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Contracts and Sales

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CONTRACTS AND SALES

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A wide variety of novel questions was presented to the Virginia courts, federal and state, during the period encompassed by this survey. Samplings of the unique situations before the courts include a written lease read by neither of the parties executing it, the droppings of pigeons on cars in a parking lot beneath a viaduct, and the dividing of a boat, motor and trailer among three adverse claimants. The following discussion concerns the ways in which the courts handled the interesting problems developed by these intriguing situations.

CONTRACT DECISIONS

A. *Precatory Language*

In *Crowder v. Commonwealth*,[1] communications to an optionor stating "'it is our desire to take up this option . . . .'" and "'please be advised that the State wishes to exercise its option and purchase the acreage of land . . . .'"[2] were held not to be mere expressions of an intent to exercise the option at some future time. Other accompanying words and circumstances sufficiently manifested a present exercise—particularly the optionor's treatment of the communications as an exercise in his subsequent actions. The Court also decided that tender of the purchase price was not essential to an effective exercise when the option itself provided for payment "when [the] deed is recorded."

B. *Insurance Proceeds*

It is the generally accepted rule that mere intent of the owner of a life

39. United States v. Village Corp., 298 F.2d 816, 819 (4th Cir. 1962).

40. H. Doc. No. 5, General Assembly of Va., 1956 Sess. 94. If the construction of the statutes is doubtful, resort to the Code Commission's Report is expressly authorized as an aid in interpreting the corporation code. VA. CODE ANN. § 13.1-132 (Repl. Vol. 1956).

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1. 202 Va. 871, 121 S.E.2d 487 (1961).

2. *Id.* at 872, 873, 121 S.E.2d at 487, 488.

insurance policy is insufficient to change the beneficiary without some overt attempt to comply with policy provisions setting forth the manner in which the change may be effected.[3] This rule stems from the once universal view that the interest of the beneficiary is vested subject to divestment, and that the divestment may occur only upon the event and in the manner prescribed therefor. Many jurisdictions, including Virginia, have strayed considerably from the vested view when the owner has reserved the right to change the beneficiary.[4] But even these "expectancy" states have retained that portion of the concept which requires the insured to do all that he reasonably can under the circumstances to comply with the procedures set forth in the policy for effecting the change. An interesting situation involving this issue was presented to the Supreme Court of Appeals in *Carter v. Carter*.[5]

Decedent's wife had been the original designated beneficiary of a group insurance policy purchased by decedent's employer as part of the company's employee insurance plan. A blanket accident policy providing additional coverage was subsequently acquired by the company as a complement to its other group insurance for employees. Decedent later changed the beneficiary of the group policy, as he had the right to do under its terms, designating his mother beneficiary of 2,000 dollars with his children to receive the balance of the proceeds. When the blanket policy reached a coverage of 40,000 dollars at decedent's then salary bracket, he was advised by the employer that death proceeds would be payable to the beneficiary designated in the group policy, and if none were so designated, then to the employee's estate. Four years later, at the time of decedent's death, the blanket policy coverage for decedent had increased to 126,000 dollars, due to his rise in salary scale over the years.

Decedent's wife maintained that in view of the mutual love, respect and cooperation between them, decedent could not have intended that she be excluded from the increased policy benefits and that therefore the designation of beneficiaries should be reformed. The trial court, accepting this argument, decreed that only 40,000 dollars of the blanket proceeds should be paid in the manner provided by the group policy beneficiary designation and that the balance of 86,000 dollars, attributable—probably without his knowledge—to decedent's rise in salary scale, should be paid to his estate.

Finding no precedent for the precise question presented by these facts, the Supreme Court of Appeals relied on the somewhat analogous testamentary bequests where bequeathed property has substantially increased in

3. *Compare* Mitchell v. United States, 165 F.2d 758 (5th Cir. 1948), *with* Bradley v. United States, 143 F.2d 573 (10th Cir.), *cert. denied*, 323 U.S. 797 (1944).

4. On the historical background of the "vested" theory, see Vance, *The Beneficiary's Interest in a Life Insurance Policy*, 31 YALE L.J. 343 (1922).

5. 202 Va. 892, 121 S.E.2d 482 (1961).

value between the time of execution of the will and testator's death. It could find no more excuse for reforming the beneficiary designation in this case than for reforming the bequests and devises in the cases of testamentary dispositions, and accordingly reversed the trial court, entering a final decree that the entire blanket policy proceeds pass to the beneficiaries designated in the group policy.

C. *Existence Distinguished from Operation, Use and Maintenance*

It is somewhat fantastic to conceive of the Seaboard Air Line Railroad and the Richmond-Petersburg Turnpike Authority in legal battle before the Supreme Court of Appeals over the droppings of pigeons.[6]

The Authority assumed liability for any damage due to, arising out of, or happening in connection with the operation, use and maintenance of the bridge facilities which it had constructed by right of easement over Seaboard's property. Seaboard leased the land beneath the viaduct to a lessee for parking lot purposes. The bridge proved to be an attractive nesting place for pigeons and consequently the lot below an unattractive place for parking automobiles. Seaboard sought to compel the Turnpike Authority to abate the nuisance, conceding, at least in its brief, that since the pigeons were *ferae naturae*, the Authority's liability must be founded upon the indemnity undertaking in the easement agreement. The Court agreed but could not find an assumption of liability in the wording of the provision and refused to interpret liability from the context. The damage caused by the pigeons, stated the Court, was a happening in connection with the existence of the bridge, not with its operation, use and maintenance.

A fascinating facet of the operation of law is the applicability of its sometimes ponderous and deeply reasoned concepts, frequently centuries in formulation, to the seemingly trivial and most unawesome of incidents. Thus the rules as to construction of contracts and the liability of persons for the trespasses of animals which are *ferae naturae* are brought to bear upon this justiciable controversy, and the pigeons and parties resume their peaceful coexistence, at least as peacefully as the former will allow.

D. *Promise Never Made*

A court of equity may reform a contract to conform with the true undertakings of the parties. That it may do so even to the extent of wholly disregarding a provision in a written agreement was asserted by the District Court for the Western District of Virginia in *Carriers Ins. Exch. v. Truck Ins. Exch.*,[7] where the parties had neither read the provision

6. Seaboard Air Line R.R. v. Richmond-Petersburg Turnpike Authority, 202 Va. 1029, 121 S.E.2d 499 (1961).

7. 203 F. Supp. 764 (W.D. Va. 1962).

nor given any consideration whatsoever to the subject matter to which it related.

Lessor, in the business of transporting petroleum products in tank trailers, was not licensed for interstate transportation. When interstate shipment was to be accomplished, it would orally lease its tank trailer to lessee, who was duly licensed and who would complete the delivery, retaining ten per cent of the revenue and remitting ninety per cent to lessor. When advised by the Interstate Commerce Commission that the oral lease arrangement would no longer be acceptable, the parties resorted to form leases solely to satisfy the Commission. The form used on the occasion of an explosion caused by the negligence of the driver, and resulting in injuries and damages, recited that lessee was to provide public liability insurance. The evidence amply supported a finding that neither of the parties had read the written form and that the only provision discussed or considered by them concerned the division of the revenue. The court held that both were engaged in a joint venture, combining resources and services, and that the liability should be shared equally by their respective insurance carriers.

E. *Miscellaneous Cases*

A party to a contract may not sue for nonperformance when he himself has been the cause of the other party's failure to perform. Moreover, his interference is a breach of promise giving a cause of action to the nonperforming party. However, the nonperforming party's damages are recoverable "'only to the extent that the evidence affords a sufficient basis for estimating their amount in money with reasonable certainty.'"[8] Thus, in *Boggs v. Duncan*,[9] it was held that the mere opinion of the defendant and another witness that the defendant might have made 6,000 dollars was insufficient evidence upon which to calculate damages.

A deed, conforming in terms with the oral offer and acceptance, given to a third party for the sole purpose of transmittal to the grantee is effectively delivered. In *Flippo v. Broome*[10] the third party retained the deed when threatened with suit by another claiming a superior right to purchase the property. The Court awarded specific performance to the grantee. *Quaere*, however, was the third party the grantor's agent for the purpose of consummating the sale, or should it not matter since the grantor parted with possession of the deed intending that it should take effect?

The use of federal and state funds for the construction of a community hospital does not per se transform the hospital into a public corporation. The Board of Trustees, vested with management of the hospital by its

8. Boggs v. Duncan, 202 Va. 877, 883, 121 S.E.2d 359, 363 (1961).
9. 202 Va. 877, 121 S.E.2d 359 (1961).
10. 202 Va. 919, 121 S.E.2d 490 (1961).

charter and bylaws, may in its discretion deny use of the hospital to anyone applying for appointment to its medical staff. In *Khoury v. Community Memorial Hosp., Inc.*[11] the Court, upholding the absolute discretion of the Board, indicated that the hospital was a private corporation and that the applicant had no right to a hearing before the board.

The *ejusdem generis* rule is invoked only for the purpose of ascertaining the intent and meaning of the language under consideration and should not be applied so as to do violence to it. Thus, in *W. F. Magann Corp. v. Virginia-Carolina Elec. Works, Inc.*[12] it was held that a contract stipulating that the defendant agreed to protect the general contractor from all liability for damage caused by defendant, "its agents, employees, subcontractors, vendors, materialmen, *or* 'any other person having anything whatsoever to do in connection with the work,' " [13] was not limited to agents and employees, etc., but would be construed to include injury caused by another subcontractor whose work was with the knowledge of and in conjunction with the work of defendant.

A broker is not entitled to a commission for finding a "ready, able, and willing purchaser" when the purchaser attaches a condition to his acceptance which conflicts with the specific instructions given to the broker by the seller. In *Tooles v. Brunk*,[14] the broker claimed that the seller had accepted a subsequent verbal offer communicated to him by the broker purporting to be by the same buyer. Upon finding that such offer was not in fact authorized by the buyer, the Court held that the seller was not bound to pay the commission.

In *Arlington Towers Land Corp. v. McFarland*[15] the Court added still another precedent supporting the proposition that a novation is never to be presumed. An agreement whereby an employee-stockholder, as one of a group, sold all of the stock of the employer corporation to a third party was held not to be a substitute for the employment contract previously entered into between the employee and the corporation in the absence of clear and convincing evidence that it was intended to do so.

Facts and circumstances may establish the agency of a husband for his wife, notwithstanding the absence of a presumption solely by reason of the marital relationship. In *Littreal v. Howell*[16] negotiations for the work in question were conducted in the wife's presence and on her premises and the work was performed pursuant to her instructions.

The agency relationship of the broker and the seller generally terminates

11. 203 Va. 236, 123 S.E.2d 533 (1962).
12. 203 Va. 259, 123 S.E.2d 377 (1962).
13. *Id.* at 263, 123 S.E.2d at 380.
14. 203 Va. 289, 124 S.E.2d 32 (1962).
15. 203 Va. 387, 124 S.E.2d 212 (1962).
16. 203 Va. 394, 124 S.E.2d 16 (1962).

upon execution of the contract of sale by the buyer and seller. The broker is thereafter free to act for the buyer in attempting to find a purchaser for him. Furthermore, the Court held in *Olson v. Brickles*[17] that the broker does not breach his obligation to the seller by making suggestions which are more favorable to the purchaser when they are openly discussed and agreed to by both parties and the seller voluntarily agrees to pay the broker his commission after the signing of the purchase agreement.

Sales Decisions

A. *Privity Requirement in Breach of Contract Actions*

1. *Foodstuffs*

In 1959 the Supreme Court of Appeals held in *Swift & Co. v. Wells*[18] that the privity of contract ordinarily required for breach of contract actions was not essential to the maintenance of an action for breach of the implied warranty that food is fit for human consumption. The Court, following the lead of many other states, allowed a consumer who had purchased a ham from a local retailer to recover on implied warranty from the processor for food poisoning. In *Harris v. Hampton Roads Tractor & Equip. Co.*,[19] the line was drawn at the sale of foodstuffs, and the Court affirmed the application of the general rule requiring privity to the sale of machinery. The operator of a crane, an employee of the purchaser, was denied recovery for injuries sustained from alleged defective installation without a showing of negligence on the part of the defendant dealer. *Swift*, therefore, sets forth an exception applicable to foodstuffs rather than an abrogation of the general rule.[20]

2. *Inherently Dangerous Products*

In *General Bronze Corp. v. Kostopulos*[21] there is dictum by the Court that the exception to the privity requirement would extend to include sales of inherently dangerous products. However, the product in that case was sliding doors and the negligence complained of was a defective

17. 203 Va. 447, 124 S.E.2d 895 (1962).

18. 201 Va. 213, 110 S.E.2d 203 (1959). For an extended discussion of this case see Dillard, *Contracts & Sales, 1959-1960 Ann. Survey of Va. Law*, 46 Va. L. Rev. 1626 (1960).

19. 202 Va. 958, 121 S.E.2d 471 (1961).

20. For 1962 legislation affecting this issue see Va. Code Ann. § 8-654.3 (Supp. 1962). This statute is discussed in the text accompanying note 35 *infra*.

21. 203 Va. 66, 70, 122 S.E.2d 548, 551 (1962). See Emroch, *Statutory Elimination of Privity Requirement in Products Liability Cases*, 48 Va. L. Rev. 982 (1962), for an extended discussion of the *Bronze* case. See generally Annot., 74 A.L.R.2d 1111, 1141 (1960).

design which permitted rain water to leak into the premises. Distinguishing the danger of injury which stems from the product itself from the danger which results from a defect in the making of the product, the Court found such doors not to be an inherently dangerous product. As in *Harris*, the absence of privity of contract between the manufacturer and the owner of the premises precluded an implied warranty; and the Court held, reversing the trial court judgment, that the evidence was insufficient to present a jury question on express warranty.

B. *Qualification on Right of Return Distinguished from Guarantee*

Generally in a sale on approval the buyer need not specify his reasons for timely rejection and return of the goods.[22] The parties may, of course, limit the buyer's right in this respect by setting forth qualifying conditions in the agreement. In *Pettibone Wood Mfg. Co. v. Pioneer Constr. Co.*[23] the distinction between a general sale on approval and one with only a conditional right of return permitted construction of a term as merely a guide for the testing of a machine during the trial period instead of a guarantee extending over the period of use of the machine. In addition to other affirmations relating to its efficiency, the agreement set forth that the overall cost of operating a road materials pulverizing machine would not exceed twenty-five cents a ton. The trial period was not to exceed five working days. Following one year's use of the machine and the crushing of 100,000 tons of materials, as it was guaranteed to do, the buyer commenced action against the seller for breach of contract, alleging damages for the difference between the twenty-five cents cost asserted in the agreement and the ninety-six cents which buyer claimed was the actual operation cost. The Court did not agree with buyer that twenty-five cents was a guarantee extending over the entire period of crushing 100,000 tons. It found it to be a reasonable construction (and one more in accord with the rule that an interpretation should be avoided which would place one party at the mercy of another) that twenty-five cents was intended as a basis to determine if, at the expiration of the trial period, the buyer would be justified in exercising its option to return the machine.

C. *Merchantability Implied but Unmerchantability Not Proved*

The implied warranty of merchantability, that goods are reasonably fit for the purposes for which goods of that description are generally used, is seeking its level in Virginia law. Categorically accepted only recently in *Smith v. Hensley*,[24] one more securing nail was administered by the

22. 46 Am. Jur. *Sales* § 500 (1943).
23. 203 Va. 152, 122 S.E.2d 885 (1961).
24. 202 Va. 700, 119 S.E.2d 332 (1961).

Fourth Circuit in *Moore v. Hecht Co.*,[25] a case involving the sale of bedroom slippers. However, the existence of the warranty, coupled with injury to the buyer while using the goods, did not complete the plaintiff's case. Plaintiff's burden included proving that the goods were defective and that the defect caused her injuries. The court agreed with the trial court that plaintiff's loss of balance and fall on a hardwood floor while wearing the newly purchased slippers was not sufficient proof of a lack of firmness of tread or dangerous slickness in the soles of the slippers.

D. *Titillating Title Case*

Resting as it does on case law, our common law system may sometimes carry us back a good number of centuries in the search for precedent. The Biblical adage that a man may not serve two masters was considered and distinguished in *Carriers Ins. Exch. v. Truck Ins. Exch.*[26] But the new record for the earliest precedent may have been set by Judge Thomas A. Michie, of the District Court for the Western District of Virginia, in deciding *In re Lawson.*[27]

Owner, prior to his bankruptcy, gave possession of a boat, motor and trailer to one of his creditors. Although it was disputed whether he loaned them or sold them in consideration of a credit against the indebtedness, the court held the latter more likely under the circumstances, despite the complete lack of any written evidence of a sale. Subsequently, owner purported to sell a one-half interest in the same properties to a third party, this time reversing the procedure by providing much written evidence, a conditional sales agreement and the certificate of title for the trailer, but failing to deliver possession of the properties. Following owner's bankruptcy, the first and second purchasers and the trustee in bankruptcy each claimed superior right to the properties. Holding that actual transfer of possession of personalty is sufficient to transfer title when coupled with the intent to do so, Judge Michie awarded the boat and motor to the first purchaser. However, with regard to motor vehicles, which category includes trailers,[28] transfer of the certificate of title is essential to pass property interest in Virginia. Accordingly, the one-half interest evidenced by the certificate of title to the trailer, held by second purchaser, was accorded validity, while the other one-half interest in the trailer passed to the trustee.

Judge Michie's appropriate finding of some analogy in Solomon's judgment regarding the baby claimed by two women probably establishes the time period record, if not for authority, at least for analogy.

25. 298 F.2d 892 (4th Cir. 1962).
26. 203 F. Supp. 764 (W.D. Va. 1962).
27. 201 F. Supp. 710 (W.D. Va. 1962).
28. See VA. CODE ANN. § 46.1-41 (Repl. Vol. 1958).

LEGISLATION

Two recent legislative enactments in this field of law, one affecting contracts and the other the law of sales, are of sufficient general interest to warrant more than mere passing notice.

Section 11-20 of the Virginia code[29] requires that in addition to the general contractor of a public contract each subcontractor of work in excess of 2,500 dollars shall furnish a payment bond with security thereon conditioned upon payment to labormen and materialmen engaged in the prosecution of the work provided for in the subcontract. The responsibility to see that such bond is furnished by the subcontractor is imposed upon the contractor. In the 1962 regular session, the General Assembly gave the subcontractor's labormen and materialmen a direct right of action against the obligors and sureties on the bond required of the contractor in the event that the latter failed to require the subcontractor's bond.[30]

The enactment having the broadest impact, however, was the one affecting sales.[31] *Swift & Co. v. Wells*,[32] referred to in the discussion of the *Harris* case,[33] made an exception to the privity requirement in the sales of foodstuffs. As noted previously, the Court in *General Bronze Corp. v. Kostopulos*,[34] indicated its complete willingness to extend the exception to include sales of inherently dangerous products. But the sense of all three of these cases, especially *Harris*, leaves no doubt that at least so far as Virginia case law was concerned the general rule requiring privity is to be observed and adhered to in all sales cases other than foodstuffs and inherently dangerous products. However, section 8-654.3,[35] enacted in the 1962 regular session, eliminates the privity requirement and bars any defense thereof in actions grounded on breach of warranty or negligence against a manufacturer or seller of goods by one who might reasonably have been expected to use, consume, or be affected by the goods. Henceforth, in actions based on breach of warranty, express or implied, the requirement of privity will be the exception and not the general rule.

There seems little doubt to the writer that by including the seller as well the manufacturer among those to whom the defense is barred, the legislature intended to do away with the previously existing distinction

29. VA. CODE ANN. § 11-20 (Supp. 1962).

30. *Ibid.*

31. VA. CODE ANN. § 8-654.3 (Supp. 1962).

32. 201 Va. 213, 110 S.E.2d 203 (1959).

33. Harris v. Hampton Roads Tractor & Equip. Co., 202 Va. 958, 121 S.E.2d 471 (1961).

34. 203 Va. 66, 122 S.E.2d 548 (1961).

35. VA. CODE ANN. § 8-654.3 (Supp. 1962). For further treatment of this enactment and a discussion of products liability in Virginia, see generally Emroch, *supra* note 21.

in Virginia law between vertical and horizontal privity. In *Swift & Co. v. Wells*[36] a break in privity occurred in the sales chain, but the retailer's purchaser, through an agent, was permitted recovery against the manufacturer. However, in *Colonna v. Rosedale Dairy Co.*[37] the consumer, a nonpurchaser, was not permitted to recover against the seller, the break occurring beyond the sales chain. *Rosedale Dairy* is commented upon by the Court in the *Swift* case with seeming approval.[38] It would now appear from the wording of the statute that the nonpurchasing consumer may recover not only from the seller, providing he is one who might reasonably have been expected to consume, but also, in the alternative, from the manufacturer despite the double break in the privity chain. Some interesting factual questions as to who might reasonably be expected to use, consume, or be affected by the goods are foreshadowed.

36. 201 Va. 213, 110 S.E.2d 203 (1959).
37. 166 Va. 314, 186 S.E. 94 (1936).
38. Swift & Co. v. Wells, 201 Va. 213, 218, 110 S.E.2d 203, 206 (1959).