CASE NOTES

CONSTITUTIONAL LAW—RESTRICTIVE COVENANTS—DAMAGES FOR BREACH OF

Plaintiff sued respondent at law for damages for breach of a restrictive covenant against sale of realty to non-Caucasians. Plaintiff contends that by the terms of the agreement, the respondent bound himself not to convey the realty without incorporating the restrictions in the deed and that by failing to do so, the respondent is answerable in damages. The trial court of California sustained defendant's demurrer and the appellate court affirmed. On certiorari to the Supreme Court of the United States, *Held*: Affirmed. Award of damages by the state court would constitute state action which would deprive non-Caucasians of equal protection of laws in violation of the Fourteenth Amendment to the Federal Constitution. U. S. CONST. AMEND. XIV. *Dissent*: A covenant, valid on its face, can be enforced between the parties, unless forbidden by state law, without running afoul of any constitutional doctrine. *Barrows v. Jackson*, 345 U.S. ......, 73 S.Ct. 1031, 97 L.Ed. 961 (1953).

The prohibitions of the Fourteenth Amendment have reference to state action exclusively and not to any action of private individuals. *Virginia v. Rives*, 100 U.S. 313, 25 L.Ed. 667 (1879). None of the constitutional amendments prohibit private individuals from contracting to control their own property by the use of restrictive covenants. *Corrigan v. Buckley*, 271 U.S. 323, 46 S.Ct. 521, 70 L.Ed. 969 (1926). But action by a state court enforcing a restrictive covenant by injunction constitutes state action denying to non-Caucasians, against whom the covenant is sought to be enforced, equal protection of the laws in violation of the Fourteenth Amendment. *Shelley v. Kraemer*, 334 U.S. 1, 68 S.Ct. 836, 92 L.Ed. 1161 (1948). The legal consequences of nonfulfillment of a covenant is that the party violating the covenant must respond in damages. *In re Gaffer's Estate*, 254 App. Div. 448, 5 N.Y.S.2d 671 (1938). Failure to insert restrictive covenant in deeds to all subdivided lots according to agreement gives rise to a cause of action for damages to the other lot owners. *Eason v. Buffaloe*, 198 N.C. 520, 152 S.E. 496 (1930). Restrictive covenants as to non-Caucasians are not legal nullities, *Shelley v. Kraemer*, *supra*, nor are they violative of any right protected by the Fourteenth Amendment. *Chandler v. Ziegler*, 88 Colo. 1, 291 P. 822 (1930). The fact that another remedy, specific performance, is ruled out because of constitutional reasons, does not necessarily affect the remedy by way of damages for breach of restrictive covenants. *Weiss v. Leanon*, 359 Mo. 1054, 225 S.W.2d 127 (1949). A restrictive covenant not to sell realty to members of the colored race cannot be enforced by judicial action of any kind. *Roberts v. Curtis*, 93 F.Supp. 604 (D.C. 1950). A party to a restrictive covenant acts at his peril of being required to pay damages for the breach thereof *Correll v. Earley*, 205 Okla. 366, 237 P.2d 1017 (1951). *Contra*: *Phillips v. Naff*, 332 Mich. 389, 52 N.W.2d 158 (1952) (claim for damages dismissed).

There is no question as to the right of a person to contract as he desires so long as it is not in contravention of law. Contracts voluntarily entered into for the economic protection of groups are quite common. The late Chief Justice Vinson, who wrote the majority opinion in the *Shelley* case, *supra*, dissents in the noted case, pointing out that the *Shelley* case did not strike down restrictive covenants but denied judicial enforcement of them against non-Caucasians. There is no reason why damages should not be recovered for the breach of a contract between the parties. To hold otherwise would open the door to continuous frauds. A person could enter a contract, receive its benefits, and then refuse further compliance; the aggrieved party having no opportunity for redress. While restrictive covenants are not favored by the law, until they are declared invalid, the courts should be open for relief. It is submitted that the

court in the noted case should have limited the rule of the *Shelley* case to instances of injunctive relief. The result reached in the *instant* case has placed a barrier around the right to contract freely with any assurance of fulfillment, thus adding confusion to an already confused issue.

C. E. ROZIER

CONSTITUTIONAL LAW—SELECTION OF JURIES—DISCRIMINATION

Negro petitioner was tried for rape in the Superior Court of Fulton County, Georgia; convicted and sentenced to death. The jury commissioner used white tickets for white jurors and yellow tickets for colored jurors; a procedure not sanctioned by statute. GA. CODE ANN. § 59-106 (1933). Of the sixty jurors selected, not one was colored, notwithstanding that five per cent of the eligible jurors were colored. On appeal to the Supreme Court of Georgia, petitioner contended that the jury which had convicted him had been selected by means repugnant to the equal protection clause of the Fourteenth Amendment of the Constitution of the United States. U. S. CONST. AMEND. XIV. The court affirmed, stating that petitioner had to prove some specific act of discrimination by some officer involved. On certiorari to the United States Supreme Court, *Held*: Reversed. When a prima facie case of discrimination is presented, the burden falls forthwith upon the state to overcome it, and failure to do so requires reversal of the conviction. *Avery v. State of Georgia*, 345 U.S. 559, 73 S.Ct. 872, 97 L.Ed. 798 (1953).

Exclusion of Negroes from grand or petit jury service on account of race denies a Negro defendant the equal protection of the law as required by the Fourteenth Amendment. *Strauder v. State of West Virginia*, 100 U.S. 203, 25 L.Ed. 664 (1880). Limitation of the number of Negroes on grand jury in approximate proportion to number of Negroes eligible for grand jury service in the county constitutes a discrimination in violation of constitutional rights of a Negro defendant. *Cassell v. Texas*, 339 U.S. 282, 70 S.Ct. 629, 94 L.Ed. 839 (1950). Where one-third of the eligible jurors were Negroes but no Negro had served on a jury for thirty years or more, indictments and verdicts returned against Negroes cannot stand. *Patton v. State of Mississippi*, 332 U.S. 463, 68 S.Ct. 184, 92 L.Ed. 76 (1947). Where no Negro has been called for service on any jury for a generation or longer, a prima facie case of denial of equal protection of the laws is presented and must be overcome by the state to halt reversal. *Norris v. State of Alabama*, 294 U.S. 587, 55 S.Ct. 579, 79 L.Ed. 1074 (1935). When no Negroes were on the jury list, and none had served for thirty or forty years, and no showing was made by the state to justify such exclusion, the denial of the rights of the Negro defendant under the equal protection clause is apparent. *Crumb v. State*, 205 Ga. 547, 54 S.E.2d 639 (1949). Sixteen years without a Negro being called for jury duty because the commissioner did not know any who were qualified presents a prima facie case of denial of the guarantee of equal protection of the laws. *Hill v. State of Texas*, 316 U.S. 400, 62 S.Ct. 1159, 86 L.Ed. 1559 (1942). Whenever by any action of a state, whether through its legislature, its courts, or its executive or administrative officers, all persons of the African race are excluded from serving as grand jurors in the criminal prosecution of a person of the African race, the equal protection of the laws is denied him. *Carter v. Texas*, 177 U.S. 442, 20 S.Ct. 687, 44 L.Ed., 839 (1900).

The decision in the noted case is obviously in accord with the settled law regarding discrimination against Negroes in criminal cases. The Georgia Supreme Court, prior to this case, accepted the construction of the equal protection clause of the constitution by the Federal Supreme Court as binding authority (*Crumb v. State, supra*) and the insistence that proof of a specific act of discrimination is necessary to vacate the verdict is not in harmony with such interpretation. Many attempts by the southern

states have been made to defeat the civil rights of Negroes but they have been consistently held as being in conflict with the Fourteenth Amendment. This case is another step in the eradication of discrimination which is and will be the trend of the times.

R. M. STONE

CONTRACTS—CONSIDERATION—TRADE SECRETS AS CONSIDERATION

The plaintiff and two others formed a partnership principally to manufacture an item of infant's clothing known as the "Handi-Panti," which they had designed. After producing the garment for some time, selling most of their output to the defendant, the plaintiff's partnership and the defendant entered into a contract which provided that the defendant would take over the manufacture of the "Handi-Panti" and pay the plaintiff's partnership a percentage of the manufacturing cost. The plaintiff's partnership then ceased to manufacture the "Handi-Panti." After operating as agreed for some time, the defendant repudiated the contract, contending that the rights to a non-patented product on the open market did not constitute good consideration, and that, therefore, the contract was void. Plaintiff brought suit for an injunction and accounting. The lower court overruled general demurrers to the petition, and the defendant excepted. *Held*: Affirmed. The property interest of an inventor in his non-patented product may be sufficient consideration for a valid contract. *Alexis, Inc. v. Werbell,* 209 Ga. 665, 75 S.E.2d 168 (1953).

The consideration for a contract is required only to be something of real value in the eyes of the law. *Newton v. Roberts,* 36 Ga. App. 156, 136 S.E. 98 (1926). Consideration need not be a positive act, but may be a forbearance. *Barrow County Cotton Mills v. Powell,* 45 Ga. App. 823, 165 S.E. 882 (1932). Going out of business may be valid consideration. *Camden v. Dewing,* 47 W.Va. 310, 34 S.E. 911, 81 Am. St. Rep. 797 (1899). A trade secret may be defined as "any formula, pattern, device, or compilation of information which is used in one's business and which gives him an opportunity to obtain an advantage over competitors who do not know or use it." RESTATEMENT, TORTS § 757 Comment (b) (1939). The inventor has a limited property right in such a secret which equity will protect. *Stewart v. Hook,* 118 Ga. 445, 45 S.E. 369, 63 L.R.A. 255 (1903). This right was recognized at common law independent of copyright or letters patent, *Tabor v. Hoffman,* 118 N.Y. 30, 23 N.E. 12, Am. St. Rep. 740 (1889); exists even if the secret is not patentable, *Walker v. Berger,* 148 Ga. 326, 96 S.E. 627 (1918); and may be bought and sold as any other property. *Stewart v. Hook, supra.* One who discovers a trade secret by fraud, artifice, or trust may not use his knowledge against the will of the inventor or in violation of trust. *Morrison v. Moat,* 9 Hare 241, 68 Eng. Rep. 492 (1851). And one who acquires a trade secret through contract may not use it in violation of the contract. *Peabody v. Norfolk,* 98 Mass. 452, 96 Am. Dec. 664 (1867). Nor does subsequent disclosure of a trade secret release employees from a prior contractual obligation to secrecy. *Julius Hyman and Company v. Velsical Corp.,* 123 Colo. 563, 233 P.2d 977 (1951). While fraudulent obtaining of a trade secret does not prohibit its use after the secret has been made public by the inventor, *Conmar Products Corp. v. Universal Slide Fastner Co., Inc.,* 172 F.2d 150 (C.C.A. 2d 1949); an injunction restraining one who has obtained a trade secret in confidence is not subject to dissolution because, due to prior disclosure by the enjoined, the matter becomes public knowledge. *Shellmar Products Co. v. Allen-Qualley Co.,* 87 F.2d 104 (C.C.A. 7th 1936). Although the fact that one person has legitimately discovered a trade secret does not permit another who has had confidential disclosure of the secret to violate his confidence, *Sandlin v. Johnson,* 141 F.2d 660 (C.C.A. 8th 1944), the majority of cases hold that he who gains knowledge of trade

secrets honestly and without obligation may use them freely—without the consent and against the will of the owner, *Chadwick v. Covell*, 151 Mass. 190, 23 N.E. 1068, 6 L.R.A. 839 (1890); though there are exceptions. *International News Service v. Associated Press*, 248 U.S. 215, 39 S.Ct. 68, 63 L.Ed. 211 (1918). In any event, the right of the inventor is a limited one and ordinarily ceases to exist when the secret is made public knowledge. *Tabor v. Hoffman, supra.*

Once a product has reached the open market and its secrets are made accessible to the world at large, it is difficult to see what property interest would remain in the inventor sufficient to be good consideration for a contract. One who has prior knowledge through fraud may now use it with impunity; the man on the street can evaluate the one-time secrets and use them as he wills. And yet he who once contracted honorably for the secret must either hold by his contract or be barred from that which is free to the world at large without contract. Giving knowledge of a trade secret before publication may be sufficient consideration even for a contract which extends beyond publication, but the same information would be no consideration at all if given after it was already general knowledge. Yet in result the decision is good; and there is consideration to support it. The plaintiff agreed to give up his business. This is a forbearance which the law considers good consideration. Thus, while plaintiff's design was no longer protected, the contract will not fail for want of consideration.

B. CARL BUICE

TORTS—RESPONDEAT SUPERIOR—ACTION BY WIFE AGAINST HUSBAND'S EMPLOYER FOR INJURIES SUSTAINED THROUGH NEGLIGENCE OF HUSBAND

Plaintiff brought action for injuries received while riding in an automobile driven by her husband as agent of the defendant. She alleged the negligence of her husband, the agent, and sought to recover from his employer, the defendant, under the doctrine of respondeat superior. The defendant's general demurrer was overruled and he excepted. *Held*: Affirmed. The marital immunity of a husband from suit for tort by his wife does not preclude her from recovering from her husband's employer under the doctrine of respondeat superior. *Henson v. Garnto*, 88 Ga. App. 320, 76 S.E.2d 636 (1953).

The common-law rule that neither a husband nor a wife could maintain a civil action against the other based on tort is applicable in Georgia. *Holman v. Holman*, 73 Ga. App. 205, 35 S.E.2d 923 (1945). A trespass, negligent or wilful, upon the person of a wife does not cease to be an unlawful act though the law exempts the husband from liability for the damage, *Schubert v. August Schubert Wagon Co.*, 249 N.Y. 253, 164 N.E. 42 (1928); therefore, this marital immunity does not mean that there is no right of action, but merely denies the remedy against the spouse. *Tallios v. Tallios*, 345 Ill. App. 387, 103 N.E.2d 507 (1952). *Contra*: *Raines v. Mercer*, 165 Tenn. 415, 55 S.W.2d 263 (1932). Under the doctrine of respondeat superior, an employer is liable for the torts committed by his employee while acting within the scope of his employment. *Brown v. Union Bus Co.*, 61 Ga. App. 496, 6 S.E.2d 388 (1939). This doctrine is dictated by public policy, *Chase v. New Haven Waste Material Corp.*, 111 Conn. 377, 150 A. 107 (1930), and its true basis is liability and not culpability. *Riegger v. Bruton Brewing Co.*, 178 Md. 518, 16 A.2d 99 (1940). Hence, an employer who had no direct relation to the wrong or injury, but is liable only because of the doctrine of respondeat superior, does not occupy the position of a wrongdoer, *Raines v. Mercer, supra*, and exoneration of the employee is a complete bar to an action against the employer. *Meece v. Holland Furnace Co.*, 269 Ill. App. 164 (1933). It is usually said that the

liability of the employer for the acts of his employee in the course of his employment is secondary and derivative, *Stulginsky v. Cizauskas*, 125 Conn. 293, 5 A.2d 10 (1939), while the liability of the employee is primary. *Shell Petroleum Corp. v. Hostetter*, 348 Mo. 841, 156 S.W.2d 673 (1941). Of the statement that the employer's liability is derivative, Cardozo, C.J., said, it "means this and nothing more: That at times the fault of the actor will fix the quality of the act." *Schubert v. August Schubert Wagon Co., supra.* In cases where it is sought to attach liability to the employer under the doctrine of respondeat superior even though the employee has a personal immunity from suit, it is frequently said that the liability of each, the employer and employee, exists without relation to that of the other, and in no sense is the employer's liability a derivative one. *Chase v. New Haven Waste Material Corp., supra. Contra*: *Maine v. James Maine & Sons Co.*, 198 Iowa 1278, 201 N.W. 20 (1924). At least one case has held that the liability of each, the employer and the employee, is so independent of the other that a joint action against the negligent employee and his employer could not be maintained. *Metropolitan Life Ins. Co. v. Huff*, 48 Ohio App. 412, 194 N.E. 429 (1933). *Contra*: *Moody v. Hardeman*, 44 Ga. App. 676, 162 S.E. 653 (1932). Where a third party has recovered of the employer for the negligence of his employee, the employee is liable over to his employer. *Georgia S. & F. Ry. Co. v. Jossey*, 105 Ga. 271, 31 S.E. 179 (1898). The basis of the employer's action against the employee is breach of duty and not subrogation to a cause of action once belonging to the injured third party. *Hudson v. Gas Consumer's Association*, 123 N.J.L. 252, 8 A.2d 337 (1939). The question of contribution by the employee to the employer is a question collateral to the issue of recovery by the injured third party of the employer and the court is not authorized to anticipate or assume that the employer could and would sue for contribution. *Broadus v. Wilkinson*, 281 Ky. 601, 136 S.W.2d 1052 (1940).

The doctrine of the immunity of one spouse from a tort action by the other and the doctrine of respondeat superior are both dictated by public policy; the former to maitnain peace and harmony in the home, and the latter to insure that employers will use care in delegating and supervising the duties of their employees. Both doctrines are built on fictions; one on the unity of husband and wife, and the other on the unity of employer and employee with regard to acts of the employee done in the scope of his employment. Both supporting fictions are much less real today than in the day of their conception; one because of the greatly increased independence of women, the other because of the greatly decreased contact between employer and employee. It is unlikely that either doctrine, if unknown, would develop in our society today. Both doctrines are closely adhered to but quickly excite a sense of injustice when overextended by the courts. The decision in the instant case brings these two equal doctrines into conflict by extending respondeat superior yet upholding the spouse's immunity. It allows an indirect action where a direct action is prohibited. It opens a new and lucrative field for fraud and collusion; and creates new inconsistencies in the law, *e.g.*, for every right there shall be a remedy, GA. CODE ANN. § 3-105. Where such recovery is allowed and the employer recovers over from the husband, the family wealth remains the same except as decreased by the cost of litigation. If the husband is judgment proof, there is a strong probability that he, as the wrongdoer, will be allowed to profit from his own wrong. This would be particularly true in community property states. The question is one of first impression in Georgia. The decisions from other states which have considered the issue since it was first raised in 1924 present a distinct split of authority. But the decision of the Georgia Court of Appeals is in line with the weight of authority, in quantity and possibly in quality. However, it is submitted that, without the necessity of following precedent, "this new field of tort actions, directly or indirectly between the spouses, should be opened up only by express and unequivocal legislative enactment." *Sacknoff v. Sacknoff*, 131 Me. 280, 161 A. 669 (1932).

GUY E. MASTIN