UIC Law Review

Volume 12 | Issue 2 Article 2

Winter 1979

Forward Contracting in Agricultural Commodities: A Case History Analysis of the Cotton Industry, 12 J. Marshall J. Prac. & Proc. 253 (1979)

Neal P. Gillen

Walter H.E. Jaeger

FORWARD CONTRACTING IN AGRICULTURAL COMMODITIES: A CASE HISTORY ANALYSIS OF THE COTTON INDUSTRY

NEAL P. GILLEN* and WALTER H. E. JAEGER**

INTRODUCTION

Contrary to popular belief, the primary business of the United States is agriculture. Major components of industry and commerce are dedicated to financing, insuring, producing, harvesting, storing, feeding, processing, manufacturing, packaging, advertising and distributing food and fiber. Steel, aluminum, and rubber to make farm machinery, fuel to run the machines, and numerous chemicals and seed varieties to make the soil more productive are only some of the requirements essential to sustain the agricultural economy of the United States. Americans spend approximately one-fourth (23%) of their disposable personal income on food alone.

The agricultural segment of American business is perhaps the most complex and yet the most efficient and productive in our economy. Although only three percent of our workforce is actually involved in agricultural production, the farm business sector contributes approximately $50 billion annually toward the

* B.S. (with honors), New York University; J.D., Georgetown University Law Center. Mr. Gillen is Vice President-General Counsel of the American Cotton Shippers Association; since 1973 he has served as a member of the Joint Industry Committee on Crop Contracting of the National Cotton Council of America. In addition, Mr. Gillen has authored articles on Products Liability, Automobile Safety and has edited the DIGEST OF MOTOR LAWS.

** A.B. (with honors), Columbia University; M.S., Ph.D., Georgetown University; LL.B., S.J.D., Georgetown University Law Center; Diploma (with honors), University of Paris; Diploma, The Hague Academy of International Law. Dr. Jaeger is presently Distinguished Visiting Professor at Potomac School of Law, in Washington, D.C. In addition to having written numerous articles and books on contracts and products liability, as well as on international and labor law, Dr. Jaeger is the author-editor of WILLISTON ON CONTRACTS, THIRD EDITION, in 23 Volumes (1953-1978). The authors gratefully acknowledge the research and editorial contribution of Thomas E. Grace, third-year student at The John Marshall Law School.

Gross National Product.[1] Why are particular crops planted? What determines the quantity and quality of the crops to be produced? Consumer decisions on what to eat and wear dictate the answers to these production questions. The aggregate of personal decisions becomes the demand for a particular vegetable, meat, grain, poultry, fish or fiber. This demand is translated in the marketplace and communicated to individual farmers in the form of commodity exchange price quotations, U.S. Government price support loan rates, and through direct offers from buyers and processors of agricultural commodities to these farmers.

The Forward Contract

The production of many agricultural commodities is directly contracted by food processing and canning companies. In contrast, the majority of vegetables, milk, fruit and sugar beets are sold through forward contracts, and the same holds true to a lesser degree for beef cattle, hogs, sheep, wheat, feed grains and cotton.[2]

The forward contract for an agricultural commodity is a merchandising contract executed with the intent to transfer physical possession and ownership of the commodity at some specified future time.[3] It has arisen from the need of growers and processors to be certain of markets and supplies of agricultural commodities. The contracts are often executed long before the farmer prepares his land for planting. The price and terms of the contract are subject to individual arms-length negotiation with the buyer and the seller mutually setting the price, precise quality, quantity, location, harvesting and processing methods, and shipment specifications.[4]

---

1. A. Holden, *Agricultural Exports in Perspective*, F.C.I.A. NEWS # 103 (Nov. 1978).

2. STATISTICAL REPORTING SERVICE, U.S. DEP'T OF AGRICULTURE, CONTRACTING AND VERTICAL INTEGRATION—WHERE THEY FIT IN THE FARM SCENE (1972); PAUL, HEIFNER & HELMUTH, ECONOMIC RESEARCH SERVICE, U.S. DEP'T OF AGRICULTURE, AGRICULTURAL ECONOMIC REPORT NO. 320, MARCH 1976; HELMUTH, COMMODITY FUTURES TRADING COMMISSION, ECONOMIC BULLETIN NO. 1, SEPTEMBER 1977.

3. Forward contracts are to be distinguished from futures contracts. Forward contracts are executed prior to planting or delivery of the crop, and contemplate actual delivery of the commodity. These contracts need not be executed through a recognized commodity exchange. Kelly Cotton Merchants, Inc. v. York, 494 F.2d 41 (5th Cir. 1974). Futures contracts do not contemplate actual delivery of the commodity, and must be executed through a recognized commodity exchange. *See* Bolin Farms v. American Cotton Shippers Ass'n, 370 F. Supp. 1353 (W.D. La. 1974). Forward cotton contracts need not conform to the Federal Cotton Futures Act, 26 U.S.C. §§ 4851-77 (1974).

4. Production terms vary by region and growing conditions. In rain-grown areas of the South, cotton production is generally sold by the acre,

Forward contracting in the cotton industry originated in the late 1940's and early 1950's. By the 1960's, as much as ten percent of the cotton crop was sold under forward contracts. In recent years, the scarcity of supply has resulted in a significant increase in the utilization of the forward contract as a means of marketing.[5] The increase in the popularity of the forward contract has been in direct proportion to the decrease in the amount of available cotton stocks.[6] Cotton farmers also have a number of marketing alternatives to forward contracting.[7]

The Cotton Crisis of 1973-1974

"When money speaks enticingly, listeners often become litigants."[8] Judge Orma R. Smith's aphorism sums up the extensive litigation engendered in 1973 and 1974. There was an epidemic of attempts by cotton growers to breach their forward contracts, due in large part to the fact that the price of raw cotton fiber on world markets rose in a sudden and spectacular

---

the farmer agreeing to sell and deliver all of the acceptable cotton produced on a stipulated number of acres. In dryland areas of the southwest and far west, farmers contract to sell a stipulated number of bales of cotton, because irrigation methods generally allow for consistent yields per acre.

5. *Reauthorization of the Commodity Futures Trading Commission: Hearings Before the Subcomm. on Agricultural Research and General Legislation of the Senate Comm. on Agriculture, Nutrition and Forestry*, 95th Cong., 2d Sess., Part II at 434 (1978):

Cotton Season	Percentage of Crop Forward Contracted
1970-1971	11
1971-1972	43
1972-1973	36
1973-1974	75
1974-1975	21
1975-1976	10
1976-1977	50
1977-1978	20

6. The enactment of the Agricultural Act of 1970, P.L. 91-524, 84 Stat. 1358 (1970), repealed restrictive aspects of farm legislation. This basic change in farm policy to a market orientation enabled the United States to discontinue its role as the residual supplier of cotton to the world, thereby freeing the cotton market and returning the United States to its former role as a major export supplier. The cotton trade and its domestic and foreign mill customers could no longer rely upon the Commodity Credit Corporation as the warehouse of world cotton stocks.

7. Recent changes in the Commodity Credit Corporation Loan Program provide farmers with up to 18 months to hold their cotton under loan prior to making a marketing decision. The progressive agricultural producer prefers to fix his price and profit early in the planting season, however, and the forward contract becomes an attractive marketing alternative to selling at harvest or waiting out the market subsequent to harvest, thereby contending with inventory management and running the risk of lower prices.

8. Cone Mills Corp. v. Hurdle, 369 F. Supp. 426, 429 (N.D. Miss. 1974).

fashion in 1973. Unfavorable weather conditions, unprecedented foreign and domestic demand, dollar devaluation, and other related factors combined to cause the market price of cotton to more than double within a six-month period. This striking increase in the market price gave rise to actual or potential defaults on a massive scale.[9]

In an effort to obviate the disaster which would follow a large-scale default on contracts, the cotton industry prepared a catalogue of all forward contracts and distributed these catalogues to all potential buyers of cotton in the world and to all known distribution points at United States gins and warehouses. The buyers listed in the catalogue asserted a claim to the cotton, and individuals utilizing the catalogue were cautioned to personally contact the listed buyers and sellers to a particular sale if a question were to arise regarding the status of that cotton.[10] When cases reached litigation, the cotton industry coordinated the presentation of the cases, providing a pool of expert witnesses, legal memoranda, pleadings, motions and briefs to interested counsel.[11] Finally, efforts were made to have the

---

9. *FHA Loans and Forward Contracts: Hearings on S.* 3252 *Before the Subcomm. on Agricultural Credit and Rural Electrification of the Senate Comm. on Agriculture and Forestry*, 93d Cong., 2d Sess. 64 (1974) (statement of Neal P. Gillen):

> In the 1973-74 marketing year approximately 75% of the crop was sold under forward contract at prices ranging from 26 to 80 cents per pound, the great majority selling at levels from 30 to 40 cents per pound. The price at harvest time ranged from 75 to 90 cents per pound depending upon the area of growth and the quality of the cotton. This was the highest increase in prices ever recorded in the history of the cotton industry. Of the 9.75 million bales (from an estimated 13 million bale crop) contracted it is conservatively estimated that 10% of this amount was in actual or near default status. At Dec.-Jan. market levels these 975,000 bales were valued in excess of $350 million. . . .

10. The validity of this catalogue was challenged as an unlawful restraint of trade in West Point-Pepperell, Inc. v. Bradshaw, 377 F. Supp. 154 (M.D. Ala. 1974). A farmer-seller whose name was in the catalogue alleged that the buyer and the writers of the catalogue had knowledge that cotton prices would rise, and sought to restrain trade unlawfully by preparing and distributing the catalogue. The court upheld the legality of the catalogue, stating: "Clearly the purpose of the publication, like the purpose of recording acts, was to provide a ready source of information from which, upon proper inquiry, fraud might be prevented. Persons are not prohibited from restraining trade reasonably in an effort to protect legal rights of their own. . . ." *Id.* at 157.

The catalogue was subsequently challenged for violating antitrust laws in Hysmith v. Laney Cotton Co., No. 74-72-N (M.D. Ala. 1974). Relying upon Cement Mfrs. Protective Ass'n v. United States, 268 U.S. 588 (1925), the *Hysmith* court held that a catalogue containing non-price information which was prepared to further a legitimate business interest was not in violation of antitrust laws. *Id.*, No. 74-72-N, slip op. at 4-5 (M.D. Ala. 1974).

11. Monthly meetings were held by attorneys for the various cotton buyers (including cotton marketing cooperatives and textile mills), and ef-

news media report judicial decisions upholding the validity of the forward contracts, so as to discourage future attempts to breach by the farmers.

A minimum of 500 separate legal actions were filed in the cotton belt states either to enforce or rescind forward contracts. With few exceptions, the terms of the contracts were upheld and enforced. This article will examine those decisions as they have shaped and affected the forward contracting concept, under both the Uniform Commercial Code and general contract principles. While this article will be largely limited to cases involving forward cotton contracts, most of which arose out of the cotton crisis of 1973-1974, the principles of law emanating from these decisions are applicable to forward contracting of all agricultural commodities. The experience of the cotton industry provides a guide for forward contracting throughout the agricultural field.

FORWARD COTTON CONTRACTS

Forward contracts, like all other contracts, must have some applicable body of law to which the parties may look for guidance if the contracts are to facilitate commerce. This body of law must establish guidelines for the creation and execution of the contracts. Rules must be formulated to govern the interpretation and construction of the various contractual provisions. The rights and duties of the parties to the contracts must be clarified. The parameters of conduct constituting a breach of the contract must be established. Finally, in cases where there is a breach of contract, the parties must be made aware of the remedies available and the nature and extent of the damages recoverable.

Applicable Law

With the promulgation of the Uniform Commercial Code (U.C.C.) and its subsequent adoption in all but one of the States, the question arose as to whether Article 2,[12] governing "transactions in goods," was applicable to forward contracts. One court held that contracts for the future sale of cotton are "transactions in goods"[13] regardless of whether the crop is presently planted or is to be planted in the future, and the transac-

forts were made to have available for use in court various pleadings, briefs, memoranda and expert witnesses. Decisions issued by various state and federal courts were also immediately made available to the law firms involved in the cotton contract litigation.

12. U.C.C. §§ 2-101 to 2-725 (1972); 8 WILLISTON ON CONTRACTS, Third (Jaeger) Edition §§ 955-1011 (1964).

13. U.C.C. § 2-102 (1972).

tion therefore came within Article 2 of the U.C.C.[14] The forward contract has additionally been considered a "contract for sale,"[15] a contract for sale of a growing crop,[16] and a transaction involving "goods,"[17] regardless of whether the crop is planted at the time the contract is executed. In short, the forward contract is governed by the provisions of Article 2 of the Code.

In addition to being controlled by the U.C.C., forward contracts are subject to general contract law principles insofar as these have not been displaced by particular provisions of the Code.[18] The Code also gives the parties a choice of laws option.[19] If such a provision is not included in the contract, the law of the state to which the transaction bears a reasonable relation will apply.[20]

Farmers as "Merchants"

One of the most important determinations to be made under the Code is whether a farmer is a "merchant" within the meaning of section 2-104(1).[21] An affirmative finding imposes a higher

14. Mitchell-Huntley Cotton Co. v. Lawson, 377 F. Supp. 661 (M.D. Ga. 1973); *accord*, Kelly Cotton Merchants, Inc. v. York, 494 F.2d 41 (5th Cir. 1974).

15. U.C.C. § 2-106(1) (1972); *see* Taunton v. Allenberg Cotton Co., 378 F. Supp. 34 (M.D. Ga. 1973); Cox v. Cox, 292 Ala. 106, 289 So. 2d 609 (1974); Harris v. Hine, 232 Ga. 183, 205 S.E.2d 847 (1974); Abney v. Lawson, No. 7359 (Bleckley Super. Ct., Ga. 1973). These forward contracts have also been validated under § 2-501. Mitchell-Huntley Cotton Co. v. Waldrep, 377 F. Supp. 1215 (N.D. Ala. 1974); Mitchell-Huntley Cotton Co. v. Lawson, 377 F. Supp. 661 (M.D. Ga. 1973).

16. U.C.C. § 2-107(2) (1972); *see* Bradford v. Plains Cotton Coop. Ass'n, 539 F.2d 1249 (10th Cir. 1976); Kelly Cotton Merchants, Inc. v. York, 494 F.2d 41 (5th Cir. 1974).

17. U.C.C. § 2-105(1), (2) (1972); *see* Taunton v. Allenberg Cotton Co., 378 F. Supp. 34 (M.D. Ga. 1973); Cone Mills Corp. v. Estes, Inc., 377 F. Supp. 222 (N.D. Ga. 1974); Mitchell-Huntley Cotton Co. v. Lawson, 377 F. Supp. 661 (M.D. Ga. 1973); Cox v. Cox, 292 Ala. 106, 289 So. 2d 609 (1974); Harris v. Hine, 232 Ga. 183, 205 S.E.2d 847 (1974); Abney v. Lawson, No. 7359 (Bleckley Super. Ct., Ga. 1973).

18. U.C.C. § 1-103 (1972): "Unless displaced by the particular provisions of this Act, the principles of law and equity, including the law merchant and the law relative to capacity to contract, principal and agent, estoppel, fraud, misrepresentation, duress, coercion, mistake, bankruptcy, or other validating or invalidating cause shall supplement its provisions." *See, e.g.*, Bradford v. Plains Cotton Coop. Ass'n, 539 F.2d 1249 (10th Cir. 1976).

19. U.C.C. § 1-105 (1972).

20. Dunavant Enterprises, Inc. v. Ford, 294 So. 2d 788 (Miss. 1974).

21. U.C.C. § 2-104(1) (1972):

> (1) 'Merchant' means a person who deals in goods of the kind or otherwise by his occupation holds himself out as having knowledge or skill peculiar to the practices or goods involved in the transaction or to whom such knowledge or skill may be attributed by his employment of an agent or broker or other intermediary who by his occupation holds himself out as having such knowledge or skill.

standard of "good faith" upon the farmers,[22] provides a means for circumventing the Statute of Frauds,[23] and creates a warranty of merchantability covering the goods.[24] While there is a consensus that cotton buyers or brokers are "merchants," authority is split as to whether farmers are "merchants." The more informed view is that an experienced farmer regularly engaged in growing and selling a commodity is a "merchant" within the intendment of the Code.[25]

The majority view is expressed by *Nelson v. Union Equity Cooperative Exchange*,[26] where the Texas Supreme Court held that the farmer-seller was a "merchant." Since Nelson dealt in wheat, within the plain meaning of the term "deal," he would be considered a dealer in goods of the kind.[27] As an experienced farmer, Nelson also, by his occupation as a farmer, held himself out as having knowledge or skill concerning the *goods* which were the subject of the contract.[28] Since Nelson's occupation was not limited to raising wheat, but also included selling this wheat, the court held that "[a] person whose occupation includes the selling of a commodity, at least to the extent shown of Nelson [five years], necessarily represents to those persons with whom he transacts business that he has knowledge of the practices and goods involved in the business transactions."[29]

The minority view is expressed by *Loeb & Co. v. Schreiner*,[30] where the Alabama Supreme Court found that the farmer was not a "merchant." For a farmer to be a "merchant," the *Loeb* court required him to meet one of the following criteria: 1) deal in goods of the kind; 2) *by his occupation* hold himself out as having knowledge or skill peculiar to the practices or goods involved in the transaction; or 3) employ an agent, broker or other intermediary who by his occupation holds himself out as having

22. U.C.C. § 2-103(1)(b) (1972).

23. U.C.C. §§ 2-201(2), 2-205, 2-207, 2-209 (1972); *see* note 59 *infra* for text of § 2-201(2).

24. U.C.C. § 2-314 (1972).

25. *See, e.g.*, Fear Ranches, Inc. v. Berry, 470 F.2d 905 (10th Cir. 1972) (rancher was an active trader who acted as agent for sale of cows, steers and other "goods"); Weil Bros.-Cotton, Inc. v. Roer, No. 76-644 (D. Ariz. 1972) (farmer-seller had previously grown cotton and sold it on both the spot and futures bases); Campbell v. Yokel, 20 Ill. App. 3d 702, 313 N.E.2d 628 (1974) (soybean farmers had sold their soybeans for several years); Oloffson v. Coomer, 11 Ill. App. 3d 918, 296 N.E.2d 871 (1973) (soybean farmers); Nelson v. Union Equity Coop. Exch., 548 S.W.2d 352 (Tex. 1977) (farmer who sold his wheat crop for 5 preceding years was considered a professional and not a casual seller).

26. 548 S.W.2d 352 (Tex. 1977).

27. *Id.* at 356.

28. *Id.*

29. *Id.*

30. 321 So. 2d 199 (Ala. 1975).

such knowledge or skill.[31] The Alabama court found that the first criterion assumes a transaction between professionals, and "[a]lthough a farmer might sell his cotton every year, we do not think that this should take him out of the category of a 'casual seller' and place him in the category with professionals."[32] As to the second criterion, the court felt that a farmer does not solely *by his occupation* hold himself out as being a professional cotton merchant.[33] Finally, there was no agent or broker involved in the transaction, so the third criterion was not applicable.[34]

Formation of the Contract

Once the applicable law and the status of the parties has been determined, there remains the communion of the essential elements to create the contract. The U.C.C. has liberalized the law relating to the creation of the contract, providing that the contract may be formed in any manner sufficient to show agreement between the parties.[35] Conduct is sufficient to create a forward contract when both parties act in a manner indicative of an intention to sell and buy the cotton.[36] The mere fact that one or more of the terms is left open will not necessarily bar the creation of the contract if the parties intended to create a contract and a remedy is available to the injured party.[37]

Problems can arise where the acceptance contains additional terms to those made in the offer.[38] Unless acceptance is conditioned upon assent to the additional terms, the acceptance

---

31. *Id.* at 201.

32. *Id.* at 202. *But see* Weil Bros.-Cotton, Inc. v. Roer, No. 76-644 (D. Ariz. 1972) (farmer had been growing a variety of crops for approximately 20 years); Campbell v. Yokel, 20 Ill. App. 3d 702, 313 N.E.2d 628 (1978) (a major factor in the determination of whether a farmer is a "merchant" is the number of years he has sold his crop); Nelson v. Union Equity Coop. Exch., 548 S.W.2d 352, 356 (Tex. 1977) (by selling his crop, a farmer deals in goods of the kind).

33. 321 So. 2d at 202. *But see* Nelson v. Union Equity Coop. Exch., 548 S.W.2d 352, 356 (Tex. 1977) (by selling his crop for a number of years, a farmer represents to those people with whom he deals that he has knowledge of the goods and practices involved in the transaction).

34. 321 So. 2d at 202. *But see* Weil Bros.-Cotton, Inc. v. Roer, No. 76-644 (D. Ariz. 1972) (involving contract procured by farmer's agent).

35. U.C.C. § 2-204 (1972).

36. Bradford v. Plains Cotton Coop. Ass'n, 539 F.2d 1249 (10th Cir. 1976); Taunton v. Allenberg Cotton Co., 378 F. Supp. 34, 39 (M.D. Ga. 1973); Austin v. Montgomery, 336 So. 2d 745 (Miss. 1976). *But see* Baccus v. Plains Cotton Coop. Ass'n, 515 S.W.2d 401 (Tex. Civ. App. 1974) (where the farmer-seller signed the instrument with the understanding that it would not be binding until the landlord signed the instrument, the absence of the landlord's signature destroyed the efficacy of the instrument as a contract).

37. Riegel Fiber Corp. v. Anderson Gin Co., 512 F.2d 784 (5th Cir. 1975) (citing U.C.C. § 2-204(3) (1972)).

38. U.C.C. § 2-207 (1972).

is valid and the additional terms are considered proposals for additions to the contract.[39] Before the court will consider whether the additional terms bind the parties, it requires the existence of a contract under section 2-204.[40] Where the acceptance is conditioned upon assent to the additional terms, or the additional terms manifest a failure of the parties to reach an agreement under section 2-204, the courts resort to the traditional offer-acceptance analysis to determine whether a contract has arisen.[41]

Those courts that have found the existence of a contract under section 2-204 and have been confronted with additional terms in the purported acceptance have reached differing conclusions. In *Bradford v. Plains Cotton Cooperative Ass'n*,[42] the buyer accepted the contract and attached to the contract a price schedule with price related to quality. The court found that the imposition of the additional terms did not prevent the creation of the contract, but the seller-grower was not bound by the additional terms as he did not accept them.[43]

A different result was reached in *Hohenberg Bros. Co. v. Killebrew*,[44] where the seller-grower offered his cotton under a one-page agreement, and buyer accepted and submitted a three-page standard agreement. Seller received buyer's three-page agreement, but not until six months had passed and the price of cotton had risen substantially did he pose the objection that this was a counter-offer resulting in the rejection of the original offer. The *Hohenberg* court determined that the requirements of estoppel by silence[45] had been met and concluded that the seller was estopped to deny the validity of the one-page contract.[46]

Statute of Frauds

The U.C.C. requires that contracts for the sale of goods for the price of $500 or more comply with the Statute of Frauds.[47] A

39. *Id.* § 2-207(2).
40. Duval v. Malcom, 233 Ga. 784, 786, 214 S.E.2d 356, 358 (1975).
41. *Id.* at 787, 214 S.E.2d at 358.
42. 539 F.2d 1249 (10th Cir. 1976).
43. *Id.* at 1253.
44. 505 F.2d 643 (5th Cir. 1974).
45. *Id.* at 646. The three requirements of estoppel by silence are: 1) the party had a duty to speak; 2) his failure to speak was either intentional or in negligent disregard of plain dictates of conscience and justice; and 3) the other party relied on the silence to his economic or financial detriment. *See* 1 WILLISTON ON CONTRACTS, Third (Jaeger) Edition §§ 139-40 (1957).
46. 505 F.2d at 646.
47. U.C.C. § 2-201(1) (1972):

(1) Except as otherwise provided in this section a contract for the sale of goods for the price of $500 or more is not enforceable by way of

writing, to satisfy section 2-201(1), must meet three definite and invariable requirements: 1) evidence a contract for the sale of goods; 2) be "signed," a word which includes any authentification which identifies the party to be charged; and 3) specify a quantity.[48] The purpose behind section 2-201, as explained by one court, is merely to indicate the existence of a contract for sale between the parties.[49] Once the existence of the contract has been established, the court then reviews the other sections of the Code to interpret the contractual provisions if the latter are ambiguous.

Since most of the cases have involved the quantity terms of the contract, thereby requiring an examination of section 2-204,[50] the court must determine whether the quantity term is sufficiently definite to support judicial enforcement.[51] In doing so, if a court is faced "with a choice between a valid or an invalid construction, the court has a duty to accept the construction which will uphold, rather than destroy, the validity of the contract."[52] Under such a standard, an output contract for the sale of "all cotton produced by a farmer during 1973" has been found sufficiently definite to be enforceable.[53] Similarly, contracts for the output of a specified number of acres have been found sufficiently definite, notwithstanding that the acres are not identified and located in relation to those excluded from the contract.[54]

---

action or defense unless there is some writing sufficient to indicate that a contract for sale has been made between the parties and signed by the party against whom enforcement is sought or by his authorized agent or broker. A writing is not insufficient because it omits or incorrectly states a term agreed upon but the contract is not enforceable under this paragraph beyond the quantity of goods shown in such writing.

48. Harris v. Hine, 232 Ga. 183, 205 S.E.2d 847 (1974); *accord*, Austin v. Montgomery, 336 So. 2d 745 (Miss. 1976); *see* 3 WILLISTON ON CONTRACTS, Third (Jaeger) Edition §§ 505-24A (1960).

49. Riegel Fiber Corp. v. Anderson Gin Co., 512 F.2d 784 (5th Cir. 1975); *see* 4 WILLISTON ON CONTRACTS, Third (Jaeger) Edition §§ 567-99 (1961).

50. *See* notes 35-37 and accompanying text *supra*.

51. Riegel Fiber Corp. v. Anderson Gin Co., 512 F.2d 784, 789 (5th Cir. 1975).

52. West Point-Pepperell, Inc. v. Bradshaw, 377 F. Supp. 154, 159 (M.D. Ala. 1974); *see* 4 WILLISTON ON CONTRACTS , Third (Jaeger) Edition §§ 600-47 (1961).

53. Kimsey Cotton Co. v. Ferguson, 233 Ga. 962, 214 S.E.2d 360 (1975); *see* notes 94-104 and accompanying text *infra* (construction of output contracts).

54. West Point-Pepperell, Inc. v. Bradshaw, 377 F. Supp. 154 (M.D. Ala. 1974) (fact that the contract specified cotton grown on 230 acres was not indefinite, even though seller-grower grew cotton on 300 acres); Austin v. Montgomery, 336 So. 2d 745 (Miss. 1976) (written contract for output of cotton on 2,500 acres was valid, even though subsequent oral agreement for cotton produced on an additional 323 acres was not enforceable because of the Statute of Frauds).

Where there is no writing to evidence the agreement of the parties, the court must find that the oral contract comes within one of the exceptions to the Statute of Frauds to be enforceable. In *Cox v. Cox*,[55] the Alabama Supreme Court refused to enforce an oral contract to sell cotton despite the buyer's immediate resale of the cotton by written contract to a textile mill. The court could find neither an agency or broker relationship[56] nor an admission by the seller to making the contract[57] which would remove the oral contract from the operation of the Statute of Frauds. Another court has refused to apply promissory estoppel to preclude a party from raising the bar of the Statute of Frauds as to an oral contract.[58]

Where both parties are "merchants," the necessity of a written agreement may be overcome.[59] As was discussed earlier, courts are in agreement that cotton buyers are "merchants," but they are divided as to whether the farmer-sellers are "merchants."[60] In *Nelson v. Union Equity Cooperative Exchange*,[61] where the farmer was found to be a "merchant," an oral contract was held to be enforceable. In *Nelson*, the parties agreed to the terms of a forward contract for the sale of wheat in a telephone conversation and the buyer mailed a written confirmation of the terms to the seller on the same day. Because the seller failed to respond within ten days, the court held the oral contract enforceable.[62] In *Loeb & Co. v. Schreiner*,[63] the farmer was held not to be a "merchant" and the agreement was there-

55. 292 Ala. 106, 289 So. 2d 609 (1974).

56. U.C.C. § 2-201(1) (1972).

57. 292 Ala. 106, 111, 289 So. 2d 609, 612 (1974). "Admittedly, the trial court made a credibility determination adverse to appellants' testimony, but such finding did not constitute a finding that the 'admission' exception [§ 2-201(3)(b)] applied."

58. H. Molsen & Co. v. Hicks, 550 S.W.2d 354 (Tex. Civ. App. 1977). Cotton buyer contended that farmer-seller promised to sign forward contract, and that buyer resold the cotton in reliance on the promise and suffered a loss when seller breached. The court found that sellers agreed to sign only if the written agreement was satisfactory to their attorney, and therefore, there was no complete agreement between the parties. *See also* 1 WILLISTON ON CONTRACTS, Third (Jaeger) Edition § 140 (1957).

59. U.C.C. § 2-201(2) (1972):

> (2) Between merchants if within a reasonable time a writing in confirmation of the contract and sufficient against the sender is received and the party receiving it has reason to know its contents, it satisfies the requirements of subsection (1) against such party unless written notice of objection to its contents is given within 10 days after it is received.

60. *See* notes 21-34 and accompanying text *supra*.

61. 548 S.W.2d 352 (Tex. 1977).

62. *Id.* at 353.

63. 294 Ala. 722, 321 So. 2d 199 (1975).

fore unenforceable despite the buyer's compliance with section 2-201(2).

Parol Evidence

Where the terms of a contract have been reduced to an integrated form, evidence of a prior or contemporaneous oral agreement is inadmissible if the effect of such parol evidence would be to contradict or vary any of the terms of the written agreement.[64] The parol evidence rule does allow the written contract, where ambiguous, to be explained or supplemented by evidence of a course of dealing, usage of trade, or course of performance.[65] In *Loeb & Co. v. Martin*,[66] the Supreme Court of Alabama was faced with a contractual provision for the sale of "all cotton produced on 400 acres." The court found this phrase subject to two inconsistent interpretations: acres of land or acres of cotton. The court held, therefore, that parol evidence of the custom and usage of the trade was admissible to determine which of the two interpretations was intended by the parties.[67]

Reformation of the Contract

Parties may alter the terms of a contract by means of modification, rescission and waiver.[68] In *West Point-Pepperell, Inc. v. Bradshaw*,[69] the farmer-seller and the buyer executed a contract for sale of the farmer's cotton at thirty-one cents per pound. The contract contained a provision that any modification had to be in writing. The buyer admitted in his pleadings that he orally agreed to pay thirty-two cents per pound. While the court found this to be an ineffective modification, it operated as a waiver of the lesser price.[70] The parties need not use the specific term "waiver" in order to make an effective waiver, and consideration is not required to support the waiver.[71]

Parties may also terminate a contract completely by rescission because of mutual mistake. In *Plains Cotton Cooperative Ass'n v. Wolf*,[72] the buyer's agent negotiated an oral contract with the farmer-sellers, who later refused to execute the written embodiment of the oral agreement when it was presented. It

64. U.C.C. § 2-202 (1972).
65. *Id.*
66. 295 Ala. 262, 327 So. 2d 711 (1976).
67. *Id.* at 267, 327 So. 2d at 715. "Whether there was a custom and usage of trade was a question of fact for the jury to determine. . . ."
68. U.C.C. § 2-209 (1972).
69. 377 F. Supp. 154 (M.D. Ala. 1974).
70. *Id.* at 156 (citing U.C.C. § 2-209(4) (1972)).
71. Barnwell & Hays, Inc. v. Sloan, 564 F.2d 254, 256 (8th Cir. 1977).
72. 553 S.W.2d 800 (Tex. Civ. App. 1977).

was alleged that as an inducement to sign, the buyer's agent informed the farmers that they could withdraw from the written contract on thirty-days' written notice. The farmers claimed that they had relied upon this representation and had signed the contract without reading it. The written contract, of course, did not embody this oral representation. When the market price of cotton rose, the farmers notified buyer of their intent to withdraw and subsequently brought an action against the buyer seeking rescission of the contract.

In examining the mutual mistake doctrine, the *Wolf* court found the general rule to be that equity will not rescind a contract where the mutual mistake was induced by the complaining party.[73] The court found a specious "exception" to this rule, however, which purportedly states that where one party's false representations induce the complaining party to contract, the complaining party's negligence will not bar relief.[74] As a corollary to the so-called "exception," the court stated that if the mutual mistake is one regarding antecedent legal rights of the parties, rescission may be warranted.[75] Finally, the court suggested another qualification of the general rule: if the mistake has in any way been brought about by the misrepresentations of the other party, relief will be authorized.[76] Since the farmers alleged that they had signed the written contracts in reliance upon the buyer's representations that they were already bound by the oral contract, a mistake as to their antecedent legal rights, the court found in the *Wolf* case that there "were ample grounds to afford the [farmers] relief from contracts which they would not have signed except for such mistakes."[77]

The decision of the *Wolf* court was clearly in error on a number of grounds. The written contract signed by the farmers clearly stated that *all* of the understandings and agreements of the parties were embodied in their integrated contract. This provision, in conjunction with the parol evidence rule, clearly requires the exclusion of any evidence tending to vary or contradict the integrated contract. To permit the farmers to escape the consequences of having made a binding contract by alleging that they had not read their integrated contracts does violence to the

73. *Id.* at 803. In an arms-length contract such as this, the farmer-sellers had a duty to read the contracts before they signed, and their failure to do so constituted negligence.

74. *Id.* "This equitable rule applies whether rescission is sought under a fraud theory or a mistake theory. . . . Similarly, the rule operates on innocent as well as intentional misrepresentations."

75. *Id.*

76. *Id.* at 804.

77. *Id.*

basic and fundamental rule that one who signs a contract is bound thereby.

In addition, the court failed to instruct the jury that to find fraud or mutual mistake it would require "clear, cogent and convincing" evidence—not a mere preponderance. This rule is so firmly and uniformly established that to adduce authority in support would be a work of supererogation. In the absence of fraud or duress, *unilateral* mistake of the farmers could not excuse them from performing their contracts, for to do so would render all contracts unenforceable.

Finally, even assuming *arguendo* that the farmers understood that they could terminate their contractual obligations by giving written notice, the only notice that would suffice was a "letter of hardship." The letter actually sent by the farmers to the buyer failed to state any hardship whatsoever. Since this was a condition subsequent, it should have been *strictly* interpreted against the farmers. As such, the failure of the farmers to mention any hardship should have rendered the notice to terminate the contract ineffectual.

Contracts may also be reformed by the delegation of duties and the assignment of rights under the contract.[78] Courts have uniformly held that a forward contract for the sale of cotton to be grown by a farmer-seller is not a personal service contract. Therefore, such a contract may be assigned pursuant to Code section 2-210.[79] Farmers also have been precluded from raising the Statute of Frauds as a defense against an oral assignment by the buyer.[80]

In *Spann v. Kennedy & Son, Inc.*,[81] the court was confronted with whether the death of the cotton farmer terminated the contract. Holding that the contract was not for personal services and was therefore subject to the delegation of duties, the court stated that "even though the personal representative [of the decedent-farmer] was not a skilled cotton farmer, he had no difficulty in securing capable and reliable tenants to farm the land and fully and completely comply with the contract his father

78. U.C.C. § 2-210 (1972).

79. Mitchell-Huntley Cotton Co. v. Waldrep, 377 F. Supp. 1215, 1222 (N.D. Ga. 1974): "Where as here, the performance may as well be by one person (having only the rather wide-spread qualification of a knowledge of cotton farming) as another, the services to be performed are not 'personal' and the contract may be assigned. . . ."; West Point-Pepperell, Inc. v. Bradshaw, 377 F. Supp. 154, 158 (M.D. Ala. 1974): "[T]he rule is well established that a contract for sale and purchase is assignable."

80. 377 F. Supp. 154, 158 (M.D. Ala. 1974): "The Statute of Frauds may not be raised by one not a party to the oral contract."

81. 257 Ark. 857, 520 S.W.2d 286 (1975).

had made."[82] The mere fact that the identity of the cotton producer was important to the merchant was insufficient to make the contract one for personal services.[83]

Obligation of the Parties

The U.C.C. provides the general obligations of the parties to a contract for sale: the seller is to transfer and deliver the goods and the buyer is to accept and pay for them in accordance with the contract.[84] For forward contracts, a promise to buy certain goods is sufficient consideration for a promise to sell those goods.[85] Therefore, a forward contract will be enforced where it can be shown that "the parties intended to create a contract, that substantial promises were made by both parties and that the terms are reasonably certain to make the agreement enforceable."[86]

The fact that the particulars of performance of the contract are omitted and are to be specified by one of the parties does not necessarily invalidate the contract.[87] The subsequent specification of the particulars must be made in good faith and within the limits of commercial reasonableness.[88] Faced with the contention that the absence of performance particulars rendered the contract indefinite and therefore unenforceable, a Georgia court held:

> The custom and dealing of the parties adequately fulfill any indefiniteness in the respective obligations of the parties and the promise of each plaintiff to plant a particular acreage of cotton, followed by the planting thereof and the production of the crop in question fulfills any deficiency as to the identity of the obligation which might have existed when the contract was signed.[89]

Agency

Since most forward contracts are negotiated by agents,

82. *Id.* at 860, 520 S.W.2d at 288 (citing 3 WILLISTON ON CONTRACTS § 411 (1959)).

83. *Id.* at 861, 520 S.W.2d at 289.

84. U.C.C. § 2-301 (1972).

85. Cone Mills Corp. v. A. G. Estes, Inc., 377 F. Supp. 222 (N.D. Ga. 1974).

86. Mitchell-Huntley Cotton Co. v. Lawson, 377 F. Supp. 661, 663 (M.D. Ga. 1973).

87. U.C.C. § 2-311(1) (1972):

> (1) An agreement for sale which is otherwise sufficiently definite (subsection (3) of Section 2-204) to be a contract is not made invalid by the fact that it leaves particulars of performance to be specified by one of the parties. Any such specification must be made in good faith and within limits set by commercial reasonableness.

88. *Id.*

89. Abney v. Lawson, No. 7359, slip op. at 5 (Bleckley Super. Ct., Ga. 1973).

questions arise as to when the agents' actions will bind the parties. The general rule holds that the acts of the agent bind the principal if the transaction under scrutiny is within the scope of the agent's authority.[90] Courts are reluctant to find that an agent has exceeded his authority, whether actual or apparent.[91] This is sometimes expressed in the precept that a principal cannot repudiate the agent's authority for one purpose and assert it for another.[92] In the absence of an express agency, one court found an implied agency relationship between a husband and wife sufficient to bind the husband to a forward contract the wife had executed.[93]

Output Contracts

Because the yield of cotton per acre is dependent upon numerous factors and varies from year to year, many contracts require delivery of the total output of cotton on a specified

90. W. B. Dunavant & Co. v. Southmost Growers, Inc., 561 S.W.2d 578, 582-83 (Tex. Civ. App. 1978); *see* Hanslik v. Nickels Ginning Co., 496 S.W.2d 788 (Tex. Civ. App. 1973) (agent incurred no personal liability to third party for contract made for and in the name of his disclosed principal in the absence of either an agreement to the contrary or a satisfactory showing that the agent incurred such responsibility).

91. Traylor v. Gray, 547 S.W.2d 644 (Tex. Civ. App. 1977). Davis, acting without authority from Traylor (buyer), used Traylor's forward contract form to purchase seller's cotton for Traylor. Davis had bought seller's cotton for Traylor for the previous two years. An employee of Traylor subsequently learned of Davis' unauthorized purchase, but did not notify Traylor or the seller that Davis acted without authority. While Davis had neither actual nor apparent authority, which "must arise from words or conduct of the principal," *id.* at 651, the court found the elements of estoppel by silence present. "Traylor is liable because it failed in its duty to warn and is thereby estopped to deny that it clothed Davis with sufficient indicia of authority to make him its apparent agent, or indeed, its actual agent." *Id.* at 654. *See also* Davis Hunt Cotton Co. v. Terry, No. E-73-355 (Morgan County Cir. Ct., Ala. 1973). Where the landlord had for the past 19 years sold tenant's cotton, he had apparent authority to contract and there was a ratification following the sale estopping seller from denying the authority of the landlord; *see generally* 2 WILLISTON ON CONTRACTS, Third (Jaeger) Edition §§ 273-315 (1959) (contracts of employment).

92. Weathersby v. Gore, 556 F.2d 1247, 1254 (5th Cir. 1977): "Since Weathersby [buyer] affirmatively states that the contract is valid, as indeed he must in order to attempt to hold Gore [seller] to its terms, he cannot deny that the person who cast its terms did not have his authorization to contract."; Plains Cotton Coop. Ass'n v. Wolf, 553 S.W.2d 800, 804-05 (Tex. Civ. App. 1977): "In equity, the conduct of one's agent must be either repudiated or ratified *in toto* . . . . [Plains'] action in filing its cross-action for specific performance constituted a ratification of the actions [the agent] took to procure the contract."

93. Nunn v. W. H. Kennedy & Son, Inc., 308 So. 2d 845 (La. App. 1975). Wife was held to be acting as an agent for the community when she signed the forward contract, and her husband either authorized or ratified the contract by his acquiescence. *Id.* at 847.

acreage.[94] This is considered as stating a sufficiently definite quantity to render the contract enforceable.[95] The Code delineates the output as that quantity which is actually produced in good faith.[96] While the output may not be a quantity unreasonably disproportionate to a stated estimate,[97] one court has held that this does not create a reciprocal right to deliver only a reasonably proportionate amount.[98] Where the contract calls for delivery of all the cotton produced, all such cotton must be delivered.[99]

While courts have had little difficulty with contracts calling for the output of a specified acreage, the resolution becomes more difficult where the acreage is vaguely stated. In *McDonald v. Webb*,[100] the contract called for seller to plant "400 plus acres," and to deliver the "entire cotton production." Rejecting the buyer's contention that the seller breached the contract by planting 488 acres, the court said the "contract called for '400 plus acres,' and did not put a limit of 400 acres on the cotton acreage."[101]

The quantity cannot be unreasonably disproportionate to a stated estimate or prior output.[102] In *Duval & Co. v. Malcom*,[103] the buyer and seller agreed to an output contract, and buyer subsequently added the language to the contract: "600 pounds per acre or approximately 875 bales of cotton." In view of the previous two years' output—756 bales in 1971 and 380 bales in 1972—the court held the 875 bale projected yield was unreasonably disproportionate to past output, constituted a material al-

94. *See* note 4 *supra*. These contracts are also called "hog round" contracts.

95. Kimsey Cotton Co. v. Ferguson, 233 Ga. 962, 214 S.E.2d 360 (1975) ("all and only the cotton"); Harris v. Hine, 232 Ga. 183, 205 S.E.2d 847 (1974) ("all the cotton produced on their 825 acres"); Lubbock Cotton Co. v. Starke Taylor & Son, Inc., 544 S.W.2d 508 (Tex. Civ. App. 1976) ("all cotton delivered us by the producers from 3,198 acres of contract cotton").

96. U.C.C. § 2-306(1) (1972):

> (1) A term which measures the quantity by the output of the seller or the requirements of the buyer means such actual output or requirements as may occur in good faith, except that no quantity unreasonably disproportionate to any stated estimate or in the absence of a stated estimate to any normal or otherwise comparable prior output or requirements may be tendered or demanded.

97. *Id.*

98. Tennell v. Esteve Cotton Co., 546 S.W.2d 346, 358 (Tex. Civ. App. 1976).

99. *Id.*

100. 510 S.W.2d 670 (Tex. Civ. App. 1974).

101. *Id.* at 672. Here the price of cotton had decreased between the time of contract and the time of delivery, and the buyer unsuccessfully attempted to avoid delivery of the entire production.

102. U.C.C. § 2-306(1) (1972); *see* note 96 *supra* for text of section.

103. 233 Ga. 784, 214 S.E.2d 356 (1975).

teration in the quantity terms and evinced a failure of buyer to accept the contract.[104]

Unconscionability

While courts are empowered to refuse enforcement of agreements found to be unconscionable,[105] the contracts are to be examined in light of circumstances existing at the time the bargains were made. Enforcement may be refused only if they are unreasonable under the circumstances then in existence.[106] The Code does not define "unconscionability," but the basic principle underlying the term is the prevention of oppression and unfair surprise.[107]

Those parties alleging unconscionability of the forward cotton contracts predicated their contentions primarily on the disparity between the contract price—formulated in early 1973—and the market price at the time of harvest and delivery. The courts facing this contention uniformly upheld the contracts, stating that an increase in price subsequent to the execution of the contract or a profit or loss to one of the parties would not render the contracts unconscionable.[108] Although the contracts were found not to be "unconscionable," the courts provided guidelines for the interpretation of "unconscionability:" fairness of price at the time the contract was made;[109] the buyer's knowledge of an imminent increase in market price;[110]

---

104. *Id.* at 785, 214 S.E.2d at 357.

105. U.C.C. § 2-302(1) (1972):

> (1) If the court as a matter of law finds the contract or any clause of the contract to have been unconscionable at the time it was made the court may refuse to enforce the contract, or it may enforce the remainder of the contract without the unconscionable clause, or it may so limit the application of any unconscionable clause as to avoid any unconscionable result.

106. Bradford v. Plains Cotton Coop. Ass'n, 539 F.2d 1249, 1255 (10th Cir. 1976), *cert. den.*, 429 U.S. 1042 (1977); West Point-Pepperell, Inc. v. Bradshaw, 377 F. Supp. 154, 157 (M.D. Ala. 1974); McEntire & Sons, Inc. v. Hart Cotton Co., 256 Ark. 937, 942, 511 S.W.2d 179, 183 (1974); *see* 15 WILLISTON ON CONTRACTS, Third (Jaeger) Edition § 1763A (1972).

107. U.C.C. § 2-302 (1972) (Comment 1).

108. Bradford v. Plains Cotton Coop. Ass'n, 539 F.2d 1249, 1255 (10th Cir. 1976), *cert. den.*, 429 U.S. 1042 (1977).

109. *Id.*; West Point-Pepperell, Inc. v. Bradshaw, 377 F. Supp. 154, 157 (M.D. Ala. 1974); McEntire & Sons, Inc. v. Hart Cotton Co., 256 Ark. 937, 942, 511 S.W.2d 179, 183 (1974); Kimsey Cotton Co. v. Ferguson, 233 Ga. 962, 214 S.E.2d 360 (1975).

110. West Point-Pepperell, Inc. v. Bradshaw, 377 F. Supp. 154, 157 (M.D. Ala. 1974); McEntire & Sons, Inc. v. Hart Cotton Co., 256 Ark. 937, 942, 511 S.W.2d 179, 183 (1974); Kimsey Cotton Co. v. Ferguson, 233 Ga. 962, 965, 214 S.E.2d 360, 363 (1975).

the absence of a meaningful choice for the seller;[111] whether the contract is normal in the cotton industry;[112] and whether the agreement is so unreasonable and one-sided as to make it unconscionable.[113]

Warranty of Title and Landlord's Liens

Because output forward contracts[114] are prevalent in the cotton industry, they inevitably come into conflict with another prevalent practice—tenant farming. Tenant farmers often pay their rent to the landlord in the form of a percentage of the crop,[115] and often contract to sell the entire crop output of the leased farm. Questions arise as to whether the output covers that portion of the crop which is to be delivered to the landlord, and of what effect is the landlord's lien on the contract?

The Code imposes an implied warranty of title on a contract for sale[116] and provides that the buyer acquires all title to the goods which the transferor (farmer-seller) had.[117] In addition, the parties may create an express warranty covering title to the goods.[118] In *Lubbock Cotton Co. v. Starke Taylor & Son, Inc.*,[119] the contract contained the following provision: "The SELLER covenants, agrees and warrants that all bales of cotton delivered to PURCHASER shall be free and clear of all liens and encumbrances and that the SELLER has full authority from the landlord to sell the cotton produced on the contracted acreage." The

111. West Point-Pepperell, Inc. v. Bradshaw, 377 F. Supp. 154, 157-58 (M.D. Ala. 1974).

112. Kimsey Cotton Co. v. Ferguson, 233 Ga. 962, 214 S.E.2d 360 (1975).

113. *Id.*; Darden v. Ogle, 293 Ala. 699, 310 So. 2d 182 (1975).

114. *See* notes 94-104 and accompanying text *supra* (discussion of output contracts).

115. Most of the cases reported involved the landlord having an one-fourth interest in the crop for rent. *See, e.g.*, Mitchell-Huntley Cotton Co. v. Waldrep, 377 F. Supp. 1215 (N.D. Ala. 1974); Day v. Lide, 304 So. 2d 843 (La. Civ. App. 1974).

116. U.C.C. § 2-312(1), (2) (1972):

(1) Subject to subsection (2) there is in a contract for sale a warranty by the seller that

(a) the title conveyed shall be good, and its transfer rightful; and

(b) the goods shall be delivered free from any security interest or other lien or encumbrance of which the buyer at the time of contracting has no knowledge.

(2) A warranty under subsection (1) will be excluded or modified only by specific language or by circumstances which give the buyer reason to know that the person selling does not claim title in himself or that he is purporting to sell only such right or title as he or a third person may have.

117. U.C.C. § 2-403 (1972).

118. U.C.C. § 2-313 (1972).

119. 544 S.W.2d 508 (Tex. Civ. App. 1976).

court found this to be an express warranty and interpreted it to mean that the buyer was entitled to all of the cotton produced by the farmer-seller, including the landlord's portion.[120] Another court held that contractual language similar to that in *Lubbock Cotton* is redundant because the implied warranty of title found in section 2-312 will mandate the same result.[121]

In contrast to the warranties of title are state laws concerning landlord and tenant, and in particular landlord liens for rent. Most states hold that between landlord and tenant, the legal title and right to possession of the entire crop is in the tenant, subject, however, to the landlord's lien.[122] Where the purchaser buys the cotton crop on which the landlord has a lien, the purchaser is liable to the landlord for conversion of the crop to the extent of the lesser of the value of the crop or the amount of rent due.[123] The landlord may waive his lien, however, by authorizing the tenant, either directly or indirectly, to sell the crop.[124]

In an effort to minimize the conflict and still give effect to the competing interests, some courts have looked at the language of the contract to ascertain whether the tenant attempted to sell the entire crop, including the landlord's portion.[125] Absent some warranty that the crop will be free from liens, most courts are reluctant to include that portion of the crop over which the landlord has a lien.[126] However, in *Ralli-Coney, Inc. v.*

---

120. *Id.* at 511.

121. Mitchell-Huntley Cotton Co. v. Waldrep, 377 F. Supp. 1215, 1223 (N.D. Ala. 1974).

122. *Id.*; Darden v. Ogle, 293 Ala. 699, 702, 310 So. 2d 182, 184 (1975); Dill v. Graham, 530 S.W.2d 157, 160 (Tex. Civ. App. 1975).

123. Darden v. Ogle, 293 Ala. 699, 310 So. 2d 182 (1975); Dill v. Graham, 530 S.W.2d 157, 160 (Tex. Civ. App. 1975); Keaton McCrary Cotton Co. v. Herron, 529 S.W.2d 630 (Tex. Civ. App. 1975).

124. An aberrant result was reached in the only non-Code state— Louisiana. In Day v. Lide, 304 So. 2d 843 (La. Civ. App. 1974), the tenant forward contracted the cotton output, but the landlord's assignee subsequently notified the tenant not to sell the landlord's portion. The lease contained the term "sale," rather than "contract to sell," and the court distorted the law of contracts in distinguishing the two terms to find that the tenant's forward contract could not cover the landlord's portion, since the forward contract was a "contract to sell." *But see generally* Davis-Hunt Cotton Co. v. Terry, No. E-73-355 (Morgan County Cir. Ct., Ala. 1973) (landlord may be given tenant's authority to sell entire crop).

125. *See* Mitchell-Huntley Cotton Co. v. Waldrep, 377 F. Supp. 1215 (N.D. Ala. 1974); Darden v. Ogle, 293 Ala. 699, 310 So. 2d 182 (1975); Lubbock Cotton Co. v. Starke Taylor & Son, Inc., 544 S.W.2d 508 (Tex. Civ. App. 1976); Keaton McCrary Cotton Co. v. Herron, 529 S.W.2d 630 (Tex. Civ. App. 1975).

126. *See, e.g.*, Bolin Farms v. Am. Cotton Shippers Ass'n, 370 F. Supp. 1353 (W.D. La. 1974); Dill v. Graham, 530 S.W.2d 157 (Tex. Civ. App. 1975); Keaton McCrary Cotton Co. v. Herron, 529 S.W.2d 630 (Tex. Civ. App. 1975). *But see* Mitchell-Huntley Cotton Co. v. Waldrep, 377 F. Supp. 1215 (N.D. Ala. 1974) (landlord's interest was included within the provisions of the contract because of the implied warranty of title); Lubbock Cotton Co. v. Starke Tay-

Gates,[127] the court relied on Code section 2-402(1),[128] which subordinates the rights of the seller's unsecured creditors in the subject matter to those of the buyer, and held "that the cotton merchants are entitled to the whole crop and the lessor's remedies, if any, are against the lessee. . . ."[129] Those courts that have refused to include the landlord's interest within the coverage of the contract have allowed the buyer damages for breach of contract if the terms of the contract required sale of all of the cotton crop.[130]

Interpretation of the Contract

In addition to delineating the obligations of the parties under the contract, courts are often called upon to construe and interpret the language of the contract. In doing so, courts attempt to ascertain the intent of the parties at the time the contract was made. In *Hohenberg Bros. Co. v. Gibbons*,[131] the court announced the rule that "where the intent of the parties is doubtful or where a condition [precedent] would impose an absurd or impossible result then the agreement will be interpreted as creating a covenant rather than a condition."[132]

Custom and Usage of the Trade

Where an agreement between the parties is ambiguous, evidence[133] of the custom and usage[134] of the trade is admissible to explain the terms of the contract.[135] The rules governing the introduction of such evidence were set out with clarity in *Jewell v. Jackson & Whitsitt Cotton Co.*,[136] where the Supreme Court of Alabama stated:

> A usage or custom to be admissible in explanation of the terms of a contract which are ambiguous or doubtful in signification must

---

lor & Son, Inc., 544 S.W.2d 508 (Tex. Civ. App. 1976) (landlord's interest was included in contract because of the express warranty that the crop was subject to no lien).

127. 528 F.2d 572 (5th Cir. 1976); *accord*, Mitchell-Huntley Cotton Co. v. Waldrep, 377 F. Supp. 1215 (N.D. Ala. 1974).

128. U.C.C. § 2-402(1) (1972).

129. 528 F.2d at 575.

130. *See, e.g.*, Keaton McCrary Cotton Co. v. Herron, 529 S.W.2d 630 (Tex. Civ. App. 1975).

131. 537 S.W.2d 1 (Tex. 1976).

132. *Id.* at 3.

133. *See* notes 64-67 and accompanying text *supra*; 4 WILLISTON ON CONTRACTS, Third (Jaeger) Edition §§ 631-47 (1961).

134. U.C.C. § 1-205 (1972). *See also* 5 WILLISTON ON CONTRACTS, Third (Jaeger) Edition §§ 648-62 (1961).

135. U.C.C. § 2-202 (1972).

136. 294 Ala. 112, 313 So. 2d 157 (1975).

> be reasonable, must not contravene or displace any of the general principles of statutory or common law or vary the express terms of the contract, *and must be brought home to the knowledge of the party sought to be charged, either by proof of actual notice, or by proof of its existence sufficiently long to raise a presumption of knowledge.*[137]

The existence of the custom and usage is a question of fact to be determined by the jury.[138]

In *Jewell v. Jackson & Whitsitt Cotton Co.*,[139] the contract called for "all the cotton" produced on 142.6 acres. Jewell planted his acreage by the "two and skip one row" method,[140] and buyer alleged the existence of a custom and usage which interpreted reference to acreage to mean "solid" acres, not "skip row" acres. Because this was the first time Jewell contracted his cotton and he was unaware of the custom and usage when he signed the contract, the court held that evidence of the custom and usage would not be admissible against Jewell.[141] *Loeb & Co. v. Martin*[142] involved facts identical to *Jewell*, but the court held that since the farmer was much more knowledgeable and experienced, evidence of the custom and usage could be used against him.[143]

Ambiguity

A contractual provision sometimes lacking precision and therefore held by the courts to be ambiguous is the "micronaire clause."[144] In most cases, the contract contained a price schedule for cotton possessing desirable quality characteristics, such

137. *Id.* at 117, 313 So. 2d at 160-61.

138. Loeb & Co. v. Martin, 327 So. 2d 711, 715 (Ala. 1976).

139. 294 Ala. 112, 313 So. 2d 157 (1975).

140. The "skip" method should be distinguished from the "solid" method. The "skip" method involves planting two rows of cotton and leaving the third row vacant. The "solid" method consists of planting all rows. If all other factors are constant, the "skip" method will result in a yield of two-thirds as much cotton as the "solid" method.

141. 294 Ala. 112, 117, 313 So. 2d 157, 161 (1975).

142. 327 So. 2d 711 (Ala. 1975).

143. *Id.* at 715.

144. Micronaire is a quality criterion indicating the fineness or coarseness of the cotton fiber, an important factor in determining yarn strength. The micronaire reading is ascertained by an instrument known as the micronaire or air permeator. The micronaire factor is included in the legislative formula for determining Commodity Credit Corporation price support loans. 7 U.S.C. § 1444 (f)(1) (1977). The general micronaire classifications are:

below 3.0	very fine
3.0-3.9	fine
4.0-4.9	average
5.0-5.9	coarse
above 6.0	very coarse

as color, length, strength and fineness, the latter characteristic determined by a measurement known as micronaire. Acceptable cotton falls within a micronaire range of 3.5 to 4.9, and cotton outside this range was tenderable but subject to a discount in price.

In the cases discussed herein, the contracts contained a graduated price schedule for cotton up to 3.5 micronaire, but no price was indicated for cotton above 3.5 micronaire. Hoping to invalidate their contracts, the farmers seized upon this apparent ambiguity, thereby providing them the opportunity to sell their cotton at considerably higher price levels. The test for ambiguity was stated as follows: "[T]he contract was ambiguous because it could not be said as a matter of law that cotton whose micronaire was not specifically listed . . . was intended to be included or excluded, and therefore, parol evidence bearing on the intent . . . was admissible."[145] The two courts confronting the ambiguity of the "micronaire clause" reached opposite results: *Esteve Cotton Co. v. Hancock*[146] held that the cotton above 3.5 micronaire was not included in the contract; *Tennell v. Esteve Cotton Co.*[147] held that the cotton above 3.5 micronaire was included in the contract.

Place and Time of Delivery

While the omission of particulars of performance will not invalidate a contract,[148] the Code provides "filler" sections which will specify the place[149] or time[150] for delivery. Absence of a specified location for delivery of the crop results in the seller's

145. Tennell v. Esteve Cotton Co., 546 S.W.2d 346, 351-52 (Tex. Civ. App. 1976).

146. 539 S.W.2d 145 (Tex. Civ. App. 1976) (one factor leading to this conclusion was that in the previous 10 years, Hancock had never raised any cotton testing higher than 2.8 micronaire).

147. 546 S.W.2d 346 (Tex. Civ. App. 1976).

148. *See* notes 84-89 and accompanying text *supra*.

149. U.C.C. § 2-308 (1972):

Unless otherwise agreed

(a) the place for delivery of goods is the seller's place of business or if he has none his residence; but

(b) in a contract for sale of identified goods which to the knowledge of the parties at the time of contracting are in some other place, that place is the place for their delivery; and

(c) documents of title may be delivered through customary banking channels.

150. U.C.C. § 2-309(1) (1972): "(1) The time for shipment or delivery or any other action under a contract if not provided in this Article or agreed upon shall be a reasonable time." *See* 8 WILLISTON ON CONTRACTS, Third (Jaeger) Edition § 956A (1964).

place of business being the place of delivery.[151] Where the contract is silent as to the time for delivery, the Code provides for a reasonable time.[152]

Even where the contract provides a time for delivery, questions may arise as to interpretation. In *Lake City Cotton Co. v. Page*,[153] the contract specified delivery immediately upon ginning but not later than December 31, 1973. The court, in response to the contention that any cotton harvested after that date belonged to the seller, found the clause "susceptible of only one interpretation. . . . The ordinary meaning of a delivery date in a sales contract is that date by which the vendor must perform his obligation under the contract. It does not mean that the obligations of the vendor terminate after the delivery date is reached. . . ."[154]

Faced with a deadline for delivery similar to that in *Page*, the court in *Mitchell-Huntley Cotton Co. v. Waldrep*[155] found that the clause did not give the buyer an option to take or reject cotton ginned after the deadline date, thereby resulting in a lack of mutuality of obligation. While the language was ambiguous, the court termed the provision to be "one of limitation, subject to an implicit obligation upon the defendants of good faith performance in the light of trade usage established by the evidence that they harvest and gin the subject cotton in the normal course, promptly as it matures."[156]

The Code also imposes a time constraint for notice of termination of the contract.[157] Unless the contract terminates upon an agreed event, the party seeking to terminate must give reasonable notice to the other party. In *Weathersby v. Gore*,[158] the seller required mutual performance bonds, and upon buyer's delay, gave him notice of a two-week deadline for posting the bond. Seller informed buyer that failure to post the bond would terminate the contract. The buyer objected to the two-week deadline, but did post the bond, so the question whether the bond had been posted within a reasonable time was left to the jury.[159]

---

151. *See* Taunton v. Allenberg Cotton Co., 378 F. Supp. 34 (M.D. Ga. 1973); Cone Mills Corp. v. A. G. Estes, Inc., 377 F. Supp. 222, 226 (N.D. Ga. 1974).

152. Taunton v. Allenberg Cotton Co., 378 F. Supp. 34 (M.D. Ga. 1973).

153. Richland County Ct. of Common Pleas, S. Car. (January 19, 1974).

154. *Id.*, slip op. at 9-10.

155. 377 F. Supp. 1215 (N.D. Ala. 1974).

156. *Id.* at 1221.

157. U.C.C. § 2-309(3) (1972): "(3) Termination of a contract by one party except on the happening of an agreed event requires that reasonable notification be received by the other party and an agreement dispensing with notification is invalid if its operation would be unconscionable."

158. 556 F.2d 1247 (5th Cir. 1977).

159. *Id.* at 1255-56.

BREACH OF CONTRACT

When the market price of cotton rose in such a sudden and spectacular fashion—nearly tripling between execution of the contracts and delivery—a number of farmer-sellers began to search for ways to avoid their contractual commitments, most of which were covered in the cases addressed above. However, many novel theories not heretofore discussed were advanced in hopes of judicial declaration that the agreements were invalid. Most of these contrived theories were dismissed by the courts, thereby avoiding total chaos in the cotton industry and maintaining order in the law of contracts.

"Bucket Shop" Defense

One means by which sellers sought to have their forward contracts declared invalid was by invocation of state "bucket shop" acts. These laws made illegal the operation of "bucket shops," in which gambling wagers were made as to future market values of commodities,[160] and required that the contracts be executed on the floor of a recognized Board of Trade or Exchange.[161] The sellers contended that these contracts for future delivery of a commodity—cotton—were not executed on the floor of a Board of Trade or Exchange and were therefore invalid.

The courts unanimously rejected this argument, distinguishing dealing in futures regulated by the "bucket shop" acts from the forward contracts: "Contracts for future delivery, if entered into in good faith, and with an actual intention of fulfillment, are valid as any other species of contract."[162] As long as the parties intend a *bona fide* sale and delivery of the commodity, the "bucket shop" acts are inapplicable and the contract is valid.[163]

Fraud

Another defense used to test the validity of the forward con-

160. McEntire & Sons, Inc. v. Hart Cotton Co., 256 Ark. 937, 941, 511 S.W.2d 179, 181-82 (1974).

161. *See, e.g.*, ARK. STAT. ANN. § 68-1005 (1957); GA. CODE § 20-602 (1977).

162. McEntire & Sons, Inc. v. Hart Cotton Co., 256 Ark. 937, 940, 511 S.W.2d 179, 182 (1974) (quoting Fortenbury v. State, 47 Ark. 188, 1 S.W. 58 (1886)); *accord*, Taunton v. Allenberg Cotton Co., 378 F. Supp. 34, 38 (M.D. Ga. 1973); Mitchell-Huntley Cotton Co. v. Waldrep, 377 F. Supp. 1215, 1222 (N.D. Ala. 1974); Abney v. Lawson, No. 7359, slip op. at 4 (Bleckley Super. Ct., Ga. 1973).

163. Mitchell-Huntley Cotton Co. v. Waldrep, 377 F. Supp. 1215, 1222 (N.D. Ala. 1974) (since U.C.C. was a later enactment than "bucket shop" acts, the Code would control even if "bucket shop" acts had been applicable).

tracts was fraud. The elements of fraud are: 1) a false statement of material fact; 2) made to be acted upon; 3) actually believed; and 4) acted on with the consequential injury to the person acting thereon.[164] In *Bradford v. Plains Cotton Cooperative Ass'n*,[165] the sellers alleged fraud in that the buyer had not informed them of provisions on the back side of the contract. The court of appeals found that "Plains did not deny any farmer an opportunity to read the back side and did not make any representation as to its contents,"[166] and thus the elements of fraud were not present.

In *Cone Mills Corp. v. A. G. Estes, Inc.*,[167] the court allowed the cancellation of a written instrument because of inceptive fraud. Inceptive fraud occurs when promises are made in the instrument which one party has no intention of performing and in fact fails to perform.[168] While prior authority required that the misrepresentations relate to a pre-existing or present fact, and not to future conduct, *Cone Mills* reasoned that although these representations were promissory in nature, they fit within the exception where fraud is predicated on future promises made with the present intention not to perform.[169] Therefore, where fraudulent misrepresentations induced the execution of the instrument, the document would fail to evince the true intent of the parties.[170]

Insecurity

One farmer sought to justify his breach of contract by alleging that at the time of his breach, the buyer was in an unsound financial position and therefore unable to perform the contract. The court found that the farmer had suffered no detriment by the buyer's alleged lack of liquidity, since "the sellers might have deemed their right to performance by the buyer (payment for the cotton) insecure and demanded assurance [under section 2-609]."[171] Since no such demand for assurance had been

164. Traylor v. Gray, 547 S.W.2d 644, 650 (Tex. Civ. App. 1977).

165. 539 F.2d 1249 (10th Cir. 1976), *cert. den.*, 429 U.S. 1042 (1977).

166. *Id.* at 1254.

167. 377 F. Supp. 222 (N.D. Ga. 1974).

168. *Id.* at 226.

169. *Id.* at 225 (citing RESTATEMENT OF CONTRACTS § 473, at 900 (1932)).

170. *Id.*; *see* 12 WILLISTON ON CONTRACTS, Third (Jaeger) Edition §§ 1486-1534B (1970).

171. Mitchell-Huntley Cotton Co. v. Waldrep, 377 F. Supp. 1215, 1221 (N.D. Ala. 1974); U.C.C. § 2-609(1) (1972):

> (1) A contract for sale imposes an obligation on each party that the other's expectation of receiving due performance will not be impaired. When reasonable grounds for insecurity arise with respect to the performance of either party the other may in writing demand ade-

made, "the financial condition of the original buyer is immaterial. . . . Capacity to perform at the time for performance . . . is all that is required."[172]

Excuse by Failure of Condition

Finally, *Dunavant Enterprises, Inc. v. Ford*[173] presented the question whether nonperformance of a contract by reason of failure of conditions would excuse the farmer from liability.[174] In this case, the farmer-seller forward contracted to plant and sell approximately 1600 acres of cotton. Because of adverse weather conditions, only 1250 acres were planted and delivered, and the buyer sought to compel seller to deliver 350 additional acres from land that seller rented. After noting that "the parties to the contract for sale of the crop to be grown in the future are well aware of the fact that weather and other conditions of nature control to a large extent the ability of the seller to grow and harvest the crop contemplated,"[175] the court held:

> [I]f the parties contract for the purchase and sale of all or a part of a particular crop to be grown in the future from a particular tract or tracts of land and by reason of weather conditions or other forces of nature the seller is unable to plant all or part of the crop or if all or part of the crop fails or is destroyed by conditions beyond the control of the seller, nonperformance to the extent of the failure is excused in the absence of an expressed condition in the contract to the contrary.[176]

REMEDIES AND DAMAGES

Interstate Commerce

Before an injured party may choose his remedy or calculate his damage, he must determine whether the contract upon which he is suing will be enforced. While this determination is generally uncomplicated, problems can and do arise. One such problem arose in *Allenberg Cotton Co. v. Pittman*,[177] where an out-of-state cotton buyer, through a Mississippi broker, negotiated a forward contract in Mississippi with a Mississippi farmer. Upon breach, the seller alleged that the buyer was doing busi-

---

quate assurance of due performance and until he receives such assurance may if commercially reasonable suspend any performance for which he has not already received the agreed return.

172. 377 F. Supp. at 1221.

173. 294 So. 2d 788 (Miss. 1974).

174. *See, e.g.*, U.C.C. § 2-615 (1972).

175. 294 So. 2d at 792.

176. *Id.*; *see* 18 WILLISTON ON CONTRACTS, Third (Jaeger) Edition §§ 1931-79 (1978).

177. 419 U.S. 20 (1974).

ness in Mississippi without the requisite certificate. The trial court rejected this defense, but on appeal the Mississippi Supreme Court accepted this stratagem designed to avoid compliance with the contract, and ruled that the transaction was intrastate, so the contract, though valid, was therefore unenforceable.[178]

The United States Supreme Court reversed, holding that the transaction was interstate and the contract was therefore enforceable. The Court stressed that the cotton industry involves an intricate marketing mechanism, of which one primary component is the forward contract.[179] Taken in isolation, delivery of cotton to a warehouse is an intrastate transaction; however, such delivery is essential for the completion of the interstate transaction.[180] Therefore, the cotton was in the stream of interstate commerce and Mississippi's refusal to honor and enforce contracts protected by interstate commerce was repugnant to the Commerce Clause.[181]

Third-Party Beneficiary

Once it has been determined that there is no bar to enforcement of the contract, the injured party must look to his remedy. The Code provides for the liberal administration of remedies so that the aggrieved party may be put in as good a position as if the other party had fully performed.[182] This approach is reflected in the treatment of third-party beneficiaries.

In *Riegel Fiber Corp. v. Anderson Gin Co.*,[183] the buyer-textile manufacturer executed a master contract with the ginner-agent, who in turn executed a number of individual contracts with farmers who regularly processed and sold their cotton at that gin. When the farmers breached the contracts, the buyer sued as a third-party beneficiary. In deciding whether the parties intended directly to benefit a third party, the court allowed evidence of the circumstances surrounding the making of the

178. Pittman v. Allenberg Cotton Co., 276 So. 2d 678 (Miss. 1973), *rev'd sub nom.*, Allenberg Cotton Co. v. Pittman, 419 U.S. 20 (1974).

179. 419 U.S. at 25; *accord*, Ralli-Coney, Inc. v. Gates, 528 F.2d 572, 575 (5th Cir. 1976).

180. 419 U.S. at 30; *see* Cone Mills Corp. v. Hurdle, 369 F. Supp. 426, 436 (N.D. Miss. 1974), *citing* 7 U.S.C. § 2101 (1966): "All cotton produced in the United States is in the current of interstate or foreign commerce or directly burdens, obstructs, or affects interstate or foreign commerce in cotton and cotton products."

181. 419 U.S. at 34; *accord*, Riegel Fiber Corp. v. Anderson Gin Co., 512 F.2d 784, 792-93 (5th Cir. 1975).

182. U.C.C. § 1-106 (1972); *see* W. H. Kennedy & Son, Inc. v. Estate of Spann, No. 42928 (Franklin County Chancery Ct., Ark., March 1, 1974).

183. 512 F.2d 784 (5th Cir. 1975).

contract.[184] This evidence showed that, in substance, the buyer was making a direct purchase from the farmers and the ginner was acting only as an accomodation party, so the buyer was a third-party beneficiary.[185]

Cover

One means by which the buyer may recoup his damages resulting from the seller's breach is "cover."[186] The buyer "covers" by, without unreasonable delay, making a good faith purchase of substitute goods.[187] In *W. B. Dunavant & Co. v. Southmost Growers, Inc.*,[188] the buyer contracted with a cooperative to purchase the output of cotton from its fourteen individual cooperative members. Subsequently, one of the cooperative members advised the buyer that he was not bound by the contract, and the buyer negotiated a purchase from him at the current market price. The court held that the buyer was at liberty to negotiate directly with the defaulting farmer for the purchase of his cotton independent of the contract, and the cooperative would be liable for damages—the difference between the contract price and the market price.[189]

Specific Performance

Another remedy available to the buyer is specific performance of the forward contract.[190] Absent a stipulation that the

184. *Id.* at 787.

185. *Id.* at 788; *see* 2 WILLISTON ON CONTRACTS, Third (Jaeger) Edition §§ 347-403 (1959).

186. U.C.C. § 2-711(1) (1972):

> (1) Where the seller fails to make delivery or repudiates or the buyer rightfully rejects or justifiably revokes acceptance then with respect to any goods involved, and with respect to the whole if the breach goes to the whole contract (Section 2-612), the buyer may cancel and whether or not he has done so may in addition to recovering so much of the price as has been paid
>
> (a) "cover" and have damages under the next section as to all the goods affected whether or not they have been identified to the contract; or
>
> (b) recover damages for non-delivery as provided in this Article (Section 2-713).

187. U.C.C. § 2-712(1) (1972): "After a breach within the preceding section the buyer may 'cover' by making in good faith and without unreasonable delay any reasonable purchase of or contract to purchase goods in substitution for those due from the seller."

188. 561 S.W.2d 578 (Tex. Civ. App. 1978).

189. *Id.* at 583.

190. U.C.C. § 2-716(1) (1972): "(1) Specific performance may be decreed where the goods are unique or in other proper circumstances." *See* 11 WILLISTON ON CONTRACTS, Third (Jaeger) Edition §§ 1418-53A (1968).

subject cotton is unique,[191] courts have not had difficulty in finding cotton to be unique. In *Lake City Cotton Co. v. Page*,[192] the court stated "[t]he test of uniqueness . . . must be made in terms of the total situation which characterizes the contract."[193] Three factors led the court to the conclusion that the cotton was unique, thereby warranting specific performance: 1) the commitments that the buyer had with others could not be fulfilled if the farmer-seller did not deliver the cotton; 2) the irreparable damage to the buyer's business; and 3) the scarcity of the goods in question, although a limited amount was available on the open market.[194]

In *W. W. Kennedy & Son, Inc. v. Estate of Spann*,[195] the court relied upon the "other proper circumstances" language of section 2-716 to grant specific performance. It noted that "[o]utput and requirements contracts involving a particular or peculiarly available source or market present today the typically commercial specific performance situation. . . ."[196] The major factor militating for specific performance was the lack of comparable cotton on the market, because the farmer-seller's cotton was of the highest grade and not generally available.[197] The other factors weighed by the court were that damages to the buyer would be inestimable, and even if they could be calculated, their award would result in a windfall to the farmer from his own breach.[198]

In different circumstances, specific performance was given a restrictive reading in *Weathersby v. Gore*,[199] where the court stated the general rule: "[S]pecific performance of a contract will not be awarded where damages may be recovered and the remedy in a court of law is adequate to compensate the injured party."[200] While the buyer alleged that he could not obtain the needed cotton on the open market, the court found that he had delayed in seeking to purchase cotton on the market after he learned of the breach, and the absence of cotton was more at-

191. Kimsey Cotton Co. v. Ferguson, 233 Ga. 962, 214 S.E.2d 360 (1975).
192. Richland County Ct. of Common Pleas, S. Car. (January 19, 1974).
193. *Id.*, Order at 14 (citing Comment 2, U.C.C. § 2-716 (1972)).
194. *Id.* at 15. "This output contract situation appears to be the precise circumstances under which the Uniform Commercial Code considers specific performance as the only adequate remedy."
195. No. 42928 (Jefferson County Chancery Ct., Ark., March 8, 1974).
196. *Id.*, No. 42928, slip op. at 4 (citing Comment 2, U.C.C. § 2-716 (1972)).
197. *Id.*
198. *Id.*
199. 556 F.2d 1247 (5th Cir. 1977).
200. *Id.* at 1258 (quoting Roberts v. Spense, 209 So. 2d 623, 626 (Miss. 1968)).

tributable to him than to the seller.[201] Finally, the court felt that the award of damages would adequately compensate the buyer for his losses resulting from the breach of contract.[202]

Liquidated Damages

While parties to a contract are given many remedies, one which is often preferred is a liquidated damages provision. The major benefit of the provision is that the liquidated damages are enforceable upon proof of the breach of contract and without proof of the damages actually sustained.[203] The sum stipulated is intended by the parties to reasonably determine the damages resulting from a breach.[204] The presence of a liquidated damages provision, however, does not necessarily mean that this is the exclusive remedy of the aggrieved party.

In *Carolina Cotton Growers Ass'n, Inc. v. Arnette*,[205] the contract contained a liquidated damages clause, but the buyer sued for specific performance upon seller's breach. In response to seller's contention that buyer's only remedy was liquidated damages, the court examined section 2-719[206] and concluded that the liquidated damages clause would not authorize the seller to pay the stipulated sum and satisfy the contract requirements.[207] "There is no statement in the present contract that the paragraph regarding liquidated damages is intended to be the exclusive or only remedy of the plaintiff [buyer] in the event

201. *Id.* at 1258-59; *see* Duval & Co. v. Malcom, 233 Ga. 784, 786, 214 S.E.2d 356, 359 (1975): "[T]he mere fact that cotton prices soared after this alleged contract is not in itself adequate to show buyer entitled to specific performance." *See generally* 11 WILLISTON ON CONTRACTS, Third (Jaeger) Edition §§ 1418-53A (1968).

202. 556 F.2d at 1259.

203. Carolina Cotton Growers Ass'n v. Arnette, 371 F. Supp. 65, 72 (D. S. Car. 1974) (citing Kirkland Distrib. Co. v. United States, 276 F.2d 138 (4th Cir. 1960)).

204. *Id.*; *see* 5 WILLISTON ON CONTRACTS, Third (Jaeger) Edition §§ 775A-84 (1961).

205. 371 F. Supp. 65 (D. S. Car. 1974).

206. U.C.C. § 2-719(1) (1972):

> (1) Subject to the provisions of subsections (2) and (3) of this section and of the preceding section on liquidation and limitation of damages,
>
> (a) the agreement may provide for remedies in addition to or in substitution for those provided in this Article and may limit or alter the measure of damages recoverable under this Article, as by limiting the buyer's remedies to return of the goods and repayment of the price or to repair and replacement of non-conforming goods or parts; and
>
> (b) resort to a remedy as provided is optional unless the remedy is expressly agreed to be exclusive, in which case it is the sole remedy.

207. 371 F. Supp. at 70.

of breach."[208] Therefore, the buyer was allowed to sue for specific performance of the contract.

CONCLUSION

Never before has an industry, the Uniform Commercial Code and the law of contracts been subject to a crisis equal in proportion to that experienced in the cotton industry in 1973-1974. What evolved was a clear and comprehensive body of case law interpreting and enforcing forward contracts for the sale of cotton. The problems encountered by the industry have in large part been resolved with the adoption of model acreage and bale contracts for the purchase and sale of cotton,[209] coupled with an ongoing program to inform farmer-sellers and merchant-buyers of their rights and obligations under forward contracts.

The state and federal judicial system acting swiftly, with few exceptions and little difficulty, upheld the validity of the cotton contracts with generally uniform interpretations that provided rational decisions in a climate of tense emotion.

The experience of the industry and the cases presented to the courts arising out of the crisis demonstrate that the Uniform Commercial Code and the law of contracts have successfully weathered the most intensive and severe tests that could be designed and applied to an industry practice. The Code provided the courts with an encyclopedic-like body of law from which to ascertain and evaluate the parties' conduct and legal obligations. Where no Code provision was applicable, general contract law resolved the difficulty. Where applicable, the Code had sufficient inbred flexibility to allow consistent interpretation of dissimilar factual distinctions.

Regrettably, a typical response to controversy in our society is the desire on the part of some to ordain the Federal Government with regulatory authority. Forward contracts are no exception. Bills have been introduced,[210] hearings conducted[211]

---

208. *Id.*; 11 WILLISTON ON CONTRACTS, Third (Jaeger) Edition §§ 1418-53A (1968).

209. *See* appendix A (model acreage forward contract); appendix B (model bale forward contract).

210. In 1972, an attempt by a Texas cotton merchant to renegotiate price terms in forward contracts entered into with cotton farmers in Arkansas caused Rep. William V. Alexander (D-Ark.) to propose legislation granting authority to the Secretary of Agriculture to license those engaged in the interstate sale of agricultural commodities. The legislation was never introduced, and the only known public discussion of this proposal appeared in the *New York Journal of Commerce* on November 8, 1972:

> An Arkansas congressman concerned by the breach of contracts by a number of cotton merchants who had advanced-contracted with producers for '72 cotton at fixed prices, has told the

and massive studies undertaken[212] to determine whether there

---

Secretary of Agriculture and House and Senate Farm Committee chairmen that he wants to use federal legislation to protect growers from 'under-capitalized merchants' and to insure proper deliveries to the merchants from the producer. His action may take the form of legislation drafted and ready for the 93rd Congress. He has already asked the House Farm Committee to hold an investigation next session on the advanced contracting.

Representative William Alexander (D-Ark.) said 5 points should be seriously considered in the cotton issue: (1) licensing of cotton merchants by USDA, (2) a requirement of merchants' financial responsibilities, (3) establishment of escrow accounts and/or bonding requirements, (4) requirement of export permits for merchants participating in cotton exports, and (5) provision for effective penalties for breach of contract-one such penalty, he said, could be revocation of the export permit.

Representative Alexander said his concern on the contracting issue mounted because advance sale contracts on interstate cotton sales are seriously threatened by merchants and producers who are unable or unwilling to comply with contract terms. Maintaining the integrity of advance spot purchases is essential to a successful cotton program, he concluded.

Rep. Bill Burlison (D-Mo.) introduced identical bills, H.R. 6163 (1973) and H.R. 9829 (1977) which would direct the Commodity Futures Trading Commission to establish and maintain a program to regulate the activities of brokers engaging in forward contracting with producers of agricultural crops. Under these bills, the Commission is directed to prescribe regulations, the purpose of which is to assist in stabilizing the marketing of agricultural commodities by affording protection to producers who market their crops through brokers. The regulations would include provisions requiring the registration of brokers at least every two years. The registration application would require as business information structure, office locations, names and addresses of all officers, partners, directors, present and prior business affiliations and any other information the Commission might deem necessary. Brokers would be required to maintain books and records and to provide the Commission with the names of producers with whom they engage in forward contracting and to submit to the Commission samples of all reports, circulars, publications or other literature distributed to producers.

Under these bills, the Commission could refuse to register or it could withdraw the registration of brokers found to have engaged in activities detrimental to producers with respect to the marketing of their crops, and the Commission could also refuse to register any broker who does not demonstrate a sound financial basis for his operations including the fact of being bonded with regard to his activities related to forward contracting. The legislation would make it unlawful to engage in forward contracting without being registered. Doing business without being registered or knowingly misrepresenting or falsely representing to the Commission any information required to be submitted would be subject to, upon conviction, a fine not in excess of $1,000 or one year in prison or both with respect to each violation.

The legislation describes the terms forward contracting and broker as follows:

> Sec. 4(1) The term 'engage in forward contracting' means to serve as a broker with respect to any contract established for the purpose of merchandising a particular quantity of an agricultural crop by shifting the ownership of that quantity from the producer of the crop to another party as a result of the contract and of the future delivery of, and payment for, the particular quantity of the crop; and,

should be a federal role in the forward contracting process.

---

(2) the term 'broker' means any person engaged in the business of negotiating sales or purchases of any agricultural crop on behalf of the producer of the crop or the purchases.

Section 20 of S. 2391, the "Futures Trading Act of 1978," contained language introduced in committee by Sen. Henry Bellmon (R-Okla.) requiring the Commission to "monitor forward contracting for domestic agricultural commodities." Section 20 provided:

Sec. 20(a) The Commission shall, for the period beginning October 1, 1978, and ending September 30, 1984, monitor forward contracting for domestic agricultural commodities and maintain records of defaults on any such contracts.

(b) The Commission shall include in its annual reports to Congress information concerning its monitoring activities under subsection (a) of this section and any defaults on forward contracts for domestic agricultural commodities during the immediately preceding fiscal year.

(c) There are hereby authorized to be appropriated to the Commission such sums, not in excess of $75,000 for each of the fiscal years for the period beginning October 1, 1978 and ending September 30, 1984.

The language was adopted by the full Senate on July 12, 1978 but deleted by the Committee of Conference. The conferees directed the Chairman of the House and Senate Committees on Agriculture to write "a joint letter on behalf of the conferees to the Secretary of Agriculture requesting him to conduct a study of forward contracting in agricultural commodities." (Report No. 95-1628, § 21, accompanying P.L. 95-405). The letter to the Secretary stated in part:

However, the conferees agreed that we would request the Department of Agriculture to evaluate forward contracting in domestic agricultural commodities. Funds otherwise available to the Department should be sufficient for this purpose. We should appreciate your providing us with the results of the study by January 1, 1980, together with any observations, recommendations, or comments on forward contracts and their regulation or the need for legislation in this area.

Given the disposition of U.S. farmers and those to whom they sell their production, and the growing skepticism of Congress towards the growth of federal regulation, it is unlikely that the Secretary of Agriculture will suggest the need for a federal presence in forward contracting.

211. *FHA Loans and Forward Contracts: Hearings on S. 3252 Before the Subcomm. on Agricultural Credit and Rural Electrification of the Senate Comm. on Agriculture and Forestry*, 93d Cong., 2d Sess., 64 (1974); *Review of Cotton Marketing System: Hearings Before the Subcomm. on Cotton of the House Comm. on Agriculture*, 93d Cong., 2d Sess., 2-46 (1974); *Reauthorization of the Commodity Futures Trading Commission: Hearings Before the Subcomm. on Agricultural Research and General Legislation of the Senate Comm. on Agriculture, Nutrition, and Forestry*, 95th Cong., 2d Sess., Part II, (1978); *Extend Commodity Exchange Act: Hearings on H.R.* 10285 *Before the Subcomm. on Conservation and Credit of the House Comm. on Agriculture*, 95th Cong., 2d Sess. (1978).

212. *Report of the Advisory Committee on Definition and Regulation of Market Instruments: Commodity Future Trading Commission*, (1976); *Forward Contracting in Selected Agricultural Commodities—An Inquiry Into Defaults: Commodity Future Trading Commission*, (1977); *The Regulation of Foward Contracting in Agriculture—A Study of Alternative Methods: Commodity Futures Trading Commission*, (1978). The latter study clearly evinces the lack of desire on the part of farmers to embrace federal regulation. The "Summary and Conclusion" of this report found that "99.6 percent

Congress, discerning no problem, heeded the advice of farm organizations and cotton and grain industry officials who saw no need for the presence of yet another federal regulatory agency affecting their business operations.

The Congress, like the courts, was mindful that these contracts are a benefit to both the sellers and the buyers. The sellers are able to fix their profits early in the planting season, thereby avoiding the possibility of a market decline at harvest. The buyers, on the other hand, are able to obtain their requisite supply before harvest, thereby avoiding an "eleventh hour" scramble for needed cotton. The ability of the forward cotton contract to survive and function effectively provides a model from which other commodities may structure their buying and selling procedures.

---

of all U.S. farmers with annual gross commodity sales over $10,000 reported no problems with forward contract defaults," and "of those who used forward contracts, 97 percent indicated no problems."

APPENDIX A

CONTRACT FOR PURCHASE AND SALE OF COTTON

THIS CONTRACT made and entered into as of this _____ day of _____, 197__, at _____
between _____ of _____ ,
called "Seller", and _____ of _____ ,
called "Buyer", WITNESSETH:

IN CONSIDERATION of the mutual promises and obligations contained herein, sufficiency of which is acknowledged, the parties agree as follows:

1. Description of Acreage Contracted: On the terms and conditions and at the prices set forth below, Seller hereby sells and agrees to deliver and Buyer hereby purchases and agrees to take delivery of _____ of the acceptable cotton produced during the crop year 197__-197__ on _____ acres situated in the State of _____ more fully described below:

ASCS Farm No. Or Other Description	LOCATION County	NO. ACRES Contracted	

IF LANDLORD'S BALE SHARE IS NOT INCLUDED IN THIS CONTRACT, ONLY TENANT'S SHARE SHOULD BE SHOWN ABOVE.

If ASCS farm numbers are not available at the time of execution of this contract by Seller, or if farm numbers are changed, Seller agrees to furnish farm numbers and other related information immediately upon farm numbers being determined.

2. Acceptable Seed Varieties to be planted are: _____

_____

3. Price and Other Terms: The prices to be paid for acceptable cotton shall be as follows: _____

_____

(Note: Prices for various qualities, delivery dates, etc., to be negotiated and written in here may include, in addition to grade, staple and micronaire, the following: below grade; cotton reduced for grass, bark, etc.; deliveries after certain dates; cotton harvested by certain methods, such as picked up off the ground; cotton planted in certain patterns, such as narrow rows; etc.)

4. Ginning and Warehousing. The cotton to be ginned at _____

_____
(name(s) and location(s) of gin(s))

and is to be warehoused at _____
(name(s) and location(s) of warehouse(s))

by Seller unless Buyer approves a change in writing, and all rebates given by the compress will be for the account of Seller.

5. Charges. All accrued charges (such as receiving and warehouse charges) to date of invoice are to be deducted from payment to Seller. Seller shall pay the Cotton Research and Promotion Fee. All rules of

(exchange or association)

relevant to charges, freight, handling, billing and weights of cotton shall apply.

6. **Invoicing.** Seller agrees to invoice the cotton promptly as government class is received. Cotton is to be invoiced on warehouse receipts; net weights with official USDA class cards attached, and invoiced as follows: _____

_____

7. **Liens or Prior Interests.** Seller acknowledges that the following, and only the following liens or prior interests (landlord's lien, landlord's crop share in bales, landlord's crop share in money, PCA, bank, prior crop contracts, etc.) are in effect against the production from the contracted acres, to wit: _____

Name	Address	Nature of Lien or Prior Interest

(Unless filled in, Seller warrants there are NONE.) Seller warrants that he will satisfy all liens from Buyer's payment for the cotton. If Seller's contracted acres are subject to a crop share in bales lease with his landlord, Seller should have his landlord join in signing below for Seller's protection, or limit amount in paragraph 1 to tenant's share, inasmuch as Seller absolutely warrants delivery to Buyer of the entire production described in paragraph 1.

8. **Jurisdiction.** It is acknowledged that this contract is accepted by Buyer in the State of _____, and shall be governed by and interpreted in accordance with the laws of said State. Should any litigation arise out of or occur because of the breach of this contract, both parties agree to submit to the jurisdiction of any State or Federal court in the State of _____, empowered to hear and determine such dispute, with any non-resident party hereby agreeing that service of process by a judicial officer or by the Secretary of State of said State through registered mail shall be sufficient to establish personal jurisdiction.

9. **General Terms Incorporated.** This contract includes all of the General Terms set out on the reverse of this page. BOTH PARTIES HAVE CAREFULLY READ AND FULLY UNDERSTAND THE TERMS AND PROVISIONS CONTAINED ON THE FRONT AND BACK OF THIS CONTRACT, WHICH REPRESENTS THE ENTIRE AGREEMENT BETWEEN THE PARTIES, AND FURTHER UNDERSTAND THAT THERE MAY BE NO MODIFICATION OF THIS CONTRACT EXCEPT IN WRITING. TIME IS DEEMED TO BE OF THE ESSENCE IN THE PERFORMANCE OF THIS CONTRACT.

Witness our signatures as of the day and year first above written.

Seller _____	Buyer _____
By _____	By _____
Witness: _____	Witness: _____
_____	_____
(Seller's Agent (if any))	(Buyer's Agent (if any))

GENERAL TERMS

A. Acceptable Cotton. "Acceptable cotton" shall be deemed to be all and only the cotton produced on said acres that is hand or conventional spindle picked, except false packed, water packed, repacked, reginned, seedy or oily cotton. The original USDA official Smith-Doxey Class shall be final. All acceptable cotton must be packaged in bagging and ties approved by the Joint Industry Committee on Bale Packaging. (Note: In areas where other harvesting methods are acceptable, this paragraph should list them.)

B. Seller's Obligation to Plant, Harvest and Deliver. Seller agrees to plant cotton on all of the contracted acres, unless Seller can show beyond reasonable doubt that he is prevented from so planting by weather conditions beyond his control. Seller agrees to practice normal, good farming methods in the production and harvesting of the crop, to see that the cotton is chemically or naturally defoliated before machine harvesting and to harvest and gin in a normal manner and deliver as quickly as practicable after maturity. Buyer may control, within reason, the amount of heat and cleaning equipment to be used in ginning the cotton. Seller agrees to use all reasonable efforts to protect the cotton from damage by exposure or any other cause from the time it is harvested to the time it is delivered to the warehouse.

C. Other Cotton Produced. Seller agrees to notify Buyer in writing of any increase in total planted acreage on the enumerated farms above the acreage covered under this contract by _____.
(date)

Buyer shall have the right of first refusal to purchase any part or all of the cotton produced on any such increased acreage at a negotiated price, such purchase to be confirmed in writing by Buyer. If Buyer fails to exercise this right within 3 business days of receipt of such notification, this right shall automatically expire, and any increased acreage shall not be covered or delivered on this contract. If the Seller harvests acres not purchased by the Buyer, the contracted cotton shall be equivalent in yield and quality to the entire production of Seller, unless Seller can show beyond reasonable doubt that the inherent productive capacity of the land or weather conditions beyond his control prevented such equivalency. If cotton not bought by the Buyer is harvested from the enumerated farms, the warehouse receipts from all the enumerated farms shall be delivered on a pro rata basis as received by the Seller.

D. Decrease in Acres. If Seller anticipates any decrease in harvestable acreage from the contracted acres, Seller shall so notify Buyer of the amount of the decrease and the reason therefor within two weeks of the occurrence causing the decrease.

E. Increase-Decrease Determination. The acreage certified to the ASCS for yield determination shall apply in case of any increase or decrease in acres under paragraphs C and D of this contract.

F. Skiprow Acreage. Skiprow acreage shall be net acres as measured by ASCS, not gross acres of the fields.

G. Authority to Contract. If any party is a partnership, tenant-in-common, life tenant, joint tenant or corporation, the person signing for such party warrants his authority to execute this contract and to convey, or take delivery of all cotton specified herein.

H. Successors & Assigns. This contract shall be binding on each party's successors and assigns and shall run with the land. In the event the Buyer assigns this contract, the Buyer shall nevertheless remain fully obligated under this contract.

I. Samples. One set of samples is to be taken before cotton is stored and sent, transportation charges collect, to Buyer or person designated by him.

J. Authorization to Inspect Records. Seller hereby authorizes Buyer to inspect all data that Seller has supplied or will at any time supply to any gin, warehouse or ASCS office, concerning Seller's cotton crop. Such gin, warehouse or ASCS office is hereby directed by Seller to release such information to Buyer or his representative.

K. Enforcement. In the event of breach of this contract by any party, the party in breach agrees to pay all court costs together with reasonable attorney's fees and expenses to the other party. Any party may enforce specific performance of this contract, all cost thereof to be paid by the party in breach.

L. Stored Seed Cotton. Seller has the privilege of storing seed cotton in pallets or ricks prior to ginning in an effort to facilitate harvesting; however, Buyer must be notified prior to any palletizing or ricking of cotton. If paragraph 3 of this contract includes a cut-off date or date for adjustment in price, Seller shall provide, ten days before such date, a bale estimate of the seed cotton to be so stored as of such date. Buyer shall have the right of physical inspection to confirm such estimate within a reasonable time. Such actual cotton so stored, not exceeding the Seller's estimate unless otherwise agreed, shall be deemed delivered at the basic contract price, even though warehouse receipts bear a date after the cut-off or price adjustment date. Seller warrants that cotton stored in this manner will be of similar quality to other cotton delivered under this contract which was harvested and ginned at approximately the same time, and Buyer shall have the right to reject any bales that are materially damaged by exposure to weather or internal moisture content.

(Note: This provision may be eliminated if not applicable.)

APPENDIX B

BALE CONTRACT FOR PURCHASE AND SALE OF COTTON

Contract No. _____ No. of Bales _____

THIS CONTRACT made and entered into as of this _____ day of _____ , 19__

between _____ of _____
(mail address, city, state, zip)

called "Seller" and _____ of _____
(mail address, city, state, zip)

called "Buyer", WITNESSETH:

IN CONSIDERATION of the mutual promises and obligations contained herein, sufficiency of which is acknowledged, the parties agree as follows;

1. **Description of Bales Contracted:** (a) On the terms and conditions and at the prices set forth below, Buyer agrees to purchase and take delivery from Seller, and Seller agrees to sell and deliver to Buyer, ____ (_____b/c) "standard weight" bales of acceptable cotton produced during the crop year 19__ - 19__, all of which shall be delivered no later than _____, 19__, (final cut-off date) except as otherwise provided in paragraph A(2). If paragraph A(2) applies, final delivery date for stored seed cotton shall be _____, 19__. Date of warehouse receipts shall govern. Such cotton shall be acceptable cotton of _____ territory of above crop year's growth as defined in paragraph A(1). "Standard weight" bales shall average 480 pounds net per bale, making the total net weight poundage sold under this contract _____ pounds, with one percent tolerance.

(b) If contract is unfulfilled as of final cut-off date, and Seller thereafter has cotton available for delivery under this contract, Seller shall offer such cotton to Buyer, and Buyer shall have the option to accept or reject such offer for a period of three days after such offer is received.

2. **Location Where Cotton Should Be Grown:** (a) Seller is obligated to deliver the above number of bales regardless of the number of bales actually produced on the farms enumerated herein. Seller agrees to produce these bales, to the extent possible, on the following farms:

Approximate No. of Acres	Farm Serial No.	Location County	Location State	Allotment in name of	ASC Projected Yields 19__	ASC Projected Yields 19__

(b) Should Seller's production on the farms enumerated in paragraph 2(a) fall short of the quantity of cotton sold under this contract, Seller may deliver cotton obtained from other sources in fulfillment of this contract. Such cotton shall be equal in quality to the average quality of the _____ territory for the crop year in question.

3. **Prices, Qualities, Delivery Dates:** (a) The base price to be paid for acceptable cotton under this contract shall be ____¢ per pound: Basis _____, original USDA Smith-Doxey Class (reclass if prior year's crop is delivered).

(b) Prices for other qualities:

(c) The above prices are applicable to all bales under this contract delivered on or before _____, 19__ (Price adjustment date). The price for all cotton delivered after such date and prior to final cut-off date shall be as follows: _____ .

(d) For any cotton reduced in grade because of preparation, spindle twist, grass, bark, or other extraneous matter, the price shall be ____ _____ .

(e) Cotton classified below grade: _____ ¢ per pound.

(f) Cotton of qualities for which no prices are specified herein is not acceptable under this contract.

(g) SINCE THIS COTTON IS SOLD ON USDA SMITH-DOXEY CLASS, THERE ARE NO IMPLIED WARRANTIES OF QUALITY.

4. **Ginning and Warehousing:** All acceptable cotton produced on the above farms shall be ginned at _____

_____

(name(s) and location(s) of gin(s)) and stored at _____

(name(s) and location(s) of compress/warehouse(s)). If the places specified herein cannot handle the cotton for reasons beyond Seller's control, alternate places of ginning and storage may be fixed by Seller with consent of Buyer, which consent shall not be withheld unreasonably.

5. **Invoicing and Payment:** (a) Seller agrees to invoice the cotton promptly as government class is received. Cotton is to be invoiced on warehouse receipts, net weights with official USDA class cards attached.

(b) All accrued and unpaid charges (such as receiving and warehouse charges) to date of invoice that are deducted from payment to Seller shall become the obligation of Buyer.

(c) Cotton to be paid for as follows: _____

_____

(d) To the extent not specifically provided herein, charges, freight, handling, billing and weights of cotton shall be governed by the custom and usage of the trade unless varied by the parties incorporating herein the rules of an exchange or an association or by other language. (See Optional Terms, Instruction A)

6. **Liens or Prior Interests:** Seller acknowledges that the following, and only the following, liens or prior interests (such as landlord's lien, landlord's crop share in bales, landlord's crop share in money, PCA, bank, prior crop contracts, etc.) are in effect against the production from the contracted acres, to wit:

Name	Address	Nature of Lien or Prior Interest

(If none, so state.) Seller warrants that he will satisfy all liens from Buyer's payment for the cotton. If Seller's contracted bales are subject to a crop share in bales lease with his landlord, Seller should have his landlord join in signing below for Seller's protection, or limit amount in

paragraph 1 to tenant's share, inasmuch as Seller absolutely warrants delivery to Buyer of the bales described in paragraphs 1 and 2.

7. **Prior Sales:** As Seller heretofore has sold _____ (if none, so state) bales from the above farm, it is understood that first-picked acceptable bales shall be delivered in fulfillment of such prior sales before Buyer hereunder is entitled to first-picked bales.

8. **General Terms Incorporated:** This contract includes all of the General Terms set out on the reverse of this page, and any Optional Terms initialed by both parties. BOTH PARTIES HAVE CAREFULLY READ AND FULLY UNDERSTAND THE TERMS AND PROVISIONS CONTAINED ON THE FRONT AND BACK OF THIS CONTRACT, WHICH REPRESENTS THE ENTIRE AGREEMENT BETWEEN THE PARTIES, AND FURTHER UNDERSTAND THAT THERE MAY BE NO MODIFICATION OF THIS CONTRACT EXCEPT IN WRITING. TIME IS DEEMED TO BE OF THE ESSENCE IN THE PERFORMANCE OF THIS CONTRACT.

WITNESS our signatures as of the day and year first above written:

	Signature of Seller	Signature of Buyer
If an individual:	_____ Seller	_____ Buyer
If Firm or Corporation:		
	_____ Name of Seller	_____ Name of Buyer
	By _____ Authorized Representative	By _____ Authorized Representative
	_____ Title	_____ Title
	_____ Landlord (If applicable—see Par. 6)	

GENERAL TERMS

A. (1) **Acceptable Cotton:** "Acceptable Cotton" shall be deemed to be cotton of the qualities for which prices are specified in paragraph 3 that is either hand or conventionally spindle picked (not stripper cotton), and excludes cotton that is picked up off the ground, false packed, water packed, repacked, reginned, or oily. (Note: In areas where other harvesting methods are acceptable, this paragraph should be modified.) The cotton to be delivered in fulfillment of this contract, to the extent produced on the above farms, shall be the first cotton harvested from the above described acreage in gin run unculled order subject to paragraphs 6 and 7. In the event that the total bales and poundage sold under this contract involve the production from more than one farm number, Seller agrees that no second-picked cotton shall be delivered from any of the above described farm numbers until all the first-picked cotton from the above described farm numbers, up to the bale and poundage limits sold under this contract, has been delivered. All acceptable cotton must be packaged in bagging and ties approved by the Joint Industry Bale Packaging Committee.

(2) **Stored Seed Cotton:** Seller has the privilege of storing seed cotton prior to ginning in an effort to facilitate harvesting; however, Buyer must be notified prior to such storage. If other paragraphs of this con-

tract include a cut-off date or date for adjustment in price, Seller shall provide, ten days before such date, a bale estimate of the seed cotton to be so stored as of such date. Buyer shall have the right of physical inspection to confirm such estimate within a reasonable time. Such actual cotton so stored, not exceeding the Seller's estimate unless otherwise agreed, shall be deemed delivered at the basic contract price, even though warehouse receipts bear a date after the cut-off or price adjustment date. Seller warrants that cotton stored in this manner will be of similar quality to other cotton delivered under this contract which was harvested and ginned at approximately the same time, and Buyer shall have the right to reject any bales that are materially damaged by exposure to weather or internal moisture content.

If not applicable, this provision may be eliminated by affixing initials:

_____ (Seller) _____ (Buyer)

B. **Seller's Obligation to Produce, Harvest and Deliver:** Seller agrees to practice normal, good farming methods in the production and harvesting of the crop, to see that the cotton is chemically or naturally defoliated before machine harvesting and, as quickly as practicable after maturity, to harvest and gin in a normal manner and deliver. Seller further agrees to cooperate in the harvesting, handling and ginning of the cotton to avoid overheating, overmachining, and poor preparation. Seller agrees to use all reasonable efforts to protect the cotton from damage by exposure or any other cause from the time it is harvested to the time it is delivered to the warehouse.

C. **Successors & Assigns:** This contract shall be binding on each party's successors and assigns and shall run with the land. In the event Buyer assigns this contract, the Buyer shall nevertheless remain fully obligated under this contract.

D. **Samples.** For all cotton covered by this contract, one set of samples shall be sent at Seller's expense direct from the compress to the United States Department of Agriculture classing office for Smith-Doxey class, and one set shall be sent, transportation charges collect, direct from the compress to Buyer at the address stated above.

E. **Cotton Research and Promotion Fee:** If draft is drawn directly on Buyer by the Seller, Seller shall deduct this fee from the invoice and Buyer will remit the fee to the Cotton Board. If other methods of payment are used, Buyer shall deduct fee and remit to Cotton Board. If draft is drawn by and/or payment made to any party other than the producer as Seller, such party shall be responsible for deducting the fee and transmitting it to the Cotton Board.

F. **Breach by Seller or Buyer:** (a) In the event of breach of this contract by either party, the party in breach agrees to pay all court costs together with reasonable attorney's fees and expenses of the other party.

(b) In addition to any other remedies under applicable law, the injured party shall have the right to demand delivery, or demand acceptance of delivery and payment, under the terms of this contract.

(c) Consequential damages otherwise recoverable by either party

under applicable law shall be excluded except in cases of intentional breach.

G. **Force Majeure:** Seller shall not be liable for any **delay** in performance of its obligations under this contract if occasioned by acts of God, war, riot, strikes, fire, flood, other natural disorder, or other cause not reasonably within Seller's control. Seller shall notify Buyer promptly upon the occurrence of any such force majeure.

H. **Jurisdiction:** This contract shall be governed by the laws of the state in which the contracted acreage is predominantly situated. Should any action by either party be brought against the other relating to this contract, both parties agree to submit to the jurisdiction of any state or federal court in such state and further agree that service of process by a judicial officer or by the Secretary of State of such state through registered mail addressed to either party at its address provided for herein shall be sufficient to establish personal jurisdiction over such party.

OPTIONAL TERMS

Instruction A:

If the parties desire to **incorporate the rules of an exchange or association** relating to charges, freight, handling, billing and weights of cotton, they should be familiar with such rules and may incorporate the following clause by affixing their initials and filling in the blanks of Special Clause 5(e) below.

_____ (Seller) _____ (Buyer)

Special Clause 5 (e)—RULES OF EXCHANGE. All rules of _____

_____
exchange or association

in effect on the date of this contract relevant only to charges, freight, handling, billing and weights of cotton shall apply except rules _____. The following special provisions shally apply:_____

_____ .

Instruction B:

If the parties desire to **include provisions for inspection of records,** they may incorporate the following clauses by affixing their initials.

Special Clause I. **Inspection of Records** (a) In the event the Buyer has reasonable grounds to believe the Seller will be unable or unwilling to perform, the Seller authorizes Buyer to inspect all data relevant to Seller's compliance with the terms of this contract that is in Seller's possession or that Seller has supplied or will at any time supply to any gin, warehouse, financing agency, ASCS office or Seller's agent for the sale of cotton concerning Seller's cotton crop. Such gin, warehouse, financing agency, ASCS office or agent, is hereby directed by Seller to release such information to Buyer or his representative.

_____ (Seller) _____ (Buyer)

(b) In the event the Seller has reasonable grounds to believe the Buyer will be unable or unwilling to perform, the Buyer authorizes Seller to inspect all data relevant to Buyer's compliance or ability to comply with the terms of this contract that is in Buyer's possession or that Buyer has supplied or will supply at any time to any banks or bro-

kers or agents for the purchase and sale of cotton. Buyer's banks and brokers and agents for the purchase and sale of cotton are hereby directed by Buyer to release such data to Seller or his representative.

_____ (Seller) _____ (Buyer)

(c) The Seller or Buyer, as the case may be, shall take such action as may be necessary to assist in the release of such data as provided in (a) and (b) above.