CONTRACTS

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The survey of Georgia cases in the area of contracts for the past year reveals no striking departures from well-accepted principles. Old principles, however, are often illuminated by application to new fact situations and therein lies much of the value of a survey of cases in an area such as contracts which changes at a glacial pace. The cases are divided into rather broad areas. There were no statutes in the survey period which directly applied to the law of contracts.

PUBLIC POLICY

A number of cases during the survey period raised the question of whether a particular contract or covenant in a contract might be denied enforcement because it violated public policy. The first of these cases to be discussed is *Funderburk v. Funderburk*,[1] in which the following statement of public policy was made:

> If one of the objects of an agreement, or part of its consideration, is the promotion of a dissolution of the marriage relation existing between the parties or to facilitate the grant of a divorce between them, such agreement is contrary to public policy.[2]

This clear statement of public policy is clouded by the admitted legality of contracts between husband and wife immediately before or after a separation which provide for the wife's support, child custody and waiver of alimony.[3]

In *Funderburk*, an agreement between husband and wife after a separation of several months was attacked as void by the husband in later divorce proceedings. It appeared that the challenged agreement relative to custody and support of minor children, distribution of property and settlement of claims had been made and transcribed in open court before a judge of the superior court in an earlier civil action between the parties. The court of appeals affirmed the lower court decision that plaintiff could not obtain a judgment on the pleadings and that defendant must be allowed to present evidence to support his contention that the agreement violated public policy.

A decision that certain contracts are void as against public policy ought not to be followed without careful periodic examination. Fifty years ago

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1. 229 Ga. 457, 192 S.E.2d 262 (1972).
2. *Id.* at 458, 192 S.E.2d at 263.
3. Sumner v. Sumner, 121 Ga. 1, 48 S.E. 727 (1904); Chapman v. Gray, 8 Ga. 341 (1850).

there seemed to have been little public disagreement with the principle that marriages ought to be permanent. Today, obstacles to divorce are crumbling, and while many decry the decay of the family, few hope that more restrictive divorce laws could improve the situation. The public policy referred to in this case seems to have disappeared outside the courts.[4] (Ga. Code Ann. §53-107 (Rev. 1961) seems not to be strictly applicable to this sort of case but to be directed more toward agreement not to marry.) Nevertheless, while a public policy of preserving marriages seems implausible at present, there are other reasons for scrutinizing such contracts as the one in *Funderburk*. Particular care needs to be taken to be sure that one party (usually the wife) has not been coerced or overreached. Where both parties are represented by attorneys (as seems to be the case in *Funderburk*, although that fact is not specifically declared), this danger seems to be eliminated.[5]

The question of whether parties may by agreement limit litigation to a specified court or courts has not received a consistent answer from American courts in recent years. There has been a growing minority of decisions which enforce such limitations if reasonable at the time suit is brought.[6] The Georgia Court of Appeals has now found such a provision void for violating public policy in the case of *Fidelity & Deposit Co. of Maryland v. Gainesville Iron Works, Inc.*,[7] an action by a subcontractor against a surety on the surety's bond. Dismissal was sought by the surety because the suit had been brought in a county other than those permitted by the contract (labor and material bond) which provided as follows:

> 3. No suit or action shall be commenced hereunder by any claimant: . . . (c) Other than in a state court of competent jurisdiction in and for the county or other political subdivision of the state in which the Project, or any part thereof, is situated, or in the United States District Court for the district in which the Project, or any part thereof, is situated, and not elsewhere.[8]

The subcontractor sued as a third party beneficiary in Hall County, a proper forum under Georgia statute.[9] The statute permits actions against insurers to be brought in a variety of counties, but the court found an improper forum under the agreement cited. Since a specific state statute governs actions against insurers, and a perusal of the cases shows that

4. GA. CODE ANN. §53-107 (Rev. 1961) seems not to be strictly applicable to this case, but to be directed toward agreements not to marry.

5. *But see* Beverly v. Beverly, 209 Ga. 468, 74 S.E.2d 89 (1953), where a separation agreement entered into by husband and wife, each represented by counsel, was voided on grounds of public policy because the parties explicitly agreed to an expeditious divorce.

6. *See* Annot., *Validity of Contractual Provisions Limiting Place or Court in which action May Be Brought*, 56 A.L.R.2d 300 (1955).

7. 125 Ga. App. 829, 189 S.E.2d 130 (1972).

8. *Id.* at 829, 189 S.E.2d at 130-31.

9. GA. CODE ANN. §56-1201 (Rev. 1971).

agreements limiting venue are much more likely to be voided in insurance contracts, this case should not be taken to stand for the broad proposition that parties may never contract to limit venue of future actions.[10]

Covenants not to compete have involved courts in public policy decisions for many centuries. In Georgia such covenants have been ruled permissible in connection with employment contracts or contracts for the sale of businesses if the time and area of the restriction are reasonable. Franchise contracts, currently the subject of a good bit of litigation, involve substantially similar considerations and covenants not to compete are regularly sustained.

Two cases decided on the same day by the Georgia Supreme Court dealt with the validity of such covenants in franchise contract cases. The less confusing of the two cases, *Williams v. Shrimp Boat, Inc.*,[11] involved a covenant by franchisee to avoid competition for one year after the termination of the franchise in a one-county area. Such a covenant is clearly reasonable, and the supreme court affirmed the trial court's injunction against defendant operating a competing business in violation of his agreement.

The more difficult case was arguably a case of first impression, although a dissenting opinion charged that controlling Georgia case law was being disregarded. In *Richard P. Rita Personnel Services International, Inc. v. Kot*,[12] the court dealt with the problem of severability when a covenant to avoid competition sets out an unreasonably broad area. The defendant, the former franchisee, had agreed not to operate a competing business for two years after termination of the franchise in " 'Fulton, Cobb and DeKalb Counties (Georgia) or any territorial areas in which a franchise has been granted by Rita.' "[13] In violation of this agreement, defendant operated a competing business in the named counties after termination of his franchise. The court, dissenters and majority alike, agreed that the clause as written was overly broad and thus invalid. The question which divided the court was whether the "blue pencil theory of severability" ought to be applied to this contract. If this theory were accepted, the court could "blue pencil" or delete the phrase "or any territorial areas in which a franchise has been granted by Rita,"[14] thus leaving a three-county restriction which would be enforceable. The majority of the court rejected the "blue pencil" theory on public policy grounds, namely, that of overreaching covenants against competition are pared down until enforceable in the few cases which reach the courts; in thousands of other contracts employers will be

10. When an agreement limiting venue is entered into after the accrual of a cause of action, different considerations are pertinent; such agreements are generally valid and enforceable. 17 C.J.S. CONTRACTS §229 (2), at 1074 (1963).

11. 229 Ga. 300, 191 S.E.2d 50 (1972).

12. 229 Ga. 314, 191 S.E.2d 79 (1972).

13. *Id.* at 315, 191 S.E.2d at 80.

14. *Id.*

encouraged to draft clauses as broad as possible.[15]

Three dissenters would have severed the objectionable language on the grounds that the contract contained a severability clause, and that the Georgia Supreme Court, in *Hood v. Legg*,[16] did sever an objectionable phrase from a covenant against competition. In the *Hood* case, however, the severed phrase did not relate to a territorial restriction, but rather to the activities which were forbidden.

Public policy has often been proposed as a reason for voiding contractual arrangements whereby one party restricts his own liability for tortious conduct. The court of appeals had reason to deal with such contractual provisions in two cases during the survey period. The first of these cases was *Ellerman v. Atlanta American Motor Hotel Corp.*[17] Plaintiff, a motel guest, left his car in the motel parking lot. He was required to leave the ignition key with the attendant who parked the car, and a claim check was given to him. The following provisions were printed on the claim check: "Liability. Cars parked at owner's risk. Articles left in car at owner's risk. . . . No attendant after regular closing hours."[18] When the guest checked out of the motel he found his car missing and it was never recovered. Plaintiff settled with his insurance company for the value of his car and then sued the company operating the motel for the value of personal property left in the trunk.

The court of appeals in *Ellerman* refused to accept defendant's argument that it was contractually exculpated from liability for negligence, although the decision acknowledged that such an exculpation would be possible for an ordinary bailee (not an "innkeeper"). The court found two grounds for its decision. First, there is a statute permitting an innkeeper to limit his liability to $100.[19] This statute is said to pre-empt the subject, thus invalidating any further limitation by contract. In addition, the court found such a limitation void on grounds of public policy for the following reason: "[T]he public, in dealing with innkeepers, lacks a practical equality of bargaining power and may be coerced to accede to the contractual conditions sought by the innkeeper or else be denied the needed services."[20]

The language applied to innkeepers in the quotation above appears to apply with equal force to landlords, particularly the landlords of large apartment complexes where more and more citizens make their homes. The case of *Camp v. Roswell Wieuca Court Apts., Inc.*[21] was brought by

15. *See* Blake, *Employee Agreements not to Compete*, 73 HARV. L. REV. 625 (1960) for the arguments relied on by the majority in reaching this decision.

16. 160 Ga. 620, 128 S.E. 891 (1925).

17. 126 Ga. App. 194, 191 S.E.2d at 295 (1972).

18. *Id.* at 194, 191 S.E.2d at 296.

19. GA. CODE ANN. §52-111 (Rev. 1961). This $100 limit was apparently placed in the law in 1925 and not raised since, certainly good fortune for hotel owners.

20. 126 Ga. App. at 195, 191 S.E.2d at 296.

21. 127 Ga. App. 67, 192 S.E.2d 499 (1972).

apartment tenants who had signed leases containing the following clause:

> It is expressly agreed and understood that Lessee releases Lessor and/or Agent from any and all damage or injury to person or property of Lessee suffered upon the premises herein leased, and will hold the Lessor and/or Agent harmless from all damages sustained during the term of this lease.[22]

Plaintiffs suffered personal injuries and property damages when a fire was allegedly caused by a defective heater which the landlord had negligently failed to repair. The fire allegedly spread because of negligent construction of the building. The court of appeals upheld summary judgments against those tenants who had signed the lease without any discussion of public policy arguments. Recent authority in other states, however, suggests this sort of clause faces increasing challenge in our courts and legislatures.[23]

CONTRACT FORMATION AND INTERPRETATION

The average homeowner probably has no more than a rough idea of the contents of his homeowner's insurance policy. Nonetheless, the policy contains important limits on his rights against the insurer, and these limits are generally enforced, regardless of the extent to which the unlucky insured may be taken by surprise. In *Parris & Son, Inc. v. Campbell*,[24] after the expiration of a three-year homeowner's insurance policy, the insured received a new policy which contained a change authorized by the State Insurance Commissioner during the term of the previous policy. This change reduced the limitation of liability for theft of any one item from $1,000 to $500. When the insured received his new policy from the insurance company's agent, he put it away without reading it, and only became aware of the new limit after his home had been burglarized. No effort had been made by the insurance company to alert its policyholders to this additional limitation of liability. The court of appeals, sitting en banc, reversed the trial court and ordered a summary judgment to be entered for the defendant insurance company and agent. The terms of the contract were those fixed by the policy whether or not the insured had knowledge of what they were. Three dissenting judges thought there was a possibility of tort liability based on misrepresentation because of the agent's assurance that the new policy afforded "full coverage."

Several cases in the survey period involved contracts for the sale of land in which it was questioned whether the description of the land sold, or the statement of a financing contingency was sufficiently clear. In most of these cases the question is whether there is sufficient clarity to satisfy the

22. *Id.* at 67, 192 S.E.2d at 500.

23. *See* McCutcheon v. United Homes Corp., 79 Wash.2d 443, 486 P.2d 1093 (1971). *Cf.* Weaver v. American Oil Co., 276 N.E.2d 144 (Ind. 1971); Sweney Gasoline & Oil Co. v. Toledo, Peoria & W. R.R., 42 Ill.2d 265, 247 N.E.2d 603 (1969).

24. 128 Ga. App. 165, 196 S.E.2d 334 (1973).

Statute of Frauds, but in some cases the question may be whether the parties reached a sufficiently definite agreement to be considered a contract, whether in writing or not. Only the briefest summary of these cases can be given here.

The following description of land was held clearly inadequate: "17 acres of land, more or less located in Land Lot No. 191 of the 5th District of the 3rd Section of Bartow County, Georgia east of the Interstate Highway Number 75 right of way."[25] On the other hand, it was found in *Chewning v. Brand*[26] that a description might be adequate which named the adjoining owners on three sides (the fourth side was a highway). One of the adjoining tracts was owned by a defendant-seller in the case, and so it was not certain whether this description would suffice without a further fact finding as to whether the tract sold was sufficiently distinct from this neighboring tract. In *Grant v. Fourth National Bank of Columbus*,[27] an otherwise objectionably vague description was saved by reference to an attached copy of a recorded plat.

In the *Chewning* case there was also a question of the adequacy of the agreement in stating financing terms. The contract provided:

> $1,900 per acre to be paid as follows: Purchaser to pay 15% down, Seller to finance balance for a period of ten years payable in equal annual payments at 7% interest per annum . . . such papers as may be legally necessary to carry out the terms of the contract shall be executed and delivered by such parties at time sale is consummated. . . . Land to be released at the rate of 120% payment per acre.[28]

The sellers relied on the third division of *Morris v. Yates*[29] where it was held that if a contract provided for deferred payments by the purchaser, but did not provide that the purchaser give notes or a security deed, the contract could not be enforced because of unfairness. The court distinguished *Morris* because of the language "Land to be released at the rate of 120% payment per acre,"[30] which could only mean that there must be a lien in favor of sellers. Besides distinguishing *Morris*, the court specifically disapproved the third division of that case, and declared that unfairness should be determined on the basis of the circumstances of the particular case.

The statement of financing terms in *Thomas v. Harris*[31] could not be saved. The inaptly drafted financing clause read as follows: "[The price] to be paid as follows: First mortgage loan shall be $23,000.00 payable in 240 monthly equal installments plus taxes and insurance." This does not

25. Dangler v. Rutland, 229 Ga. 439, 440, 192 S.E.2d 156 (1972).
26. 230 Ga. 255, 196 S.E.2d 399 (1973).
27. 229 Ga. 855, 194 S.E.2d 913 (1972).
28. 230 Ga. at 256, 196 S.E.2d at 400.
29. 226 Ga. 43, 172 S.E.2d 428 (1970).
30. *See* note 27 *supra*.
31. 127 Ga. App. 361, 193 S.E.2d 260 (1972).

specify whether third party financing is to be obtained, therefore, the court found it too vague for enforcement.[32] Part performance by defendant contractor could not cure the inadequacy of the agreement.[33]

Exceptions to the Statute of Frauds are not infrequent, and two cases from the survey period which attempted to establish exceptions are worth noting. In *Powell v. Adderholdt*,[34] an executor brought an equitable petition for direction as to whether he should execute deeds to certain persons claiming under an alleged contract with the decedent. After a jury verdict in favor of the contract claimants, the remainderman under the decedent's will appealed to the supreme court as against one of these claimants, Albert Poole. There was no written memo sufficient to satisfy the Statute of Frauds. However, there were some written indications that the alleged contract had been made. A small account book bore on one page the statement " 'Albert E. Poole bought land from Mr. W. T. Campbell [decedent] August 14, 1965 this book will show payments.' "[35] The book showed dates and amounts of payments totaling $1,920. "The rough drawing had the words at the top 'Albert Poole land mark' and at the bottom 'Bought August 14, 1965 from W. T. Campbell.' Around the sides of the drawing of an irregular rectangle were the notations 'Road 2600 feet-225-ft-2600-feet-Gulley-481 ft.' "[36]

Poole claimed that because of his payments, the transaction came within the exception to the Statute of Frauds for a contract which has been partly performed.[37] However, partial payment of purchase price alone has never been sufficient to establish this exception, and the court was very short with this theory. A more interesting theory on which to escape the Statute of Frauds was the claim based on the Georgia statute providing that "The specific performance of a parol contract as to land shall be decreed, if the defendant admits the contract. . . ."[38] The court interpreted the statute as applying to an admission in the pleadings without asserting the Statute of Frauds, or a written admission outside of the pleadings.[39] Neither the above mentioned notebook nor the testimony of

32. *Id.*, 193 S.E.2d at 261.

33. For a detailed treatment of the problem of adequately stating financing conditions, *see* Comment, *The Financing Clause in Real Estate Sales Contracts in Georgia*, 8 GA. ST. B.J. 118-20 (1971).

34. 230 Ga. 211, 196 S.E.2d 420 (1973).

35. *Id.* at 213, 196 S.E.2d at 421.

36. *Id.*

37. GA. CODE ANN. §20-402(3) (Rev. 1965).

38. GA. CODE ANN. §37-802 (Rev. 1962).

39. The facts of this case did not require an imaginative interpretation of the statute. In a case where an oral contract to sell land was sued on against a living person, however, it seems that this statute, properly interpreted, could give the same result which is currently produced in the cases of contracts to sell goods by GA. CODE ANN. §109A-2-201(3)(b) (Rev. 1962):

(3) A contract which does not satisfy the requirement of subsection (1) but which

several witnesses as to oral admission by decedent were sufficient to authorize the judgment. Two dissenters asserted that it was appropriate for the jury to decide both questions of whether there was sufficient part performance, and whether there was a sufficient admission in writing (the notebook).

The sort of part performance sufficient to take a contract out of the Statute of Frauds is illustrated by *Thompson v. Frost*.[40] The oral contract alleged by plaintiffs provided as follows:

> Thompson was to purchase a designated tract of land and deed half of it to the plaintiffs for a filling station, placing his own business on the half retained by him; plaintiffs were to construct a service station on their half at a total price between $45,000 and $50,000; if the total price exceeded $45,000 defendant would pay the excess by a four-year note; upon completion of the service station Thompson would operate it and would enter into a lease purchase agreement with plaintiffs for an amount equal to the mortgage; Thompson would use plaintiffs' products and pay a monthly rental in a sum equal to the monthly mortgage payment, said sum to apply against the purchase agreement; upon payment in full of the note and mortgage the lot would be deeded back to the defendant, and the payments made would constitute payment in full of that property plus the lot remaining in his name.[41]

The following summary was used by the court of appeals in deciding that there was sufficient part performance to get past the Statute of Frauds:

> The partnership sets up as its sole obligations: (1) accepting a deed to one half the land purchased by Thompson; (2) funding and building a service station thereon; (3) turning it over to the defendant to operate; (4) deeding it back after full performance. All of these things except the last were done. The defendant's obligations were to (1) make the initial pur-

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is valid in other respects is enforceable . . . .

(b) if the party against whom enforcement is sought admits in his pleading, testimony or otherwise in court that a contract for sale was made. . . .

It has been held in other jurisdictions that this section of the UNIFORM COMMERCIAL CODE:

(1) permits enforcement of an agreement which is admitted in pleadings even though the pleadings also assert the Statute of Frauds as a defense; Chrysler Corp. v. Majestic Marine, Inc. 35 Mich. App. 403, 192 N.W.2d 507 (1971);

(2) prevents dismissal of an action on motion, even though the pleadings do not assert the existence of a necessary writing, since it is possible that in discovery proceedings the party to be charged will admit the contract. Reisman Int'l Corp. v. J.S.O. Wood Products, Inc., in no official reporter; *see* 10 U.C.C. Rep. 1165.

To the extent that GA. CODE ANN. §37-802 (Rev. 1962) can be interpreted to bring about such a result, the Statute of Frauds can protect parties from contracts they never made, but no longer permit parties to escape from otherwise valid contracts because there is no writing. Such a result has been achieved in several states. *See* IOWA CODE ANN. §§622.34 to .35 (1946); ALASKA CODE §09.25.020(4) (1963).

40. 125 Ga. App. 753, 188 S.E.2d 905 (1972).

41. *Id.* at 754, 188 S.E.2d at 906.

> chase; (2) deed the corner lot to the plaintiffs; (3) move his business on to the lot retained by him; (4) operate the plaintiff's business; (5) pay the mortgage notes as they came due; (6) execute and pay a note on any construction balance over $45,000. The first three operations were performed; the fifth and sixth were not. There was accordingly almost full compliance by the plaintiffs and a substantial compliance by the defendant.[42]

The plaintiff, having gotten past this hurdle, nonetheless failed to establish to the satisfaction of the jury that the complete contract alleged had in fact been entered into. The court of appeals affirmed a jury verdict which appeared to represent a *quantum meruit* recovery for certain land retained by defendant.

Custom, when used to establish an implied-in-fact contract, is subject to the same limitation as when it is used to aid in interpretation of contracts. In *Ptacek v. Edwards*,[43] the plaintiff real estate broker obtained a judgment for a commission against the seller of real estate. The court of appeals found error in the trial court's refusal of requests to charge the jury on the question of whether the real estate agent was acting for the buyer or the seller; and also in the trial court's admission of testimony that it was a custom in the real estate trade for the seller to pay commissions on a real estate sale even though the agent represented the buyer. It was error to admit such testimony in the absence of any evidence that the defendant seller knew of such custom. Of course, whether a trade custom is used to establish a contract or to aid in interpretation of a contract, it must be established that the person against whom the custom is asserted knew or had reason to know of the custom.[44]

In *Jacobs Pharmacy Co. v. Richards & Associates, Inc.*,[45] the supreme court determined the meaning of a restrictive covenant in a lease whereby the lessor agreed not to lease any other building or store " 'in the shopping center in which these premises are located . . .' " for use as a drug store.[46] The property leased was specifically described as follows:

> Store building, 48 feet by 120 feet, located in a shopping center development at 72 Greenville Street, in City of Newnan, Coweta County, Georgia, and as indicated on the Plat of said development, dated May 13, 1955, which is attached hereto, and made a part hereof.[47]

After the execution of this lease, the lessor acquired land immediately adjoining the shopping center and developed it as stores, one of which was then leased to a competing drug store. The original lessee contended that

42. *Id.* at 755-56, 188 S.E.2d at 907.
43. 127 Ga. App. 233, 193 S.E.2d 54 (1972).
44. *See, e.g.*, UNIFORM COMMERCIAL CODE §1-205.
45. 229 Ga. 156, 189 S.E.2d 853 (1972).
46. *Id.* at 158, 189 S.E.2d at 855.
47. *Id.*

the new development had become so integrated with the original shopping center as to become part of it. Some evidence had been introduced showing that one vehicular driveway furnishes the only access to the rear of the stores, old and new, that a single paved parking area serves the stores, old and new, that pedestrians and vehicles move freely back and forth between the two areas, that only a service driveway separates the two areas, and that people commonly refer to the entire area as the "Greenville Street Shopping Center."[48]

The supreme court upheld the superior court's refusal to grant an interlocutory injunction, relying on the "intention of the parties" as seen from the specific description of the shopping center in the original lease. Two cases from other jurisdictions were cited by the lone dissenter which closely parallel the facts of this case but were decided opposite.[49] At first blush the decision appears to honor the "letter" of the agreement to the disregard of the "spirit," but this can perhaps be explained by the traditionally antagonistic attitude of Georgia courts toward contracts in restraint of trade.

BREACH AND DAMAGES

The purchaser of a defective article is usually protected by the warranty provisions of the U.C.C. A purchaser of real estate, however, has been said to be subject to the rule of caveat emptor[50] and, in the absence of fraud, to have no rights against the seller.[51] Thus, in *Caroline Realty Investment, Inc. v. Kuniansky*,[52] the plaintiff, buyer of a building, sued the builder-seller of the building when the roof collapsed four years after the sale. Summary judgment for defendant, builder-seller, was upheld in the court of appeals on grounds that the express warranty given by the seller only covered repairs needed within one year, that fraudulent concealment of known defects was not argued, and that negligent construction by the seller does not create liability to the purchaser in the absence of fraudulent concealment. In the case of *Dooley v. Berkner*,[53] the court of appeals declared that the law of Georgia as to implied warranties in real estate or as to a seller's liability for negligent construction must remain at the point to which it had evolved by May 14, 1776, unless the state legislature takes action.

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48. *Id.* at 158-59, 189 S.E.2d at 855.

49. Parker v. Lewis Grocer Co., 246 Miss. 873, 153 S.2d 261 (1963); Carter v. Adler, 138 Cal. App.2d 63, 291 P.2d 111 (1955).

50. For an interesting discussion of the antiquity of this "common law principle," *see* R. TAWNEY, RELIGION AND THE RISE OF CAPITALISM (1926).

51. Dooley v. Berkner, 113 Ga. App. 162, 147 S.E.2d 685 (1966); *but see* Annot., *Defective Home-Vendor's Liability*, 25 A.L.R.3d 383 (1969) for the recent development of several theories of liability for the vendor of new homes, all in jurisdictions other than Georgia.

52. 127 Ga. App. 478, 194 S.E.2d 291 (1972).

53. 113 Ga. App. 162, 147 S.E.2d 685 (1966).

This leaves the unhappy buyer who received no express warranty with only one potential theory of recovery against the seller of a defective building: fraudulent concealment of a known defect. The recent case of *Batey v. Stone*[54] suggests that this theory may have a rather broad application. The court of appeals there held that the evidence justified a jury verdict of damages for fraud in favor of the plaintiff buyer against the defendant builder-seller of a new house. The court cited as ruling law the following proposition from the case of *Southern v. Floyd*:

> If there is a concealed defect, known to the seller, in property being sold, the seller is bound to reveal it to the purchaser [cits.]; and although the purchaser signs a contract of sale which provides that it contains the entire agreement between the parties and that no representation, statement, or inducement except as therein noted shall be binding upon either party, this provision does not relieve the seller from performing his duty to disclose the concealed defect to the purchaser, either by a statement in the contract or otherwise. Concealment of material facts may amount to fraud when direct inquiry is made, and the truth evaded, or where the concealment is of intrinsic qualities of the article which the other party by the exercise of ordinary prudence and caution could not discover (Code §96-203); and misrepresentation may be perpetuated by acts as well as words, and by artifices designed to mislead. Code §96-202.[55]

Thus it appears that "fraudulent concealment" may be found where the seller has failed to disclose hidden defects even though he did not take affirmative steps to hide the defects. The defects complained of in *Batey* included defective waterproofing which defendant was aware of and had concealed with dirt and paneling. Also included were the following defects:

> [t]hat the driveway had less than the stipulated thickness and base in some areas; that some beams had sagged because of inadequate size; that the paint and other finishes were improperly and inadequately applied; that portions of the house had sunk as much as 3 inches, cracked, and malfunctioned due to fill dirt underneath; . . . .[56]

Thus, the fraud consists of the defendant's failure to reveal defects which he knew about, and which were difficult to discover. The defendant's actual knowledge of defects other than the defective waterproofing is not explicitly asserted in the decision. If such knowledge can be inferred from defendant's status as the builder of the house, "fraudulent concealment" may be a useful tool for the disappointed home buyer. Since the Georgia courts have apparently foreclosed themselves from any other line of case development which might protect the purchasers of defective new homes, it is to be hoped that a very broad view will be taken on the extent to which

54. 127 Ga. App. 81, 192 S.E.2d 528 (1972).
55. 89 Ga. App. 602, 603, 80 S.E.2d 490, 491 (1954).
56. 127 Ga. App. at 82, 192 S.E.2d at 529.

knowledge can be inferred.

It is rather unusual that a case stating a basic rule of damages needs description in a survey article. In *Redman Development Corp. v. West*,[57] a construction contract was breached by the owner of the real estate, who ordered the contractor off the job. A judgment in favor of the contractor was reversed because the amount did not appear to be justified by the figures available in the record. The case is remarkable for a statement of the appropriate measure of damages in such a case. The court of appeals' decision quoted:

> The measure of damages for a contract not completed because of the fault of the opposite party is the difference between the contract price and the cost to complete the work *plus sums expended by the contractor up to the time of the alleged breach.*[58]

The flagrant error of the italicized portion of this "rule," if not self-evident, can best be seen in the case of its origin. In *Herrman v. Conway*,[59] when a construction contract was wrongfully terminated by the owner, the court accepted as a proper measure of damages the following:

> [T]he difference between the contract price of $9,280.59 and the cost to complete the work under the contract of $6,527.79, which cost he itemized, plus the sum of $421.02 expended for material and labor up to the time of the alleged breach, which final figure is $3,173.82 . . . .[60]

Of course, reversing the figures, if plaintiff had already expended the $6,527.79, and $421.02 was the cost to complete, this measure of damages would give a patently absurd judgment of $15,387.36.

The correct rule of damages in this situation is that the contractor should receive the unpaid contract price less what he saves as a result of the breach—the cost of completing the contract.[61] It is occasionally stated that the contractor is entitled to the profit he would have made on the contract, plus the actual expenditures to date of breach.[62] It can be seen that this is simply another way of coming to the same result. The startling misstatement of law found in the *Redman* case, the *Herrman* case, and the *Robertson* case appears to originate in a misinterpretation of the case of *Campbell & Co. v. Mion Bros.*;[63] however, in that case a correct result was reached.

The late completion of a building contract is a situation which often raises a serious question as to what damages should have been foreseeable

57. 127 Ga. App. 265, 193 S.E.2d 213 (1972).
58. *Id.* at 266, 193 S.E.2d at 214-15 (emphasis added).
59. 83 Ga. App. 888, 65 S.E.2d 41 (1951).
60. *Id.* at 891, 65 S.E.2d at 44.
61. 5 A. CORBIN ON CONTRACTS §1094, at 508 (1963).
62. *Id.*
63. 6 Ga. App. 134, 64 S.E.2d 571 (1909).

by the party causing the delay. The uncertain outcome of this question is one of the factors leading to the frequent insertion of per diem liquidated damages clauses for delay in construction contracts. In *Concrete Materials of Georgia, Inc. v. Smith & Plaster Co. of Georgia*,[64] construction of a warehouse was completed late, allegedly due to the fault of a subcontractor. The owner of the warehouse had leased it before construction, and he withheld from his payments to the general contractor sums representing the lost rent and other expenses incurred by the lessee due to the delay: wages paid to a security guard while the lessee was storing materials in the uncompleted building, storage charges for other materials shipped in before the building was available and other like charges. The general contractor sought to recover these items from the subcontractor. A jury verdict in favor of the general contractor was reversed by the court of appeals, en banc, on the grounds that the damages other than the lost rentals were not foreseeable by the defendant subcontractor. Three justices dissented on the grounds that foreseeability of these additional elements of damages was properly submitted to the jury.

Among the subsidiary issues decided by the court was a contention by the subcontractor that the general contract limited the contractor's liability to $4,400 and that the owner was legally limited to these damages as against the general contractor, thus this amount would be a maximum recovery by the general contractor. The provision in question read as follows: "Work must be completed by March 1, 1969 as tenant must vacate present facilities. Liquidated damages of $4,400 plus costs will be assessed."[65]

The court found the meaning of this provision to be uncertain because of the language "plus costs"; in addition it declared that the provision constituted a penalty because the amount of damages was readily capable of computation[66] and because damages for loss of rental are directly dependent upon the time period. In such a case a single amount not variable with the extent of the late performance is prima facie a penalty and invalid.[67] Certainly, this portion of the case points up the uselessness of hastily drafted liquidation damages clauses.

The enforceability of a liquidated damage clause was also involved in the case of *State Highway Dept. v. Hall Paving Co.*[68] The contract provided that time for performance would be 161 "available days" (an "available day" was defined as an ordinary weekday on which five hours of work was not prevented by causes beyond the contractor's control) and liquidated damages of $150 per day were to start upon written notice to the contractor

64. 127 Ga. App, 817, 195 S.E.2d 219 (1973).
65. *Id.* at 820, 195 S.E.2d at 222.
66. GA. CODE ANN. §20-1403 (Rev. 1965).
67. *See also* Florence Wagon Works v. Salmon, 8 Ga. App. 197, 68 S.E. 866 (1910).
68. 127 Ga. App. 625, 194 S.E.2d 493 (1972).

of the expiration of the time allowed. No special notification in writing was sent to the contractor announcing that the contract had expired, however, the highway department had sent weekly reports showing the number of "available days" used until the time of the report. After expiration of the contract time, the reports also showed the amount of liquidated damages due. The contractor sued for the amount of money withheld by the highway department and was granted a summary judgment. The court of appeals, sitting en banc, reversed the trial court's award of summary judgment to plaintiff and its denial of a summary judgment in favor of defendant.

The weekly reports were said to comply with the spirit, and not the letter only, of the contract. The contractor made no claim that he did not actually know of the intent to charge liquidated damages, thus the weekly reports were said to be sufficient. The court suggested that in addition to the actual written notice, the case could be decided on the grounds of waiver. The basis for this waiver was that the contractor did not insist on his right to be notified in a writing limited for that purpose when he first discovered liquidated damages were being assessed, but continued working on the project.

Three dissenting judges joined in an opinion which began by concluding the liquidated damages provision was "in the nature of a forfeiture or penalty."[69] No discussion of the considerations governing validity of liquidated damages is found here, and, although it is clear that if a so-called liquidated damages clause is in fact a "penalty," it is void and actual damages only are to be assessed.[70] But the dissenters relied on cases not involving liquidated damages for the proposition that the law will be stretched to the limit to find a waiver of a "forfeiture." The idea propounded by the dissenters would seem to present an unnecessary obstacle to the enforcement of otherwise valid liquidated damages clauses.

The question of whether contract terms had been waived also arose during the survey period in the case of *Continental Casualty Co. v. Union Camp Corp.*[71] This problem can appropriately be viewed with cases on contract formation since by Georgia statute an effective waiver consists of a departure from the terms of a contract sufficient to constitute a "quasi new agreement."[72] In the *Continental Casualty* case, Union Camp Corporation's premiums on a group accident and sickness insurance policy for its employees were paid beyond that grace period four times in 18 months. When Union Camp, for the fifth time, paid a premium beyond the grace period, the insurance company claimed its right to terminate the contract

69. *Id.* at 631, 194 S.E.2d at 497.

70. *See* note 66 *supra.*

71. 230 Ga. 8, 195 S.E.2d 417 (1973).

72. GA. CODE ANN. §20-116 (Rev. 1965).

(a right expressly given by the contract).

If the toleration of four late payments constituted a waiver or "quasi new agreement," the insurance company would have to give reasonable notice before relying on the exact terms of the agreement. The plaintiff, Union Camp, won a jury verdict of specific performance. The supreme court affirmed, stating that such a "quasi new agreement" must be based on the mutual intention of the parties. While the question of mutual intention may be decided by the jury, thus giving maximum value to the advocate's persuasive power, the court in dictum suggested that the mere fact of four late payments accepted by the insurance company would not be sufficient evidence to justify a jury verdict. In this case, however, there were several communications from the insurance company to an agent of Union Camp indicating that failure to make payments within the grace period was not sufficiently important to result in cancellation. The evidence needed to get to the jury appears to be late payments, tolerated by the payee, plus some additional action or expression by the payee indicating acquiescence.

ACCORD AND SATISFACTION

When a debtor sends his creditor a check intended to be full settlement of a disputed or unliquidated claim and the creditor retains the check without cashing it for a period of months, has the creditor by retaining the check agreed to the settlement proposal? This question has generally been answered in the affirmative.[73] However, in the case of *Studstill v. American Oil Co.*,[74] the court of appeals sitting en banc split several ways on this question. The case involved an attempted settlement of a claim for personal injuries to plaintiff. A check was received by plaintiff under circumstances creating some doubt as to whether it was intended a full settlement or part payment. It was finally made clear that the check was intended as full payment and defendant demanded that it be either cashed or returned. After this demand, the check was retained by plaintiff's attorney for about nine months. The trial court held that an irrevocable accord and satisfaction had taken place, and granted the defendant's motion for summary judgment. This judgment was reversed by the court of appeals. Three judges joined in an opinion which concluded as follows:

> Mere retention of a stale check, where the evidence demands a finding that there was knowledge on the part of the debtor at the time that the creditor refused to accept it in full satisfaction of the unliquidated liability . . . will not support a judgment of accord and satisfaction.[75]

The opinion suggested, however, that retention of a check might create a

73. 6 A. CORBIN ON CONTRACTS §1279, at 131 (1963).
74. 126 Ga. App. 722, 191 S.E.2d 538 (1972).
75. *Id.* at 727, 191 S.E.2d at 541.

situation in which the debtor would reasonably rely on his offer having been accepted, and in such a case the creditor would be barred from further recovery. Two other judges joined in the result reached in this opinion. The analysis of the four dissenting judges was that the sending of the check was an offer of settlement. Plaintiff's retention of the check, despite requests that he negotiate it or return it, estopped him from setting up a denial of his answer. The dissenting opinion appears to set forth the more common interpretation of this problem, and is supported by at least two previous cases in the court of appeals dealing with the precise problem.[76]

76. Fidelity & Cas. Co. of N.Y. v. C.E.B.M., Ltd., 116 Ga. App. 92, 156 S.E.2d 467 (1967); Pan-American Life Ins. Co. v. Carter, 57 Ga. App. 294, 195 S.E. 460 (1938).