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CONTRACTS AND SALES

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CONTRACTS

The contract cases reaching the Supreme Court of Appeals in this past year covered a wide area of subject matter, a listing of which would approximate the table of contents of a contracts casebook. Voidability, impossibility, illegality, assignments, third-party beneficiary, and specific performance are the issues passed upon, and while perhaps there are no startling innovations of law or great strides in development of legal concepts resulting from the Court's pronouncements, there is much strengthening of accepted views in the Court's forthright statements of position.

A. *Covenants in Restraint of Trade*

Employers who seek to restrain competitive activities of employees following termination of the employment are cautioned to stay well within their needs in defining the scope of the restrictions if the covenant is to be effective for the purpose. The caution is flagged by the decision of the Supreme Court of Appeals in *Richardson v. Paxton Co.*¹

Employer was engaged in the business of selling marine and industrial supplies, paints, chemicals, and services. Employee was schooled in the technical skill and special knowledge required for handling and selling a particular manufacturer's products for which employer was area distributor. Employee was assigned the primary responsibility for the sale of these products, and his duties included appraising jobs and selecting and supervising application of the chemicals to be used in performance. When employer's distributorship was terminated by manufacturer, employee withdrew from his employment and thereafter accepted a position as sales representative of manufacturer for the same area wherein he had served employer. Employer secured the distributorship for another chemical producer whose products were comparable to the line sold by manufacturer.

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1. 203 Va. 790, 127 S.E.2d 113 (1962).

As a term of his employment contract with employer, employee had agreed not to "enter or engage in any branch of marine or industrial supplies, equipment, services business" for three years after termination of his employment within an area encompassing that where he now served manufacturer. Employer's suit to enforce the covenant was successful in the circuit court.

Reversing the chancellor's decree, the Supreme Court found the prohibition against engaging in *any branch* of activities relating to any kind or type of marine or industrial supplies, equipment, or service to be too broad to be enforced and to embrace activities in which employer was not even engaged. Applying the generally accepted rule that a restriction is unenforceable as an unreasonable restraint of trade if it is greater than needed to protect the employer's business interests or unduly harsh in curtailing the employee's opportunities to earn a livelihood, the Court held this one to be remiss in both respects.

Nor was employee enjoined from engaging in such activities as might be harmful to employer's business interests and within the scope of the covenant. When such covenants fail, "it is commonly because, like the dog in the fable, they grasp too much, and so lose all."²

B. Restoration Necessary To Enable Contract Avoidance by Incompetent

[W]here a contract with an insane person has been entered into in good faith, without fraud or imposition, for a fair consideration, of which the incompetent has received the benefit, without notice of the infirmity, and before an adjudication of insanity, and has been executed in whole or in part, it will not be set aside unless the parties can be restored to their original position.³

This basic rule was quoted with approval by the Supreme Court of Appeals in *Edmunds v. Chandler*.⁴ Confronting the Court was the issue whether absolute and literal restoration of the competent party is required to constitute the *status quo* which would enable the incompetent to avoid the contract.

The incompetent had granted leases for quarrying purposes, and her subsequently appointed committee sought to rescind them. The lessee's changes in position encompassed (1) payment of the consideration, (2) additional expenditures made in procuring the lease agreements, (3) services performed in effecting a beneficial sub-lease with a quarrying company and persuading it to operate the incompetent's premises instead of other property leased to it, and (4) declining to lease his own dairy farm to a

2. 4 L.Q. REV. 241 (1888).

3. 29 AM. JUR. *Insane Persons* § 95 (1960). (Footnotes omitted.)

4. 203 Va. 772, 127 S.E.2d 73 (1962).

competitor quarry operator out of regard for the sub-lessee quarry company. Lessee contended that he could not be placed *in status quo* since the opportunity to lease his dairy farm could not be restored. The Court said that this item was too speculative to be considered in placing him *in status quo*, and that in any event it appeared that the opportunity to make the lease was unavailed of because of lessee's relationship with the sub-lessee company and not because of the lease of incompetent's property. Affirming the chancellor's decree, the Court found the restoration adequate in the return to lessee of the consideration paid and an additional allowance to cover the expenditures mentioned in item (2) above. Further, it denied the lessee compensation on a *quantum meruit* basis for the services of item (3), there being no evidence of the value of those services or that the additional allowance given him was not sufficient to embrace them.

The requirement of restoration of the consideration as a condition of rescission is not universal.⁵ The weight of authority in this country, however, supports the requirement when the other party had no reasonable cause to know of his co-contractor's incompetency, and it is clear that the *Edmunds* case offers no support for the opposing view in Virginia. The Court makes it equally clear, however, that the restoration need not be absolute and literal but only such as the equities of the situation demand.

C. Surety's Liability To Pay Principal's Laborers and Materialmen

The Court of Appeals indulged in no quibbling when presented with an opportunity to expound on the absoluteness of the undertaking of a building contractor's surety to pay unpaid laborers and materialmen. In *Phoenix Ins. Co. v. Lester Bros.*,⁶ a lax materialman failed to resort to a special source available for the payment of his claim, failed to file a claim against the contractor's bankrupt estate, failed to file a timely mechanics lien, and failed to notify the surety on the contractor's bond of the non-payment of his claim. The Court held that none of these omissions could serve the surety as a defense to the third-party beneficiary materialman's action on the bond. With regard to the failure to seek payment from the special source, the Court found no duty on the part of the materialman to do so, since it had not been a party to the agreement whereby the source became available. As for notice, the surety was a principal debtor and not a guarantor entitled to such. And, although acknowledging that the release of collateral security by a creditor without the consent of the surety would operate to discharge the surety, the Court viewed the omissions of materialman in failing to file claim against the bankrupt estate and to file a mechanics lien as not constitut-

5. See 2 WILLISTON, CONTRACTS § 254 (3d ed. 1959).

6. 203 Va. 802, 127 S.E.2d 432 (1962).

ing an affirmative release of the collateral security. Categorically stated by the Court, the obligation of a surety on a building contractor's bond, unqualified in terms, is a primary, unconditional, and absolute undertaking which may be enforced by a claimant for labor or material charges without first exhausting other remedies.

D. *Remedying Defects Is "The Last of Work"*

Although the surety's liability may be absolute if not qualified, of course it can be tempered by express conditions, and in *American Sur. Co. v. Zoby*,⁷ the giving of written notice within ninety days after the date on which the last of a claimant's work or labor was performed was made a condition precedent to the claimant's right of action on the bond. The question in the case was whether "the last of the work or labor" was done by a plumbing and heating subcontractor when defective work was completed and an invoice submitted to the general contractor, or not until the defective work was thereafter remedied by the subcontractor. The defective work was completed and invoice submitted for 15,000 dollars in late February, but the subcontractor thereafter worked throughout the summer at a cost to him of over 10,000 dollars in making good the defects. The required written notice of his claim was given to the surety in November, which was within ninety days of the completion of the remedial work. Holding that the running of the ninety-day period commenced only upon completion of the corrective work, the Court said that until the work had been done properly the subcontractor would not have been entitled to demand payment of the general contractor or the surety and thus there was no occasion to give them the required notice. It distinguished prior contrary cases on the fact that the additional work done in those cases was of a minor and inconsequential nature in comparison with the total work performed by the claimant. As noted above, the additional work done in this case extended over many months and entailed substantial cost.

E. *Failure To Obtain Act of Third Party as a Defense*

Where there is no evidence that could support an affirmative finding by the jury on a matter, an instruction which permits them to speculate on it is reversible error. In *Foreman v. E. Caligari & Co.*,⁸ the jury's speculations were invited by the lower court's instructions on defenses of mistake, mitigation of damages, and impossibility. The defendant's own witness denied making any mistake, and no one had testified that one was made. There was no evidence that plaintiff had failed to do anything which would have avoided or mitigated his loss, and there was none to show that

7. 204 Va. 325, 130 S.E.2d 587 (1963).

8. 204 Va. 284, 130 S.E.2d 447 (1963).

it was inherently impossible for defendant to supply the materials which he had promised. Although defendant's performance may have depended upon the consent or act of a third party, his promise was absolute and not conditional upon obtaining such consent or act, and his non-performance is not then excused by his failure to obtain it. On these findings, the Court of Appeals reversed the judgment for the defendant, which may have resulted from the jury's deliberation on these matters, and remanded the case for a new trial.

F. *Specific Enforceability Despite Technically Late Tender*

In equity, as contrasted with law, the granting of specific performance of contracts for the sale of real estate is the rule and not the exception, and time, absent express limitation, is not regarded as of the essence. Both of these distinctions were observed by the Court of Appeals in *Sims v. Nidiffer*,⁹ where it held that a late tender of performance by the vendee did not permit the vendor to rescind and granted the former specific performance of the contract. Evidence that the parties did not regard time as of the essence lay in the terms of the contract itself as well as in the conduct of the parties. The contract established the time of settlement as February 1, "or as soon thereafter as the title could be examined and the papers prepared." On March 6 it was agreed that settlement would be made on April 1, later extended to April 3. Despite no compliance by vendee on that date, the note and deed of trust which vendee was to execute were delivered by vendor's agent to vendee for execution on April 5. Vendor did not attempt to rescind until the executed note and deed of trust were tendered by vendee on April 8. Furthermore, the vendee had been in possession of the subject property for about a year, and had made substantial payments on the price and some improvements to the property.

Adhering to its pronouncements in *Hamilton v. Newbold*,¹⁰ the Court said that even if the vendee had been in default for failure to settle on the agreed date, the vendee's possession, part payment, and improvements, coupled with vendor's treatment of the contract as in force up to the time of tender by the vendee, would preclude vendor's rescission. Thus, possession, payment, and improvements serve not only to take an oral contract for the sale of realty out of the Statute of Frauds, but to bring a written one into the zone of specific enforceability, some delinquency of the vendee notwithstanding.

G. *Payment of Negotiable Note Without Obtaining Its Surrender or Cancellation*

In the absence of notice of an assignment given to an obligor, his full

9. 203 Va. 749, 127 S.E.2d 85 (1962).

10. 154 Va. 345, 153 S.E. 681 (1930).

performance rendered to the original obligee operates as a complete discharge of his obligation, albeit the unknowing assignee is in possession of the unsurrendered instrument which records the obligation.¹¹ However, an instrument may be of such a nature as to require its surrender in order to effect a discharge of the obligation which it represents, and an obligor who fails to obtain that surrender enjoys no such protection. This marked distinction between the rights of an ordinary contract assignee and those of a holder in due course of a negotiable note is again brought to light in *American Security & Trust Co. v. John J. Juliano, Inc.*¹² The maker's good faith payment made to the original payee without obtaining surrender of the note proved to be of no avail as a defense to the innocent pledgee's subsequent action on the note. The Supreme Court of Appeals found no basis for an agency existing between the payee and pledgee and held, in reversing the circuit court decree, that payment to one who does not have the obligation in hand is made at the payer's risk that such one had authority to receive the payment on behalf of the holder.

SALES

Express and implied warranties in sales transactions received comprehensive treatment by the appellate courts, federal and state, in this period. The significance of the time elapsed between purchase and injury and the applicability of the parol evidence rule to oral and implied warranties, as well as the complexities of repossession upon default by a conditional sales vendee, were accorded considerable attention. But perhaps the most noteworthy of the issues passed upon in the sales area was that of the liability of a retailer for defective manufacture when he sells a product as his own brand.

A. *Unmerchantable Despite Fifteen Months of Good Use*

A comprehensive case involving warranties and negligence in the sales of goods to consumers came before the United States Court of Appeals for the Fourth Circuit. In *Carney v. Sears, Roebuck & Co.*,¹³ plaintiff's case ran the gamut from express warranty through the two implied warranties of quality and on into negligence.

After fifteen months use, a stepladder collapsed under the purchaser, causing substantial personal injuries. Plaintiff's witness testified that the ladder's collapse was due to a defectively headed rivet which connected a brace between two of the legs. The district court had held that the fifteen months of normal use, without apparent defect, established that the ladder

11. RESTATEMENT, CONTRACTS § 167 (1932); 3 WILLISTON, CONTRACTS § 433 (3d ed. 1960).

12. 203 Va. 827, 127 S.E.2d 348 (1962).

13. 309 F.2d 300 (4th Cir. 1962).

was reasonably adapted to the purposes for which it was sold and negated breach of the implied warranty of merchantability or negligence in the course of manufacture. The circuit court concluded that this accorded too much weight to the buyer's fifteen months good use of the ladder. The time element is a factor to be considered, acknowledged the Court, but only in relation to all the other facts in the case showing negligence, and it is not to be regarded as conclusive except where there are no other facts tending to show a breach of duty.

The opinion covers a wide number of issues concerning warranties and negligence in sales transactions. Among the propositions for which it may serve well as additional precedent is that although a buyer's particular intended use of a product may be made known to the seller, no warranty of suitability for that special use will be implied where the buyer acts substantially upon his own judgment in the selection of the product. Another is that defective manufacture will be imputed to the retail seller if he puts a product out as his own without indicating that it has been manufactured by another and if the seller is not known to be doing only a retail business.

B. Oral Warranties and the Parol Evidence Rule

The parol evidence rule is perhaps nowhere more frequently applied than in cases of alleged oral warranties in sales of goods and merchandise. It is generally accepted that the rule excludes proof of express oral warranties if the written contract states that there is no warranty except as may be contained therein, and also where, although there is no such statement, the writing contains express warranties which concern the same attributes of the goods as do the alleged oral ones.¹⁴ Even where there are neither exclusionary statements nor express warranties in the written instrument, extrinsic evidence of express oral warranties is usually excluded if the writing purports to represent the whole agreement of the parties.¹⁵

There is some authority to the effect that a written contract containing no warranty precludes the implication of one. Support for that position in Virginia is found in *International Harvester Co. v. Smith*¹⁶ and in *Ford Motor Co. v. Switzer*.¹⁷ The great weight of opinion, however, is otherwise with regard to implied warranties, and in this area application of the parol evidence rule is usually restricted to negating only such implied warranties as would be inconsistent with those expressed in the written contracts. In 1945 the Virginia Court of Appeals adopted the majority view in

14. See 1 WILLISTON, SALES § 215 (rev. ed. 1948).

15. VOLD, SALES § 92 (2d ed. 1959).

16. 105 Va. 683, 54 S.E. 859 (1906).

17. 140 Va. 383, 125 S.E. 209 (1924).

Greenland Dev. Corp. v. Allied Heating Prods. Co.,¹⁸ holding that its statements in the two previously mentioned cases were dicta and that it was therefore free to adopt "the more liberal rule."

In this year's case of *Bolling v. General Motors Acceptance Corp.*,¹⁹ the defendant, conditional sale vendee, asserted a cross-claim to a bill in equity for enforcement of the written contract, pleading breach of an express oral warranty. During argument before the chancellor, defendant sought to show the existence and breach of an implied warranty. The Court of Appeals held that the evidence of the implied warranty was properly excluded by the chancellor as at variance with the pleadings and that, as the written contract provided that only the manufacturer's "new car" warranty would apply to the truck purchased by defendant, the express oral warranty was excluded by the written warranty. Once again the force of the parol evidence rule is brought to bear upon express oral warranties where the written contract of sale is manifestly complete upon its face. The asserted implied warranty, having already fallen on the variance defect, did not come in for consideration by the Court in this light.

C. "Public Auction" Conducted by Unlicensed Auctioneer

A conditional sales vendor who, without legal process, repossesses and sells personal property upon the vendee's default may not have a deficiency judgment against the vendee.²⁰ The Virginia statute so providing further declares that such repossession and sale operates to cancel and fully discharge the amount secured by the contract. An exception is made, however, where the repossessed property is sold at public auction, and the question before the Court in *Associates Discount Corp. v. Lunsford*²¹ was whether, in order to constitute a "public auction," the auctioneer must be licensed as required of auctioneers by state law.²²

In this case the sale had been conducted by an employee of the vendor's assignee who was not a licensed auctioneer, and the circuit court, in denying vendor's right of recovery, held that therefore it was not a public auction within the exception. The Court of Appeals reversed, reasoning that the license requirement is not intended to protect the public but is solely to raise revenue and that the matter of licensing thus concerned only the state and the auctioneer, not third parties. All other requisites to meet the public auction exception having been met, the Court remanded and directed judgment for the vendor's assignee.

18. 184 Va. 588, 35 S.E.2d 801 (1945).

19. 204 Va. 4, 129 S.E.2d 54 (1963).

20. VA. CODE ANN. § 55-93 (Repl. Vol. 1959).

21. 204 Va. 1, 128 S.E.2d 924 (1963).

22. VA. CODE ANN. § 54-792 (Repl. Vol. 1958).

D. *Transfer of Title to Repossessed Vehicle "by Operation of Law"*

The sale of personal property and transfer of ownership are normally handled by a bill of sale, but automobiles are subject to a special statutory treatment. As a general rule, a change in the ownership of an automobile is not consummated until there is an assignment and delivery of the certificate of title.²³ *United States Fid. & Guar. Co. v. Trussell*²⁴ not only supports this proposition, but in addition it approves a statutory exception in cases where the transfer of title is effected by operation of law. A dealer sold a used car under a conditional sales contract to one Bowman and thereafter assigned the contract to the Home Finance Company. When Bowman defaulted on the payments, the finance company repossessed the car, obtaining from Bowman a release, a request for private sale, and a power of attorney. It failed, however, to obtain the title papers. Despite the fact that it had no certificate of title with which to effect the transfer, the finance company was able to resell the car, and within a short time the vendee became involved in an accident. In the ensuing action for damages, it became necessary to determine whether title was in the finance company at the time of the accident so as to render its insurer liable for the vendee's negligence.

With regard to the second sale of the car, the insurer argued that the vehicle was not "registered" at the time of the sale, that the registration laws are applicable only to "registered" vehicles, and that the delivery of the car and the bill of sale effected a transfer of title under the general law of sales. The court made short shrift of this argument by stating: "To say that Virginia title law, passed specifically to effectively regulate the transfer of automobiles, could be avoided altogether by simply failing to ever register the automobile would seem to fly in the face of the clear purpose of the statute."²⁵

Having concluded that no title could have passed from the finance company to the second vendee, the court turned to the question whether the finance company had title at the time of the accident even though there was no certificate of title registered in its favor. Section 46.1-93 allows special relief for transferees "in the event of the transfer by operation of law of the title . . .," naming among other events producing such a transfer, "repossession upon default in the performing of the terms of . . . [an] executory sales contract . . ."²⁶ The court concluded that under this provision a transfer of ownership to the finance company was effected by operation of law at the time the repossession took place.

23. *Nationwide Ins. Co. v. Storm*, 200 Va. 526, 106 S.E.2d 588 (1959); VA. CODE ANN. § 46.1-87 (Repl. Vol. 1958).

24. 208 F. Supp. 154 (W.D. Va. 1962).

25. *Id.* at 159.

26. VA. CODE ANN. § 46.1-93 (Repl. Vol. 1958).