2d 722 (1960); likewise where a councilman had sold the premises in question to the applicant for variance. Piggott v. Hopewell, 22 N.J. Super. 106, 91 A.2d 667 (1952); and where a board member was also a member of the church applying for rezoning. Zell v. Roseland, 42 N.J. Super. 75, 125 A.2d 890 (1956). Motives of zoning officer, see Annot., *Zoning—Inquiry Into Motive*, 71 A.L.R.2d 568 (1960).
ning and construction of such a park, a subsequent resolution of the county commissioners which eliminated the mobile park classification throughout the county was held invalid as against him in Spalding County v. East Enterprises, Inc.\(^{167}\)

In Davidson v. Guhl,\(^{168}\) the landowner applied for a development permit for a so-called "private club" and "summer lodge" for himself. Later inspection disclosed that he was using the premises as a summer day camp for children enrolled in his numerous commercial day-care centers throughout the area. By way of defense he claimed to have expended $45,000 in reliance upon approval of a county planning administrator with whom he discussed his plans; he also contended the use was not commercial, nor was it specifically prohibited by the existing zoning. But the court viewed the conversation with a zoning officer as ultra vires since he had no authority to vary the ordinances; nor was there any proof that the expenditures were made before or after the alleged conversation. Although no monetary charges were made by the camp, its use in conjunction with the day-care centers was enough to place it on an equally commercial basis. The ordinances did not specifically prohibit summer camps but they did restrict the area to residential use. An interesting comparison may be made between this case and Spalding County v. East Enterprises, Inc.,\(^{169}\) where vested rights were acquired during favorable zoning conditions. The present case did not require rezoning.

Zoning in Georgia rests upon a unique foundation. In 1925 the supreme court of this state held that municipal zoning was unconstitutional as a violation of the rights of private property and equal protection of the laws.\(^{170}\) In the following year the United States Supreme Court upheld the validity of zoning ordinances in the famous case of Village of Euclid v. Ambler Realty Co.\(^{171}\) In 1928 the state constitution was amended to permit zoning in cities of 25,000 or more, extended downward in 1937 to those of 1000 or more. Under the 1945 Constitution the legislature may authorize


\(^{170}\) Smith v. City of Atlanta, 161 Ga. 769, 132 S.E. 66 (1926).

\(^{171}\) 272 U.S. 365 (1926).
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zoning by all cities and counties, but direct zoning by legislative action is still inhibited. Matthews v. Fayette County points out that the 1966 County Home Rule Amendment eliminates the necessity for any further enabling legislation in the zoning field for counties. When a property owner claims that a zoning ordinance is unreasonable or arbitrary, he must carry the burden of showing some abuse of discretion, or that the operation of the ordinance in the particular case has resulted in an unreasonable classification working unnecessary hardship. The validity of a county ordinance restricting mobile homes to areas licensed as mobile home parks was sustained, and the holding is well in line with authorities throughout the country.

XVII. LEGISLATION

Among the new acts of the General Assembly of Georgia there are several of special interest to real property attorneys. Landowners whose title is plagued with outstanding mineral rights may obtain some relief from one 1975 act which attempts to impose a bar by adverse possession of the surface. Cancellation of mortgages and security deeds is affected by another act which requires the holder to deliver the cancellation for record within 45 days or be penalized in the amount of $200 plus actual loss and attorneys' fees. Under another 1975 act when a foreclosure deed under power in a deed to secure debt is recorded the clerk must make a cross-reference on the record of the original security deed. Where microfilms are used, the notation is made on the indexes. Assumption charges in the sale of mortgaged property are regulated by another 1975 statute which amends Ga. Code Ann. chapter 67-13 (Rev. 1967) by limiting the transfer fee to 1% of the loan balance where the lender relieves the grantor from liability; or to one-half that amount (minimum $75) where the grantor is not relieved. Deeds from husband to wife in connection with divorce cases are exempted from the Deed Transfer Tax under another act.

The 1975 Georgia Condominium Act should be carefully studied by attorneys and developers working in that field. It prohibits the levy of taxes

on the condominium project as a whole once as much as one unit has been sold; makes many zoning regulations inapplicable to condominiums; regulates the effect of taking by eminent domain, operation of associations, damage or destruction to units, foreclosure of mortgages and liens, and provides for leasehold condominiums, easements, conversion of units, expansions, alterations, and relocation of boundaries. The important subjects of tort liability and insurance are also dealt with.

A new statute providing for distress warrants appears in Ga. Laws, 1975, p. 1514, replacing the old code sections held unconstitutional in Blocker v. Blackburn on the ground that under it "the owner's furniture is summarily removed from his home, because he is allegedly behind with payment of his rent, without giving him any notice or prior hearing." The new act provides for notice and hearing similar to the revised Dispossessory Proceeding Act of 1971. The tenant is allowed to remain in possession by paying into court all rent admittedly due and rent thereafter coming due, and instead of immediate seizure of personal property as under the old law, the tenant is merely prohibited from removing it from the premises. A dispossessory proceeding may also be brought simultaneously under Ga. Code Ann. §61-405(c) (Rev. 1966).

Several other acts are listed in the footnotes.

There is a recent act of Congress, known as the Real Estate Settlement Procedures Act of 1974, which is now in effect, and will govern all residential settlements or closings in which a "federally related mortgage loan" is involved. Under its terms a standard prescribed form of settlement statement has been issued by the Secretary of Housing and Urban Development and the V.A. Administrator. The act requires advance disclosure of all charges to be made in the closing statement against the home buyer or borrower, at least twelve days before the closing.

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186. 12 U.S.C.A. §2601 et seq. (Supp. 1975). The statute was effective 180 days after date of passage. Disclosure must also be made of the name and address of the present owner, when acquired, and the purchase price. The act also prohibits "kickbacks" and unearned fees.