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Contracts and Sales

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CONTRACTS

The case of *Crown Central Petroleum Corporation v. Port Oil Co.*[1] arises out of dispute over a series of agreements whereunder Port Oil Co. agreed to purchase all of its petroleum including a guaranteed minimum from Crown, and leased to Crown certain filling stations which were in turn leased-back to Port with the reservation that the leaseback would be cancelled upon the abrogation by Port Oil Company of the distributor agreement. In the lower court Crown alleged that Port had defaulted in the distributor agreement and Crown sought cancellation of the leaseback agreement and possession of the service stations. The lower court found that Crown had violated an oral agreement to assist Port Oil Company in building additional service stations and that Port Oil Company was therefore justified in ceasing to act as distributor and Crown was procluded from cancelling the leasebacks and re-possessing the stations. The Court of Appeals reversed the lower court's finding on the oral contract stating that the terms of this alleged contract were so vague as to the size, number, locations, date of construction and expense of the service stations to be erected that it could not be said that there was in fact a contract. The case was remanded to the district court to determine whether it ought to enforce or lift forfeiture provision of the leaseback agreement, the court pointing out the contractual provisions for forfeiture are looked upon with disfavor and will not be enforced if the result of the forfeiture will be unconscionable.

The defense of lack of mutually between the contracting parties and the Statute of Frauds was raised by the appellant in *Noland Company v. Graver Tank & Manufacturing Company.*[2] The action was originally brought in the United States District Court by a general contractor against a subcontractor, Noland, for the difference between Noland's bid price to supply an elevated water tank and Ruscon's actual cost of supplying the tank after the bid was not com-

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1. 301 F. 2d 175 (4th Cir. 1962).
2. 301 F. 2d 43 (4th Cir. 1962).

plied with. Noland filed a third party complaint against its supplier, Graver, and the lower court found for the contractor as against Noland and Noland was awarded the same amount from the third party defendant, Graver. The bid price on an elevated water tank was quoted by Graver over the telephone to the subcontractor Noland who passed it on to the contractor. After the bid was accepted it was discovered that the price quoted was for a smaller tank and both of the parties before the Court of Appeals failed to plead the contract.

The appellant contends that the price quoted on the water tank was so low that it should have been apparent that a mistake was made and that an offer based on an obvious mistake can not be accepted. The court accepted this principal and sustained the lower court's finding of fact that the mistake was not obvious to the offeree. The court went on to quote the two principles of contract law that a unilateral mistake does not render the transaction voidable by the party making the mistake; and an offer is judged by its objective manifestations not by any mental reservations or intentions of the offeror.

The appellant further argued that the South Carolina Statute of Frauds[3] prevents enforcement of oral contracts for the sale of goods of the value of $50.00 or more. The court quoted from the South Carolina case of *Wallace v. Dowling*[4] where the goods contracted for have to be made or something be done to put it in a condition to be delivered according to the terms of the contract, that it is not within the Statute of Frauds. The appellant's contention was rejected since in this case the water tank had to be erected and assembled.

The case of *Black v. Gettys*[5] is concerned primarily with the interpretation of a will and the trust thereby created. However, it was also called upon to decide the enforceability of a "stock option contract" signed by the widow under seal wherein she agreed upon the death of her husband to transfer certain bank stock to a named trustee. The widow's uncontradicted testimony was that she received no actual consideration to sign this contract and the Court held that she should not be required to perform her agreement to deliver this stock.

3. CODE OF LAWS OF SOUTH CAROLINA, § 11-103 (1962).
4. 86 S. C. 307, 68 S. E. 571 (1910).
5. 238 S. C. 167, 119 S. E. 2d 660 (1961).

The general rule is that one is not allowed, in the absence of fraud, to show that an instrument signed under seal was without consideration, since the seal of itself imports a consideration. However, in an action for specific performance, equity will never enforce an agreement unless there was an actual valuable consideration. Unlike the common law, equity does not permit a seal to supply the place of real consideration.

Where the language of a contract of insurance, as with other contracts, is free from ambiguity it must be construed according to the terms which the parties have used, to be taken and understood in their plain, ordinary and popular sense and such construction is for the Court. On this fundamental point of the law of contracts the South Carolina Supreme Court reversed the lower court, and ordered judgment entered for the appellant-insurer in the case of *Rhame v. National Grange Mutual Insurance Co.*[6] The plaintiff could not recover medical expenses for his injured employees under his policy since it specifically excluded such benefits.

Fraudulent Breach of Contracts

The soundness of the general rule that one who seeks to avoid the effect of a release of a claim under an insurance policy must first return or tender the consideration paid for the release, was considered in the case of *Dunaway v. United Insurance Company of America.*[7] The lower court directed a verdict for the defendant insurance company because of the failure of the plaintiff to return or offer to return the money received by him for the execution of a release and a hospitalization insurance policy claim which release the plaintiff now claims was fraudulently obtained from him. The appellant's contention before the Supreme Court was that he was seeking to recover in tort for the fraud and not in contract, therefore a return of the consideration is not required. This rationale has been followed in some other jurisdictions,[8] however the Supreme Court held that the present action was one ex contractu since the plaintiff had "elected to go to trial upon fraudulent breach of contract."

After having refused appellant's contention that he was seeking to recover in tort the Court stated that it was not

6. 238 S. C. 539, 121 S. E. 2d 94 (1961).
7. 239 S. C. 407, 123 S. E. 2d 353 (1962).
8. Annot. 134 A. L. R. 6 (1941); 45 AM. JUR. RELEASE, § 53 (1943); 76 C. J. S. RELEASE, § 34 (1952).

passing upon the question of whether an action correctly brought in tort for fraud and deceit could be maintained without returning the consideration for the release. However, the red flag is definitely raised for the practitioner by the citation of the case of *Taylor v. Palmetto State Life Insurance Company.*[9] In the Taylor case the court said the rule that the party seeking to avoid a release must remit the funds received therefor applied to actions ex contractu as well as actions ex delicto.

It appears to this writer that even where an action is brought ex contractu seeking to set aside a release fraudulently obtained, that harsh results are being reached by the technical requirement that a return of the consideration paid therefor must be first made. Would not the same results be accomplished if the plaintiff were simply permitted to acknowledge receipt of a sum under the alleged fraudulent settlement in his pleading and then if he prevails, this be applied on the verdict or judgment ultimately received?

It also appears to this writer that to deprive a person of his rights under a contract by obtaining its cancellation through fraud and deceit gives rise to an action in tort just as surely as if one party to a contract tried to deny the other party of his rights and benefits under a contract by running him down with an automobile. Why should an action for fraud and deceit require return of the consideration as indicated in the *Taylor case,* when this is the very thing sued upon?

Contract of Employment

The case of *Oxman v. Sherman*[10] arose out of an attempt to enforce three restrictive covenants in a contract of employment:

1. Employee would not engage in the competitive business of selling health, accident and life insurance in the State of South Carolina within one year after the termination of his employment as the plaintiff's agent.

2. Employee would not induce any of his employer's personnel to terminate their employment.

3. Employee would not induce any policyholder to cancel or terminate his insurance in force with the employer.

9. 196 S. C. 195, 12 S. E. 2d 708 (1940).
10. 239 S. C. 218, 122 S. E. 2d 559 (1961).

The defendant (employee) contends that the covenants are void as against public policy. The Court states that covenants not to compete in a contract of employment are looked upon with disfavor and will be strictly construed against the employer and then reviews the criteria such covenants must meet if they are to be enforceable.[11]

The covenant not to compete was held to have expired since the employee ceased acting as an insurance agent for employer more than one year before the action, although he remained with the employer in a supervisory capacity.

Further, the extension of the restriction to cover the entire State, when employee only worked for the employer in two counties, renders it unenforceable.

The second covenant is reasonable since it does not prevent the employee after leaving the services of his employer from seeking to hire his former fellow-employees; but merely prohibits him from maliciously inducing another to breach his contract, which right is recognized at common law.

The third covenant was held to be valid.

SALES

In the case of *Clanton's Auto Auction Sales Inc. v. Harvin and Stevenson Finance Company,*[12] the plaintiff sold the defendant Harvin, an automobile dealer, an automobile and by oral agreement held the title pending receipt of Harvin's check in payment. Harvin mortgaged the auto to Stevenson which instrument was recorded. The plaintiff now brings claim and delivery on the theory that its retention of all indicia of title placed all others on notice that Harvin did not have title and they dealt with him at their peril. The Court in affirming the lower court's order for the defendants held that under the provisions of the South Carolina Bailment Statute[13] a reservation of title by a vendor must be in writing and recorded in order to effect the rights of a subsequent creditor. Under the South Carolina Vehicle Title Law[14] the

11. See Delmar Studios v. Kinsey, 233 S. C. 313, 104 S. E. 2d 388 (1958) and Standard Register Co. v. Kerrigan, 238 S. C. 54, 119 S. E. 2d 533 (1961) reviewed in 14 S. C. L. Q. 16 (1961).
12. 238 S. C. 237, 120 S. E. 2d 237 (1961).
13. CODE OF LAWS OF SOUTH CAROLINA, § 57-308 (1952).
14. CODE OF LAWS OF SOUTH CAROLINA, § 46-139.53 and 46-139.81(3) (1952).

defendant Harvin, being a dealer, was not required to produce the title certificate.

The almost identical question as that in the Clanton case above was presented to the court in the case of *Ex Parte Dort In Re: Stevenson Finance Company v. Wingard.*[15] The appellant Dort sold Wingard, an automobile dealer, withholding the certificate of title and bill of sale pending clearance of Wingard's check. Wingard thereafter immediately mortgaged the automobile to Stevenson Finance Company. This transaction took place in December, 1958, and the Court held that the Motor Vehicle Title Law[16] did not apply since it was not enacted until 1959. The Supreme Court affirmed the lower court's decision in favor of Stevenson, the mortgagee, basing its opinion upon the Bailment Statute which requires that the reservation of interest in property be reduced to writing and recorded and upon the principles that one in possession of personal property is presumed to be the owner. The Court also recognized that its decision followed the rule that if one of two innocent persons must suffer from the fraud of another then the one whose negligence made the fraud possible must bear the loss.

Universal C.I.T. Credit Corporation v. Platt[17] was an action for deficiency judgment upon a conditional sales contract upon a truck after the truck had been voluntarily delivered to the plaintiff and sold at public auction. There was a conflict in the testimony of the witnesses and the court's judgment n.o.v. for the plaintiff was based upon its view of the credibility and probative value of the evidence. This case adds nothing to the body of law on the subject of sales.

Fraudulent Misrepresentation

In the case of *Aaron v. Hampton Motors, Inc.*[18] plaintiff sued the defendant automobile dealer for fraudulently misrepresenting the mileage and condition of the used automobile sold to him. The plaintiff alleged that the defendant salesman told him that the car had only about 16,000 miles on it and the speedometer read only approximately 16,000 miles, when in fact the automobile had been driven more than 55,000 miles.

15. 238 S. C. 506, 121 S. E. 2d 1 (1961).
16. CODE OF LAWS OF SOUTH CAROLINA, § 46-138 as amended (1952).
17. 239 S. C. 103, 121 S. E. 2d 351 (1961).
18. 240 S. C. 26, 124 S. E. 2d 585 (1962).

The defendant contends that there was failure of proof of one of the essential elements of fraud, that is that the salesman had knowledge of the falsity of his representations as to the mileage and condition of the car. The Court held that it was not necessary to prove that the person making the allegedly false representations had actual knowledge of its falsity, but that if he makes it as of his personal knowledge, with reckless disregard of his lack of information as to its truth, his knowledge of its falsity is legally inferable. The Court also recognized the well known rule that one will not be allowed to recover if by his own negligence and failure to avail himself of information easily within his reach he has contributed to the perpetration of the alleged fraud; holding in this case that there was no such failure on the part of the purchaser who had no reason to doubt the truth of the statements at the time of the sale. Judgment of the lower court for the plaintiff was affirmed.