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One Year Review of Corporations, Partnership, and Agency

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ONE YEAR REVIEW OF CORPORATIONS, PARTNERSHIP, AND AGENCY*

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Corporations:

The case of *Miller v. Hepner*[1] is the sequel to *Hepner v. Miller.*[2] The Supreme Court in *Hepner v. Miller* had held "that a court has no power, in the absence of a permissive statute, to dissolve a going solvent corporation; to appoint a receiver to sell its assets, and divide the proceeds of such sale among the stockholders."[3] The court ordered the case remanded, with directions to discharge the receiver and to dismiss the action.

Miller v. Hepner involved the question whether the trial court was correct in fixing: (a) the receiver's fee at $100 a month for the twelve months he acted as such, (b) $750 as the fee for the receiver's attorney, and (c) the fee of appraisers retained by the receiver to appraise the corporate real estate. The second question was whether such expenses should be charged against the plaintiff stockholders who brought the action for the appointment of the receiver. The trial court decided all these issues against the plaintiffs. *Held,* judgment modified by reducing the receiver's fee and his attorney's fee by fifty per cent. The supreme court held with the trial court that such fees were chargeable to plaintiff stockholders, who had improperly obtained the appointment of the receiver. But, "As to the fees for appraisal of the real estate, it is to be observed that this appraisal was premature on the part of the receiver and it is only fair and just that he be directed to pay this item."[4]

In *Fehr v. Hadden,*[5] plaintiffs were stockholders in a mutual nonprofit corporation organized under the Colorado statutes for the purpose of acquiring and distributing water for domestic purposes in Jefferson County. All water users were required to own stock in the corporation. The plaintiffs brought action against the corporation and its directors, to have an election of directors declared invalid on the grounds: (1) that certain record stock owners allowed to vote at the election were building contractors, and should not have been allowed to vote, because they might dispose of their stock to purchasers of homes, and that they, therefore, were not bona fide stockholders for the purpose of voting; and (2) that certain record stockholders were not bona fide equitable owners of stock because they had contracted to sell the stock to others, and consequently should not have been allowed to vote. The trial court entered judgment for the defendant directors. *Held,* judgment affirmed. (a) The Colorado statute[6] provides that, unless the articles of incorporation of a Colorado corporation shall provide to the contrary, every shareholder of record is entitled at every shareholders' meeting to one

* This article concludes the review of cases decided between Nov. 1, 1955 and Jan. 1, 1957. For six other annual review articles see 34 DICTA 69-122 (1957).

[1] 132 Colo. 395, 292 P.2d 968 (1955).

[2] 130 Colo. 243, 274 P.2d 818 (1954); see Note, 32 DICTA 314 (1955).

[3] 130 Colo. at 246, 274 P.2d at 819.

[4] 132 Colo. at 399, 292 P.2d at 970.

[5] 300 P.2d 533 (1956).

[6] Colo. Rev. Stat. Ann. § 31-2-7 (1953).

vote for every share standing in his name on the books of the corporation. There was nothing to indicate that the articles of incorporation provided for any limitation on voting rights. Consequently, the building contractors' intention to sell their stock at some time in the future did not disqualify the stock from being voted. (b) The Colorado stock transfer act expressly permits a corporation to "recognize the exclusive right of a person registered on its books as the owner of shares . . . to vote as such owner. . . ."[7] And the same act contains the definition: "(i) 'Title' means legal title and does not include a merely equitable or beneficial ownership or interest."[8] Therefore, the mere fact that certain stockholders of record had contracted to sell their stock would not preclude them from voting that stock.

The case of *Colorado Builders' Supply Co. v. Hinman Brothers Construction Co.*[9] involved the question of what constitutes doing business within the state by a foreign corporation so as to make it amenable to process served on its employees within the state. The defendant corporation, an Illinois corporation, had not qualified to do business in Colorado, nor had it designated an agent for process. It manufactured heavy earth-moving machinery in its plants in Illinois and Georgia, and sold its products in Colorado, and portions of Nebraska and Wyoming, through an exclusive distributor, the plaintiff, a corporation.

[7] *Id.* § 31-9-3.
[8] *Id.* § 31-9-21.
[9] 304 P.2d 892 (1956).

The plaintiff was the defendant's distributor for just less than a month, from May 1, 1953, to May 29, 1953, and from the latter date to October 12, 1953, the defendant had no distributor in Colorado. In September 1953, one Murphy became the defendant's district representative. Murphy's first efforts were toward finding a suitable distributor for his company, and on October 12, 1953, Liberty Company became the distributor in Colorado. Murphy made his services available to Liberty in providing the personnel with a working knowledge of the equipment and in giving sales training to Liberty employees. On some occasions, he accompanied Liberty salesmen in meeting prospective customers. At all times following his appointment, Murphy spent a very substantial portion of his time outside Colorado, although he lived in Denver because of its central location. He made written reports of his work to the defendant corporation. He was paid a fixed salary by the defendant, drew no commissions, and was not supplied with an office.

In addition to the district representative, the defendant corporation employed one Slade as a service engineer. The area to which he was assigned comprised all the United States west of and including Texas, Oklahoma, Kansas, Iowa, Minnesota, Wisconsin, as well as portions of Canada, Alaska, and Hawaii. His duties were to train and counsel distributors on problems of maintenance, repair, and upkeep of machines made by defendant. He worked under direct orders from the factory, and was in no way responsible to the distributor. When Liberty became a distributor in Colorado, its employees were not familiar with the equipment and had to be trained to service and maintain it. Slade occasionally went with the distributor's service man on a repair job, because the distributor's employee was too inexperienced to locate the trouble with the equipment. Slade was paid a salary by the defendant, and the defendant was not reimbursed by the distributor in the few instances in which Liberty called upon Slade to assist in repair work.

The plaintiff served process, in an action in personam against defendant corporation, on both Murphy and Slade, referring to each, in the return of service, as "agent and principal employee" of the defendant. The defendant moved to quash the service of process on the grounds: (1) that it was not engaged in business in Colorado; and (2) that the persons served were not agents for accepting service of process. After hearing evidence, the trial court determined

that the defendant corporation was not "doing business" within Colorado so as to be amenable to process served within the state. *Held,* judgment affirmed.

In *Western Homes, Inc. v. District Court,*[10] it was held: "A corporation can conspire and can commit a tort."[11] The alleged tort was common law deceit.

Partnership:

The only partnership case found is *Bennett v. Gardner.*[12] In that case the plaintiff brought an action against his former partner for an accounting. He alleged a loan of $800 to the former partner and, on information and belief, alleged that $5,000 was the approximate amount due for assets sold and unaccounted for by the former partner. The trial court was unsatisfied with the account filed by the defendant on court order, because the court considered it incomplete. The defendant's counsel claimed that the defendant could not submit any other records. Thereupon, on motion of the plaintiff, the court entered judgment for the plaintiff for $5,800 as prayed for in the complaint, "since any other course of action appeared useless."[13] *Held,* reversed and remanded to the trial court, with direction to vacate the judgment against defendant and grant a new trial. It was encumbent on the plaintiff to establish his case by evidence of the amount due under the accounting, "and the court cannot, without proof, assume that the amount due plaintiff is the sum named in his complaint."[14]

In the supreme court's report of the *Bennett* case, it is difficult to discover whether the court considered that either a real partnership or a real joint adventure had been formed. It speaks of "the so-called partnership agreement." Assuming that partnership law was involved, the case poses a real problem for the dormant partner who asks for a court accounting, on dissolution, from the active partner who was in entire charge of the business. When the active partner refuses to file a complete account as ordered by the trial court, is the court powerless to give relief to the dormant partner? Maybe the trial court could cite the active partner for contempt of court, but that would not benefit the dormant partner in a pecuniary way. Strangely, not a single case is cited by the Supreme Court for its holding, nor did it cite the Uniform Partnership Act,[15] adopted in Colorado.

Agency:

Cases concerning the relationship of principal and agent, and master and servant, are included here, but workmen's compensation cases are omitted.

Three cases deal with real estate brokers. The first is *McCullough v. Thompson.*[16] In that case, the defendants, the owners of certain real property, listed the property with the plaintiffs, real estate

[10] 133 Colo. 304, 296 P.2d 460 (1956).
[11] *Id.* at 310, 296 P.2d at 463.
[12] 133 Colo. 33, 291 P.2d 705 (1955).
[13] *Id.* at 37, 291 P.2d at 707.
[14] *Id.* at 38, 291 P.2d at 708.
[15] Colo. Rev. Stat. Ann. §§ 104-1-1 to 43 (1953).
[16] 133 Colo. 352, 295 P.2d 221 (1956).

agents, for sale at a certain price. The defendants agreed in writing to pay the agents a commission of five per cent if a purchaser ready, willing, and able to buy the property on the terms prescribed was found within sixty days. The agents did find such a purchaser within sixty days, but the defendants refused to go through with the sale. Thereupon, the plaintiffs sued for the agreed commission, with interest, and obtained a judgment for that amount. *Held,* judgment affirmed. "Under the pertinent statute . . . they were entitled to their commission."[17]

In *Ginsberg v. Frankenberg,*[18] the defendant gave a non-exclusive listing of his property to the plaintiff, a real estate broker who was also an attorney. The contract of listing was drafted by the plaintiff, and provided for a commission to the plaintiff if he found a purchaser willing to pay the amount asked by the defendant. Plaintiff was unable to find such a purchaser. Defendant subsequently sold the property through another agent, and paid the latter a commission. Plaintiff sued the defendant, claiming he had earned a commission. In the trial court, after the plaintiff had put in his evidence, the defendant moved for a nonsuit and dismissal of the complaint. This motion was granted. *Held,* judgment affirmed. The supreme court stated that if there was any ambiguity in the contract, it must be construed against the writer. The court then went on to say: "Recovery in this case is not only barred by the decisions of this court, but by . . . ." the statute.[19]

In *Heady v. Tomlinson,*[20] a real estate broker brought action to recover a commission for effecting a sale of real estate for the defendant. The defendant had been negotiating with one Larreau regarding selling to Larreau certain wheat land owned by the defendant. Later, Larreau introduced the plaintiff to defendant; and upon the plaintiff's representation to the defendant that he would have some cash buyers on the defendant's land the next day, the defendant agreed to allow the plaintiff to show the land for sale and to pay a commission to the plaintiff if a sale was made. Larreau later decided to buy the land and he informed the plaintiff of his desire. The plaintiff showed the defendant's land to certain prospective cash buyers, but a sale did not materialize. The plaintiff

[17] *Id.* at 355, 295 P.2d at 222 [citing Colo. Rev. Stat. Ann. § 117-2-1 (1953)].
[18] 133 Colo. 382, 295 P.2d 1036 (1956).
[19] Colo. Rev. Stat. Ann. § 117-2-1 (1953).
[20] 299 P.2d 120 (1956).

then informed the defendant of Larreau's offer, and the defendant informed the plaintiff that he would accept Larreau's offer. Subsequently a contract of sale was entered into between the defendant and Larreau, at which time the plaintiff was present. Plaintiff demanded his commission from the defendant, but the defendant refused to pay it, on the basis that he, and not the plaintiff, had produced the buyer. The case was tried to the court without a jury, and judgment was entered for the plaintiff. *Held,* judgment reversed and the cause remanded with directions to enter judgment for the defendant. The plaintiff did not produce a purchaser. Defendant and the purchaser had already been negotiating for the sale of the property, and plaintiff did nothing to induce the buyer to purchase the property.

In *Weick v. Rickenbaugh Cadillac Co.*,[21] suit was brought by the administrator of the estate of decedent to recover commissions which plaintiff claimed that his decedent had earned while employed as sales manager for the defendant automobile distributing company. The contract between the plaintiff's intestate and the company was silent as to when the plaintiff's commission would be deemed earned. Under the contract, the plaintiff's intestate was to receive a certain per cent of the sale price of all cars sold by the defendant company, as his commission as sales manager. Plaintiff contended that the contract included cars sold during his intestate's lifetime but delivered afterwards. The practice of the defendant company was to pay the commissions on the fifteenth day of the month following the last month of each quarter. The trial court held that the plaintiff's intestate was not entitled to commissions on cars sold prior to his death but delivered afterwards. *Held,* reversed. "The basic error lies in the failure of the trial court to recognize the distinction between the time when a commission is earned and the time when it may become due and payable.[22]

Garden of the Gods Village v. Hellman[23] involved the distinction between the relationship of principal-agent and the relationship of employer-independent contractor. Defendant corporation was engaged in developing its real property for the purpose of subdividing the land into lots to be sold to the public. Heyn was president of the corporation and controlled practically all of its issued stock. The corporation, through Heyn, employed two brothers at a stipulated wage per hour to blast out some large rocks that were on the land. One of the brothers suggested to Heyn that about a hundred holes should be bored and then fired with light loads of blasting material. However, to save cost, Heyn directed that only four or five holes be bored and then fired with heavy loads. As a result of the brothers' following Heyn's directions, plaintiff's nearby building was materially damaged by concussion from the blasting. The plaintiff obtained a verdict and judgment against the defendant corporation. *Held,* judgment affirmed. The court first found that the brothers were not independent contractors but were servants of the corporation, and "it was liable for any damage result-

[21] 303 P.2d 685 (1956).
[22] *Id.* at 687.
[23] 133 Colo. 286, 294 P.2d 597 (1956).

ing from their operations. . . ."[24] The court then observed that the work was of an inherently dangerous character, and in such a case an employer cannot evade liability by engaging an independent contractor.

The case of *Radosevich v. Pegues*[25] involved the question whether an attorney, who has entered his appearance on behalf of a party to an action, may compromise and settle his client's claim without the knowledge and consent of his client. The facts are somewhat involved, but it will suffice for our purposes to say that the supreme court followed settled Colorado authority in stating that the attorney "may not compromise his client's cause without express authority."[26]

Two master and servant cases were decided by the Colorado Supreme Court. (Workmen's compensation cases are omitted here.) One of the master-servant cases, interesting on its facts, is *Lombardy v. Stees.*[27] Defendant was the owner of the Pioneer Hotel and bar in Steamboat Springs, and one Brasier was in his employ as bartender. Brasier was instructed not to serve any patron who had had too much to drink. The plaintiff entered the bar one night, drank several glasses of beer, and then argued with the bartender over whether the latter had given him the proper change. The plaintiff claimed that, later, the bartender asked him to leave, and when he was a few feet from the door the bartender came from behind the bar and beat him with a golf club handle. The bartender claimed that the plaintiff called him a "dirty name" and that he thought the plaintiff was looking for trouble with him personally and not with the patrons of the bar. The plaintiff sued the defendant and the bartender for his injuries. The first trial was before a jury, which failed to reach a verdict. Another trial was had with no service being had on the bartender and no appearance being made for him. The court instructed the jury as to acts of the servant entirely for his own purposes being beyond the scope of his employment, and added:

> "The fact, however, if it be a fact, that at the time of and in the perpetration of the wrongful act complained of, the servant was combining some private purpose of his own with the business of his master is not of itself sufficient to take the wrongful act outside of the scope of the authority and employment, and the master will not on that account be relieved from liability."[28]

Counsel for the defendant objected to the instruction, but was overruled. The jury brought in a verdict for the plaintiff for $20,000, and judgment was entered thereon. *Held,* judgment reversed and the cause remanded with directions to dismiss the complaint. The supreme court stated that the above-quoted instruction was erroneous, because there was no evidence in the case to show that the bartender was acting partly in behalf of his master.

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[24] *Id.* at 294, 294 P.2d at 601.
[25] 133 Colo. 148, 292 P.2d 741 (1956).
[26] *Id.* at 152, 292 P.2d at 743 (dictum).
[27] 132 Colo. 570, 290 P.2d 1110 (1955).
[28] *Id.* at 575, 290 P.2d at 1112.

It seems to us that the supreme court was somewhat naive in its examination of some of the evidence. For instance, the court said: "There was a stick, apparently the handle of a golf club, in the bar and it is not shown by the evidence that it was used for any purpose in the operation of the bar as such."[29] Would it not be more realistic to say that the stick was kept there, behind the bar, for some useful purpose connected with the operation of the bar? It certainly was not kept there for playing golf, since it was useless as a golf club.

Whether the bartender was acting within the scope of his employment was properly a jury question, and since the evidence on that point was conflicting, the direction given by the trial court was proper. The local jury was in a much better position to determine who was telling the truth than was the appellate court, which read the abstract of record and the briefs in Denver.

A case equally interesting on its facts as the preceding one, but not as doubtfully decided is *Bidlake v. Shirley Hotel.*[30] There the plaintiff drove his car up to the entrance of the Shirley-Savoy Hotel, operated by the defendant in Denver, preparatory to registering as a guest. He was asked by the defendant's uniformed employee if he desired his car stored. Plaintiff answered in the affirmative and gave the car keys to the employee, a night porter. Instead of taking the car to the garage, the employee used it for a "joy-ride" and damaged it. Upon the plaintiff's recovering the car the next day, valuable personal property had been taken from the glove compartment. Plaintiff sued the defendant hotel for the damage to the car and the loss of the personal property. Defendant set up in defense that the employee had no authority to take the plaintiff's automobile to a garage and that the employee converted the automobile to his own use. The defendant gave evidence tending to show: that it was not the practice of employees of the hotel to take guests' cars to the nearby garage for storage; that the doorman ordinarily was the person who would take the car keys of a guest who wished his car stored; that the doorman would give the guest a claim-check and would call the garage to have it send a shag-boy to come for the car; that the employees had been instructed that only the supervisor and the doorman should ever drive move a guest's car and then only in an emergency; and that it was not the custom in Denver to permit porters or bellhops to drive automobiles of guests arriving by automobile. The trial was to the court, and at the conclusion of all the evidence judgment was entered in favor of the defendant. *Held,* judgment reversed. A guest registering at a hotel has no duty to inquire as to the limitations of an employee's authority. Defendant had vested the uniformed employee with apparent authority to accept on its behalf the delivery of the plaintiff's automobile for storage.

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[29] *Id.* at 572, 290 P.2d at 1111.
[30] 133 Colo. 166, 292 P.2d 749 (1956).