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As usual there were, during 1958, a large number of cases in the broad general field of contracts. Some of the cases could be discussed under more than one heading. These cases prove that basic contract problems can plague courts[1] as well as lawyers.

CONSIDERATION—INCLUDING JOINT VENTURE AGREEMENT AND A POSSIBLE NOVATION

At least five cases dealt directly with the subject of consideration for a promise. In *Rhodes v. Haberstich*[2] suit was brought for return of a deposit paid on a contract to purchase certain personal property including a hotel business. The purchasers contended that a provision of the contract requiring the sellers to return the deposit in case they failed or refused to close meant that the sellers had not bound themselves to perform but could, at their option, return the deposit and terminate the contract. In reversing a judgment entered for the plaintiff the supreme court held that these were mutual promises of sale and purchase which were consideration for each other. Each party was bound to perform. The sellers' duty to return the deposit was not the purchasers' exclusive remedy for breach by the sellers. The purchasers could have waived return of the deposit and sued for specific performance.

In the case of *Lindsay v. Marcus*[3] the supreme court held that when the mutual promises of joint venturers were exchanged, even though one party put up no cash, the joint venture was consummated. Lindsay, Marcus and Holland entered into a joint venture to purchase and develop certain real property on which Lindsay already held a purchase option. Lindsay, aided by Holland, was unsuccessful in his efforts to secure an amended option, but later Lindsay did consummate the purchase on the terms of the original option. The joint venture agreement was not disclosed to the vendor. After the purchase, Lindsay repudiated the joint venture agreement. Prior to this repudiation, Marcus and Holland had tendered performance of their capital contributions but Lindsay always delayed accepting them. In affirming a decree ordering specific performance of the joint venture agreement, and an accounting, the supreme court reviewed and amplified the Colorado law on joint venturers holding: (1) "Equity holds each joint venturer strictly accountable for completing ventures and will not permit the unilateral withdrawal of one partner to the detriment of his fellow contractors without the consent of the latter,"[4] (2) Prior to termination or abandonment of the joint venture, one coadventurer cannot exclude the others by acquiring an interest in the property in his own name. If so acquired the property will be treated as held in trust for the coadventurers, and

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[1] In reviewing the 1958 cases it was observed that one district judge was reversed five times on an equal number of writs of error to review his judgments in cases involving contracts.
[2] 326 P.2d 657 (Colo. 1958).
[3] 325 P.2d 267 (Colo. 1958).
[4] *Id.* at 270.

(3) only *slight* evidence sustains the claim of a fiduciary's failure to perform his duty to the principal.

The supreme court dealt with another problem of especial interest to the legal profession in holding that the occasional prior legal services rendered by Holland for Lindsay did not create a fiduciary relationship between them in regard to the entry into the joint venture agreement. Neither this case nor a case decided in 1957[5] dealt with the right of one joint venturer to withdraw from the joint venture when a coadventurer refuses or neglects to perform his duties.

An example of consideration for a promise being rendered to a person other than the promisor[6] is furnished by *Reilly v. Korholz.*[7] Here the plaintiff financed a then current payroll of Rock Wool Insulating Company and later arranged for an additional $100,000 financing for the company thereby preventing the company from being bankrupt. The defendants had requested these acts and in exchange had promised to to transfer 833 1/3 shares of their own capital stock in the company to Korholz, without payment, and to vote their stock so as to elect Korholz president of the company and chairman of its board of directors. Over a month later, in an independent promise, the defendants promised to transfer certain claims against the company and their remaining 507 1/6 shares of capital stock to Korholz as trustee.

When Korholz sued to enforce the promises, the trial court held that Korholz was entitled to outright ownership of 833 1/3 shares, and to transfer of the claims and the 507 1/6 shares to his name as "trustee," without defining the terms of the trust. The supreme court refused to hold that the promise to vote the stock was illegal under the statute of the state (not Colorado) in which the contract was made. It held that the promise to vote the stock, if illegal, was severable from the promise to transfer the stock. The promise to transfer the claims and the 507 1/6 shares to Korholz as "trustee" was held not supported by any consideration and the trial court was reversed on this point. The partial reversal appears correct since no bargained-for exchange of performance was shown to support this later promise.

Granberry v. Wright[8] would seem to be just another illustration of an act as consideration for a promise but is worthy of note for the dictum of the supreme court to the effect that the trial judge apparently fell into error in *seeking to satisfy both sides.* The trial court had dismissed the plaintiff's complaint on a promissory note, and the defendant's counterclaim for damages arising out of an alleged nonperformance of the services in consideration of which the note was given. The supreme court held that the dismissal of the counterclaim should be regarded as a finding that the services for which the note was given had been performed. Accordingly, judgment was reversed for the plaintiff.

Justice Frantz' dissent in *Richie v. Phillebaum*[9] makes it worthwhile to examine this case. The decision affirms a trial court's decree ordering foreclosure of a trust deed and the entry of judgment for attorneys fees. The defendant, in consideration of his mortgagee's allowing him to remove and sell a deposit of sand, promised to pay, on his note, $5,000 of the proceeds realized on such sale and further promised to refinance the

[5] Smaller v. Leach, 136 Colo. 297, 316 P.2d 1030 (1957).
[6] See Restatement, Contracts § 75 (2) (1932).
[7] 320 P.2d 756 (Colo. 1958).
[8] 320 P.2d 979 (Colo. 1958).
[9] 324 P.2d 375 (Colo. 1958).

note within ninety days after sale of the sand. The $5,000 was paid, but the defendant failed to refinance. When the note fell into default, the foreclosure suit was brought. Justice Frantz, in his dissent, applied the theory that the permission given by the mortgagee, coupled with the sale and $5,000 payment by the mortgagor, supports a substituted contract whereby the note and trust deed were "novated" leaving only an unperformed obligation to refinance. If this were so, no attorneys fees would be collectible and the instant suit should have been dismissed. The possibility that a novation, in its broader sense[10] could be found in a case like this is intriguing. The majority opinion is consistent with a theory (not expressly mentioned) that the agreement of the mortgagee and mortgagor only resulted in a partially performed executory accord. Viewed in this light, upon failure to refinance the mortgagee had the right to elect to sue on the promise to refinance, or proceed, as he did, to seek foreclosure and attorneys fees, under the note and trust deed.

INTERPRETATION AND REFORMATION OF CONTRACT

Some of the recent cases deal with questions of interpretation and concern matters that are of frequent interest to the legal profession. In *Culley v. Grand Junction Legion Building Corp.*[11] the supreme court held that a lessee, who had the right to buy the leased premises at the *"best bona fide offer"* the lessor might be willing to accept, was not entitled to recover the amount of a real estate broker's commission which was included in the price the lessor communicated to the lessee and the lessee paid to the lessor. The contract did not call for communication of the best "net" offer.

In *Pullen Motors v. Thompson*[12] the defendant's auto was repossessed by the motor company and sold for part cash and a traded-in auto. The trade-in was sold at auction. The motor company sued for the deficiency after deducting the cash sale prices of both cars. The supreme court affirmed the trial court's holding that the language of the chattel mortgage requiring net proceeds of the "money arising from the sale"[13] to be applied on the defendant's debt permitted only a cash sale of the repossessed car.

The case of *Moddelmog v. Cook*[14] involved the right of a purchaser of real estate to recover his down payment when the vendor could not deliver title "free and clear of all taxes, liens and encumbrances" with certain stated exceptions. The alleged encumbrance was a right-of-way and easement for an irrigation ditch over the property. The ditch was visible, seen and discussed by the purchasers before the contract was signed. The vendors had secured dismissal of the complaint following a decree of the trial court that the contract be reformed by inserting the following: "conveyance to be subject to lateral ditch across said property." In reversing the trial court and permitting the purchasers to rescind and recover their deposit the supreme court declared that under the rule of *Eriksen v. Whitescarver*[15] a covenant to convey free and clear of liens and encumbrances applies not only to unknown, but, in the absence of a showing to the contrary, to known encumbrances. The contract was complete and

[10] Ames, Novation, in Selected Readings on the Law of Contracts (1931); Restatement, Contracts § 424 (1932).
[11] 331 P.2d 514 (Colo. 1958).
[12] 331 P.2d 1102 (Colo. 1958).
[13] *Id.* at 1103.
[14] 330 P.2d 1113 (Colo. 1958).
[15] 57 Colo. 409, 142 Pac. 413 (1914).

unambiguous. The supreme court held that reformation is to be allowed only where a *"mutual mistake is proved,"*[16] but that this was not a case of such mistake.

The case of *Nolan v. Colorado Mortgage Co.*[17] is noteworthy in that the court referred to "gross negligence" of an escrow agent as having been proved and as being the basis for holding the agent responsible for damages arising out of its nonperformance of duties as escrowee. The defendant for valuable consideration undertook to disburse $9,200 of escrowed funds to a building contractor under a contract, between the plaintiff and the contractor, requiring payment in proportion to work accomplished on the proposed structure. The work was stopped when only about one-third done and when only about twenty-six dollars remained in escrow. The trial court's dismissal of plaintiff's complaint was reversed. The facts and reasoning of the supreme court clearly demonstrate a breach of the escrowee's contract duties. However, nothing is gained by the reference to "gross negligence," especially since previous cases have held that Colorado does not recognize degrees of negligence,[18] and this is neither a tort case, nor a case involving a gratuitous bailee for the sole benefit of the bailor.

INTEREST AS DAMAGES FOR FRAUDULENTLY INDUCING CONTRACT

The language of two cases, *Moreland v. Austin*[19] and *Doenges-Long Motors, Inc. v. Gillen,*[20] may appear to be in conflict. In the former case the supreme court expressly states, "interest is not recoverable in an action for damages occasioned by fraud and deceit."[21] In that case the defendant fraudulently represented that cattle and land he was selling to the plaintiff were free from disease. In *Doenges,* a minor fraudulently misrepresented his age to induce the motor company to sell him a car. The supreme court allowed the defrauded motor company to recover, among other damages, an amount equal to the interest, at the legal rate, on the reasonable value of the automobile the infant had purchased. The interest ran only during the time the infant retained the automobile. The cases can be reconciled because in the first case interest on the damages occasioned by the fraud was denied, in the second case interest was used only to calculate the principal amount of the damages to be awarded for detention of the automobile.

INTEREST, ATTORNEYS' FEES AND LIQUIDATED DAMAGES

In *Weitzel v. Alles*[22] the contract of purchase and sale of real property provided that if it was cancelled by the vendor for breach by the purchaser, "all payments that shall have been *theretofore* made . . . shall be retained by the vendor . . . in full liquidation of all damages sustained by the vendor."[23] The purchaser had given a note for $2,000 payable April 1, 1956. The contract was declared terminated July 28, 1955. The note was specifically "subject to" the purchase contract and

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[16] 330 P.2d 1115 (Colo. 1958).
[17] 322 P.2d 98 (Colo. 1958).
[18] Adams v. Colorado & S. Ry. Co., 49 Colo. 475, 478, 113 Pac. 1010, 1012 (1911). "Degrees of negligence are not recognized in this jurisdiction." But *cf.* Pettingell v. Moede, 129 Colo. 484, 496, 271 P.2d 1038, 1044 (1954) where our court uses the phrase "some higher degree" referring to negligence and after eliminating simple negligence as sufficient to support an action under our guest statute.
[19] 330 P.2d 136 (Colo. 1958).
[20] 328 P.2d 1077 (Colo. 1958).
[21] 330 P.2d 136, 138 (Colo. 1958).
[22] 322 P.2d 698 (Colo. 1958).
[23] *Id.* at 700.

was not a down payment on the property. The supreme court held that under the contract only actual payments made prior to cancellation could be retained as liquidated damages. The note was held to be "but an incident" of the contract and no right to recover thereon existed after the forfeiture and cancellation of the contract.

In *Weaver v. First Nat'l Bank*[24] damages for breach of warranty included attorneys fees. The purchaser of cattle from the proprietor of a Colorado licensed livestock ring sued the proprietor, on a third party complaint, for breach of warranty of title to the cattle. The proprietor filed additional third party complaints against the person who delivered the stolen cattle to the ring, the state brand inspector and the bank on which the proprietor drew his check to pay for the stolen cattle. The purchaser secured judgment against the proprietor. All other third party complaints were dismissed. In hearing the writ of error brought by the proprietor the Colorado Supreme Court held: (1) The proprietor, under the licensing statute[25] warranted title to the cattle, (2) damages for breach of this warranty include the purchase price paid, attorneys fees for the purchaser's attorney and interest from the date of judgment only,[26] (3) the brand inspector is liable to the proprietor for certifying title to the cattle without referring to his book of registered and recorded brands[27] to determine their ownership. The third party defendant banks were held not liable since there was no evidence showing that the proprietor delivered his check to a person who represented himslf to be the agent of a fictitious payee. A full discussion of the so-called impostor or fictitious payee rule and its limitations is stated in this case.

The case of *Kepler v. Burns*[28] should be of more than "passing interest" to all attorneys. Burns bought certain property from Kepler who was executor of an estate. In inviting bids on the property Kepler required 15 per cent in cash to accompany the bid and stated terms of sale as, "cash upon delivery to purchaser of an executor's deed. . . ."[29] Much later a demand was made for payment of the balance of the price in cash. Burns paid his cash balance by the required date. Kepler, having been later surcharged for failing to collect interest for the period of more than one year between payment of the 15 per cent and payment of the balance of the purchase price, sued Burns for this interest. The supreme court affirmed a dismissal of Kepler's complaint on the ground that by the terms of the offer, no payment was due from Burns until the deed was tendered. This is in accord with generally accepted principles.[30]

INFANTS' CONTRACTS

The *Doenges* case[31] must be considered at greater length because it extends previous decisions and settles many elements of damages to be considered in cases involving disaffirmance of a contract by a minor.[32] In this case, Gillen, shortly before his twenty-first birthday, bought an automobile from the motor company, traded in his old car, made a cash

[24] 330 P.2d 142 (Colo. 1958).
[25] Colo. Rev. Stat. §§ 8-11-1 to 17 (1953).
[26] Colo. Rev. Stat. § 73-1-2 (1953) does not provide interest for breach of warranty.
[27] Colo. Rev. Stat. § 8-2-8 (1953).
[28] 324 P.2d 785 (Colo. 1958).
[29] *Id.* at 786.
[30] Restatement, Contracts § 267 (c) (1932).
[31] 328 P.2d 1077 (Colo. 1958) see note 20, *supra*.
[32] An excellent and detailed case comment on the Doenges case appears in 31 Rocky Mt. L. Rev. 102 (1958).

payment and financed the balance due. When he became twenty-one he promptly rescinded the contract, returned the new car and demanded return of his cash payment and of his trade-in, which had already been sold. The motor company counterclaimed for damages arising out of Gillen's fraudulent misrepresentation of his age and alleged that the misrepresentation estopped Gillen from rescinding. The supreme court held: (1) the right of an infant to disaffirm his contract is an *absolute* right whether he has or has not misrepresented his age and thereby induced another to contract with him; (2) on disaffirmance the contract is void ab initio;[33] (3) Gillen's recovery should be return of the money he paid plus reasonable value of his old car and interest from date of delivery (the agreed trade-in value could not be used since the contract was void ab initio); and (4) Gillen is liable for all damages resulting directly and proximately from his tort of deceit and these damages consist of the difference between the reasonable value of the purchased car on the date of its delivery and its reasonable value on the date of its return, with interest for the period it was withheld.

CONTRACTS INVOLVING MECHANICS' LIENS

In this period of continued expansion of building it is of value to consider the case of *Bishop v. Moore*.[34] In this case the supreme court affirmed dismissal of a suit to foreclose a mechanic's lien stating: "A prime requisite to the establishment of a valid mechanic's lien is that an indebtedness exists in favor of the claimant for labor or materials. Where the labor or materials furnished are in breach of the contract and so unsatisfactory as to require that either or both be redone at equal or greater expense, clearly they are without value to the property owner and do not constitute an indebtedness. . . . Indebtedness is a prerequisite to any mechanic's lien. . . ."[35]

In *Brannan Sand & Gravel Co. v. Santa Fe Land & Improvement Co.*[36] the plaintiff subcontractor constructed and paved a roadway partly over the land of the defendant land company and partly over the land of others. After the roadway was completed it was dedicated to the public. The land company had contracted for the construction and had partly paid the principal contractor. The principal contractor went bankrupt without paying the subcontractor.[37] In allowing a lien against

[33] 328 P.2d 1078, 1080 (Colo. 1958).
[34] 323 P.2d 897 (Colo. 1958).
[35] *Id.* at 899, the court quoting Trustee Co. v. Bresnahan, 119 Colo. 311, 203 P.2d 499 (1949).
[36] 332 P.2d 892 (Colo. 1958).
[37] Some of the above facts were derived from an examination of the court file.

the land company's land, proportionate *only* to the amount of roadway adjacent to the land company's land, the trial court concluded: (1) that the statute[38] only permits a lien upon property to the extent of the value of labor performed and materials furnished *upon the property,* and (2) that the Colorado mechanic's lien statute[39] does not impose personal liability on a landowner for the entire amount of the contract when no lien attaches, nor even when it does unless there is privity of contract between the contractor and the owner. Here there was no such privity between Brannan and the land company. Some readers may have run into the situation of the Denver building and engineering departments requiring that a developer of land improve land outside the development area by installing curb, gutter and street over a dedicated road as a condition precedent to permitting installation of such improvements adjacent to the developed land. On the basis of *Brannan* and another case [40] it appears that the unfortunate developer, caught in such a predicament, cannot expect to secure a lien on the land he involuntarily improves. Improvements to a previously dedicated roadway, on public land, will not support a mechanic's lien against the land adjacent to the road.

NEGOTIABLE INSTRUMENTS

As inferred above, some of the preceding cases could be considered under this heading; however, the most important case in this field is

[38] Colo. Rev. Stat. § 86-3-1 (1953).
[39] Colo. Rev. Stat. § 86-3-17 (1953).
[40] Johnson v. Bennett, 6 Colo. App. 342, 40 Pac. 847 (1895).

Myrick v. Garcia.[41] In *Myrick* the trial court refused to permit the plaintiff, an endorsee, to place a promissory note of the defendant in evidence without proof of both the execution and endorsement of the note to the plaintiff. The supreme court reversed and remanded for a new trial holding that if three applicable sections of the statutes[42] are read together the person having possession of a promissory note which bears the payee's endorsement is prima facie the owner of the note and entitled to have it placed in evidence. If the defendant then challenges this prima facie title the plaintiff should be permitted to offer evidence to rebut the challenge to his ownership. Two earlier Colorado cases[43] had required that if the execution and/or endorsement are denied in the answer, the note could not be admitted in evidence until the endorsee offers evidence of the validity of the endorsement by the payee, and if denied, of the execution of the note. The *Myrick* case expressly overrules the two earlier decisions insofar as they are inconsistent with its result.

In *Civic Finance Co. v. Meintzer*[44] the supreme court in a very restrained opinion reverses the trial court's judgment which incorrectly refused to permit a holder in due course for value to recover from an accommodation maker of the note.

Miscellaneous Cases

In *Walker v. Nelson*[45] the supreme court defines the nature and obligations of an agistment contract and distinguishes the agistment contract from a lease of pasture land.

The case of *Wysowatcky v. Lyons*[46] should be of interest in the field of contracts and quasi-contracts for a reminder, in a concurring opinion, that where the value of things or services furnished is common knowledge the trier of the facts "may determine the question of value from its own knowledge without the aid of opinion evidence."[47]

The plaintiff in *School District v. Brenton*[48] had achieved "stable and continuous tenure" under the Colorado Teacher Tenure Act,[49] as principal and a teacher of a high school in the defendant district. The defendant, without reducing the number of teachers, abolished the position of principal and continued the plaintiff as a teacher at reduced salary. The Colorado Supreme Court affirmed a judgment for the plaintiff in the amount of the salary reduction. Under the Teacher Tenure Act[50] the defendant could not cancel the plaintiff's contract or reduce his salary except in accord with the act.

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[41] 332 P.2d 900 (Colo. 1958).

[42] Colo. Rev. Stat. §§ 95-1-63, 31, 59 (1953) which to the extent here pertinent read as follows: "A person placing his signature upon an instrument otherwise than as maker, drawer or acceptor shall be deemed to be an endorser unless he clearly indicates by appropriate words his intention to be bound in some other capacity. The endorsement must be written on the instrument itself or upon a paper attached thereto. *The signature of the endorser, without additional words, is a sufficient endorsement.*" (emphasis supplied) "Every holder is deemed prima facie to be a holder in due course."

[43] Marks v. Munson, 59 Colo. 440, 149 Pac. 440 (1915) and Middlesex Co. v. Jacobs, 87 Colo. 445, 290 Pac. 784 (1930), both cited in *Myrick*.

[44] 328 P.2d 379 (Colo. 1958).

[45] 327 P.2d 285 (Colo. 1958).

[46] 328 P.2d 576 (Colo. 1958).

[47] In re Hartle's Estate, 236 S.W.2d 40, 41 (Mo. App. 1951) (cited in instant case).

[48] 323 P.2d 899 (Colo. 1958).

[49] Colo. Rev. Stat. § 123-8-1 (1953).

[50] Colo. Rev. Stat. § 123-8-7 (1953) provides for cancellation of an employment contract of a teacher on continuous tenure . . . for incompetency, neglect of duty, immorality, insubordination, justifiable decrease in the number of teacher positions, or other good and just cause. . . ." None of the grounds were present. The alleged reason for cancellation of the contract was to conserve finances of the district, but actually one or two new teachers were employed.