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Contracts

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CONTRACTS

RICHARD A. HAUSLER*

"Is there a contract? What the . . . !
Fever and night-mare cases raise:
A offers fondly, offers well,
but B withholds reply for days,
or, answering, rewords a phrase,
and A determines not to sell.
A falls for fraud. B's eyeballs glaze.
Is there a contract? What the . . . !"

One turns from contemplation of the past two years' growth of Florida contract laws as from the provocative experience of Greek tragedy. Life struggling against form — "form" being the Statute of Frauds, an irrational concept of consideration, etc. By and large, however, "life" or substance seems to be winning over form. In view of the dead weight of legal conservatism that is difficult to overcome, this is no small achievement; the Florida Supreme Court in the past two-year period has done well, indeed, in rejecting formalistic absurdities, inconsistencies, and anomalies which have emerged, in other jurisdictions, out of the basic laws of contracts.

Time and time again,² the court employs the true test in contracts: the intention of the parties to enter into a lawful agreement affecting their legal relations is the basic, determining factor in the interpretation of contracts. Perhaps one fine day, the court will conclude that all agreements should be enforceable without reference to any form, from the very fact that the parties intended such a result. I fear, however, that there is little prospect in the very near future of Florida law being changed in so vital a respect as, for example, the abolition of consideration. Even the achievement of one or the other various practical reforms³ of consideration seems unlikely in spite of persistent indications in the decisions⁴ that the court's function in a contract case is to determine whether a sound and sufficient reason exists for the enforcement of the promise.

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1. LLEWELLYN, PUT IN HIS THUMB, *Ballad of the Class in Contracts*, pp. 39-40 New York: Appleton-Century-Crofts (1931).

2. See notes 5-10 *infra*.

3. See HOLDSWORTH, 8 HISTORY OF ENGLISH LAW 47 (1925); POUND, INTERPRETATIONS OF LEGAL HISTORY 66 (1923); POUND, INTRODUCTION TO THE PHILOSOPHY OF LAW 271 et seq. (1922); Lorenzen, *Causa and Consideration in the Law of Contracts*, 28 YALE L. J. 621 (1919); Wright, *Ought the Doctrine of Consideration be Abolished from the Common Law?* 49 HARV. L. REV. 1225 (1936).

4. See notes 5-10 *infra*.

"Like the Watermen that
row one way and
look another."

Robert Burton, *Anatomy of Melancholy*

The largest single category of cases or contracts in the past two years was with reference to interpretation or construction of contracts. One such case was *Ehrlich v. Barbatsis Holding Co.*,⁵ which involved an action by a landlord against a tenant for a decree that the lease had terminated. The lease provided that it was to be in force during continuance of war between "Allies" and so-called "Axis Nations" and for six months after the final treaty of peace had been signed. It was held that the six months period had passed and term of lease had expired, even though the final treaty of peace has not been signed with Germany. Justice Barns pointed out that the words "conclusion of war" or "duration of present world war" in contracts do not have definite legal meaning, and such meaning will depend on the subject matter to which the words relate and the purpose of their use. The opinion that the intent of such words may vary with circumstances is in line with the court's general liberal tendency of interpretation. An interpretation that will permit a greater elasticity is often permitted in order to arrive at the intent of the parties to the contract.

The court again stressed this idea in *Underwood v. Underwood*⁶ where the court considered property settlements between husband and wife. That these agreements should be construed or interpreted as other contracts is no longer open to question.⁷ Justice Drew relied on an earlier Florida case⁸ for the proposition that in construing contracts, it is the duty of the court to place itself, as near as may be, in the situation of the parties, and from a consideration of the surrounding circumstances, the occasion, and apparent object of the parties, to determine the meaning and intent of the language employed. This is a well-established, conspicuous, and far-reaching rule; it involves the nature of the instrument, the condition of the parties, and the objects which they had in view. Indeed, the great object, and practically the foundation, of rules for the construction of contracts is to arrive at the intention of the parties. It was this philosophy that guided the court in the *Underwood* case to decide the primary and controlling question whether, in the particular facts, the agreement constituted a property settlement, or whether the financial arrangements constituted alimony.

The Florida Supreme Court again stressed these fundamental rules of construction in *Triple E Development Co. v. Floridagold Citrus Corp.*⁹

5. 63 So.2d 911 (Fla. 1953).

6. 64 So.2d 281 (Fla. 1953).

7. *Bergman v. Bergman*, 145 Fla. 10, 199 So. 920 (1940).

8. *St. Lucie County Bk. & Tr. Co. v. Aylin*, 94 Fla. 528, 114 So. 438, 441 (1927).

9. 51 So. 2d 435 (Fla. 1951).

where a contract for the sale of citrus groves provided that all hazards and risks to the assets should continue to the vendor until the transaction was closed. Another provision was to the effect that if damage to the property, between the time of the making of the contract and the date of closing was such as to reduce substantially the market value of the remaining property, the vendee might have the option of terminating the contract without liability on its part. After the date of the execution of the contract and before the date of closing, a hurricane destroyed a portion of the fruit on the trees. By mutual consent, the sale was consummated on schedule, the vendor agreeing not to interpose a defense of estoppel or waiver should the vendee bring suit. The court, adopting the "intention tests" held that the parties, by their agreement as a whole, intended that compensation for the fruit damaged by a hurricane should be permitted only in the event the damage was substantial; therefore, the court could determine the question of whether the sewage actually was such as to "substantially reduce" the market value of the remaining fruit.

In *James v. Gulf Life Ins. Co.*,¹⁰ we again have the Supreme Court emphasizing that interpretation of any instrument ought to be broad enough to allow it to operate fairly and justly under all the conditions to which it may apply. In an action upon a life policy, the court held that the word "annually" within a life policy provision (that ten percent interest on all premiums paid would be added to the death benefit annually) referred to the time of addition of interest and to the premiums paid for that year and that year alone. This holding is in keeping with the doctrine that the court should endeavor to give a reasonable construction most equitable to the parties and one which will not give one of them an unfair or unreasonable advantage over the other.

"When we're with wolves,
one learns to howl, they say."

Racine, *The Litigants*

The question of legality of subject matter was involved in several recent cases. For example, where, after the plaintiff and the defendant had made one or two bids at a judicial sale of real property at which there were several other bidders, the plaintiff and defendant made an oral agreement that the former drop out of the bidding and that, if the defendant was the successful bidder, each would have a one-half interest in the property, and the defendant, after buying in the property, refused to convey to the plaintiff a one-half interest, upon payment of one-half of the bid; the Florida Supreme Court¹¹ held that the defendant held a one-half interest in the property as a constructive trustee for the plaintiff.

10. 66 So.2d 62 (Fla. 1953).

11. *Rome v. Fincke*, 53 So.2d 712 (Fla. 1951).

This is in keeping with the general rule that agreements to unite in bidding at a judicial sale will be condemned only where they are of such a character as to deprive the sale of the benefits of competitive bidding. In the instant case, the agreement did not have for its object the suppression and stifling of fair competition of the sale, with the purpose of acquiring the property at less than its fair value.

A similar philosophy was adopted in *Bower v. Seleeman*,¹² where the president of a corporation, who was the minority stockholder, and an employee of a transportation company purchased stock of the majority holder and gave a note upon the majority holder's guarantee that the Railroad and Public Utilities Commission would issue an additional franchise which might enable the corporation to operate at a profit. All the parties knew that the majority holder could make no absolute promise that the Commission's power would be exercised in a certain way, and that the promise was at most, only an undertaking to assist in obtaining the permit. There was ample evidence that the majority holder did undertake to obtain the permit. On these facts the court found no need to explore the well settled law that agreements for control by individuals of business operations of government are void as against public policy, and correctly saw no occasion to hold that the agreement, such as it was, amounted to a contract improperly to influence public officials, and, therefore, the agreement could not be held to violate public policy.

By provision of the Constitution and the statutes,¹³ the public policy of the State of Florida with respect to labor activities and labor opportunities has been earlier defined¹⁴ to include a ban on closed shop agreements. Therefore, in *Local No. 234 v. Henley & Beckwith, Inc.*,¹⁵ the court held that even though a union participated in wrong, being party to an agreement for closed shop, which violated public policy, the union could assert invalidity of the contract, since one who has entered into a contract violative of public policy owes to the public a continuing duty of withdrawing from such agreement.

A contract should be treated as entire and indivisible when, by consideration of its terms, nature, and purpose, each and all of its parts appear to be interdependent and common to one another and to the consideration. However, in the instant case, the remainder of the employment contract between employer and union was taken up with general details concerning wages, law, and conditions of labor, and such details tied directly into the illegal portion of the contract providing for closed shop. Thus, the contract was held indivisible, although, admittedly, a bilateral contract is severable where the illegal portion of the contract

12. 52 So.2d 680 (Fla. 1951).

13. FLA. CONST., Decl. of Rights § 12; FLA. STAT. § 481.01 *et seq.* (1951).

14. *Local Union No. 519 of United Ass'n of Journeymen v. Robertson*, 44 So.2d 899, 902 (1950).

15. 66 So.2d 818 (Fla. 1953).

docs not go to its essence, and where with the illegal portion eliminated, there remains of the contract valid legal promises on one side which are wholly supported by valid legal promises on the other.

The case of *Thomas v. Atlantic Coast Line R. Co.*¹⁶ involved an action against a railroad for fire damage to property stored by plaintiff on premises leased from railroad. The court of appeals held that the provision of the lease by the railroad of its premises adjacent to the track, whereby lessee undertook to indemnify lessor railroad against all claims for damage to the building on the premises, or contents therein (whether same was result of fire caused by negligent emission of sparks from locomotive engines of lessor, or otherwise, however resulting), applied to ordinary negligence but did not apply to cases of wilful negligence, and if construed to do so, the provision would to that extent have been illegal.

In Florida there is an almost complete survival of the common law freedom of contract theory. Florida has no public policy against contracts exempting railways from liability for ordinary negligence.

“Though This be madness,
yet there is method in it.”

Hamlet, Act II, Sc. 2.

The two-year period of decisions with reference to specific performance was confined largely to reaffirmance of previously established positions and realignment with settled doctrines. Following the general rule that the seller is not required to furnish an abstract of title unless he specifically contracts to do so, the Florida Supreme Court denied specific performance because the plaintiff's correspondence did not amount to an acceptance but to a counter proposal.¹⁷

However, Justice Hobson went on to say that the test to be applied to determine whether written instruments in fact constitute a contract is whether there has been a “meeting of the minds” of the parties upon definite terms and conditions which include the essential elements of the valid contract.¹⁸ Generally speaking, this may be true; but it is not universally or literally true. Justice Hobson's terminology is disturbingly misleading for the inner intention of parties to a transaction subsequently alleged to create a contract cannot either make a contract of what transpired, or prevent one from arising, if the words used were sufficient to constitute a contract. Justice Hobson's inexactitude is not his alone; judicial opinions and elementary treatises abound in statements of the generally discredited “meeting of the minds” theory. Even where it is accepted, the theory has

16. 201 F.2d 167 (1953).

17. *Mehler v. Huston*, 57 So.2d 836 (Fla. 1952).

18. *Id.* at 837.

been carried too far: once a contract has been validly made, the courts attach consequences to the contract, consequences of which the parties never thought, never dreamed — as, for example, where situations arise which the parties had not contemplated.¹⁹

The case of *Cottages, Miami Beach, Inc. v. Wegman*²⁰ involved a letter from a father to his daughter which promised her that if she would leave her home in New York City and come to live with him in Miami Beach for the purpose of assisting him in operation of business to be conducted in connection with certain real property (which he was in process of purchasing) that he would vest in her a one-half interest in the property. The court held that although the letter was not such a written memorandum as would meet the requirements of the Statute of Frauds (and had to be treated as an oral agreement to convey land), there was such part performance as would take the oral agreement out of the Statute of Frauds and entitle plaintiff to enforce it. This decision is in keeping with a long line of Florida cases to the effect that taking of possession and, in addition, the payment of some part or all of the consideration is such part performance as will take an oral contract out of the Statute of Frauds. While rendition of services by a promisee is not in itself sufficient part performance, it is ordinarily treated as equivalent to payment of consideration of contract and when coupled with possession of property to which the contract relates, is sufficient part performance to take a contract out of the Statute of Frauds.

The case of *Streit v. King*²¹ concerned the following facts:

A vendor and vendee contracted for the sale of the controlling interest in a corporation. Subsequently a second contract was substituted which cancelled the first and provided for the purchase of a smaller amount of stock, carrying with it the condition that the stock would be voted by a voting trust in accordance with an agreement to be entered into which would be acceptable to both parties. Later the vendor refused to enter into any voting trust arrangement. The court held that since the second contract was void for failure of consideration (the consideration being the subsequent voting trust agreement), the cancellation of the first contract was ineffective and the vendee was entitled to specific performance of the first contract or of the second contract without the trust.

Thus, the court rejected the idea that when one acts on a conditional promise, if he gets the promise he gets all that he is entitled to by the act, and if, as events turn out, the condition is not satisfied and the promise calls for no performance, there is no failure of consideration.

The topic of options was a major point in two cases. An option under

19. See *Ricketts v. Penn R. Co.*, 153 F.2d 757, 760-765 (1946) (concurring opinion); *Embry v. Hargadine*, 127 Mo. App. 383, 105 S.W. 77 (1907).

20. 57 So.2d 439 (Fla. 1952).

21. 54 So.2d 522 (Fla. 1951).

a contract to purchase real property in which it was stipulated that the optionee should have the right to complete the transaction by delivering a second mortgage for the difference between the purchase price and an outstanding first mortgage, was held in *Stoffer v. Adams*,²² to entitle the optionee to specific performance when he obtained an assignment of the first mortgage and offered to give the seller a new first mortgage.

After all, when the optionee sought to give the seller a first mortgage, when he was entitled only to a second one, the seller obviously could not complain. In other words, the optionee would be undertaking to do more than he originally promised!

In the second major case involving options, *South Inv. Corp. v. Norton*,²³ the court pointed out that an option contract is not a contract of sale but is a unilateral contract which gives the option holder the right to purchase under terms and conditions of the option agreement. Thus, if such terms and conditions are not met by the option holder, the unilateral contract does not become a bilateral contract, binding on both parties, and susceptible of enforcement by court of equity in specific performance thereof.

“Ah, but a man’s reach
should exceed his grasp,
Or what’s a heaven for?”

Robert Browning, *Andrea del Sarto*

Aside from specific performance suits, the 1951 to 1953 period of Florida contract law contained several interesting cases involving the matter of remedies. For example, in *Holbrook v. City of Sarasota*,²⁴ the plaintiff brought suit against a municipal corporation for breach of contract, express or implied, to furnish nursing care to a patient, who was in the city hospital and who was injured by being permitted to fall from bed. The plaintiff elected not to sue in tort, but based the suit upon contract. The court held that the city charter provision requiring thirty days written notice after injury in order to maintain suit against the city arising out of tortious action was inapplicable to bar the suit. There is some conflict of authority as to the circumstances under which an injured party may waive his right to sue in tort and ground his action on contract, but all agree that it may be done if there is a contract express or implied, or if the matter out of which the cause of action arises partakes of both contract and tort. The *Holbrook* case is well within this rule.

*Steak House, Inc. v. Barnett*²⁵ was a suit for rescission of contract. The plaintiff was lessee of certain premises, which were operated by the defendant under an agreement between plaintiff and defendant. The complaint,

22. 54 So.2d 801 (Fla. 1951).

23. 57 So.2d 1 (Fla. 1952).

24. 58 So.2d 863 (Fla. 1952).

25. 65 So.2d 736 (Fla. 1953).

instituted in this cause for rescission of the agreement, averred performance on the part of the plaintiff and the failure and refusal of the defendant-assignee to pay the indebtedness of plaintiff-assignor as agreed. The question presented was whether plaintiff should be entitled to rescission in equity or whether it must be left to its remedy at law for damages.

The Supreme Court held that the complaint alleging defendant's breach of a covenant which was such that plaintiff would not have entered into the contract with the covenant omitted, and alleging further that at the time of making of the contract, the defendant did not intend to perform, and that plaintiff was willing to place defendant in status quo existing at the time of execution of the contract, sufficiently stated claim for rescission.

The well established rule, adopted in the instant case, is that generally rescission is granted for fraud as to existing fact, but not for failure to perform a covenant or promise to do an act in the future, unless the covenant breached is a dependent one, which, in turn, is determined by a consideration of the intention of the parties as shown by the whole contract. More specifically, a covenant is "dependent" where it goes to the whole consideration of the contract, where it is such an essential part of the bargain that its failure destroys the entire contract, or where, (as in *Steak House, Inc. v. Burnett*)²⁶ it is such an indispensable part of what both parties intended, that the contract would not have been made with the covenant omitted. A breach of such a covenant amounts to breach of the entire contract. Equity will order rescission for either fraud or breach of the dependent covenant.

In *Bernecker v. Bernecker*,²⁷ the plaintiff brought an action for judgment declaring a grove management contract terminated. The contract under which a son (plaintiff) was to manage the father's (defendant) citrus grove, required that the son pay father specified amounts of money monthly, and to care for the grove according to best prevailing practice; the net profits were to be divided equally between father and son. Three months transpired, and the father told the son to put such money into the grove, and the father stood idly by for nearly three years permitting the son to put such money into the grove and to spend his own savings in fertilizing and caring for the grove. The father then tried to terminate the contract without notice, and took possession of the grove full of fruit. The Supreme Court held that the father had no right to terminate the contract without notice, and that plaintiff was entitled to one-half of the proceeds from a sale of the fruit produced by plaintiff on defendant's grove. The particular holding is in accord with the generally accepted doctrine that a right to rescind because of delay in performance or breach must be asserted promptly, but a delay which is not inequitable does not cut off the right.

26. *Ibid.*

27. 60 So.2d 399 (Fla. 1952).

It is a firmly established rule in Florida²⁸ and elsewhere, that a party who has advanced money or done an act in part performance of the agreement and refuses to proceed to its ultimate conclusion, may not recover back what has thus been advanced or done, if the other party is ready and willing to proceed and fulfill his stipulations according to the contract. Thus, the Supreme Court held in *Reitano v. Fote*²⁹ that a prospective vendee who advanced a deposit toward fulfillment of the contract and then refused to continue with the agreement, could not obtain a refund of the money so paid, where the vendor remained at all times ready, willing and able to sell.

“Many of them want common sense, many more common learning; but in general, they make up so much by their manner for those defects, that frequently they pass undiscovered.”

Lord Chesterfield, *Letters to His Son*.

The last category of 1951 to 1953 Florida cases on contracts to be considered here refers to a collection of cases involving miscellaneous points.

There are three views concerning the liabilities of a surety when there has been a departure in a contract. The first, or common law rule, says that even a slight departure from the terms of the contract will relieve and discharge the surety from liability. The second view holds that there must be a material departure from the construction of the contract in order that the surety may be relieved of liability. Under the third, and one followed by Florida,³⁰ the court determines whether the departure from the contract results in injury to the surety, then ipso facto such departure must be classified as material, but the surety should only be relieved to the extent of the injury. The principles governing the liabilities of sureties did not spring from the form of the contract, but rather from the relations of the parties to such contracts. A striking change in that relation exists where the obligation of the surety, once gratuitously assumed, is not assumed as a source of profit. A realistic recognition of the mutation is the underlying philosophy adopted by the Florida Supreme Court. True, the contract should govern the rights and liabilities of the parties, but as Justice Hobson holds, such contract should not longer be construed strictly in favor of the surety.

In *Advertects, Inc. v. Sawyer Industries, Inc.*,³¹ the court considered the topic of non-performance, and drew some distinctions. A manufacturer of salt and pepper shakers had contracted with an advertising agency for

28. Realty Securities Corp. v. Johnson, 93 Fla. 46, 111 So. 532 (1927).

29. 50 So.2d 873 (Fla. 1951).

nation-wide advertising; a receiver was later appointed for the manufacturer upon petition of the advertising agency. The manufacturer was held liable for all advertising, though the business had been so conducted during receivership that neither the receiver nor the manufacturer were able to manufacture and sell enough shakers to pay advertising costs. The court did not reject the rule that a plaintiff cannot prevail in an action for non-performance of a contract, for which non-performance he alone is responsible; rather, the court pointed out that in order for the doctrine to apply it would be necessary that the advertising agency, and it *alone* was responsible for the receivership. The court pointed out that the wrong-doing of the manufacturer, as set forth in the bill of complaint, was the cause of the receivership.

In *De Lotto v. Fennell*³² the court held that when parties enter into a contract for construction work, and during the progress thereof changes or alterations are requested, the law implies an obligation to pay the reasonable costs thereof in addition to the stipulated sum named in the original agreement.

The concluding case to be considered here is *Thomas Carlton Estate, Inc. v. Keller*.³³ A contract and escrow agreement for the sale of land provided for annual payments, upon the default of any one of which the vendor might retake the deed from the escrow agent. No payments were made for three years. During the fourth year, and before the payment for that year was due, the vendor withdrew the deed from the escrow agent. On the same day he sold the land to another and notified the defaulting vendee to vacate. The court held that the vendor had waived strict performance of the contract and consequently could not declare a forfeiture without first notifying the vendee of his intent so to do, and without giving him a reasonable time in which to make up the delinquent payments.

Although the doctrine of waiver and estoppel are frequently confused, and sometimes are incorrectly regarded as synonymous, the court in the instant case correctly defined and applied the doctrine of waiver: waiver is the intentional relinquishment of a known right.

30. *Gibbs v. Hartford Co.*, 62 So.2d 599 (Fla. 1953).

31. 64 So.2d 300 (Fla. 1953).

32. 56 So.2d 518 (Fla. 1951).

33. 52 So.2d 131 (Fla. 1951).