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ONE YEAR REVIEW OF CONTRACTS

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REAL ESTATE AND BUSINESS OPTIONS

During 1957 the Colorado Supreme Court had many additional opportunities to revisit that perennial source of litigation, the real estate and business opportunity option, with the claims for commissions, forfeitures of earnest money and efforts to secure repayment of the earnest money.

In this review the cases dealing with this field of litigation will be considered first. *Johns v. Ambrose-Williams*[1] held that a real estate broker seeking to recover commissions on an alleged open account for services connected with renting his "principal's" property, must sustain his action by clear and convincing testimony. In reversing a judgment for the broker the Colorado Supreme Court stated: "The record is barren of any evidence that the parties here proceeded on the basis of an account, nor is there any competent evidence of a contract of employment."[2]

Jones v. Hocks[3] presents a novel situation with a principal seeking cancellation of a note and trust deed given to the broker as a security for future services to be performed in selling certain property and securing a loan on other property. The broker counterclaimed for judgment on the note and foreclosure of the trust deed. The contemplated acts of the broker, if performed, would have been the consideration for the note and trust deed, but the acts were not performed and the trial court correctly dismissed the counterclaim for failure of consideration.[4] The supreme court would have given Hocks the equitable relief of cancellation of his note and trust deed, but Hocks failed to assign error to the dismissal of his complaint by the trial court.

Perino v. Jarvis[5] reflects the efforts of a prospective purchaser of a beer business to recover $1000 left with the vendor's agent until the sale should be consumated. When the principal could not effect transfer of the beer license, the agent, now defendant-in-error, kept the deposit. Perino secured reversal of the adverse judgment. The Colorado Supreme Court stated, the "depositor is entitled to recover full amount of deposit if he shows agreement failed of performance because of the breach of the other party . . . ." (here the vendor).[6] The defendant did not allege nor prove either the willingness of the principal to perform, nor the existence of any damages. The court again set out the guide posts of the

1 317 P.2d 897 (Colo. 1957).
2 Id. at 898.
3 315 P.2d 987 (Colo. 1957).
4 Restatement, Contracts § 75, comment a (1933).
5 312 P.2d 108 (Colo. 1957).
6 Ibid.

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essential elements of a contract for retention of a sum paid as liquidated damages.[7]

In another case, one Cumming sued to recover a deposit paid under a written contract to purchase certain personalty from one Payne.[8] Cumming claimed that the contract was mutually rescinded by a subsequent parol agreement. The jury found this to be the fact. Basing its decision squarely on *Niernberg v. Feld,*[9] the Colorado Supreme Court held that a written contract can be voided by evidence of a rescission resting in parol. A noted authority on contracts has approved this view in these words: "Even if a contract is in writing, whether it is required by the statute to be in writing or is not so required, it can be rescinded by parol agreement as long as it is wholly executory."[10]

In *Wyatt v. Buchanan*[11] the plaintiff sued to recover a $500 deposit on the purchase of a dress shop. Conditions for forfeiture of the deposit and its retention by the agent as liquidated damages were set out in the writing signed by the plaintiff. The court approved the forfeiture, and by inference we can assume that the essentials for a contract for liquidated damages lacking in *Perino v. Jarvis* are present here.

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7 Id. at 109. The elements are: ". . . . that the damages to be anticipated are uncertain in amount or difficult to be proved . . . that the parties intended to liquidate them in advance . . . and that the amount stated is a reasonable one, that is, not greatly disproportionated to the presumable loss or injury. . . ." 25 C.J.S. § 102 (1941). See also Restatement, Contracts §§ 339, 340 (1933).

8 Payne v. Cumming, 315 P.2d 818 (Colo. 1957).

9 131 Colo. 508, 283 P.2d 640 (1955)

10 Corbin, Contracts § 302 (1952).

11 312 P.2d 510 (Colo. 1957).

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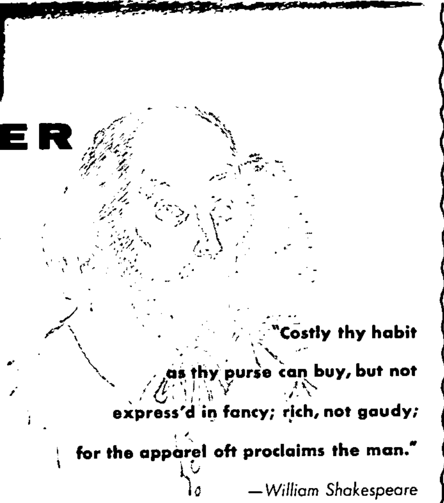

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WHERE DENVER SHOPS WITH CONFIDENCE

During the past year the Supreme Court of Colorado dealt with the problems of claims for specific performance of real estate conveyances in three cases. *Hill v. Chambers*[12] was an action to specifically enforce the defendants' oral promise to convey one acre of land to the plaintiffs, if the plaintiffs would build a house, which house the plaintiffs built. In granting specific performance the trial court held that the building of the house was part performance of the contract and thereby the statutory requirement[13] of a writing to support a promise to convey an interest in land was eliminated. It is to be noted that the Colorado Supreme Court again stated that where specific performance is sought, "the contract must be clear, and established beyond question, and even then the granting or refusing of the requested decree rests largely in the discretion of the court."[14]

Dunton v. Breymaier[15] was an action to secure conveyance of land, or in the alternative to secure refund of the amount paid by the optionee to the defendants under an agreement of June 12, 1947. The optionee was to subdivide a larger tract of land, pay $6,000 on or before October 1, 1948, and pay a similar sum during a subsequent year of a five year period. Upon performance of these conditions, the defendants were to convey land at $600 per acre. Only $1,500 additional was paid, and the optionee did not subdivide the acreage. The optionee assigned its rights to the plaintiff corporation. In affirming a judgment dismissing the complaint the court relied heavily on a letter delivered the day after the contract was made. The letter contained the optionee's quit claim deed to the acreage which was to be delivered to the defendants and recorded if the optionee failed to fully perform the contract. From the letter and the terms of the contract it was clear that the assignee did not agree to purchase any property nor to bind itself to make any payments. The court re-emphasized the characteristics of an option, saying: "It may be laid down as an established rule of law that unless the contract contains language which may reasonably be construed as an agreement on the part of the vendee to purchase the property, or to assume obligations thereunder, it will be an option contract and not an agreement of sale and purchase. . . ."[16] The right to claim a conveyance never arose and is defeated by the non-performance of the optionee. The facts only disclose an option which was terminated by failure to exercise it.

The final case involving both earnest money and specific performance is *Kalish v. Brice*.[17] This case is the most interesting of all, and so has been reserved for comment here. It has twice been before the Colorado Supreme Court. First, it tested the right of the plaintiff to amend his complaint from an action for return of the deposit to an action for specific performance of an alleged duty to convey real estate. In the first review,[18] the court permitted the amendment solely on the basis of Rule 15 (a)[19] for the reason that the defendants had not filed an appearance nor a responsive pleading prior to the tendering of the amended complaint. The instant case followed a judgment of non-suit by the trial court at the close of the plaintiff's evidence on the amended complaint, a prima facie case for specific performance not having been shown. In

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12 314 P.2d 707 (Colo. 1957).
13 Colo. Rev. Stat. Ann. § 59-1-8 (1953).
14 314 P.2d at 709.
15 316 P.2d 1048 (Colo. 1957).
16 Id. at 1052.
17 315 P.2d 829 (Colo. 1957).
18 Kalish v. Brice 130 Colo. 220, 274 P.2d 600 (1957).
19 Ibid.

granting the non-suit, the trial court granted Kalish the right to amend his complaint and pray for return of the deposit (the relief he originally sought). The court stated that upon such amendment judgment for the return of the deposit would be entered. Kalish sought to reverse the judgment of non-suit. The Colorado Supreme Court, in affirming the trial court, made it letter clear that *this is not a case involving an election of remedies.* Kalish demanded return of his deposit and then waited about two years before filing the original action for its return. Ten months later he sought to amend to claim specific performance, because he had discovered that the property had been improved and greatly increased in value. Such conduct was consistent only with a repudiation of the receipt and option. If Kalish ever did have an election he made it when he originally acted to regain his deposit. "The set of facts arising from the conduct of Kalish prior to the filing of the amended complaint permitted resort to only one remedy—the return of the deposit."[20] Consequently, as a matter of law, the trial court had to grant the non-suit. Kalish had originally asserted a right to return of the deposit on the ground of a title defect, which Brice always denied. Since Brice did not object to the trial court's order concerning amendment to return to the original complaint, it would appear that Kalish gets a refund of his deposit and the defendant is deprived of an opportunity to present evidence to establish marketability of the title. However, no cross-error was assigned to this order permitting amendment and entry of judgment for return of the deposit. It is this reviewer's thought that we may have occasion to re-visit this case should such amendment be attempted and should judgment for return of the deposit then be entered.[21]

MISCELLANEOUS CONTRACT CASES

In addition the Colorado Supreme Court considered cases involving the measure of damages for breach of contract, pleading and proof of conditions precedent, the right of a consignee of personalty to reject goods damaged in transit, the meaning of the word "or"; the stability of the State of Colorado for breach of an authorized contract, the effect of acceptance of personalty which a buyer later claims fails to conform to an implied warranty of fitness for its intended use, a grubstake contract—ala scintillater—, the dead man's statute and several promisees, legality of a condition limiting the right of a holder of a license to apply for removal to another location of a hotel and restaurant liquor license, and the right of a third party creditor beneficiary to sue. Cases involving these subjects are considered below.

In *Brenaman v. Willis*[22] the problems of mitigation of damages and non-recovery of speculative (non-contemplated) damages for breach of contract were considered. The Colorado Supreme Court quoted with approval the following language: "Where the defendant has breached a contract it is the *duty* of the injured party to take such reasonable steps as are within his power to reduce the damages which he has sustained, or to lessen or avoid them as a reasonably prudent man would take in like circumstances."[23]

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[20] 315 P.2d at 831.
[21] Cf. Restatement, Contracts § 382 (1933). The reader may be interested in knowing that the area in question is now part of what is known as "Holly Hills," south and east of Denver.
[22] 314 P.2d 691 (Colo. 1957).
[23] Id. at 693 (emphasis supplied).

While cases dealing with mitigation of damages frequently use the word "duty," it is believed that nothing is gained by such wording. If there were in fact a duty, then the law should penalize the injured party's inaction. This it does not do, "it merely does nothing to compensate him for the harm that a reasonable man in his place would have avoided."[24]

The Colorado Supreme Court had occasion to consider the effect of a specific denial of performance of certain conditions precedent to plaintiff's right to recover on a guarantee, in a case where the plaintiff's complaint generally alleged performance of all conditions precedent. This was the case of *Sullivan v. McCarthy*.[25] Under Rule 9 (c),[26] the case holds that the plaintiff had only to prove occurrence of those conditions denied. He did not have to prove occurrence of the other conditions stated in the guarantee.

The case of *Denver Truck Exchange v. Perryman*[27] could properly be commented upon under workmen's compensation. It is of interest to us here for three reasons: (1) the Colorado Supreme Court here defined "contract," and distinguished an "arrangement," (2) the opinion contains an excellent discussion of offer and acceptance in unilateral contracts, and (3) it reaffirms the rule that generally the place of making the contract is the place where the last act in creating the contract is done—and in the case of unilateral contracts it is the place where the requested act is performed or performance is begun.

Denver-Chicago Trucking Co. v. Republic Drug Co.[28] is a case involving the right of a consignee to refuse to accept a shipment from a carrier where twenty-five percent of the merchandise shipped is damaged in transit. The case also interprets the word "or" as used in a bill of lading providing: "As a condition precedent to recovery, claims must be filed in writing with the receiving *or* delivering carrier, *or* carrier issuing this bill of lading, *or* carrier on whose line the loss, damage, injury or delay occurred. . . ."[29] Denver-Chicago, a third party defendant and counterclaimant contended that the word "and" should be substituted for the word "or." This the Supreme Court refused to do for the reason that such interpretation would have been unreasonable, stating "the disjunctive word, 'or,' which, when used in this sense is defined by Webster as: 'A co-ordinating particle that marks an alternative . . . *It often connects a series of words or prepositions, presenting a choice of either*'."[30] As to the second problem, that of rejection of the consigned goods, the court held that a consignee cannot abandon an entire shipment because some twenty-five percent of it is damaged in transit where the goods retain a substantial value. The consignee is entitled to recover damages for the goods injured.

In *Ace Flying Service v. Colorado Dep't of Agriculture*,[31] already reviewed in DICTA,[32] the Colorado Supreme Court holds that the State's authorized contracts are enforceable to the same extent as those of an individual.

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24 Restatement, Contracts § 336, comment d (1933).
25 314 P.2d 901 (Colo. 1957).
26 Colo. R. Civ. P. 9(c).
27 307 P.2d 805 (Colo. 1957).
28 306 P.2d 1076 (Colo. 1957).
29 Id. at 1078.
30 Ibid.
31 314 P.2d 278 (Colo. 1957).
32 34 DICTA 422 (1957).

Vanadium Corp. v. Wesco Stores[33] was an action to recover the price of turkeys. The defendant filed a third party complaint. The third party defendant, Vanadium, having accepted the turkeys, was held to have the burden of proving that the turkeys were unfit for human consumption at the time of acceptance, four and one-half days before opening the bags containing them. To find acceptance of the turkeys by Vanadium the definition of acceptance under our sales act was applied: "the buyer is deemed to have accepted the goods when he intimates to the seller that he has accepted them, or when the goods have been delivered to him, and he does any act in relation to them which is inconsistent with the ownership of the seller, or when, after the lapse of a reasonable time, he retains the goods without intimating to the seller that he has rejected them."[34] "There is no presumption that the defects discovered after delivery existed at the time of sale."[35]

Smaller v. Leach[36] may well prove to be the most important case decided in the contract field in 1957. The case involves an oral grubstake contract (held not to be within the statute of frauds) concerning the radiometric prospecting for uranium by week-end prospectors. The grubstake is not beans and a donkey, but the loan of a scintillator. This case could have wide application to our region. The Colorado Supreme Court has gone to great lengths to define the right of the grubstakor

[33] 308 P.2d 1011 (Colo. 1957).
[34] Id. at 1014, citing Colo. Rev. Stat. Ann. § 121-1-48 (1953).
[35] Id. at 1014.
[36] 316 P.2d 1030 (Colo. 1957).

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and grubstakee concerning mineral discovery by means of, pursuant to, and during the continuance of the grubstake contract. The decision cannot be treated here at length but merits greater attention. The basic law of grubstake contracts is here molded to accommodate a new mining frontier.

Of interest in considering the leasing of a location where a tavern is to be operated is the case of *Jones v. Parsons*.[37] This case could have been considered along with the first cases reviewed, but since it turns on the question of a claimed illegality of a condition in a lease, its discussion was delayed. In this decision, the trial court's judgment ordering refund of a $1,000 deposit paid on a receipt and option agreement concerning purchase of a tavern was reversed. The Colorado Supreme Court held that it is not a violation of the Colorado Liquor Code nor of public policy for the seller and buyer of a tavern to agree that in the event of termination of the business, or the lease, for any reason, the lessee-optionee would not attempt to move the three-way liquor license from the leased location, but would surrender it to the licensing authority in favor of the optionor-lessee.

Miller v. Hepner[38] involved a novel attempt to avoid a statutory exception to the dead man's statute.[39] Plaintiff, Miller, sued on two counts: (1) for accounting, and (2) for money due under an agreement with Hepner. At the pre-trial conference he was erroneously required to elect between the counts, and elected to rely on count (2). In its simplest terms Hepner agreed to pay a certain sum to plaintiff and to Hepner's wife, monthly. Hepner died during the pendency of the suit and his widow, as executrix, was substituted as defendant on this second claim. When Miller offered his testimony, concerning conversation with the decedent in the presence of Mrs. Hepner, it was excluded. The theory of the exclusion was: (a) that Miller was suing to enforce a right as a joint promisee, and (b) that the widow of Hepner, also a promisee under Hepner's promise, was co-promisee, or had interests under the promise parallel with Miller's interests (c) therefore, pecuniarily, the interests of both Miller and Mrs. Hepner were antagonistic to the estate of Hepner, and (d) under *Norris v. Bradshaw*[40] the exception of the dead man's statute[41] did not apply. As a practical matter, the widow stood to receive everything from the estate of Hepner (after a certain small bequest) and since her interest in payment under Hepner's promise was found to be several and independent, and not joint, she did not have to rely on the plaintiff's action to recover from the estate. In fact, it was to her interest to eliminate Miller's claim, for that would increase her interest in the estate. Asserting her claim under

[37] 10 Colo. Bar Ass'n Adv. Sh. 88 (1957).
[38] 314 P.2d 604 (Colo. 1957).
[39] Colo. Rev. Stat. Ann. § 153-1-2(6) (1953).
[40] 92 Colo. 35, 18 P.2d 467 (1935).
[41] See note 39 supra.

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Hepner's promise would only be paying herself out of her own pocket. The Supreme Court of Colorado was able to pierce the executrix's ingenious argument, and reversed the judgment of the trial court which had dismissed's Miller's complaint, by clear analysis of the so-called "joint promise" resolving this claim by classifying the interests of plaintiff and Mrs. Hepner as "several" and concluded: "Mrs. Hepner's pecuniary loyalties were entirely on the side of the estate. She was wholly averse to the claim of the plaintiff. She fulfilled the letter and the spirit of"[42] the statute.

The report of the case leaves unsettled, in this reviewer's thought, the questions of what was the consideration for Hepner's promise and whether such a promise as his was in aid of a legal purpose. The agreement indicated that Hepner was receiving excess compensation from the corporation and then was splitting the excess compensation with his wife and Miller.

The last case decided in the contracts field is *Sanders v. Black*.[43] For a sufficient consideration Lillian Black promised Arthur Black that she would discharge an encumbrance on Myrtle Black's property. It appears that Myrtle was in the position of a creditor of both Lillian and Arthur. When Lillian sold other property to Sanders, part of the consideration was Sanders' promise to pay off the encumbrance on Myrtle's property. Sanders defaulted and Myrtle paid off the encumbrance. In affirming the judgment of the trial court in favor of Myrtle and against Lillian and Sanders, the Colorado Supreme Court again agreed that a third party beneficiary may enforce a promise made for his benefit even though the beneficiary is neither a party to the contract nor to the consideration therefore. Sanders assumed the obligation of Lillian. The obligation of Lillian still remained. It was not "transferred." Obligations may be delegated, and assumed. If the obligation were actually "transferred" then a novation would result, with Sanders being substituted as the debtor, instead of being an additional debtor to whom Myrtle might look for performance. The use of the word "transferred" in the option is a misnomer at least as to legal effect of the agreement between Lillian and Sanders.

Viewing the above cases in retrospect and on an overall basis, they reflect credit on the Colorado Supreme Court.

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[42] 314 P.2d at 606. For a further discussion on "several" interests of co-promisees, see Restatement, Contracts §§ 111 and 128 (1933).
[43] 318 P.2d 1100 (Colo. 1957).

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