CONTRACTS

By ALBERT P. REICHERT, JR.*

Of the contract cases during the survey period, a few have been selected for discussion. They have not been selected on the ground that they are landmark decisions. They were selected to remind us of some of the applications of contract law (such as an assignor ordinarily remains liable for performance of the duties of the contract, but whether the assignee is liable depends on whether he has assumed the duties, expressly or impliedly) or to compare similar cases to see whether legal principles are being applied consistently (such as in the cases concerning whether real estate sales contracts are too vague to be enforced) or to raise questions as to the correctness of the court's method for reaching a decision (such as in the case concerning interpretation of contracts).

FORMATION OF CONTRACTS

In *Brown v. Five Points Parking Center*,[1] the majority and dissenting judges differed on the basic question of whether or not the evidence demanded a finding that there was a contract. The setting is familiar: A parking ticket on which was printed: "Holder may park one automobile in this area at his own risk of any fire, theft or damage to auto or contents of same." The majority held the plaintiff (a lawyer) was bound by the provision; the dissenters would have left the question to the jury, there being no evidence that plaintiff actually read or agreed to the terms. The majority suggested that the operation of a parking garage may have become so affected with a public interest that such limitations of liability should be prohibited, but that this was a matter for the General Assembly. It may be asked whether it is necessary for the court to wait upon the General Assembly. Might not the court find such limitations to be unconscionable and invalid? On the other hand, the legislative process might be more appropriate for devising alternate routes which would not be either all or nothing.

In *DeKalb County v. Georgia Paperstock Co.*,[2] one of the questions involved was whether or not an "output" contract was valid. That is, the county agreed to deliver, and the paper company agreed to purchase, all the waste paper corrugated boxes it collected, free and clear of all

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1. 121 Ga. App. 819, 175 S.E.2d 901 (1970).
2. 226 Ga. 369, 174 S.E.2d 884 (1970).

garbage, trash or other materials undesirable or unsuitable for use of the company. The court held that what is suitable and satisfactory for the company's use constitutes a matter of evidence, and that evidence of the customs and usages of the trade would be admissible to show what was intended. The decision seems reasonable and correct.

Chastain v. Allison[3] and *Ideal Realty Co. v. Reese*[4] involved the often litigated issue of whether or not a real estate sales contract is too vague to be enforced. In *Chastain*, the contract was held to be too vague but in *Ideal Realty Co.*, not too vague.

In *Chastain*, the contract recited that the purchase price to be paid was "Purchaser will give equity in property at 2791 Rollingwood Lane, S.E. Atlanta, Georgia" (plus other consideration). The court held that this was not definite and did not furnish a key as to how the value of purchaser's equity could be ascertained without resorting to parol evidence.[5]

In *Ideal Realty Co.*, the contract provided:

(a) alternative prices, being the greater of a fixed price and a price per acre, without saying how the acreage was to be determined,

(b) alternative methods of payment, one of the methods being "traded for another properties [*sic*] as designated by purchaser (if not same in value) balance to be credited or debited as applicable,"[6]

(c) that "seller will subordinate this deed [deed to secure debt given by purchaser] to a construction and/or permanent loan used for the improvements of the above described property."[7]

The court held the fact that the contract did not set forth how the acreage is to be established did not make it indefinite. A survey could be made. That the parties might disagree as to the results of a survey did not make the contract indefinite.

The provisions agreeing to subordinate the security deed to another loan did not, in the court's view, make the contract unenforceable because the amount and terms of the other loan were not stated. The seller had the privilege of making such an agreement even though neither the terms nor amount were definitely set forth. The court held that the alternative methods of payment did not render the contract indefinite.

Are the *Chastain* and *Ideal Realty Co.* cases consistent? The parties in both cases no doubt considered initially that they had a contract. In the *Chastain* case was the purchaser's "equity" really indefinite? Could

3. 122 Ga. App. 811, 178 S.E.2d 752 (1970).
4. 122 Ga. App. 707, 178 S.E.2d 564 (1970).
5. 122 Ga. App. 811, 178 S.E.2d 752 (1970).
6. 122 Ga. App. at 708, 178 S.E.2d at 566.
7. *Id.*

not the purchaser have conveyed whatever interest he had in the other property and satisfied the requirement that he give his "equity?" Even if ambiguous, what would be wrong with resorting to parol evidence? Is this not similar to the provision in the *Ideal Realty Co.* contract for a price per acre without specifying how the acreage would be determined (even admitting that the latter is a more common provision)? And, as in the *Ideal Realty Co.* case, should not the parties have the privilege of making such an agreement? Or have the courts made the price provision somehow different from the other provisions and required it to conform to a higher standard of definiteness?

Perhaps the *Chastain* decision is proper, but, when the court does not explore what meanings the parties intended, one gets the feeling on reading it that the justified expectations of the parties have been thwarted by a technicality.

INTERPRETATION OF CONTRACTS

In *General Forms Inc. v. Continental Casualty Co.*,[8] a contractor rented pouring forms from General Forms, Inc., it being provided that forms are to remain on job site for duration of work.

The contractor defaulted during construction and his surety took over the work. A dispute arose between General and the surety as to whether "duration of the work" meant duration of the entire job or duration of the time scheduled for pouring the concrete structure. The president of General and the general manager of the contractor signed affidavits agreeing that in this particular contract and as a matter of custom in the construction trade it was understood that the forms were being rented only for the time scheduled for pouring the concrete structure and that unusual retention beyond this time would result in compensation additional to that in the original agreement.

The court cited Ga. Code Ann. § 20-704 (Rev. 1965) which provides: "The custom of any business or trade shall be binding only when it is of such universal practice as to justify the conclusion that it became, by implication, a part of the contract."

The court then held that where both signatories to a contract swear that they intended one thing and that this corresponded with the general usage of the trade and where nothing in the contract ruled out such an interpretation, the question of whether such a custom exists and whether it becomes, by implication, a part of the contract becomes a question of fact for the jury.

8. 123 Ga. App. 52, 179 S.E.2d 522 (1970).

Of course, if the only parties involved were the parties who signed the contract, the court's holding would make no sense, because the signatories agreed on what the contract meant. The real question is whether the surety steps into the shoes of the contractor and takes the contract with the meaning it had between the signatories or whether the surety can take the position that the meaning of the contract is to be determined as between itself and General.

It would seem that the surety steps into the shoes of the contractor and takes the contract with the meaning it had between the signatories. This would not be unfair to the surety, since it has not relied on another interpretation. It would be unfair to General not to apply the interpretation on which both signatories relied.

ASSIGNMENT

In *Belau v. Brown & Sons Realty Co.*,[9] the majority held that the assignee of the lease was liable for the obligation to pay commissions to the real estate agent. The dissenting judges took the position that it was a question of fact as to whether the assignee had assumed the obligation by implication, since it had not expressly done so.[10]

Southern Concrete Co. v. Carter Construction Co.[11] shows the other side of the coin, *i.e.*, that the assignor remains liable. Here, a contractor ordered pre-cast concrete slabs from a supplier and the supplier assigned its duties under the contract to an affiliate company. That company furnished the slabs and later, when not paid, sued the contractor for the price. The contractor filed a third party complaint against the supplier-assignor, claiming that the slabs were defective, resulting in substantial loss to the contractor for which it sought damages. The court held that the third party complaint was proper.

Central of Georgia Railway v. Woolford Chemical Works, Ltd.[12] involved the question of whether an indemnity clause in a sidetrack agreement was binding on an assignee. The court stated that where a contract is personal, it binds only the original parties and those who may assume the obligation, even though the contract contains a provision that it is binding upon the successors and assigns of one of the contracting parties. A third person may assume the obligation expressly or by implication. In one case[13] cited by the court it was held that buying a

9. 122 Ga. App. 76, 176 S.E.2d 210 (1970).
10. *Id.* at 78, 176 S.E.2d at 212.
11. 121 Ga. App. 573, 174 S.E.2d 447 (1970).
12. 122 Ga. App. 789, 178 S.E.2d 710 (1970).
13. Greer v. Pope, 140 Ga. 743, 79 S.E. 775 (1913).

business with notice of a contract and performing under it for two months was not sufficient to bind the buyer to perform the contract. Nevertheless, these factors are to be considered together with all other circumstances in determining whether the obligations have been impliedly assumed. The court in *Central of Georgia Railway* held that the matter could not, on the evidence available, be disposed of on a motion for summary judgment.

ENFORCEABILITY—CONTRACTS NOT TO COMPETE

Six cases during the survey period considered the validity of contracts not to compete. In only one of the six was the contract held valid.

The beginning point in each case is Ga. Code Ann. § 20-504 (Rev. 1965), which provides that "a contract which is against public policy cannot be enforced" and which gives as one example "contracts in general restraint of trade." However, the courts have held that: "A contract concerning a lawful and useful business in partial restraint of trade and reasonably limited as to time and territory, and otherwise reasonable, is not void."[14]

The *Coffee System* case[15] was the one case during the survey period where the contract was found valid. Therefore, this contract is one which should be closely examined by those who plan to draw a valid contract not to compete.

It will be seen that the contract was one which was limited not only as to time (one year following termination of the employment agreement) and territory (thirteen named counties) but also was limited so as only to prohibit solicitation of those within the territory who were customers of the employer during the two year period immediately preceding the termination of employment or those who had been actively solicited as customers.

The contract did not expressly prohibit the employee from accepting employment with a competitor but did prohibit the employee during his employment or within one year thereafter from divulging or using any information or knowledge relating to sales prospects, business methods and/or techniques which were acquired by him during employment.

One of the tests used by the courts in determining whether the restraint is reasonable or not is the determination of whether the restraint goes only as far as necessary to protect the employer, and no further. Whoever drew the *Coffee System's* contract was evidently aware of this

14. *See* Coffee System v. Fox, 226 Ga. 593, 595, 176 S.E.2d 71, 73 (1970).
15. *Id.*

limitation and adhered closely to it. If one considers the contract to be over cautious, he has only to look at the other five cases where any doubts seemed to be resolved against the validity of the contracts.

In *Edwin K. Williams & Co.—East v. Padgett*,[16] the contract prohibited the employee from competing for two years (a) by going into a similar business within a 50 mile radius of Augusta and Athens or (b) by soliciting for himself or others accounts served by the employer. It was alleged that the employee was soliciting for another in a 50 mile radius of Augusta. The court held that limitation (a) was not applicable because it was not alleged that the employee had gone into business on his own, and that limitation (b) was void because not limited as to territory.

The court made no reference to *Kirshbaum v. Jones*,[17] which held a similar type contract valid. There the contract prohibited the employee from soliciting customers that he had served during his employment. Although no territory was set out in the contract, the court said that the territory would necessarily be limited to that served by the employee.

It would seem that the court in the present case should have at least considered what territory would have been included, even though it was based on the employer's accounts and not merely those served by the employee.

In *Moore v. Dwoskin, Inc.*,[18] the contract provided that the employee would not for two years following termination of employment engage in the wall covering and decorative fabric business anywhere in his assigned territory. Including new areas added after the original contract, the employee's territory consisted of the primary business areas of 31 states. The court held that this contract which in effect prohibited the employee from pursuing his trade or business in that territory was unreasonable, not necessary for the protection of the employer, oppressive to the employee, opposed to the interests of the public, and therefore void.

In *Taylor Publishing Co. v. Jones*,[19] the contract prohibited the employee for a period of two years from selling or soliciting orders for any high school or college yearbooks in competition with the employer within the state of Georgia. The court held that this prohibited the employee from pursuing his trade or business in the whole state and was void. The court cited in support of its ruling a case[20] which held a similar

16. 226 Ga. 613, 176 S.E.2d 800 (1970).
17. 206 Ga. 192, 56 S.E.2d 484 (1949).
18. 226 Ga. 835, 177 S.E.2d 708 (1970).
19. 226 Ga. 832, 177 S.E.2d 655 (1970).
20. Artistic Ornamental Iron Co. v. Wilkes, 213 Ga. 654, 100 S.E.2d 731 (1957).

contract void even though agreeing that a contract may be valid which embraces portions of more than one state. The rationale for this is not clear.

In *Colonial Life & Accident Insurance Co. v. Byrd*,[21] the contract prohibited solicitation of the company's insureds for a period of two years "in the territory covered by this agreement."[22] However, the contract itself did not set out the territory. The company alleged that at or about the time the contract was given and accepted, the agent was given a manual setting out his territory. The court held that since the territory was not set out in the contract, the contract was void. The court did not discuss whether or not the contract could be construed to include the manual's definition of the territory.

One wonders what the intention of the parties was, and whether the court was giving due consideration to effectuating that intention. That goal was expressed by the court in *Wells v. First National Exhibitors Circuit, Inc.*[23] as follows:

> While contracts in restraint of trade are not favored in the law and are not to be extended in their construction beyond the fair import of the language used, nevertheless such contracts must be reasonably construed, and when the intention of the parties is ascertained it must be effectuated.[24]

Where the true meaning of such a contract is equivocal, the circumstances existing when the contract was made, as well as the existence of a custom so well known that the parties must have contracted with the intention that it would apply to their contract, may be shown by parol evidence.

The contract in *Watkins v. Avnet, Inc.*[25] prohibited the employee for the term of employment and three years thereafter from engaging directly or indirectly in the manufacturing or distribution of products in a six state area competitive with "(i) any products presently manufactured or distributed by the Division, or (ii) any products manufactured or distributed by the Division during the term of Employee's employment."[26] The term of employment as stated in the contract was five years.

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21. 227 Ga. 198, 179 S.E.2d 746 (1971).
22. *Id.*
23. 149 Ga. 200, 99 S.E. 615 (1919).
24. *Id.* at 201, 99 S.E. at 615.
25. 122 Ga. App. 474, 177 S.E.2d 582 (1970).
26. *Id.* at 475, 177 S.E.2d at 583.

The employee resigned and brought an action for declaratory judgment that the restrictive covenants were not enforceable.

The court seized on the provision of the contract concerning products manufactured "during the term of employee's employment," and concluded that this meant products manufactured during the contemplated five year term, whether or not employment was terminated sooner. The court surmised:

> [I]f within the restricted period Watkins (employee) should desire to associate himself in a business for the distribution of trivets, which Fairmont (employer) had never previously manufactured or distributed, Fairmont could prevent this activity by also engaging in the distribution of trivets.[27]

Therefore the court held the restrictive covenants unenforceable.

There was no discussion as to whether or not the "term of employee's employment" should be construed to mean the term that he was actually employed (thus avoiding the problem posed by the court). Likewise, there was no discussion as to whether or not one provision (concerning products presently being manufactured) could be enforceable even though another provision (concerning products manufactured during the term of employment) might not be enforceable.[28]

It seems that the court of appeals in this case and the supreme court in some of the other cases cited have resolved doubts against the validity of contracts containing covenants not to compete. Perhaps this is prompted by the worthy motive of promoting competition and making all talents available to the public. Yet there are interests to be protected on the other side too, *e.g.*, protecting an employer from having an employee use the information and customer contacts that he has gained from the employer to draw customers away from the employer the day after he terminates.

If the courts are going to narrow the operation of restrictive covenants, then they should do so along rational lines which give reasonably clear guidelines, should not use strained constructions and should not use failure of a part to invalidate the whole where such is not reasonably required.

REMEDIES

Measure of Damages

In *All-Co Drainage & Building Products, Inc. v. Umstead Enter-*

27. *Id.* at 476, 177 S.E.2d at 584.

28. There is precedent for this in Aladdin, Inc. v. Krashoff, 214 Ga. 519, 105 S.E.2d 730 (1958).

prises, Inc.,[29] All-Co appointed Umstead as its distributor and shipped to it 1600 bags of quick setting cement, advising that if distribution of the product was not to Umstead's satisfaction, All-Co would repurchase the merchandise at 90 per cent of the original purchase price. Umstead contended that All-Co had advertised a 100 per cent guarantee. That matter was never resolved.

Later Umstead found that the cement would not set as represented and brought suit for damages, claiming that the goods were worthless. Approximately 1,000 bags remained in Umstead's warehouse. The jury returned a verdict for Umstead for 90 per cent of the original purchase price of the 1,600 bags. The court of appeals affirmed on the condition that Umstead write off as credit on the judgment the inventory price of all goods disposed of without the consent of All-Co.

The court reasoned that under the UCC the parties could agree on a method of computing the loss and that the jury was authorized to find that the parties had agreed on a 90 per cent repurchase method of computation. However, the UCC provides that resort to a remedy as provided by agreement is optional unless expressly agreed to be exclusive.[30]

Under the UCC the general measure of damages is "the loss resulting in the ordinary course of events from the seller's breach as determined in any manner which is reasonable."[31] Here that could amount to 100 per cent of the original purchase price of the bags remaining in Umstead's warehouse. Should not the court have considered whether this measure of damages was available to Umstead?

Expenses of Litigation

In *Pittman v. Dixie Ornamental Iron Co.*,[32] the court held that a defendant cannot recover expenses of litigation from the plaintiff under Ga. Code Ann. § 20-1404 (Rev. 1965) and indicated that defendant's remedy, if any, would be a separate action for malicious abuse of process after the original action terminated.

It may be asked why there is a different standard for plaintiffs and defendants. Is the court restricted by the failure of section 20-1404 expressly to mention defendants' remedies? Or could not the court use this as a legislative expression of policy that a litigant, whether he be plaintiff

29. 123 Ga. App. 244, 180 S.E.2d 250 (1971).
30. GA. CODE ANN. § 109A-2-719(1)(6) (1962).
31. GA. CODE ANN. § 109A-2-714(1) (1962).
32. 122 Ga. App. 404, 177 S.E.2d 167 (1970).

or defendant, should be able to recover his expenses of litigation if the other litigant has acted in bad faith, or is stubbornly litigious, or has caused unnecessary trouble and expense?

Election of Remedies

Edwards v. Simpson[33] and *G.E.C. Corp. v. Southern Fabricators, Inc.*[34] reaffirmed that under the present practice a plaintiff is not required to elect whether he will proceed upon a theory of express contract or quantum meruit.[35] However, this does not mean that a plaintiff may not have to make an election between other remedies, as shown in the case of *Corbin v. Lee*.[36] Here the plaintiff sued for damages for fraud and deceit in the sale of realty. He proved no actual damages, and the court held that rescission was not an available remedy, because "one who seeks rescission of a contract on the ground of fraud must restore or offer to restore the consideration therefor as a condition precedent to bringing the action,"[37] and plaintiff here had not.

In the case of *Cutcliffe v. Chesnut*,[38] there was again mention of the necessary election between rescission and damages. Here, however, the emphasis was not on the election itself, but whether rescission was an available remedy to a principal for his agent's failure to carry out the agency. The court first stated that a breach of an agency agreement is governed by the law of contracts, there being no rules peculiar to agency, and then stated that the general rule is that a contract may be rescinded for substantial nonperformance or breach. However, there are various rules governing situations in which the remedy will be granted. The record being too incomplete to determine which of the rules were applicable, the court reversed a summary judgment for the principal.

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33. 123 Ga. App. 44, 179 S.E.2d 266 (1970).
34. 122 Ga. App. 452, 177 S.E.2d 497 (1970).
35. *See* GA. CODE ANN. §§ 81A-108 (e)(2), 115 (6) (1962).
36. 121 Ga. App. 784, 175 S.E.2d 102 (1970).
37. *Id.* at 785, 175 S.E.2d at 104.
38. 122 Ga. App. 195, 176 S.E.2d 607 (1970).