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# One Year Review of Contracts

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# ONE YEAR REVIEW OF CONTRACTS

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The cases being considered in this review are grouped into various broad subdivisions. Perhaps the most important case is one dealing with the interpretation of what was intended to be a covenant not to sue.[1] Failure to know of it could be disastrous to the practitioner of the law.

## OFFER AND ACCEPTANCE

In *Nucla Sanitation Dist. v. Rippy*,[2] the district sued to recover damages for an alleged breach of contract. Rippy counterclaimed for work done and expenses incurred in reliance on the district's representation that it had accepted a counter-offer made by Rippy. The facts of the case were as follows: the district prepared a written contract and mailed it to Rippy. Rippy signed and returned the contract, but sent a covering letter stating that his acceptance was conditioned on extension of the proposed completion date. Rippy moved in his construction equipment after speaking to the president of the district and having been assured that everything was all right regarding the contract and the conditional letter of acceptance. The district, in the meantime, had written to Rippy refusing to extend the completion date. Rippy pulled off the job when he received the district's letter. The Court held that Ripp's conditional acceptance of the district's offer amounted to a counter-offer which was never accepted by the district. No contract resulted. An approved instruction stated, in essence, that an acceptance must be in the identical terms of the offer, without any modification whatever, otherwise it is only a counter-proposition.

In *Superior Distrib. Corp. v. Points*,[3] the plaintiff recovered the money he had paid to the defendant under a purchase order. After receiving the purchase order and the deposit money, Superior required Points to sign a note and conditional sales contract, on terms different from those in the purchase order, and refused to deliver the purchased merchandise unless these additional documents were executed. Judgment for the purchaser was affirmed in a holding that Superior could not claim the benefits of the original contract while denying its obligations under that contract and demanding a new agreement. The *Nucla Sanitation* case is cited along with two other cases which hold that an acceptance on terms varying from those offered is a rejection of offer.

## CONSIDERATION

In *Arrow Mfg. Co. v. Ross*,[4] employees and employer had discussed the possibility of an increase in pay. After the end of the employer's fiscal year, the employer sought permission of the Wage

1 Price v. Baker, 12 Colo. Bar Ass'n Adv. Sh. 157 (1959). At the time of this writing a petition for re-hearing has not been determined. This case is discussed in the text at footnote 26 *infra*.
2 344 P.2d 976 (Colo. 1959).
3 347 P.2d 140 (Colo. 1959).
4 346 P.2d 305 (Colo. 1959).

Stabilization Board to pay a retroactive bonus for the preceding fiscal year. Between the end of that year and the receipt of approval from the Board, some of the employees were discharged for lack of work. The court held that the discharged employees were not entitled to participate in this gratuitous bonus since the employees gave no consideration upon which it could be contended they had an agreement with their employer for the payment to them of a share of the authorized bonus. Continued employment could not be said to have been induced by the expectation of a bonus since the employees knew nothing of it.

*Schweizer v. Amalgamated Butcher Workmen*[5] is here included for the limited purpose of illustrating an accord and satisfaction between the plaintiff and the defendant concerning the plaintiff's claims for vacation and sick pay. After discharge, the plaintiff and her employer met and agreed on the sum of $100.45 for these items and a check for this amount was given to her. The plaintiff did not cash this check. The mutual agreements regarding vacation and sick pay, by way of compromise, were consideration for each party giving up additional rights then asserted. Having compromised the disputed claims, an accord and satisfaction arose.

In *Police Pension and Relief Board v. McPhail*,[6] the view was approved that the pension claimed by policemen had the attributes of a contract and was entitled to constitutional protection.[7] The plaintiffs' employment was under a written contract on terms set forth in the charter and an ordinance of the City and County of Denver[8] providing that plaintiffs would receive a pension subject to increase or decrease based on the salary of the rank which they occupied as of date of retirement. One factor which weighed heavily in favor of the policemen was that they had contributed to the pension fund through the years. The court recognizes that the contract principle regarding the pension escalation clause here adopted is a minority view, but is supported by consideration paid by the policemen, which consisted of regular contributions paid out of the policemen's taxable income.

## CONDITIONS

Two fire insurance policies were construed in *Standard Marine Ins. Co. v. Peck*.[9] One policy contained a condition suspending the insurance coverage at such times as there might be an increased hazard within the control and knowledge of the insured; the other policy denied coverage for loss or damage arising from illegal trade. The plaintiff's losses arose out of a fire caused by ignition of fireworks. The court found that fireworks were held for sale contrary to an applicable statute. This increased hazard being in the control or knowledge of the insured, and the fireworks trade being illegal, the trial court's judgments for plaintiff were reversed.

Where a party to a contract in effect promises to procure the occurrence of a condition, and does not make a bona fide effort to secure such occurrence, recovery of monies dependent upon the

5 347 P.2d 516 (Colo. 1959).
6 338 P.2d 694 (Colo. 1959).
7 Colo. Const., art. II, § 11.
8 Denver, Colo., Charter § 133, at 45-46 (1953).
9 342 P.2d 661 (Colo. 1959).

non-existence of the condition will be denied. Accordingly, in *Maruca v. Hunter & Presba, Inc.*,[10] a judgment refusing to return plaintiff's deposit on purchase of a tavern was affirmed, even though a stated condition never occurred, because plaintiff had not made a bona fide effort to secure a loan. This loan was a condition in a receipt and option on the non-occurrence of which the vendor was to return purchaser's deposit.

In *Jahn v. Park Hill Realty Co.*,[11] the broker secured judgment against the defendant owners for his commission under a listing agreement which gave the broker an exclusive right to sell. The owners gave possession during the period of an extension of the listing, which extension the court found to have been ratified by the co-owner who had not joined in the extension agreement. The deed was withheld until after the extended listing had expired. Testimony supported the position that the sale was closed when the purchasers moved in, which was prior to termination of the extended listing. The condition under the listing of a sale "either by the undersigned owner, the undersigned broker, or by any person . . ."[12] occurred when the owners sold during the listing period, and the broker's right to commission was immediately perfected.

An earlier decision[13] was re-affirmed in *Hayutin v. DeAndrea*[14] to the effect that a broker who does not have an exclusive right to sell cannot collect a commission on a sale which is consummated to a person not produced by the broker. In order for the broker to collect, it is not necessary that his efforts be the sole cause of the sale; however, they must be the predominating effective cause of the sale. In *Hayutin*, the owner called in the broker after the purchaser had first contacted the owner.

Conditions relating to cancellation of contracts were considered in *City of Fort Collins v. Park View Pipe Line*.[15] In this case the city reserved the right to cancel outside-water-users' contracts "at any time upon giving written notice of intent so to do" in one group of contracts, and in another contract the cancellation clause provided for cancellation "when, in the judgment of the City Council, the *interests of the City of Fort Collins require the discontinuance of such service in order to better serve the inhabitants of the City of*

10 344 P.2d 968 (Colo. 1959).
11 12 Colo. Bar Ass'n Adv. Sh. 223 (1959).
12 *Ibid.*
13 Heady v. Tomlinson, 134 Colo. 33, 299 P.2d 120 (1956).
14 337 P.2d 383 (Colo. 1959).
15 336 P.2d 716 (Colo. 1959).

*Fort Collins.*"[16] Water users having contracts with the first type of cancellation clause could not object to cancellation on notice. The second type of cancellation clause was held to state a condition which the city council must first find to exist. This provision for termination, like a "just cause" or "good cause" required a finding of fact based upon a fair and honest cause regulated by good faith on the part of the party exercising the power to terminate.

### MONEY HAD AND RECEIVED

Two cases arose under this general subject. The first, *Crouch v. Mountain States Feed Co.*,[17] holds that where a plaintiff seeks to recover upon a quasi-contractual theory of money had and received, having elected to waive the tort which gave rise to the implied contract to pay the money, he must show that the defendant actually received the money claimed. Judgment for plaintiff in this action was reversed and a new trial ordered because such receipt had not been proved.

In the other case, *American Medical and Dental Ass'n v. Brown*,[18] Brown paid the association the amount it claimed on an assigned claim in order to secure a release of garnishment. Brown later found a receipt evidencing previous payment of the assigned claim to the assignor. The court approved a judgment, in favor of Brown, on the theory of money had and received by the association through coercion by the garnishment proceedings. In equity and good conscience the money should be returned to Brown since payment to the association represented a duplication.

### ACCOUNT STATED

The case of *Johnson v. Adams*[19] once again sets forth the elements[20] necessary to prove an account stated. In this case the court denied the existence of an account stated. A finding of the trial court that there was a dispute as to part of the claim was approved. The mere sending of a bill, and a failure of the recipient to object thereto, was not sufficient to establish an account stated.

### MECHANIC'S LIEN CASES

*Sontag v. Abbott*[21] emphasizes the danger of permitting the holder of an option to purchase real estate, to take any steps toward the commencement of a building prior to recordation of the purchase money encumbrance. Sontag lent the optionee the purchase money, and received a note and deed of trust to secure it. Two days before Sontag received and recorded the trust deed, the optionee ordered material from Abbott, which was immediately delivered to the premises. The materials were incorporated in a structure built by the optionee. All of the building operation took place after the

16 *Id.* at 720.
17 343 P.2d 1052 (Colo. 1959).
18 344 P.2d 189 (Colo. 1959).
19 337 P.2d 601 (Colo. 1959).
20 The court stated that the elements of account stated are epitomized as follows:
1. An account which must have been examined and accepted by the parties;
2. An agreement that the balance and all items of account representing the previous monetary transactions of the parties are correct;
3. An admission of liability to the apparent debtor for the amount of the balance against him.
4. The assent of both parties and a meeting of the minds.
*Id.* at 603.
21 344 P.2d 961 (Colo. 1959).

option ripened into a fee title. Sontag foreclosed his deed of trust and received a trustee's deed. Thereafter, Abbott sued to foreclose his mechanic's lien. The trial court's holding was affirmed to the effect that the optionee held an interest in land by virtue of his option. When this interest later ripened into a fee title, the date of delivery of materials would be treated under the statute as "commencement of the work"[22] for purposes of establishing priority of liens between Sontag and the materialmen. The materialmen won out over the mortgagee.

The other mechanic's lien case, *Hayutin v. Gibbons*,[23] holds that a materialman may have a valid action for debt, for the full amount of goods delivered to the project, even though his lien may be for less than the contract price of the goods. Johnson was Hayutin's building contractor. The contract between Hayutin and Johnson was filed pursuant to statute. On disputed facts, the trial court found that Hayutin had ratified Johnson's contract with the materialman by expressly promising payment for such materials. Through the ratification the unauthorized act of Johnson bound Hayutin, in spite of the limitation clause in the statute.[24] Hayutin's personal liability thus exceeded the amount of the lien.

## INTERPRETATION OF CONTRACTS

Some cases, discussed under other headings, could be discussed here. In *Hutchinson v. Elder*,[25] there is a holding that inept expressions should not be allowed to defeat the evident intention of the contract. It is further held that an interpretation making the contract fair and reasonable is to be preferred to one which would be harsh and unreasonable. The case involves a contract between the landowner and a building contractor which contemplated a joint venture to develop a residential area. Construction loan costs were held to be the sole obligation of the landowner and not included in the term "ultimate cost of the houses". A provision for payment of fifty per cent of *"any amount obtained from the sale of any house . . ."* as additional compensation to the contractor was held to require deduction of usual sale and closing expenses and to be the equivalent of an agreement to divide the *net amount obtained* on the sale. Mr. Justice Moore dissented, stating that the majority opinion makes a new contract by writing in the word "net". While dissenting opinions do not satisfy litigants, they often, as here, enable the reader to gain a clearer concept of the problem involved.

The "booby trap" case referred to in the introductory paragraph is *Price v. Baker*.[26] Here the plaintiffs gave a so-called covenant not to sue to one of three defendants, after plaintiffs' action for damages for fraud and deceit was set for trial. The covenant stated that plaintiffs ". . . expressly reserves (sic) the right to sue and continue to sue any other person or persons against whom they may have or assert any claim for loss or damage . . . ."[27] The cov-

22 Colo. Rev. Stat. § 86-3-3 (1953).
23 338 P.2d 1032 (Colo. 1959).
24 Colo. Rev. Stat. §§ 86-3-1, -2 (1953). The filing of a contract which conformed to the requirements of these sections of Mechanic Lien Statutes has sometimes proven to be the most effective way that the owner can limit his liability to mechanics, materialmen and subcontractors. It would have served Hayutin's purpose here except for his ratification of the unauthorized contract.
25 344 P.2d 1090 (Colo. 1959).
26 12 Colo. Bar Ass'n Adv. Sh. 157 (1959).
27 *Id.* at 158.

enant further provided that it might be pleaded as a defense in bar or abatement of any action against the covenantee. The covenantee was, by stipulation, dismissed without prejudice. The other two defendants then moved for summary judgment of dismissal for them as well, alleging that the covenant was a release since it could be pled as a bar, and that a release of one joint tortfeasor was a release of all. In a four to three decision, the covenant was held to be equivalent to a release of the one joint tortfeasor thereby releasing the others. It is difficult to reconcile the kindly language in *Hutchison v. Elder*[28] with the harsh result in *Price*, a result which appears to be exactly contrary to the expressed intent of the covenant in *Price*. An excellent dissent by Mr. Justice Doyle, with Justices Day and Frantz concurring, must be studied by every practitioner. The better view, in the opinion of this reviewer, would be to overrule *Morris v. Diers*[29] which supports the majority opinion and follow those cases cited in the dissent which hold that a release which contains a reservation of right against remaining defendants should be construed as a covenant not to sue.

In *Ryan v. Fitzpatrick Drilling Co.*,[30] the plaintiff contractor agreed to drill an oil well in Wyoming to a depth sufficient to test the Curtis sands or to a total depth of 4300 feet. The contract also provided that any drilling costs, after the necessary Schlumberger electric log had been run, was to be borne twenty-five per cent by the contractor, seventy-five per cent by the defendant operator. The Curtis sand was encountered at 4775 feet. The plaintiff sought to recover three-quarters of the cost of alleged extras representing drilling costs between 4300 and 4775 feet. The judgment of the trial court awarding the plaintiff three-quarters of the cost of claimed extras was affirmed. The defendant claimed that the test clause modified the depth clause and that no extras could be claimed until the test had been run. Approval was given to the trial court's finding that plaintiff was required to drill only to a depth to test the Curtis sand or to a total depth of 4300 feet *whichever was reached first*. Additional drilling was therefore to be compensated on a *quantum meruit* basis and evidence of a trade custom was admitted to establish the value of such extras.

In *Greeley & Loveland Irrigation Co. v. McCloughan*,[31] plaintiff's predecessor had a right to 140 inches of water from defendant. For a period of forty-five years such predecessor, and later plaintiff, had accepted only 100 inches. In reversing the trial court's decree quieting title in plaintiff to the claimed additional water, the court held that the construction placed on a contract by the parties, before controversy arose, was a reliable test of their own interpretation of the contract. It was held that the long continued distribution of water in a manner wholly inconsistent with the contract on which plaintiffs relied, along with other evidence, defeated plaintiff's claim.

28 344 P.2d 1090 (Colo. 1959).
29 134 Colo. 39, 298 P.2d 957 (1956).
30 342 P.2d 1040 (Colo. 1959).
31 342 P.2d 1045 (Colo. 1959).

### ESTOPPEL AND RATIFICATION

In *Western Motor Rebuilders, Inc. v. Carlson*,[32] the plaintiff bought land from Carlson, and fully paid for it. Thereafter, with Carlson's full knowledge, plaintiff entered into possession and constructed a motel, costing approximately $45,000, on the land. Five months after payment and plaintiff's entry, Carlson recorded restrictive covenants and thereafter delivered the deed to the plaintiff. In reversing a decree of the trial court enjoining the purchaser from operating any business enterprise on the land in violation of the restrictive covenants, the court pointed to the actions of the parties before the controversy as being one of the best indications of their true intent. Viewed in this light there was no contractual prohibition against a business use of the land. Plaintiff-seller testified that while defendant was building the motel, she just sat by and "said nothing. I listened."[33] Such conduct, the court stated, estopped the plaintiff to assert any breach of the restrictive conditions later recorded. Query: Can the same past-contractual event (silence) form the basis of contract interpretation, *and* of estoppel?

In *Ashback v. Wenzel*,[34] a judgment of dismissal was affirmed. The plaintiff sought to obtain damages for an alleged breach of contract, which breach was found not to exist, and plaintiff sought to accelerate maturity under the promissory notes by reason of the payor's failure to pay on time. The evidence disclosed that for thirty-one months the payee had accepted late payments. Such long-continued acceptance of late payments was held to waive the defaults so far as time of payment was concerned and to prevent the payee from declaring the entire unpaid balance due and payable without prior warning. In *Film Enterprises, Inc. v. Selected Pictures, Inc.*,[35] so far as pertinent to this review, it is held that retention of proceeds of a contract may constitute ratification of the contract.

### RESCISSION AND CANCELLATION OF CONTRACT

Rescission of purchase of stock in a mining company was permitted in *O.K. Uranium Development Co. v. Miller*.[36] Here representations had been made that the company had valuable properties, sufficient funds to carry on exploration for at least six months without further financing, was in good financial condition, and that ore samples exhibited were from the company's properties. In fact, the company only had properties under option in the name of one of its chief officers. Miller testified that he believed the representations, and that had he known them to be false he would not have invested his money. A judgment of rescission for fraud in the inducement to plaintiff to purchase the stock was affirmed. It is interesting to note that the type of option right claimed by the company in this case was the same as in *Sontag v. Abbott*.[37] This indicates that the same type of right may change its character with its context; the optionee there had sufficient right to create mechanic's

32 138 Colo. 404, 335 P.2d 272 (1959).
33 *Id.* at 417, 335 P.2d at 279.
34 346 P.2d 295 (Colo. 1959).
35 138 Colo. 468, 335 P.2d 260 (1959).
36 345 P.2d 382 (Colo. 1959).
37 344 P.2d 961 (Colo. 1959); 344 P.2d 965 (Colo. 1959), discussed in text at note 21 *supra*.

liens, but he does not here have "property" to make his representations to Miller true.

In *Olinger Mutual Benefit Ass'n v. Christy*,[38] the insurer sought to avoid a life insurance policy on the basis of misrepresentations made in the application for coverage. The court holds that an insurance contract is not sui generis. In order to avoid such, or any other contract, the quantum of proof must, according to the court, be clear, convincing, indubitable, and beyond a reasonable doubt. The same quantum is said to be required to avoid a contract for fraud, concealment or mistake. Mr. Justice Moore filed a written dissent. The principal case should be compared with language in *Woodruff v. Clarke*[39] and *Hanks v. McNeil Coal Corp.*[40]

In *Askins v. Easterling*,[41] an oral contract between the plaintiff and his deceased wife was examined. The wife had made the down payment on real property which was to have been purchased in the names of both the husband and wife. The plaintiff made succeeding payments on the property, in part from rentals on the property. After the decedent's death, it was discovered that she had taken the property in her sole name and had later conveyed the property to herself and her son by a prior marriage as joint tenants. The court held that the son took an undivided one-half interest in the property as constructive trustee for the plaintiff-husband. The court ap-

38 342 P.2d 1000 (Colo. 1959).
39 128 Colo. 387, 262 P.2d 737 (1953).
40 114 Colo. 578, 168 P.2d 256 (1946). In this case there was a holding that fraud may be inferred from inadequacy of consideration. It may be difficult to reconcile such inference with the requirement that a misrepresentation must be "indubitable".
41 347 P.2d 126 (Colo. 1959).

proved a finding that the oral contract had been breached by the wife, but also stated that such a contract must be established by clear and convincing evidence.

### ATTORNEYS FEES, INTEREST AND DAMAGES

In *Rock Wool Insulating Co. v. Huston*,[42] the court said that attorney's fees which were not shown to have been actually incurred or paid by plaintiff-payee could not be secured in an action on a promissory note providing for such fees. The lower court's judgment for such fees, being unsupported by any evidence, was reversed.

In *Stone v. Currigan*,[43] the Colorado Interest Statute[44] was construed as requiring interest to be paid to a judgment creditor whose judgment was entered January 13, 1958, *nunc pro tunc*, as of the earlier date, February 16, 1956. This case is included here because of the following dictum: "By way of carefully considered dictum, let it be known that any creditor who can bring himself within the terms of the quoted statute is entitled to interest from his debtor,"[45] even though the original judgment may have omitted the adjudication of interest.

In an action for damages for a landlord's refusal to grant a lease pursuant to contract,[46] a judgment for plaintiff was reduced by eliminating expected profits from a business to be operated at the intended situs of the leased premises. The loss of such profits was characterized as being purely conjectural, based upon complete realization of the lessee's most ambitious hopes and dreams for the new future. The court stated that "litigants cannot be permitted to estimate the money out of the coffers of their opponents in this reckless way. . . ."[47]

Interest was allowed on the statutory penalty bond[48] of a motor vehicle dealer in *Massachusetts Bonding and Ins. Co. v. State*.[49] The cause of action arose in October 1947. The interest was allowed from date of commencement of the action, June 16, 1948.

### MISCELLANEOUS CASES

The case of *Colorado Mortgage Co. v. Nolan*[50] is a follow-up stating the same law as in the original case between the parties.[51]

*University of Denver v. Industrial Comm'n*[52] holds, insofar as pertinent to this review, that parties cannot by private contract abrogate statutory requirements or conditions affecting the public policy of the state. Consequently, a receipt in full payment for commuted installments due under the Workmen's Compensation Act[53] does not prevent the employee from re-opening the case within the statutory period.

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42 346 P.2d 576 (Colo. 1959).
43 334 P.2d 740 (Colo. 1959).
44 Colo. Rev. Stat. § 73-1-2 (1953).
45 334 P.2d at 743.
46 Nevin v. Bates, 347 P.2d 776 (Colo. 1959).
47 *Id.* at 778.
48 Colo. Rev. Stat. § 13-11-9 (1953).
49 347 P.2d 507 (Colo. 1959).
50 347 P.2d 778 (Colo. 1959).
51 Nolan v. Colorado Mortgage Co., 137 Colo. 103, 322 P.2d 98 (1958), 36 *DICTA* 22 (1959).
52 138 Colo. 505, 335 P.2d 292 (1959).
53 Colo. Rev. Stat. § 81-14-19 (1953).