CONTRACTS

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During the survey period, the appellate courts of Georgia reviewed approximately 70 cases involving problems of contract law. As usual, the great majority of the cases merely applied well-settled principles. Many turned on procedural points. None can be described as "land-mark" cases. A few are worthy of discussion in that they present interesting problems in the application of established principles to new situations.

The test of a lottery is in its working rather than in its wording, says Judge Eberhardt in *Boyd v. Piggly Wiggly Southern, Inc.*[1] Mrs. Boyd played Piggly Wiggly's "Pot O'Gold Derby" during its ninth week and her ticket on a horse named "Crimson Satan" produced her a $500.00 winner on WJBF-TV, Augusta, or so she thought. Mrs. Boyd was elated for now she had the long sought-for money to consult a Savannah doctor. Piggly Wiggly was not particularly overjoyed for that week it had handed out approximately 9100 tickets on this horse, along with tickets on others, of which approximately 6000 were distributed to its patrons in the Albany, Macon and Augusta television areas. "Crimson Satan" was not scheduled to win a race during the ninth week but instead was scheduled to win in the eleventh week. However, WJBF-TV erroneously ran the taped races for the eleventh week during the ninth week and "Crimson Satan" sneaked through to victory. Ill though she was, Mrs. Boyd got up, changed clothes and crept to her friendly Piggly Wiggly to claim her "pie from the sky" only to find that Piggly Wiggly had wiggled out by posting the correct verification poster for the ninth week. It seems that the TV station discovered its mistake, promptly announced it and showed the ninth week's program immediately afterward but Mrs. Boyd was no longer present before her TV screen to hear this disheartening news. Hence, the litigation ensued.

The first task facing Mrs. Boyd was that of showing that the contest scheme was legal, for our courts uniformly refuse to lend their aid in the enforcement of an illegal agreement. Recognizing that three ingredients are necessary to constitute an illegal lottery or gift enterprise, prize, (chance and consideration) Mrs. Boyd acknowledged that prize and consideration were present in the sales promotion scheme in question, but contended that chance was not. The basis of her contention of "no chance" was an assertion that the televised horse race programs were based upon moving

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1. 115 Ga. App. 628, 155 S.E.2d 630 (1967).

picture films of horse races which were run months and years before each televised program, and, in advance of the distributing of the tickets or the showing of the films, and therefore the winning horse of each race thus televised was well known in advance by Piggly Wiggly, the public at large and was a matter of record. Piggly Wiggly contended that consideration was not present so as to support a suit upon the alleged winning ticket and further contended that even if consideration were present, that a lottery or gift enterprise was shown because prize and chance also appeared. The court held that chance was involved because the record conclusively showed that the recipients of the winning tickets were determined purely by chance; that the prize element was obvious; and that consideration as an ingredient of a prohibited lottery or gift enterprise is shown when there is present, in the actual working of the sales promotion scheme, a class of persons who, in addition to receiving or being entitled to chances on prizes, supply consideration for all the chances in bulk by purchasing whatever the promoter is selling, whether the purchasers were required to do so or not under the wording of the promoter's rules.

The *Boyd* case is exemplary of the usual scholarly opinion by Judge Eberhardt and contains an excellent resume of almost all of the cases involving similar sales promotion schemes and is worthy of reading in its entirety. The *Boyd* case specifically overrules the case of *Dumas v. Todd*[2] which had held that in the absence of consideration, the drawing for an automobile at an auction whereby some person present at the sale would receive an automobile did not come within the scope of a lottery device.

Mrs. Boatright didn't fare any better in her action against Winn-Dixie Stores, Inc.[3] when that store wouldn't pay her the $2,005.00 she thought she had won in its "Two for the Money" game. Under the rules of that game as advertised, each customer was given a ticket during such customer's visit to one of Winn-Dixie's stores, or tickets might also be clipped from the newspaper ads of the sponsoring stores. Each ticket consisted of two halves, on each of which half was a block marked "You Win $_____," leaving after the dollar sign a blank space. The customer was instructed to apply bleach to the blank space which would make visible the previously invisible amount. Customers were invited to participate in the game at all stores of the defendant and informed that, upon matching a left and right half of such tickets with the same amount, the amount so matched would be won by such customer. Mrs. Boatright accepted Winn-Dixie's invitation to play the game and visited its stores in Daytona Beach, Florida and Douglasville, Georgia. She used her bleach and matched four left and right halves of tickets with the amounts of $500.00 on both halves, and matched one left and one right half of a ticket with the amount of

2. 93 Ga. App. 540, 92 S.E.2d 265 (1956).
3. Winn-Dixie Stores, Inc. v. Boatright, 115 Ga. App. 645, 155 S.E.2d 642 (1967).

$5.00 on each half, and, according to the rules of the game as advertised, she was entitled to the sum of $2,005.00. Once again, the grocery store wouldn't pay, denying Mrs. Boatright her cash because the code numbers on the ticket halves did not also match. There was no mention of matching code numbers in the advertisement and Mrs. Boatright was rightfully chagrined and brought her suit. Winn-Dixie changed its advertisement thereafter to require that the code numbers, as well as the amounts, be matched in order to be eligible to win in the game. The court held that this case was controlled by *Boyd*[4] and that the trial court erred in its judgment overruling the renewed general demurrer to Mrs. Boatright's petition as amended, which sought a recovery based upon Winn-Dixie's unlawful scheme.

In *Kelly v. Banda*,[5] plaintiff sued defendant for money had and received. Plaintiff and defendant entered into an oral agreement that they would enter a football contest being conducted for the Emerson Radio Corporation and that, if either party won any prize, they would divide it, share and share alike. The contestants were to pick the champions of the American Football League and the National Football League and the grand winner of the contest would be drawn from the group of entry blanks that had correctly picked the winners of the two teams. Plaintiff used his expert knowledge of football to furnish the information on the football teams and defendant furnished the free entry blanks. Together they filled out about 300 blanks. They won and an Emerson Radio Corporation official presented the winning check to defendant. Plaintiff sued defendant for approximately $10,500.00 after defendant refused to share the winnings with plaintiff. The court held that where the plaintiff and the defendant jointly participated in a prohibited lottery or gift enterprise, a suit for money had and received will not lie as to funds derived therefrom which are in the defendant's possession.

One cannot do indirectly that which the law does not allow to be done directly, so Richmond County found out in the case of *Richmond County v. McElmurray*.[6] On a previous appearance of this case,[7] the Georgia Supreme Court ruled that a contract which creates a debt for a county each year for ten years without the approval of the voters and which also binds future governing authorities without their approval is contrary to statutory law and GA. CONST. art. VII, section 7, para. i and is void from its inception. Thereafter, the county and the corporate defendant entered into a new contract whereby they rescinded the agreement and sale contract previously ruled on and agreed to a new contract whereby the corporation would lease the property in question to the county for a term of one year

4. Boyd v. Piggly Wiggly Southern, Inc., 115 Ga. App. 628, 155 S.E.2d 630 (1967).
5. 116 Ga. App. 421, 157 S.E.2d 782 (1967).
6. 223 Ga. 440, 156 S.E.2d 53 (1967).
7. McElmurray v. Richmond County, 223 Ga. 47, 153 S.E.2d 427 (1967).

with automatic renewal for similar periods for nine years unless notice was given within ninety days in writing prior to the expiration date of the county's intention not to renew, and providing that after five years the county might pre-pay rent for a total of 120 payments all together, and likewise that in the event of condemnation for public purposes any award would first go to the lessor in an amount equal to 120 monthly payments less whatever rent had been paid. Simultaneously therewith the parties entered into a sale contract whereby lessor agreed to sell and buyer to buy the same property within thirty days from the termination of the lease for $10.00, provided 120 monthly payments had been made thereunder or the county had pre-paid rent pursuant to the lease agreement, but also providing in the last paragraph that "there shall be no obligation upon Richmond County, Georgia to buy the aforesaid property if it does not want to." Examining the new agreement in the light of the original scheme by Richmond County and the corporate defendant to circumvent the law in the construction of a public building, the court held, notwithstanding the fact that "loopholes" were left in the lease and also in the sale contract whereby the county would not have to buy the property if it did not so desire and could rescind the lease, that the lease, if allowed to continue for a number of years, would require public officials to continue it in effect to avoid moral and pecuniary loss to the public by refusing to continue the agreement, and would always require affirmative action on their part to prevent it from amountiing to a ten year lease and a debt payable for 10 years in the purchase of a public building, without the approval of the voters, and binding on future governing authorities without their approval contrary to constitutional and statutory authorities. The court found that the same defect existed in the new contract as in the old.

Several cases dealt with accord and satisfaction. In *Fidelity & Cas. Co. of New York v. C.E.B.M., Ltd.*[8] the court held that where a check for less than the amount claimed by the payee and marked "in full settlement" of a contractual obligation was mailed December 29th, received in due course and retained by the payee, who acknowledged receipt of the check January 28th, but, calling attention to a dispute as to the amount due, informed the sender that the check would not be cashed, suggesting that another be issued in partial payment rather than full settlement, and without further communication about it still had the check in its file when it brought suit in November for the full amount claimed, retention of the check worked an accord and satisfaction. The court found the retention in question to be a retention for an unreasonable time as a matter of law pointing out that if there was no intention to accept it, the check should have been returned with promptness. The court brushed aside a suggestion that the check was simply being held for evidence under the circumstances,

8. 116 Ga. App. 92, 156 S.E.2d 467 (1967).

pointing out that the plaintiff could have photostated the check before returning it, for evidentiary purposes.

Moody v. Nides Fin. Co., Inc.[9] was a suit for a deficiency judgment after repossession and sale of an automobile. The debtor sent the money for her December payment to the office of the finance company in early January, by her sister-in-law, using the car—the collateral for the debt—as a means of transportation. The man in charge refused to accept the proffered payment and asked for the keys to the car so that it might be road-tested to "see whether we have our money's worth in it." On his return from the road test, the sister-in-law was advised that "we do have our money's worth in the car, and we are going to keep it." The car was subsequently sold at a private sale in May and no notice of the intended sale was given the debtor, nor was she afterward informed that the sale had been made, to whom or for what price, and, indeed, heard nothing from the finance company until August when she was informed that because of default the entire balance was accelerated to maturity and that unless paid within ten days attorneys' fees would be claimed. Reiterating the general rule that while the debtor in a security transaction has no right to surrender the collateral in satisfaction of the debt, yet if a creditor accepts surrender or effects a repossession under circumstances that amount to an accord and satisfaction the debtor is entitled to take advantage of it, the court held that the facts of the repossession authorized the jury to find that the finance company had, in effect, informed the debtor that it was taking the car in settlement of the debt, particularly since no notice of the intended sale or disposition of the car was given. The court pointed out that it was content to rest its decision on the accord and satisfaction which the jury would have been authorized to find under the facts, although it opined that it would likely have reached the same result by applying the provisions of the UNIFORM COMMERCIAL CODE.[10]

In a similar case to *Moody*,[11] *Johnson v. Commercial Credit Corp.*,[12] the court of appeals held that evidence including disclosure that after six payments the debtor returned the automobile to the creditor who stated, "You can't afford to turn it in . . . it's worth more than you owe on it" was sufficient to go to the jury on the question of whether the oral transaction amounted to an accord and satisfaction.

The alteration, by the creditor bank, of a contract of suretyship by the release of one of the three original sureties and the substitution of a new surety therefor did not discharge the other two original sureties, since such novation was authorized by a provision in the contract to the effect that the bank could surrender any kind of security it held and substitute

9. 115 Ga. App. 859, 156 S.E.2d 310 (1967).
10. *See* GA. CODE ANN. §§109A-9-503 through 109A-9-507, and particularly §109-A-9-504(3) (1962).
11. Moody v. Nides Finance Co., Inc., 115 Ga. App. 859, 156 S.E.2d 310 (1967).
12. 117 Ga. App. 131, 159 S.E.2d 290 (1968).

any kind of collateral for the indebtedness without notice to or further consent of the sureties.[13] The court in *Overcash*[14] further pointed out that, since there was no contention that the alterations were made with intent to defraud or that they were done by anyone other than a party to the contract, that even if the provisions of the contract be deemed insufficient to constitute consent, or to dispense with its necessity, the contract could still be enforced against the remaining original sureties by virtue of GA. CODE ANN. section 20-802 (Rev. 1965), which provides as follows:

> If a written contract be altered intentionally, and in a material part thereof, by a person claiming a benefit under it, *with intent to defraud* the other party, such alteration voids the whole contract, at the option of the other party. If the alteration be unintentional, or by mistake, or in an immaterial matter, *or not with intent to defraud,* if the contract as originally executed can be discovered and is still capable of execution, it will be enforced by the court. If the alteration be made by a stranger, and not at the instance or by collusion of a party or privy, if the original words can still be restored, the contract will be enforced. (Emphasis Supplied.)

Evans v. American National Bank & Trust Co.[15] reiterates the established principle that any act of the principal or guarantee in a contract of suretyship or guaranty which increases the risk of the surety or guarantor or exposes him to greater liability discharges him. The court found that failure to keep collateral security insured amounts to such an increase in risk which will discharge the surety or guarantor to the extent he is injured thereby.

There were several cases dealing with restrictive covenant agreements ancillary to employment contracts. The general rule as restated in *Ryder v. Orkin Exterminating Co., Inc.*[16] is that an agreement in restraint of trade ancillary to a contract of employment supported by a valuable consideration, and limited as to both time and territory, and not otherwiise unreasonable, is enforceable. As pointed out by the court therein a restrictive covenant which is part of an employment contract is supported by consideration. In *Silverberg v. Photo-Marker Corp. of Atlanta,*[17] the Supreme Court of Georgia held that a restrictive covenant in an employment contract prohibiting the employee for a period of 18 months after termination of his employment from soliciting customers, business or patronage from any persons with whom he may have dealt while in the employ of the employer was uncertain, indefinite, unreasonable and imposed on the employee greater limitations than were necessary for protec-

13. Overcash v. First National Bank; Haynie v. First National Bank, 115 Ga. App. 499, 155 S.E.2d 32 (1967).
14. *Id.*
15. 116 Ga. App. 468, 157 S.E.2d 815 (1967).
16. 224 Ga. 145, 160 S.E.2d 381 (1968).
17. 223 Ga. 383, 155 S.E.2d 385 (1967).

tion of the employer and was therefore unenforceable. In another case,[18] an employment contract providing that the employee would not directly or indirectly engage in distribution or manufacture products competitive to those of the employer in any area in whch the employer's products might be distributed or sold at the time of such termination was held to be unreasonable, not necessary for the protection of the party in whose favor the restraint was imposed, oppressive to the party restrained, opposed to the interest of the public and unenforceable. A restrictive covenant ancillary to a stock purchase agreement under which the employee agreed that he would not engage in competition with the employer or any subsidiary of the employer in any phase of the vehicle renting or leasing business for a period of two years after the termination of his employment in any city where the employee was employed was held in *Fox v. Avis Rent-A-Car Systems, Inc.*[19] to be certain and definite as to the prohibited activity and reasonable as to time and place and was enforceable against the employee who resigned his employment and engaged in the rental and leasing of trucks.

A contract which is required by the statute of frauds to be in writing and which is therefore put in writing, cannot be modified by a subsequent agreement in parol; therefore, the Georgia Supreme Court in *Sanders v. Vaughn*[20] held that a subsequent oral modification of a written contract to sell land was not binding on the seller and that the purchaser could not enforce the contract by specific performance or recover damages for its breach. Likewise, the supreme court reaffirmed in the case of *Pope v. Cole*[21] that an express trust cannot be engrafted on a deed by parol. It was pointed out in the case of *Dawn Memorial Park, Inc. v. Southern Cemetery Consultants of Georgia, Inc.*[22] that substantial performance during the first year of an oral contract between the memorial corporation and the cemetery corporation, that the former would sell lots and markers for the latter on a commission basis, brought the oral contract within an exception to the statute of frauds and that, in any event, a suit based on quantum meruit is not within the bar of the statute of frauds.

In *Candler v. Wilkerson*[23] the Supreme Court of Georgia held that Georgia Laws 1966, p. 160, amending GA. CODE ANN. section 30-309 (Supp. 1967), so as to provide for the termination of permanent alimony whether created by contract or otherwise upon the remarriage of the wife unless otherwise provided for in the decree, was, with respect to a contract which was made part of a final divorce decree rendered prior to the act and which pro-

18. Taylor Freezer Sales Co., Inc. v. Sweden Freezer Eastern Corp., 224 Ga. 160, 160 S.E.2d 356 (1968).
19. 223 Ga. 571, 156 S.E.2d 910 (1967).
20. 223 Ga. 274, 154 S.E.2d 616 (1967).
21. 223 Ga. 448, 156 S.E.2d 36 (1967).
22. 115 Ga. App. 180, 154 S.E.2d 258 (1967).
23. 223 Ga. 520, 156 S.E.2d 358 (1967).

vided for payment of permanent alimony in varying amounts over subsequent years, violative of the Georgia and Federal Constitutions as a law impairing obligations of valid contracts and was null and void.

Other cases decided during the period of this survey reaffirmed the following rules of construction and well-established principles of contract law: the mere necessity of an accounting to ascertain the amount due on a contract is wholly insufficient to give equity jurisdiction to order an accounting;[24] the seller of a house is under a duty to reveal concealed defects which were known, or in the exercise of ordinary care should have been known to him, and which an ordinarily prudent examination by the buyer would not reveal, and the failure to do so would amount to fraud;[25] a party to an entire contract who has partly performed and then subsequently abandoned further performance according to its stipulations, voluntarily and without fault of the other party or his consent thereto, can recover nothing for such performance;[26] a tender which is not in full of the claim at the time it is made is not a good tender;[27] a general agreement to arbitrate all questions which may arise in the execution of a contract, both as to liability and loss, is against public policy and void, as an attempt to oust the courts of jurisdiction;[28] mere inadequacy of price may justify a court in refusing to decree specific performance of a contract of bargain and sale and so, also, may any other fact showing the contract to be unfair, or unjust, or against good conscience;[29] a unilateral contract is unenforceable for want of mutuality and such a contract is terminable at will;[30] an oral contract to make a will giving property to the other contracting party for valuable consideration is enforceable by specific performance in Georgia;[31] if one party to a written contract has not signed, his acceptance is inferred from performance under the contract in part or in full and he becomes bound;[32] the terms of a written contract may be modified by a subsequent contract wholly in parol where there is some performance under the subsequent contract to afford the necessary mutuality or to take it out of the statute of frauds;[33] where the parties have not provided for a rescission by making time of the essence, before one party can make it of the essence he must give the other party notice of a desire to rescind and give him an opportunity to comply or else be deemed to have assented to the rescission;[34] although a contract executed on Sunday is prima facie void,

24 Gifford v. Jackson, 223 Ga. 155, 154 S.E.2d 224 (1967).
25. Windsor Forest, Inc. v. Rocker, 115 Ga. App. 317, 154 S.E.2d 627 (1967).
26. MacLeod v. Belvedale, Inc., 115 Ga. App. 444, 154 S.E.2d 756 (1967).
27. State Highway Department v. Hewitt Contracting Co., 115 Ga. App. 606, 155 S.E.2d 422 (1967).
28. Wright v. Cecil A. Mason Constr. Co., 115 Ga. App. 729, 155 S.E.2d 725 (1967).
29. Georgia Money Corp. v. Montelesone Apartments, Inc., 223 Ga. 418, 156 S.E.2d 39 (1937).
30. Parks v. Atlanta News Agency, Inc., 115 Ga. App. 842, 156 S.E.2d 137 (1967).
31. Logan v. Logan, 223 Ga. 574, 156 S.E.2d 913 (1967).
32. Cooper v. G. E. Constr. Co., 116 Ga. App. 690, 158 S.E.2d 305 (1967).
33. *Id.*
34. Development Corp. of Georgia, Inc. v. West, 116 Ga. App. 768, 159 S.E.2d 94 (1967).

one seeking to recover on such an instrument may plead and prove that the true effective date was other than that shown on the instrument itself and a contract, though made on Sunday, if not completed on Sunday, will not be affected by the Sunday law;[35] construction of an ambiguous written contract is a matter for the court, and no jury question is raised unless after application of all applicable rules of construction the ambiguity remains;[36] an agreement on the part of one to do what he is already legally bound to do is not a sufficient consideration for the promise of another;[37] the cardinal rule of construction is to ascertain the intention of the parties and if that intention be clear, and it contravenes no rule of law, and sufficient words be used to arrive at the intention, it shall be enforced, irrespective of all technical or arbitrary rules of construction.[38]

There were no statutory enactments affecting the law of contracts at the 1968 session of the Georgia General Assembly.

35. Sprayberry v. Wright, 116 Ga. App. 748, 159 S.E.2d 102 (1967).
36. Farm Supply Co. of Albany, Inc. v. Cook, 116 Ga. App. 814, 159 S.E.2d 128 (1967).
37. Robert Chuckrow Constr. Co. v. Gough, 117 Ga. App. 140, 159 S.E.2d 469 (1968).
38. Romine, Inc. v. Savannah Steel Co., 117 Ga. App. 353, 160 S.E.2d 659 (1968).