Denver Law Review

Volume 32 | Issue 1 Article 6

January 1955

# Agency, Contracts, Corporations and Partnerships

Ervin T. Larson

# Agency, Contracts, Corporations and Partnerships

him since 1922. The lots were located on Wolff Street just off West Colfax Avenue in Denver. They were zoned Residence "B". Relator failed of permission before the Inspector, Board of Adjustment and District Court.

The sole question prosecuted to the Supreme Court was whether the evidence entitled relator to the relief demanded. No protests or objections to the petition had been made. The Court found nothing in the return of respondents which even remotely suggested that the contemplated use of relator's property would be injurious or detrimental to adjacent properties. It recognized the principle that any regulation or restriction upon the use of property which bears no relation to public safety, health, morals or general welfare, cannot be sustained as a proper exercise of the police power of the municipality. The Court found the surrounding area to be commercial in nature and concluded that the Board's action was arbitrary and directed issuance of the permit.

## AGENCY, CONTRACTS, CORPORATIONS AND PARTNERSHIPS

By ERVIN T. LARSON *of the Ordway Bar*

AGENCY

(1) *Gray v. Blake,* 1953-54 C.B.A. Adv. Sh. No. 4.

Action by real estate broker Gray against the defendant Blake for commission in obtaining a purchaser for certain real estate. Trial by jury was in favor of defendant and plaintiff sued out writ of error. Blake and his wife were owners in joint tenancy of ranch property. Blake alone listed the property with Gray in 1949 and again in 1950. In March, 1951, Gray obtained a prospective buyer for the property upon terms which were approved by Blake. A down payment of $1,000 by the purchaser was made by check but the check was never cashed. Abstracts were furnished and examined, after which the purchaser tendered the balance of the purchase price in cash and demanded a deed signed by both Mr. and Mrs. Blake. Mrs. Blake refused to sign, the deal fell through and Gray sued for his commission.

*Held:* That if the broker Gray knew in advance that Mrs. Blake would not join in the conveyance the broker could not recover a commission. The opinion also indicates that if the broker knew of the existence of the joint tenancy at the time of the listing, it would be incumbent upon him to obtain the wife's consent to the listing as well as the husband's. The case was reversed for failure of the trial court to instruct properly and the cause was remanded for further proceedings.

(2) *Dumont v. Teets as Director of Employment Security,* 1953-54 C.B.A. Adv. Sh. No. 4.

Plaintiff, Dumont Sales Company, a partnership, brought action against Bernard E. Teets as Director of the State Depart-

ment of Employment Security, seeking a declaratory judgment to the effect that certain of their agents were individual contractors and not employees and therefore the company was relieved from making contribution under the Colorado Employment Security Act.

The stipulated facts were that the Dumont Company was engaged in selling maintenance equipment and janitorial supplies and had several agents who had applied for permission to sell the company's products. Some of the agents were assigned certain territories, others had no particular territory. They used their own automobiles and paid all of their own expenses. They remitted the full price for all orders directly to the company and were paid direct commissions by the company. There were no restrictions of any kind as to the amount of time to be devoted to the sale of the company's products by these agents and many of them sold several other lines as well as the Dumont Company products. Also, some of the agents devoted only a small part of their time to selling the Dumont Company's products. The agency agreement was subject to termination by either party at any time and agents were not required to sell any particular amount of the products or to refrain from engaging in other occupations.

The trial court held the agents to be employees and entered judgment in favor of the Department of Employment Security. On writ of error to the Supreme Court, the Court held that since the word "employee" is not defined in the Colorado Employment Security Act it retained its ordinary and customary meaning, the true test being the right of control retained by the employer. In the instant case, no particular services were required and no time limit fixed and therefore the agents were definitely classified as individual contractors. The ruling of the trial court was therefore reversed.

(3) *Lambert v. Haskins*, 1953-54 C.B.A. Adv. Sh. No. 5.

This is probably the most important case in this category during the present year, since it is one of first impression in Colorado.

The defendant Lambert by written listing employed the plaintiff Haskins as sole and exclusive agent to sell or exchange his farm at an agreed price and on an agreed commission. The agreement was to run for two months from date and thereafter until thirty days' written notice of termination was given. The plaintiff contacted some prospective purchasers but never found a buyer, and approximately a month after the date of the listing the defendant himself sold the property at a lower price than that listed with the plaintiff. The plaintiff brought this action for the commision provided in the listing. The trial court gave judgment for the commission.

The Supreme Court held that the trial court erred in giving plaintiff judgment for his commission, since he was entitled to such a commission only in case he procured a purchaser at the agreed price. The sale by the owner does not violate a contract of

exclusive agency. Such a right to sell is an implied condition of every agency contract and will prevail unless it is expressly negatived. The only effect of an exclusive agency contract is to forbid the owner from placing the property in the hands of another agent. The owner always has the right to sell the property himself without violating his obligation to the agent. Judgment was reversed and cause remanded to enter judgment of dismissal.

(4) *Gibbons and Reed Co. and Boyle Bros. Drilling Co. v. Howard,* 1953-54 C.B.A. Adv. Sh. No. 12.

This is a case involving "scope of employment" in the determination of liability in a tort action. Plaintiffs, Mr. and Mrs. Howard, sued the defendant companies for personal injuries and property damage resulting from a collision between plaintiffs' car and a truck owned by the defendant companies.

The undisputed facts were that the truck was owned by the defendant companies and it had been the custom of the companies to permit certain responsible employees to use the truck for personal purposes. In the instant case, an employee obtained permission to use the companies' truck for the purpose of moving his family and belongings from Loveland to Climax. During the moving trip, the accident occurred and the plaintiffs brought suit against the defendant companies. The trial court entered judgment for the plaintiffs and the defendant companies sued out a writ of error.

The Supreme Court held that there is a distinction between acts done "while in employment" and acts done "within the scope of employment". In the instant case the only evidence of the driver's acting within the scope of his employment was the practice by the defendant companies in permitting their employees to make occasional use of this particular truck for individual and personal purposes. It was the burden of the plaintiffs to establish that acts occurred within the scope of employment and there was no evidence whatsoever to establish this. The use of the defendants' truck for the employee's personal convenience did not expose the defendants to liabilty. Case was reversed and cause remanded with instructions to dismiss the complaint.

CONTRACTS

(1) *Smith v. Whitlow,* 1953-54 C.B.A. Adv. Sh. No. 11.

Plaintiff, Whitlow, as assignee of a construction contract brought suit against the defendant Smith for the balance due under the contract. Smith defended on the ground that he had actually signed the contract as president and agent of a corporation which had become defunct prior to the bringing of the action. Smith asked that the contract be reformed to substitute the corporation as the real party in interest. There was no dispute as to the amount due.

Evidence showed that plaintiff's assignor had originally prepared the contract and that Smith had refused to sign it in its original form and had taken it to his attorney for revision. A contract was finally signed in the attorney's office but Smith was the

only party mentioned and the corporation which he allegedly represented was never referred to in the contract.

The trial court entered final judgment in favor of the plaintiff against the defendant Smith. Smith then filed motion for new trial and upon its being denied took the case to the Supreme Court.

It was held that even if all of the evidence presented by Smith in support of his contention that he signed the contract solely as agent for the corporation were accepted as true, it would still constitute only a unilateral mistake and that a unilateral mistake does not justify reformation of a contract. The Court further stated that even in the case of the reformation of a contract on the grounds of a mutual mistake the evidence must be clear, unequivocal and undisputable. Judgment in favor of the original plaintiff was affirmed.

(2) *Whitechurch v. Dunlap,* 1953-54 C.B.A. Adv. Sh. No. 14.

This is an action on a sales agreement for a used truck and involves alleged representations made by the seller concerning the running condition of the truck. There was also an issue as to a payment to a finance company which was supposed to have been made by the seller but had to be paid by the buyer before he obtained title to the truck.

The buyer was required to make substantial repairs to the truck after he acquired it and the trial court entered judgment for $689 in favor of plaintiff, said sum consisting of the unpaid installment to the finance company plus a part of the repair bill. In the Supreme Court it was held that there was no evidence to justify the finding of fraudulent representations by the seller and that in fact the evidence seemed to show that the buyer relied upon his own judgment in accepting the truck rather than upon what the seller told him. The judgment was reduced to the sum of $124 which was the amount of the unpaid installment to the finance company, and affirmed as to that amount.

(3) *Carleno Coal Sales, Inc. v. Ramsay Coal Company,* 1953-54 C.B.A. Adv. Sh. No. 14.

This case involves the right to terminate a contract for failure of performance by one party. The plaintiff and the defendant had entered into a written contract whereby the plaintiff was granted the exclusive distribution for all coal produced by the defendant's mines, excepting a reserved right to sell to certain railroad companies. The contract was entered into in 1944 and carried a term of five years with a renewal option for an additional five years. Three years after the contract date the defendant served a notice of immediate termination which merely stated that the plaintiff had failed and refused to execute the provisions of the agreement. The written contract provided that the innocent party *may* give sixty-day written notice of default and then terminate.

After serving the notice of immediate termination on the plaintiff the defendant ceased to deliver coal to the plaintiff and delivered the same to other purchasers. Plaintiff brought suit for

damages. The trial court held that the termination by the defendant was effective and judgment was entered in favor of the defendant.

On writ of error to the Supreme Court it was held that the provision in the written contract for cancellation by sixty days' notice was the only manner in which the contract could be terminated prior to the expiration of its original term. Defendant's contention was that the word "may" in the written contract in connection with the termination clause merely gave each party an additional method of termination and that either party still had the original right to immediate termination upon breach or failure of performance.

The Court held, however, that the word "may" gave each party the right to determine whether a breach was of sufficient consequence for such party to seek termination of the contract, but that if termination was desired it must be accomplished in accordance with the provisions of the written agreement. The judgment of the trial court was reversed and the case remanded for determination of damages, if any, sustained by the plaintiff.

(4) *Mills v. Sharpe,* 1953-54 C.B.A. Adv. Sh. No. 16.

This is a suit on the basis of *quantum meruit* for labor performed in the construction of four irrigation dams brought by plaintiff, Sharpe, against defendant, Mills. Evidence showed that initial negotiations for the dams had been between the plaintiff and one Watkins but that dams were built on land owned by the defendant or leased and used by her. The dams were constructed under the directions of the defendant who changed some plans for the dams and on occasion halted the work on one of the dams. The trial court gave judgment for the plaintiff in the amount prayed for and the defendant appealed, the principal point of the appeal being that the defendant was not a party to the contract, that there was no privity of contract between plaintiff and defendant, no consideration and no mutuality of contract.

The Supreme Court held that if the plaintiff did the work for the defendant's benefit and with her knowledge he is entitled to recover reasonable compensation therefor. There being little question that the dams were constructed for the benefit of the defendant and that she had knowledge thereof, the judgment was affirmed.

(5) *Barday v. Steinbaugh,* 1953-54 C.B.A. Adv. Sh. No. 16.

Suit on a promissory note. Defendants executed a promissory note for $18,000.00 payable to the plaintiff in monthly installments of $150 each, the first payment to become due July 1, 1951. The note carried no interest but provided for default interest and also contained an acceleration clause in the event of default.

There appeared to be no dispute as to the facts, which were as follows: Defendant made payment of each installment through December of 1951 and mailed a check for the January 1952 pay-

ment, which check was received by the plaintiff and lost in the mails when she sent the same for deposit. Defendants continued making the monthly payments thereafter but did not make another payment of the January 1952 installment although plaintiff requested the same on numerous occasions. In October 17, 1952, plaintiff gave notice of her election to declare the full amount due and payable, coupled with a demand for default interest, all based on the January payment which had been lost. After delivery of the notice the plaintiff accepted two more monthly installments and then returned subsequent tendered installments. The trial court granted defendant's motion for summary judgment on the ground that the acceptance of payments after the notice of acceleration constituted a waiver of the acceleration right.

In the Supreme Court, the trial court was upheld, the Supreme Court holding that the right to accelerate is an optional right in the payee and may be waived. In the instant case waiver was made complete by the acceptance of regular installment payments after the acceleration notice had been given. Judgment was affirmed.

(6) *Constitution Life Insurance Co. v. Rogerson,* 1953-54 C.B.A. Adv. Sh. No. 17.

This case involves the interpretation of certain rules of contracts with respect to a written application for a life insurance policy and the life insurance policy subsequently issued on such application. The plaintiffs, Mr. and Mrs. Rogerson, made application for a $20,000 life insurance policy on each, the purpose being to obtain certain benefits in connection with estate taxes. Payment of the first year's premium accompanied the application for each policy and the application contained the usual provision that the application and policy issued thereon constituted the entire agreement between the parties and that no outside statements or parol agreement were of any force or effect. When the policies were received by the plaintiffs they refused to accept the same and sued for the amount of the premiums plus interest.

The basis of the plaintiffs' claim was that the policies were at variance with the application in each case and therefore the policy constituted a counter offer by the insurance company which the plaintiffs could accept or reject. The first annual premium as stated in the application for one policy was $1,767.60, whereas the policy issued thereon called for an annual premium of $1,808.60, an increase of $41.00. This was one of the grounds of the allegation of variance, the others being that the application called for "commercial whole life" policies and that the statement of absolute ownership in each policy was not called for by the respective applications. The trial court held that the policies issued by the company were at variance with the applications and rendered judgment in favor of the plaintiffs for the full amount of the premiums plus interest.

The Supreme Court held that the change in the amount of premium on the one policy constituted a variance from the applica-

tion and therefore the policy was merely a counter offer which could be rejected or accepted by the applicant. The change in policies from a "commercial whole life" to a "whole life" policy was not considered a variance since no evidence was introduced to show any difference between the two policies. The absolute ownership clause in the policy was likewise construed not to be at variance with the application, since the formal application in each case had attached thereto a written statement providing for such absolute ownership. Accordingly, the judgment of the trial court was affirmed as to the policy where increase in premium occurred and was reversed with respect to the other policy.

(7) *Pioneer Mutual Compensation Company v. Vernon Casualty Insurance Company and Roxie Johns.* 1953-54 C.B.A. Adv. Sh. No. 18.

Suit by Johns against both insurance companies to recover under collision policies in both companies on a certain tractor and trailer which had been damaged. Johns owned two similar tractor-trailer outfits. The one involved had been insured in the Vernon Company first and when Johns applied for a policy on the second trailer outfit with the Pioneer Company an error in description was made so that the Pioneer policy covered the same outfit already insured by the Vernon Company. The same agent handled both policies. The Pioneer policy was delivered to the agent on January 10, 1952 at which time he noticed the mistake in the description of the trailer outfit and notified the company immediately. The policy however was delivered to Johns and the accident occurred eight days later. After the accident an agent for Pioneer contacted Johns and agreed to pay the entire loss, authorizing repairs to be made on the trailer. Shortly thereafter the tractor-trailer was repaired and Johns disposed of it. After Pioneer agreed to the settlement they cancelled the policy as of January 28, 1952 and Johns paid the premium to that time. Pioneer then refused to pay the loss. The trial court gave judgment to Johns against both insurance companies and Pioneer appealed.

Pioneer's contention was that the policy involved covered the tractor-trailer outfit by mistake and should be reformed to describe the vehicle intended to be covered. It was held that since the Pioneer Company had received and retained a premium for the period during which the accident occurred and since its agent had authorized settlement under the policy, it had waived any right to reformation. Judgment against the Pioneer Company was affirmed and judgment against the Vernon Company was reversed since no proof of loss or other requirements of the Vernon Company policy had been complied with by Johns.

CORPORATIONS

(1) *Department of Employment Security v. General Cleaners and Dyers.* 1953-54 C.B.A. Adv. Sh. No. 2.

This case does not involve any corporation laws as such but

concerns the state statutes on unemployement security. The General Cleaners and Dyers as plaintiff in the trial court sought judgment for a stipulated amount as refund of contributions paid under protest to the defendant, Department of Employment Security. Plaintiff was a corporation which had purchased a partnership business and the issue was whether the corporation was entitled to continue the contribution rate as determined by its predecessor, the partnership.

The Spreme Court held that the corporation was not entitled to continue the partnership contribution rate since the statutory requirements with respect to the predecessor in business owning at least 50% of the interest in the successor business had not been met. The judgment of the trial court awarding the refund claimed was reversed.

(2) *Arvey Corporation v. Fugate, Director of Revenue of the State of Colorado.* 1953-54 C.B.A. Adv. Sh. No. 16.

This case involves an income tax assessment by the State of Colorado against a foreign corporation. A subsidiary of the Arvey corporation, an Illinois corporation, was engaged in the manufacture of insecticides in several states but had no plants in Colorado. One Julius Hyman had invented the insecticides and was an officer and director of the subsidiary corporation. Differences arose and Hyman resigned and formed a new corporation with authority to do business in Colorado. The Arvey corporation subsequently brought an action in the Denver District Court to obtain an injunction against Hyman and his company to restrict them from manufacturing and selling certain insecticides and for damages from the wrongful use of the Arvey company's trade secrets, etc. The injunction was granted and a judgment in favor of the Arvey company for over a million dollars was entered.

This judgment was affirmed by the Supreme Court and upon its affirmance the Director of Revenue of the State of Colorado asserted his claim for income tax liability against the Illinois corporation. The trial court gave judgment in favor of the Director of Revenue and the Arvey corporation assigned error. It was contended by the Arvey corporation that the judgment against Hyman and Company was compensation for injuries and damages sustained by their wrongful acts and was an intangible having as its situs the domicile of the Arvey corporation and therefore should not be taxable by Colorado.

It was held however that there was no question concerning the source of the income, that the judgment itself was based on profits made by Hyman and Company in Colorado and that an adjudication had already been made that the judgment was for the amount of the profits made by Hyman and Company. Since the real question was the jurisdiction to tax, Colorado's right to levy an income tax on this judgment was undeniable. The trial court's judgment in favor of the Department of Revenue was affirmed.

(3) *Burleson v. Hayutin,* 1953-54 C.B.A. Adv. Sh. No. 17.

This is a case involving the appointment of a receiver for a corporation. Plaintiff Burleson and one Vaughn were originally partners and owners of the Curve Tavern. Two of the defendants were attorneys for these partners and Vaughn subsequently sold his interest to all of the defendants. A corporation was formed and the assets of the partnership were transferred to the corporation, one-half of the stock being issued to the plaintiff Burleson and the other one-half issued to the five defendants.

At the first meeting of the corporation Burleson was elected president and made a director and actively managed the business, receiving a salary of $250 a month. About a year later Burleson was informed that his position as president and his salary were terminated and that one of the defendants would be the new president. The directors authorized payments of salaries and a percentage of the profits to three of the defendants and thereafter Burleson did not receive either salary or dividends from the corporation. Prior to the directors' meeting which ousted Burleson he had given a proxy to vote his stock to one of the defendants, the written proxy providing that it was irrevocable as long as the two lawyer defendants owned any stock in the corporation. Burleson subsequently filed a suit in district court for an accounting, for dissolution of the corporation and for receivership. The trial court refused to appoint a receiver on the grounds that no mismanagement of the corporation business was alleged or shown and that no emergency existed.

Burleson appealed under Rule 111 of the Colorado Rules of Civil Procedure and the Supreme Court held that the circumstances of this particular case were such that a receiver should have been appointed. Two of the defendants were attorneys for the plaintiff at the time they purchased the one-half interest in the business and a very close and delicate relationship existed. When plaintiff, who was the owner of one-half of the stock, received absolutely nothing from the corporation after defendants assumed control the only relief available to him was the appointment of a receiver and an accounting. The order of the trial court denying the appointment of a receiver was reversed.

PARTNERSHIPS

(1) *Silvola v. Rowlett,* 1953-54 C.B.A. Adv. Sh. No. 16.

This was an action by the plaintiff Silvola to recover judgment for services rendered to the McRea Motor Company, the suit being against the defendant Rowlett, one of the partners. McRea and Rowlett formed a limited partnership under the name of McRea Motor Company and had filed a certificate of limited partnership indicating that McRea was the general partner and Rowlett the limited partner. Under the terms of the limited partnership Rowlett contributed certain personal property and cash and was to receive 9/24 of the profits of the partnership.

McRea was the manager of the business and had contracted for the employment of the plaintiff as an accountant to keep the books and records of the partnership. Rowlett acted as foreman in the partnership repair shop for a period of some six or eight months, after which he discontinued his services as foreman and another person was employed by McRea as foreman of the shop. The partnership funds were all in one bank account under the sole and exclusive control of McRea. He made all deposits and was the only person authorized to draw checks on the company account. Since McRea had been discharged in bankruptcy, suit was brought against Rowlett and the trial court sustained Rowlett's claim that he was a limited partner and entered judgment for the defendant.

In the Supreme Court the plaintiff contended that the assumption of duties as foreman of the partnership shop and the fact that Rowlett at time discussed the partnership business with McRea removed him from the status of a limited partner and rendered him liable as a general partner. In affirming the trial court's judgment, however, the Supreme Court held that the services rendered by the defendant did not deprive him of his protection as a limited partner and that the partnership act does not impose a silence on a limited partner to voice his opinion and suggestions concerning the business.

(2) *Kincaid v. Miller,* 1953-54 C.B.A. Adv. Sh. No. 16.

Action in the trial court by the plaintiff Miller to recover one-half of certain profits alleged to have been received and retained by the defendant Kincaid from a joint venture of Miller and Kincaid in certain oil leases and properties. The trial court found in favor of the plaintiff and defendant appealed to the Supreme Court by way of writ of error.

The evidence disclosed that plaintiff and defendant jointly purchased certain oil leases, taking the leases in the name of a third party. Certain leases and portions of leases were later sold and the proceeds from the sale were divided equally between the parties. Subsequently the defendant Kincaid repurchased various interests which had been sold and then resold them at large profits, which profits were retained entirely by the defendant. The defendant admitted the original joint venture in the leases but claimed that after such leases had once been sold or disposed of the joint venture relationship terminated and his subsequent acquisition of the leases was an individual venture in which the plaintiff had no interest and should not share in the profits.

The testimony contained several admissions by the defendant in support of plaintiff's claim of joint ownership and the Supreme Court found that the joint ownership existed throughout the entire transactions. It was held that in a joint venture one party cannot exclude his co-owner from a rightful interest in joint property by purchasing it himself and must account to his associate for any interest in the joint venture property which he acquires for his individual benefit. The judgment of the trial court was affirmed.