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Contracts

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CONTRACTS

By EDGAR HUNTER WILSON*

It is interesting for a contracts teacher to note the relatively small number of contract cases decided during the survey period and that the contract cases decided seldom involve problems of offer, acceptance or consideration, the basic content of a law school course on contracts. The conclusion to be drawn, however, is not that the wrong emphasis is being placed in contract courses, but rather that the lawyer generally is so well informed on the more fundamental problems of contracts that he either avoids the creation of such problems or is able to decide upon the proper rule without going to an appellate court. It is also true that the absence of a great volume of contract litigation is due to the fact that conracts is a relatively settled and stable body of law.

The right of a third party to bring an action on a contract made for his benefit has had a turbulent history in Georgia.[1] In 1949, a statute[2] was passed expressly conferring the right to sue on third party beneficiaries. But this was not finally to settle the problem. In *Guest v. Stone*[3] the Supreme Court refused to apply the statute to contracts made prior to the passage of the act. This refusal was based on the theory that to do otherwise would violate the State and Federal Constitutions as an impairment of the obligations of a contract.[4] Such a holding is questioned on two grounds. First, in this particular case, the obligation of the contract ran from a bank on a savings account which the bank had promised to pay to the plaintiff on the depositor's death. The bank admitted owing the amount of the deposit and was relieved of further liability upon paying the funds into court. It is hard to understand who could raise the question of impairment of obligations other than the bank. The bank did not make that claim and therefore was not in a position to complain. Secondly, as a matter of principle, there is a strong argument that giving a third party contract beneficiary the right to sue could never amount to the impairment of a contract obligation. Allowing a suit to be brought by the beneficiary is simply recognizing a right already existing. Such an argument, of course, raises the age-old question of whether there can be a right without a remedy. But that problem aside, giving a cause of action to a beneficiary amounts to enlarging the obligation of the contract but not impairing it. It is pertinent to observe that many jurisdictions have adopted this rule by decisions without finding the impairment difficulty and, as a matter of fact,

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1. For an excellent discussion of the law in Georgia prior to 1949, see O'Neal and Quarles, *Some Significant Recent Georgia Legislation*, 1 MERCER L. REV. 27, 39 (1949).
2. Ga. Laws 1949, p. 455.
3. 206 Ga. 239, 56 S.E.2d 247 (1949).
4. GA. CONST., Art. 1, § 3, ¶ 2, GA. CODE ANN. § 2-302 (1948 Rev.); U. S. CONST., Art. 1, § 10, cl. 1, GA. CODE ANN. § 1-134 (1948 Rev.).

it will be seen that the Georgia courts also have allowed recovery by beneficiaries without the aid of statute.

The constitutional problem of impairment of contract obligations was not mentioned by the court in *Franklin v. Pope*,[5] when the beneficiary of government savings bonds was allowed to recover. Surprisingly enough, the legislation giving this right to a beneficiary was not mentioned. Rather, the court relied on an earlier Georgia case[6] where a co-owner of a government bond was allowed to recover. The court seemed to think that there was no difference between the co-owner problem and the beneficiary on death problem. Reliance was also placed on Code Section 20-306 which provides: "Consideration moving from another . . . If there be a valid consideration for the promise, it matters not from whom it moves; the promisee may sustain his action, though a stranger to the consideration." This Code section was never intended to give a cause of action to a beneficiary, but rather contemplates a situation where the promisee (a party to the contract) brings the suit but a third party has furnished the consideration.[7]

It is difficult to determine why recovery should be allowed in the *Franklin* case and denied in the *Guest* case. The only conceivable material difference between the two is that in one case a bank was the promisor and in the other the federal government was the promisor.

In three more cases[8] the beneficiary problem was present, although the court did not base their opinion on or discuss that theory. All of these cases involved a suit by a prime contractor for the use of creditors of a subcontractor. The suits were based on a contract between the prime contractor and subcontractor to the effect that all labor and materials going into a certain job would be paid for by the subcontractor. Without much in the way of theoretical analysis, the court found that the obligation of this contract (and the surety bond issued pursuant thereto) ran to the creditors of the subcontractor and therefore they were entitled to a recovery. These cases in final effect allow the beneficiary a cause of action, and again, without reference to the statute.

Several cases raised the problem of contracts against public policy. A medical doctor in the case of *Burdine v. Brooks*,[9] agreed not to maintain an office or clinic in a particular county for a period of ten years. Plaintiff asked the court to enjoin the defendant doctor from operating a clinic within the county. Defendant contended that, particularly in view of the shortage of doctors in the county concerned, his promise was against public policy and void. The court observed that it might not be desirable for doctors to enter into such agreements but held that the contract was legally binding. The opinion noted that *general* restrictions on professional service either as to time or territory would render the contract void. The restric-

5. 81 Ga. App. 729, 59 S.E.2d 726 (1950).
6. Knight v. Wingate, 205 Ga. 133, 52 S.E.2d 604 (1949).
7. GRISMORE, LAW OF CONTRACTS § 62 (1947).
8. Southeastern Const. Co., *for use of* Gill Equipment Co. v. Glens Falls Indemnity Co., 81 Ga. App. 764, 59 S.E.2d 747 (1950); Southeastern Construction Co., *for use of* D-A Lubricant Co. v. Glens Falls Indemnity Co., 81 Ga. App. 770, 59 S.E.2d 753 (1950); Southeastern Const. Co., *for use of* Beckhom v. Glens Falls Indemnity Co., 81 Ga. App. 770, 59 S.E.2d 751 (1950).
9. 206 Ga. 12, 55 S.E.2d 605 (1949).

tions in this case being *limited* were held to be reasonable. In the restraint agreement it was provided that the defendant could make house visits within the county from an office in an adjoining county. This stipulation weighed in favor of the reasonableness of the contract. *Kirshbaum v. Jones*[10] was concerned with a contract restraining an employee from soliciting the patronage of his employer's customers within a certain territory for a period of one year after termination of the employment contract. The court held in favor of the validity of the agreement, basing their decision on the same reasoning as that of the *Burdine* case.

Drake v. Parkman[11] was an action to recover a commission paid to a real estate broker who was not licensed in accordance with the Code. The court refused to apply the usual rule that the law will leave parties to an illegal contract where it finds them. The court pointed out that the plaintiff was in no way a wrongdoer and that the statute was designed to protect parties to transactions with unlicensed brokers, and therefore gave judgment for the plaintiff. In another case[12] a real estate broker was suing for his commission but failed to allege that he was duly licensed. Defendant's general demurrer was sustained even though the question of the plaintiff's license was raised for the first time on appeal.

Sells v. Sells[13] held that a contract between a husband and wife to promote the dissolution of their marriage was against public policy; but when, as here, an agreement providing for the wife's maintenance was entered into after separation, it would be enforceable.

A number of cases presented problems of interpretation. Some of these cases are important only in relation to their facts and will receive only brief mention. The promise of the defendant in a timber lease to pay compensation to the plaintiff for damage done to fences and "growing crops" was interpreted as not covering growing trees.[14] And in *Sutton v. Dowling*[15] the court ruled that an exclusive listing contract with a real estate broker, making no mention of credit, contemplated a cash sale of the property before the broker would be entitled to his fee. It was also held in that case that an offer by the owner to sell to a particular party on credit did not waive the requirement of cash as to other willing buyers secured by the broker.

Shepard v. Gettys[16] was an action for specific performance of a contract to convey realty. The contract provided for cash payment upon approval of the title by the plaintiff's attorney. It was discovered that a timber lease was outstanding against the property, so the parties agreed to postpone the sale until the lease expired and then reduce the purchase price by the value of timber cut. When the lease expired the plaintiff tendered the original price (no timber had been cut), but the defendant refused to perform. Defendant contended that the plaintiff should have tendered interest for the period of postponement. The court held for the plaintiff on

10. 206 Ga. 192, 56 S.E.2d 484 (1949).
11. 79 Ga. App. 679, 54 S.E.2d 714 (1949).
12. Mayo v. Lynes, 80 Ga. App. 4, 55 S.E.2d 174 (1949).
13. 206 Ga. 650, 58 S.E.2d 187 (1950).
14. Ingram & LeGrand Lumber Co., Inc. v. Bunn, 81 Ga. App. 93, 58 S.E.2d 193 (1950).
15. 79 Ga. App. 690, 54 S.E.2d 763 (1949).
16. 206 Ga. 392, 57 S.E.2d 272 (1950).

the ground that the agreement of the parties negatived a requirement of interest.

In *Gostin v. Scott*[17] the plaintiff sued to recover for farm machinery delivered to the defendant on the defendant's representation that the machinery went with a farm the plaintiff had sold to the defendant. The contract and deed of sale made no mention of the farm machinery. The court ruled that the delivery by the plaintiff did not preclude her claim here. The elements of a gift were not present, she was not contractually obligated to pass title to the defendant and in no way waived her rights by delivery under the circumstances.

Another case[18] found an agreement to pay a certain stipulated salary to the plaintiff and a fair share of the profits of a business was too indefinite to be enforced, as far as it concerned sharing in profits. Duckworth, J., dissenting, thought that the standards set forth in the contract were sufficient to allow recovery, in that they were sufficient to give a guide for men with a fair conception of what is meant by equity, fair, honesty, etc. In *Employer's Loan & Thrift Corporation v. Ashley*[19] it was held that a vendee could recover the unearned portion of the time price from the vendor who had collected fire insurance proceeds for an automobile, if the vendee could establish that there was a cash price and a time price for the automobile under the sales contract.

The meaning of a contract of safety deposit box rental was so clear that the court refused interpleader to the bank when the co-tenants of the box could not agree as to their rights.[20] And *Hill v. Bush*[21] simply sustained an auditor's finding that a building contract did not include the furnishing and installation of awnings.

A question of consideration was presented in *Jones v. Smith.*[22] A written agreement extending an option stated that one dollar had been paid for the extension. The court held that valid consideration was present even if the dollar had not actually been paid. The statement that the money has been paid will create an enforceable obligation for the one dollar although it has not been paid. Although this case is in line with earlier Georgia decisions,[23] the rule announced is open to some question. Such a holding, in effect, takes the question of what is necessary to make an enforceable obligation out of the hands of the courts and places it with the parties. It does away with the real requirement of consideration, since the parties can make their agreement binding by merely stating that money has been paid. It gives such a recital the same force that a seal had in earlier days.

In *Langenbak v. Mays*[24] the defendant had sold certain tourist cabins to the plaintiff pursuant to a written contract. In order to induce the plaintiff to enter into the contract of sale, the defendant had orally promised not to compete in the tourist cabin business. Defendant raised the parol evi-

17. 80 Ga. App. 630, 56 S.E.2d 778 (1949).
18. Gray v. Aiken, 205 Ga. 649, 54 S.E.2d 587 (1949); 1 MERCER L. REV. 304 (1950).
19. 81 Ga. App. 150, 58 S.E.2d 205 (1950).
20. Mandeville v. First Natl. Bank of Atlanta, 206 Ga. 426, 57 S.E.2d 553 (1950).
21. 206 Ga. 543, 57 S.E.2d 670 (1950).
22. 206 Ga. 162, 56 S.E.2d 462 (1949).
23. Southern Bell Telephone & Telegraph Co. v. Harris, 117 Ga. 1001, 44 S.E. 885 (1903).
24. 205 Ga. 706, 54 S.E.2d 401 (1949).

dence rule to the plaintiff's suit on the oral contract. The Supreme Court concluded that, although the sale of the cabins furnished consideration for both contracts, the oral and written agreements were collateral and independent of each other. Defendant also raised the question of compliance with the statute of frauds. The court held that this agreement was outside the statute of frauds, since it had been completely performed by one side in accordance with the provisions of Code Section 20-402(2).

The court refused to find a novation in *Williams v. Rowe Banking Co.*[25] The opinion properly observed that there must be a substitution of one party for another by agreement in order to constitute a novation. Here, one Thomas had executed a note and a deed with power of sale to the defendant's assignors. Thomas then sold the property covered by the deed to the plaintiff who executed a new note to the defendant and received in return the note of Williams marked paid. Whether a novation occurred is largely a question of the intent of the parties, and it would be difficult to disagree with the court's finding in view of the dearth of facts recited in the opinion. The court stated that all that had taken place was a change in one term of the contract.

Two cases were concerned with the problem of the right of one party to a contract to rescind. *Adler v. Adler*[26] was an action to rescind a contract of dissolution of a partnership on the basis of mistake of fact. Plaintiff alleged that he was kept in ignorance of the financial condition of the partnership and consented to its dissolution because he believed that he owed the partnership money, whereas by recasting his account the partnership really owed him. However, there was a statement in the contract that the plaintiff's account had not been properly recast to reflect his interest and that such a recasting would probably show a different balance. The court properly ruled that a party would not be heard to rely on a mistake of fact when due diligence on his part would have avoided the mistake. Plaintiff as a partner had full rights to the partnership books, and his failure to exercise that right indicated a lack of due diligence on his part. *Milam v. Gray*[27] was instituted to rescind a contract whereby the plaintiff had traded automobiles with the defendant. A mortage had been foreclosed on the automobile the plaintiff had received. Defendant had stated that the title was clear. The court held that a breach of warranty is not sufficient to support a recession. A material misrepresentation of an existing fact, however, will give ground for a recission. A new trial was ordered. The case of *Kinard v. Moore*[28] was a suit to recover back a sum paid to the defendant under a contract to paint and repair the plaintiff's roof. The court found that there was sufficient evidence to establish that the defendant had done such a poor job of repairs that there was a total failure of consideration and the plaintiff was entitled to recover back the full amount paid.

In a suit for money lent,[29] the Court of Appeals held that evidence to establish that the money had been given to the defendant to purchase, repair and sell an automobile, the profit on which was to be split between the

25. 205 Ga. 770, 55 S.E.2d 123 (1949).
26. 205 Ga. 818, 55 S.E.2d 139 (1949).
27. 80 Ga. App. 356, 56 S.E.2d 168 (1949).
28. 79 Ga. App. 750, 54 S.E.2d 345 (1949).
29. Tippens v. Tweedell, 81 Ga. App. 257, 58 S.E.2d 494 (1950).

parties, was not evidence of an accord and satisfaction and therefore was admissible to support a general denial. It did not come within Code Section 81-307, which requires special pleading of all defenses that do not go to disprove the plaintiff's cause of action.

John Monoghan, Inc. v. State Highway Dept.[30] was an action by a contractor to collect damages for a delay caused by the State Highway Department in the contractor's performance of a highway contract. It was determined that one of the department's standard specifications, which was incorporated into this contract by reference, provided that the acceptance of final payment would act as a discharge and release to the department for all claims under the contract. Therefore, the court held that the lower court properly sustained a general demurrer.

The rule announced in *Reisman v. Massey*[31] was that only parties to a sealed instrument could sue and be sued thereon. Therefore the plaintiff could not maintain an action against the defendant partnership (husband and wife) since the contract was signed only by the wife in her individual capacity.

Pierce v. Deich[32] involved an action by a real estate broker for a commission. The court ruled against the defendant's contention that the agreement for the broker to induce the seller to sell was unenforceable within the statute of frauds, as a contract for the sale of lands. This was a contract concerning the broker's services and not one for the sale of land.

The following cases have very little precedent value in the law of contracts and therefore will be mentioned only: *Rivers v. Farrer*[33] held that the lower court erred in sustaining an arbitrator's award against admitted evidence showing an accord and satisfaction. *Dunlap Roofing & Fooring Co., Inc. v. Boatwright*[34] found that the contract sued on was made with the defendant's son not acting as the defendant's agent, even though the contract concerned the defendant's property. *Ronacle Corporation v. Aero Const. Corporation*[35] held that there was sufficient evidence to sustain a finding that a contract condition of an architect's certificate had been waived. *Buice v. Smith*[36] sustained a finding that the defendant had breached an exclusive realty listing contract with the plaintiff.

30. 81 Ga. App. 289, 58 S.E.2d 242 (1950).
31. 81 Ga. App. 277, 58 S.E.2d 528 (1950).
32. 81 Ga. App. 717, 59 S.E.2d 755 (1950).
33. 79 Ga. App. 445, 54 S.E.2d 295 (1949).
34. 80 Ga. App. 155, 55 S.E.2d 643 (1949).
35. 205 Ga. 424, 53 S.E.2d 921 (1949).
36. 81 Ga. App. 658, 59 S.E.2d 676 (1950).