CONTRACTS

By EDGAR H. WILSON*

An examination of the cases decided by the appellate courts during the survey period would lead one to the conclusion that not much change is taking place in the venerable law of contracts. This conclusion is correct if the study is confined to case law. Actually there are many pressures for change of the ancient rules of contract law. These demands are being met by legislation rather than judicial decisions. Portions of the Uniform Commercial Code and the Uniform Consumer Credit Code are two outstanding examples of wholesale revision of long established contract rules.

The 1970 session of the General Assembly of Georgia enacted two significant laws affecting contracts. The problem of unsolicited merchandise that has occupied the mind and pen of many contract scholars was solved by an act providing that unsolicited merchandise shall be deemed an unconditional gift to the recipient.[1] The act further provides that a member of an organization which makes retail sales may treat as a gift any merchandise received 30 days after execution of the return receipt for a certified letter terminating membership.

An act was adopted making void as against public policy provisions in building contracts relieving the contractor of liability for injury to person or property resulting from the negligence of the contractor or his employees.[2]

Although, as indicated, cases decided during the survey period do not represent a marked departure from established principles, a number of them do involve interesting applications of old rules to new factual situations and therefore deserve mention.

CONSIDERATION

In *Smith v. Warshaw*[3] the parties entered into a lease which contained the following provision regarding damages: "[U]pon the lessee's breach of the terms hereof, . . . Lessee shall be liable to lessor for the deficiency, if any, between the lessee's rent hereunder and the price so

* Dean and Professor of Law, College of Law, The University of Tulsa. Professor of Law, School of Law, Mercer University 1948-1968.

1. Ga. Laws, 1970, p. 565.
2. Ga. Laws, 1970, p. 441.
3. 121 Ga. App. 72, 173 S.E.2d 234 (1970).

obtained by the lessor on reletting." Subsequently the parties executed a document entitled "Liquidated Damage Agreement" which provided: "If the Lessee vacates the demised premises, for any reason whatsoever, . . . the lessee agrees, at lessor's option, to forfeit any and all security deposits and to pay to lessor an amount equal to two (2) months rental as liquidated damages sustained by lessor because of the aforesaid unauthorized termination . . . ." The court held per Hall, J. that this later document was void for lack of consideration and damages were consequently controlled by the terms of the original lease. Since the lessor retained the option of collecting damages under the original agreement or relying on the liquidated damages provision, he gave nothing in return for lessee's agreement to pay liquidated damages.

The court in *Moorer v. Merrill*[4] reaffirmed the long established, but difficult to rationalize, rule that a subsequent promise to pay a debt discharged in bankruptcy is enforceable. This proposition defies explanation under the general rules of consideration. Justifiable or not, the rule is well entrenched in the common law and is not likely to be changed.

The Georgia rule that a sealed instrument raises a rebuttable presumption of consideration was reaffirmed in *Wenke v. Norton*.[5]

In another case a term in a real estate sales contract providing: "purchaser to assume a first mortgage in favor of Collateral Investment Company in the amount of $1,850,000.00 bearing interest at the rate of 6½% per annum . . ." was held to state the consideration with sufficient clarity.[6] The court noted that the law required only that the agreement furnish a "key" by which the consideration may be ascertained.

In *Complete AAA Mfg. Corp. v. Citizens & Southern National Bank*[7] the plaintiff, C & S National Bank, was assignee of a conditional sales contract on a truck. As a defense to foreclosure the defendant introduced the "Certificate of Title" covering the truck which showed a "Release of Lien or Security Interest" executed by the plaintiff. The defendant admitted no payments had been made. The bank admitted the release but introduced evidence to show that it was executed in order that defendant could collect on an insurance policy at a time when it was believed the truck had been stolen. Further, the bank claimed that it was understood between the parties that the release was not to be effective

4. 120 Ga. App. 250, 170 S.E.2d 298 (1969).
5. 120 Ga. App. 70, 169 S.E.2d 663 (1969).
6. Summerlin v. Beacon Investment Co., 120 Ga. App. 296, 170 S.E.2d 307 (1969).
7. 119 Ga. App. 450, 167 S.E.2d 734 (1969).

until the plaintiff was fully paid. It was later discovered that the truck had not been stolen. In affirming a judgment for the plaintiff the court quite properly held that there was no consideration for the release and it was therefore void. Although the court did not rely on it, the decision could probably also be justified on the basis of mistake of fact.

In two cases[8] the court reaffirmed the well established proposition that it is not necessary that the consideration flow to the promisor.

STATUTE OF FRAUDS

The agreement in *Houston v. Jefferson Standard Life Insurance Co.*[9] provided that a loan was to be closed more than a year after execution of the contract and therefore was within the statute of frauds' requirement that contracts not to be performed within a year must be in writing. The court held that the writing requirement could be met by more than one memorandum if the signed memorandum contained a sufficient reference to other memoranda.

In another case[10] the court held that where a parol contract and each renewal thereof were to be performed in less than a year, the contract was not within the statute of frauds and thus valid without a writing.

The court in reversing a summary judgment for the defendant in *Scott v. Ryder Truck Lines, Inc.*[11] observed that oral modifications of contracts required by the statute of frauds to be in writing are ineffective unless the modification has been acted on or performed by one of the parties. It was also noted that a special plea is necessary to invoke the statute of frauds.

Forest Services, Inc. v. Fidelity & Casualty Co. of New York[12] involved an oral equipment lease for a period of more than one year. The lessee used the equipment and paid the monthly rental for a period of time. The court held that this was not the type of partial performance that would take the contract out of the statute of frauds. For part performance to take the contract out of the statute it must result in such a loss to one or a benefit to the other that it would constitute a fraud not to enforce the agreement. In this case there was no showing that the monthly rental payments were not reasonable and therefore the lessor suffered no loss.

8. First Jewelers, Inc. v. Rosen, 119 Ga. App. 355, 166 S.E.2d 919 (1969); Fine v. Haas, 120 Ga. App. 524, 171 S.E.2d 372 (1969).

9. 119 Ga. App. 729, 168 S.E.2d 843 (1969).

10. Goette v. Darvoe, 119 Ga. App. 320, 166 S.E.2d 912 (1969).

11. 120 Ga. App. 819, 172 S.E.2d 365 (1969).

12. 120 Ga. App. 600, 171 S.E.2d 743 (1969).

PAROL EVIDENCE RULE

Two cases dealt with parol evidence problems. In one[13] the court held that a written agreement to pay a real estate broker a specified commission in several installments could not be modified by a contemporaneous oral agreement to make the installments conditional on the purchaser being current in its obligations to the vendor. In *Johnson v. Mutual Federal Savings & Loan Association of Atlanta*[14] the plaintiff sought relief from the defendant lender for improper disbursement of the proceeds of a loan. Against a plea that since the note and security deed were in writing, the oral agreement violated the parol evidence rule, the court found the oral agreement was collateral and thus not in violation of the rule. The "collateral agreement" exception to the parol evidence rule is hard to justify logically because it is applied in cases where the written and oral portions are clearly part of one contract. However, the exception is well established in the law and was quite correctly applied in this case.

INTERPRETATION

The parties in *Murrah v. First Naional Bank of Columbus*[15] had agreed that the vendee would pay the vendor an additional sum in the event of a "sale" for more than a specified amount. The court decided that the conveyance of an estate for years was not a sale within the meaning of the agreement.

A provision in a real estate sales contract which provided that the sale was contingent on the purchaser being able to obtain "suitable" financing was held to be too vague and indefinite to be enforceable in *Garner v. Brown*.[16] Likewise the words "on conventional type loan 5 ¾%; purchaser to pay closing costs" in a real estate sales contract were found to be too uncertain to be enforceable.[17]

In *Kenney v. Clark*[18] an exclusive real estate brokerage contract provided that the agent would receive a commission ". . . if the property is afterwards sold within three months from the termination of this agency to a purchaser to whom it was submitted . . . during the continuance of said agency . . ." The court observed that generally a

13. Knight v. William Summerlin Co., 119 Ga. App. 575, 168 S.E.2d 179 (1969).
14. 120 Ga. App. 255, 170 S.E.2d 278 (1969).
15. 225 Ga. 613, 170 S.E.2d 399 (1969).
16. 120 Ga. App. 501, 171 S.E.2d 391 (1969).
17. Alexander v. Wood, 119 Ga. App. 332, 166 S.E.2d 903 (1969).
18. 120 Ga. App. 16, 169 S.E.2d 357 (1969).

broker is entitled to a commission if he is the procuring cause of the sale even after the agency is terminated. The contract specifically set a three months limit and therefore the agent was not entitled to recover on a sale made after that time.

Provisions in a construction contract that the general contractor would ". . . exonerate, indemnify and save harmless the . . . [plaintiff] from and against all claims or actions . . . in any way connected with the work . . ." were held to be broad enough to include damages resulting from the plaintiff's own negligence.[19]

CONDITIONS

In *Brady v. Poulos*[20] the court made the following statement: ". . . the closing of the sale, or the performance of the contract, in the present case cannot occur until notification from the mortgage company, an event which may or may not occur depending upon whether or not an F.H.A. loan is available to the purchaser, and the contingency still exists . . . therefore, the contract lacks mutuality." The court then held that the purchaser was entitled to a refund of the earnest money. If this agreement lacks mutuality, then all agreements that are conditioned on an event which may or may not happen are void for lack of mutuality. That is simply not sound contract law. The rights and duties in this case were conditional and recovery of the earnest money should have awaited the expiration of a reasonable time for the loan to be made.

Eberhardt, J. in another case[21] quite correctly held that a provision in a deferred profit-sharing plan that an employee would lose the benefits if he engaged in competitive employment was a valid condition precedent to the employee's right to participate in the plan. The court recognized that this type of condition could be more restrictive than promises not to compete.

The contract in *Williams v. Claussen-Lawrence Construction Co.*[22] contained promises by the plaintiff to do paving work at two sites at a stated amount per foot. The agreement contained a provision that payment would be made "upon completion of job." The defense was that one of the jobs had not been completed. The court held that the contract was entire and not severable. If the quoted provision regarding

19. Robert & Company Associates v. Pinkerton & Laws Co., 120 Ga. App. 29, 169 S.E.2d 360 (1969).

20. 121 Ga. App. 35, 172 S.E.2d 437 (1970).

21. Brown Stove Works, Inc. v. Kimsey, 119 Ga. App. 453, 167 S.E.2d 693 (1969).

22. 120 Ga. App. 190, 169 S.E.2d 692 (1969).

payment were absent, the contract probably should be classified as severable. However, it seems proper to treat the provision for completion as an express condition precedent and therefore require performance of all work before any part of the compensation is due.

MISCELLANEOUS

Other cases deserving mention decided during the period of this survey held: furnishing a credit card constitutes an offer and use of the card is an acceptance of the terms stated on the card;[23] a party cannot use as a defense a mistake resulting from his own negligence;[24] an assignment must either be for consideration or a gift;[25] when a property owner requires changes in original plans which involve additional labor and materials, there is an implied contract to pay for the additions;[26] an unlicensed real estate broker cannot recover for services on the basis of contract or quantum meruit;[27] restrictive agreements limiting employee from future competition are enforceable if reasonable and the determination of reasonableness is a question for the court;[28] mutual rescission of an executory contract is a complete defense to the executory portion;[29] plaintiff had no right for future damages under contract which provided that either party could terminate without prior notice and for any reason;[30] acceptance of rent by a lessor after breach of a provision requiring written notice of intention to extend the lease, constituted a waiver of the requirement;[31] a written contract may be the subject of an oral novation by a substitution of debtors;[32] when parties agree to abide by the decision of a third party the determination is binding except in the case of bad faith, fraud or gross mistake;[33] notice after delay of over three years is not "prompt" notice.[34]

23. Standard Oil Co. v. State Neon Co., 120 Ga. App. 660, 171 S.E.2d 777 (1969).
24. D.H. Overmyer Co. v. Joe Summers Roofing Co., 120 Ga. App. 188, 169 S.E.2d 821 (1969).
25. Long Mfg. Co. v. Citizens Bank, 120 Ga. App. 321, 170 S.E.2d 334 (1969).
26. Gardner v. Tarpley, 120 Ga. App. 192, 169 S.E.2d 690 (1969).
27. Dixon v. Rollins, 120 Ga. App. 557, 171 S.E.2d 646 (1969).
28. Career Girl Temporary Service v. Bridgewater, 226 Ga. 166, 173 S.E.2d 214 (1970); Mike Bajalia, Inc. v. Pike, 226 Ga. 131, 172 S.E.2d 676 (1970).
29. Knight v. Millard, 119 Ga. App. 696, 168 S.E.2d 331 (1969).
30. Revlon, Inc. v. Hagood Pharmacy, Inc., 119 Ga. App. 747, 168 S.E.2d 649 (1969).
31. Chalkley v. Ward, 119 Ga. App. 227, 166 S.E.2d 748 (1969).
32. Davis v. American Acceptance Corp., 119 Ga. App. 265, 167 S.E.2d 222 (1969).
33. Skinner v. Smith, 120 Ga. App. 35, 169 S.E.2d 365 (1969).
34. J.G.T., Inc. v. Brunswick Corp., 119 Ga. App. 719, 168 S.E.2d 847 (1969).