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Notes and Comments

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CONTRACTS: A CONTRACT MAY NOT BE RESCINDED IN VIOLATION OF ITS TERMS—The facts in *Carleno Coal Sales, Inc. v. Ramsey Coal Company*[1] are simple. The defendant coal producer entered a written contract under which the plaintiff sales company was to have an exclusive distributorship of all coal produced by the defendant. The contract was to continue for five years with an option for the plaintiff to renew the contract for an additional five years. The dispute in the case arose over a clause in the contract providing for cancellation of the contract for failure or breach by one of the parties. The provision stated that in such event "the party not at fault may give the defaulting party 60 days' written notice" of intent to cancel because of such breach. The party notified would then have 60 days to correct such default or breach in order to avoid cancellation of the contract.

In trial to the court there was ample evidence that the plaintiff failed to perform his obligations under the contract. The defendant, without following the above-mentioned provision for cancellation, simply wrote the plaintiff that the agency was terminated as of that time, and he then began sales to other companies. The plaintiff sued for damages arising from the breach of contract.

There are really two issues presented by this case. The first is one of interpretation of the contract; when the provision for cancellation said "may", did it really mean "shall" or "must". The second issue is a question of law; may an agency which has been created to continue over a definite term be revoked for good cause, but contrary to the terms of contract providing for revocation, without subjecting the revoking party to liability for such a breach?

Problems of construction of an instrument are usally troublesome. In this case the trial court held that the word "may" was used in a simple permissive sense and that the provision therefore merely provided one method by which alleged breaches or defaults might be ironed out. The Supreme Court of Colorado reversed this interpretation on appeal, holding that "may" meant "shall" or "must" for the reason that if the method of notice outlined in the provision were merely optional, it created no rights or duties and was, therefore, without purpose and "mere surplusage." The court reasoned that unless the procedure were to be obligatory, its recital added nothing to the contract and such an interpretation would violate the presumption that "each part of a contract has a purpose, and a construction which gives legal effect to every part thereof . . ." The ultimate significance of this part of the case is a lesson for those drafting contracts not to use the word "may"

[1] .... Colo. ...., 270 P. 2d 755, 1953-4 C.B.A. Adv. Sh. No. 14, p. 321.

when they mean "must." This case represents a rather expensive cure for ambiguous drafting.

The second issue in this case involves more nearly a question of pure law. The confusion evolves primarily from the attempt to transform a well-settled rule in agency law into a principle of contract law which rests on entirely separate considerations. It is well settled that the courts will not enforce an agency relationship (which is essentially a fiduciary one) over the protest of either party irrespective of the original duration envisaged. Phrased a little differently—

> An agency created for a definite term may nevertheless be rightfully revoked before its scheduled date of expiration, without liability on the part of the principal, where the agent fails to perform faithfully his express or implied duties.[2]

While the above rule is unquestionably good agency law, it in no way abridges the rights of contracting parties to render themselves liable for failure to follow any specified procedure stipulated to be binding on the parties. In this case the liability of the defendant in no way rested on the agency relationship, but was based entirely on a contractual agreement as to measures to be followed in the event that the agency relation were to be terminated. The Court cited American Jurisprudence for a statement of the rule that the right to cancel an agency contract may be restricted by a stipulation in the contract creating the agency relationship.[3] With this contract law in mind, perhaps the agency rule could be clarified by a statement to the effect that a mere stipulation that an agency contract is to continue over a stated term does not subject the parties to liability in the event it is revoked prematurely for good cause. Such liability may, however, be fixed by the contract creating the agency. The ultimate lesson evolving from this dispute is that in determining possible liability in an anticipated breach, the party should look carefully to both the laws of agency and the laws of contract.

J. BELKNAP

DAMAGES—A WIFE CANNOT RECOVER IN A TORT ACTION FOR LOSS OF SUPPORT BY HER HUSBAND—The answer to the question of a wife's right to a cause of action for loss due to injuries resulting to her husband through the negligence of a third party has been reiterated and perhaps extended in the case of *Weng v. Scheiger*.[1] In this case the plaintiff, her son and her husband were passengers in an automobile which was struck from behind by the defendant's truck. There was little doubt that the accident was caused by the carelessness of the driver

[2] 2 C.J.S. 1157.
[3] AMERICAN JURISPRUDENCE 45, § 49.
[1] .... Colo. ...., 1953-54 C.B.A. Adv. Sh. No. 17, p. 443.

of the truck. In an amended complaint the husband did not participate as a plaintiff, but his wife alleged that he was permanently injured as a result of which she lost his support and companionship to her damage in the sum of $50,000. She also alleged damages due to injuries to herself in the sum of $50,000. The jury awarded $8,000 to the plaintiff in its verdict.

Over objection, the trial court submitted a special interrogatory to the jury directed to a finding of a separate amount for the loss of support of plaintiff's husband. The interrogatory was returned without answer and upon question the foreman of the jury stated that no damages were found for loss of support. The Supreme Court held that the question was improperly before the court and jury and that the error was aggravated by the submission of the special interrogatory to the jury which emphasized the question which easily could have been reflected in an excessive verdict. The errors were not cured by a failure on the part of the jury to answer the interrogatory or make a finding as to such damages, and because of these errors and others, the case was reversed and sent back for new trial.

Since the case of *Giggey v. Galagher Transportation Company* [2] the Colorado courts have recognized the rule that a wife cannot recover for the loss of consortium of her husband because of injuries resulting from the negligence of a third party. In that case the husband recovered and the Court said that his recovery precluded a double recovery for the same injury or wrong in an action by the wife. In the present case, however, the husband made no claim to recover so that the theory of double recovery is inapplicable. The plaintiff argued that support, meaning monetary remuneration, is not recognized as a part of consortium by standard definitions [3] and accordingly cannot be inferred.

In the case of *Franzen v. Zimmerman* [4] the Supreme Court affirmed a dismissal of a complaint which alleged that, "Because of the negligence of defendant, plaintiff was deprived of the society, companionship, services and support of her husband to her damage." The Court seemed to base that decision on the ground that as no right of action existed in favor of married women under the common law, it cannot now be claimed in the absence of a legislative grant. The plaintiff in the present case insisted that *Franzen v. Zimmerman* did not settle the question of support alone. If the question was not then settled, it seems clearly and distinctly established in the present case that the wife has no right of action for loss of consortium or support even where the husband realizes no such recovery for that loss.

Persons sympathetic with the idea of equality of spouses before the law will realize that in this decision the Colorado Court

[2] 101 Colo. 258, 72 P. 2d 1100 (1937).

[3] BLACK'S LAW DICTIONARY, THIRD ED., p. 408; WORDS AND PHRASES, THIRD SERIES, p. 349.

[4] 127 Colo. 381, 256 P. 2d 897 (1953).

follows the great weight of authority which sustains the husband's right to recover for loss due to the negligent injury to his wife, but denies the wife a corresponding right in case of injury to her husband.

JOHN PHILLIP LINN

TAXATION: INCOME FROM SOURCES WITHIN THE STATE —The case of *Arvey Corporation v. C. P. Fugate* [1] arose as a result of a previous action by the Arvey Corporation against the Julius Hyman and Company.[2] In that action, just as here, the Arvey Corporation sued on its own behalf and the behalf of its division Velsicol Corporation.

The action out of which the instant case arose [3] was an action primarily to enjoin and restrain the manufacture and selling of insecticides, and to require the defendants to account to the plaintiff for gains and profits resulting from the manufacture and sale of such insecticides. Hyman was a vice-president and director until February, 1947. Through his contractual obligations, Hyman was to assign to Velsicol any invention or discovery made while so employed. Differences arose which were not resolved and as a result, Hyman resigned. A new Delaware Corporation was formed, which was authorized to do business in Colorado and in February of 1947 it began to manufacture insecticides in Colorado.

Upon trial in the District Court of the City and County of Denver, an injunction was issued which determined that Velsicol was entitled to recover from Hyman and Company all of the gains and profits from the production and sale of Chlordane for the accounting period ended March 31, 1949.

Hyman and Company appealed and the trial court was affirmed.[4] Shortly thereafter, the Director of Revenue of the State of Colorado made a determination of tax liability against Velsicol on the theory that the recovery in the prior case was income taxable under the laws of the State of Colorado. Velsicol filed its complaint against the Director of Revenue as an appeal from the final determination of the deficiency income tax assessment in the district court of the City and County of Denver. The result of that action is the subject of the present appeal.

The Supreme Court of Colorado upheld the decision of the trial court in assessing the tax against Velsicol. The assessment was made pursuant to COLO. STAT. ANN., c. 84A, § 3 (1935) which is as follows:

> Upon corporations, except those corporations described in section 6 of this section, there shall be levied and collected and paid for each taxable year, a tax at the rate provided in sub-section (2) of this section upon the net income

[1] Director of Revenue of the State of Colorado.
[2] 123 Colo. 562, 233 P. 2d 977 (1951).
[3] *Ibid.*
[4] *Ibid.*

> of every corporation derived from sources within this state on or after the effective date of this Act. Income from sources within this state includes income from tangible or intangible properties located or having a situs in this state and income from any activities carried on in this state, regardless of whether carried on intrastate, interstate, or foreign commerce.

The Court states: "The precise question presented is whether or not the monies received by Velsicol from the judgment, including the profit made by Hyman and Company, constitute 'income derived from sources within this state' and as such is it subject to tax?" Velsicol contends that since it never was domiciled in the State of Colorado, never had an office or representative here, and has never carried on business in this state, it therefore never derived any income from sources within the State under the above Act. It further contends that the situs of its right being an intangible, was at the place of domicile of the owner.

The Court answers Velsicol's first contention by holding that the phrase "sources within this state" is all-inclusive and without any limitation. It is not confined to business activities carried on in this state, but rather covers any and all sources.

As to Velsicol's second contention, the Court states: "In the matter of assessment as applied in income taxation, there appears to be a business situs of intangibles which may be separate and distinct from the domicile of the owner."

The monies recovered by Velsicol were admitted to be income. If it were recovery of damages then it would not have been income and would not have been taxable. The court states: "This admission is made by way of insisting that the real question here involved is one of jurisdiction to tax." In the last analysis, the question seems rather simple, in that Velsicol is precluded by an adjudication that the monies it received was income; that such income constituted the profits from the operation of a Colorado corporation, and therefore the source of the income was confined strictly to Colorado.

Finally, it is held that Velsicol cannot accept the profits from sources within the state and then rely on its status as a foreign corporation to evade the tax thereon. Velsicol had stepped into the shoes of Hyman and Company. For the reasons above stated the trial court was affirmed.

In affirming the lower court, the Supreme Court cites only one case and distinguishes it. The case does not change the law as it stands, but rather it extends the definition of the words of the statute, "income from sources within the state". The case cited by the Court is *Cruse v. Clam and Coupling Company*,[5] which was held not to be in point because of the difference of the 1937 statute, as amended in 1943.

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[5] 113, Colo. 254, 156 P. 2d 397.

The holding in this case may be rationalized solely on the statute involved. The statute is found at section 2 (b) (1) chapter 196, page 453, S. L. 1951.[6] The pertinent words therein are "income of every corporation derived from sources within this state." The fact situation under which this case arose is such that it fits the statute perfectly. Assume for a moment that Velsicol had not had any action against Hyman and Company. In such a case, there can be no doubt that Hyman and Company would be liable for the tax under the statute. The source of that income, gain, or profit was from sources within this state and clearly Hyman and Company would be liable therefor.

Now let us substitute Velsicol in place of Hyman and Company. By so doing, we are doing exactly what the lower court did in allowing Velsicol to recover the gains and profits of Hyman and Company. It should be noted that Velsicol has admitted that its recovery was of gains and profits, or in the words of the statute, the net income, of Hyman and Company. Velsicol, as the opinion states, stepped into the shoes of Hyman and Company. By so doing, it subjects itself to liability for the corporation income tax.

The Court, by holding the phrase in question, all inclusive, has precluded a corporation from successfully maintaining that since it has conducted no business in Colorado it is not subject to income tax, if the income received was actually derived from a source within the state. A source may apparently be any source from which it is possible to derive income. If a foreign corporation should recover income because of a right it holds against a Colorado Corporation it subjects itself to taxation. As above stated, the holding seems entirely within the purview of the statute. It also apears to be within the intent of the Legislature, as the rewording of the statute between the time of the *Cruse case* and the instant case seems to indicate. The phrase was changed from "business conducted within the state" to "sources within this state". In merely comparing the two statutes and noting the changes made, the legislative intent is clear. That intent was given effect in the instant case.

GERALD F. GROSWOLD

[6] COLO. STAT. ANN., c. 84A § 3 (1935).