CONTRACTS

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I. INTRODUCTION

The concept of contract no doubt dates back to the time when man entered upon the socialization process. This agreement concept has matured through the ages guided by public policy and the pragmatic need for stability in the ever expanding commercial process. Consequently, it is not surprising that in the approximately seventy cases involving contracts, which were reported during the survey period, there was little deviation from the general law of contracts. The majority of cases were determined by the application of rules already well established by the state appellate courts. However, there were several decisions presenting interesting questions in the application of established principles to new situations, and more significantly, several cases requiring the appellate courts to look to sister jurisdictions for guidance in resolving the issues presented.

Before embarking on a discussion of the more significant cases, it would seem appropriate to comment on the most prevalent cause of appellate litigation in the area of contracts. To one who has taken on the task of reading practically all of the contract cases reported out of appellate courts, it becomes apparent that the chief nemesis lies in problems of pleading. While this writer is admittedly not experienced with the intricacies of Georgia practice and procedure, two deductions appear reasonable. First, it would appear that there is definite need for revision of the rules guiding the drafting of pleadings. Second, there is a need for many attorneys to put forth a significantly greater degree of diligence in drafting pleadings and motions related thereto. Assuming arguendo that the major fault lies under the first premise, until such legislative change occurs, it is our responsibility as advocates before the bar to make every effort in the interim to comply with the niceties of present day requirements so that the merits of the case may be quickly heard and decided. Poor draftmanship will not hasten the demise of archaic procedural rules.

While the remainder of this article will be devoted to substantive matters, this commentary is submitted as a caveat lest the reader lose his perspective regarding the importance of proper well-drafted pleadings in contract litigation, as well as the importance of intimacy with the substantive rules as determined by the high courts of the state.

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II. Novel Decisions

A. MUTUAL WILL DEFINED

A realty contest presented an issue for which the Georgia Supreme Court could find a "paucity of prior cases dealing" with the problem.[1] Following the death of his wife, A jointly executed with B, his deceased wife's brother, their last will and testament which provided *inter alia* that "upon the death of either of us, the survivor, shall have absolutely and in fee simple title to all realty, cash, insurance, stocks, bonds, and all personalty that the deceased might be possessed at the time of death."[2] Thereafter A remarried and B then died. B's heirs at law filed a caveat to the will alleging that it was a mutual will between the parties and had been revoked by the marriage of A.

The court defined a mutual will as one which "contains reciprocal provisions giving the separate property of each testator to the other and is executed jointly and shows on its face to be in performance of an agreement between the parties and on the death of one the will of the survivor no longer exists."[3] Applying this definition to the above quoted clause of the will the court concluded that the necessary agreement for the formation of the mutual will was implicit in the instrument itself. Therefore, by operation of law, the marriage of A was held to have revoked the will as to both parties and B's heirs were permitted to take.

B. INSURANCE LITIGATION

Two insurance contract cases presented the Georgia Court of Appeals with the task of resolving new and interesting problems. *State Farm Fire & Cas. Co. v. Rowland*[4] presented the problem of defining the terms "private structure" and "mercantile purposes." It appears that Rowland had a fire insurance policy on his residence which provided in one of the several clauses that "the insured may apply up to 10% of the amount of insurance applicable to the principal dwelling item as an additional amount of insurance to cover private structures appertaining to the premises described for that dwelling and located thereon, but not to (1) structures used in whole or in part for mercantile, manufacturing or farming purposes."[5] Rowland had a garage on the premises outfitted as an automobile body, paint and repair shop and a fire loss to this structure was sustained. The insurer denied liability, and Rowland brought suit. The trial court rendered judgment in favor of Rowland and denied the insurer's motion for judgment notwithstanding the verdict. The insurer appealed the denial of this motion to the Court of Appeals.

1. Webb v. Smith, 220 Ga. 809, 141 S.E.2d 899 (1965).
2. *Id.* at 810, 141 S.E.2d at 900.
3. *Id.* at 811, 141 S.E.2d at 901.
4. 111 Ga. App. 743, 143 S.E.2d 193 (1965).
5. *Id.* at 744, 143 S.E.2d at 194.

The questions presented to the appellate court were whether the term "private structure" applied to a garage which was open to business invitees and whether the term "mercantile purposes" applied to automobile body, paint and repair. Construing these key terms more strongly against the author of the instrument, the insuror, and looking to secondary authority, the court defined "private structure" as a structure which is personally owned as distinguished from one where possession, use and ownership is in the public, and the adjective "mercantile" was limited to a business which deals substantially in the buying and selling of commodities for gain or profit as distinguished from the rendering of a service such as auto repair. Further, the appellate court held the doctrine of the *ejusdem generis* limited the terms in question by the description "mercantile, manufacturing, or farming purposes," to these enumerated subjects. Therefore, the decision in favor of plaintiff was affirmed.

The second insurance contract case[6] presented an interesting problem gravitating around GA. CODE ANN. section 20-1401 (1965), providing that all breaches of contract occurring up to the commencement of an action on such contract must be included, and an earlier Supreme Court decision interpreting this provision to mean that "a judgment rendered in a litigation arising under a contract is conclusive of all the accrued rights of the parties arising under the contract, whether they are actually inquired into or not; and such a judgment may, in a subsequent suit between the parties, arising under the same contract, be pleaded as *res adjudicata*."[7]

The instant case involved a claim against an insuror for three separate hospital stays occurring during a period from June 1962 into January 1963. Prior to these confinements the plaintiff had a claim arising out of an injury received in November 1961. In February 1962 the insuror denied liability and claimed the policy to be void from its inception. The defendant continued thereafter to send premium notices and accepted the plaintiff's tender of premiums due. On February 22, 1963, the plaintiff filed an action against the insuror for benefits allegedly due for the November 1961 injury. The plaintiff did not at this time include the injury now in issue, nor did she give the defendant the requisite notice of these claims at this time. The suit pertaining to the November 1961 injury did not proceed to judgment, but was voluntarily dismissed by the plaintiff after a settlement with the defendant had been reached. That settlement expressly provided that it was only for the November 1961 claim and did not cover any other claims arising out of the policy of insurance.

Thereafter, the plaintiff brought this suit for the hospitalization stays of 1962-1963. In its defense the defendant alleged (1) that the sending of any premium notices following the February 1962 disclaimer (which dis-

6. World Mut. Health & Acc. Ins. Co. v. Thurmond, 112 Ga. App. 393, 145 S.E.2d 252 (1965).
7. Missouri State Life Ins. Co. v. Pilcher, 179 Ga. 231, 175 S.E. 586 (1934).

claimer was alleged not to be arbitrary or unjustified) was done while changing the manner of processing same from manual means to mechanical means and that the sending of any such premium notices was an administrative error and inadvertently done; (2) that this claim had existed prior to the February 1963 suit and had not been raised therein so as to be barred by GA. CODE ANN. section 20-1401 (1965), and (3) that the plaintiff is barred from proceeding with this action for failure to give the defendant notice of claim and proofs of loss as required by the policy.

The Court of Appeals concluded that GA. CODE ANN. section 20-1401 (1965) and the *Pilcher* case[8] did not apply to the instant fact situation since here no judgment was ever rendered in the February 1963 suit and the settlement causing the plaintiff to voluntarily dismiss her suit was expressly limited to the claim arising out of the November 1961 injury. Further, it was held that the defendant's specific renunciation of the policy and denial of any liability thereunder which had not been expressly withdrawn, waived the necessity for the plaintiff to comply with the notice preliminaries under the contract before bringing suit.

While the court did not deal with the defendant's defense of administrative error and inadvertence resulting from a switch in the premium notification process, implicit in its decision to affirm the trial court judgment for the plaintiff is the fact that such a defense may not be valid in contract actions. The increase of industry switching to the use of computers, the resulting mistakes while the transfer is made, and the employees use of the master computer signal an additional risk for companies to contemplate in deciding whether to make such a change.

C. CONSTRUCTION CONTRACTS

Construction contracts are always plentiful during a survey period, but two in particular are noteworthy. *State Highway Dep't v. Hewitt Contracting Co.*[9] presented an issue to the Supreme Court which had earlier been before the Court of Appeals in the case of *State Highway Dep't v. Wright Contracting Co.*[10] Hewitt sought to have the contract between itself and the State Highway Department rescinded on the ground that there had been a mutual mistake in the specifications supplied by the state, causing the plaintiff additional work in order to properly complete the job. The plaintiff had proceeded to complete the job after the error had been discovered and sought to recover payment based on the reasonable value of the work done and not on the contract. Looking to the Court of Appeals' decision in the *Wright* case, the Supreme Court held that since the plaintiff had continued the performance after the discovery of the error, equity could not rescind the contract. The court determined that the plaintiff should

8. *Id.* at 231, 175 S.E. at 587.
9. 221 Ga. 621, 146 S.E.2d 632 (1965).
10. 107 Ga. App. 758, 131 S.E.2d 808 (1963).

recover on the contract plus a *quantum meruit* recovery for any additional work performed due to the error in specifications.[11]

A standard clause in a contract between a contractor and subcontractor presented the Court of Appeals with a problem of interpretation.[12] The clause in question provided that "subcontractor assumes entire responsibility and liability for losses . . . in connection with or arising out of any injury, or alleged injury (including death) to any person, or damages, or alleged damages, to property of contractor or others sustained or alleged to have been sustained in connection with or to have arisen out of or resulting from the performance of the work by the subcontractor . . . *including losses, expenses or damages sustained by contractor,* and agrees to indemnify and hold harmless contractor . . . from any and all such losses . . . and agrees to defend any suit or action brought against them . . . and to pay all damages, costs and expenses, including attorneys' fees in connection therewith or resulting therefrom. . . ."[13]

The facts of this case of first impression were that an employee of the subcontractor was injured and brought an action against the contractor, alleging that the contractor's negligence was the sole cause of his injuries. The contractor requested that the subcontractor take over the suit as provided in the contract but the subcontractor refused. Thereafter, the contractor reached a settlement with the injured employee and brought this action against the subcontractor to recover the total expense related to the settlement. The trial court sustained the subcontractor's general demurrers to the action, and the contractor appealed to the Court of Appeals.

The court considered several cases decided within and without the state and was particularly persuaded by the Fifth Circuit decision of *Batson-Cook Co. v. Industrial Steel Erectors,*[14] wherein the same plaintiff was before the court, and the identical indemnity clause was involved. While the use of the term "negligence" or any other specific term was held not to be a prerequisite to the indemnitee's [contractor's] recovery, several factors led the court to the conclusion that the trial court decision should be affirmed. Specifically, the court was persuaded by the fact that this was a standard form contract, copyrighted by the American Institute of Architects and furnished by the contractor, thereby coming within the general rule that where the contract is ambiguous it should be construed most strongly against the party who prepared it. Secondly, the court found that the contractor occupied a "somewhat superior bargaining position to that of the subcontractor," who "was forced to either accept the contract as it was written in order to have his bid accepted, or to reject it entirely."[15] Finally, the

11. *Id.* at 764, 131 S.E.2d at 814.
12. Batson-Cook Co. v. Georgia Marble Setting Co., 112 Ga. App. 226, 144 S.E.2d 547 (1965).
13. *Id.* at 227, 144 S.E.2d at 548. (Emphasis added.)
14. 257 F.2d 410 (5th Cir. 1958).
15. *Supra* n. 12 at 229, 144 S.E.2d at 551 (1965).

court was impressed by the fact that all the forms of insurance which the agreement required the subcontractor to carry were such as ordinarily provide coverage for damages which might be recovered against the subcontractor as a result of his own negligence, rather than that of some other party, and that the contractor carried liability insurance to cover its liability as a result of its own negligence. While none of these factors were held conclusive, nor any similar cases found binding, the court concluded that in this case, under these circumstances "the intention to indemnify the plaintiff-indemnitee was not expressed plainly, clearly and unequivocally, in sufficient specific words"[16] to compel the construction sought by the plaintiff.

D. USURY UNDER THE INDUSTRIAL LOAN ACT

The effect of decisions under the Small Loan Act,[17] repealed by the Industrial Loan Act,[18] was at issue in *Securities Inv. Co. v. Pearson.*[19] The plaintiff, Securities Investment Company, sought to recover on two loan notes, one in the amount of $2,500 to the defendant individually, and one in the amount of $750 to the defendant and another jointly. The trial court sustained the defendant's general demurrers and the plaintiff appealed to the Court of Appeals. That court found that while the language of the Industrial Loan Act[20] was different from the former Small Loan Act,[21] the legislative intent for both acts was the same. Therefore, it was concluded that the Industrial Loan Act,[22] providing that every licensee thereunder "may loan any sum of money not exceeding $2,500," should be interpreted according to the decisions under the Small Loan Act.[23] Under those decisions,[24] where there are two loan contracts, and X is the maker of one note and co-maker of another, then X has primary liability on the total sum lent and that sum must be not more than the maximum amount allowed by the statute. Since in the instant case the sum total was $3,250 and the present statute allows a maximum of $2,500, the loan contracts were held void as usurious and the trial court's decision was affirmed.

E. CONSIDERATION

Problems evolving out of the doctrine of consideration are always occurring, and this survey period was no different than any other. Trying to maintain a scheme of logical consistency while at the same time not allowing any rule or group of rules to lend themselves toward the securing of

16. *Supra* n. 12 at 230, 144 S.E.2d at 552 (1965). *But see* italicized language of the clause quoted in the text.
17. GA. LAWS, 1920, p. 215.
18. GA. CODE ANN. §25-301 (1959).
19. 111 Ga. App. 761, 143 S.E.2d 36 (1965).
20. *Supra* n. 18.
21. *Supra* n. 17.
22. *Supra* n. 18.
23. *Supra* n. 17.
24. *E.g.* Hartsfield Co. v. Robertson, 48 Ga. App. 735, 173 S.E. 201 (1934).

unjust outcomes is a recurring problem throughout the law and is particularly apparent in the area of consideration.

In a case of first impression before the Court of Appeals[25] the plaintiff, for a sum of money, agreed with the agent corporation not to sue it for injuries received by a trespass, the agreement being expressly limited to suits between the plaintiff and the agent corporation. Thereafter, the plaintiff sued the principal corporation under its derivative liability for the tortious conduct of its agent, and the principal corporation set up the covenant as a bar to the action. The court, conceding that the principal would be subrogated to a right against the agent if the suit were permitted, distinguished this case from those of other jurisdictions on the premise that here the parties to the covenant had expressly reserved the plaintiff's right against the principal corporation, and the consideration had been paid not to extinguish the plaintiff's cause of action but merely to eliminate one of the parties against whom he might proceed directly. Therefore, the court held that the trial court erred in dismissing the case.

The effect of a recital of consideration in a warranty deed when in fact no consideration had actually been given was raised in the case of *Williams v. Lockhart*,[26] which was an action brought to cancel a warranty deed. The Georgia Supreme Court accepted the general rule set out in American Jurisprudence,[27] that "even if there was consideration for the deed in the absence of some equitable grounds such as fraud, a voluntary deed will not be cancelled on the ground that they lack consideration."[28]

F. CONDITIONS

Satisfaction of the purchaser as a condition precedent in a contract has frequently presented interesting problems for decision. *Commercial Mortgage & Fin. Corp. v. Greenwich Sav. Bank*[29] presents such an interesting fact situation. In this case the plaintiff bank entered into a contract with the defendant mortgage company whereby the plaintiff was to purchase certain home mortgage loans from the defendant at specified terms including satisfaction of the plaintiff as to: (1) credit rating of owner occupants; (2) title insurance; (3) form and content of all documents; and (4) all fire insurance policies as to both coverage and insuror. The defendant delivered and sold a portion of the loans but refused to deliver and sell the remainder and the plaintiff brought this action for breach of contract seeking the liquidated damages provided for in the contract.

On review, the Georgia Court of Appeals found that there existed no disparities of bargaining power between the parties and since no public policy exists in Georgia against promising to render a performance satisfactory to

25. Otis v. Wren Mobile Homes, Inc., 111 Ga. App. 649, 143 S.E.2d 8 (1965).
26. 221 Ga. 343, 144 S.E.2d 528 (1965).
27. 13 AM. JUR. 2d *Cancellation of Instruments* §21 (1962).
28. *Supra* n. 25 at 344, 144 S.E.2d at 529.
29. 221 Ga. App. 338, 145 S.E.2d 249 (1965).

the other party, it was held that there was no lack of mutuality such as to make this contract unenforceable. In conclusion, the court relying on a New Jersey decision,[30] pointed out that the plaintiff had a positive obligation to purchase the particular loan agreements, and if it refused to purchase any of them for want of satisfaction with any of the particulars "the defendant had the means of enforcing the contract by seeking a jury determination as to whether the plaintiff acted in good faith in rejecting the loans."[31]

G. BAIL BOND LIABILITY

In a unique and interesting case the Court of Appeals was confronted with the problem of whether a surety on a bail bond was liable when the principal's inability to appear for trial was due to confinement in the jail of another state for violation of laws thereof.[32] The action arose when the state issued *scire facias* against the principal and surety. The court, relying on an old United States Supreme Court decision,[33] held that while ordinarily if an act of a state prevents the appearance of the principal for trial, the surety is relieved of the liability under the bond, such rule does not apply as to an arrest and detention by another state. Therefore, the surety was found liable on the bail bond.

III. Some Commentary and Criticism

In another series of cases decided during the survey period, established principles were applied to fact situations in such a manner as to invite this writer's comment. Before commencing on a case by case discussion, a caveat is appropriate. It is easy for one confronted with merely the final opinion rendered in a case and not burdened by the presence of the parties, argument of counsel and lengthy records to find meat for criticism. In addition, the case load of our appellate judges, as well as our trial judges, is so burdensome as to necessarily preclude the needed time to always draft a comprehensive and satisfactory opinion. As a result of this unfortunate circumstance, all too frequently the judge in reaching what is a just decision may fail to indicate to his reader those factors that totally support the conclusion. Therefore, some of the comments which are made below may inadvertently be somewhat inaccurate but they are profferred in the hopes of making a constructive contribution.

Hudson v. Hudson[34] is a case over which the Supreme Court was divided. The action arose from an insurance company's interpleader which was filed in a dispute between former spouses regarding the ownership of a paid up insurance annuity policy. The former husband alleged that by virtue of a

30. Paley v. Barton Sav. & Loan Ass'n., 82 N.J.Super. 75, 196 A.2d 682 (1964).
31. *Supra* n. 28 at 229, 145 S.E.2d at 252 (1965).
32. Walls v. State, 111 Ga. App. 337, 141 S.E.2d 606 (1965).
33. Taylor v. Taintor, 16 U.S. (Wall.) 366 (1872), *affirming* 36 Conn. 242, 4 Am. Rep. 58 (1869).
34. 220 Ga. 730, 141 S.E.2d 453 (1965).

contract entered into by the parties, in the form of a settlement agreement just prior to their divorce, the former wife was divested of ownership and it was transferred to him. The majority of the Supreme Court reversed the trial court decision for the former husband, and held that the contract must be interpreted in light of the circumstances prompting the agreement and that since it was intended to meet the husbands alimony obligations, all general language divesting the wife of title to unmentioned property was limited to property not clearly the wife's. Since it was admitted by the parties that the policy was the former wife's prior to the contract, it was determined still to be hers.

Chief Justice Duckworth, joined by Justice Chandler dissented on the premise that the general divestment clause immediately followed disposal of two other insurance policies of lesser value to the former wife, and the subsequent conduct of the parties (for eight years the former husband had possessed the policy and paid the premiums) indicated that all insurance policies should be construed to be within the settlement agreement.

It would appear that the settlement agreement was ambiguous with regard to the policy in question and it is appealing to this writer that the ambiguity be resolved by the subsequent conduct of the parties. Since here the wife had made no claim to the policy subsequent to the agreement but rather permitted it to remain in possession of her former husband and he had paid the premiums on the assumption that the policy was his property as a result of the settlement agreement, the dissenting opinion seems preferable. The majority failed either to consider the conduct of the parties or to interpret the general divestment clause in light of the remainder of the agreement, and looked merely to the formal purpose for which the agreement was made. Such an approach, which in this case would only be partially rectified by the husband's being able to recover the premiums paid by an action in restitution, fails to meet the intentions of the parties. Rules of interpretation which secure fulfillment of the intended outcomes of the parties are to be preferred in the decision-making process.

A decision which is by no means extraordinary was rendered in *AA Music Serv., Inc. v. Walker.*[35] The parties in May 1964 entered into a contract by which the plaintiff placed its coin operated music equipment in the defendant's place of business and the defendant agreed that the plaintiff was to be the sole and exclusive supplier. Approximately four months later the defendant disconnected the plaintiff's machines and began using those of a third party. The plaintiff brought an action seeking an injunction.

The contract, in the clause providing for the consideration supporting the agreement, provided: "In consideration therefore, company shall open the coin boxes of such equipment weekly at which time company shall receive the first $_____, and, thereafter any remaining moneys shall be divided

35. 221 Ga. 46, 142 S.E.2d 800 (1965).

equally between company and proprietor."[36] The trial court's decision granting the defendant's general demurrers was affirmed by the Supreme Court which held that the contract by its terms is too uncertain, vague, and indefinite to authorize any relief. The absence of the amount which was first to go to the plaintiff before the moneys were to be divided equally between the parties was a fatal error.

It is a reasonable assumption that the contract used in this instance was a form prepared in advance for the plaintiff's general use. It is also a reasonable assumption that the omitted amount was the result of inadvertence. The importance of freedom of contract is traditionally recognized and the law of contracts has been described as the vesting of individuals with a legislative power toward each other.[37] With this power to make private law; perhaps there exists a corresponding duty to take pains that such inadvertence as occurred in the *Walker* case is precluded. But "it is human error" and this is a fact of which courts ought to take judicial notice. Just as Chief Justice Duckworth in the *Hudson* case[38] looked to the subsequent conduct of the parties to resolve an ambiguity in the contract involved therein, it would seem that the court might have looked to the subsequent conduct of the parties in *Walker* to see if the four months of dealings under the alleged contract would supply the omitted information. Such an approach would permit the court to reach the merits of the action. As a general proposition, it would seem praiseworthy for courts to always make a reasonable effort to find a valid contract, for clearly this is what the parties must be assumed to have intended. The use of extrinsic evidence would not seem unreasonable, especially in this case where if the information is to be supplied at all, it would probably come from the written records of the parties.

An American idiom, "nice guys finish last," might be illustrated by *Brooks v. Hooks*.[39] In that case the plaintiff discovered fraudulent conduct on the defendant's part but continued to operate under the contract in order to give the defendants an opportunity to rectify the possible results of the fraudulent misrepresentations. The court applied the rule that "if the defrauded party, with knowledge of the fraud, does an act in ratifying or affirming the contract which shows his intention to abide by the contract as made with the fraud in it, and thus waives the fraud, he cannot afterwards set up the fraud and recover damages therefor."[40]

Here the plaintiff treated the defendants as though they were fiduciaries and the fraud arose only after several similar transactions had been properly handled. The plaintiff apparently went along with the fraudulently formed contract on the premise that this improper contract could be worked out so as not to damage him. The result is that the plaintiff is being pen-

36. *Id.* at 47, 142 S.E.2d at 801.
37. Patterson, *Contracts*, 16 MERCER L. REV. 54 (1964).
38. *Supra* n. 27.
39. 221 Ga. 229, 144 S.E.2d 96 (1965).
40. *Id.* at 236, 144 S.E.2d at 101.

alized for trying to work out a satisfactory solution without invoking the judicial process. It would seem questionable whether one who might be said to be in a fiduciary relation should be required to use the courts before resorting to a reasonable form of self-help. Perhaps, however, it is a better solution to insist that the defrauded party either immediately commence a court action or enter into a subsidiary contract wherein he is guaranteed the protection desired in consideration for his proceeding with the contract as originally drawn.

Specific performance is and always has been an exceptional award. The rule is that equity will grant specific performance only in situations where no adequate remedy exists at law and where the court can reasonably supervise the conduct ordered. One of the pragmatic reasons given for the parsimonious use of the specific performance decree is the economic problems involved in enforcing such a decree. However, it would seem that in the long run it might be less expensive if specific performance were readily granted whenever feasible. If parties to a contract were aware that should they fail to perform and that more than likely a court will order them to perform rather than permit them the luxury of money damages, then fewer contracts might be breached. This would result in the long run in a savings of both time and money to the judicial system.

In *Keappler v. Miller*[41] the plaintiff sought specific performance of the defendant's oral promise to build a wall along some 375 feet of boundary line between the property of the respective parties so as to furnish stability and lateral support after excavation of soil. The Georgia Supreme Court held the promise was not sufficiently definite, certain and clear for a specific performance decree since no specifications were given to guide the court in rendering an order as to how the wall should be built.

The question which immediately arises is why not establish, by the use of expert witnesses, minimum specifications for a wall sufficient to furnish the needed support? Such evidence would appear to be readily obtainable and thereby protect the interests of the plaintiff who has already suffered the excavation. In fact, if the plaintiff were to recover a money damage award, it would seem that this very type of evidence would be secured in order to give the jury a point from which to estimate damages. The defendant has reaped the benefits of the agreement; it would seem only equitable that the court make some effort to see that he fulfills the corresponding duties thereto.

Can an appellate court divine the meaning of the term "conventional loan" in a contract for the sale of realty? *Scott v. Lewis*[42] answers the question in the negative. In that case the court held that a condition precedent in a sales contract for the sale of realty providing "The within sale is contingent upon the purchaser's ability to secure a conventional loan of $10,500

41. 221 Ga. 144, 143 S.E.2d 647 (1965).
42. 112 Ga. App. 195, 144 S.E.2d 460 (1965).

for ten years"[43] was not sufficiently specific to be enforceable as there was no provision as to interest rate, terms of repayment, etc. The court distinguished the case from *Blanton v. Williams*[44] on the ground that in *Blanton,* the plaintiff, seeking specific performance, offered to pay the entire purchase price in cash thus affecting a waiver of the loan provision in the contract. Just as the court in *Keappler*[45] could have used expert testimony to establish minimum specifications for the construction of a wall, it would seem that when the phrase "conventional loan" is used in a contract for the sale of realty the custom and practice of the community, if looked to, might provide the necessary information as to interest rate, terms of repayment and the like. Of course, if there is no hard and fast concept in the community of what is meant by "conventional loan," the court could reach no other decision. As suggested in *Walker,*[46] to seek a definition by extrinsic evidence would seem to be a reasonable effort on the part of the court to save a contract by which the parties intended to be guided.

On the positive side, the Supreme Court's decision in *Storey v. Austin*[47] is a laudatory one. Though not particularly unique it is certainly worthy of comment. The plaintiff-lessee had a ten year lease on property upon which he had built and operated a drive-in theater. The lease provided for two options to extend the term for two additional ten year terms and that such option may be exercised by the lessee giving to the lessor notice, in writing, not later than June 1, 1965, of the lessee's intention to exercise the option.[48] Plaintiff orally notified the defendant-lessor's agent (who in turn notified the defendant-lessor) of his intent to exercise the option. This was done prior to June 1, 1965. On June 29, defendant, relying on the plaintiff's failure to give written notice, refused to exercise the option and subsequently sought to repossess the property. The plaintiff brought an action for specific performance of the option and the trial court sustained the defendant's general demurrer because of the plaintiff's failure to give the written notice prior to June 1. On appeal, the Supreme Court assuming that the lease required written notice, held that since the defendant's conduct had led the plaintiff to rely on his oral notice until such time as it would be too late to comply with the written requirement, and that since the deviation here was slight, that the plaintiff's notice was timely, and that the defendant was not damaged because of the form of notice, then the defendant's efforts to enforce a forfeiture would now result in unconscionable hardship and oppression to the plaintiff. Therefore, it was concluded that the defendant had waived the requirement of the written notice and consequently the trial court's decision was reversed.

43. *Id.* at 196, 144 S.E.2d at 461.
44. 209 Ga. 16, 70 S.E.2d 461 (1952).
45. *Supra* n. 34.
46. *Supra* n. 28.
47. 221 Ga. 692, 146 S.E.2d 728 (1966).
48. *Id.* at 695, 146 S.E.2d at 730.

The time of final payment in a construction contract provides another interesting, though not novel, case for discussion. In *Peacock Constr. Co. v. West*[49] the subcontractor sued the general contractor and indemnitor for final payment under the contract. The contract provided for installment payments and that "final payment shall be made within thirty days after completion of the work included in this subcontract, written acceptance by the architect, and full payment therefore by the owner."[50] The plaintiff did not allege facts showing or excusing written acceptance by the architect and full payment by the owner, but claimed these factors were mere indicia of the time at which payment was to be made, since the duty of payment was unconditional. The trial court denied the defendant's demurrer and ruled for the plaintiff; the defendant appealed to the Court of Appeals. That court reversed, holding that the plain meaning of the contract was that the written acceptance by the architect and the owner's payment were conditions precedent to the final payment to the subcontractor. The court found that the contract shifted the risk of non-payment by the owner to the subcontractor. Therefore, in the absence of allegations showing the occurrence of the two conditions precedent or excuse therefor, the trial court was held to have erred in denying the general demurrers.

The case is consistent with the general rule that the architect's certificate is a condition precedent which will be excused only where its non-production is due to (1) impossibility, (2) prevention by the owner, or, (3) for fraud or bad faith on the part of the architect.[51] It should be noted that several jurisdictions, especially since the depression, have interpreted clauses regarding the owner's payment to the general contractor as merely descriptive of the time at which payment is to be made.[52] However, the language of the instrument in this case, placing the architect's certificate and the owner's payment in the same sentence, would not allow such a construction once it was concluded that the architect's approval was a condition precedent.

Lawyers are always interested in cases which concern other lawyers, and one case decided during the survey period is interesting for that reason. In *Hilton v. Bazemore*,[53] the plaintiff, a former client of the defendant, brought an action seeking a money rule against the defendant to pay over a fee collected. The plaintiff alleged that the defendant-attorney, at a time when he was authorized to represent the plaintiff with respect to one claim, represented him in a second claim without authority, by falsely claiming that he had a contract with the plaintiff for a fee of one-third of the re-

49. 111 Ga. App. 604, 142 S.E.2d 332 (1965).
50. *Id.* at 606, 142 S.E.2d at 333.
51. SIMPSON, CONTRACTS 312 (3rd ed. 1965).
52. *E.g.*, Greenleaf v. Safeway Trails, 140 F.2d 889 (2d Cir. 1944); M. O'Neil Supply Co. v. Petroleum Heat & Power Co., 280 N.Y. 50, 19 N.E.2d 676 (1939). Of course the duty to pay the subcontractor is only suspended until such time as final payment to the contractor is made.
53. 112 Ga. App. 659, 145 S.E.2d 765 (1965).

covery. Thereafter he collected the fee from the adverse party after his representation in the first claim had ended. The Georgia Court of Appeals affirmed the superior court decision overruling the defendant's general demurrer to the petition, and held that the collection grew out of unauthorized acts occurring when the attorney-client relationship existed between the parties and therefore the client was entitled to a money rule.

IV. Some Established Principles Revisited

Other cases decided during the period of this survey reaffirmed the following well-established propositions: good consideration, as distinguished from valuable consideration, must be based on love and affection toward near relatives of consanquinity or affinity, or one to whom natural duty exists, or must be based on some moral obligation arising from some antecedent legal obligation, although then unenforceable, or on some present equitable duty;[54] restrictive covenants in employment contracts and sale of business contracts reasonably limited as to time and territory are valid and enforceable so long as not unreasonable in other respects;[55] where an action is brought for an entire tract of land, the plaintiff may recover a portion thereof, if he can establish title thereto;[56] the sovereign immunity doctrine is not applicable in an action against the State Highway Department based on a breach of its contractual obligations;[57] failure to allege performance of a condition precedent to recovery is not a ground for a general demurrer where it appears from the allegations of the petition that the performance of the condition was made impossible by the acts of the defendant;[58] generally a contract should be construed more strongly against the party preparing it;[59] it is not a defense to the State Highway Department that supplemental agreements for extra work were not reduced to writing as required by the original contract;[60] whether or not there has been a mutual departure from the terms of a contract is generally a question for a jury;[61] a condition placed in a statutory contractor's bond, which is not authorized by Ga. Code Ann. section 23-1705 (1966), must be read out of the bond's terms and there need be no allegation of compliance with it in the petition;[62] when the

54. Hobbs v. Clark, 221 Ga. 558, 146 S.E.2d 271 (1965).
55. Williams v. Rio Grande Fence Co., 221 Ga. 633, 146 S.E.2d 630 (1966); McMurray v. Bateman, 221 Ga. 240, 144 S.E.2d 345 (1965); Wallace Business Forms, Inc. v. Elmore, 221 Ga. 223, 144 S.E.2d 82 (1965); Wood v. Bowers Battery & Spark Plug Co., 221 Ga. 215, 144 S.E.2d 101 (1965); Brittain v. Reid, 220 Ga. 794, 141 S.E.2d 903 (1965).
56. Henderson v. Flood, 221 Ga. 217, 144 S.E.2d 676 (1965).
57. State Highway Dep't v. W. L. Cobb Constr. Co., 111 Ga. App. 822, 143 S.E.2d 500 (1965).
58. *Ibid.*
59. *Supra* n. 57.
60. Mion Chem. Brick Corp. v. Daniel Constr. Co., 111 Ga. App. 369, 141 S.E.2d 839 (1965).
61. Bridgboro Lime & Stone Co. v. Hewitt Contracting Co., 221 Ga. 552, 146 S.E.2d 305 (1965); Piedmont So. Life Ins. Co. v. Copeland, 111 Ga. App. 852, 143 S.E.2d 514 (1965).
62. H. W. Ivey Constr. Co. v. Southwest Steel Prods., 111 Ga. App. 527, 142 S.E.2d 394 (1965).

parties contemplate that certain duties and obligations contained in an executory contract for the conveyance of land are to be performed after the delivery of the possession of the property, and the warranty deed thereto, these duties and obligations are not merged in the deed and the acceptance of delivery of possession;[63] and, a contract between the State Highway Department and a construction company, by which the latter undertakes to provide for the safety of the public during the construction of the work, inures to the benefit of the public, and a member of the public injured as a result of negligence may sue the contracting party directly.[64]

V. STATUTES

The 1966 session of the state legislature enacted two bills in the area of contracts. These bills deal with contracts of infants and pre-need funeral service contracts.

The bill titled "Contracts and Deeds of Infants"[65] amends and consolidates the laws and Code sections relative to contracts, conveyances, and other consensual transactions of minors, particularly minors aged eighteen or more and married. GA. CODE ANN. section 20-201 (1965) dealing generally with infants' contracts and GA. CODE ANN. section 29-106 (1952 Rev.) dealing generally with the deeds of an infant are completely re-enacted and generally provide that the agreements and conveyances of an infant are avoidable, but that those agreements and conveyances of a minor who is eighteen years of age or older and married are to be as effective as though such minors were of the age of the majority. The act specifically repeals all prior legislation covered by or in conflict with it.

The "Pre-need Funeral Service Contract Act"[66] is intended to serve as a limitation upon the manner in which a licensed funeral director is permitted to accept funds in pre-payment of funeral services which are to be performed in the future, to the end that at all times members of the public may have an opportunity to arrange for and pay for funerals for themselves or their families in advance of need while at the same time providing all possible safeguards whereunder such prepaid funds cannot be dissipated, whether intentionally or not, so as to be available for the payment of the funeral services arranged for. Further, it is the legislature's intent that no person may offer, sell or negotiate for the sale of a pre-need funeral service contract who is not licensed to make funeral arrangements or plan details of funeral services as provided for in section 18 of the State Board of Funeral Service Act. A pre-need funeral service contract is defined as: "any contract, other than a contract of insurance, under which for a specified consideration paid in advance in a lump sum or installments a person promises upon the

63. Knight v. Hedden, 112 Ga. App. 847, 146 S.E.2d 556 (1965).
64. Smith v. Ledbetter Bros., Inc., 111 Ga. App. 238, 141 S.E.2d 322 (1965).
65. GA. LAWS, 1966, p. 291.
66. GA. LAWS, 1966, p. 398.

death of a beneficiary named or implied in the contract to furnish funeral service or burial supplies and equipment."[67] The Comptroller General of Georgia is charged with the responsibilities of administration and enforcement as well as promulgating regulations necessary to effectuate the purposes of the act. In addition, the act provides in section 8 for cancellation of the contract by any person who has procured a pre-need funeral service contract by demanding a refund of the entire amount actually paid together with all interest and accretions of any kind whatsoever which may have been earned by such funds. Violation of the act is deemed a felony and upon conviction the punishment is to be imprisonment in the penitentiary for not less than one year and not more than five years.

67. *Id.* §2 (2).