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Contracts

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CONTRACTS

I. STATUTE OF FRAUDS

In *Campbell v. Hickory Farms*[1] the defendant pleaded the Statute of Frauds in response to the plaintiff's contention that the defendant was indebted to him. The defendant purchased a retail establishment from Doc M. Campbell. Prior to the purchase the business was failing and the plaintiff, Campbell's brother, made several substantial loans to Campbell to help save the business. At the time of defendant's purchase these loans were still outstanding and the plaintiff sued to recover the amounts due, relying upon testimony that the defendant had agreed to assume the outstanding debts of the business at the time of the purchase. In response the defendant pleaded the Statute of Frauds, contending that he did not have to answer for the debts of another because he had not so agreed in writing.[2]

On appeal the South Carolina Supreme Court, in holding for the plaintiff, recognized that the three following exceptions to the Statute of Frauds were controlling:

> [W]here the promise to pay a debt incurred by another is made a part of a transaction where the main purpose and object of the promisor is not to answer for the debt of another, but to subserve some purpose of his own, his promise is not within the Statute.
>
> . . . [W]here the agreement to pay the debt of another is part of an original undertaking between the parties, and it is not collateral to the origination of the debt, the Statute does not apply.
>
> . . . [A] promise to pay a debt out of the debtor's funds or property taken over or held by the promisor is an original undertaking, and the Statute is not applicable to the promise.[3]

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1. 258 S.C. 563, 190 S.E.2d 26 (1972).

2. S.C. CODE ANN. § 11-101 (1962) provides:

> No action shall be brought whereby:
>
> . . . .
>
> (2) To charge the defendant upon any special promise to answer for the debt, default or miscarriage of another person;
>
> . . . .
>
> Unless the agreement upon which such action shall be brought or some memorandum or note thereof shall be in writing and signed by the party to be charged therewith or some person thereunto by him lawfully authorized.

3. 258 S.C. at 568, 190 S.E.2d at 29. The court relied upon Stackhouse v. Pure Oil Co., 176 S.C. 318, 180 S.E. 188 (1935), and the cases cited therein.

II. TENDER

In *Ruscon Construction Co. v. Beaufort-Jasper Water Authority*[4] the South Carolina Supreme Court was asked to consider whether a valid tender of money had been made. Plaintiff Ruscon contracted with the defendant to construct subaqueous mains for $180,000.00 payable upon completion of performance. Acceptance of payment by plaintiff would have released the defendant from all claims by the plaintiff. After completion of performance, but before the Water Authority proffered payment, a subcontractor sued Ruscon to settle a dispute related to Ruscon's work for the Water Authority. Ruscon impleaded the Water Authority but later withdrew the action. The testimony indicated that Ruscon withdrew the impleader action pursuant to an agreement with the Water Authority that, should Ruscon not prevail, its right of action against the Water Authority would be preserved.

The Water Authority then proffered payment demanding that Ruscon sign an unconditional release. Ruscon refused the payment, fearing the release would bar an action against the Water Authority if Ruscon lost the pending litigation. Subsequently, the subcontractor's suit was decided in Ruscon's favor. Ruscon then accepted the tender by the Water Authority, signed the release, but nevertheless sued to recover interest accruing on the $180,000.00 from the time payment was first proffered until the tender was accepted.

When a valid tender is made and refused the debt is not discharged, but the running of interest is stopped. However, a tender is not valid if it is made subject to a condition.[5] The supreme court recognized these principles and its decision thus turned on whether the tender was conditional.[6] Defendant argued that the tender was not conditional because plaintiff was bound by the contract to release defendant when payment was made. Without specifying the nature of the subcontractor's claim, the court stated that the claim had not been one contemplated by the contract,[7] and that defendant therefore had made his tender conditional by demanding that the plaintiff release defendant. Fur-

4. 259 S.C. 314, 191 S.E.2d 715 (1972).
5. L. SIMPSON, CONTRACTS § 212 (2d ed. 1965).
6. 259 S.C. at 320, 191 S.E.2d at 717.
7. *Id.* at 319, 191 S.E.2d at 717.

thermore, the court deemed it unnecessary to establish that plaintiff had withdrawn the impleader pursuant to an agreement in order to find that the plaintiff was justified in not signing the release. Citing *Reynolds v. Price*,[8] the court held that if an obligee refuses tender in good faith based upon a reasonable belief that he does not have to abandon his right to seek indemnification against the obligor, and the tender is conditioned upon the surrender of this right, the tender is invalid because it is conditional.[9]

III. INTERPRETATION OF CONTRACTS

In *Eastern Business Forms v. Kistler*[10] defendant was employed by the plaintiff as a salesman. When defendant terminated his employment and began selling the same product for another firm, plaintiff sought a restraining order against defendant based upon the following contractual provision:

> 7. . . . It is further understood and agreed that upon the termination of this contract Salesman is not to sell printing products of the type produced or sold by Employer for a period of twelve (12) months within a 100-mile radius of the City of Greenville nor within a 100-mile radius of the central city of the assigned territory of Salesman.[11]

Holding that the 100-mile radius provision was unreasonable because such a large area was unnecessary for the protection of the plaintiff's business, the trial judge severed that part of the contract and enforced the restrictive covenant by granting an injunction *pendente lite* against defendant in a smaller area comprised of Spartanburg, Cherokee and Union counties.[12]

On appeal the supreme court noted that in South Carolina a restrictive covenant is severable only if it is severable in terms, but that if it is not severable into distinct terms the entire covenant must fail.[13] The court rejected the rule applied by some courts allowing an indivisible restrictive covenant, even though

8. 88 S.C. 525, 71 S.E. 51 (1911).

9. 259 S.C. at 320, 191 S.E.2d at 718.

10. 258 S.C. 429, 189 S.E.2d 22 (1972).

11. *Id.* at 432, 189 S.E.2d at 23.

12. Standard Register Co. v. Kerrigan, 238 S.C. 54, 119 S.E.2d 533 (1961), held that a restraint as to territory in order to be reasonable must be necessary for the protection of the interest of the employer.

13. The court cited Somerset v. Reyner, 233 S.C. 324, 104 S.E.2d 344 (1958), as the leading authority for this rule.

unreasonable, to be enforced to the extent performance of the restraint *is* reasonable. The supreme court agreed with the trial court that the covenant was unreasonable but also held that the covenant was indivisible. In vacating the order enjoining the defendant from violating the restrictive covenant, the court stated: "We cannot make a new agreement for the parties into which they did not voluntarily enter. We must uphold the covenant as written or not at all, it [*sic*] must stand or fall integrally."[14]

Bowaters Carolina Corp. v. Carolina Pipeline Co.[15] involved a detailed contract for the supply of natural gas between defendant, a supplier, and plaintiff, a commercial customer. The first issue considered by the court concerned a provision in the contract for the purchase of non-preferred interruptible gas. Customers buying non-preferred interruptible gas are subject to having their supply interrupted as demands for the gas fluctuate. Furthermore, orders from preferred interruptible customers have priority over orders from non-preferred interruptible customers.[16] The contract provided that "Buyer [would] be *among the last* of Seller's non-preferred interruptible customers to be curtailed and *among the first* to be restored to service."[17] Defendant normally curtailed the supply to non-preferred interruptible customers on a price-paid basis, reducing the amount sold to the lowest paying customer first. Being classified as one of defendant's lowest paying customers, plaintiff sought a declaratory judgment that defendant be prevented from using this criterion for curtailing plaintiff's supply. On this question, the court held: "[T]he defendant in exercising its judgment as to the availability of gas to be delivered to plaintiff as non-preferred interruptible gas shall not consider the price paid by the plaintiff and other customers as a factor."[18] The second disputed contractual provision concerned the sale of preferred and non-preferred interruptible gas. The provision stated:

> Seller shall use its best efforts to deliver to Buyer preferred interruptible gas, estimated at 1,200 MMBTU per day approximately *ninety-five (95) percent of the time*, and non-preferred

14. 258 S.C. at 434, 189 S.E.2d at 24.

15. 259 S.C. 500, 193 S.E.2d 129 (1972).

16. *Id.* at 508, 193 S.E.2d at 133. The court here presented an exhaustive survey of the customs and terminology of the natural gas business.

17. *Id.* at 511, 193 S.E.2d at 135 (emphasis added).

18. *Id.* at 524, 193 S.E.2d at 142.

> interruptible gas up to 10,800 MMBTU per day *eighty to eighty-five percent of the time* . . . .[19]

The plaintiff argued that this provision obligated the defendant to supply gas in accordance with the stated percentages. The court, however, pointed out such a commitment would in essence provide plaintiff with a firm commitment of gas and render the term "interruptible gas" meaningless. Thus, the court held that this phrase was only intended "to express the hopes and expectations of the parties and that it was not intended to give any right to [plaintiff]."[20]

The final issue on which plaintiff sought declaratory judgment concerned the following provision of the contract:

> In the event that the Commodity Charge for gas purchased by Seller from Transcontinental Gas Pipe Line Corporation is increased above or decreased below twenty-four (24) cents per MCF for contract demand gas under the two-part rate schedule . . . the amount of such increase or decrease shall be added to or subtracted from, as the case may be, the price of gas to Buyer as set forth herein.[21]

Transcontinental Gas Pipe Line Corporation (Transco) was the defendant's sole supplier at the time the contract was made. At the time of this action defendant had other suppliers, and defendant argued that the contract should be limited to the Transco source of supply since it was the only source contemplated by the contract. The court cited the following provision of the contract: "The gas delivered hereunder shall be natural gas, or equivalent as provided for in Paragraph 3 hereof, from Seller's *present or future sources of supply* . . . ."[22] Relying upon this provision and upon evidence that future growth of defendant was contemplated when the contract was made, the court held: "[T]he obligation of the defendant to deliver gas to the plaintiff [was] not limited to gas procured by the defendant from Transco and applied to gas obtained from whatever source."[23]

Finally, in *Shackelford v. Walpole*[24] the supreme court inter-

19. *Id.* at 510, 193 S.E.2d at 135.
20. *Id.* at 514, 193 S.E.2d at 137.
21. *Id.* at 512, 193 S.E.2d at 135-36.
22. *Id.* (court's emphasis).
23. *Id.* at 524, 193 S.E.2d at 142.
24. 259 S.C. 611, 193 S.E.2d 541 (1972).

preted a provision in a real estate broker's contract. Defendant listed a parcel of property for sale with the plaintiff, a real estate broker. The parties entered into a contract, the significant portion of which stated: "Seller [defendant] is to pay the real estate commission of Fifteen thousand ($15,000.00) Dollars *at the time of closing*, which commission shall be divided among [the plaintiffs]."[25] Plaintiff found a buyer for defendant and the parties entered into a contract of sale. A survey of the land disclosed that the acreage had been overstated and, after litigation and negotiation, defendant and buyer agreed to rescind the contract of sale. This action was brought by the plaintiff to recover his commission as stipulated in the contract.

The central issue before the supreme court was the interpretation of the phrase "at the time of the closing." Plaintiff contended that the contract of sale was obligatory upon the parties and that he was entitled to his fee. The court found it unnecessary to resolve this issue and instead applied the controlling law of *Hamrick v. Cooper*.[26] In discussing *Hamrick*, the court remarked: "This court reversed, holding that the promise to pay a commission was limited by the words 'on date of settlement'; hence, the promise was 'contingent upon the payment of the purchase price and the closing of the transaction,' which had not come to pass."[27] The court then held that the words "at the time of the closing" conveyed the same meaning and effect as "on date of settlement" and that the closing had not occurred.

IV. IMPLIED CONTRACT

In *Spencer v. Miller*[28] the South Carolina Supreme Court followed the well-established doctrine that a contract may be inferred from the conduct of the parties.[29] In planning a large construction project the defendant approached the plaintiff, an attorney, to have him conduct a title search and certification of certain property. Plaintiff advised the defendant of the local bar rates for such an undertaking. The defendant replied that the rates were too high and that the parties would have to negotiate

25. *Id.* at 613, 193 S.E.2d at 542.

26. 223 S.C. 119, 74 S.E.2d 575 (1953).

27. 259 S.C. at 615, 193 S.E.2d at 543, *quoting from* Hamrick v. Cooper, 223 S.C. 119, 126, 74 S.E.2d 575, 578 (1958).

28. 259 S.C. 453, 192 S.E.2d 863 (1972).

29. L. SIMPSON, CONTRACTS § 5 (2d ed. 1965).

a fee. The next contact between the parties came when defendant called plaintiff and asked that he issue a binder on the property to a prospective lender of defendant. The parties failed to discuss the fee during this conversation. Plaintiff issued the binder and brought this action against defendant to recover the full amount of the fee originally quoted.

On appeal defendant argued that he had not asked the plaintiff for a title search or certification but had asked only for a binder and that no fee had in fact been agreed upon. The supreme court observed that defendant was knowledgeable in real estate matters and must have known that a binder involved a title search and certification. The court found an implied contract and affirmed the lower court, stating:

> The defendant had been quoted the York County Bar rates, which were in evidence before the trial judge and before this court. The only reasonable inference that can be drawn from the record is that the defendant impliedly agreed to the title investigation at the York County Bar rates when he requested the plaintiff to procure the binder.[30]

V. SECURED TRANSACTIONS

In *Finance, Inc. v. Haltiwanger*[31] plaintiff attempted to obtain a deficiency judgment after a foreclosure sale of logging machinery on which defendant had defaulted in payment. Defendant counterclaimed against the plaintiff alleging fraud and seeking actual and punitive damages. C & K Enterprises, acting on behalf of plaintiff, took possession of the machine after defendant's default. C & K Enterprises was in the business of storing heavy machinery. The evidence indicated that before the foreclosure sale, while the machine was located at C & K Enterprises, the value of the machine had been materially reduced because of tampering. The evidence also revealed that, absent the tampering, the machine could have been sold for a price that would have more than satisfied defendant's obligation.

The South Carolina Supreme Court held that C & K Enterprises was plaintiff's agent and noted that it was unnecessary to prove that the plaintiff actually did the tampering. The court stated, "It was the plaintiff's duty to safely keep the machine and

30. 259 S.C. at 458, 192 S.E.2d at 866.

31. 258 S.C. 305, 188 S.E.2d 472 (1972).

to refrain from doing or permitting others to do any act which might depress its value or cause injury to defendant."[32]

Two dissenting justices expressed the view that plaintiff and C & K Enterprises were merely in a bailor-bailee relationship and that defendant had no right of action against the plaintiff.

VI. BAILMENT

In *Fortner v. Carnes*[33] the plaintiff left his automobile for repairs in the care of defendant, an automobile mechanic. After business hours a thief broke into the garage and stole the automobile which was later recovered in a badly damaged condition. The evidence showed that defendant had left the keys in the car and that the garage door was relatively easy to force open when locked. Plaintiff instituted this action to recover the cost of his automobile.

On appeal the defendant asserted that plaintiff had not produced sufficient evidence to show that defendant had breached a duty of due and ordinary care. The supreme court, citing *Fleischman, Morris & Co. v. Southern Ry.*,[34] recognized that in South Carolina: "[T]he burden is upon the bailee to prove due or ordinary care on his part, to the satisfaction of the jury, if he is to relieve himself of liability for goods not returned in accordance with the terms of the bailment."[35] The court held that the jury was warranted in concluding that defendant had not met the burden of proof.

Defendant also contended that his actions were not the proximate cause of plaintiff's loss because of the intervention of the criminal act of a third person. Defendant relied upon *Johnston v. Atlantic Coast Line R.R.*[36] and *Stone v. Bethea*[37] to support this contention. The court distinguished these cases as being concerned merely with torts in which no bailment was involved, and concluded that in the case of a bailment the theft itself and the

32. *Id.* at 310, 188 S.E.2d at 474. It should be noted that the transactions involved in this case arose before the enactment of S.C. CODE ANN. § 10.9-207(1) (Spec. Supp. 1966), which provides: "A secured party must use reasonable care in the custody and preservation of collateral in his possession . . . ."

33. 258 S.C. 454, 189 S.E.2d 24 (1972).

34. 76 S.C. 237, 56 S.E. 974 (1907).

35. 258 S.C. at 460, 189 S.E.2d at 26-27.

36. 183 S.C. 126, 190 S.E. 459 (1937).

37. 251 S.C. 157, 161 S.E.2d 171 (1968).

failure to return the goods in accordance with the terms of the bailment constitute the injury. The subsequent negligent or intentional acts of a third person can in no way be considered to intervene between the negligence of the bailee and the injury.

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