AGENCY

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During the 1965-1966 survey period covered in this report, there were no significant changes in the law on Agency in Georgia. However, there was one decision on a question decided in Georgia for the first time. There were no legislative changes and, essentially, the fundamentals have remained the same.

This article will cover the subject matters in general categories which will be subdivided by issues according to the specific case or series of cases.

CONTRACTS

Validity of Employment Contracts. Most of the contract actions decided during the survey period involved employment contracts. The decisions reiterated that such contracts may be either express or implied for there to be an action on the breach.[1] Nevertheless, a valid employment contract will continue to be binding where all of the legal requirements are maintained.[2]

Consequently, the courts have again held that an employment contract must continue to designate the employee's place of employment, the period for which he is employed, the nature of the services he is to render and the compensation he is to receive. This general rule was stated in a case where a physician had a territorial limitation of a fifty-mile radius of a given city in which radius he agreed not to practice medicine on the termination of the contract. The contract was upheld since the territory was that throughout which his employer generally practiced including that over which he had reasonable prospects of extending his practice.[3]

Furthermore, an employment contract need not be in writing to be binding. An oral contract was upheld after the plaintiff had acted in furtherance of the agreement and there were damages as a result of the failure to comply.[4] Likewise, an issue arose during the survey period as to the rights of an employee where judgment or discretion is involved. There the court held that a management incentive plan providing that employees selected by a committee from a group considered for incentive awards, which were allotted amounts determined within the committee's discretion, did not entitle any eligible employee to an award as a matter of right or to a particular sum if the award should have been made. The only right of action would have accrued in the event the committee had abused or failed to use its discretion.[5]

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1. Biles v. Home Interiors & Gifts, Inc., 112 Ga. App. 1, 143 S.E.2d 566 (1965).
2. Nationwide Mut. Ins. Co. v. Teal, 112 Ga. App. 236, 144 S.E.2d 657 (1965).
3. McMurray v. Bateman, 221 Ga. 240, 144 S.E.2d 345 (1965).
4. R. L. Bass, Inc. v. Brown, 111 Ga. App. 250, 141 S.E.2d 200 (1965).
5. Jones v. Vulcan Materials Co., 112 Ga. App. 402, 145 S.E.2d 268 (1965).

Agency Contracts. Some decisions were also rendered on issues involving agency contracts. In one suit for a broker's commission where the broker and the owner of a business agreed for the broker to sell the business, which agreement contained certain stipulations, and there was no allegation that the seller had waived any variances as to the stipulations, the broker's petition was held to be subject to dismissal on general demurrer since the stipulations were not complied with. The court also stated that if there had been a waiver as to the variances on the stipulations, such would have been inconsistent with the fact that the action by the broker was brought on the contract as originally executed. In such an instance, the contract and all of the stipulations must be adhered to for the broker to recover.[6]

There was also a decision on a petition to require an attorney to pay over a fee collected by him. There, the attorney had been authorized to represent the client in respect to one claim and had represented the plaintiff in a second claim without authority. Moreover, he falsely represented that he had a contract with the client for a fee of one-third of the recovery, which fee the attorney keep after his representation of the client in the first claim had ended. These facts gave rise to a valid cause of action for a money rule.[7]

Agents' Admissions. The general rule has again been applied that where evidence was admitted of the corporate agents' admissions acting within the scope of their powers, the principals are to be so bound.[8] This was followed in a suit by a beneficiary to recover on a life insurance policy where the application provided that no liability should exist unless and until the policy applied for was delivered to and accepted by the agent, which was never done. The agent making the sale made an unauthorized verbal assurance that the applicant was insured. Since no contract of insurance existed and the agent's statement was unauthorized, the insurer was not liable.[9]

Moreover, where an agent was deemed to have been merely a sales agent, it was not sufficient without more to show that he had apparent authority to act for the company in rescinding a prior sales contract entered into with the defendant, nor to accept the return of goods on behalf of the plaintiff company. For the court held in that situation that any statements of the agent, where an extension of the agency relationship was not shown, should have been excluded as hearsay.[10]

In another decision rendered during the survey period, the rule binding the master for the servant's unauthorized admissions where they have been ratified was upheld.[11] These cases are all distinguishable on the factual issues involving authorization and ratification.

Agent Disclosing Relationship. The general rule was applied during the

6. Turner v. Atlanta Realty Co., 112 Ga. App. 648, 145 S.E.2d 758 (1965).
7. Hilton v. Bazemore, 112 Ga. App. 659, 145 S.E.2d 768 (1965).
8. Timeplan Loan & Inv. Corp. v. Moorehead, 221 Ga. 648, 146 S.E.2d 748 (1966).
9. Sasser v. Coastal States Life Ins. Co., 113 Ga. App. 17, 147 S.E.2d 5 (1966).
10. Royal Oil Co., Inc. v. Hooks, 111 Ga. App. 779, 143 S.E.2d 441 (1965).
11. Travelers Ins. Co. v. Ansley, 111 Ga. App. 784, 143 S.E.2d 422 (1965).

survey period that for an agent to avoid personal liability there is a duty to disclose his principal and that principal must be in existence and not be a mere sham.[12]

The estoppel principle was applied in an action by a stock brokerage company against an individual to recover on a contract to keep certain accounts properly within the margin requirements. The court held a contract, made by the agent known to the defendant and which benefited the defendant by the company's performance, could not be denied on the ground that the person signing the contract was acting in an individual capacity rather than as an agent.[13]

Joint Adventurers. In an action by purported joint adventurers to obtain a first mortgage commitment for the plaintiff's benefit, the issue arose as to whether the defendant was a joint adventurer with a third person. This third person was one to whom the plaintiff's check, given to obtain the first mortgage commitment, was made payable. This presented the issue of whether he was liable for the amount of the check as a joint adventurer or whether he was a mere agent for the plaintiff or for the third person or both. The court held that the status of the joint adventurer was a jury question, and thus a verdict for the defendant denying the joint adventurer could be authorized.[14]

TORTS

Release of Principal. In the field of torts, the most unique development is the novel decision rendered in the case of *Otis v. Wren Mobile Homes, Inc.*[15] There, a suit was brought against the principal and agent for a tort of the agent for which the principal was liable only through the doctrine of *respondeat superior.* A covenant not to sue was issued only to the agent. The covenant recited that it was in no way to affect the rights of the plaintiff against the principal corporation. The court held that since the instrument expressly reserved the rights of the covenantors against the principal corporation, it cannot be construed as extinguishing the cause of action against the principal.

Pleading. As to the question of the sufficiency of pleading agency in an automobile damage suit it is necessary to allege only that the driver of the vehicle was the servant, agent and employee of the plaintiff and that the direct and proximate cause of the collision was the negligence of the plaintiff by and through its servant, agent and employee.[16]

Circumstances Establishing the Relationship. Under this heading, most of the cases involve fact situations distinctive within themselves in determining the agency relationship. However, one case which is unique under the cir-

12. Brown-Wright Hotel Supply Corp. v. Bagen, 112 Ga. App. 300, 145 S.E.2d 294 (1965).
13. Greenberg v. J. C. Bradford & Co., 114 Ga. App. 746, 146 S.E.2d 119 (1965).
14. Security Dev. and Inv. Co. v. Williamson, 112 Ga. App. 524, 145 S.E.2d 581 (1965).
15. 111 Ga. App. 649, 143 S.E.2d 8 (1965).
16. Georgia Power Co. v. Rabun, 111 Ga. App. 63, 140 S.E.2d 568 (1965).

cumstances and will be discussed more fully is that of *National Ass'n for the Advancement of Colored People v. Overstreet.*[17] In that case, the National Association for the Advancement of Colored People (NAACP) through its national branch, local branch and Georgia State Conference of Branches allegedly organized and led a picket of a grocery store. The agency question involved whether or not the local group acted as agents of the other groups. The evidence showed that an individual defendant was President of the Savannah branch of the Georgia State Conference of Branches of the defendant group. He, by means of circulars, called a mass meeting of the group in which he and another leader led the group in agreeing to picket the plaintiff's place of business and in planning the proposed picket. No plea to the jurisdiction or traverse of service was filed after service and each submitted to the court's jurisdiction by filing answers. The court held that since the local branch used the national name and held itself out as representing the national corporation and the national corporation gave orders and counsel to its local representatives at its annual conventions and that other facts existed, such as the locals being affiliated with the national convention and paying dues thereto and the members being members of both the local and national organization, a principal and agency relationship was created. Moreover, since the national organization never at any time disavowed the agency of the local leaders as well as the local chapter and defended the case on its merits, the relationship bound the national organization.

There was another unusual factual situation in the case of *Redd v. Brisbon.*[18] There a service station operator had a customer come to his place of business to have his automobile washed. The operator being unable to perform the service for him at that time, asked another customer, hereinafter called defendant-customer, to accompany the vehicle owner and return the automobile to the service station for washing. Upon returning the automobile, the defendant-customer caused a collision with the plaintiff. The court upheld the summary judgment of the lower court as to the service station operator, stating that the defendant-customer was not subject to the operator's orders and control, and thus not liable to be discharged by him for disobedience of orders or misconduct. In that case, the tests employed by the court to determine the master-servant relationship were related and included the payment of wages, whether an appointment was made for a task and subject to the control of the person making the appointment, the power to discharge, and the determination of whose benefit the given work was done. The court stated, however, that the latter test standing alone cannot be the basis in Georgia for fixing liability upon an alleged owner of an automobile for the negligence of the driver. The defendant-customer was deemed to be merely a volunteer and under no control of the service station

17. 221 Ga. 16, 142 S.E.2d 816 (1965).
18. 113 Ga. App. 23, 147 S.E.2d 15 (1966).

owner. Thus, a master-servant relationship was determined not to have arisen.

Other fact situations brought forth decisions as to the establishment of the principal-agent relationship. One involved an arrangement for one to act as an agent for the service of process. There the court held that since there was no authority to act for the company in a representative capacity and no power to bind the company in a business transaction, there was no agency relationship.[19] Similarly, a fact question arose in determining whether or not a group of taxi-cab operators were independent contractors. There, a number of individuals, each licensed to own and operate a taxi-cab, jointly made use of the same trade name, although each conducted a separate business. In the instant case, each paid a fixed sum for the use of a cab stand, telephone facilities and an employee in charge of the same. The individual defendant, as well as having his own taxi-cab under the group name, was the manager of the cab stand, collecting a certain sum from each driver using the facilities. The court held that the individual defendant who was also the manager was an independent contractor.[20]

Principal Assuming Liability of Agent. There were very few cases in which this issue arose. In one motor vehicle damage suit, the court held that where an employer had a driver who was intoxicated and did not have a driver's license, it would be incumbent upon the plaintiff to show that the owner had actual knowledge that the driver was incompetent. Further, the burden is on the plaintiff to show that the owner's denial of knowledge of the driver's incompetency was untrue.[21]

Under the same subject is the question of a parent's liability for his child. During the survey period, it was again decided that in cases of wilful or wanton vandalism, the parent would be liable for the tort of his child in directly inflicting injury on another.[22] The liability does not arise, however, out of the mere relationship of the parent and the child. Thus, to allege that the defendant father's minor son intentionally shot and killed the plaintiff's minor son with the defendant's rifle, which the defendant negligently left in such a manner as to allow it to come into the possession and control of the son, is not sufficient in itself to plead a cause of action.[23] Conversely, where the defendant had provided his six and one-half year old son with sparklers and allowed him to use them without supervision and control and the son caused a fire which destroyed the plaintiff's property by the use of the sparklers, the court held that a cause of action was set forth.[24] This case was deemed analogous to the automobile cases in that the young child was furnished with and used a dangerous instrumentality in violation of the

19. Orkin Exterminating Co. v. Thornton, 111 Ga. App. 636, 142 S.E.2d 422 (1965).
20. Atlanta Car For Hire Ass'n v. Ware, 112 Ga. App. 668, 145 S.E.2d 813 (1965).
21. Lee v. Swann, 111 Ga. App. 88, 140 S.E.2d 562 (1965).
22. Bell v. Adams, 111 Ga. App. 819, 143 S.E.2d 413 (1965).
23. *Ibid.*
24. Barlow v. Lloyd, 221 Ga. 603, 145 S.E.2d 272 (1965).

law that resulted in damage to the property of the third person.[25] These two cases can be distinguished in that liability was imputed to the parent where the child was furnished an instrument—sparklers—the use of which was in violation of the law while liability was not imputed where the instrumentality was not of a nature to be in violation of the law.

Master's Duty to Servant. The appellate court during this survey period has again invoked the rule that the master has a duty to the servant of ordinary care in providing a safe place to work. Similarly, the servant must exercise ordinary care in protecting himself from the dangers incident thereto. Both of these questions, it was held, are to be resolved by the jury unless circumstances are such that a finding for either side is demanded as a matter of law.[26]

Fellow Servant Rule. The court has followed the fellow servant rule in a case decided during the survey period. There an injured party and two sons of the defendant were employed by the defendant to do farm work. The injured party's injuries were caused by the negligence of one of the sons in driving the defendant's truck in which the injured party was riding. In view of the fellow servant rule, the court held that the plaintiff was not permitted to recover. It was stated that this would be the general rule except in cases involving railroad companies.[27]

Agency Relationship Created by Interference or Assuming Control. Where a right of recovery is based upon the employer interfering and assuming control of the employee, thus creating a master-servant relationship, but there is no allegation of such, there can be no recovery. This was held in a case decided during the survey period where the plaintiff's decedent was employed by a sub-contractor to make repairs on the defendant's plant. While working there and going from one floor to another to get material, he feel through an unlighted hole. Since there was no allegation that the employer retained a right to direct or control the time and manner of executing the work and where the right of recovery is based on the employer interfering and assuming control, which would have otherwise created a master-servant relationship, there would be no recovery.[28]

Malicious Acts. In instances where malicious acts were performed by the agents of the corporations, the court continued the policy of holding the agents personally accountable for their torts. This would apply even where the corporation might also be a proper party to the action.[29]

Defects Known by Master. In regard to the liability of a master for injuries to his servant caused by defects in machinery which the master owned, the Appellate Courts again held that a master is not responsible for a defect

25. *Ibid.*
26. Henry v. Adams, 111 Ga. App. 297, 141 S.E.2d 603 (1965).
27. Miller v. Fulton, 111 Ga. App. 849, 143 S.E.2d 578 (1965).
28. Brunswick Pulp & Paper Co. v. Dowling, 111 Ga. App. 123, 140 S.E.2d 912 (1965).
29. Wrigley v. Nottingham, 111 Ga. App. 404, 141 S.E.2d 859 (1965); Beavers v. Johnson, 112 Ga. App. 677, 145 S.E.2d 776 (1965).

where the servant had equal means of knowing it. This would apply even where the employer had made an assurance that a machine could be safely used without the defect causing any damage.[30]

SALES

Insolvency of Principal No Issue. The court decided a case involving the plaintiff suing an agent of an insolvent principal for poultry purchased. In a question of evidence, it was deemed immaterial to the issue of the defendant's liability and prejudicial to the plaintiff to permit evidence that the principal was insolvent and the defendants would have no opportunity to recover from them.[31]

BANKING

Relationship of Banks. The case of *Georgia Bank & Trust Co. v. Hadarits,*[32] decided during the survey period, discusses whether or not a bank acted as an agent where it had taken funds on deposit to apply to its note, thereby leaving no funds to pay a check. The court held that the bank was authorized to refuse payment of a check subsequently drawn upon it by the borrower. The agency principle that an agent will not be allowed to violate a trust imposed by benefiting itself in preference to its principal was distinctly not invoked by the court. Thus, the court held that merely because the holder of a check left it with the bank to be paid when there were funds to pay it, did not cause the bank to become an agent to collect. Therefore, it was not required to sacrifice its rights as against the creditor. For the court held that the bank merely took that to which it had a superior claim as against the holder of the check.[33]

CONCLUSION

There were a considerable number of cases presented for appellate review during the survey year. Based on this review, it is evident that the issues presented were of sufficient questionability as to provide appellate review. Nevertheless, with the exception of the novel case involving the covenant not to sue, all of the cases reflect that the general agency principles remained essentially unaltered during the survey year reviewed.

30. Swails v. Carpenter, 112 Ga. App. 117, 144 S.E.2d 182 (1965).
31. Pendley v. Murphy, 112 Ga. App. 33, 143 S.E.2d 674 (1965).
32. 221 Ga. 125, 143 S.E.2d 627 (1965).
33. *Ibid.*