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Contracts

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CONTRACTS

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During the survey period the appellate courts of Georgia reaffirmed the following general contract principles: The requisites of a sealed instrument are a recital in the instrument that it is under seal and a signature followed by a scroll or seal.[1] An assignee of a non-negotiable chose in action takes subject to the equities existing between the assignor and obligor at the time of the assignment.[2] The acceptance and cashing of a check given as a final audit on an unliquidated and disputed claim constitutes an accord and satisfaction.[3] An agreement to pay a sum of money in settlement of a disputed claim is binding on the promisor even though the dispute if properly determined would have absolved the promisor from all liability.[4] A contract wherein a public officer is to make a profit from his office is illegal and when it appears that part of the consideration of a contract is so tainted a nonsuit is properly granted.[5] A defense based on fraudulent misrepresentations will not be available to a party who had means readily at hand to determine the truth of the representations.[6] The parol evidence rule does not prevent the establishing of an independent collateral oral contract, even though the consideration is found in the execution of the written contract, so long as the agreements are not inconsistent.[7] The primary guide in the interpretation of contracts is the intent of the parties and if that intent clearly appears it will prevail over technical rules of construction.[8] Rescission of an executory bilateral contract finds consideration in the mutual agreement of each party to give up his rights against the other, whereas a release requires outside consideration.[9] The giving of a promissory note is not payment of an obligation unless the parties so agree.[10] Where the parties have reduced an agreement to writing the obligations of the parties must be found in the writing.[11]

Carter v. Rich's Inc.[12] and *Studebaker Corp. v. Nail*[13] raised interesting problems of consideration. In the *Carter* case the plaintiff brought an action to foreclose a title retention contract on personal property. The defendant contended that the conract sued on had been rescinded by a new contract entered into by the parties. Both contracts bore the same date, covered the same items of personal property and contained the same pro-

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1. Chastain v. L. Moss Music Co., 83 Ga. App. 570, 64 S.E.2d 205 (1951).
2. Mutual Investment Corp. v. Friedman, 83 Ga. App. 544, 64 S.E.2d 298 (1951).
3. Harvey v. Smith, 207 Ga. 692, 63 S.E.2d 885 (1951).
4. Mons v. Morgan's, Inc., 83 Ga. App. 814, 65 S.E.2d 34 (1951).
5. Hulgan v. Gledhill, 207 Ga. 349, 61 S.E.2d 473 (1950).
6. Love v. Nixon, 82 Ga. App. 445, 61 S.E.2d 423 (1950).
7. Chelsea Corp. v. Steward, 82 Ga. App. 679, 62 S.E.2d 627 (1950).
8. Bussey v. Hager, 82 Ga. App. 23, 60 S.E.2d 532 (1950); Chelsea Corp. v. Steward, *supra* note 7.
9. Riggens v. Pomona Products Co., 82 Ga. App. 636, 61 S.E.2d 682 (1950).
10. Mabry v. Holcomb, 82 Ga. App. 1, 60 S.E.2d 411 (1950).
11. West View Corp. v. Alston, 208 Ga. 122, 65 S.E.2d 406 (1951).
12. 83 Ga. App. 188, 63 S.E.2d 241 (1951).
13. 82 Ga. App. 779, 62 S.E.2d 198 (1950).

visions. The second contract recited an additional down payment of $2.98 and corrected certain arithmetical inconsistencies appearing in the first writing. The second writing appears to have been executed for the purpose of correcting errors in the first instrument. A majority of the court held that the second writing was without consideration and could not be claimed as a discharge of the original contract. Judge Felton in a well-reasoned dissenting opinion took the position that there had been a mutual rescission of the first agreement and the execution of a valid new contract. He also suggested that, even if a rescission could not be found, the provision in the second writing for an additional down payment constituted sufficient consideration. Judge Felton's reasoning is compelling in that it is extremely difficult to imagine any reason for the parties executing the second agreement covering the same subject matter except that they intended to rid themselves of the first contract and replace it with the new one. It is true that defendant's position was somewhat technical in that he admittedly owed for the articles in question and the plaintiff had a right to foreclose on one or the other of the contracts. Nonetheless, the dissent is logically correct and the majority opinion establishes a questionable precedent for future cases where there may be a very substantial difference between the first and second agreement.

In *Studebaker Corp. v. Nail* the plaintiff, who had purchased a new automobile from a dealer, brought an action against the manufacturer based on a "Standard Factory Warranty." The court found that the dealer was an agent of the defendant manufacturer for the purpose of delivering the warranty and that consideration for the warranty stemmed from the purchase of the automobile. The decision certainly gives relief in a situation that demands a remedy, but it is not entirely free from difficulty in so far as consideration is concerned. Of course the purchase price could be consideration for both the automobile from the dealer and the warranty from the manufacturer, but the parties must have intended the exchange.[14] There is no indication in the opinion that the plaintiff knew that he was going to get a warranty from the manufacturer or that any mention was made of warranties before the sale was completed. If the parties intended to exchange purchase money for the automobile and the warranty, the decision is unquestionably correct, but if the warranty was not part of the trade, orthodox consideration was missing.

In *Crawford v. Baker*[15] the plaintiff had furnished certain equipment to defendant and paved a filling station in return for defendant's promise to buy all petroleum products from plaintiff. Defendant claimed that the agreement was void for lack of mutuality because the defendant had promised to buy but the plaintiff had not promised to sell. The agreement, it was held, gave plaintiff an option to sell. The consideration for the option was the furnishing of the equipment et cetera. Mutuality only raises a problem in consideration when there is no other promise or act that will supply the necessary benefit or detriment.

Several cases either directly or indirectly dealt with the problem of third

14. 1 WILLISTON, CONTRACTS § 100 (Rev. ed. 1936).
15. 207 Ga. 56, 60 S.E.2d 146 (1950).

party contract beneficiaries.[16] In *Harris v. Joseph B. English Co.*[17] the plaintiff alleged that the defendant corporation had entered into a contract with the Georgia Department of Veterans Service concerning "on-the-job" training for veterans. That contract set forth the wage scale to be paid to veterans employed under this program. Plaintiff further alleged that defendant employed him under that agreement for a period of seventeen months at a salary lower than that provided in the defendant's contract with the Veterans Service. This action was to recover the difference between the amount actually paid to the plaintiff and the scale set forth in the contract with the Veterans Service .The Court of Appeals affirmed the sustaining of a general demurrer to the petition on the ground, among others, that the contract between defendant and Veterans Service was not made for the benefit of plaintiff. The court said,

> . . . it clearly appears that the instrument sued on here, assuming it to be a contract, was not made specifically with the view to benefiting the plaintiff. His name nowhere appears in the instrument and there is nothing to indicate that it was the intention to benefit the plaintiff specifically or as one of a class of persons.[18]

It is difficult to understand the purpose of this contract if it was not to benefit veterans. Such a strict interpretation of the intention to benefit seems out of harmony with the statute[19] and decisions in other jurisdictions.[20] The court also noted that plaintiff failed to allege that he was a veteran. Such an objection appears extremely technical in view of the fact that plaintiff alleged that he was employed "under" the "on-the-job" training agreement.

Mealor v. McNabb[21] held that a real estate broker who was agent of the seller was entitled to recover his commission from the buyer where the contract of sale provided that buyer would pay the commission in event of his default. The plaintiff, broker, appears to have been a party to the sales contract only in a representative capacity. Thus, although the court makes no mention of the point, broker was really a third party beneficiary of the contract.

One case[22] involved an action on a completion bond brought by the prime contractor for the use of certain suppliers of material to the subcontractor. The Supreme Court reversed a decision of the Court of Appeals in favor of the contractor. The Court of Appeals decision was discussed and approved in the last annual survey of this Review.[23] The majority of the Supreme Court thought that the words used in the completion bond (to "provide and pay for all labor and material") were not

16. For an excellent study of third party beneficiary contracts in Georgia prior to 1949, see O'Neal and Quarles, *Some Significant Recent Georgia Legislation*, 1 MERCER L. REV. 27, 39 (1949).
17. 82 Ga. App. 281, 63 S.E.2d 346 (1951).
18. *Id.* at 282, 63 S.E.2d at 347.
19. GA. CODE § 3-108 (1933), as amended, Ga. Laws 1949, p. 455.
20. In Vail v. Donnelly Corp. 56 Ohio App. 219, 10 N.E.2d 239 (1937), for example, a doctor, who had entered into a contract with a telephone company for a listing in the directory, was allowed to recover from the printer of the directory for failure to properly print doctor's listing in the telephone directory.
21. 83 Ga. App. 432, 63 S.E.2d 702 (1951).
22. Glens Falls Indemnity Co. v. Southeastern Const. Co., 207 Ga. 488, 62 S.E.2d 149 (1950).
23. Wilson, *Contracts*, 2 MERCER L. REV. 29, 30 (1950).

broad enough to make the bond for the benfit of laborers and materialmen. The court held that the case was controlled by *American Surety Co. v. County of Bibb*[24] where the bond provided: ". . . conditioned for the faithful compliance by the contractor with the terms and conditions of his contract with the county, *so as to indemnify and save harmless the county.* . . ."[25] Chief Justice Duckworth in a dissenting opinion thought that the case was within the rule of *Union Indemnity Co. v. Riley*[26] where recovery was allowed on a similar bond. He points out that the Bibb County case involved an agreement to "save harmless" whereas in the principal case and the *Riley* case the promise was to pay absolutely. The dissenting opinion is in harmony with the law in the majority of other jurisdictions.[27] In *Stein Steel & Supply Co. v. Goode Const. Co.*[28] it was held that the allegations of the petition failed to show a contract made for the benefit of the plaintiff. It was alleged that defendant had entered into a contract with a subcontractor to have certain plumbing work done. The subcontractor purchased plumbing equipment from the plaintiff which was used on defendant's job. This, as the court held, was not sufficient to establish a contract between defendant and the subcontractor for plaintiff's benefit.

Cartwright v. Bartholomew[29] was an action by plaintiff doctors for payment on a contract wherein they agreed to provide defendant's wife prenatal care, delivery and postnatal care. Defendant claimed the plaintiffs had breached the agreement by failing to administer adequate pain relieving drugs to his wife. The court agreed that this was an entire and not a severable contract and that breach of a part of the contract would be a complete defense. However, it was pointed out that even if the facts alleged in the petition were sufficient to amount to a breach, the defendant waived the breach by leaving his wife and baby under the plaintiffs' care until five days after the alleged breach. In an entire contract, such as involved here, complete performance on part of the plaintiff is a condition precedent to the duty of performance on the part of the defendant.

In *Cain v. Tuten*[30] an action was brought to recover a fee paid to defendant, an attorney, for representing plaintiff in a workmen's compensation case. The employment agreement provided that defendant was to receive a one-third contingent fee. Plaintiff was awarded a recovery in the compensation action and in some manner defendant obtained possession of plaintiff's award. Plaintiff alleges that defendant refused to turn over the check unless plaintiff paid additional money. Upon plaintiff's refusal the defendant returned plaintiff's check to the State Highway Department (employer of plaintiff). Sustaining of a demurrer to the petition was found to be error. The majority opinion stated that plaintiff's receipt of the award was a condition to defendant's right to the fee. And since defendant had delayed plaintiff's receipt of the check, the condition had not been met and plaintiff was entitled to a return of the fee that had been paid to defend-

24. 162 Ga. 388, 134 S.E. 100 (1926).
25. *Id.* at 393, 134 S.E. at 102.
26. 169 Ga. 229, 150 S.E. 216 (1929).
27. 2 WILLISTON, CONTRACTS, § 372 (Rev. ed.).
28. 83 Ga. App. 821, 65 S.E.2d 183 (1951).
29. 83 Ga. App. 503, 64 S.E.2d 323 (1951).
30. 82 Ga. App. 102, 60 S.E.2d 485 (1950).

ant. Judges Garner and Worrill dissented on the ground that defendant had completely performed the contract.

In *Herrman v. Conway*[31] the plaintiff sought damages for defendant's wrongfully preventing plaintiff from performing a lathing and plastering contract between the parties. Defendant claimed that the oral subcontract incorporated by reference the terms of the prime contract which required an architect's certificate before final payment and that plaintiff was not entitled to recover because he had not obtained such a certificate. The court answered that, even if the architect's certificate be treated as a condition, the plaintiff would still be allowed to recover because this action was not for final payment but rather for damages occasioned by defendant's breach in preventing plaintiff's performance.

Conklin v. Lewis State Bank[32] was an action to enjoin defendant bank from selling plaintiff's home and to cancel a note and loan deed. In 1934 defendant held a note of plaintiff's which was in default. Defendant's agent advised plaintiff to refinance the loan with Home Owner's Loan Corporation. H.O.L.C. agreed to loan $2,400 on the plaintiff's house if defendant would take $1,569.37 in full settlement of the note it held. This was at the rate of about fifty per cent of the amount actually owed on the note. Plaintiff executed and delivered to H.O.L.C. a note for $2,400 and a loan deed. On receipt of H.O.L.C. bonds for the agreed amount, defendant turned over plaintiff's note and deed marked satisfied. After this, an agent of defendant contacted plaintiff and stated that the H.O.L.C. loan would not go through unless plaintiff executed a second lien to defendant for the difference between the amount defendant actually received and the balance due on the cancelled note. Plaintiff executed such a note and loan deed and they are the subject of this action. The court reasoned that the purpose of the federal act creating H.O.L.C. was to relieve distressed home owners and that any agreement which defeated that purpose was against public policy and void. Other and possibly sounder grounds for the decision would seem to be available. First, from the facts alleged, fraud is apparent. And secondly, since the first note had been cancelled for good consideration (the loan to plaintiff by H.O.L.C.), there was a total lack of consideration for the execution of the note involved in this suit.

In *Columbus Wine Co. v. Sheffield*[33] it was found that the evidence did not conclusively show that a sale of liquor was knowingly made in violation of a statute[34] providing for sales to be made only to licensed dealers, and therefore it would not be proper to rule as a matter of law that the contract was against public policy. It was also observed that if the liquor was improperly invoiced, defendant was under a duty to make such fact known to plaintiff and his failure would estop him from making the claim in an action for the purchase price.

A mother had turned over her child for adoption in return for a promise of a legacy to the mother in a case before the Court of Appeals.[35] The

31. 83 Ga. App. 888, 65 S.E.2d 41 (1951).
32. 207 Ga. 106, 60 S.E.2d 447 (1950).
33. 83 Ga. App. 593, 64 S.E.2d 356 (1951).
34. GA. CODE ANN. § 58-1036 (Supp. 1947).
35. Savannah Bank & Trust Co. v. Hanley, 208 Ga. 34, 65 S.E.2d 26 (1951).

contract was condemned as opposed to public policy. Such agreements would "open the door to unlimited barter of children."

In *Swofford v. Glaze*[36] the plaintiff was seeking to set aside a release given by plaintiff to defendant in connection with the death of plaintiff's husband. The release was given for a payment of one thousand dollars. Plaintiff contended that the release was fraudulently obtained by defendant's agent by reason of the agent's statement that the defendant was not liable and that if plaintiff instituted legal proceedings she would receive nothing. The court denied relief on this ground, holding that the agent's statements were mere expressions of opinion and adding that everyone was presumed to know the law. The plaintiff also sought to avoid the release on the ground that at the time of its execution she did not have the proper mental capacity. This claim was based on the fact that she was still suffering from the shock and grief of her husband's death. The court per Justice Wyatt rejected this contention saying that "a total want of understanding or idiocy or delusion" must be shown.

Thomas v. Lomax [37] was an action for unpaid wages due to plaintiff for working as a clerk in defendant's store. The case was tried on the theory that there was an express contract to pay plaintiff certain wages. The Court of Appeals decided that the evidence failed to establish an express contract. The plaintiff had testified: "When Amanda said she would pay me six dollars a week for working in the store was when she asked me to take the store and see after it."[38] It also appeared that defendant had promised to pay plaintiff many times during the four years that plaintiff worked for defendant. The trial court had found in favor of the plaintiff. The Court of Appeals thought that an implied obligation but not an express contract was shown and therefore a reversal was in order. It is difficult to conceive why the evidence failed to support an express contract for employment, at least on a week to week basis. If the fair meaning of the words and actions of the parties was that plaintiff would operate the store for six dollars per week, there was an express contract. This would be so regardless of whether the understanding was arrived at by express words of the parties or by the reasonable intendment of their actions. An express contract is a mutual understanding arrived at by the words and conduct of the parties, whereas an implied contract (for purposes of determining whether a case should be reversed for failure to prove the theory on which the case was tried) is a contract imposed on the parties by the court where the parties did not intend to contract. A hand signal by a bidder at an auction shows his assent to an express contract just as surely as if he had written or spoken his offer. Either the court confused the difference between an implied in fact contract (which is an express contract for the purpose here involved) and an implied in law contract, or else the case lays down an extremely technical rule that a party must make clear that he is counting on an oral or written contract rather than a contract arising from the conduct of the parties.

In *Harrell v. Deariso*[39] the plaintiff was suing to recover a commission

36. 207 Ga. 532, 63 S.E.2d 342 (1951).
37. 82 Ga. App. 592, 61 S.E.2d 790 (1950).
38. *Id.* at 593, 61 S.E.2d at 791.
39. 82 Ga. App. 774, 62 S.E.2d 434 (1950).

for bringing about the sale of defendant's cafe. It appeared that plaintiff and one Clark were in defendant's cafe when Clark remarked that he was considering purchasing a cafe. Plaintiff asked Clark why he did not buy defendant's cafe. Clark asked if it was for sale and plaintiff replied that he would find out. Plaintiff questioned defendant as to his willingness to sell and defendant told him that he would sell for eleven thousand dollars and would give plaintiff all over that sum that plaintiff could sell it for. Plaintiff then told Clark that the sale price was twelve thousand dollars. Plaintiff showed the cafe to Clark and then introduced him to defendant. Clark and defendant arrived at an agreement to buy and sell the cafe for twelve thousand dollars. These facts were held sufficient to show a parol contract to pay the plaintiff a commission of one thousand dollars. The statement by defendant would seem to be an offer to a unilateral contract which was accepted by plaintiff's act of producing a ready and able buyer.

The courts also held: a sale of standing timber to be cut within a reasonable time does not require a writing under the statute of frauds because it does not involve an interest in land;[40] notice providing that prompt payment under a lease would be required in the future revived a condition that had been waived in the past by acquiescing in late payments;[41] a plaintiff could not sue on an open account for the value of a new roof installed on defendant's building when there had been no assent to or request for the new roof by defendant;[42] a promise to extend credit until a house was sold would allow defendant a reasonable time to sell the house after completion;[43] a promise would be implied to pay for the services of a real estate broker rendered at the request of defendant;[44] an insured who had been indemnified by the insurer for the theft of his automobile and had assigned all claims against third parties and transferred title to the insurer could not maintain an action in trover for the use of the insurer;[45] where two parties to a tripartite agreement secretly intended that the promise running to defendant would not be performed the agreement was fraudulent and therefore voidable at the election of the defendant;[46] and under a building contract wherein the contractor agreed to build for a certain price and the owner agreed to make advances for labor and materials and these advances exceeded the contract price the owner could recover the excess paid in an action for breach of contract.[47]

40. Seabolt v. Christian, 82 Ga. App. 167, 60 S.E.2d 540 (1950).
41. Sachs v. Jones, 83 Ga. App. 441, 63 S.E.2d 685 (1951).
42. Lawson v. O'Kelly, 81 Ga. App. 883, 60 S.E.2d 380 (1950).
43. West Lumber Co. v. Schnuck, 82 Ga. App. 799, 62 S.E.2d 370 (1950).
44. Rhyne v. Price, 82 Ga. App. 691, 62 S.E.2d 420 (1950).
45. Browder v. Cox 83 Ga. App. 738, 64 S.E.2d 460 (1951); Coffee v. Cox, 83 Ga. App. 743, 64 S.E.2d 464 (1951).
46. Johnston v. Dollar, 83 Ga. App. 219, 63 S.E.2d 408 (1951).
47. Jones v. Bohannon, 83 Ga. App. 779, 64 S.E.2d 918 (1951).