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Custom and Usage in Contracts in South Carolina

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LAW NOTES

CUSTOM AND USAGE IN CONTRACTS IN SOUTH CAROLINA

In an early South Carolina case Justice Johnson of the Court of Appeals discussed the growth of the effect of custom and usage in the history of jurisprudence. He observed that the law merchant was originally made up for the most part of rules framed and acted upon by the merchants for their convenience, which, with the sanction of the Courts, became the law of the land; it is from this source that rules for interpretation of mercantile contracts were principally derived. "Every trade, art, and profession has a language in some degree peculiar to itself, and it is only by reference to the general understanding of those who are accustomed to use it, that we arrive at the meaning."[1] An example of these unique rules was the old usage of allowing days of grace for payment of bills of exchange, such practice having since been changed by the enactment of the Negotiable Instrument Law. Although these customs and usages which have risen to suit new sources of enterprise and trade have not the force of law until they have received the sanction of the courts of justice, they are received as evidence to explain what was meant by the contracting parties.[2]

This note is intended to be a general survey of the South Carolina contract cases involving custom and usage, their essential elements and their operation and effect. Although there is a distinction between the terms "custom" and "usage," they are commonly used interchangeably. "Usage is habitual or customary practice,"[3] while custom is such usage which has by long and uniform practice become the law of that to which it relates.[4] The Restatement of Contracts avoids reference to custom and discusses only the effect of usage in the law of contracts. South Carolina cases seem to manifest no great distinction between the two, and "custom" is treated in them as synonymous with usage and not in the sense of law arising from long usage.

1. Connor & Co. v. Robinson, 2 Hill 354 (S. C. 1834).
2. *Ibid.*
3. RESTATEMENT, CONTRACTS Sec. 245 (1933).
4. Williston, CONTRACTS Sec. 649 (1938).

REQUISITES AND ESSENTIAL ELEMENTS

"A usage to become law must be of long standing, general in its operation, and known to, and acquiesced in by all those whose rights are affected by it, besides being just and reasonable in its operation."[5] Before persons are required to know the customs and usages which constitute the law of their contracts, those customs and usages should be plain and distinct, ancient and certain,[6] and must not violate any general rule of law.[7] *Singleton v. Hilliard*[8] quotes Lord Coke as saying that the characteristics of a good custom are that it is "not subject to contention and dispute" and it has "continuity."

South Carolina cases have considered the element of reasonableness in the alleged custom. Where a printer asserted that it was a usage of the trade to insert advertisements in the newspaper until expressly discontinued though in fact the purpose of the advertisement had ceased, the usage was held unreasonable.[9] On the other hand, a custom in the shipping trade which exempted the insured shipper from providing a pilot, which by the general law of insurance he was to have done, was established to be reasonable. The insured had no duty to make the usages of the trade known in his offer because the underwriters were bound to know them. The reasonableness of this custom "depended on proof of its general use and its being established as a general custom."[10]

A custom will be considered unreasonable if it is calculated to operate unequally and fraudulently.[11] Where a consignee of goods gave a note to the seller, unindorsed by the purchaser, and the purchaser pleaded that by custom he was thus discharged and that only the maker of the note was liable, the Court held the custom was unreasonable, although several witnesses swore to its existence. The Court said that the buyer owed the seller a debt, that from these facts the true debtor should not be released and that a custom so unreasonable should never supersede law.[12]

5. Hayward v. Middleton, 3 McCord 121 (S. C. 1825).
6. Singleton v. Hilliard, 1 Strob. 203 (S. C. 1847).
7. Connor & Co. v. Robinson, 2 Hill 354 (S. C. 1834).
8. 1 Strob. 203 (S. C. 1847).
9. Thomas v. Graves, 1 Mill Const. 308 (S. C. 1817).
10. Cox, Maitland & Co. v. Charleston F. & M. Ins. Co., 3 Rich. 331 (S. C. 1831).
11. Connor & Co. v. Robinson, 2 Hill 354 (S. C. 1834).
12. Prescott v. Hubbell, 1 McCord 94 (S. C. 1821).

Before a usage can be legally binding on one who does not have actual knowledge of it, the usage must be shown to be certain and uniform. In an action for damages for loss of bales of cotton shipped on defendant's boat, the defendant asserted a usage of carriers in the particular trade exempting them from common law liability. Finding this custom to be of recent origin and continually resisted in cases, the Court said that a custom or usage, intended, as here, "to alter established rules of law, must be of very long standing so as to imply the general acquiescence of all parties."[13]

No usage or custom is allowed which is in conflict with the law of the land. Usage might allow a factor commissions on goods purchased and on advances, but it cannot allow interest as well as commissions on the advances, which are really loans of money, because that would savor of usury.[14] Where the defense of a man indicted for selling liquor to a slave was that under his license the usage allowed him to do so, such practice was held forbidden by an act of the Assembly, and usage was no defense.[15] In an action to recover for loss of cotton waste evidence was excluded of a custom of the trade that when waste was bought from a dealer and stored in his warehouse, the dealer either insured it or notified the customer that he did not have it insured. This custom was in derogation of a warehouse receipt statute.[16] The Court said that when parties enter into a contract, "all laws of the state that may relate to the subject matter of the contract are part of that contract; custom and usage cannot take precedence over the statutory law of the state."[17]

OPERATION AND EFFECT

In South Carolina custom and usage have been of primary importance in the field of contractual relations. Evidence of them has been received to add unexpressed terms to a written agreement,[18] to aid in its interpretation,[19] and to explain cer-

13. Singleton v. Hilliard, 1 Strob. 203 (S. C. 1847).
14. Smetz v. Kennedy, Riley 218 (S. C. 1837).
15. The State v. Nicholas Jarcke, Riley 296 (S. C. 1837).
16. CODE OF LAWS OF SOUTH CAROLINA, 1952 Sec. 69-4.
17. Ayres v. Crowley, 205 S. C. 51, 30 S. E. 2d 785 (1943).
18. Burden v. Woodside Cotton Mills, 104 S. C. 435, 89 S. E. 474 (1916).
19. Southern Ry. Co. v. Order of Ry. Conductors of America, 215 S. C. 280, 54 S. E. 2d 816 (1949), reversed Order of Ry. Conductors of America v. Southern Ry. Co., 339 U. S. 255 (1945).

tain ambiguities of the language[20] or terms[21] used therein. But evidence inconsistent with or contradictory of a contract will not be allowed.[22] The following subdivisions amplify these general statements on the effect of custom and usage on contracts.

I. *Creation of the Contract*

Evidence of custom is admissible to show whether the contract ever came into existence. Where it was the established custom in the cotton trade in a particular community for both buyer and seller to confirm to each other in writing when a sale was made by a broker, it was held that a contract was not created because of lack of such confirmation.[23]

II. *Adding to Terms of the Contract*

Evidence of usage or custom may add unexpressed terms to written contracts. The known usage of a trade, business or calling are presumed to enter into and form a part of contracts made with respect thereto,[24] unless they are excluded or modified by agreement.[25] In an early case in Charleston, a custom of the cotton trade was held binding on the sale, which custom provided that the wharfinger weigh bags on arrival and that contracts of sale be made with reference thereto, unless there was an express stipulation for reweighing by the buyer.[26] But as has been noted, a custom to be binding, as a part of the *lex contractum*, must be general and well understood. The parties must stipulate with a knowledge of it.[27] The rule is that such knowledge must be shown either by evidence of personal knowledge or by evidence that the custom is so notorious, general and well-established that knowledge of it will be presumed. Where an addressee lived outside the free delivery limit of a telegraph company, an asserted custom that the company often delivered messages in

20. Mullins Lumber Co. v. Williamson & Brown Land & Lumber Co., 246 F. 232 (4th Cir. 1917).
21. W. S. Forbes & Co. v. W. M. & J. J. Pearson, 87 S. C. 67, 68 S. E. 964 (1909).
22. Albion Phosphate Min. Co. v. Wyllie, 77 F. 541 (4th Cir. 1896).
23. Johnson v. Fairmont Mills, 129 F. 74 (4th Cir. 1904), affirming 116 F. 537 (C. C. D. S. C. 1902).
24. Friedheim v. Walter H. Hildic Co., 104 S. C. 378, 89 S. E. 358 (1916).
25. Burden v. Woodside Cotton Mills, 104 S. C. 435, 89 S. E. 474 (1916).
26. Connor & Co. v. Robinson, 2 Hill 354 (S. C. 1834).
27. Smetz v. Kennedy, Riley 218 (S. C. 1837).

the neighborhood did not avail because it was not within the knowledge of the parties to be affected.[28] On the other hand, where an insurance company customarily notified its policyholders of the due dates of premium notes, the holder was held entitled to the benefit of such custom, in an action to reinstate his policy, regardless of the provisions of the premium note waiving notice of the due date to such holder.[29]

It is a question of fact for the jury whether the parties contracted with reference to the specific custom of one of the parties or a custom general in that business. If each had a different custom in mind, no contract is formed.[30]

When a usage is expressly incorporated into the contract the Courts will enforce it accordingly. Thus, in an 1838 case involving a policy of insurance which referred to the laws and usages of London and no other as the standard by which liabilities on a vessel would be determined, the usage of Philadelphia, the port of destination, was of no effect.[31] However, a custom may be excluded by the terms of the contract. Where a contract laid out the commissions to be paid to a consignee and stated that there were no other agreements, verbal or otherwise, the Court held that evidence to show a custom of the trade as to payment of commissions was inadmissible.[32]

A custom can imply an agreement contrary to the settled doctrine. Although interest is not allowed on an open account in South Carolina unless there is an agreement to pay it, such agreement may be implied from the usage of trade.[33] However, in this situation it is emphasized that a custom of a particular store cannot prevail unless it is expressly or impliedly sanctioned by the party.[34] Again, while the rule is that a partner is not liable on the basis of implied authority for the contracts of his copartner unless they are within the scope of the business, usage may show the contract made by

28. Martin v. Telegraph Co., 81 S. C. 432, 62 S. E. 833 (1907).
29. Lane v. New York Life Ins. Co., 147 S. C. 333, 145 S. E. 196 (1925).
30. Burden v. Woodside Cotton Mills, 104 S. C. 435, 89 S. E. 474 (1916).
31. Union Bank of South Carolina v. Union Ins. Co., Dud. 171 (S. C. 1838).
32. Armour Fertilizer Works v. Hymen, 120 S. C. 375, 113 S. E. 330 (1922).
33. Knight v. Mitchell, 2 Tread. Const. 668 (S. C. 1814).
34. Searson v. Heyward & Co., 1 Speers 249 (S. C. 1843).

one member to have been within the scope of such a business.[35] On the other hand, no usage will authorize a departure from the positive instructions of principal to agent.[36] In one case, although custom indicated that a factor shipping goods was liable for the wharfage, it was held that it could also be recovered from the owner of the goods.[37]

III. *Explaining the Contract*

Usages concerning the subject matter are admissible to aid in construction of a written contract. In a comparatively recent case where the question was whether certain switching trips by a railroad entitled conductors to an extra day's pay,

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35. Galloway v. Hughes, 1 Bailey 553 (S. C. 1830); Nichols v. Hughes, 2 Bailey 109 (S. C. 1831); Fleming, Ross & Co. v. Prescott, Bishop & Gray, 3 Rich. 307 (S. C. 1832). "The resort to custom and usage to establish the implication of authority is well illustrated in two cases, in which the defendants were the same persons. In Galloway v. Hughes, the defendants were partners engaged in transporting freight by boat from points in the upper part of the state to Charleston. The plaintiff dealt with one of the partners, delivering cotton to him to be hauled to Charleston and sold. The partner sold the cotton but did not remit the proceeds, and in this action to recover the money from the firm, there was a denial that the partner selling had the authority to do so. The case was decided principally on the ground that custom and usage indicated the existence of the practice of selling for a shipper in the area involved, and the partners were held liable. On the other hand, in Nichols v. Hughes, where the plaintiff turned over iron to one partner to deliver to a consignee and to collect for it, and the partner failed to pay over the proceeds, it was held that there was no evidence of custom among those engaged in the same kind of business to collect for a shipper on a consignment of freight, and that the nonparticipating partner was not liable. The decision in Galloway v. Hughes was held not to be controlling, because of dissimilarity in the facts, and the presence there of a custom not duplicated in this case.

"The role of local usage is pointed up in Flemming v. Prescott, which was an action upon a note given in the firm name. The note, signed by one of the partners, had been given in substitution of a draft previously accepted by one of the members in the name of the firm for the accommodation of a third party. The defense was that there was no authority to accept or endorse drafts for the use of third parties. The court held, however, that according to the usage in Charleston, in which the transaction took place, it was the practice of business firms to accept and endorse bills of exchange for accommodation, and that whatever the custom might be elsewhere local usage controlled. The partners were, therefore, held liable, although it was on the basis of actual assent of all the partners that the case was principally decided.

"The three cases just discussed emphasize the part that custom and usage play, and their authority on the general principle is hardly to be questioned. The force of those cases as precedent, however, under similar facts, is open to doubt, since a fresh inquiry would have to be made as to custom—for as times change, so do customs." Karesh, *Partnership Law and the Uniform Partnership Act in South Carolina*, 3 S. C. L. Q. 193, p. 369 (1951).

36. Barksdale v. Brown & Tunis, 1 Nott. & McC. 517 (S. C. 1815).

37. Thomas v. Graves, 1 Mill Const. 3088 (S. C. 1817).

the United States Supreme Court held that evidence of practices which had prevailed over a number of years was admissible to show the interpretation of the contract by the parties.[38]

The place where the contract is made and is to be performed controls what trade terms and customs are applied. Thus, "ground sheep manure" was interpreted according to the Charleston market and not Chicago, when the purchaser paid the draft and received the bill of lading in South Carolina.[39]

Where doubt arises as to the meaning of words used in a contract, parol evidence may be admitted as to the significance the words have according to the usage of those accustomed to make contracts of that particular kind,[40] but such evidence is not admissible when the meaning of the language is plain.[41] In a suit involving a deed containing the description "down said creek to Little Pee Dee River," the party was allowed to give proof of a certain and immemorial usage that this meant to a swamp on the edge and not to the run of the stream. The Court said evidence of common usage of the locality must be plain and clear to give a meaning to a word or expression different from its usual significance.[42] Besides common words and phrases, evidence of custom is also admissible to explain particular or peculiar language of a trade or profession. "Net sales" in one case was held, according to the usage, to mean after deductions for freight and jobbers' discount.[43]

IV. *Varying the Terms of the Contract*

A group of cases has applied the limitation that, "Evidence of custom and usage is not admissible to explain or vary the terms of an express contract, whether written or verbal, unambiguous in its terms, unless it be to show the meaning of certain terms used in such contract, which by well-established custom or long usage, have acquired a meaning different from that which they primarily bear, for the

38. Southern Ry. Co. v. Order of Ry. Conductors of America, *supra* note 19.
39. Markey v. Brunson, 286 F. 893 (4th Cir. 1923).
40. Forbes & Co. v. Pearson, 87 S. C. 67, 68 S. E. 964 (1909).
41. Bailey v. Savannah Guano Co., 106 S. C. 50, 90 S. E. 317 (1916).
42. Mullins Lumber Co. v. Williamson & Brown Land & Lumber Co., 246 F. 232 (4th Cir. 1917).
43. Friedheim v. Walter H. Hildic Co., 104 S. C. 378, 89 S. E. 358 (1916).

reason that when parties in making a contract use terms which through custom or usage have acquired a certain meaning, they must, in the absence of any evidence to the contrary, be assumed to have used such terms in such acquired sense."[44]

A leading case involved a telegram to brokers in New York instructing them to sell corn for future delivery and to "stop loss 144." The seller contended that a usage of trade limited the language in controversy to application only on the day the instructions were sent. It was held, however, that evidence of the usage was inadmissible because "the language on the face of the wire is clear and unambiguous."[45] In an earlier action the language of the contract specifically spelled out the terms, among which were "seller paying brokerage at 10 cents per ton." To a plea that a custom of the fertilizer trade allowed brokerage only on such fertilizer as was *actually delivered* on the contract, the Court said this was not a contract of the character which would require or warrant a resort to evidence of custom and usage in order to explain any ambiguity therein, as there was none.[46]

Evidence of custom is not admissible to vary a special contract between the parties. A merchant defended an action for the purchase price of goods with the allegation that it was customary among merchants to order by needles and not by cards. The order blank had specific words "needle cards" in front of which defendant inserted "5M." This written contract was binding on the parties and was held to override any custom.[47] A similar case involved an agreement whereby a consignee was to be liable for loss incurred from his failure to keep certain property "fully insured." His allegation that among insurance companies full insurable value is customarily interpreted to be 3/4ths of actual value, was held incapable of contradicting this "unambiguous and unequivocal agreement."[48]

An unambiguous contract of employment cannot be varied or explained by evidence of custom and usage. Where the

44. Alexas v. Post & Flagg, 129 S. C. 53, 123 S. E. 769, 35 A. L. R. 969 (1924).
45. *Ibid.*
46. Fairly v. Wappoo Mills, 44 S. C. 227, 22 S. E. 108, 29 L. R. A. 215 (1894).
47. Coates & Sons v. Early, 46 S. C. 220, 24 S. E. 305 (1896).
48. Kentucky Wagon Mfg. Co. v. People's Supply Co., 77 S. C. 92, 57 S. E. 676 (1905).

commission for selling certain commodities was fixed by the agreement, that special contract was binding.[49] A contract between a deceased employee and the Brotherhood of Railway Carmen of America stated that a blue flag would be put out when a workman was under a car. No evidence could be offered as to a custom that workmen themselves placed the blue flag.[50] In a very recent case a broker who held the purchaser's earnest money under a land purchase contract on which the purchaser subsequently defaulted was held not entitled to retain one-half of the earnest money in accordance with the purported *local* custom. The Court said, "The custom was proved but the law, by the weight of authority, is to the contrary, in the absence of controlling contract provision."[51]

ESTABLISHMENT

The general usages of trade form a part of the law of the land, and are presumed to be known by all, and are the tests of all contracts arising under them. When the custom has been settled by solemn adjudications or where the usage is known to everyone and leaves no doubt in the minds of a court or jury, proof will not be admissible.[52] Thus, those customs which have been included as part of the common law are subject of general notice without proof in point of fact; however, usages of business do not as a general rule lie within the notice of the court. In a case involving the meaning of certain language in a charter to a railroad company, this principle was applied. A different rate applied to "heavy articles" than to "articles of admeasurement," and the question was to which group bales of cotton belonged. It was held that the terms could not be defined by mere legal authority, but that testimony was necessary of the custom or habit of business tending to define their import by those in the business of transportation by rail.[53]

When the action is on a claim founded on general or local custom, it must be pleaded;[54] on the other hand, it is not nec-

49. Autrey v. Bell, 114 S. C. 370, 103 S. E. 749 (1919).
50. Cato v. Atlantic & C. A. L. Ry. Co., 164 S. C. 123, 162 S. E. 239 (1931).
51. Thomas v. Jeffcoat, 230 S. C. 126, 94 S. E. 2d 240 (1956).
52. Thomas v. O'Hara, 1 Mill Const. 303 (S. C. 1817).
53. Bonham v. C. C. & A. Ry. Co., 13 S. C. 267 (1879); Elder & Co. v. C. C. & A. Ry. Co., 13 S. C. 279 (1879).
54. Pennsylvania R. Co. v. Charles E. Gibson, Inc., 23 F. Supp. 857 (E. D. S. C. 1938).

essary to plead a private custom for evidence to be admissible.[55]

As already stated, the general rule is that evidence of custom is not admissible when the meaning of the language of a contract is clear.[55a] The Supreme Court declined to reverse a circuit judge who admitted evidence on the ground that he himself did not understand the meaning of the terms used.[56]

Establishing a custom to be general[57] requires many witnesses.[58] In a recent case the Court would not rely on evidence by the plaintiff purporting to establish a custom that the undefined term "occupancy" in leases of textile plants meant occupancy for manufacturing operations and not entry merely to prepare the property for such use. The evidence offered by the plaintiff relating to his experience with the term did not show its use to have been general, either in New England where he had been doing business, or in South Carolina where the textile plant was situated, or that it was of such uniformity and duration as to charge the defendant with knowledge.[59] In another case evidence of a business usage was held insufficient when given by only a few merchants.[60] However, a witness who qualifies as an expert may testify as to the general custom of trade.[61] The ultimate decision as to the existence of a custom is a question of fact for the jury.[62]

Conclusion

Although custom and usage have been a vital force in creating legal principles, today the judicial process has tempered their importance. In the words of Judge Cardozo, "In these days . . . we look to custom, not so much for creation of new rules but for tests and standards that are to determine how established rules shall be applied."[63] In South Carolina the

55. A. M. Law & Co. v. Cleveland, 172 S. C. 200, 173 S. E. 638 (1934).
55a. Etiwan Fertilizer Co. v. Johns, 208 S. C. 428, 38 S. E. 2d 387 (1946).
56. Forbes & Co. v. Pearson, 87 S. C. 67, 68 S. E. 964 (1909).
57. Chastain v. Bowman, 1 Hill 270 (S. C. 1833).
58. Thomas v. Graves, 1 Mill Const. 308 (S. C. 1817).
59. Kayser & Co. v. Textron, 228 F. 2d 783 (4th Cir. 1956).
60. Hayward v. Middleton, 3 McCord 121 (S. C. 1825).
61. Rhodus v. Dukes, 128 S. C. 354, 122 S. E. 872 (1923).
62. Carolina Nat. Bank v. Wallace, 13 S. C. 347 (1880).
63. Cardozo, The Judicial Process (1921), p. 60.

majority of cases on custom and usage arose during the 19th century, and only a handful during the last twenty years. There seems to be no serious conflict in these decisions; the individual factual situation appears to control.

In an early case it was said that to make a custom binding, three things only are necessary: first, that it should be general, so much so as to be generally known to those conversant with the particular trade; second, it should be reasonable; and third, it must not violate any general rule of law.[64] With regard to the effect of custom and usage on contracts, it may be said that in general the parol evidence rule prevails — that evidence of parol testimony cannot be received to contradict, vary, add to or subtract from the terms of a valid written instrument; but if there is any ambiguity on the face of the contract, evidence of custom and usage will be admitted to ascertain the intention of the parties. Furthermore, parol evidence of the meaning according to the usages of trade is admissible to explain technical terms and abbreviations in a written memorandum required under the Statute of Frauds.[65] Thus, in effect, evidence of custom and usage may make an otherwise indefinite contract enforceable and valid.

VIRGINIA A. GASTON.

64. Connor & Co. v. Robinson, 2 Hill 354 (S. C. 1834).

65. Pitts v. Edwards, 141 S. C. 126, 139 S. E. 219 (1925). Note, this case doesn't specifically mention "custom and usage"; however, it holds that parol evidence is admissible to explain technical terms in a written memorandum.