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One Year Review of Contracts

Paul F. Goldsmith

ONE YEAR REVIEW OF CONTRACTS

PAUL F. GOLDSMITH

A. B. University of Denver, 1941; L.L. B. University of Denver, 1943; Private practice, Denver, 1945-48; Member of firm of Sears and Goldsmith, Denver, since 1948.

1. DEALINGS UNDERSTOOD NOT TO IMPOSE DUTY TO MAKE COMPENSATION

The case of *Heafer v. Gathers*[1] involves the claim of an automobile repair man for rental of a substitute car loaned to a customer while the customer's car was being repaired. The customer contends the lending was understood not to involve any duty to pay rental. The Supreme Court ordered a new trial on this question. The confusion arises over a "counter slip" which was to have been submitted to the insurance company to evidence rental expense but ended up, slightly altered, as a bill to defendant. (This case could have been discussed under the heading of Interpretation below.)

2. OFFER AND ACCEPTANCE INCLUDING:

(a) Promise for an act.

McCullough v. Thompson[2]

(See 4 (a), below)

(b) Lapse of offer in:

1. Option to purchase Real Estate.

In the case of *Miller v. Hiett*[3] there was apparently a month to month rent agreement with an option to buy the subject real estate and apply rental to the purchase price. After paying $100.00 per month rent for six and one-half years, the tenant sues for specific performance and loses. The best reason, though not clearly advanced in the report, to support the result of the case is that the offer to sell, in the option, had lapsed and the tenants never, prior to suit, accepted the offer or exercised the option. It is not sufficient to state, as was done in this case, that (1) there was no consideration for the option, and (2) that there was a lack of mutuality. The monthly payments themselves could be consideration, and mutuality is not necessary.

2. Offer to pay broker a commission on sale of real estate where act was not performed.

Ginsberg v. Frankenberg[4]

Heady v. Tomlinson[5]

(See 4 (a), below)

(c) Lapse of counter-offer.

In the case of *Lincoln Liberty Life Ins. Co. v. Martinez*,[6] Martinez' application for insurance was rejected by the defendant company. The company offered a policy with the premium "rated high up." Martinez was injured in an automobile accident and died be-

[1] 300 P.2d 523 (Colo. 1956).
[2] 133 Colo. 352, 295 P.2d 221 (1956).
[3] 133 Colo. 576, 298 P.2d 394 (1956).
[4] 133 Colo. 382, 295 P.2d 1036 (1956).
[5] 299 P.2d 120 (Colo. 1956).
[6] 299 P.2d 507 (Colo. 1956).

fore accepting the counter-offered policy and without having paid the premium. The application provided: "That there shall be no contract of insurance until a policy shall have been delivered to me and the premium paid to the home office of said Company in Lincoln, Nebraska, during my life time and in good health."[7] On the above showing judgment for plaintiff was reversed.

(d) QUERY: Is offer and acceptance necessary?

Kugel v. Young.[8] This case is included here only to pinpoint the court's statement in ruling on the petition for re-hearing. The case arose on the question of automatic termination of a producers 88 oil and gas lease, "unless" specified delay rental payments were made by a given date. The assignees of a part of the lease tendered the second year delay rental on an incorrectly described *part* of the total acreage and the lessors accepted and applied this tendered rental without knowing the area covered by the assignment and without intent to accept rental payment on less than the whole tract. The court held that this constituted a continuance of the lease as to the described portion and a surrender regarding the omitted portion. On petition for re-hearing the problem of a meeting of the minds, i. e., offer and acceptance of the "insufficient" delay rental was raised. The court stated that:

> "where we have under consideration an already existing contract partially performed, and under the facts and circumstances peculiarly applicable to this case, we cannot escape the conclusion that the picture revealed, if not technically an offer and acceptance, is so closely in the nature thereof that the result is the same."[9]

3. INTERPRETATION OF CONTRACTS

In *Williams v. Lundquist,*[10] the plaintiff sued for fifty per cent of the profits from operation of a kitchen, operated in connection with a bar. The plaintiff contended, and the court found, that only cost of food and kitchen-help salaries were to be deducted from the gross sales receipts from food. This was shown by parol evidence. The case was reversed because the trial court did not deduct the value of "house meals" for kitchen-help as part of, and an additional, expense of "kitchen salaries."

Note: the kitchen was operated at a $3,400 loss if all operating expenses are considered. *Moral:* Define kitchen expenses to include a fair share of all overhead.

In *United Oil Production Co. v. Quinn,*[11] Quinn's investment was a pre-organization investment used by the president of United to secure other investors. However, the company in which Quinn expected to receive a one per cent share was never formed. Instead, United took over the project of the contemplated company and Quinn was told her money was consumed by pre-organization costs. The court gave Quinn a one per cent share in the project as carried out by United, since in equity her money had been diverted to United when United took over the contemplated project which

[7] *Id.* at 508.
[8] 132 Colo. 529, 291 P.2d 695 (1955)
[9] *Id.* at 547, 291 P.2d at 704.
[10] 133 Colo. 379, 295 P.2d 1035 (1956).
[11] 133 Colo. 430, 297 P.2d 270 (1956).

was promoted by use of Quinn's investment. (This arose out of a promotional scheme to drill and develop a Rangely oil and gas lease.)

In *Weick v. Rickenbaugh Cadillac Co.*,[12] plaintiff's intestate had been the salesmanager for defendant. At the time of decedent's death, it is admitted that he was entitled to in excess of $6,000.00 for accumulated commissions due and payable at the date of his death. The dispute concerns plaintiff's claim for an additional amount of commissions on sales which were not consummated, by delivery, until after decedent's death, but with respect to which contracts of purchase, or orders, had been signed prior to decedent's death. The trial court held that plaintiff had not made out a prima facie case which would justify a recovery of these additional commissions and entered judgment for only those commissions admitted to be due. The Supreme Court reversed the judgment and remanded the cause for presentation of evidence on behalf of defendant company. The reason being: (1) Unless there is an agreement clearly providing to the contrary, a person selling on a commission basis is entitled to commission when a sale is made, irrespective of when shipment takes place, (2) The complaint of plaintiff stated a claim against the company which was supported by evidence sufficient to establish a prima facie case.

[12] 9 Colo. Bar Ass'n Adv. Sh. 40 (1956).

4. CONDITIONS TO CONTRACTUAL DUTY OF IMMEDIATE PERFORMANCE

While some of these cases could be discussed under the heading of offer and acceptance or consideration they are more significantly handled here.

(a) Three cases involving real estate broker's commission:

(i) In *McCullough v. Thompson*,[13] the plaintiff, broker, secured a purchaser according to the terms of the listing and a contract was signed by the principals (sellers) and purchasers. The principals refused to close on the accepted terms. The broker, correctly, was held to have earned his commission and the refusal of the principals to close on a contract they had approved could not

[13] See note 2 *supra*.

defeat the broker's claim. The Supreme Court found that the conditions of the statute[14] had been met.

(ii) In another case for broker's commission the Supreme Court held that the conditions of the same statute had not been met. This was *Ginsberg v. Frankenberg.*[15] The plaintiff, a licensed broker and attorney, drew a *non-exclusive* listing and was to have as his commission any excess over a stated price if sale was to a buyer procured by the broker and disclosed to the principal, and the excess over the stated price, but not less than "regular commission as provided by the Denver Board of Realtors" if sale to such disclosed person was by the owner. No provision was made if sale was through another broker. Another broker sold the property for a price in excess of any offers ever secured by the plaintiff, but less than the price stated in the plaintiff's listing. The court affirmed a judgment of dismissal, stating that the listing had to be construed against the one who drew it. The real basis for this holding is that the plaintiff never produced the necessary buyer, and never became entitled to a commission under the above statute. In other words, it is either a case of no acceptance or non-performance of a condition.

(iii) *Heady v. Tomlinson,*[16] is a case wherein a broker tendered an offer to an owner at the request of a person who had been negotiating with the owner. This owner is the present defendant. The sale was closed and the broker was present at the closing. The owner refused to pay the commission claimed and appealed from an adverse judgment. In reversing the judgment, the Supreme Court stated that even though there was a listing agreement signed by the owner, the broker was not himself, nor by his efforts, responsible for the sale. Consequently, the broker was not entitled to a commission.

(b) Condition precedent of notice of suit in public liability insurance contract.

Ewing v. Colorado Farm Mut. Cas. Co.,[17] concerns an action against an insurance company whose policy contained the following usual condition: "no action shall lie against the Company, un-

[14] Colo. Rev. Stat. Ann. § 117-2-1 (1953).
[15] See note 4 *supra.*
[16] 299 P.2d 120 (Colo. 1956).
[17] 133 Colo. 447, 296 P.2d 1040 (1956).

less as a condition precedent thereto, there shall have been full compliance with all the terms of this policy."[18] One term of the policy required the insured to give notice to the company in case of suit against the insured. The trial court had dismissed the plaintiffs' action upon the plaintiffs' own evidence that (a) they were judgment creditors of a person who was driving the insured vehicle, on a mission of his own, not with direct or delegated authority of the insured, and (b) no notice had been given to the insurer of the prior action against the driver. In affirming the trial court's judgment, the Supreme Court describes the plaintiffs as third-party beneficiaries to the contract between the insured and the insurer, who are required, as such beneficiaries, to prove performance of conditions precedent, which they neither did nor alleged. As to the statute,[19] the court stated "it is exquisitely calipered as an imponderable"[20] but does not eliminate the condition of notice.

5. JOINT OBLIGATIONS

Womack v. Grandbush[21] dealt with the right of a judgment creditor of one partner to have a third person, a partner of the judgment debtor, show cause under Rule 106 (a) (5)[22] why such other partner should not be bound by the original judgment. In this case the original judgment was obtained on what appeared to be an individual obligation, but facts disclosed in the trial of the original action[23] indicate the obligation to have been a partnership obligation. The order and judgment dismissing the petition was reversed.

Note: Not all partnership obligations are joint and several.[24] See C.R.S. 76-1-1 (joint and several obligations) and compare C.R.S. '53 104-1-15 (2). Colorado statutes provide that partners are liable jointly, and not jointly and severally,[25] except when specified conditions[26] appear. The Rules of Civil Procedure do not change substantive law and Rule 106 (a) (5) should apply only where the omitted party did not have to be made a party under the substantive law or, if made a party, could not be served with process. Otherwise Rule 106 (a) (5) would change the substantive statutory law. Perhaps substantively there was an estoppel in *Womack v. Grandbush,* but it is difficult to see since all relevent facts concerning the other partner were developed during the original trial.

6. REMEDIES

(a) *Rescission and restitution for fraud in the inducement.*

Rescission was held to be the proper remedy in *Dumas v. Klatt,*[27] although the court had to award a decree for payment of money, instead of restoring the specific property which the defendant, the delinquent party, had received from the plaintiffs. In this case, the plaintiff bought a duplex from the defendant who

[18] *Id.* at 452, 296 P.2d at 1043.
[19] Colo. Rev. Stat. Ann. § 13-7-23 (1953).
[20] 133 Colo. 451, 296 P.2d at 1043.
[21] 298 P.2d 735 (Colo. 1956).
[22] Colo. R. Civ. Proc. 106 (a) (5).
[23] Cf. Grandbush v. Womack, 129 Colo. 26, 266 (P.2d 771 (1954) (cited in instant case).
[24] *See, e.g.,* Colo. Rev. Stat. Ann. § 76-1-1 (1953) (joint and several obligations).
[25] Colo. Rev. Stat. Ann. § 104-1-15 (2) (1953).
[26] *Id.* §§ 104-1-13 & 14.
[27] 132 Colo. 333, 288 P.2d 642 (1955).

knowingly misrepresented material facts concerning the duplex with the intent of inducing the purchase by plaintiff. Plaintiff did reasonably rely on these misrepresentations, as was to have been expected. Plaintiff tendered the duplex back to the defendant, but to preserve it, and avoid increased damages, continued to rent it pending outcome of the action. The court restored the status quo, insofar as possible, by decreeing that the defendant pay the plaintiff the purchase price, plus expenses of operating the duplex, less rentals received by the plaintiff.

Note: The Supreme Court spoke of fraud in the "inception" without defining it as fraud in the procurement, in which event the transaction would be void (but restitution would still be proper) and fraud in the inducement, which it was, in which event the agreement is merely voidable at the instance of the injured party. When the agreement is voidable, the injured party may elect to affirm and seek damages or may rescind and seek restitution.[28]

(b) *Damages for fraud in the inducement.*

A judgment for damages (in the form of cancellation of purchase money notes) in *Cherrington v. Woods*,[29] was reversed. Here, the plaintiff purchased a tavern from the defendant, under a contract which provided: "It is understood that the books and records of said business will be open and available for Mr. Wood's inspection. . . ."[30] A year after the purchase plaintiff claimed he was de-

[28] 5 Williston, Contracts § 1488 (Rev. ed. 1937). Restatement, Contracts § 475, comments (a) & (b) (1932).

[29] 132 Colo. 500, 290 P.2d 226 (1955)

[30] *Id.* at 503, 290 P.2d at 227.

frauded in that the business showed a net profit which was much less than the $1,400.00 to $1,600.00 per month claimed to have been represented by the seller. The Supreme Court reversed the judgment, dismissed the complaint and ordered further proceedings on the counterclaim on the notes given by plaintiff for the unpaid balance of the purchase price. The reason given being:

> "Where the means of knowledge are at hand and equally available to both parties, and the subject of purchase is alike open to their inspection, if the purchaser does not avail himself of these means and opportunities, he will not be heard to say that he has been deceived by the vendor's representations."[31]

(c) *Rescission for breach of warranty in contract of sale.*

Rudd v. Rogerson[32] is an action which construes Uniform Sales Act,[33] dealing with rescission as a remedy for breach of an express warranty in a sale. In this instance, plaintiff sought to rescind the purchase of cattle, which were expressly warranted, prior to the sale, in the bill of sale, and even after delivery, to be registered, or registerable, Aberdeen Angus cattle. The defendant argued that the plaintiff, by inspection of the cattle and the herd book, which was in plaintiff's hands for a week (but which defendant himself represented as needing additional entries to constitute a complete record) knew or could have discovered the incorrectness of the warranty. Plaintiff showed that he did not rely on the herd book, but on the representations of defendant. In reversing a judgment on a counter claim for balance due on the purchase price, and reinstating the plaintiff's complaint, our Supreme Court held:

(1) The defendant sold the cattle under an express warranty as defined in the above statute.

(2) Where an expressed warranty is given, the buyer is not precluded from relying on it, unless his investigation reveals the defect. The court said that the maxim, *caveat emptor,* has no application to matters included in an express warranty.

Comment: The two cases are probably consistent because in *Cherrington* the statements were mere representations and in Rudd the Court found an express warranty.

7. Discharge of Contractural Duty By:

(a) *Performance*

Erickson v. Publix Cab Co.[34] Plaintiff's testatrix was injured when defendant's taxi cab backed into testatrix in a public highway. Testatrix had been a fare-paying passenger in the taxi. The taxi cab driver parked the cab at the testatrix's destination, assisted testatrix to the sidewalk, received his fare and returned to the cab. Testatrix started to cross the street behind the cab, and the cab in backing up struck testatrix. Shortly after the accident, testatrix died. Plaintiff sues, not in tort, but on the implied contract for safe carriage between a carrier and its passenger, alleging that testatrix was still a passenger at the time of the accident. The trial

[31] *Id.* at 506, 290 P.2d at 228.
[32] 133 Colo. 506, 297 P.2d 533 (1956).
[33] Colo. Rev. Stat. Ann. § 121-1-12 (1953).
[34] 301 P.2d 349 (Colo. 1956).

court sustained a motion for a directed verdict in favor of the defendants. The Supreme Court affirmed the ruling of the trial court, for the reason that the contract between a carrier and passenger terminates at such time as the carrier has discharged the passenger in a safe place (which in this instance was the public sidewalk). Thereafter, the testatrix was a member of the general public and defendant owed her the same duty that it owed to all other persons on the street or sidewalk. This duty was no part of the contract for safe carriage.

Note: The reason for the unique theory of plaintiff is that if the claim were based on negligence it would be an action to recover for injuries done to the person, which does not survive under the statute.[35]

(b) *Release and mutual rescission.*

In *Johnston v.Emerson,*[36] the plaintiff contracted with defendant to remodel a certain structure. Disputes arose and the parties entered into a release and rescission agreement under which defendant warranted and guaranteed that all work already executed under the agreement would be sound and waterproof, free from defects of materials and workmanship for a period of one year from August 18, 1949. In an action for damages filed in 1951, but tried in 1955, experts testified as to defects in work done prior to the date of the release and rescission, and not within the terms of the guarantee. In holding that the judgment in favor of plaintiff should be reversed and the complaint dismissed, the Supreme Court ruled:

[35] Colo. Rev. Stat. Ann. § 153-1-9 (1953).
[36] 133 Colo. 343, 296 P.2d 229 (1956).

(1) The rescission agreement relieved defendant of the obligations of the original contract;

(2) The release agreement was to be construed against its makers, plaintiffs, and

(3) Duties, if any, of defendants were to be measured as of the one year guarantee period, and not by conditions five years later.

(c) *Surrender of Promissary Note to its makers*:

Two of the defendants in *Denver National Bank v. McLagan*,[37] defended an action by the bank, special administrator, of the estate of Margaret Hurley, deceased, on $7,000.00 in notes executed by defendants, on the ground that the decedent had returned the notes to the makers with the statement, "I want thee and John to have *these*."[38] As to another claim concerning a later loan of $2,000.00, defendants contended this also to have been a gift. They had been paying interest on it and when the $2,000.00 was delivered one defendant indicated that John could use it at six per cent. The Supreme Court affirmed that part of the judgment which found that the notes were the subject of a gift to the makers, but reversed as to the $2,000.00 with instructions to enter judgment for this amount. The reasons were:

(1) Voluntary surrender of a promissary note by the named payee to the maker will operate in and of itself as a gift and extinguishment of the debt and in such case it is not necessary to the validity of the gift that the note shown be endorsed by the payee.

(2) Lack of a note for the $2,000.00 does not evidence an intent to make a gift, and payment of interest negatives donative intent.

(d) *Substantial failure of consideration.*

Scientific Packages, Inc. v. Gwinn.[39] On March 16, 1953, defendant Gwinn gave Shapiro a written 10 day option to buy Gwinn's interest in Scientific Products, Inc. (hereafter called Scientific). Shapiro exercised the option by making certain payments and promising to have Scientific, within 10 days, secure a release from the First National Bank of Denver, releasing Gwinn from all obligation as a guarantor of a third person's note. Gwinn agreed that neither he nor any corporation "now" controlled by him would compete with Scientific, directly or indirectly, for five years, in

[37] 133 Colo. 487, 298 P.2d 386 (1956).
[38] *Id.* at 492, 298 P.2d at 388.
[39] 301 P.2d 719 (Colo. 1956).

the United States. Time was expressly made of the essence. Shapiro, without justification, failed to secure the required release from the bank, and Gwinn had to purchase the note for $10,000.00.

In September, 1953, a corporation called Die-Craft Corporation was organized. Gwinn became a stockholder in this corporation, and in April, 1954, it started to compete with Scientific. Scientific, Shapiro and others, seek to enjoin Gwinn and Die-Craft Corporation from competing. When the application for a temporary injunction was denied by the trial court, a writ of error was prosecuted to review the denial.

The Supreme Court affirmed the denial of the injunction stating:

(1) Failure to release Gwinn from liability on the note held by the Bank in accordance with Shapiro's promise was a substantial breach of the contract, which deprived plaintiffs of the right to demand performance by Gwinn of the agreement not to operate a competing business. The party who commits the first substantial breach of a non-divisible contract is also deprived of the right to complain of a subsequent breach by the other party.

(2) Neither corporation was party to the contract between Gwinn and Shapiro. Gwinn could not compel Scientific to secure the release, and Gwinn did not waive the duty of Shapiro to secure the release.

(3) Die-Craft Corporation was not a corporation, "now" controlled by Gwinn, within the meaning of the March 16, 1953, option contract.

Note: Scientific was a third party donee beneficiary; Gwinn's duty not to compete was dependent on the release, and the donee's rights were likewise dependent (conditional).

8. ILLEGAL BARGAINS

(a) *Restraint of Trade*

A restraint on competition was found to be enforcible and reasonable in the case reported as *Mabray v. Williams.*[40] The plaintiff had hired the defendant as an associate physician under terms of a written contract which restricted Dr. Mabray, upon termination of association with plaintiff, from practicing medicine for five years, in a radius of fifty miles of Lamar, Colorado, without written permission of Dr. Williams. When the contract terminated, Dr. Mabray, without such permission continued to practice in Lamar. Dr. Williams secured an injunction and the Supreme Court affirmed the decree on the basis of *Freudenthal v. Espey,*[41] a case which also involved physicians, quoting: "The reasonable and fair protection to which the plaintiff is entitled can only be obtained by the parties conforming expressly and exactly to the terms of the contract."[42]

Query: Should not public policy, in view of the shortage of doctors, have confined plaintiff to a claim for damages?

[40] 132 Colo. 523, 291 P.2d 677 (1955).
[41] 45 Colo. 488, 102 Pac. 280 (1909) (cited in instant case).
[42] *Id.* at 506, 102 Pac. at 286.

(b) *Severability and enforceability of legal portion of contract.*

If the legal portion of a contract is severable from an illegal portion, the courts will enforce the portion to which no illegality attaches. In *Carter v. Thompkins*,[43] the plaintiff contracted to furnish and install plumbing fixtures, a furnace, stoker, ducts, etc. The statute[44] requires a license to install plumbing fixtures. No such license is required as to the furnace, stoker, ducts, etc., nor to sell plumbing fixtures. From a summary judgment dismissing the complaint when it appeared that plaintiff lacked the statutory license, plaintiff appealed and in reversing the summary judgment and remanding for further action it was held:

(1) Contracts for services by one who is required by statute to have a license to engage in the particular profession, trade or calling, and who does not have such a license are generally unenforcable.

(2) This contract is severable and therefore enforceable as to all amounts due, except for installing plumbing fixtures.

(3) If plumbing fixtures were installed by a licensed plumber, on behalf of plaintiff, that plumber could, in his own name, sue for installation services.

9. Quantum Meruit Recovery For Value of Material Delivered and Labor Performed

Leoffer v. Wilcox[45] presents the unique situation of a suit by a well driller's administratrix for the reasonable value of materials and labor in drilling a well for defendants. During lifetime of the driller the defendants had secured a substantial rebate of monies paid the driller by representing that they were dissatisfied with the well drilled, since it only produced 200 gallons per minute, instead of the guaranteed 1000 gallons per minute. But while leading the driller to believe the well was useless for irrigation, the defendants were arranging to and did use it to irrigate 100 acres of land. In affirming a judgment for the plaintiff, the Supreme Court reasoned:

(1) The refund and rescission agreement "was predicated upon a mistake of fact if the testimony is considered in its most favorable light in behalf of defendants, or as a result of the fraudulent representation taken at its worst. . . ."[46]

(2) As stated in Louthan v. Carson,[47] ". . . where a thing is so far perfected as to answer the intended purpose, and it is taken possession of and turned to that purpose, by the party for whom it was constructed, no mere imperfection or omission, which does not virtually affect its usefulness, can be interposed to prevent a recovery, subject to a deduction for damages, consequent upon the imperfection complained of."[48]

(*Note:* On the court's reasoning, recovery cannot clearly be determined as either contract or quantum meruit, and is here treated as the latter.)

[43] 133 Colo. 279, 294 P.2d 265 (1956).
[44] Colo. Rev. Stat. Ann. § 107-1-9 (1953).
[45] 132 Colo. 449, 289 P.2d 902 (1955).
[46] *Id.* at 452, 289 P.2d at 904.
[47] 63 Colo. 473, 168 Pac. 656 (1919) (cited in instant case).
[48] *Id.* at 477, 168 Pac. at 658.

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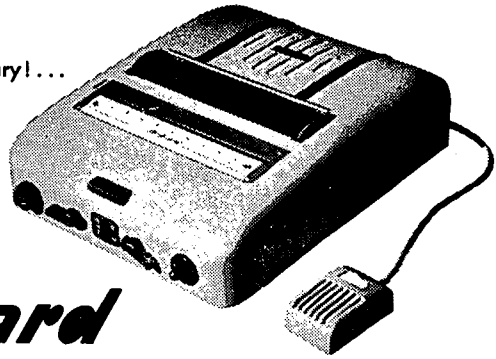

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