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Contracts, Agency and Partnership, Personal Property, Sales and Corporations

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CONTRACTS, AGENCY AND PARTNERSHIP, PERSONAL PROPERTY, SALES AND CORPORATIONS

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It would be impossible in the space available to this article to detail all of the cases of interest relating to the above subjects decided in the past year. The following are selected because they should have the widest application to the general practice of law.

Ferry-Morse Seed Co. v. Board of County Commissioners of El Paso County:[1] Question as to ownership of personal property (seeds) for tax purposes. The Seed Company contended that title to the property passed to merchants with whom it dealt, who were therefore liable for the tax. The county contended that the transactions between the Seed Company and its merchants were consignments or bailments and that title remained in the Seed Company rendering them liable for the tax.

The so-called contracts of the Seed Company with the merchants were order forms of varied terminology signed only by the merchants and providing for re-purchase of seeds unsold by the merchants with consequent credit to merchants on invoice price. Some of the forms contained the words "title passes at Detroit."

It was held that title did not pass from the Seed Company and that the real nature of the transactions were sales on consignment and not "sale or return" transactions or absolute sales. The Supreme Court observing that "there is nothing mystifying about the word 'sell' and plaintiff was not prevented from its use in these contracts which would have . . . removed all doubt" based its opinion on the following: (a) The so-called contracts were unilateral, signed only by the merchants, and therefore appeared to be contracts of bailment or consignment. (b) The contracts should be construed against the maker thereof, the Seed Company. (c) The course of dealing between the Seed Company and the merchants indicated that the transactions were sales on consignment and this course of dealing was held to overcome the statement on some of the contracts that "title passes at Detroit." (d) That the merchants had to return unsold seed to the Seed Company, they having no option to keep the unsold seed, which indicated a control and right of property remaining in the Seed Company.

Lerner v. Stone:[2] Previous to this action the plaintiff had been successful in an unlawful detainer suit against the defendant and the plaintiff here sought treble damages under the statute for the unlawful detainer. The defendant counterclaimed and sought damages on the ground that the plaintiff had breached the terms of a

[1] 126 Colo. 426, 250 P. 2d 1003 (1952).
[2] .....Colo....., 252 P. 2d 533, 1952-53 C.B.A. Adv. Sh. No. 9.

contract of sale of a partnership interest previously made between the plaintiff and the defendant. It appeared that there had existed a partnership between the plaintiff, the defendant and one Schwartz which did business under a lease of certain premises in Denver. The plaintiff notified the defendant that he desired the dissolution of the partnership and in conformity with the partnership agreement made an offer to buy the defendant's interest, including goodwill, for a certain sum or to sell his interest to the defendant, including goodwill, for the same amount. The defendant accepted the offer to sell and apparently a written agreement was made relative thereto, which agreement did not specifically mention goodwill. Subsequently the defendant acquired the interest of Schwartz and operated the business as the sole owner. Subsequently also the plaintiff acquired ownership of the leased premises in which the defendant was doing business, gave the defendant notice to vacate which was not complied with and brought the unlawful detainer action above mentioned. Upon the defendant's eviction from the premises under this unlawful detainer action the plaintiff moved into the premises, established a similar business and sent advertising circulars to old customers of the partnership. It was upon these acts that the defendant's counterclaim was based.

The decision in this case turned upon the trial courts' ruling respecting a motion for the joinder of the party, but the Supreme Court in a matter which did not seem to be necessary to support the decision, commented upon the defendant's counterclaim as follows:

> It is clearly established that Lerners (plaintiffs), upon eviction of Stone (defendant), entered into possession of the premises; sought to establish a competitive business; and by such action totally and wholly destroyed the goodwill for which he offered and received a consideration. As hereinbefore stated the "buy or sell" offer made by the Lerners included "goodwill." While the final written agreement representing the acceptance by Stone of Lerners' offer is silent as to the matter of "goodwill," it follows as a necessary implication that the "goodwill" as offered was accepted and paid for, unless specifically excluded. . . . [I]n some jurisdictions the rule seems to be firmly settled that one who voluntarily sells the goodwill of a business thereby precludes himself from setting up a competing business which will derogate from the goodwill which he has sold. That rule has particular application here because of the circumstances that the "goodwill" here impliedly conveyed, carried with it the name and location of the business . . . it follows that there is merit to a counterclaim, in some measure, as against the Lerners. . . .

This is certainly new, and perhaps surprising, law in Colorado and should be of interest to any lawyer contemplating a contract for the sale and purchase of a going business.

Trans-American Corporation v. Merrion:[3] In this case the Supreme Court points out that consent to sale of mortgaged personal property given by a mortgagee to to his mortgagor will bar the mortgagee from setting up his mortgage as against a purchaser from the mortgagor and that such consent may be inferred; but that nonetheless such consent depends upon the intent of the parties and is a question of fact for the jury.

This case is also of interest because it treats with the adequacy of a description of livestock in a chattel mortgage.

Burkhardt v. Bank of America Nat. Trust and Savings Association:[4] One Horn was the lessor under a lease upon which the defendant was one of two guarantors of the rental payments. The guaranty was not made contemporaneously with the lease, but was subsequent thereto, and by its terms was binding upon the heirs of the guarantor. Horn died prior to any default of payments under the lease, but after his death default occuurred and his testamentary trustee brought action against the defendant upon the guaranty.

The trial court entered judgment for the plaintiff which was reversed by the Supreme Court and remanded with instructions to dismiss the complaint. The Supreme Court held that the guaranty by its terms was a special guaranty addressed to a particular person to which person only the guarantor is liable. Further that such a guaranty cannot be transferred or assigned to any other person until a right of action has accrued thereunder, in which case the right of action would be assignable. Since in this case there was no default prior to the guarantee's death, no right of action had accrued and the unaccrued cause of action did not survive the guarantee's death. This decision was aided by the pronouncement that a guarantor is like a surety, a favorite of the law.

Rogers v. Fitzsimmons:[5] Here the Supreme Court affirmed a judgment for rescission of a real estate sales contract in favor of a purchaser against his vendor on the ground of misrepresentation. In respect to the vendor's defense of waiver by reason of the purchaser having made two monthly payments on the contract after discovery of the alleged misrepresentation the Supreme Court held that the purchaser was not guilty of laches for there was no showing of a change of position of the parties that would make rescission inequitable and that the purchaser was entitled to preserve the *status quo* by making payments due under the contract in the event rescission was denied the purchaser.

Kuper v. Scroggins:[6] In an action by a purchaser against his

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[3] .....Colo....., 255 P. 2d 391, 1952-53 C.B.A. Adv. Sh. No. 11.
[4] .....Colo....., 256 P. 2d 234, 1952-53 C.B.A. Adv. Sh. No. 15.
[5] .....Colo....., 257 P. 2d 420, 1952-53 C.B.A. Adv. Sh. No. 19.
[6] .....Colo....., 257 P. 2d 412, 1952-53 C.B.A. Adv. Sh. No. 20.

vendor for specific performance of a real estate sales contract wherein the purchaser asked for abatement of the purchase price to compensate him for the vendor's inability to convey mineral rights which were not excepted from the contract the Supreme Court stated that a purchaser has a right, if he sees fit to do so, to accept less than he bargained for and to seek compensation for the loss of that which he does not obtain.

Eitel v. Alford:[7] In a contract for sale of realty providing that the vendors should deliver abstracts of title to the purchaser for examination and further providing that in event said abstracts show good and marketable title the balance of purchase price shall be paid, there is no specific covenant and promise on the part of the vendors to insure marketable title. In such a case the burden is upon the purchaser to satisfy himself with the title, and if not, to refuse further performance until the title is perfected. If the purchaser completes the payments under the contract without examining the title and takes the fruits of the contract for many months without inquiring as to the title when the facts concerning the same were known to him or readily ascertainable, his right to rescission is thereby lost.

Self v. Watt:[8] This case confirms an interesting and recent development in Colorado Law respecting forfeiture or foreclosure under real estate sales contracts.

For a time there existed some doubt in Colorado as to whether or not a defaulting purchaser under a real estate sales contract was to be treated as a mortgagor and be entitled to a six month period of redemption. This doubt was apparently resolved in *Miller v. Temple* [9] which held that the sales contract there involved was not a mortgage and that the purchaser could not be treated as a mortgagor relative to the statutory period of redemption. However, the court, upon equitable principles, gave the purchaser a 30 day redemption period.

In this case *(Self v. Watt)* the plaintiff had sold certain real property to the defendant under a contract providing for termination of the contract upon default and a retention by the vendor of all payments made as liquidated damages. Approximately $18,700.00 was paid on this contract which called for a total purchase price of $35,200.00 when the defendant defaulted in his payments. The plaintiff brought this action for a decree directing the defendant to pay the balance within such time as determined by the Court and upon defendant's failure to comply, for termination of the contract and for delivery of possession to the plaintiff. The defendant made no appearance and the trial court entered an order as prayed for, giving the defendant 30 days to pay the balance due under the contract, and upon his failure so to do, ordered the con-

[7] .....Colo....., 257 P. 2d 955, 1952-53 C.B.A. Adv. Sh. No. 18.
[8] .....Colo....., 259, P. 2d 1074 (1953), 1952-53 C.B.A. Adv. Sh. No. 26, p. 413.
[9] 120 Colo. 546, 211 P. 2d 989 (1949).

tract to be null and void and possession to be awarded to the plaintiff. The defendant's motion for relief from this default judgment was denied and the case was appealed to the Supreme Court which affirmed the judgment.

In sustaining the 30 day redemption period ordered by the trial court over the claim of the defendant that he had a six months' redemption period the Supreme Court said:

> An application for a strict foreclosure under an executory contract to shut out the rights of a purchaser is addressed to the sound discretion of the Court, and the time allowed the purchaser to make payment of the arrears is largely within the discretion of the trial court. . . . Equity will take into consideration all the attendant facts and circumstances in fixing the time. We conclude that such a period is not the six month's provided in the statute regarding redemption under mortgage foreclosure. In the instant case the trial court did not abuse its discretion in fixing the time which was, under the facts of the case, both reasonable and equitable. . . . [T]here are at least these two cases in our jurisdiction. [*Miller v. Temple, supra,* and *Gordon-Tiger Mining and Reduction Co. v. Brown* [10]] where we have recognized the propriety of a 30 day period within which to make payment of the arrears. We see no reason in the instant action to depart from our holding in these cases.

While the period of time may still be within the jurisdiction of the Court depending upon the equities in the case, this case may tend to solidify the 30 day time limit, thereby providing by judicial legislation a 30 day period of redemption.

It is interesting to note that it does not appear from the opinion whether or not the contract in question made time of the essence. Prior cases in Colorado and cases in other jurisdictions have often made this provision determinative in cases of this kind.

First National Bank of Ogallala, Nebraska v. Chuck Lowen, Inc.:[11] In this case the plaintiff bank had taken a chattel mortgage on a new automobile from one Harney, a car dealer in Ogallala, Nebraska, and had received therewith the manufacturer's certificate of origin showing Harney's ownership. This chattel mortgage was not recorded in Nebraska or elsewhere. Subsequently Harney sold the automobile to the defendant, a licensed car dealer in Colorado, giving a bill of sale therefor. The defendant then sold the automobile giving a dealer's bill of sale to the purchaser. The plaintiff bank brought this action for conversion and the trial court entered summary judgment for the defendant on the ground of

[10] 56 Colo. 301, 138 Pac 51 (1913).
[11] .....Colo....., 261 P. 2d 158 (1953) C.B.A. Adv. Sh. No. 28, p. 440.

plaintiff's failure to record the mortgage and a lack of actual or constructive notice of the mortgage by the defendant prior to the sale of the automobile by the defendant.

The Supreme Court reversed and remanded the case for reasons as follows:

(a) The failure to record the mortgage in Nebraska did not render it invalid here because under Nebraska Law the mortgage was valid by delivery of and retention of the manufacturer's certificate by the bank and under Colorado Law [12] recording in another state is not constructive notice rendering a mortgage valid against a subsequent purchaser without actual notice. Hence, recording in Nebraska would have been "vain and fruitless by the laws of both states" and thereby not a necessary act. (b) Colorado has no statute or settled policy rendering such a mortgage invalid. Respecting our certificate of title act the Court points out that the import of this act is that acquiring valid title against a prior mortgagee depends upon delivery of a certificate of title showing no lien, which in this case would be the manufacturer's certificate which was never delivered by Harney to the defendant, except in case of transfer of a new automobile from a dealer upon the dealer's bill of sale. This latter exception was held not to apply in this case because Harney was not a licensed dealer under Colorado Law, an important consideration because if he were a licensed dealer, his bond would have protected the parties here.

The essence of this case is that clear title to an automobile in Colorado can be obtained only by possession of a certificate of title free of lien or in case of a new automobile by bill of sale from a *licensed Colorado* dealer.

[12] (Chapter 16, Section 13 (31) '35 C.S.A.).

JUDGE PHILLIPS TO SPEAK ON EVIDENCE

At a meeting of the Denver Chapter of the American Statistical Association on January 19, 1954, Judge Orie L. Phillips is going to be the speaker and his subject will be "Statistics as Admissable Evidence in the Courts." All lawyers and Bar Association members are invited. The meeting will feature a dinner at 6:30 P. M. in the Pioneer Room of the Student Union Building on the University Park Campus of the University of Denver.

Reservations may be made by mail to the Secretary of the Association, Mr. Henry Mosher, c/o Mountain States Tel. & Tel. Co., P. O. Box 960, Room 1101, Denver 1, Colorado. Telephone reservations may be made by calling TAbor 4171, Ext. 7188.