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Contracts and Sales

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CONTRACTS

No Waiver by Silence

Silence is not golden when there is a duty to speak, but the Virginia Supreme Court of Appeals found no duty when an owner permitted a builder to complete a late performance but did not state that he would seek damages for the delay. In *May v. Martin*,[1] the builder took approximately twenty months to complete construction of two houses; there was evidence that they could reasonably have been completed in four months. When sued by the builder for the balance of the building contract price, the owner counterclaimed for the additional sixteen months' interest that he had had to pay on money borrowed to construct the houses. The jury returned a verdict which denied the owner offset of these damages, but the Court of Appeals found fault with two of the instructions that had been given by the lower court. The first was that the builder should not be held responsible if the jury should find that the owner had failed to take reasonable steps to minimize the damage from the builder's delay. The Court could find no evidence of the owner's failure in this respect to warrant giving this instruction.[2] The second was that if the jury should find that the owner had acquiesced in the delay, the builder would not be liable for the additional interest expense incurred by the owner. This the Court held to be an incorrect statement of the law, as it gave to acquiescence the "same weight, meaning, and implication as waiver." The Court stated that the owner could either treat the delay as a breach and declare the contracts forfeited, or permit the delay and claim damages therefor,

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1. 205 Va. 397, 137 S.E. 2d 860 (1964).

2. 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, although correctly stating the law involved, is generally held to be reversible error. See Foreman v. E. Caligari & Co., 204 Va. 284, 130 S.E.2d 447 (1963).

without any duty to advise the builder of election of the latter course.[3] The case was remanded, however, for a jury's determination of the time within which the work was to be performed since there was conflicting evidence on that point.

Tendency to Imply Terms to Avoid Uncertainty and Indefiniteness

In *High Knob, Inc. v. Allen*[4] written sales contracts and deeds to residential properties made no reference as to how the vendees were to obtain water, but did proscribe the taking of water from the ground through development of wells or springs. Faced with this impasse, the chancellor had permitted the introduction by the vendees of an oral agreement whereby the vendor's water system was to be made available as the source of water for their properties. The Supreme Court of Appeals affirmed the chancellor's holding that the written contracts did not encompass the entire understanding of the parties and obviously implied that there must have been some other agreement on this point, admissible by parol under the doctrines of partial integration and collateral contract. But even the oral agreements introduced by the vendees failed to specify the length of time that the vendor would be obligated to supply water. The chancellor was not at all reluctant to find by implication that the term was for so long as the vendor's water system was capable of supplying a reasonable quantity of water and that therefore the oral agreements were not void for indefiniteness and uncertainty. In affirming, the Court of Appeals stressed the tendency of the courts to turn away from a construction which would render a contract void on these grounds, especially where there has been partial performance as in the instant case.

Since it was not raised below, the Court refused to treat the point that the oral agreements were barred by the statute of frauds as not to be performed within one year. However, since the implied term was for "so long as the vendor's water system was capable of supplying a reasonable quantity of water," the matter should fall in that category where the terminating event might possibly happen within a year, however unlikely it is to do so, and thus it would not be within the scope of the statute.

Independent Collateral Agreement Not Barred by Parol Evidence Rule

Additional exposition on the parol evidence rule was given by the

3. Contentions of waiver by silence have sometimes succeeded in insurance cases, see Phenix Ins. Co. v. Grove, 215 Ill. 299, 74 N.E. 141 (1905), but the view that there is no duty to speak more often prevails, see Oriole Paper Box Co. v. Reliance Ins. Co., 257 F. 2d 707 (4th Cir. 1958). Of course, silence when coupled with other circumstances may give rise to an estoppel.

4. 205 Va. 503, 138 S.E. 2d 49 (1964).

Supreme Court of Appeals in *Durham v. National Pool Equipment Co.*[5] In this case two written contracts had been entered into by the parties, one for the supply of equipment for the construction of a swimming pool,[6] and the other for the furnishing of technical advice by the equipment seller. Plaintiff-vendee sought to establish the vendor's oral "guarantee" that the total cost of the pool would be no more than 8,000 dollars and plaintiff's action was to recover the excess of approximately 5,000 dollars which he had expended. The two written contracts fixed the costs of the equipment and technical advice, making no mention of such "guarantee," and the lower court struck plaintiff's evidence and entered summary judgment for the defendant-seller. In reversing, the Supreme Court held that plaintiff's evidence tended to establish an indemnification agreement, independent of and in addition to the written terms, since the subject matter of the written contracts was confined only to the costs of the equipment and the technical advice and did not encompass the actual construction of the pool and total cost thereof. This independent collateral agreement, said the Court, would not vary or contradict in any way the terms of the written contracts, and hence was not barred by the parol evidence rule.[7] The case was remanded, however, for the determination of the sufficiency of plaintiff's total evidence to establish the oral agreement, since his oral testimony was stricken before he had rested his case and the probative value of the oral testimony alone was at least questionable for that purpose.

Promisee Need Not Assist Promisor's Performance

It is an implied condition of every contract that one party will not hinder or prevent performance by the other.[8] This is not, however, extended to the point of obligating the one to facilitate or assist the other's performance, except in circumstances from which it may be inferred that the promisee is under a duty to cooperate. In *Whitt v. Godwin*,[9] the written promise to pay a sum of money to the promisee for a stated consideration was absolute in form, although there was evidence that the promisee knew that the promisor hoped to obtain the money with which to make payment from a third party who was demanding that both promisor and promisee join in a release discharging the third party from a

5. 205 Va. 441, 138 S.E. 2d 55 (1964).

6. Although this contract had not been formally executed by the defendant, the Court found assent from the acts and conduct of the parties.

7. However, what was the consideration for the indemnification promise, if not the price to be paid for the equipment and technical advice? Or was it the assent to enter into the equipment and technical service contracts? If the latter, is not the issue one of proving fraud in the inducement rather than a collateral contract?

8. 5 WILLISTON, CONTRACTS § 677A (3d ed. 1961).

9. 205 Va. 797, 139 S.E. 2d 841 (1965).

certain liability. The Supreme Court of Appeals affirmed the lower court's holding that the refusal of the promisee to execute the release was no defense to the promisee's action against the promisor. The result reached was reinforced by the fact that the promisee had stated at the time of the execution of the agreement with the promisor that he would not be willing to sign the release, and the promisor nevertheless had made his promise absolute and not expressly conditioned upon the promisee's joining in the release.

Applicability of the parol evidence rule also entered into the issue before the Supreme Court, which said that the rule is not one of evidence but of substantive law, and that therefore although parol evidence may have been admitted without objection, a court may disregard it upon a subsequent motion for summary judgment.[10]

Damages for Willful Defects Without Fraud

A contractor's suit to enforce a mechanic's lien in the amount of the unpaid contract price was met by the owner's counterclaim for defective work.[11] The owner prevailed on his counterclaim and was given judgment for the full amount of the damages without offset of the unpaid contract price. The Supreme Court of Appeals could find no justification for this result on the grounds that the contractor's departures were made knowingly and willfully, but without fraud. The Court distinguished the "no recovery for intentional departure" cases from those in which the contractor and owner asserted offsetting claims and from those where the departures did not involve bad faith. The Court noted that disallowance of the offset for the unpaid contract price would in this case place the owner in a better position than if the contract had been wholly performed in accordance with its terms, and subject the contractor to punitive measures despite the lack of any bad faith.

The major part of the Court's opinion in this case was concerned with an interesting, but not novel, agency issue—whether an architect who is to have general supervision of the work has authority to bind the owner by approval of substantial changes in the specifications. It is generally held that the architect's supervisory authority does not constitute him a general agent of the owner for all purposes.[12] The Court's adherence to the general rule was facilitated by specific terms of the contract between the owner and the contractor which expressly limited the architect's authority to approve changes in the work.

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10. See Laughlin, *Evidence, 1964-1965 Annual Survey of Va. Law*, 51 VA. L. REV. & n.7 (1965).

11. Kirk Reid Co. v. Fine, 205 Va. 778, 139 S.E. 2d 829 (1965).

12. 5 AM. JUR. 2D *Architects* § 6, at 668 (1962).

No Estoppel Against State Acting in Governmental Capacity

Another case in which reliance upon the authority of subordinate employees to approve substantial changes was found to be misplaced is *Main v. Department of Highways*.[13] As in *Kirk Reid Co. v. Fine*,[14] the contract expressly provided the method for authorizing substantial changes in the highway construction specifications, and the contractor's failure to adhere proved fatal to his right to recover for extra work. Resort to an estoppel contention was met with the holding that the doctrine does not apply to the rights of a state when acting in its sovereign or governmental capacity. The Court also passed upon the validity of an arbitration provision in the contract, holding that it was enforceable as an implied condition precedent to the right of action.

Terminability of Exclusive Agency Agreement To Procure a Purchaser

Distinguishing clauses in exclusive listing agreements requiring "efforts to find a purchaser" and "making reasonable efforts to sell" from one which required "procuring a purchaser and advertising therefor," the Supreme Court of Appeals held that in the latter instance there is only an offer by the owner which is terminable in good faith at any time prior to acceptance effected by the agent's producing someone ready, willing and able to buy on the stated terms of sale. In *Hummer v. Engeman*,[15] the agent's prospective purchaser was willing to meet the scheduled payments upon commensurate piecemeal release of the land, which counteroffer was not acceptable to the owner. Reversing the lower court judgment for the agent, the Court held that the owner's termination of the agency and subsequent sale to another within the thirty-day period set forth in the agreement for the duration of the exclusive agency did not subject the owner to liability for payment of a commission to the agent.

Where the consideration to be given by the agent is recited to be his efforts, there, too, in the absence of an agency coupled with an interest, the agreement is unilateral. Acceptance is effected by the agent's making substantial efforts, whereupon the owner becomes bound for the duration of the agency agreement.[16] The significance of the distinction lies not in the unilateral or bilateral nature of the agreement, but in the performance required to effectuate the agent's acceptance.

13. 206 Va. 143, 142 S.E. 2d 524 (1965).

14. 205 Va. 778, 139 S.E.2d 829 (1965), discussed in text accompanying notes 11 & 12 *supra*.

15. 206 Va. 102, 141 S.E.2d 716 (1965).

16. See Morris v. Bragg, 155 Va. 912, 156 S.E. 381 (1931); Wilson v. Brown, 136 Va. 634, 118 S.E. 88 (1923). Both cases are mentioned by the Court in the principal case as exemplifying the distinction in consequences depending upon the nature of the performance required of the agent.

Anticipatory Breach Eliminates Tender Requirement

Optionee timely notified optionor that it elected to exercise its option to purchase the subject property and proffered a contract to purchase which it contended was wholly in conformance with the sale terms set forth in the agreement. Optionor refused to execute the tendered contract, there being a difference of opinion as to whether a major provision thereof was in accord with the option agreement. Optionee brought suit for specific performance in advance of the date set forth for final performance and without tendering the purchase price or entering into further negotiations to arrive at contract terms suitable to the optionor. The factual question whether optionee's proposed contract embodied the option terms was resolved in its favor and in *Two-Way Tronics, Inc. v. Greater Washington Educational Television Ass'n*[17] the Supreme Court of Appeals affirmed the holding of the lower court that optionor's refusal to execute the contract proferred by optionee constituted an anticipatory breach. This, the Court held, permitted suit in advance of the performance date and eliminated the requirement of tender of the purchase price by the vendee as well as any alleged requirement that the vendee enter into further negotiations to obtain the vendor's acceptance of terms. These would seem to be the well-recognized consequences of an anticipatory breach.

SALES

True Owner's Chain of Title Stronger Than Thief's

There are few exceptions to the general rule that a thief cannot convey a title superior to that of the true owner, even to one who pays full value and in good faith. One of the exceptions pertains to the negotiation of stolen documents of title under some of the uniform acts;[18] another is in the transfer of a vehicle in strict certificate of title jurisdictions.[19] Virginia has certificate of title laws,[20] but does not align herself with those states which treat the title certificate as conclusive of interest,[21] and in *Vicars v. Atlantic Discount Co.*[22] the certificate of title holder, whose chain of title went back to a thief, was compelled to surrender possession of a car to the

17. 206 Va. 110, 141 S.E.2d 742 (1965).

18. See, *e.g.*, UNIFORM COMMERCIAL CODE § 7-502(2); VA. CODE ANN. § 8.7-502(2) (1965).

19. See, *e.g.*, Kelley Kar Co. v. Finkler, 155 Ohio St. 541, 99 N.E.2d 665 (1951); OHIO REV. CODE ANN. § 4505.04 (Page 1965).

20. VA. CODE ANN. §§ 46.1-41 to -98 (1958).

21. See McQuay v. Mount Vernon Bank & Trust Co., 200 Va. 776, 108 S.E.2d 251 (1959).

22. 205 Va. 934, 140 S.E.2d 667 (1965).

holder of a conditional sale contract who succeeded to the rights of the original buyer, a conditional vendee in default. Although the bill of sale to the original buyer was unsigned and recited an incorrect serial number, the Court held that under Georgia law, where the sale had been made, no bill of sale was essential to pass title to personalty and that other irrefutable evidence of identification was sufficient to overcome the incorrect serial number designation.[23]

No Implied Warranty of Quality in Sale or Bailment of Used Car

A prospective used car buyer was invited by the dealer to take the car out for a trial run with a view to inducing its sale. In the course of the trial run, a tire blew out, causing the car to overturn and injure the prospective buyer-bailee. His action to recover damages from the dealer was grounded on negligence and breach of implied warranty of safety and suitability. The bailee failed to prove negligence to the satisfaction of either the trial court of the Supreme Court of Appeals.[24] On the breach of warranty count, the Court noted the "almost unanimous" view that no warranty of quality is implied in the sale of a used automobile,[25] and concluded that since no such warranty is implied in the case of a sale, a fortiori it is not to be implied on a bailment to test with a view to purchase.

Miscellaneous

Section 8-673 of the Virginia Code[26] protects the title of a purchaser at a judicial sale unless the sale is set aside within twelve months from its confirmation. In *Finkel Outdoor Products, Inc. v. Beil*,[27] the Supreme Court of Appeals held that the protection does not extend as against prior judgment lien creditors who were not served with process and made parties to the suit from which the decree of sale emanated. The Court also found that the facts did not establish a defense of laches, and held that in any event the creditors were not asserting an equitable right but a legal one not subject to the doctrine.

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23. See also *In re* Lowry, 40 F.2d 321 (4th Cir. 1930), to the effect that an incorrect serial number designation is not decisive of nullity.

24. Smith v. Mooers, 206 Va. 307, 142 S.E.2d 473 (1965). See also Emroch, *Torts, 1964-1965 Annual Survey of Va. Law*, 51 Va. L. Rev. —, — (1965), for discussion of the negligeuce issue.

25. See 8 Am. Jur. 2d *Automobiles* § 655 (1963). While the Uniform Commercial Code and the Virginia version thereof do not specifically exclude the implied warranties of quality in the sale of used goods, they do provide that the warranties can be excluded "by course of dealing or course of performance or usage of trade." Uniform Commercial Code § 2-316(3)(c); Va. Code Ann. § 8.2-316(3)(c) (1965).

26. Va. Code Ann. § 8-673 (1957).

27. 205 Va. 927, 140 S.E.2d 695 (1965).

An agreement to subordinate one's claim to a mortgage may include subordination to all debts secured by the mortgage and not just the face amount of the mortgage recited in the agreement. In *Globe Iron Construction Co. v. First National Bank of Boston*[28] the Court found this to be the clear import of the agreement terms; it could not be explained away by a contrary understanding of only one of the parties.

The voiding of a lien where the subject property has been removed from the county where recorded for more than one year is provided for by section 55-98,[29] which was applied in *Richmond Auto Parts, Inc. v. Forbes.*[30]

A running account generally constitutes but one cause of action and cannot be divided into separate claims so as to provide a basis for several actions.[31] Accordingly, in *Deal v. C. E. Nix & Son, Inc.*[32] the seller prevailed only by proving that his delivery of fuel oil to six separate properties of the buyer constituted six separate accounts.[33] His default judgment for the amount due for fuel oil delivered to one of the properties was therefore held not to merge actions for the amounts due for fuel delivered to the other properties.

In *United States v. Waddill, Holland & Flinn, Inc.*,[34] the United States Supreme Court held that a Virginia landlord's lien, until actually enforced by levy, was merely a caveat of a more perfect lien to come. And in *United States v. Lawler*,[35] the Supreme Court of Appeals of Virginia followed *Waddill* in upholding the priority of a federal tax lien docketed prior to a landlord's distress warrant, writ of attachment and execution sale, although the tenancy had commenced and the rent had become in arrears prior to the federal assessment. In *United States v. New Rose Development Corp.*,[36] the Supreme Court of Appeals reaffirmed its *Lawler* concepts.

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28. 205 Va. 841, 140 S.E.2d 629 (1965).

29. VA. CODE ANN. § 55-98 (1959), repealed effective Jan. 1, 1966, Va. Acts of Assembly 1964, c. 219.

30. 205 Va. 856, 140 S.E.2d 825 (1965).

31. 1 AM. JUR. 2D *Actions* § 142 (1962).

32. 206 Va. 57, 141 S.E.2d 683 (1965).

33. Where the running of the statute of limitations is involved, and not the splitting of causes of action, a seller may be urging a single account rather than separate ones in order to establish commencement of the statutory period at the time of last delivery. This was the case in Columbia Heights Section 3, Inc. v. Griffith-Consumers Co., 205 Va. 43, 135 S.E.2d 116 (1964), discussed in Curtis, *Contracts & Sales, 1963-1964 Annual Survey of Va. Law*, 50 VA. L. REV. 1280, 1282 (1964).

34. 323 U.S. 353 (1945).

35. 201 Va. 686, 112 S.E.2d 921 (1960), discussed in Curtis, *Taxation, 1959-1960 Annual Survey of Va. Law*, 46 VA. L. REV. 1523, 1524 (1960).

36. 205 Va. 697, 139 S.E.2d 64 (1964).