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C. T. Wyche

*Wyche, Burgess & Wyche (Greenville, SC)*

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## CONTRACTS, BILLS AND NOTES, AND SALES

C. THOMAS WYCHE\*

### I. CONTRACTS

*Alderman v. Bivin*<sup>1</sup> involved the validity of a release and whether it was rescindable because of a mistake as to the extent of the actual injuries sustained. The plaintiff sustained damages to the engine of his truck due to a severe freeze; the defendants had been negligent in failing to put anti-freeze in the truck. Upon inspection by a repairman selected by plaintiff it appeared that only a gasket had been blown out. The defendants, through their liability insurer, paid the amount (\$30.00) to repair this damage and plaintiff executed a general release to defendants. It later developed that the engine block was cracked and useless and plaintiff sought to set aside the release on the ground of mutual mistake.

The Court upheld the decision of the lower court which decided from the allegations of the complaint that the mistake was unilateral rather than mutual. The mistake resulted from the failure of plaintiff's agent to discover the extent of damage and was plaintiff's mistake rather than both parties'.

*Turbeville v. Gordon*<sup>2</sup> primarily involved the interpretation of a complaint to which defendant demurred; so the case is of more interest from a procedural than substantive standpoint. As interpreted, the complaint alleges that the defendant impliedly promised to pay plaintiff for constructing a house on defendant's lot to be occupied by defendant's daughter and son-in-law. Upon trial defendant's liability may well rest on an estoppel theory rather than contract, actual or implied. To hold that the complaint alleges an implied contract does indeed require a liberal construction of the complaint, but having reached such a conclusion, from the substantive standpoint, the correct result is reached.

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\*Member of the firm of Wyche, Burgess & Wyche, Greenville, S. C. B.E., 1946, Yale University; LL.B., 1949, University of Virginia; member of Greenville County, South Carolina, and American Bar Associations.

1. 233 S. C. 545, 106 S. E. 2d 385 (1958).  
2. 233 S. C. 75, 103 S. E. 2d 521 (1958).

*Furbeck v. Crest Manufacturing Company*<sup>3</sup> presented the single legal question as to whether a written contract of employment was invalid as being for an indefinite period of time. The letter agreement was in essence as follows:

... we must have your cooperation in accepting this offer to join our sales force. . . . We would have you work New York State and New England until about October 1st, and then the Southeastern states until April 1st.

The proposal was accepted by plaintiff but the following month the employment was terminated. The Court sustained the directed verdict in favor of the employee holding that the contract of employment was for a definite period of time.

In *Delmar Studios v. Kinsey*,<sup>4</sup> the defendant in his employment contract with plaintiff had agreed not to compete with plaintiff in soliciting, procuring or carrying out certain types of contracts involving photography. The period of the restriction was two years following termination of employment. The restricted area was about three-fourths of North Carolina, all of South Carolina, and eleven counties in Georgia. This comprised the entire area in which plaintiff did business. Defendant ceased his employment relation and began the prohibited solicitation in portions of South Carolina and Georgia.

The interpretation of this contract was governed by North Carolina law. After a review of the North Carolina decisions the Court concluded that the non-competition restriction was unenforceable since the plaintiff had not shown that the extent of the territory included was necessary for the protection of plaintiff's business. The testimony showed that defendant's contact with plaintiff's customers was within a limited area. The Court further held that the contract could not be revised by making a new territory limitation which would be reasonable and that the entire contract must fall.

In *Somerset v. Reyner*,<sup>5</sup> a similar non-competition agreement was involved except that in this case the agreement was in connection with the sale of a business rather than an employment contract.

3. 233 S. C. 169, 103 S. E. 2d 920 (1956).

4. 233 S. C. 313, 104 S. E. 2d 338 (1958).

5. 233 S. C. 324, 104 S. E. 2d 344 (1958).

The plaintiff sold his jewelry business to defendant and agreed not to compete for a period of twenty (20) years anywhere in South Carolina. The business which was purchased had 95 per cent of its sales from within the greater Columbia area.

The Court concluded that there was no basis for the extent of the territorial restraint and that the covenant was clearly invalid.

The Court then considered whether it should enforce so much of the restriction as would be reasonable from a standpoint of duration and territory. Without deciding specifically whether such a holding might not follow in some cases, the Court held that in this particular case it could not undertake to split up the covenant and carve out a new territory; it was the intent of the parties that the contract be indivisible and the whole contract must fall.

The plaintiff in *Pharr v. Canal Insurance Company*<sup>6</sup> had previously obtained a judgment for damages against a person who was insured under a liability policy of defendant. The defendant had, in another action, obtained a declaratory judgment against its insured to the effect that defendant was not liable under said policy because of the acts of the insured in failing to cooperate as required by the terms of the policy; the plaintiff was not made a party to the declaratory judgment suit. The judgment was offered as a defense to the instant suit. The lower court directed a verdict for the plaintiff and this appeal followed.

The Supreme Court agreed with the lower court that the declaratory judgment suit between the insurer and the insured was not binding on the plaintiff who was injured by the negligence of the insured. This was because the third party who was injured was not a party to the declaratory judgment suit and, therefore, the identity of parties necessary to *res adjudicata* was missing. The Court also held that under the terms of the insurance policy the injured person who had obtained his judgment could maintain an action directly against the insurer.

The Supreme Court disagreed with the finding of the lower court, however, that the judgment holder was entitled to a directed verdict against the insurer and said that the trial judge should have submitted to the jury whether the insured

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6. 233 S. C. 266, 104 S. E. 2d 394 (1958).

had complied with the terms of his policy and cooperated with the insurer. The testimony showed that the insured failed to meet with the attorneys of the insurer, failed to acknowledge correspondence or comply with certain requests of such attorneys; thereafter, the insurer withdrew from the defense of the action and the plaintiff thereafter obtained judgment. Although the burden of proof is upon the insurer to show that the insured has failed to perform the terms and conditions and, in addition, that the insurer was substantially prejudiced by the failure to cooperate, the facts in this case raise for the jury's decision whether the insured has proven this defense.

The plaintiff in *Evatt v. Campbell*<sup>7</sup> was engaged in partnership with the defendant under a written partnership agreement but brought this action for alleged salaries that had been unpaid to plaintiff, claiming that the previous partnership agreement had been superseded by an oral contract of employment. The written partnership agreement did not have any provisions as to how it should be modified or any requirement that its modification or termination be in writing. The Court held that a written agreement could be modified or superseded by an oral one if supported by valuable consideration. The referee's findings of fact, concurred in by the Circuit Judge, were to the effect that such written agreement had been superseded by an oral contract of employment; these findings were supported by competent evidence and, therefore, were binding on the Supreme Court. Also presented in the case was the question of accounting by the partnership. The special referee accepted the accounting submitted by the plaintiff and this finding was concurred in by the lower court. The Supreme Court concluded that the facts amply support the findings of the special referee insofar as the accounting was concerned.

The plaintiff in *Batchelor v. American Health Insurance Company*<sup>8</sup> brought a suit under a "Hospital Expense Policy", claiming benefits payable under the terms of the policy. The issuance of the policy and the amount of medical bills incurred by the plaintiff were admitted but the defense was that the plaintiff had taken out numerous hospitalization policies which voided the particular policy because the overall scheme was one of wagering. It was shown by the evidence that the

7. 234 S. C. 1, 106 S. E. 2d 447 (1959).

8. 234 S. C. 103, 107 S. E. 2d 36 (1959).

amount that could be recovered under the various contracts of insurance was highly disproportionate to any loss which could be sustained. The trial court directed a verdict in favor of the insurance company on the ground that such policies were wagering contracts. This decision was reversed; the Supreme Court held that there is no established public policy which prevents one from purchasing as many hospital expense policies as one may desire. There is no statute or judicial decisions establishing a public policy which prevents such action. The Court pointed out that an insurer could, under the insurance laws of this state, provide for a proportionate reduction of insurance in its policy in the event the insured had other similar insurance with other companies. This clause was not contained in the policy under question and, therefore, plaintiff was entitled to full recovery.

## II. SALES

In *Mishoe v. General Motors Acceptance Corporation*,<sup>9</sup> the defendant had repossessed plaintiff's automobile pursuant to a conditional sales contract or chattel mortgage. The automobile was sold at public sale after notice by registered mail was given to the plaintiff. Plaintiff thereafter brought an action against the defendant for alleged fraud and deceit, apparently in inducing the plaintiff to go to Tabor City, North Carolina, with his automobile where it was seized or repossessed by the defendant.

The lower court construed the conditional sales contract as giving the plaintiff a thirty-day grace period after default. The defendant had, after default, declared the entire balance due under the contract but the plaintiff thereafter tendered to the defendant the monthly payment, contending that such payment could be made within the thirty-day period.

The Court, after examining the contract in some detail, concluded that the clause which made reference to installments not paid within thirty days related to the amount that would be required to restore a defaulted contract to a current status should the holder of the conditional sales contract not elect to declare the entire indebtedness due and payable. The other provision of the contract clearly gave the holder thereof the unqualified right to declare the whole amount due and payable

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9. 234 S. C. 182, 107 S. E. 2d 43 (1958).

upon default without having to wait for any period of time to pass. Therefore, it was held as a matter of law that the maker of the contract was in default as a matter of law and that the judge should have so charged the jury.

The Court then discussed the question of whether the plaintiff had made out a case as to the action for fraud and deceit. The Court held that under the facts viewed most favorably from the standpoint of the plaintiff there was not a false representation, but that the holder of the conditional sales contract had the right to repossess the automobile under its contract and that the plaintiff sustained no loss on account of any misrepresentation by the defendant.