PERSONAL PROPERTY AND SALES

By FRANK M. MCKENNEY*

The most important developments in this field during the survey period were legislative acts rather than judicial decisions. These acts will be reviewed under the LEGISLATION portion of this article.

The most important ruling came in a trover suit to recover the value of certain alcoholic beverages, "Gypsy Rose" beer and "Red Hurricane Peach" wine.[1] The plaintiff was the only witness who testified that the gross value of the beer and wine was "two hundred dollars or better" in his opinion. On cross examination, he displayed only vague knowledge of the value of many specific items of the beer and wine. The trial judge directed a verdict for the plaintiff in the amount of $200.00.

In a full bench decision, the Court of Appeals of Georgia took this opportunity to clarify what Judge Bell called the "confusing and hazy" rule relating to opinion evidence as to value, brought on through "too many ill-considered opinions originating in the Appellate Courts." The court held that, before a witness is allowed to give his opinion as to the value of property, he must show his basis for forming the opinion.[2] Furthermore, the majority of the court overruled prior cases not requiring this foundation, in particular *Warren v. State*.[3] The court also held that an opinion of value based solely on "cost value" is inadmissible, unless coupled with other evidence of value. The directed verdict for the plaintiff was reversed. The attempt to clear up the "vague and hazy" rule about opinion evidence of value is weakened by a specially concurring opinion of four judges, who based their reversal solely on the inadequate testimony of the only witness, and did not believe it necessary to reverse any cases.

SALES CONTRACT

Garrison v. Piatt[4] demonstrates a change made in the Georgia law of sales by the UNIFORM COMMERCIAL CODE. The suit was upon an oral contract for the purchase of a house trailer within the prohibition of Georgia's Statute of Frauds,[5] and this fact appeared on the face of the petition. A general demurrer based on the Statute of Frauds by the defendant was sustained. Under the law prior to the UNIFORM COMMERCIAL CODE, a party could admit a contract within the prohibition of the statute, and still claim

*A.B. 1956, Mercer University; LL.B. 1959, Walter F. George School of Law, Mercer University; Member of Macon Bar Association and State Bar of Georgia.

1. Hoard v. Wiley, 39 Ga. App. 522, 147 S.E.2d 782 (1966).
2. GA. CODE ANN. §§38-1708 to-1709 (1954 Rev.).
3. 76 Ga. App. 243, 45 S.E.2d 726 (1947).
4. 43 Ga. App. 94, 147 S.E.2d 374 (1966).
5. GA. CODE ANN. §109A-2-201 (Supp. 1962).

the statute's protection.[6] However, under present law, if the defendant admits "in his pleadings, testimony or otherwise in court that a contract for sale was made,"[7] the contract is enforceable. Since the demurrer admits the facts as pleaded, the general demurrer therefore admitted the existence of the contract for demurrer purposes. The sustaining of the general demurrer was reversed. To allow a suit on such a contract to be dismissed on demurrer would deprive the plaintiff of the opportunity to elicit an admission of the contract in court. This change in the law prevents the Statute of Frauds from being used to perpetuate a fraud. In fact, an oral contract if it actually exists and is otherwise valid, can now be enforced, unless the opposite party is prepared to lie about it, possibly while under oath.

In *Braselton Bros., Inc. v. Better Maid Dairy Products, Inc.*[8] the defendant's agent had defrauded the plaintiff over a number of years, by collecting for more milk than he delivered. When the fraud was discovered, the defendant promised to repay the plaintiff, therefore the plaintiff continued to trade with the defendant. Since the defendant never paid, the plaintiff sued. The court of appeals upheld the trial judge's sustaining of a general demurrer to the suit. The plaintiff had gone on paying for more milk than his cooler would hold for nearly two years. Any reasonable check by the plaintiff corporation would have discovered the fraud. Nor could there be any contractual obligation growing out of the defendant's promise to repay the plaintiff, since the continued trading by the plaintiff was not shown to be in reliance on that promise.

In *Chestnut v. Al Means Ford, Inc.*[9] the plaintiff alleged that the defendant's agent had induced him to sign a contract in blank for the purchase of an automobile, by promising that the balance owed on the car the plaintiff was trading in would be paid off. Later the plaintiff saw the contract filled in, with the word "none" entered in the space for the balance owed on the traded car. It was alleged that the car dealer did not pay off the balance due on the traded car, and the plaintiff was required to pay it. He sued for fraud, and the trial court sustained a general demurrer to his petition. The court of appeals was caught between a desire to prevent an obvious hardship, and the general rule that representations amounting to fraud and deceit must be of existing or past facts, not of future intentions.[10] After a quick trip around "O'Hoolihan's barn," the court arrived at a just decision. The salesman's alleged statement that the balance would be paid off obviously was representation of a future event. The contract itself with "none" entered in the space for "amount owing" could be construed as a mere promise to pay off the balance. In signing the contract in blank, however, the plaintiff relied on the dealer's agent

6. Mendel v. L. F. Miller & Sons, 134 Ga. 610, 68 S.E. 430 (1910).
7. GA. CODE ANN. §109A-2-201(3) (Supp. 1962).
8. 113 Ga. App. 382, 148 S.E.2d 71 (1966).
9. 113 Ga. App. 623, 149 S.E.2d 410 (1966).
10. Brooks v. Pitts, 24 Ga. App. 386(1), 100 S.E. 776 (1919).

to fill it in in accord with the agreement.[11] Here the court worried briefly that the salesman was in fact acting as the plaintiff's agent in filling in the blanks, making the representation that of the plaintiff. The court merely passed over this problem without pursuing it, since such a course would lead to the conclusion that the plaintiff had defrauded himself. The court held instead that the prior promise coupled with the "none" entry justified the plaintiff in believing that the balance on the traded car had already been paid off, and, therefore, could support an action for fraud, and reversed the trial court.

The holder of a bill of sale to secure debt to the goods of a retailer signed a waiver, subordinating his claim to the present and future claims of a wholesaler. At the same time the wholesaler and retailer entered into a contract whereby the buyer was to pay cash for all future orders. In spite of this contract, the wholesaler sold to the retailer on credit. Since these two instruments were part of the same transaction, and *so stipulated by the parties,* the holder of the bill of sale was entitled to rely upon the clause for cash sales and has priority to the assets of the retailer, in spite of his subordination agreement.[12]

The plaintiff in *American Int'l Indus., Inc. v. Plumbers Woodwork Co.*[13] contracted to sell the defendant adult toilet seats, with a "baby ring" conversion. The defendant was to furnish the unpainted baby seats, and the plaintiff was to paint and install them. The plaintiff allegedly delivered unpainted and defective seats, and finally no seats at all. The defendant gave the plaintiff the promissory note which is the basis of this action in an effort to induce the plaintiff to complete its contract. The court of appeals held that payment of part of the purchase price after knowledge of the defective condition of the merchandise does not waive the defects and the defendant had stated a defense of partial failure of consideration.

BAILMENT

In *AAA Parking, Inc. v. Bigger,*[14] the plaintiff alleged that he left his automobile with the defendant parking lot, and returned later, to find the lot unattended and his car gone. The car was later located wrecked. The court of appeals upheld the trial court's decision in overruling the defendant's demurrers. The court restated the duty of a bailee to exercise ordinary care in protecting the bailed article, it also discusses the distinction between a tort suit against a bailee, which alleges misfeasances and a suit ex contractu, relying on nonfeasance. The abandonment of the auto by the defendant was held to amount to nonfeasance, and the action was therefore contractual in nature. It seems the parking lot was not

11. Thompson v. Bank of Chatsworth, 30 Ga. App. 443, 118 S.E. 470 (1923).
12. Holmes v. Western Auto Supply Co., 222 Ga. 475, 150 S.E.2d 641 (1966).
13. 114 Ga. App. 490, 151 S.E.2d 822 (1966).
14. 113 Ga. App. 578, 149 S.E.2d 255 (1966).

through with poor Mr. Bigger. A second case followed immediately after the first. Same allegations of fact, same plaintiff, same defendant, but a different automobile, and the same result.[15]

WARRANTY

Mons v. Republic Steel Corp.[16] was a suit for breach of manufacturer's warranty under former GA. CODE ANN. section 96-307 (1958 Rev.). The petition alleged that the galvanized pipe purchased was not suited for the "use intended"—well digging. It also alleged that the manufacturer knew the use the plaintiff intended to make of the pipe. The court of appeals affirmed the sustaining of a general demurrer to the petition. The term "use intended" was held to be the use for which the item was made, and not the use the buyer intended to make of it, even though it is alleged defendant knew the use plaintiff intended. Under the UNIFORM COMMERCIAL CODE, which repealed and replaced this section, the buyer in this case would have a cause of action against his immediate seller, if not against the manufacturer.[17]

MISCELLANEOUS

Normally, the UNIFORM COMMERCIAL CODE does not apply to security interests in motor vehicles, which are controlled by GA. CODE ANN. sections 68-4A *et seq.* (1957 Rev.).[18] *Guardian Discount Co. v. Settles*[19] points out an exception to this rule. Security interests created by a manufacturer or dealer are not covered by the Motor Vehicle Certificate of Title Act[20] and must be perfected under the provisions of Title 9 of the UNIFORM COMMERCIAL CODE. Plaintiff in this trover suit claimed title to certain automobiles by virtue of security instruments executed by a dealer, who had received possession of the cars from the defendant for resale. Plaintiff claimed the agreement between defendant and the dealer was a "sale or return" contract, under GA. CODE ANN. section 109A-2-236 (Supp. 1966), and that as a creditor of the dealer, it could acquire title from him. Since the defendant had failed to protect its own interests in the cars by filing under the UNIFORM COMMERCIAL CODE, the plaintiff was entitled to recover the cars and the trial court erred in failing to grant it a new trial.

In *Charles S. Martin Distrib. Co. v. Haney*[21] the seller delivered goods to a retailer for resale, and retained title until sold. The court held that when the seller brings a trover action it must show which items have not been sold at retail, and their value in order to recover a money judgment.

15. *Id.*
16. 113 Ga. App. 135, 147 S.E.2d 473 (1966).
17. GA. CODE ANN. §109A-2-315 (Supp. 1962).
18. GA. CODE ANN. §109A-9-302(3) (Supp. 1962).
19. 114 Ga. App. 418, 151 S.E.2d 530 (1966).
20. GA. CODE ANN. §68-405A (1957 Rev.).
21. 114 Ga. App. 346, 151 S.E.2d 239 (1966).

A materialman who keeps one ledger account on a contractor, and does not keep track of the jobs on which the material is used, and credits payments against the total balance cannot claim a lien against any of the property owners;[22] he must look to the contractor for payment.

STATUTES

The Retail Installment and Home Solicitation Act[23] is one of the more important acts passed by the 1967 General Assembly. The two most noteworthy and beneficial aspects of the new law are the right of a buyer under a "home solicitation" contract to reject the contract within a certain time, and a restriction on deficiency judgments.

When a buyer has signed a contract after solicitation in his home, he may by midnight of the day following the signing give notice to the seller by certified mail, with a return receipt that he is cancelling the contract. He will still be liable for five per cent of the contract or $25.00, whichever is less, as liquidated damages, and must, of course, return any merchandise he has received. The buyer is also entitled to recover any down payment or trade-in he has given.[24]

A defect in this provision of the act is that the buyer will not learn of his right to cancel until the time for doing so has expired. Notice of the right to cancel should be required in the contract, when the time itself is too short. The buyer should have a certain fixed time in which to cancel, but should also be allowed to cancel at any time before the seller has changed his position, by shipping the goods, transferring the contract, etc. This is particularly true since the buyer is required to pay liquidated damages.

In order to claim a deficiency balance, the seller must notify the buyer of his intent within ten days after repossession by registered or certified mail. The notice must also advise the buyer of his right to a public sale. All of these rights are cumulative of those given under the UNIFORM COMMERCIAL CODE.[25] Used car sales[26] which frequently tag the hapless buyer with staggering deficiency judgments are excluded from the act. However, such transactions are covered under The Motor Vehicle Sales Finance Act,[27] which was passed at the last session of the General Assembly. It is substantially the same in its provisions as to deficiencies as the Home Solicitation Act.

The act also requires that certain clauses be included in contracts, regu-

22. Atlanta Lighting Fixture Co. v. Peachtree-Sheridan Corp., 113 Ga. App. 313, 147 S.E.2d 847 (1966).
23. Ga. Laws 1967, p. 659.
24. Ga. Laws 1967, p. 670.
25. Ga. Laws 1967, pp. 671-72.
26. Ga. Laws 1967, p. 670 (1). "Goods" means all personalty—but not including motor vehicles.
27. Ga. Laws 1967, p. 682.

lates the size of printing on contracts, the rate to be charged on installment and revolving accounts, and provides for penalties for violation of its terms. The provisions of this act, as well as the Motor Vehicles Sales Finance Act cannot be waived.[28] Transfer of the contract does not relieve the seller of liability under the penalties section, and the transferee is subject to defenses connected with excessive finance charges.[29] Both acts provide a civil penalty of at least $100.00 for the violation of any provision of the respective acts.[30] The effective date of both acts is October 1, 1967.[31]

The Motor Vehicle Certificate of Title Act was amended twice in 1967. One amendment provides for registration of automobiles in certain cases without a certificate of title, and requires a bond from the applicant before issuance of a certificate in certain cases.[32] The second amendment exempts cars made prior to the effective year of the act (1963) from the mandatory requirement that they have a certificate of title by January 1, 1964.[33]

28. Ga. Laws 1967, p. 673; Ga. Laws 1967 p. 683.
29. Ga. Laws 1967, p. 671.
30. Ga. Laws 1967, p. 672; Ga. Laws 1967, p. 683.
31. Ga. Laws 1967, p. 673; Ga. Laws 1967, p. 683.
32. Ga. Laws 1967, p. 450.
33. Ga. Laws 1967, p. 451.