South Carolina Law Review

Volume 23
Issue 4 *Survey of South Carolina Law*

Article 2

1971

Contracts

Jimmy Heisz

CONTRACTS

I. BASIC ELEMENTS

The South Carolina Supreme Court in *Mid-Continent Refrigerator Co. v. Dean*[1] applied the basic theory behind contract law that the parties to a contract are in actuality making their own law and the court enforces the bargain they make. Appellant, Mid-Continent Refrigerator Co., had entered into a written contract to lease a display refrigerator to respondent. One of the provisions of the agreement was a stipulation that the lessee was to inspect and notify the lessor of any defects within 48 hours after delivery. Any defects discovered thereafter were to be repaired by the lessee at his own expense. In this case the respondent failed to inspect the refrigerator within 48 hours and actually delayed the inspection from 30 to 45 days, at which time the refrigerator was uncrated for installation. At this time it was found that the refrigerator would not work. The respondent, Dean, tried to return the refrigerator but the appellant refused to accept it. In reversing the lower court, which held for the respondent, the supreme court said:

> It is elementary and needs no citation of authority that the function of courts is to adjudge and enforce contracts as they are written and entered into by the parties. The court cannot make them for the parties. When such contracts are capable of clear interpretation, the court cannot exercise its discretion as to the wisdom of such contract or substitute its own for that which was agreed upon, where its provisions are clear, unambiguous and free from doubt.[2]

II. STATUTE OF FRAUDS

The South Carolina Supreme Court heard an appeal based on the Statute of Frauds in *Dewitt v. Kelly*.[3] The appellant, Kelly, had been authorized by the Horry County Progressive Association to prepare an application for a federal grant to institute a head start program in Horry County. To assist in the preparation of the application, the

1. 180 S.E.2d 892 (S.C. 1971).

2. *Id.* at 893. This is a quote in the opinion taken from Charles v. Canal Ins. Co., 238 S.C. 600, 121 S.E.2d 200 (1961). The fact that the function of the court is that of judging and enforcing the contracts as made by the parties is referred to in several South Carolina cases. *See, e.g.*, McElmurray v. American Fidelity Fire Ins. Co., 236 S.C. 195, 113 S.E.2d 528 (1960); Brown v. Mutual Life Ins. Co., 186 S.C. 245, 195 S.E. 552 (1938).

3. 182 S.E.2d 65 (S.C. 1971).

appellant sought the assistance of the respondent, who was an attorney. The testimony given by the respondent at the trial was that the appellant had promised to see that the respondent would be paid for his professional services and that he was not hired by the association. Appellant pleaded the Statute of Frauds and claimed the alleged promise was within the Statute of Frauds because he was to answer for the debt of another, the Horry County Progressive Association.[4]

Justice Littlejohn stated that since the respondent had fully performed his part of the bargain the situation was taken out of the Statute of Frauds. In support of this opinion he cited the following:

> The courts have repeatedly reiterated that the statute of frauds only applies to executory, as distinguished from executed, contracts; *if an oral contract, otherwise within the statute, is completely executed or performed it is taken out of the operation of the statute.* (Emphasis added)[5]

The remainder of the court concurred in the result, but felt the case was not within the Statute because it fell within a different exception. Justice Bussey said the cases relied on by Justice Littlejohn were clearly distinguishable from the present case and the section in *American Jurisprudence* immediately following that cited by Justice Littlejohn reads as follows:

> It is not always clear just what is meant by the expression 'completely performed' as used in the rule that the statute of frauds does not apply when the contract has been executed or completely performed. The rule is most frequently stated with reference to an oral contract for the sale of land which has been consummated by the execution of the deed and its acceptance by the vendee,. . . .[6]

American Jurisprudence goes on to say:

> Part performance does not take an oral promise to answer for the debt of another out of the statute of frauds, since neither part nor

4. S.C. CODE ANN. § 11-101 (1962) reads as follows: AGREEMENTS REQUIRED TO BE IN WRITING.—No action shall be brought whereby:

(2) [T]o charge the defendant upon any special promise to answer for the debt default or miscarriage of another person; . . . .

5. 182 S.E.2d 65, 67 (S.C. 1971). Justice Littlejohn cited this from 49 AM. JR. *Statute of Frauds* § 550 (1943). He cited as authority supporting his position Footman v. Sweat, 247 S.C. 172, 146 S.E.2d 624 (1966); McLauchlin v. Gressette, 224 S.C. 296, 79 S.E.2d 149 (1953).

6. 182 S.E.2d 65, 67 (S.C. 1971) *quoting from* 49 AM. JR. *Statute of Frauds* § 551 (1943).

> *even full performance by the promisee* of the consideration for the promise enriches the promisor. (Emphasis added)[7]

Justice Bussey said, "[I]t cannot be said as a matter of law that the contract has been completely executed or performed, within the rule which Mr. Justice Littlejohn would apply."[8] The exception that Justice Bussey ruled applicable in *Dewitt* is commonly known as the main purpose doctrine. The evidence given was that the appellant received substantial monetary benefits from the services rendered by the respondent. This evidence "if believed by the jury, was quite sufficient to support an inference that Dr. Kelly did retain the services of the plaintiff and that his main object in doing so was to serve purposes of his own."[9] The court in support of its holding quoted the following:

> Whenever the main purpose or object of the promisor is, not to answer for another, but to subserve some purpose of his own, his promise is not within the statute, although it may be in form, a promise to pay the debt of another.[10]

III. IMPLIED WARRANTY

In *Rutledge v. Dodenhoff*[11] it was held that the doctrine of *caveat emptor* is no longer applicable when a new house is sold by the builder-vendor. The new rule is that an implied warranty exists that the structure is built in a reasonably workmanlike manner and is reasonably suitable for habitation. In this case the septic tank was installed at a higher level than the house itself. This fact, plus an unusually high water level, which was known to the builder-vendor, caused the tank to overflow on several occasions damaging the house and its furnishings. The defendant stated the reason the tank was not properly put at a lower level was because the county health authorities had specified that the tank should be placed in the rear of the house. However, no suggestion was made by the builder-vendor that the location be

7. 182 S.E.2d 65, 67 (S.C. 1971) *quoting from* 49 AM.JUR. *Statute of Frauds* § 500 (1943).

8. 182 S.E.2d 65, 68 (S.C. 1971).

9. *Id.*

10. Lorick v. Caldwell, 85 S.C. 94, 67 S.E. 143 (1910). For a detailed discussion of the purpose of the promisor as a test see 3 S. WILLISTON, LAW OF CONTRACTS § 470 (3d. ed. W. Jaeger 1960).

11. 254 S.C. 407, 175 S.E.2d 792 (1970). This case is distinguished from that of Rogers v. Scyphers, 251 S.C. 128, 161 S.E.2d 81 (1968) where the theory of recovery against a builder-vendor was either an imminently dangerous condition caused by negligence or a failure to disclose a condition that involves an unreasonable risk.

changed to the front of the house where the septic tank would be lower than the level of the house.[12] The court said that these facts made it a jury question as to whether or not the installation was defective.[13] In stating that the doctrine of *caveat emptor* is inapplicable to the sale of a house by a builder-vendor, the court said that the essence of the contract is the purchase of a habitable dwelling and a knowledgeable inspection by the purchaser is impossible.[14] "Since this is true, it is proper that there should be an implied warranty that the dwelling is fit for the purpose for which it was intended."[15]

IV. FRAUD

In *Moye v. Wilson Motors, Inc.*[16] the appellant Ford Motor Credit Corporation was the codefendant and the assignee of a conditional sales contract. The contract contained the stipulation that the respondent, Moye, would obtain comprehensive-collision insurance at his own expense to cover the automobile purchased from Wilson Motors, Inc. This amount was included in the amount financed by Moye through Wilson Motors, as Moye did not have adequate personal funds to pay for the insurance himself. The contract was then assigned by Wilson Motors to the Ford Motor Credit Corporation. The insurance was issued to the respondent by the Excel Insurance Company with the premium being paid by the appellant, Ford Motor Credit Corporation.

Later, respondent's automobile was damaged in a collision. When he notified the insurance company of the accident he was informed that his insurance had been cancelled, and that notice of the cancellation had been sent to both the respondent and the appellant, both of whom

12. 254 S.C. 407, 411, 175 S.E.2d 792, 793 (1970).
13. *Id.*
14. *Id.* at 414, 175 S.E.2d at 795.
> [T]he primary purpose of the transaction is to provide the purchaser with a habitable dwelling and the transfer of the land is secondary. The seller holds himself out as an expert in such construction and the prospective purchaser, if he buys, is forced to a large extent to rely on the skill of the builder. This is true because the ordinary purchaser is precluded from making a knowledgeable inspection of the completed house not only because of the expense and his unfamiliarity with building construction, but also because the defects are usually hidden, rendering inspection practically impossible. Under such circumstances, the purchaser is at the mercy of the builder-vendor.

15. *Id.*
16. 254 S.C. 471, 176 S.E.2d 147 (1970).

denied receipt of the notification. Investigation revealed that Ford Motor Credit Corporation had received a $221 refund which was applied to the principal owed by the respondent as per the sales contract.

The question presented to the court was whether or not there was any evidence of fraud or deceit upon which the jury could find for the respondent, in that Moye was told by a salesman that the insurance premium would have to be paid in full before he could take possession of the car, and in reliance on this he entered into an agreement to have the price of the insurance included in the sales agreement. It was the contention of the appellant that this was not evidence of fraud and deceit and a verdict should have been directed for the appellant as a matter of law. The supreme court said:

> The respondent, in order to recover in an action for fraud and deceit, must prove the elements thereof, such being: (1) A representation; (2) its falsity; (3) its materiality; (4) the speaker's knowledge of its falsity; (5) his intent that it should be acted upon by the person; (6) the hearer's ignorance of its falsity; (7) his reliance on its truth; (8) his right to rely thereon; (9) and his consequent and proximate injury. The respondent, having charged the appellant with fraud and deceit as a basis of his cause of action, must establish the foregoing elements thereof by evidence that is clear, cogent and convincing and the failure to prove any one of such is fatal to recovery.[17]

The court could find no evidence of any false representation on the part of the appellant.

> We point out that there is no evidence whatever that any representation, true or false, was made to the respondent by the appellant prior to the execution of the conditional sales contract and the obtaining of the policy of insurance.[18]

The court further said that: "One cannot complain of fraud in the misrepresentation of the contents of a written instrument when the truth could have been ascertained by his reading the instrument."[19] Therefore his complaint that he had not received notice of such cancellation was without merit, if such cancellation was done in accordance with the provisions of the insurance contract.

---

17. *Id.* at 478, 176 S.E.2d at 151.

18. *Id.* at 479, 176 S.E.2d at 151.

19. *Id.* at 480, 176 S.E.2d at 152. *Accord*, Jones v. Cooper, 234 S.C. 477, 109 S.E.2d 5 (1959); O'Connor v. Bhd. of R.R. Trainmen, 217 S.C. 442, 60 S.E.2d 884 (1950); J.B. Colt Co. v. Britt, 129 S.C. 226, 123 S.E. 845 (1924).

As no evidence was found that could be construed as a misrepresentation to the respondent that appellant had undertaken to keep the policy in force, the trial court should have directed a verdict for the appellant.

V. BILLS AND NOTES

The case of *Duckworth v. First National Bank*[20] was affirmed by the South Carolina Supreme Court in its interpretation and application of a code section concerning a holder not in due course and the defenses available to him. Respondent, Duckworth, instituted a suit for slander and the appellant counterclaimed seeking recovery from the respondent as the endorser of a bad check or, in the alternative, restitution for unjust enrichment.

Duckworth was the co-indorser of a check deposited with the appellant that had previously been dishonored. The co-indorser of the check was also the debtor of Duckworth in the amount of $1000. This check was deposited to the account of an attorney hired for the purpose of collection. The attorney paid over to Duckworth's co-indorser a portion of the money the check represented. The co-indorser in turn deposited it with the appellant's bank in another account. Duckworth was then paid his $1000 out of this account.

The court ruled First National Bank was not a holder in due course of the check, because the check contained a stamped notation that it had been previously dishonored.[21] Therefore the bank in allowing a withdrawal "did so at its own risk and resulted in the loss which it sustained."[22] Duckworth was not liable as the endorser of the check, because a holder not in due course takes the check subject to the same defenses as if it were nonnegotiable.[23]

---

20. 254 S.C. 563, 176 S.E.2d 297 (1970).

21. S.C. CODE ANN. § 8-882 (1962) provided:

WHO IS HOLDER IN DUE COURSE.—A holder in due course is a holder who has taken the instrument under the following conditions:

(1) It is complete and regular upon its face;

(2) He became the holder of it before it was overdue and without notice that it had been previously dishonored, if such was the fact;

(3) He took it in good faith and for value; and

(4) At the time it was negotiated to him he had no notice of any infirmity in the instrument or defect in the title of the person negotiating it.

22. 254 S.C. 563, 575, 176 S.E.2d 297, 303 (1970).

23. *Accord*, Falk v. Felder, 168 S.C. 103, 167 S.E. 27 (1932); Ives v. Rutland, 135 S.C. 173, 133 S.E. 539 (1925).

Recovery was also denied on the theory that Duckworth had been unjustly enriched. The $1000 owed to the respondent by his co-indorser was uncontradicted and respondent only took the amount to which he was justly entitled:

> The respondent herein did not receive a benefit, *per se*, but only accepted repayment for money lent and any stigma of unjustness was similarly lacking, as respondent was legally and equitably entitled to receive and retain payment from Fields, his debtor.[24]

JIMMY L. HEISZ

24. 254 S.C. 563, 576, 176 S.E.2d 297, 304 (1970).