CONTRACTS

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Probably the most interesting contract case decided during the survey period is *Pethel v. Waters*.[1] This was an action involving a lease with an option to purchase. The agreement provided that the plaintiff could exercise the option by the payment of the purchase price during the lease period. The plaintiff relied on the defendant's statements that the sale could be consummated at the end or after the expiration of the lease period. The Supreme Court, per Quillian, J., affirmed a judgment for the plaintiff. Duckworth, C. J., dissented without opinion.

The result reached by the court is sound, but the reasoning of the opinion is troublesome. In fact, some of the language defies understanding. The decision was based on waiver and estoppel as is illustrated by the following quotation:

> However, the present suit is not brought to enforce such a contract or any contract. The plaintiff's cause as set out in the petition rests upon his right to exercise the option after its expiration date because by the defendant's conduct discussed in the first division of this opinion he waived and was estopped to contend the tender of the purchase money for the farm described in the option came too late when made within a reasonable time after the expiration of the option and that upon such tender being made the plaintiff was not entitled to have the sale of the farm consummated in conformity with the other terms of the option.[2]

The decision can be supported on the theory of waiver. A condition to the plaintiff's right to have a deed to the property was payment of the purchase price by a certain date. Ordinarily, failure of this condition would give the defendant a defense to an action on the contract. However, the defendant may waive this condition by voluntarily giving it up. Although, from the facts cited in the opinion, it is somewhat difficult to decide, probably a determination that there had been a waiver of the condition was warranted.

There is no theory which will justify the statement that "the present suit is not brought to enforce such a contract or any contract."[3] The net result

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1. 220 Ga. 543, 140 S.E.2d 252 (1965).
2. *Id.* at 551, 140 S.E.2d at 257.
3. *Ibid.*

of the case was to enforce an agreement by the defendant to convey land to the plaintiff on certain terms and conditions. This, by any definition, amounts to the enforcement of a contract. One does not sue on a waiver or estoppel, but rather the cause of action is based on the contract, and the defendant is not allowed the benefit of a defense he otherwise would have because he has voluntarily given it away (waiver) or his conduct has been such that it would be inequitable for him to claim it (estoppel).

At another point in the opinion the court seems to be aware that a contract is being enforced. The following quotation will bear no other interpretation: "But where . . . a party by making an invalid agreement or promise induces another to forego a valuable legal right, he waives and is estopped to deny the right of the promisee to have the agreement carried out or the promise fulfilled."[4] Actually this language sounds like the court is adopting the doctrine of promissory estoppel. Indeed the soundest theory on which the result of the case can be based is promissory estoppel. The defendant promised to extend the time of the option. This promise was without consideration because nothing was bargained for in return. However, the plaintiff reasonably relied on this promise and was thus induced to forego exercising the option during the original period. This situation supplies all of the elements of promissory estoppel. Although the term estoppel is used in the opinion, the denial that a contract was being enforced and other language leads one to believe that the court did not mean to embrace promissory estoppel, but rather the more traditional estoppel to deny a representation which has been relied on. The defendant did not make a representation of fact, but promised to extend the time for payment. If there was estoppel, it was promissory estoppel. The opinion leaves doubt as to Georgia's position on the promissory estoppel doctrine. A good opportunity to settle this puzzling question was missed.

Several cases dealt with the problem of whether a particular contract was void on the ground that it was vague and indefinite. *Milton Frank Allen Publications, Inc. v. Georgia Ass'n of Petroleum Retailers, Inc.*[5] involved a controversy between the G.A.P.R. and the defendant publisher concerning the validity and construction of a contract which provided that the publisher would publish a magazine which would be the "official organ" of the association. The agreement also provided that the plaintiff would not use any other printed medium to disseminate information to its members and that the magazine would "speak officially" for the association in printed form.

The plaintiff contended that the writing was vague and uncertain in that it failed to define "official organ" and "speak officially" and did not

4. *Id.* at 552, 140 S.E.2d at 257.
5. 219 Ga. 665, 135 S.E.2d 330 (1964).

specify the rights of the parties in determining the content of the magazine. The court held that the provisions were ambiguous, but not uncertain. Ambiguity imparts a double meaning which can be explained by parol but uncertainty imparts no meaning and cannot be supplied. Therefore the plaintiff was entitled to have the jury resolve the ambiguity.

The distinction between ambiguity and uncertainty is supportable in theory, but is rarely helpful in determining the validity of a particular agreement. Definiteness in contracts is a matter of degree. Probably this agreement was definite enough to allow a jury to construe it without being in the position of making a contract for the parties.

The G.A.P.R. further claimed that the contract was against public policy because it restricted the association from communicating with its members through other printed matter. The court found that this provision was not contrary to public policy because it did not limit the power of the officers to determine the policy of the association.

Southern Land, Timber & Pulp Corp. v. Davis & Floyd Eng'rs, Inc.[6] was an action for breach of a contract to furnish engineering services in planning and constructing a paper mill and railway. The defense was based on the ground that the agreement was vague and indefinite and specified the following areas of uncertainty: time for performance, who would furnish the tools, and time for payment. The Court of Appeals, per Eberhardt, J., upheld the validity of the contract and compared it with contracts for architectural services, pointing out that in the nature of the services to be rendered certain details could not be included in the contract since the purpose of the contract was to produce those details. On the specific charges of uncertainty, the court held: where time for performance is not specified, performance is due within a reasonable time; since engineers promised to do the work they were obligated to supply the tools unless otherwise specified; and where time for payment is not stated, payment is due on completion of the work.

A real estate contract involved in *Cole v. Cates*[7] provided in one place "to be evidenced by a note secured by a first mortgage." Another provision stated "security deed given to secure note for deferred portion of the purchase price." Against the claim that the contract was indefinite because the terms were contradictory, the court took judicial notice that the terms "mortgage" and "security deed" are commonly confounded in ordinary usage.

In another case,[8] the Court of Appeals held that a purchaser who has taken possession under a written contract for the sale of land cannot defend an action for past due installments on the ground that the agreement

6. 109 Ga. App. 191, 135 S.E.2d 454 (1964).
7. 110 Ga. App. 820, 140 S.E.2d 36 (1964).
8. Chambless v. Cain, 109 Ga. App. 163, 135 S.E.2d 463 (1964).

is vague and indefinite. The opinion did not relate the terms of the contract claimed to be uncertain. Although the proposition announced by the court is sound as applied to some circumstances, it is not as to others. In fact, the rule is supportable only when taking possession clarifies otherwise uncertain terms, for example, the identity of the property. It would not be correctly applied to a contract in which the amount and terms of the purchase price were uncertain.

Dealing with the problem of definiteness in *Allen v. Arrow Contracting Co.*,[9] the Supreme Court made the following statement: "Even if we assume arguendo that the alleged contract was unenforceable when entered into, the plaintiff's performance would make it mutual and enforceable against the defendants."[10]

One of the contract problems most frequently before the appellate courts of Georgia is that of the validity of non-competition provisions in employment agreements. Two cases involving this problem were decided during the survey period. In both cases the former employee prevailed. In *Stein Steel & Supply Co. v. Tucker*,[11] the employment contract provided that the employee for a period of twenty-four months following termination of employment would not, among other things, "work or obtain employment with any other person, firm, company, partnership or corporation engaged in the fabrication of structural steel, . . . or the selling of plumbing supplies . . . as now handled or sold by said company," within eight named counties. The court held that the restrictions were broader than necessary because they prevented any type employment with a competitor in the restricted area even though the job had nothing to do with trade secrets. Three justices dissented on the ground that the employee could disclose trade secrets even though they might not be related to his new employment.

The agreement not to compete in *Mason, Au & Magenheimer Confectionery Mfg. Co. v. Jablin*[12] provided that the employee would not for five years "manufacture or sell candy, or engage in any fund-raising activities, in any geographic area in which employer had been engaged . . . for a period of one year or more." The Supreme Court held that the agreement was void because the terms respecting the business which the employee was prohibited from engaging in were unreasonable, uncertain, and indefinite.

Both of these cases serve as further lessons to the draftsman that "non-competition" agreements must be carefully drawn. The employer is much better advised to settle for reasonable time, area, and activity limitations than to insist on broader limitations and run the risk that they will be declared invalid.

9. 110 Ga. App. 369, 138 S.E.2d 600 (1964).
10. *Id.* at 370-71, 138 S.E.2d at 602.
11. 219 Ga. 844, 136 S.E.2d 355 (1964).
12. 220 Ga. 344, 138 S.E.2d 660 (1964).

For many years the status of third party beneficiary contracts in Georgia was in doubt. This uncertainty remained for a time after the enactment of GA. CODE ANN. section 3-108 (1962 Rev.).[13] The right of a third party to maintain an action on a contract made for his benefit is now well settled and this principle was reaffirmed in *Holmes v. Western Auto Supply Co.*[14]

Walter L. Talley, Inc. v. Council[15] was an action by a vendee to recover the purchase price paid on an executory contract for the sale of land. The contract provided for conveyance by a warranty deed subject to any incumbrances specified. No incumbrances were provided for in the contract and the court held that the conveyance by vendor of a sewer easement to the county constituted an incumbrance and upheld the plaintiff's right to rescind.

The defendant in *Gibson v. Filter Queen Co.*[16] purchased a vacuum cleaner from the plaintiff under a conditional-sale contract. The plaintiff assigned its rights to Union Discount Company with recourse. After the assignment, the defendant surrendered the machine to Union with the understanding that the debt would be cancelled. Although the elements of mutual rescission were present, the court treated the case as one of accord and satisfaction and applied the rule of *Rivers v. Cole Corp.*[17] to the effect that payment of a sum less than the amount due with the agreement that it is a final settlement constitutes an accord and satisfaction.

In a case involving a contract of guaranty, the Supreme Court held that extending credit to the debtor constituted consideration even though no consideration was paid directly to the guarantor.[18] This is an application of the well established proposition that consideration may be given to the promisor or to some other person.[19]

McLaughlin v. Farmers Gin Co.[20] was an action to recover for services rendered in representing the defendant in tax-assessment matters. The court held that, if the services were rendered and accepted as claimed by the plaintiff, there was an implied promise to pay the reasonable value thereof, and the question of value was one for the sole determination of the jury.

In another case,[21] the Court of Appeals held that where a contract with an auctioneer provided for the sales commission to be paid on the day of the sale, the owner had the right to refuse a bid, but was still liable to the auctioneer for his commission.

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13. For a discussion of other cases interpreting the statute, see Wilson, *Contracts*, 2 MERCER L. REV. 29 (1950).
14. 220 Ga. 528, 140 S.E.2d 204 (1965).
15. 109 Ga. App. 100, 135 S.E.2d 515 (1964).
16. 109 Ga. App. 650, 136 S.E.2d 922 (1964).
17. 209 Ga. 406, 73 S.E.2d 196 (1952).
18. Woods v. Universal C.I.T. Credit Corp., 110 Ga. App. 394, 138 S.E.2d 593 (1964).
19. RESTATEMENT, CONTRACTS §75 (1932).
20. 111 Ga. App. 89, 140 S.E.2d 492 (1965).
21. Leggett v. Todd, 110 Ga. App. 41, 137 S.E.2d 742 (1964).

The following well established principles were reaffirmed in other cases decided during the survey period: a tender is not necessary when the party to whom the tender is to be made makes it clear that the tender would not be accepted;[22] a contract is not deprived of mutuality because it is subject to a condition precedent;[23] a petition which alleges that a promise is subject to a condition precedent does not state a cause of action if it fails to allege occurrence of the condition;[24] a third person cannot dispose of a chose in action belonging to another without his consent;[25] one who has performed services under a contract may sue for breach of the contract or on quantum meruit for the value of the services;[26] construction of an unambiguous contract is a question of law for the court;[27] when a party accepts installmens after due date over a period of time, he must give reasonable notice before he can insist on performance according to the exact terms of the contract.[28]

22. McLoon v. McLoon, 220 Ga. 18, 136 S.E.2d 740 (1964); Murray v. Lett, 219 Ga. 809, 136 S.E.2d 348 (1964).
23. Rothberg v. Charles H. Hardin Constr. Co., 111 Ga. App. 41, 140 S.E.2d 520 (1965).
24. Cresent Brass & Pin Co. v. Owen, 109 Ga. App. 369, 136 S.E.2d 141 (1964).
25. Rowland v. Lewis, 109 Ga. App. 755, 137 S.E.2d 387 (1964).
26. Turner v. Houser, 110 Ga. App. 379, 138 S.E.2d 619 (1964).
27. Goff v. Cooper, 110 Ga. App. 339, 138 S.E.2d 449 (1964).
28. Murray v. Lett, *supra* n. 22.