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Contracts (Survey of Virginia Case Law - 1955)

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CONTRACTS

Compliance With Statute—Effect on Enforceability of Contract. The question often arises as to the validity of a contract when one of contracting parties has failed to comply with the statutory requirements making it unlawful to conduct certain business activities in this State without having first obtained a license.

This question was considered in three cases in the past year. On the basis of well settled doctrines, the Supreme Court of Appeals found little trouble in disposing of these problems.

In *Lasting Products Co.* v. *Genovese*,[1] plaintiff, a Maryland Corporation, had not complied with the requirements of the Virginia Paint Law[2] which requires persons selling or transporting paint for sale in Virginia to register annually with the Commissioner of Agriculture and to label their products in a specified manner, violation being a misdemeanor. In an attempt to recover the balance due on the purchase price of paint sold and delivered in Virginia, plaintiff brought the action on the contract of sale. The Court sustained defendant's motion to strike plaintiff's evidence on the grounds of non-compliance with the registration requirement and entered a judgment on a verdict returned by the jury in obedience to the court's ruling; on appeal, affirmed.

The general rule is that a contract made in *violation* of a statute enacted to protect the public against fraud, imposition, or to safeguard the public health or morals, is illegal and unenforceable by the guilty party.[3] This rule is well settled in Virginia on the theory that the aid of the Court will not be extended to those parties whose transactions are tainted with illegality. Public policy demands full recognition of the laws of the State.

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[1] 197 Va. 1, 87 S.E.2d 811 (1955).

[2] Va. Code (1950), §§59-61.1 to 59-61.12.

[3] Cohen v. Mayflower Corp., 196 Va. 1153, 86 S.E.2d 860 (1955); Rohanna v. Vozzana, 196 Va. 549, 84 S.E.2d 446 (1954); Surf Realty Corp. v. Standling, 195 Va. 431, 78 S.E.2d 901 (1953); Bowmen Electric Co., Inc. v. Foley, 194 Va. 92, 72 S.E.2d 388 (1952); Colbert v. Ashland Construction Co., Inc., 176 Va. 500, 11 S.E.2d 612 (1940); Massie and Miller v. Dudley, 173 Va. 42, 3 S.E.2d 176 (1939).

In *Clark* v. *Moore*,[4] plaintiff, a civil engineer, failed to comply with Section 54-27 of the Code of Virginia (1950)[5] which made it mandatory that he obtain a license before he could lawfully perform engineering services.

After quickly disposing of the plaintiff's contention that the type of work performed was not engineering services, the Supreme Court affirmed the trial court's judgment for defendant on essentially the same principles as were stated in the *Genovese* case *supra*.

The statute in question was found to be a police regulation and not a revenue measure and had as its object the protection of the public.

The above two cases deny recovery to the guilty party under a contract otherwise valid but unenforceable due to non-compliance with the statutory regulations. In contrast to this situation a unique question has been raised with respect to allowing the guilty party to use this omission, i.e., his failure to comply with statutory requirements, as a defense when the *innocent* party attempts to enforce his rights under the contract.

In *Cohen* v. *Mayflower Corporation*,[6] this very question arose. Plaintiff had contracted with defendant to have its buildings waterproofed and upon completion of the job paid defendant the amount due under the contract. After notifying defendant of the continued leakage of the buildings and after unsuccessful attempts to remedy the defects the plaintiff engaged another contractor to do the job. The suit, in the instant case, was brought to recover damages for failure to perform the contract successfully.

Defendant in his answer alleged that as a result of his failure

[4] 196 Va. 878, 86 S.E.2d 37 (1955).

[5] Va. Code (1950) Sec. 54-27, "In order to safeguard life, health and property, any person practicing or offering to practice as . . . a professional engineer . . . shall hereafter be required to submit reasonably evidence to the Board . . . and to be certified as herein provided. It shall be unlawful for any person to practice . . . the profession of engineering . . . unless such person has been duly registered . . . " Sec. 54-17(2), definitions, "Professional engineer shall be deemed to cover a civil engineer, mechanical engineer . . ." etc.

[6] 196 Va. 1153, 86 S.E.2d 860 (1955).

to obtain a license under Title 54 of the Code,[7] the contract was void and therefore unenforceable.

This specific situation had not been previously before the Court, but on the basis of sound reasoning, the Court held that plaintiff, as an innocent party to the contract, was not in *pari delicto* with the defendant, the unlicensed contractor, but was rather among the class of persons designed to be protected by the statute.[8]

Some jurisdictions have disposed of this question on the principle that the unlicensed party is estopped to assert as a defense his failure to comply with the provisions of the statute.[9] If otherwise, the very purpose of the statute would be defeated.[10] This result is consistent with the prevailing view in other jurisdictions.

Offer and Acceptance. There must be an offer and an acceptance in order to consummate a contract. This fundamental rule in contracts was again expressed in *Nolan Bros.* v. *Century Sprinkler Corp.*[11] A contractor's letter, replying to Sprinkler Corporation's quotation of price for installing a sprinkler system was not such acceptance of the Corporation's offer to install for a stated price, in accordance with terms and conditions of the original offer, as to ripen into contract. The "acceptance" of the offer varied from its terms and in effect constituted a counter-offer wanting acceptance.

The offeree, Nolan, had made two qualifications in his letter of acceptance to Century in that it stipulated that Nolan would draw up the contract between the parties and also a work schedule was to be made a part of such contract. These terms were listed in the standard form used by all sprinkler companies nationally and were included in the offeror's letter.

A party to whom the offer is made must either accept it wholly or reject it wholly. A proposition to accept on terms varying from those offered is a rejection of the offer, and a sub-

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[7] Va. Code (1950), §§54-113-145.
[8] Restatement, *Contracts* §90, at 1116 (1932).
[9] Ferguson v. Sutphen, 8 Ill. 547; Romano v. Brown, 125 N.J.L. 293, 15 A.2d 818, 820.
[10] 6 Corbin, *Contracts*, p. 1070; 5 Williston, *Contracts*, p. 4568.
[11] 220 F.2d 726 (1955).

stitution in its place of a counter proposition.[12] It puts an end to the negotiation so far as the original offer is concerned.

A plain enforceable proposal followed by a plain unconditional acceptance, neither narrower nor broader than that proposal, generally constitutes a contract. The offeror has a right to prescribe in his offer any condition as to time, place, quantity, mode of acceptance or other matters which it may please him to insert in and make a part thereof, and the acceptance to conclude the agreement must in every respect meet and correspond with the offer.

Ambiguity of Contract—Parol Evidence. Often the contract will contain obvious inconsistencies, conflicts, and ambiguities in the provisions and hence will require that extrinsic evidence be received in explanation.

In *Bolling* v. *Hawthorne Coal Co.*, [13] what appeared to be a lease between the parties was found by the court to be actually a contract of conditional sale. The court permitted the introduction of extrinsic evidence to clarify the ambiguous and conflicting terms of the contract and arrived at its conclusion based on the well settled proposition that a contract may be interpreted in the light of surrounding facts and circumstances in order to determine the real meaning and intention of the parties and not for the purpose of varying the plain terms of the instrument.[14]

The real purpose and intention of the parties thereby are brought to the forefront as the courts attempt to place themselves in the same situation as the parties at the time the contract was executed.[15] Such ambiguities must be latent in the contract and the evidence must not add words to the instrument, substitute others, or contradict or vary the terms of the instrument.[16]

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[12] Hoge and Bro. v. Prince William Co-op Ex., 141 Va. 676, 126 S.E. 687 (1925); Bloomberry-Michael Furn. Co. v. Cappes. Bros. 141 Va. 18, 126 S.E. 59 (1925); Crews v. Sullivan, 133 Va. 478, 113 S.E. 865 (1922); Richeson Hardwood Lbr. Co. v. Hughes, 140 Va. 249, 12 S.E. 283, (1924).

[13] 197 Va. 554, 90 S.E.2d 159 (1955).

[14] Ford v. Street, 129 Va. 437, 106 S.E. 379, (1921); Virginia Ry. Co. v. Avis, 124 Va. 711, 98 S.E. 638, (1919); Jones v. Gammon, 140 Va. 704, 125 S.E. 681, (1924).

[15] Matthews v. LaPrade, 130 Va. 408, 107 S.E. 795 (1921); 7 M.J. *Evidence*, §148.

[16] Shockey v. Wescott, 189 Va. 381, 53 S.E.2d 17 (1949).

Specific Performance. Where the remedy at law is inadequate and the nature of the contract is such that specific performance of it will not involve great practical difficulties, equity will grant specific performance of the contract.

In *Thompson* v. *Commonwealth*,[17] the court granted specific performance of a contract the subject matter of which was found to be unique.[18] The defendant Thompson was employed by the Commonwealth to install and improve vote recording systems of his invention in the Capitol. The defendant was under a contract which required the delivery of certain spare parts for the machines installed in the Capitol. The Commonwealth was granted specific performance of the contract since it involved personal property not readily available on the open market for which defendants were the only experienced manufacturers.

It was conceded that these parts were not readily available on the open market but that a first class machine shop could build the necessary parts.

The doctrine is well settled that a court of equity will not, in general, decree specific performance of contracts relating to chattels, yet it will do so where the remedy at law is inadequate to meet all the requirements of a given case, and to do complete justice between the parties.[19]

Where there is a special need on the part of the plaintiff and at least a temporary monopoly on the part of the defendant the court is less technical in the application of specific performance of a contract relating to chattels.[20] The only doubtful point raised was whether or not there was an adequate remedy at law in that an experienced machine shop could do the necessary work called for. Specific performance was granted however because of the burden and risk that would be imposed upon the Commonwealth.

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17 197 Va. 208, 89 S.E.2d 64, (1955).

18 The subject matter in the Thompson case was not readily purchasable in the market and the word unique in this respect meant the difficulty of obtaining the parts called for in the contract from one other than the defendant.

19 Stuart v. Permis, 91 Va. 688, 22 S.E. 509 (1895).

20 17 M.J. *Contracts*, §63, p. 97; 5 Williston, *Contracts*, rev. ed. §1419, pp. 3954, 3955.

Considering the difficulty involved in searching for a first class machine shop which could manufacture these parts, the court rightly placed this burden on the defendant who had contracted to do the job.

Oral Promise to Devise—Statute of Frauds. An oral contract made with a party involving a promise to devise realty is unenforceable because in violation of the Statute of Frauds.

The effect of the Statutes of Frauds was felt in *Cochrane* v. *Bise*,[21] where the plaintiff agreed to perform services in return for an oral promise to devise a share of realty to him upon the death of the promisor. The promise was never fulfilled by the promisor and the promisee sued for specific performance.

Precluded by the Statute of Frauds from recovery, the court turned to the theory of implied contract, as it normally does in this type of case, granting the plaintiff recovery for the reasonable value of services performed.

The Statute of Frauds makes contracts unenforceable but not void. Recovery is nevertheless allowed on the theory that where an agreement is not illegal but merely unenforceable and one of the parties refuses to perform his promise after the performance or part performance by the other, the law will perceive an implied promise to pay a reasonable compensation for the benefits received.[22]

Recognizing clearly the application of the Statute of Frauds, the cases are many which will imply a contract to pay a reasonable amount for services rendered by a party who has faithfully performed unaware of the intricacies of the law. The courts of equity will not allow the Statute of Frauds to be used as an instrument of fraud.[23]

A distinction is noted, however, where the services are performed by a member of a family. In such a case a rebuttable presumption arises that such services are gratuitous.[24]

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[21] 197 Va. 483, 90 S.E.2d 178 (1955).
[22] Richs v. Sumler, 179 Va. 571, 19 S.E.2d 889 (1942).
[23] Canmon v. Canmon, 158 Va. 12, 163 S.E. 405 (1932); Simpson v. Scott, 189 Va. 392, 52 S.E.2d 21 (1949).
[24] Stoneburner v. Motley, 95 Va. 784, 30 S.E. 364 (1898); Jackson v. Jackson, 96 Va. 165, 31 S.E. 78 (1898).

All due respect to the Statute of Frauds and strict compliance with its terms is necessary to prevent fabricated agreements, fraud, or unfounded claims, yet the courts will not deny a recovery where an innocent party has acted in reliance upon an oral promise.

Contracts—Venue of Action for Breach. A cause of action for breach of contract may be brought in the jurisdiction where the contract is made or in that in which a breach occurs.

Negotiations which are merely preliminary to a contract, wherever made, are not to be considered binding on the parties.[25] However, if the only function that remains is to reduce the oral terms to a formal writing, then the place where the oral terms were agreed upon is a proper venue for any subsequent suit that may arise.

In *Coal Corp.* v. *Railroad Company*,[26] the court considered the proper venue to be where the breach of the contract occurred. Under a contract for the shipment of coal, the terms expressly stated that the coal was to be shipped "F.O.B. mine" which was located in Wise County. The uncontradicted evidence showed that defendant breached the contract in Wise County in that it refused to accept shipments of coal which were tendered to it at the mine. The obligation to deliver property under a contract implies the correlative obligation to receive, and therefore the refusal to receive is a breach of the contract.[27] The effect of a breach of contract is generally to render the party guilty of such breach liable to the injured party for the resulting loss or injury. A breach of contract has been defined as, "a failure without legal excuse to perform any promise which forms the whole or part of a contract." [28]

Where the parties had agreed to ship the coal "F.O.B. mine" and a refusal to accept such shipments as were ready occurred, the court properly held the cause of action to have arisen in Wise County where the mine was located.[29]

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[25] Bousian v. Fuller, 96 Va. 45, 30 S.E. 457 (1898); Adams v. Hazen, 123 Va. 304, 96 S.E. 741 (1918).
[26] 196 Va. 686, 85 S.E.2d 228 (1955).
[27] Ragland v. Butler, 18 Gratt. (59 Va.) 346 (1868).
[28] 17 C.J.S., *Contracts* §457 (1939).
[29] For the proper venue and service statutes see §§8-39, 8-47, 8-59, Va. Code (1950).

Assignment—Defenses Good Against Assignor Good Against Assignee. The extent of a contractor's liability to his subcontractor for the payment of labors and materialmen was discussed in *National Bank and Trust Co.* v. *Castle.* Defendant Castle, as general contractor with the City of Charlottesville for the construction of a school building, subcontracted to Albemarle Plumbing Co. the installation of plumbing and heating equipment. Under the terms of his contract with the City and of his performance bond, Castle was required to pay for all labor and materials, and Albemarle was by the terms of his contract similarly bound to Castle.

To secure plaintiff Bank for sums advanced to meet its expenses on the job, Albemarle assigned to the Bank all sums due and to become due under the contract. Notice of the assignment was given Castle on June 4, 1951. Prior and subsequent to this time, Castle had been notified of claims by materialmen against Albemarle which exceeded in value the amount ultimately paid Castle by the City for the work subcontracted to Albemarle.

The principal question involved was the rights of the assignee, the Bank, to the accounts receivable made by Albemarle as against the contractor, Castle. The Bank contended that its assignor, Albemarle, having performed all of the work required under its contract was entitled to be paid the full amount agreed upon. Castle, the defendant, argued that the assignment to the Bank covered only such sum as would become due Albemarle under its contract with Castle; that nothing ever became due to Albemarle because its failure to pay its subcontractors resulted in placing the obligation to pay them upon Castle; that, therefore, Castle never became liable to Albemarle, and consequently there is nothing on which the assignment can operate.

The court held that the Bank as assignee stood in the shoes of its assignor and any defense good against the assignor would be equally as effective against the assignee.[81]

The nonpayment of materialmen by the subcontractor was a defense available to the contractor at all times before and after the assignment. If the assignor never had any enforceable rights

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[80] 196 Va. 686, 85 S.E.2d 228 (1955).

[81] Norton v. Rose, 2 Wash. (2 Va.) 233 (1796); Feazle v. Dillard, 5 Leigh (32 Va.) 31 (1834); Etheridge v. Parker, 76 Va. 247 (1882).

against the contractor, the assignee stood in no better position and hence acquired no right against the contractor.[32]

Conclusions: In 1956 little controversy has arisen in the field of contracts; of the nine cases surveyed only one presented an original problem (the *Cohen* case, supra), and this was disposed of unanimously by the Court. The remaining eight were decided on well-established principles of contract. There were no dissenting opinions voiced in any of the nine cases studied.

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[32] Selden v. Williams, 108 Va. 542, 62 S.E. 380 (1908); Finney v. Bennett, 27 Gratt. (68 Va.) 365 (1876).