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CONTRACTS—1954 TENNESSEE SURVEY

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Mutual Assents: In the case of *Jones v. Horner*[1] it appeared that Jones was a tenant of Mrs. Horner. The lease gave Jones an option to purchase the property for a stated price and provided that Jones might exercise his option "by payment or tender of the agreed purchase price." Jones, within the life of the option, without tendering the purchase price, gave notice that he would exercise the option. He said he would pay the purchase price upon receipt of a deed to the property. Mrs. Horner refused to treat this notice as a valid exercise of the option.

Judge Swepston sustained the chancellor who had held in the trial court that Mrs. Horner was not bound. He points out that an option is an irrevocable offer and, like any other offer, must be accepted in accordance with its terms in order to make a contract. The terms of this option called for payment—not merely a promise to pay. The Judge points out that the rule of substantial compliance is not applicable to the exercise of an option.

In the case of *Anderson v. Sharp*[2] the following facts appeared. Alyne Dumas Lee is a professional singer. She had been engaged to give a concert at the Shiloh Presbyterian Church in Knoxville for a consideration of $200.00. The agreement was that she was to be paid before she sang. When it was time to start, only $117.00 had been taken in for sold admissions. In this situation Sharp and Scott, who were known agents to known principals, signed an agreement with Miss Lee that read in part as follows: "We the undersigned agree to pay to Alyne Dumas Lee the sum of $200.00 for Artistic Services to be rendered on May 26, 1949, at the Shiloh Presbyterian Church, Knoxville, Tenn. . . .

"It is further understood and agreed that this programme is under the auspices of Usher Board of the Shiloh Presbyterian Church, and Clinton Chapel Sunday School (Clinton Chapel A.M.E. Zion Church). "Signed Stella H. Sharp

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1. 260 S.W.2d 198 (Tenn. App. E.S. 1953).

2. 259 S.W.2d 521 (Tenn. 1953).

"Signed S. S. Scott
"Signed Alyne Dumas Lee"

Miss Lee was paid the $117.00. In this case she sues Sharp and Scott as individuals on the theory that they individually promised to pay the balance of $83.00.

The court was of the opinion that the instrument sued on was ambiguous as to what parties were bound and that parol evidence was admissible to explain the actual agreement. On the oral evidence the court found that Miss Lee was not expecting Scott and Sharp to pay the bill but that she was expecting it to be paid by their disclosed principals.

When an agent makes a contract there is frequently presented a peculiar question of interpretation. Has the agent bound himself? Has he bound his principal? Or has he bound both himself and his principal? When an agent makes an informal contract for a known principal it is presumed that the contract is binding on the principal[3] but not on the agent.[4] But when an agent makes a contract that in terms binds the agent he cannot avoid being held personally on the contract by showing his agency. And that is so whether his principal is disclosed or undisclosed.

The contract in this case of *Anderson v. Sharp* recites "We the undersigned agree . . . ." And the contract is signed by agents Sharp and Scott. This sounds like the agents, Sharp and Scott, were making themselves liable. But the court notes that Miss Lee also signed the contract and that she would not be promising to pay herself. The court also notes that the contract recites that the programme is to be given under the auspices of two organizations (the principals). It is hard to demonstrate that one or another construction of a contract is correct. But the features alluded to seem to warrant the court in its finding that this contract was ambiguous.

Liability of Consignee Who Accepts Shipment: A consignee who has made no promise to the shipper or carrier cannot be made liable for freight charges by a shipment to him. But if a consignee accepts a shipment the law is quick to imply a promise on his part to pay the freight charges. In *Tennessee Cent. Ry. v. Cumberland Storage &*

3. Rochell v. Moore-Handley Hardware Co., 239 Ala. 555, 196 So. 143 (1940). See also RESTATEMENT, AGENCY §§ 146, 147 (1933).

4. Owen v. Gooch, 2 Esp. 567 (1797). See also, Warren v. Dickson, 27 Ill. 115 (1862); Beeman v. May, 193 Misc. 684, 85 N.Y.S.2d 122 (1948); Right Printing Co. v. Stevens, 107 Vt. 359, 179 Atl. 209, 100 A.L.R. 528 (1935).

Warehouse Co.,[5] the carrier brought suit on a demurrage charge. Several cars of scrap iron had been shipped to the defendants who were engaged in the storage and warehouse business in Nashville. The defendants were to unload the cars and reload the scrap iron onto barges, rendering such service for the owners of the scrap iron. When the cars in question arrived no barge was available. The carrier asked an officer of the defendant what to do with the cars. He replied, "I don't know, I don't want them, we have no place to put them, we don't want the scrap." After some delay, however, a barge arrived and the defendant received the cars. The court held that the defendants were liable for the demurrage charges. The decision can probably be justified on general principles. A consignee of goods is presumed to be their owner and when he exercises dominion over the goods by accepting delivery he impliedly promises to pay the freight.[6] The decision is bolstered by the fact that there was an "average demurrage agreement" between the plaintiff and the defendant whereby the defendant promised to pay demurrage charges.

The decision in *Plastic Products Co. v. Cook Truck Lines*[7] is hard on the consignee. Goods were shipped from Pittman, N. J., to the defendant, Plastic Products Co., in Memphis. Shipment was C.O.D. by truck line. The initial carrier brought the goods to Nashville where they were picked up by the Cook Truck Lines and by them delivered to the defendant. The initial carrier erroneously changed the bill of lading from "C.O.D." to "prepaid." Thus the defendant in Memphis received the goods on a "prepaid" freight bill. The defendant used some of the goods received and rejected the rest. A settlement was made with regard to the rejected goods on the erroneous assumption that the freight had been paid. This would seem to lay the grounds on which the defendants could set up an estoppel. But it was admitted by the plaintiff that "An interstate carrier cannot by any action estop itself from exacting the lawful freight rate and recovering the full amount from the consignee or consignor." The moral seems to be that consignees should be chary about accepting interstate shipments that they are not bound to receive.

Contract in Favor of Third Party: The case of *Stewart v. Sullivan County*[8] involves a point that was not fully discussed in Judge Gailor's opinion. The suit was brought by a number of property owners in

5. 260 S.W.2d 208 (Tenn. App. M.S. 1953).

6. New York Cent. R.R. v. Ross Lumber Co., 234 N. Y. 261, 137 N.E. 324 (1922).

7. 260 S.W.2d 178 (Tenn. 1953).

8. 264 S.W.2d 217 (Tenn. 1953).

Sullivan County against the County and the Tennessee Valley Authority. It was based on a contract between Sullivan County and the TVA. The contractors took for granted a possibility that the TVA might, in its operations, inundate or otherwise obstruct highways and bridges that the county was obliged to maintain. The contract provided in part as follows: "The Authority hereby expressly covenants and agrees to indemnify the County against and save it harmless from any such obligation or liability." The contract further provides that the county shall not settle claims without the consent of the Authority, and that the Authority shall have full control over the defense and settlement of claims.

The right of the plaintiffs, property owners, to recover directly against the TVA is the point in question. The court says, correctly of course, that "it is elementary law in Tennessee that the beneficiary of a contract made by third parties may sue in his own right for its breach." It will be observed that the undertaking of the TVA runs only to Sullivan County. The Authority did not in terms consent to be bound to property owners or to anyone except the County. Should the property owners have a right of action, on that contract, directly against the TVA? The court held that the property owners did have such a right of action.

A similar question has arisen in connection with automobile liability insurance. In *Ohio Casualty Ins. Co. v. Beckwith*[9] it appeared that a policy of liability insurance had been taken out by the owner of an automobile. In terms the company's promise ran only to the insured. But the victim of an accident was allowed to recover from the insurance company. The *Beckwith* case was similar to the *Sullivan County* case in this: it provided that the insured could not settle any claim or interfere in any negotiation about claims without the consent of the company.

Statutes exist in a good many states that give an injured or damaged person a right of action directly against the insurer in respect to insurance that was carried by the party who was primarily liable.[10] The *Sullivan County* case and the *Beckwith* case indicate a tendency to hold the insured liable to the victim even without the aid of a statute. If a theory is needed to support this tendency it can be found in the subrogation or asset theory that was long used to enable a creditor beneficiary to recover on a contract that had been made in his favor. The subrogation theory as applied to the *Sullivan County* case would run like this. The landowners can recover against the county.

9. 74 F.2d 75 (5th Cir. 1935).
10. See Note collecting many cases, 85 A.L.R. 20 (1933).

The county has a right against TVA to be indemnified. This right is an asset of the county. The property owners could reach it by first getting a judgment against the county and then garnishing TVA. Why relegate the property owners to such a roundabout procedure? Let their recovery be direct.

On grounds of justice and expediency, the decisions in the *Beckwith* and *Sullivan County* cases are satisfactory. As stated in a note in the *Michigan Law Review* "This result seems desirable. It is welcomed with enthusiasm by the person injured, and it is agreeable to the insured because it relieves him of the worries of collecting from his obligor; finally, the insurer ought not to complain because he owes the debt anyway and it should make no difference to whom he pays it."[11]

Breach: The case of *King v. Mutual Life Ins. Co. of New York*[12] grew out of the alleged failure of an insurance company to pay disability benefits due under a policy. The plaintiff presented his case in four counts. They will be noted seriatim.

In the first count the plaintiff invoked a Tennessee statute[13] and sued to recover the accrued monthly benefits, plus interest, plus the statutory penalty of 25% and plus the amount of premiums paid since commencement of disability. The plaintiff was allowed to recover on this count.

In the second count the plaintiff asked for a decree of specific performance, requiring the defendant to pay future installments as they became due and enjoining the defendant from requiring physical examinations outside his home county and from requiring any examination oftener than once a year. This count was stricken out on the ground that it asked the court to remake the contract by which the parties would be governed in the future. This seems to be a natural disposal of the second count.

The plaintiff's third count alleges a breach of the whole policy and a repudiation by the defendant of its duties under the policy. Wherefore, the plaintiff sues to recover the present value of all future benefits, including the death benefit and the monthly payments, based upon the life expectancy of the insured. It is obvious that the plaintiff, if allowed to recover according to his claim in the third count, would get judgment for an amount that is relatively large as compared with recovery of the past due payments, even after the addition of the 25%

11. 33 MICH. L. REV. 1263 (1935).
12. 114 F. Supp. 700 (E.D. Tenn. 1953).
13. TENN. CODE ANN. § 6086 (Williams 1934).

penalty. This third count was stricken out. The decision on this point is in line with what is probably the better view. But there is some authority to the contrary.[14]

The company broke its contract when it defaulted on even one payment. But there is a difference between (a) a partial breach, in which case the plaintiff can recover only damages for the omission that has occurred; and (b) a total breach, in which case the plaintiff can cash in on the whole contract, including the payments that are not yet due. Does this third count present a case of total breach and so enable the plaintiff to get one remedial right in lieu of the entire contract?

Perhaps a digression is in order to notice that instances of total breach are frequent in connection with bilateral contracts but are rare in connection with unilateral contracts.

Almost all bilateral contracts are for an "agreed exchange."[15] The gist of the bargain is that the performance on one side is to be rendered in exchange for the performance on the other side. And that is true even though one or both performances are, by the terms of the contract, to extend over a period of time. Suppose, for example, that *A* is building a house for *B* under a contract that calls for payments by *B* at intervals as the work progresses. That would be a contract for an agreed exchange. Suppose further that *B* materially fails to keep up his payments. What can *A* do? He can, in the alternative, sue for the payments that are due—*i. e.*, he can sue for the partial breach that has occurred. Or *A* can stop work and sue for the profit he would have made on the entire contract—*i.e.*, he can sue for a total breach. In case *B* not only fails to make his payments but also repudiates the contract *A* must desist from further performance under this penalty: he cannot recover any enhanced damages that are caused by his continuance. And so *A*, in such a case as we have supposed, may or must sue as for a total breach.

Consider next the matter of breach of a unilateral contract. In such a contract one party has already performed. The bargain does not contemplate a future exchange. The party who has performed simply has a right to get the price of his performance which has already been rendered. He has no alternative right to get damages because the exchange will not go through.[16] It has gone through to the extent

14. Federal Life Ins. Co. v. Rascoe, 12 F.2d 693 (6th Cir.) *cert. denied*, 273 U.S. 722, (1926).

15. The exceptions are noted in RESTATEMENT, CONTRACTS § 266 (1932).

16. Exceptions are noted in RESTATEMENT, CONTRACTS § 316 (1932).

that his performance has been rendered. Suppose, for instance, that *A* Bank has loaned *B* $1,200.00. It is to be repaid in monthly installments of $100.00. Suppose further that *B* materially defaults in making payments, and even repudiates, what can the bank do? In the absence of an acceleration clause in *B's* promise, the bank cannot do a thing except bide its time and sue for installments as they come due.

Against this background we may consider the *King* case. According to count three, the insurance company defaulted in that it failed to make payments of monthly benefits that were due. It is asserted also that the company repudiated its liability. Does the company's behavior constitute a total breach and enable the insured to cash in on the whole contract? That is, does it enable the insured to recover the present worth of payments that are expected to fall due under the policy? The case of *Federal Life Ins. Co. v. Rascoe*[17] presented facts that were substantially like the facts in the *King* case. It was there held, by a divided court, that the plaintiff could recover the present worth of all payments that would become due under the policy according to the life expectancy of the insured. Judge Donahue, in writing the majority opinion, took the view that the contract was not unilateral, inasmuch as the insured had to be examined periodically and make reports. The decision in the *Rascoe* case has been expressly disapproved by the Supreme Court of the United States.[18] The express disapproval of this high Court might, however, be considered dicta because in the cases where the expressions were made it did not appear that there had been flat repudiations by the company. Said Professor Williston,[19] in speaking of this group of cases, "It can hardly be doubted that few courts will hereafter allow recovery of future instalments of an insurance policy or of any other instalment contract where the consideration has been fully paid, and where all that remains to be performed is a series of fixed payments."

This extended discussion of the plaintiff's third count in the *King* case leads to the conclusion that Judge Taylor was right in striking out that count. The apology for the extended discussion of Judge Taylor's brief opinion is that there has been enough difference of judicial authority on the point to justify a re-examination of the basic principles that are involved.

The plaintiff, in his fourth count sought to rescind the entire con-

17. *Supra* note 14.

18. Mobley v. New York Life Ins. Co., 295 U.S. 632, 55 Sup. Ct. 876, 79 L. Ed. 1621 (1935); New York Life Ins. Co. v. Viglas, 297 U.S. 672, 56 Sup. Ct. 615 80 L. Ed. 971 (1936).

19. 23 A.B.A.J. 172, 177 (1937).

tract and to recover all the premiums he had paid. This count also was stricken. In addition to the reasons given by Judge Taylor, it may be noted that rescission and restitution is not an available remedy unless there has been a total breach.[20] Another reason for denying the plaintiff's claim for restitution is that it would be impossible for him to return the benefits he had received in the way of protection during the time the policy was in effect.

20. RESTATEMENT, CONTRACTS § 347 (1932).