Denver Law Review

Volume 33 | Issue 2 Article 3

January 1956

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Recommended Citation
Paul Goldsmith, One Year Review of Cases on Contracts, 33 Dicta 57 (1956).

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ONE YEAR REVIEW OF CASES ON CONTRACTS

BY PAUL GOLDSMITH, *of the Denver Bar*

For the purpose of this review, the cases have been divided into (A) Six cases which were affirmed by the Supreme Court, and (B) Six cases which were reversed in whole or in part by the Supreme Court.

A. CASES AFFIRMED:

Ralph Yockey, etc, vs Mae I. Graves, Executrix, etc.[1]

The defendant Yockey is a common carrier of live stock. Defendant contracted with Plaintiff's testator to transport a large number of cows and calves from a designated place in Colorado to a designated place in Wyoming. Owing to bad roads and adverse weather conditions the defendant's drivers "jumped" the cattle before reaching the designated destination. As a result, 40 cows and 70 calves were lost and unaccounted for. Plaintiff obtained judgment for the agreed value of the lost cattle and defendant was denied recovery of shipping charges. The defendant sought reversal on various grounds summarized, for the purposes here pertinent as follows: (a) that the damages were due to an act of plaintiff's agent or (b) due to an act of God.

The Supreme Court refused to inquire into the trial's findings of facts which appear to have been made on disputed evidence. The trial Court found among other facts that the plaintiff was not negligent and that there was no act of God, no act of any public enemy, no inherent nature of the goods shipped which would operate to excuse the defendant, and that defendant breached its contract to carry.

Held: affirmed. (1) "The general rule . . . is that carriers of live stock are liable absolutely for loss of or injury to stock entrusted to them for transportation, like other common carriers, unless the loss or injuries were occasioned by the act of God, or the public enemy, or the negligence of the shipper, except that they are not liable for loss or injury caused by the "proper vice" of natural propensities of the animals themselves, and not by any negligence on the part of the carriers."

Citing: Colorado & Southern Railway Co. vs. Breniman, 22 Colo. App. 7, 125 P. 855 and Moore on Carriers, page 509. (2) This being an action for breach of contract, and the breach being shown, plaintiff was not required to establish negligence on the part of defendant. Damages for the breach being recoverable independently of the question of defendant's negligence.

Montgomery Ward & Company vs. R. A. Reich.[2]

Defendant, Reich, was store manager for the plaintiff company under a written agreement prepared by the company which stated the base salary and provided for payment of "extra compensa-

[1] — C—, 281 P. 2d 1004.
[2] — C—, 282 P. 2d 1091.

tion" on the basis of a sliding percentage of "net profit" during the applicable fiscal year of the company. The contract stated: ". . . If, during the year, your employment is terminated for any reason . . . both your eligibility for Extra Compensation and the amount thereof, if any, shall be at the discretion of a Bonus Committee . . ." and "No extra compensation or any part thereof shall become due or payable before the end of the fiscal year." When the company sued Reich on his open account, Reich counterclaimed for $1,134.54 of "extra compensation" although Reich had voluntarily left the employment of the company 8 months after the year began. The jury awarded Reich a verdict for $706.34, after deducting the agreed amount of the open account. Judgment was entered on this verdict and this reviewed on writ of error.

Held: Judgment on the verdict affirmed. (2 justices dissenting, 1 not participating)

1. Forfeitures are not favored in the law, and to be effectual, must be clear and unequivocal; and 2. this contract is to be liberally construed in favor of defendant because it was drafted by plaintiff. 3. In the absence of any failure on the part of defendant to faithfully serve plaintiff under this contract, justice requires that it be determined that he earned the proportionate part of the net profit of the store for the period which he served. 4. The statement: "no extra compensation or any part thereof shall become due or payable before the end of the fiscal year" is not a condition concerning the payment of extra compensation, but is only a fixing of the

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time at which it was to be paid—net profit could not be determined until the end of the year. 5. In giving the bonus committee discretion, it is implied that the bonus committee will act upon a sound judgment and it is, of course, precluded from arbitrary or oppressive action. 6. There is no showing of bad faith on the part of the committee, it did not abuse its discretion, it just simply did not use discretion in construing the terms of the contract liberally in defendant's favor; but was misguided in its interpretation to the effect that no extra compensation could be claimed by defendant because he did not serve until the end of the fiscal year. *George H. Curtis, as Conservator . . . et. al. v. E. E. Wilson.*[8]

Plaintiffs secured a written option from defendant to purchase defendant's interest in certain partnership assets, including state land leases on Oct. 7, 1948. Plaintiffs and defendant had been partners in the ranching business. Dec. 27, 1948, plaintiffs paid the total purchase price for defendants interest in assets and leases to defendant. January 6, 1950, plaintiffs secured approval of the assignment of defendant's interest in the state leases from the State Land Board and paid the board, voluntarily, the sum of $2,500.00 in connection with a re-assignment of the leases to a third party. August 1950, plaintiffs actually transferred and assigned the leases to the third party. Paragraph 3 of the State Land Lease provided that upon assignment the lessees shall pay to the State Land Board one-half of the capital gain on said leases. Paragraph II of the option agreement stated: "II . . . said payment (the option price) to be made upon the . . . assignment of said State Leases . . . and upon the approval of said assignment by the State Board of Land Commissioners." The payment of December 27, 1948, by plaintiffs to defendant was made before such approval was obtained, and the payment to the State Land Board was shown to have been computed with reference to the transfer to the third party. Plaintiffs sued defendant for one-half of the payment to the State Land Board, their complaint was dismissed by the trial court.

Held: "There being no term in the contract requiring defendant to secure the approval of the State Land Board, and the state land lease terms not being incorporated into the contract by

[8] .... C ...., 282 P. 2d 1079.

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reference or interpretation, and plaintiffs' payment of $2,500.00 capital gain on the leases being voluntary by plaintiffs, the trial court was right in holding the requirements alleged to be performed by defendant were not established." Which means: The plaintiff failed to show that the defendant was under any duty to pay.

Phillip Niernberg, v. Nathan B. Feld et. al.[4]

This was an action to recover a deposit of $1,500.00 paid by Mr. and Mrs. Feld to Mr. and Mrs. Niernberg under the terms of a "receipt and option" regarding real estate. Finding that they would not be able to comply with the requirements to purchase the real estate, Mr. Feld and Mr. Niernberg met in the office of the Felds attorney and there was a verbal agreement that the deposit of $1,500.00 would be refunded if the sellers later sold the property for the same or a greater price than that stated in the "receipt and option." The Niernbergs did in fact later sell the property for the same or a greater price than that price the Felds were to pay. The oral agreement was denied by Mr. Niernberg, but found by the jury to have been made. Mrs. Niernberg, not having been a party to the alleged rescission, and having denied the authority of her husband to enter into such a rescission, was dismissed from the action.

Held: Affirming the verdict and judgment thereon for refund of the deposit: (1) This is a case of first impression in Colorado, and though there is a conflict in decisions of other jurisdictions, the better reasoned rule is that the statute of frauds (Ch. 71, Sec. concerns the making of contracts only, and does not apply to parol agreements rescinding a prior written executory contract involving title to, or an interest in, lands. 2. The consideration for the rescission was a promise for a promise involving the release of each party from further performance. 3. The fact that Mr. Niernberg assumed to act for himself and Mrs. Niernberg in her absence cannot be urged to relieve him of his own actions and declarations.

[4] .... C...., 283 P. 2d 640.

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Associated Master Barbers of America, Local No. 115, *etc. vs. Journeyman Barbers, Hairdressers, etc.*[5]

Reeves and the Journeyman Barbers, etc., brought action under R.C.P. 57 (b) for construction of a contract. Neither of the plaintiffs were parties to the contract they sought to have construed. Reeves had previously had a contract with the Associated Master Barbers but refused to sign the contract under examination, a contract which had been signed by over 400 barber shop operators. From a dismissal of the complaint this review was prosecuted.

Held: Affirmed. (1) To permit action under Rule 57 (b) there must be involved a judicial declaration of right "under a . . . contract . . ." It is well settled that a proposed contract affords plaintiff no right to have it construed, and since no contract or rights of the parties is adversely affected, plaintiffs' action cannot stand. (2) This is not a class action. There is no allegation in the complaint, neither is there any evidence in the record, that the persons plaintiffs seek to represent are so numerous as to make it impractical to bring them all before the court; Rule 23 (a). (3) The Court could not affect the contract of the more than 400 shop owners who have signed it unless pursuant to Rule 57 (j) they were made parties to the action. (4) The Colorado Labor

[5] .... C....; 285 P. 2d. 599.

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Peace Act C.R.S. '53 80-5-1 is inapplicable and does not prohibit a proprietor of a three man barber shop from belonging to the union.

Capitol Fixture & Supply Company, a Colorado Corporation, v. National Fire Insurance Company of Hartford.[6]

Plaintiff was a judgment creditor of a third party who held a fire insurance policy in defendant company. This action was an attempt to compel payment under the policy, by way of garnishment of the insurance company. The insured's fire loss occurred December 20, '46. The writ of garnishment was issued 3 years after the fire. Liability on the policy had been denied March 25, 1947. The policy contained standard provisions stating: ". . . That no suit or action be sustainable unless commenced within twelve months after the inception of the loss . . ." The Supreme Court approved the findings of the trial court that there had been no waiver of the requirements that proof of loss be filed within 60 days and that suit be instituted within 12 months of the loss. The court further approved the trial court's finding that there was no sufficient excuse for the failure to file the proof of loss within 60 days of the fire and determined that the 12 month limitation on suit upon the insurance contract was not unreasonable, pointing to Daly v. Concordia Fire Ins. Co., 16 Colo. App. 349, 65 Pac. 416, wherein a six months' limitation upon the time within which suit may be instituted is not unreasonable.

So here the garnisher, who was not a party to the insurance contract, loses and the court gave full effect to the condition precedent of filing of proof of loss within 60 days of loss and to the condition subsequent that required suit be commenced within 12 months of date of loss.

B. Cases Reversed In Whole Or In Part:

Theodore Argys, Gust Argys, doing business as Argys Brothers Garage vs. F. D. McGlothlen, Dorothy Cowan and Muriel Patricia Brooks, doing business as Cowan Coal and Feed Yard.[7]

Defendants Cowan and Brooks, as sole heirs of George F.

[6] C ; 279 P. 2d. 435.
[7] 276 P. 2d. 983.

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Cowan inherited the Cowan Coal and Feed Yard. After two years operation of the same, they sold it in 1947 to McGlothlen, on contract. McGlothlen defaulted in payment, and in December 1950 Cowan and Brooks repossessed the business. At that time there were accounts receivable of some $7,000.00, and they agreed to collect these accounts and pay the debts of the business out of the same. In July 1952 this action was instituted to collect $1,426.96 being incurred between January 9, 1950, and January 11, 1951, by McGlothlen as to all but $185.47, which balance had been incurred by Cowan and Brooks. The trial judge gave judgment by default for $641.45 against McGlothlen and for $185.47 against Cowan and Brooks who admitted they purchased goods for that sum after the repossession. The remaining $600.00 was not involved having been paid out by Cowan and Brooks. The trial court said that it could not see any consideration for the promise to pay the debts of McGlothlen. The promise to pay the debts appears to have been oral. No question of the bulk sales law was raised.

Held, reversing. (1) Where the promise to pay the debt of another is in consideration of property or funds received from the debtor for the express purpose of paying the debt, an oral promise to pay the debt is not within the statute of frauds and there is consideration flowing from the debtor to the promissor. (2) Both the debtor and creditor may sue on such a promise though made to debtor alone. (3) Had defendants Cowan and Brooks collected an amount in excess of the business debts which McGlothlen owed, they would without question have been entitled to retain such excess, and they were liable if the amount collected did not equal the indebtedness assumed.

Comment: It is worth noting here that there is no direct reference in *Argys vs. McGlothlen* to the contract as a third party creditor beneficiary contract. A failure to clearly understand the nature of such third party creditor contracts has frequently been evidenced by the contention made and were erroneously followed by the trial court, to-wit: That there was no consideration for the promise of Cowan and Brooks made to McGlothlen (the debtor) to pay to plaintiff (the third party and creditor of McGlothlen). The same failure to recognize such third party creditor relationships has also led to confusion as to whether or not such promises

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must be in writing under the statute of frauds as a promise to pay the "debt of another." In the promise to pay the "debt of another," the promise is made *to the creditor* to whom a "third person" (the debtor) is or later becomes obligated. In the third party contract the debtor is himself the promisee, and the creditor is the third person. The Promissor as in *Argys vs. McGlothlen* is by his contract not answering for the "debt of another" but for his own debt arising out of his contract with the debtor-promisee. In the promise to answer for the debt of another, which must be in writing (C.R.S. '53, 59-1-12 (2)), the debtor is not a party to the contract, but is the third person, whereas the creditor is the promisee and is a party to the contract.

Herbert J. Newcomb, Jr., and Bernard H. Johnson, plaintiffs in error vs. Betty W. Schaeffler and Willy J. Schaeffler, Defendants in error.[8]

Plaintiffs, owners, sued for damages on breach of written contract. Plaintiffs contracted to pay cost plus $2,000.00 to defendants, contractors, for the erection of a residence on plaintiffs' lots and defendants contracted to erect the residence "as shown on the drawings and described in the specifications prepared by Owners" and "to find, provide and furnish such materials of such kinds, qualities and descriptions, as shall be fit, proper and sufficient for completing and finishing all the work or works mentioned in a good, substantial and workmanlike manner *to the satisfaction* of and under the direction of *the owner*." Plaintiffs paid for all materials and work, and paid $1,000.00 of defendants' profit. No specifications were ever prepared, but plans were. Work was commenced in July 1951, and continued until September 1951, when defendant Johnson reported to one of the plaintiffs that cracks had developed in the foundation and walls of the house. This condition was due to the settling of the soil and evidence showed that thereafter some work was done to solidify the soil by chemical treatment and to underpin the foundation.

On trial to the Court the following damages were found to have been sustained by plaintiffs:

[8] — , 279 P. 2d. 409.

(a) $1,350.00 to correct the soil condition
(b) $4,000.00 major structural repairs, etc.
(c) $1,500.00 replacing certain moldings and trim, patching plaster, replacing brick, etc.
(d) $200.00 delay in completion.

The damages totaled $7,050.00, from which the court deducted $1,000.00 being the balance of defendants' profits under the contract.

As to items (b), (c) and (d) the Court stated, without citing authority: "under the well-known rule that a finding of fact based on conflicting testimony will not be set aside upon review, we cannot reverse the judgment so far as it relates to the items embraced in the award of $5,700.00.

Regarding the item of $1,350.00 awarded for the soil solidification, the court found it could have been done for $600.00 prior to the time the cement floors were laid in the basement. (Plaintiffs contended they should not have to pay for any part of this solidification.) The $600.00 would have fallen under "cost" under the "cost plus" contract, and should have been deducted by the trial court. In this connection, the Court approved the rule as follows:

"If he (contractor) wishes to protect himself against the hazards of the soil, . . . he must do so in his contract." *White vs. Mitchell,* 123 Wash. 630 213 Pac. 10. "If the difficulties are apparent on the surface he must overcome them. If they are not, but become apparent by excavation or the sinking of the building, the rule is the same. He must overcome them, and erect the building simply because he has agreed to do so—to do everything necessary for that purpose."
Superintendent vs. Bennett, 27 *N.J.* 513, 72 *Am. Dec.* 373.

At the common law a contractor who undertakes an entire contract for erecting a building is presumed, in the absence of any express provision to the contrary, to have assumed the risk of unforeseen contingencies arising during the course of the work. . . . Under this rule there is no implied warranty of the sufficiency of the soil to support the building to be erected, and the contractor assumes the risk of loss incident to such defectiveness."

To be entitled to the $2,00.00 profit, the defendants must show that they had substantially complied with their contract. This means that although the conditions of the contract have been devi-

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ated from in trifling particulars, not materially detracting from the benefit the other party would derive from a literal performance, he has received substantially the benefit he expected, and is therefore bound to pay. The court then approved the holding in *Nance v. Patterson Bldg. Co.*, 140 Ky. 564, 13 S.E. 635. "As a matter of law, it is a substantial failure if the foundation of a house cracks so as to leak and crumble immediately after its completion; whereas, if it had been properly constructed it would have done neither." Therefore, defendants are not entitled to any part of this $1,000.00 balance of profits. Here the deviations from plans and contract were not trivial or slight . . . defendants did not perform in a good and workmanlike manner and the structure as delivered was not satisfactory to plaintiffs. Judgment modified and cause remanded with instructions to enter judgment in favor of plaintiffs for $6,450.00.

Query: If the plaintiffs had asked for a further allowance of $1,000.00, representing the portion of profit forwarded to and retained by defendants, should plaintiffs have been awarded this additional amount? It is the reviewer's belief that since there was not substantial performance, as a matter of law, there would have been good grounds for a claim for refund of this profit.

Clesta Johnson Holscher, as the Administratrix of the Estate of Paul F. Holscher, Jr., deceased et al. vs. Charles N. Ferry, Defendant in Error.[9]

Ferry, plaintiff, sued to rescind a contract of May 23, 1952, under which he sold his interest in Winslow & Associates Construction Co. to defendants' intestate, for an agreed consideration of $20,000.00 represented by four $5,000.00 promissory notes. Paul F. Holscher, Jr., the purchaser, died July 10, 1952. The contract interest in Winslow & Associates Construction Co., was inventoried at $12,000.00, but the best offer made to the administratrix for this interest was $6,500.00. August 28, 1952, plaintiff filed his claim for $20,000.00 in the estate proceedings basing the claim on the notes, the claim was allowed by the County Court and never withdrawn. When it appeared that the claims in the estate exceeded the value of the estate and plaintiff would receive much

[9] ___; 280 P. 2d 655.

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less than the sale price of $20,000.00, plaintiff, on January 28, 1953, made demand for rescission of the contract and on February 11, 1953, filed suit for rescission. The promissory notes were attached to the claim filed in the County Court. The defendants contend that the purchase under the contract of May 23, 1952, was a fully executed transaction and that the filing and allowance of the claim in the County Court was an election and barred the plaintiff from prosecuting this action; that the only relationship between plaintiff and decedent was that of debtor and creditor. The trial court held that "there was breach of a dependent covenant (payment)" and that equity required the recission of the contract. A writ of error was obtained to review this judgment.

Held: Plaintiff, by filing his claim in County Court for $20,000.00 based on the notes, affirmed the contract and waived his right to rescind, especially as he never withdrew this claim and it was allowed.

(1) The notes, attached to and filed with and in support of the claim in County Court, were merged in the judgment of the County Court when the claim was allowed.

(2) There is substantive inconsistency between the legal remedy of suit on the notes, by filing claim in the County Court, which amounted to an affirmance of the contract, and the equitable remedy thereafter sought by seeking to rescind the contract by the instant suit. The inconsistency is clearly seen when it is recognized that the suit on the notes is based on title in the purchaser, and the suit to rescind is based on title in the seller.

(3) The election is not effective and there is no estoppel where the party, in selecting his legal or equitable remedy, acts in ignorance of the facts, or where both are predicated on the affirmance or on the disaffirmance of a contract.

(4) Where a party has alternative remedies of rescission and of damages for breach, he must elect, at some stage, upon which remedy he will base his action. The court then stated: "By filing his claim in the county court Ferry affirmed the contract and at the same time elected the remedy he wished to pursue. Having done so, he is barred from suing in the district court for rescission . . ." "Once a claim has been filed in the county court, no other court should act upon that claim, or upon the subject matter

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thereof, until the final determination by the county court. (citing cases)."

Comment: This case may shed some light on the problem of pleading, in the alternative, substantively different claims in the same suit. Can it be that this light arises out of the Supreme Court's use of the word: "especially" when the Court states: ". . . Ferry by filing his claim . . . based on the notes, affirmed the contract and waived his right to rescind, *especially* as he never withdrew this claim and it was allowed. . . ." Where substantively different theories for claims for relief are set forth in one complaint, there should always be the possibility of the withdrawal of one or the other inconsistent theory for relief and a choice could be made after all the evidence is in. Here we have suits in two different courts, on two inconsistent theories. The same inconsistency pleaded alternatively in a single suit. Would not amount to an election to affirm. Rule 8 (e) (2) R.C.P.

It should also be noted that in the case here reviewed the affirmance of the contract preceded the attempted rescission in point of time, and they occurred in two distinct cases in different courts. Generally, a prior affirmance bars a subsequent rescission; however, a prior attempted rescission does not generally bar a subsequent affirmance. This arises from the fact that the rescission is, in the sense here used, not final until so decreed by the Court, whereas, no such approval of the Court is needed to make final an act of affirmance.

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Harry I. Gardner and Maurice Gardner, general partners doing business as Gardner Construction Company. Plaintiffs in error, vs. City of Englewood, a municipal corporation, defendant in error[10]

Plaintiffs contracted with defendant to perform certain services in connection with erection of a concrete storage reservoir for defendant. Near the end of the construction a controversy developed as to whether plaintiffs or defendant was to pay for concrete used. Plaintiffs seek judgment against defendant in the sum of $16,000.00 either on contract or quantum meruit, defendant admits the existence of the contract, in its answer, but contends the plaintiffs were to furnish all concrete at no cost to defendant. At the conclusion of all evidence, the Court entered a directed verdict in favor of defendant, without announcing any specific findings regarding such verdict, and entered judgment against plaintiff and for defendant. This was done on the motion of defendant alleging first, no contract, second, that quantum meruit was not available against a municipal corporation. Upon writ of error, the trial court was reversed.

1. The Court held that the parties treated the writing entered into by them as a contract, and that the construction placed upon the instrument before the controversy arose concerning it generally is binding upon them and also the Court. The City had admitted the existence of a contract in its answer, and any contrary determination was manifest error.

2. The sole issue to be determined is: "which party to the contract is required to furnish and pay for the 1500 odd yards of concrete that went into the construction of the covered reservoir." Incidental to this question is the problem of whether liability for payment for concrete can be determined from the contract. This being an issue of law for determination by the Court, and in such determination the Court may call upon the following well-recognized rules of construction:

(a) ". . . each and every part and portion of a contract is to be given effect, if possible, and that where all provisions, stipulations and conditions thereof may be given effect without one contradicting the other, then the contract cannot be said to be uncerain or ambiguous."

[10] ...., 282 P. 2d. 1084.

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(b) In the event of language of doubtful meaning in a contract, or where it appears indefinite or uncertain to a degree, it shall be interpreted most strongly against the party who drew it.

(c) The City, in erecting its water work system, was acting in a proprietary capacity and not a governmental capacity, and its contracts are governed by the same rules as contracts made between individuls.

(d) In a building contract, in case of conflict or inconsistency between them, the contract prevails over the plans and specifications, except where the terms of the contract are general; . . . a copy of plans and specifications furnished the contractor and on the faith of which his bid was made and contract entered into prevails over original plans and specs; a specific provision of the specs controls a general provision.

(e) In interpretation of contracts "trade meaning" may in a proper case be considered.

(f) In the absence of an ambiguity, intent is to be determined from the contract itself, if possible to do so ,and parties are bound by what the contract says rather than what they say.

(g) In the event the contract was determined to be ambiguous, it would be proper to admit evidence as to which paragraphs, etc., are *stock* paragraphs and which are specially prepared for this project.

3. Although not determinative in this case, the Court observed that a municipal corporation is prohibited by law from disbursing funds for purpose of such construction except upon contract.

P. W. Carpenter and Ardie Carpenter, Plaintiffs in Error vs. George W. Hill and Nellie M. Hill, Defendants in Error[11]

The Carpenters as plaintiffs filed suit containing 2 *causes* of action for rescission. One cause was based on fraud and was abandoned, the other on mutual mistake. Plaintiffs owned a filling station in Pueblo and in an effort to dispose of it contacted a real estate agency and learned of the availability for trade of a peach orchard held under contract of purchase by defendants. The letter of the real estate agent stated, regarding the peach orchard: "This is a very good ranch priced at $25,000.00 with a loan of approximately $14,000 at 5 per cent interest that can be assumed. This loan is to be paid off by crop payment which doesn't take long if the prices are good on fruit, and everybody seems to think it will be." Defendants told plaintiffs that they had the peach orchard on crop payments of one-half the fruit crop, and if there was no fruit crop the payment would be carried over, including taxes and water assessments. The contract seller of the orchard was Renna Aspinall, who, in February 1946, sold the property and the defendants acquired their interest by assignment of that contract December 10, 1949. Neither plaintiffs nor defendants saw the actual contract before the trade was completed. The contract provided that the entire balance fell due November 1, 1953. Plaintiffs inquired at the bank holding the original contract as to the balance owing, but did not inquire as to the terms nor did they see

[11] ___, 283 P. 2d 963.

the contract. On June 10, 1953, following this inquiry, a written contract was drawn up and signed whereby plaintiffs traded their equity in the Pueblo property for the equity of defendants in the orchard in Mesa County. The agreement was silent as to the crop payments. The parties exchanged deeds and entered into possession of the respective properties. About a month later, plaintiffs discovered that the balance due on the contract in the sum of $15,252.09 was due on November 1, 1953, instead of being due on crop payments, as they believed. Thereupon plaintiffs gave notice of intention to terminate the contract and vacated the premises after irrigating them and filed this suit for rescission. The trial court refused to permit rescission and would not grant damages to plaintiffs. Renna Aspinall, in March 1954, gave notice of intention to terminate the contract and forfeit the amounts previously paid, after being permitted to intervene in this suit, and was granted possession of the property. At the time the Supreme Court decided the case, Renna Aspinall owned the orchard and defendants owned the property in Pueblo County and plaintiffs had lost the net value of the Pueblo property, namely $13,062.23. The trial court held that plaintiffs were negligent in not discovering the terms and denied recission of the contract. The trial court found, and it is freely admitted, that there was a mutual mistake.

The Supreme Court reversed the trial court and held:

(1) No principle is better settled than the equitable doctrine

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that an agreement is void if founded in a mutual mistake of facts that are the very basis of the contract. The fact concerning which the mistake was here made was the very life and substance of the transaction; and the mistake, not only clearly proven, but admitted, is so important that rescission, if sought, must follow.

(2) "The negligent failure of a party to know or to discover the facts, as to which both parties are under a mistake does not preclude rescission or reformation on account thereof." Restatement of the Law, Contracts. Section 508.

(3) If negligence was a defense, defendants were deprived thereof by failing to file an affirmative pleading.

(4) Trial court was directed to enter judgment for plaintiffs for restoration of their property, and if that cannot be had then enter such judgment for damages as the court may determine by a hearing thereon. (See case discussion by William E. Kenworthy, Dicta, Sept.-Oct. '55, P. 393)

R. M. Martin, Plaintiff in error vs. Pueblo Dairymen's Cooperative, Inc., Defendant in Error[12]

Plaintiff dairy association and defendant, producer, entered into a contract in writing, under which defendant sold all his milk, except that used for his home and farm, to the association from December 1, 1941, to December 16, 1952, at which time defendant refused to deliver further to plaintiff. Section 7 of the contract provided for liquidated damages in case of breach of producer, at the rate of $5.00 per cow controlled by producer at time of breach. Section 9, provided that unless the contract was terminated May 1 in any years, by a notice in the preceding March, the contract would continue from year to year. May 5, 1953, under Section 32, Chapter 106, '35 C.S.A., plaintiff obtained a temporary restraining order, which November 18, 1953, was changed to a preliminary injunction to remain in effect pending trial on the merits. Defendant continued to deliver under the injunction to May 1, 1954, when he stopped delivery, having given a written notice in March 1954 of his intention to so do. Defendant in his answer

[12] —, 284 P. 2d 238.

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and counterclaim filed December 1, 1954, and among other defenses, alleged: (a) failure to state a claim, (b) breach by plaintiff in buying milk outside the association's area, thereby causing the price to drop regarding milk purchased from defendant; (c) admitted refusal to deliver as of January 25, 1953, and notice to such effect at that time, and that thereby plaintiff was entitled to $140.00 liquidated damages, @ $5.00 per cow for 28 cows controlled by defendant (d) counterclaimed for $1,500.00 damages, incurred in selling to plaintiff under the injunction after January 25, 1953, less the $140.00 liquidated damages. The trial court awarded damages to plaintiff and found against the defendant. The minutes of the Association's Board of Directors for December 23, 1952, and January 25, 1953, were admitted in evidence and show that as of December 23, 1952, the Board voted to accept the liquidated damages from those producers shipping to another buyer and voted to return the $5.00 (apparently the price of share in association) to members "jumping the contract after hearing is held or check *(for liquidated damages)* is received." (parenthetical words added)

The January 25, 1953, minutes show: "Hearing for producers who have jumped their contracts. . . . 11. Russell Marvin—staying out."

Reversed and judgment granted to defendant in amount of $1,400.00 on defendant's counterclaim.

Held: The plaintiff having called a meeting for that purpose, received the information or notification at that time (January 25, 1953) that defendant was no longer going to deliver to plaintiff the milk produced by defendant. No additional notice had to be given in March 1953. Both parties already knew that the contract was terminated as of May 1, 1953.

At the meeting of December 23, 1952, after defendant refused to deliver further, plaintiff waived any right to injunction provided by statute. VOLUNTARY CHOICE AND ACTION BY PLAINTIFF IS THE VERY ESSENCE OF THE WAIVER. By resolution of December 23, 1952, defendant was no longer a member of plaintiff after his stock "was lifted" according to the resolution above quoted, after defendant "had jumped" the contract at a hearing held thereon.

The restraining order was unwarranted. The evidence of defendant showed $1,400.00 damage to defendant and was uncontradicted.

The statute permits the liquidation of damages, here accomplished by agreement, and the ordinary and accepted meaning of "liquidated damages" would be that upon payment or collection of the amount specified all claims in connection therewith, and the matter of the right to a restraining order or injunction would depend entirely upon the terms of the marketing agreement. In this case the agreement was for no specified period of time. After a year the producer could cancel and be relieved from the agreement upon certain conditions therein provided.

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