CONTRACTS

By JOHN IZARD, JR.*

During the survey period, the appellate courts of Georgia had occasion to review more than sixty cases dealing with various phases of the law of contracts. As might be expected, the great majority of these cases merely applied settled principles. It is the purpose of this article to discuss the few novel questions decided by the courts, to mention briefly some of the settled points which continue to provide the basis of litigation, and to brief some of the more interesting factual situations brought before the courts. Attention will also be directed to statutes enacted during the last session of the legislature relating to the subject of contracts.

The defense that a contract was based on an illegal consideration was raised in four cases, two of them involving contracts with lawyers. A contingent fee contract between plaintiff and her attorney covering services to be rendered in recovering permanent alimony payments for the support and maintenance of her minor child was held to be void as contrary to public policy.[1] On the other hand, a petition based on a contract for an attorney's services in defense of a criminal charge was held sufficient against general demurrer even though many of the services allegedly performed by the attorney, such as attempts to influence public authorities, were illegal. The court held that the petition could be amended by striking therefrom the illegal services.[2]

In *Hanley v. Savannah Bank & Trust Company*,[3] a contract to make a will was before the Supreme Court for the second time. In the earlier appearance of the case,[4] the court held that an agreement by a mother to surrender possession of her infant child in order to receive a benefit for herself and her other children was void as being against public policy. In the second appearance of the case, plaintiff had amended her petition so as to allege various personal services rendered to the deceased as additional consideration for the contract. The court held that the consideration being illegal and void in part as against public policy, the contract in its entirety was unenforceable.

The Supreme Court, in another case, noted by way of dictum that a truck lease intended to circumvent the laws regulating interstate commerce would be for an unlawful purpose and unenforceable by either party thereto.[5]

Dealing further with the subject of consideration, it was held

*Member of the firm of Spalding, Sibley, Troutman & Kelley, Atlanta; B.S., 1944, Yale University; LL.B., 1949 University of Virginia; Member Atlanta, Georgia, and American Bar Associations.

1. Thomas v. Holt, 209 Ga. 133, 70 S.E.2d 595 (1952).
2. Iteld v. Karp, 85 Ga. App. 835, 70 S.E.2d 378 (1952).
3. 208 Ga. 585, 68 S.E.2d 581 (1952).
4. Savannah Bank & Trust Co. v. Hanley, 208 Ga. 34, 65 S.E.2d 26 (1951).
5. See Bowman v. Fuller, 84 Ga. App. 421, 66 S.E.2d 249, 254 (1951). An agreement not to prosecute as an illegal consideration, see Simmons v. Noble, 84 Ga. App. 255, 65 S.E.2d 834 (1951).

that a claim subject to a bona fide dispute is a valid consideration for a note, even though it later appeared that the contentions of one of the parties were without foundation. Accordingly where an agent informed a borrower that he expected a commission for negotiating a loan and was in a position to block the loan if the commission was not paid, notes given as payment for such services were valid even though no services had in fact been rendered.[6] Under the same principle, the actual payment of a fixed sum in settlement of disputed alimony payments was held to be a valid accord and satisfaction.[7]

In *Dumas v. Dumas*[8] the grantor in a deed, which recited as consideration "One Dollar and furnishing the grantor with food" and various other expenses, sued the grantee for failing to provide the foregoing items. The court held that the agreement to support constituted a valid consideration, and that acceptance of the deed created a binding contract.

A large number of cases involved suits for specific performance. Relief was refused in a surprising number of these cases on the ground that the descriptions contained in the contracts were too vague to be enforced.

Thus an exchange of telegrams referring to the "Lumpkin Place" was found to be insufficient.[9] Similarly, a description excepting "three acres more or less to be set aside as a home place containing the Wilkinson home" was found to be deficient.[10] Where a portion of a tract of land was to be conveyed, failure to locate exactly one boundary line was fatal.[11] On like principles, an agreement by an aunt to educate her niece provided the child be named after her was too vague to permit of specific performance since the term "education" is susceptible of many meanings and certainly impossible of exact determination.[12]

Specific performance was denied in a number of other cases where petitions lacked sufficient averments that contracts were fair and equitable. The court adhered repeatedly to its previous holdings that specific performance would not be granted as a matter of absolute right but should be controlled by the exercise of sound discretion. Therefore, the reasonableness of the contract must be established.[13]

In another case, the Supreme Court held that a written contract for the sale of land which did not contain the name of the purchaser was invalid. The contract relied upon was an exchange of telegrams between a seller and his agent which stated all the terms of the contract but failed to disclose the name of the purchaser. Although the offer was accepted by the seller, the absence of the purchaser's name was fatal.[14] In another case

6. Littlegreen v. Gardner, 208 Ga. 523, 67 S.E.2d 713 (1951).
7. Nauman v. McCoy, 84 Ga. App. 131, 65 S.E.2d 853 (1951).
8. 84 Ga. App. 265, 66 S.E.2d 129 (1951).
9. Ogletree v. Ingram & LeGrand Lumber Co., 208 Ga. 855, 69 S.E.2d 723 (1952).
10. Smith v. Wilkinson, 208 Ga. 489, 67 S.E.2d 698 (1951).
11. Harris v. Abney, 208 Ga. 518, 67 S.E.2d 724 (1951).
12. First National Bank & Trust Co. v. Falligant, 208 Ga. 479, 67 S.E.2d 473 (1951).
13. Thomas v. Holt, 209 Ga. 133, 70 S.E.2d 595 (1952); Bailey v. Bell, 208 Ga. 715, 69 S.E.2d 272 (1952); Almand v. Williams, 208 Ga. 703, 69 S.E.2d 271 (1952); Harris v. Abney, 208 Ga. 518, 67 S.E.2d 724 (1951).
14. Ogletree v. Ingram & LeGrand Lumber Co., *supra* n.9. Also see Cashin v. Markwalter, 208 Ga. 444, 67 S.E.2d 226 (1951).

the Court of Appeals held that a seller who had fully performed the terms of a contract could recover even though he had not executed the contract.[15] The general subject of mutuality was also considered by the court in *Wehunt v. Pritchett*,[16] where a contract for the sale of land was conditioned upon the buyer's consummation of the sale of his old residence pursuant to a contract already negotiated. Since there was no allegation that this condition had been performed, the contract lacked mutuality, and the court held that a general demurrer should have been sustained.

The Supreme Court continued to apply the strict rule that a tender is an absolute requisite to a suit for specific performance, and that a mere refusal to carry out the contract will not dispense with a proper tender.[17] The court pointed out, however, that a tender will not be required where the party to whom the offer is made states that the tender would be refused if made. Under this rule defendant's statement that "he would not sell at the price stipulated in said contract" excused a tender.[18] Further, it was held that, where payment is refused when legally tendered, such tender satisfies the statutory requirement of payment.[19]

The necessity of a continuing tender in order to stop the running of interest was reaffirmed by the court along with the necessity of payment of such amount into the registry of the court upon filing suit.[20]

An interesting question concerning the Statute of Frauds to be applied to a contract executed in Georgia but to be performed outside the state was settled by the Georgia Supreme Court in *Fimian v. Guy F. Atkinson Co.*[21] While in Georgia, plaintiff entered into an oral contract of employment for a period of three to five years to be performed in the State of Washington. Suit was instituted in Georgia for an alleged breach of the contract, whereupon the defendant interposed a plea of the Washington Statute of Frauds. Plaintiff's demurrer to this plea was overruled, which ruling was reversed by a four-to-two decision of the Court of Appeals. On certiorari, the Supreme Court held that the Statute of Frauds relates exclusively to the remedy and is controlled by the *lex fori*. Accordingly plaintiff's demurrer should have been sustained, and plaintiff was entitled to the benefit of the Georgia rule to the effect that such part performance as would render it a fraud of the party refusing to comply will remove a contract from the operation of the statute.[22]

Dealing further with the Statute of Frauds, the court reaffirmed that an option to purchase land must be in writing[23] and that partial performance of a contract for the sale of land accompanied by possession is sufficient part performance to take the contract out of the statute.[24]

15. Jones v. Logan Co., 85 Ga. App. 256, 68 S.E.2d 718 (1952).
16. 208 Ga. 441, 67 S.E.2d 233 (1951).
17. Blake v. Williams, 208 Ga. 353, 66 S.E.2d 829 (1951).
18. Nickelson v. Owenby, 208 Ga. 352, 66 S.E.2d 828 (1951).
19. Anderson v. Barron, 208 Ga. 785, 69 S.E.2d 874 (1952).
20. Bank of LaFayette v. Giles, 208 Ga. 674, 69 S.E.2d 78 (1952).
21. 209 Ga. 113, 70 S.E.2d 762 (1952).
22. GA. CODE § 20-402 (1933).
23. Alderman v. Crenshaw, 84 Ga. App. 344, 66 S.E.2d 265 (1951).
24. Harris v. Underwood, 208 Ga. 247, 66 S.E.2d 332 (1951).

In *Arnold v. Johnston*[25] plaintiff sued on a note given for a pre-existent debt which was barred by the statute of limitations. On the back of the note was a notation that "it is agreed, that in no event will it (the note) be sued." The court held that plaintiff, having accepted the note, was bound by its conditions, and further that plaintiff was not entitled to recover since a note containing a covenant not to sue is not such a new promise as will extend a debt which is barred by the statute of limitations.[26]

The Court of Appeals restated the four essential elements of a novation as (a) a previous valid obligation, (b) the agreement of all the parties to the new contract, (c) the extinguishment of the old contract, and (d) the validity of the new one. It appeared from the petition, however, that the plaintiff had failed to comply with the contract allegedly constituting a novation, and therefore, the court found it necessary to decide whether or not a novation had been effected.[27]

In another case the Court of Appeals held that a contract was extinguished where a new contract between the plaintiff and a party other than defendant expressly superseded the original contract.[28] This was true particularly where the new party was a corporation organized by the defendant who executed the contract on behalf of the corporation.

In *McKee v. Wheelus*,[29] plaintiff entered into a building contract with defendant for the construction of certain cabinets and other improvements to his dining room. Plaintiff's wife paid for the work in full upon completion thereof. The next day a number of defects were found in the work. Defendant refused to correct any of the defects, and plaintiff sued on the theory that the work was totally useless and had to be done over completely. The court held that payment did not as a matter of law constitute acceptance amounting to a waiver of undiscovered defects in the work and that plaintiff was entitled to recover the difference between the value of the work as done, and the value of the work as it should have been done.

Likewise on the question of waiver, it was held that, where a contract of employment contains a provision that the employee is to furnish the employer a bond, the mere fact that the employee is permitted to enter upon his duties without giving a bond does not of itself constitute a waiver of the bond provision of the contract.[30]

In *Thomas v. Eason*[31] defendant sought to resist a suit for specific performance on the ground that the written contract did not properly state his agreement with plaintiff, which fact was unknown to defendant because on the day that the contract was executed, he had left his glasses at home and been unable to read the terms of the contract. He further alleged that plaintiff, to his knowledge, was an "ordained Minister of the Gospel, who

25. 84 Ga. App. 138, 65 S.E.2d 707 (1951).
26. GA. CODE § 3-904 (1933).
27. Miller-Terrell, Inc. v. Strother, 85 Ga. App. 763, 70 S.E.2d 160 (1952).
28. Ajouelo v. Wilkerson, 85 Ga. App. 397, 69 S.E.2d 375 (1952).
29. 85 Ga. App. 525, 69 S.E.2d 788 (1952).
30. Holmes Mfg. Co. v. Fraker, 85 Ga. App. 83, 68 S.E.2d 172 (1951).
31. 208 Ga. 822, 69 S.E.2d 729 (1952).

claimed to have been called of God to preach redemption to a lost world," and so, defendant placed the utmost confidence in his honesty and integrity. The court held that such facts did not establish a confidential relationship between defendant and plaintiff; that a party to a contract who can read must show a legal excuse for not doing so; and that fraud which would relieve a party who can read must be such as prevents him from reading. Under this rule, without any showing of emergency, the absence of plaintiff's eyeglasses was found to be no excuse for his failure to read the contract.

In *Jackson v. Brown*[32] plaintiff alleged that he was an ignorant colored man, and that defendants had induced and forced him to execute a quit-claim deed to his property by fraudulent allegations that defendants were the true owners of the property, and that unless he executed such a quit-claim, they would have him summarily dispossessed; whereas if he executed the deed, they would permit him to remain in possession for fifteen years. He was further fraudulently influenced by defendants' promise to deed the property back to him should there prove to be any error concerning the condition of the title. The court found no confidential relationship between the parties or any artifice practiced by defendants to prevent plaintiff from determining the true facts. The court refused, therefore, to relieve plaintiff from his own negligence, noting in reference to the promise to reconvey, that fraud cannot be predicated upon statements which are promissory in their nature as to future acts.

Based on the same reasoning, it was held that misrepresentations by defendant concerning rights which he held under a certain timber lease would not, without more, excuse plaintiff from inspecting said lease and determining the truth of the representations.[33]

In *Mann v. Moseley*[34] the Supreme Court upheld the validity of a contract to make a will based on an agreement to support the decedent for the remainder of his life, provided same be proved beyond a reasonable doubt, and that the contract be fair and just. Since the record disclosed such a showing and proof of full performance by the plaintiff, a judgment decreeing specific performance was affirmed.

In another case plaintiff sued on *quantum meruit* for services rendered to a decedent during his lifetime without any allegation of an express contract.[35] The court recognized the rule that when services are rendered and voluntarily accepted, the law will imply a promise by the recipient of such services to pay for them. Since there was no showing of a close family relationship between the parties to rebut this presumption, a verdict for the plaintiff was affirmed. The subject of recovery on *quantum meruit* was also discussed by the Court of Appeals in *Abernathy v. Putnam*.[36] Plaintiff brought suit on an express contract to dig a well. The jury returned a verdict for approximately one-tenth of the contract price,

32. 209 Ga. 78, 70 S.E.2d 756 (1952).
33. Skinner v. Melton, 84 Ga. App. 98, 65 S.E.2d 693 (1951).
34. 208 Ga. 420, 67 S.E.2d 128 (1951).
35. Guyton v. Young, 84 Ga. App. 155, 65 S.E.2d 858 (1951).
36. 85 Ga. App. 644, 69 S.E.2d 896 (1952).

although there was no plea of partial failure of consideration. The court pointed out that a plaintiff who sues on an express contract cannot recover on a *quantum meruit,* but then affirmed the judgment of the trial court. The distinction made by the court is not entirely clear, but is apparently based to some extent on the proposition that plaintiff's argument, in effect, complains of a non-prejudicial error, that is, plaintiff argued that the jury should have returned a verdict for defendant, and could not complain that a small verdict was returned in his favor.

One case appearing before the Court of Appeals dealt with the subject of implied warranties.[37] There the plaintiff brought suit to recover the price of a cow which died soon after plaintiff purchased it. The court held that there is no implied warranty against patent defects or latent defects which may be discovered by the exercise of ordinary care, and that acceptance of property with full knowledge of its defective condition constitutes a waiver of the implied warranty that the property is in merchantable condition and suited for the purpose intended. There was evidence that the cow was sick at the time purchased, and that plaintiff either knew of the defects or by the exercise of ordinary care would have discovered such defects prior to acceptance of the cow, and accordingly, judgment for the defendant was affirmed.

Applying the well settled rule that protection of good will purchased, if reasonably limited as to time and territory, is enforceable, the court found that five years as to time, and the limits of the City of Blue Ridge as to area, were reasonable in connection with the sale of a service station.[38]

In the only case dealing with capacity to contract, it was held that even though a person has been adjudicated insane, it may be shown that he has sufficient capacity to enter into a contract until such time as a guardian has been appointed.[39] The adjudication merely raises a presumption of the continuance of insanity, and places the burden of proving sanity on one contracting with such person.

No laws were passed by the 1952 General Assembly which change general principles of contracts. Two Acts should, however, be mentioned in this section of the survey. One provides a new method of giving notice of assignments of accounts receivable.[40] Accounts receivable are defined as including "A right to sums due or to become due on open accounts or contracts" with certain enumerated exceptions.[41] The Act sets out a form of notice to be executed by the assignor and recorded in the same manner as mortages on personal property,[42] and provides that recordation in that manner shall be notice to everyone except the account debtor during the four-year effective period of the notice.[43] The old provision for notice by

37. Smith v. Northeast Georgia Fair Ass'n., 85 Ga. App. 32, 67 S.E.2d 836 (1951).
38. Pinson v. Moffat, 209 Ga. 7, 70 S.E.2d 359 (1952).
39. Summer v. Boyd, 208 Ga. 207, 66 S.E.2d 51 (1951).
40. Ga. Laws 1952, p. 225.
41. *Id.* at p. 226, § 1.
42. *Id.* at p. 226, § 2.
43. *Id.* at p. 227, § 3.

book marking[44] is expressly repealed,[45] but otherwise this method of giving notice is in addition to other methods provided by law.[46]

The other Act amended the Milk Control Law.[47] It sets out in detail the requirements of contracts relating to the purchase and sale of milk subject to regulation under the Act.[48] The details of these provisions are not of sufficient general interest to warrant inclusion in this study, but should be inspected with respect to all contracts for the purchase or sale of milk, as the law provides that a failure to comply with such regulations renders the entire contract null and void.[49]

During the survey period no cases on contracts were overruled nor were any major changes made by the General Assembly. The courts applied a number of settled principles to new factual situations and in some instances clarified previous holdings. All in all, however, there were few significant departures from previous pronouncements of the law.

44. GA. CODE § 85-1803 (1933).
45. Ga. Laws 1952, p. 229, § 9.
46. *Id.* at p. 228, § 6.
47. Ga. Laws 1952, p. 55.
48. *Id.* at p. 59, § 11.
49. *Ibid.*