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Contracts

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> books whose dominant tendency might be to "deprave or corrupt" a reader. . . . I cannot say that its [obscene literature's] suppression would so interfere with the communication of "ideas" in any proper sense of that term that it would offend the Due Process Clause." [50]

The only conclusion to be drawn is that the Washington court has followed the more conservative line of authority and has not extended the holdings of the United States Supreme Court's recent decisions in the obscene literature field. Whether the same reasoning which is applied to obscene literature could be applied equally to crime comics is still open to question.

R. TED BOTTIGER

CONTRACTS

Options to Purchase Realty—Manner of Acceptance. In *Duprey v. Donahoe*[1] the plaintiff lessor entered into a lease for a term of two years which contained an option to purchase the leased premises in the following language:

> [I]n consideration of the payment . . . of the sum of $500 heretofore made, receipt of which is hereby acknowledged . . . Lessors . . . hereby give, grant, and convey to Lessees the right and option to purchase said real estate at any time within the terms of this lease for a total purchase price of $12,500 in cash.

On the final day of the term the defendant lessee orally stated to the plaintiff's agent, "I am exercising my option."

Subsequently the plaintiff's agent communicated to the defendant the plaintiff's opinion that the defendant had not properly exercised the option for the reason that it could be exercised only by full payment of the purchase price within the term of the tenancy.

Upon retention of possession of the premises by the defendant, the plaintiff commenced an unlawful detainer action to which the defendant pleaded the exercise of the option and prayed for specific performance. The trial court found that the lessee had exercised the option and allowed the parties thirty days within which to deposit the deed and payment in escrow. Upon appeal the decree was affirmed in a departmental decision, one judge dissenting.

The majority held that the option failed to provide a particular

[50] *Id.* at 501-03. See also Justice Frankfurter's dissent in Winters v. New York, 333 U.S. 507 (1948), where he contended that the statue in that case merely made incitement to crime an offense, was sufficiently definite to avoid attack for vagueness, and that it therefore was well within the police power of the state.

[1] 152 Wash. Dec. 93, 323 P.2d 903 (1958).

method by which the optionee could exercise his power of acceptance and thereby exercise the option. Consequently, it was held that any manifestation indicating acceptance would be sufficient, and thus the oral notice given on the last day of the term was a proper exercise of the option and resulted in the formation of a bilateral executory contract of sale.

The dissenting opinion stated that the offer contained in the option requested performance of the act of payment during the term of the lease and called for a unilateral contract of sale which was never formed, since the purchase price was not tendered within the duration of the option.

The Washington court has defined an option to purchase real property as:

> [A] contract by which one party, owner of the property and termed the optionor, for valuable consideration, sells to another party, called the optionee, the right to buy, or agrees with that other party that the latter shall have the privilege of buying, the property within the time, for the price, and upon the terms and conditions specified in the option agreement, but which of itself imposes no obligation on the optionee to purchase the property.[2]

In previous cases the court has used language which referred to options both as offers[3] and as unilateral conditional contracts.[4] The distinction is not important for the purposes of this Note because the exercise of the power of acceptance in the one instance or the satisfaction of a condition precedent in the other yield exactly the same legal relations, and the provisions of the option similarly govern the manner by which the power is exercised or the condition satisfied. An offered promise may also be a binding promise[5] in the sense that it may be irrevocable for a prescribed period of time or for a reasonable length of time. It is perfectly correct to refer to that binding promise as a contract in itself, either unilateral if the consideration given for it was a performance or bilateral if the consideration was a promise. Since the option contract is not legally enforcible against the optionee until he exercises his power under it, the problem of exercise best submits of analysis on offer-acceptance principles.

As in the case of all offers, the offeror can prescribe any mode of

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[2] Hopkins v. Barlin, 31 Wn.2d 260, 266, 196 P.2d 347, 350 (1948).
[3] Jacobson v. Barnes, 158 Wash. 691, 291 Pac. 1109 (1930).
[4] Andersen v. Brennen, 181 Wash. 278, 43 P.2d 19 (1935); Spokane, P. & S. Ry. v. Ballinger, 50 Wash. 547, 97 Pac. 739 (1908).
[5] 1 CORBIN, CONTRACTS § 264 (1950).

acceptance that he pleases, and in order to be an acceptance, the act or promise by the offeree must be in accord with the required mode set out in the offer.[6] Consequently, the question as to whether or not the purchase price must be paid or tendered in order to exercise an option to purchase contained in a lease, resolves itself into a matter of interpretation of the particular option involved.[7]

The standard of interpretation relative to integrations, such as a lease containing an option to purchase, is that of an objective interpretation of the provisions aided by an awareness of all the circumstances surrounding the formation of the instrument.[8] However, where that standard produces an uncertain or ambiguous result, the partially subjective standard of the meaning which a reasonable offeree might be expected to give the provisions is appropriate.[9] Subsidiary rules aiding interpretation include the rule which requires that doubts arising from ambiguous language be resolved against the draftsman of the instrument.[10] The presumption that an offer invites the formation of a bilateral contract by an acceptance amounting in effect to a promise is another rule often applied in interpreting offers.[11]

The majority in the *Duprey* case, although not verbally expressing an interpretive approach, implied the presence of ambiguity when they found that there was no explicit reference in the option contract to the mode of acceptance by which the option could be exercised. The statement that, in the absence of such a reference, any manifestation indicating acceptance by the optionee is sufficient, is an expression of the presumption that an offer invites the formation of a bilateral rather than a unilateral contract. Thus the court was able to reach the stage where the offer or the unilateral conditional contract of sale was transformed into a mutually binding executory contract of sale. Such a bilateral contract fully protects both parties, since each party's duty of immediate performance is constructively conditional on tender of the other's performance. The duration of the option, which coincided with the term of the lease, was presumed to be referable to the acceptance or exercise by the optionee and thus the court was able to find that the option contract failed to provide an express time provision with regard to payment of the purchase

[6] *Ibid;* 91 C. J. S., *Vendor & Purchaser* § 10 (1955).
[7] 32 AM. JUR., *Landlord & Tenant* § 307 (1941); Annot., 101 A.L.R. 1432 (1936).
[8] RESTATEMENT, CONTRACTS § 230 (1932).
[9] *Id.* § 233.
[10] *Id.* § 236 (d); Sunset Oil Co. v. Vertner, 34 Wn.2d 268, 208 P.2d 906 (1949).
[11] *Id.* § 31; 1 WILLISTON, CONTRACTS § 31 A, 61 n.4 (rev. ed. 1936).

price. Consequently, the parties were justifiably given a judicially constructed reasonable time within which to perform.

The dissenting opinion, on the other hand, found no absence of provisions and resulting ambiguity but rather decided that a specific provision in the option required payment of the purchase price during the term of the lease. This conclusion is actually an interpretation of the provisions placing emphasis on the words, "purchase said real estate at any time within the term of this lease," and thus requires a completed purchase within that period. The majority view can be rationalized as an interpretation of the entire transaction which gave the lessee an "option to purchase," which option could be exercised by him "at any time within the term of this lease. . . ." In the absence of such words as, "on payment within the term of this lease," it could be found that no particular manner of acceptance was called for and therefore notice was sufficient. The cash payment is then placed in the position of the bargained-for equivalent of the optionor's promised performance.

Neither opinion referred to a number of prior decisions involving the exercise of options to purchase, perhaps because the resolution of the issue is so dependent on the particular language of the option contract. In some cases the options specifically provided for acceptance by notice.[12] In others the optionee tendered performance within the duration of the power of acceptance.[13] Consequently, those cases are of no utility in solving the principal problem, because they do not involve an interpretation of the requested mode of acceptance.

Several cases[14] hold that the options involved could be exercised by a proper notice of acceptance which constitutes a promise to pay the purchase price, but no analysis leading to that conclusion is given. The issue facing the court was whether or not the conduct of the optionee could be fairly characterized as an unconditional notice of an election to purchase. Dictum in two other cases states a similar proposition.[15]

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[12] Omicron Co. v. Hansen, 16 Wn.2d 362, 133 P.2d 505 (1943); Andersen v. Brennen, 181 Wash. 278, 43 P.2d 19 (1935); Union Oil Co. v. Hale, 163 Wash. 503, 2 P.2d 87 (1931).

[13] Hardinger v. Blackmon, 13 Wn.2d 94, 124 P.2d 220 (1942); Willenbrock v. Latulippe, 125 Wash. 168, 215 Pac. 330 (1923); Crowley v. Byrne, 71 Wash. 444, 129 Pac. 113 (1912).

[14] Whitworth v. Enitai Lumber Co., 36 Wn.2d 767, 220 P.2d 328 (1950); Roth v. Snider, 25 Wn.2d 514, 171 P.2d 819 (1946); Phillipp v. Curtis, 35 Wn.2d 844, 215 P.2d 431 (1950); DeBritz v. Sylvia, 21 Wn.2d 317, 150 P.2d 978 (1944).

[15] Jacobsen v. Barnes, 158 Wash. 691, 291 Pac. 1109 (1930); Neeson v. Smith, 47 Wash. 386, 92 Pac. 131 (1907).

Olsen v. Northern S.S. Co.[16] is an example of interpretation of an option leading to the result that tender must be made within the specified time period. An option to sell corporate stock back to the issuer was worded, "the company would, within six months . . . , take redelivery of said shares and repay the par value thereof." This provision was interpreted to mean that the option could be exercised only by a redelivery of the shares within six months.

Another case reaches a similar result,[17] stating that the problem was indistinguishable from a previous case and holding that the latter was controlling. In that case[18] the option stated the optionor did "agree, *on written request,* within six months from date, to sell and convey. . . ." (Emphasis supplied.) Although a letter of acceptance was received within the duration of the option, the court held that tender of payment during that period was essential to the exercise of the option. In the light of the approach to the "written request" provision, the case is not reliable precedent either as to reasoning or result.

In summary, it appears that the method of an option's exercise is a matter of some importance in the drafting and interpretation of option contracts. The present court seems inclined to search for an explicit provision referring to the method of acceptance and, finding none, will apply an interpretation in favor of the optionee. The lesson which the draftsman learns from the principal case is of the necessity of incorporating into the option a proviso requiring that the optionee's acceptance take a stipulated form.

DAVID C. CUMMINS

Implied Warranty of Fitness as Applied to Building Contracts —Builder's Liability for Defects. In the case of *Hoye v. Century Builders, Inc.*,[1] the Washington court held a contractor liable on a theory of implied warranty for a defect in a finished house. The plaintiff selected one of the defendant's lots, and the latter agreed to build on it according to his own pre-drawn specifications. A series of rainstorms three weeks after the plaintiff moved in resulted in ground saturation, and caused septic tank effluent to rise and exude unpleasant odors. The plaintiff brought his action for rescission, but by order of the trial court the complaint was amended to plead a

[16] 70 Wash. 493, 127 Pac. 112 (1912).
[17] Chambers v. Slethei, 136 Wash. 84, 238 Pac. 924 (1925).
[18] Spokane, P. & S. Ry. v. Ballinger, 50 Wash. 547, 97 Pac. 739 (1908).

[1] 152 Wash. Dec. 776, 329 P.2d 474 (1958).

cause of action for damages upon a breach of warranty. The lower court's judgment for the plaintiff was affirmed by the supreme court.

Previous Washington cases dealing with building contracts have used normal breach of promise rules, the contractor being held liable when the proof established unjustified "failure of substantial performance in a workmanlike manner."[2] The *Hoye* case is the first instance in which the court has applied warranty language to a contract of purchase and construction of real property. Less than a year before this decision the court said: *"We have limited the theory of implied warranty* of fitness or suitability *to sales of personal property. . . ."*[3] (Emphasis added.) The implication of this statement is that the court has not previously used warranty theories in the cases of building contracts. The problem created by the *Hoye* decision is to determine whether the court is establishing a distinction between liability on the theory of breach of promised performance and liability by virtue of an implied warranty of fitness for the use intended, notwithstanding full performance.

To make this determination, it is necessary to examine the distinction between an implied promise in a contract and an implied warranty. Corbin states that a promise is "[A]n expression of intention that the promisor will conduct himself in a specified way or bring about a specified result in the future, communicated in such manner to a promisee that he may justly expect performance and may reasonably rely thereon."[4] A warranty may be defined as an express or implied statement of something promised as part of a contract but collateral to its object.[5] Implied warranties are not promises by the warrantor that the facts warranted are true, but are obligations imposed as a consequence of making a contract, regardless of the warrantor's intent.[6] Accepting these definitions, an implied warranty is not a promise in the contract itself, or consideration therein, but rather

[2] White v. Mitchell, 123 Wash. 630, 213 Pac. 10 (1923); Eckhardt v. Harder, 160 Wash. 207, 294 Pac. 981 (1931); Kenney v. Abraham, 199 Wash. 167, 90 P.2d 713 (1939).

[3] Bidlake v. Youell, Inc., 51 Wn.2d 59, 62, 315 P.2d 644, 646 (1957). (A case dealing with landlord-tenant tort liability for injury due to the defect).

[4] 1 CORBIN, CONTRACTS § 13 at p. 25 (1950). In § 14 the author goes on to state"A promise may be expressed in the form of a warranty, and that which appears to be the object of desire and expectation on the part of the promisee may be something over which the promisor has absolutely no power or control. . . . Warranties of this kind may turn out, on proper interpretation, not to be promises at all, but to be mere representations of fact, the truth of which is a condition precedent to the duty of the other party."

[5] Pauls Valley Milling Co. v. Gabbert, 182 Okla. 500, 78 P.2d 685 (1938); Metropolitan Coal Co. v. Howard, 155 F.2d 780 (2d Cir. 1946).

[6] Strika v. Netherlands Ministry of Traffic, 185 F.2d 255 (2d Cir. 1950).

an obligation imposed by law and external to the promised performance. Therefore, liability on a warranty theory is not the same as liability on a contractual theory. In the former the promisor could have entirely performed, yet be held liable for a defect rendering the house unfit for the purpose intended. In the latter there must be a failure of the consideration; viz, failure to perform as promised, resulting in a breach of the contract.

Bearing in mind the distinction between these alternative remedies, the question arises whether the court intended to create the additional liability by imposing upon the contractor an implied warranty, holding him to standards greater than his promised performance.

Liability in earlier cases was based on the contractor's failure to perform in a workmanlike manner, which was considered a breach of an implied promise of the contract. If there was a material defect in the completed home, the contractor had not substantially performed.[7] In *White v. Mitchell*[8] the court held the builder contractually liable to build a house without any material defects therein, without regard to the purchaser's rejection of the original specifications which would have avoided the defect. The *White* case demonstrated how far the court would go to impose almost absolute contractual liability. However, unlike its predecessor, the *Hoye* case does not use the language of "substantial performance" but rather that of an "implied warranty."

The reasoning behind the court's shift in approach is not clear. One reason may be that the court was influenced by the many jurisdictions, including Washington, which hold the supplier of plans (whether contractor or purchaser) warrants the sufficiency of his plans for the purpose intended.[9] The Washington court, recognizing this ground for liability in the *Hoye* case, did not render its decision

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[7] White v. Mitchell, 123 Wash. 630, 213 Pac. 10 (1923); Eckhardt v. Harder, 160 Wash. 207, 294 Pac. 981 (1931); Kenney v. Abraham, 199 Wash. 167, 90 P.2d 713 (1939).

[8] 123 Wash. 630, 213 Pac. 10 (1923).

[9] Montrose Contracting Co. v. County of Westchester, 80 F.2d 841 (2d Cir. 1936), *cert. denied*, County of Westchester v. Montrose Contracting Co., 298 U.S. 662 (1935). See also: Hill v. Polar Pantries, 219 S.C. 263, 64 S.E.2d 885 (1951); Ward v. Pantages, 73 Wash. 208, 131 Pac. 642 (1913); Huetter v. Warehouse & Realty Co., 81 Wash. 331, 142 Pac. 675 (1914); Seattle School Dist. v. King Plumbing & Heating Co., 147 Wash. 112, 265 Pac. 463 (1928); Ericksen v. Edmonds School Dist., 13 Wn.2d 398, 125 P.2d 275 (1942). For other citations see note 5 in the opinion of the court in the Hoye case, 152 Wash. Dec. 776, 329 P.2d 474 (1958). The court also cited McConnell v. Gordon Construction Co., 105 Wash. 659, 662, 178 Pac. 823, 824 (1919), which stated: "Where either party to a building contract agrees to furnish, and does furnish, the plans for a building, he thereby guarantees their sufficiency for the purpose."

solely on this basis. If it had, it would not have had to imply a warranty of fitness of the building itself but could have held the builder liable for the inadaptability of the plans to the conditions of the ground surrounding the house.

To support its use of warranty language, the court cited the English decision of *Miller v. Cannon Hill Estates, Ltd.*,[10] which held that in a contract with builders or with the owners of a building estate for the purchase of a house to be erected or in the course of erection, there is an implied warranty by the vendors that the house shall be built in an efficient and workmanlike manner and of proper materials and shall be fit for habitation.

Though the application of the theory of an implied warranty of fiitness for the use intended to building contracts may be new in Washington, the modern trend seems to favor this theory as a basis of contractor's liability for defective structures.[11] It has been said that the law will read into a building contract the stipulation that the building shall be erected in a reasonably good and workmanlike manner and be reasonably fit for the specified purpose.[12] Another case held that where the builder holds himself out as a qualified expert, the court will automatically imply a warranty of fitness for the use intended, the court further stating:

> [I]t [the implied warranty] was a part of this contract incorporated therein as fully as if expressly stated that defendant would do its work with reasonably good materials in a reasonably workmanlike manner, and in such a way as reasonably to meet such requirements as it had notice the work was required to meet.[13]

Viewing the *Hoye* decision in the light of earlier Washington cases,

[10] 2 K.B. 113 (1931). This case had a factual situation almost exactly like the Hoye case. Plaintiff entered into a formal contract with defendant for the purchase of a plot of land and a house thereon which was in the course of construction at the time the contract was signed. The plaintiff moved into the completed house and within five months was forced to leave under doctor's orders because of a serious dampness that penetrated the house due to abnormally wet weather. The plaintiff was granted damages for breach of an implied warranty of fitness.

[11] Jose-Balz Co. v. DeWitt, 93 Ind. App. 672, 176 N.E. 864 (1931); Minemount Realty Co., Inc. v. Ballentine, 111 N.J. Eq. 398, 162 Atl. 594 (1932); Economy Fuse & Mfg. Co. v. Raymond Concrete Pile Co., 111 F.2d 875 (7th Cir. 1940); Hall v. MacLeod, 191 Va. 665, 62 S.E.2d 42 (1950); Sparling v. Housman, 96 Cal. App.2d 159, 214 P.2d 837 (1950).

[12] Minemount Realty Co., Inc. v. Ballentine, 111 N.J. Eq. 398, 162 Atl. 594 (1932). Other cases which follow the same reasoning are: Hall v. MacLeod, 191 Va. 665, 62 S.E.2d 42 (1950); Sparling v. Housman, 96 Cal. App.2d 159, 214 P.2d 837 (1950); Kuitems v. Covell, 104 Cal. App.2d 482, 231 P.2d 552 (1951). A contrary case is Allen v. Reichert, 73 Ariz. 91, 237 P.2d 818 (1951) (holding no warranty on the sale of real property.)

[13] Economy Fuse & Mfg. Co. v. Raymond Concrete Pile Co., 111 F.2d 875, 878 (7th Cir. 1940).

it may be concluded that Washington has expanded the builder's liability. The court must have intended this result, since the language of "implied warranty of fitness" is distinguishable from that of "implied promise to perform substantially in a workmanlike manner." Thus the builder is held to something more than mere performance of the contract. Because liability in the *Hoye* case was not rested on contractual language, but on that of an implied warranty, it must be assumed that the contractor collaterally warrants the usefulness of the house for human habitation. This may merely be an extension of contract law, since the parties actually contract for the finished product of a suitable home. However, the result was reached through the use of sales law language.

The result seems reasonable although it has increased the scope of the contractor's liability. The question whether this was intended by the court is unclear and could be more precisely determined under facts where the contractor did not supply the plans and specifications. Considering the authority of *Miller v. Cannon Hill Estates, Ltd.*,[14] relied upon by the court, it is possible that it did not intend to ground liability on the inadequacy of the plans and specifications, but rather to create a new theory of liability in this jurisdiction. The *Hoye* decision has brought Washington within the present trend of American courts implying warranties in building contracts.

MORTON G. HERMAN

Subrogation—Public Construction Contract—Right of Surety to Unpaid Funds upon Contractor's Default—Effect of Non-Assignment and Withholding Provisions. The court in *Levinson v. Linderman*[1] held a surety subrogated to the rights of a school district, the contractee, to *unpaid* funds payable upon a construction contract the surety completed upon the contractor's default.

The contract was for the construction of school buildings. Performance bonds were acquired and filed by *P*, the contractor, in accordance with statutory requirements.[2] An assignment of a single progress payment to be earned by *P* was given by *P* to a bank as security for a loan. The bank filed notice of the assignment in accordance with the

[14] 2 K.B. 113 (1931).

[1] 51 Wn.2d 855, 322 P.2d 863 (1958).

[2] RCW 39.08.010.

accounts receivable assignment statute.[3] *S*, surety on the performance bonds, completed the construction at *C*'s (school district) direction.

The court in discussing the subrogation rights of *S* mentioned the following two independent provisions in the construction contract: (1) "The contractor may not assign any money due or to become due to him hereunder, without the previous written consent of the owner." (2) The construction contract also provided that, should the contractor default, the school district could withhold the unpaid balance due under the contract and apply the sum to expenses incurred in completing the contract. No more money should then be due the contractor unless a surplus existed after payment of all expenses.[4]

Judge Foster, in summing up the court's decision, made the following statement:

> [T]he assignment was prohibited by contract and is, therefore, void, and the funds involved are those of the surety by right of subrogation. Upon the contractor's default, the school district had the right to apply the entire unpaid balance to the completion of the construction, and the surety on the performance bond completing the contract is subrogated to all its rights.[5]

The court did not define the *unpaid* funds in question. Accordingly, they could include either or both funds earned by *P* before default or funds earned by *S* after default and necessarily include the statutory retained percentage.[6] In the case at hand, there is doubt only as to whether earned estimates were in dispute. Washington has held that where a valid assignment has been made by a contractor to a bank, the latter is a "preferred claimant" to funds earned by the contractor prior to default.[7] If such funds were not in dispute, the court would have had no need to consider the aforementioned provisions of the contract. It could have relied upon the established law to the effect that the surety is entitled to funds earned by it in completing work after a contractor's default[8] and to a retained amount, statutory or

[3] RCW 63.16.030.

[4] The prohibition of assignment clause was quoted from the Brief for Appellant, p. 30. The withholding clause was discussed in Levinson v. Linderman, 51 Wn.2d 855, 857, 322 P.2d 863, 865 (1958).

[5] 51 Wn.2d 855, 864, 322 P.2d 863, 869 (1958).

[6] RCW 60.28.010.

[7] North Pacific Bank v. Maryland Casualty Co., 24 Wn.2d 843, 167 P.2d 454 (1946); Hall & Olswang v. Aetna Cas. Co., 161 Wash. 38, 296 Pac. 162 (1931).

[8] In Washington, Fidelity & Deposit Co. v. Northwestern National Bank of Bellingham, 90 Wash. 179, 155 Pac. 743 (1916), supports this proposition. Nationally, Colusa-Glenn Production Credit Ass'n v. Phoenix Ins. Co., 145 F. Supp. 844 (1956), was cited as authority.

otherwise, withheld by the owner for the protection of laborers and materialmen.[9]

The court, having cited Washington authority for the above propositions,[10] then cited a federal decision[11] holding the surety subrogated to funds withheld by the owner upon the contractor's default. Here, as in the Washington authority cited, funds earned by the contractor were not in dispute. Finally the court relied on a New York case,[12] "as expressing [the] applicable rule of law"[13] on the basis of "similar" facts. That decision held a surety subrogated to all the rights of the owner against the contractor; the surety having completed the contract work after the contractor's default. Again, the surety was entitled to funds withheld by the owner which the surety earned. But, in this decision, funds earned by the contractor prior to default were in issue. There was also a withholding clause as in the principal case. The New York court included in the surety's right to the funds withheld, the amount earned by the contractor prior to default and indicated the same result would "probably" follow in the absence of the withholding clause. The court further stated that: "The equitable lien arose at the time of the execution of the bond and was thus superior to the assignment [from the contractor to a bank for money loaned to the former]."[14]

The Washington court, in *Levinson v. Linderman,* made no definite holding as to the significance, if any, of the withholding clause to its determination. The court elected not to go beyond the opinion in the New York case on this matter. Washington has never before mentioned such a clause, although it is a provision of a printed form copyrighted by the American Institute of Architects and probably has been before the court on a prior occasion.[15]

In holding the assignment void because prohibited by the construction contract and the surety entitled to the unpaid funds by right of subrogation, the court found authority within Washington to support

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[9] Title Guaranty & Surety Co. v. First Nat'l Bank, 94 Wash. 55, 162 Pac. 23 (1916); United States Fidelity & Guaranty Co. v. City of Montesano, 160 Wash. 565, 295 Pac. 934 (1931).

[10] 51 Wn.2d 855, 863, 322 P.2d 863, 868 (1958).

[11] Colusa-Glenn Production Credit Ass'n v. Phoenix Ins. Co., 145 F. Supp. 844 (1956).

[12] Scarsdale Nat'l Bank & Trust Co. v. United States Fidelity & Guaranty Co., 264 N.Y. 159, 190 N.E. 330 (1934).

[13] 51 Wn.2d 855, 864, 322 P.2d 863, 869 (1958).

[14] Scarsdale Nat'l Bank & Trust Co. v. United States Fidelity & Guaranty Co., 264 N.Y. 159, 163, 190 N.E. 330 (1934).

[15] The effect in Washington of other forms of withholding provisions was discussed in North Pac. Bank v. Maryland Casualty Co., 24 Wn.2d 843, 167 P.2d 454 (1946).

the proposition.[16] The court, in giving effect to the prohibition clause is in accord with cases from most jurisdictions.[17]

Prior Washington decisions[18] have held that a prohibition of assignment clause is for the benefit of the contracting party in whose favor it is inserted, and only he can take advantage of such a provision. The court in *Levinson v. Linderman* did not mention these holdings. Therefore there remains doubt as to whether this rule is applicable to the facts of the principal case.

GENE G. OLSON

Interpretation—Reformation of Instruments—Conditional Promise to Pay Earnest Money. *Noord v. Downs,* 51 Wn.2d 611, 320 P.2d 632 (1958), arose upon an attempt to enforce a forfeiture of earnest money against a purchaser who had defaulted in closing the real estate sale. Plaintiff seller employed a real estate firm to procure a buyer for his residence. The effort proved successful, and defendant secured an appraisal from a lending institution which determined that the property would support a mortgage loan of $13,000.00. Thereupon defendant signed an earnest money agreement providing for a purchase price of $17,250.00, $13,000.00 in cash by means of a mortgage loan to defendant, and the balance consisting of defendant's equity in his present home. A note was attached to the agreement representing the earnest money. The note was payable on demand with the further provision, "on approval of loan to mortgagor by Lincoln Federal Sav. . . ."

This offer was rejected by plaintiff, who insisted that the entire transaction consist only of cash, since he desired to use that money to procure another residence for himself. Assuming the property would support a $13,000.00 mortgage loan, defendant signed a second earnest money agreement which did not contain any reference to mortgage financing but did contain a forfeiture clause calling for liquidated damages in the form of the earnest money. The purchase price was stipulated as 100 per cent cash. The same note which had accompanied the prior agreement was attached to the second agreement. The seller accepted this offer, and a contract for the sale of the property was formed.

Defendant repeatedly assured plaintiff that he would need no aid in financing and that the loan would certainly be made. However, defendant was surprised and mistaken when his formal loan application was disapproved. The closing date passed, and the purchaser was unable to perform. Plaintiff elected to enforce the forfeiture provision and sued for payment of the earnest money note. The purchaser's defense was that his laibility on the note was conditional and that the condition, viz., approval of the loan, was never satisfied.

The trial court found that the unconditional earnest money agreement and the conditional earnest money note were inconsistent in their terms, and that such inconsistency was explained by evidence showing the purchaser made the unconditional contract in reliance on the words and conduct of a lending institution indicating that the loan would be made. The court treated the note as reformed by eliminating the "approval" provision, and thus enforced absolute liability on the note.

[16] Indemnity Ins. Co. v. Nelson, 173 Wash. 294, 22 P.2d 984 (1933).

[17] See cases cited at 6 C.J.S., *Assignments,* § 75 (1937). Grand Trunk Western Ry. v. H. W. Nelson Co., 116 F.2d 823 (6th Cir. 1941).

[18] Morrison v. Nelson, 38 Wn.2d 649, 231 P.2d 335 (1951) (lease contract); Erckenbrack v. Jenkins, 33 Wn.2d 126, 204 P.2d 831 (1949).

The supreme court affirmed, finding that there was sufficient ambiguity between the unconditional contract to purchase and the conditional liability on the note to warrant an inquiry into the surrounding circumstances. It was reasoned that the note, singularly viewed, was itself ambiguous, in that the "approval" provision might be interpreted either as a condition precedent to the liability of the maker or as merely a provision referring to the time when payment was to be made. In the latter instance, the failure of the occurrence would not affect liability. Viewed in conjunction with the unconditional contract to purchase, which did not mention mortgage financing but called for complete payment in cash and provided for forfeiture of the earnest money as liquidated damages in the event the purchaser failed to purchase, the ambiguity was multiplied.

In the light of defendant's confidence that the loan would be granted and his assurance to that effect, plus the unclear condition language of the note and the futility of the forfeiture provision in the contract unless the loan were approved prior to the closing date, it was thought reasonable that the ambiguity should be resolved by construing the "approval" provision as merely referring to a convenient time for payment.

The court used interpretive approaches but found that the instrument should be reformed. As to the distinction, see 3 CORBIN, CONTRACTS § 540 (1951), and compare RESTATEMENT, CONTRACTS § 230 and § 504 (1932).

Business Compulsion—Duress—Filing of Lien. In *Emrich v. Gardner & Hitchings, Inc.*, 51 Wn.2d 528, 320 P.2d 288 (1958), *P*, a property developer, brought suit to set aside a compromise agreement entered into with *D*, an engineering firm employed by *P* to render civil engineering services. Under the original contract, *D* was to be paid as the lots were sold by *P*. *D* commenced work on the project and performed until *P*'s failure to have necessary prerequisites accomplished prevented *D* from continuing his work. *P*'s financial condition had become impaired, and at this point none of the lots had been sold, and consequently no payments had been made to D. *P* informed *D* that the development might, of necessity, be terminated. *D* proposed several modifications of the original contract, one of which contained the statement that *P* was indebted to *D* in the amount of $5,350.00. None of these modifications were accepted by *P*, who attempted to negotiate a sale of the property in its partially developed condition and to that end requested a statement of his liability to *D* in the event the contract was terminated immediately. *D* responded with an estimate of $19,099.59 and demanded this amount.

Since, at this juncture, the allowable time in which *D* might file his statutory lien under RCW 60.48 was fast expiring, *D* filed his lien in the amount of $11,990.14. *P*'s sales agent further frustrated the developer by threatening to abandon his contract with *P* unless the situation quickly improved. In this state of affairs, *P* entered into a compromise agreement with *D* calling for installment payments amounting to $10,000.00 for *D*'s services to *P* and $6,500.00 for *D*'s services rendered to a water and sewer district, on which *P* had previously become secondarily liable.

After *P* had made payments amounting to $6,400.00 and the water district had paid *D* on its primary liability, *P* refused to pay the remaining $3,600.00, which was held by his sales agent and subsequently paid into court. *P* sought recovery of that amount plus $950.00 as being the excess of the $6,400.00 payments over the reasonable value of *D*'s services. *P* claimed, under the "business compulsion" theory, that the formation of the compromise agreement was coerced, in that *D* had waived his lien rights by a provision in the original contract or, in the alternative, had filed his lien in bad faith for an excessive amount.

The trial court found that *D*'s lien rights were not waived, the amount claimed under

the lien was reasonable, and that since *P* accepted the benefits of the compromise agreement for nineteen months and thus caused *D*'s foreclosure rights to lapse, *P* could not be heard to complain of the agreement.

On appeal the decision was affirmed. The court held that the lien was: (1) not waived by the provision for payment as the lots were sold, since RCW 60.04.100 contemplates just such credit provisions; (2) justifiably filed and was not so excessive as to evidence bad faith, because the disparity between the amount claimed to be due in one of the proposed modifications, $5,350.00, and the amount of the lien, $11,990.00, was explained to the satisfaction of the trial court. The proposed modification contemplated that the full value of the services rendered up to that point would not be treated as due at that time but would accrue later as the developed property was better able to secure a market.

Under this explanation the amount claimed under the lien was rightfully claimed, and there was no attempt to exact a payment to which the lienor was not entitled. The mere presence of financial instability and economic hardship was not sufficient to constitute duress when another party claimed only what was owed to him and threatened to enforce his right by the legal methods expressly provided by law to assure his recovery. As was held in *Doernbecker v. Mutual Life Ins. Co.*, 16 Wn.2d 64, 132 P.2d 751 (1943), it is not duress to threaten to do what one has a legal right to do.

Guarantee in a Conditional Sales Contract—Impossibility of Performance—Refusal of Liquor Board to Issue License. In *Fischler v. Nicklin*, 51 Wn.2d 518, 319 P.2d 1098 (1958), *D*, who had sold his taven business to *X* under a conditional sales contract, assigned his interest in the contract to *P* and promised to retake possession of the premises and make the unpaid installment payments in the event *X* defaulted. When *X* later defaulted, she surrendered her beer license to the Washington State Liquor Control Board, and *D* was unable to acquire a license from the liquor board. *P* sued under the contract guarantee, and *D* defended on his inability to secure a license and operate the tavern.

The controlling principle was stated by the court in a quotation from *Embry v. Lewis*, 19 S.W.2d 87 (Tex. Civ. App. 1929):

> Where the impossibility arises after the contract is made and the defendant had knowledge of facts and circumstances from which it might reasonably have been foreseen, but makes no provision for such contingency, he assumes the risk of the happening of the impossibility, and cannot defend on that ground.

Since existing law is a part of every contract, the liquor board's power to refuse an assignment or issuance of an operating license was known to the parties through RCW 66.24. *D*'s failure to condition his prospective liability on his ability to secure a license was held to be equivalent to assuming the risk of non-issuance.

The additional fact that both *P* and *D* were experienced tavern operators seems to make the court's decision most appropriate.

Validity—Violation of Statute. In *Fleetham v. Schneekloth*, 152 Wash. Dec. 141, 324 P.2d 429 (1958), a real estate broker was permitted to recover his commission under an exclusive listing agreement despite his failure to deliver a copy to the vendors as required by RCW 18.85.310. Although the statutory violation was a misdemeanor under RCW 18.85.340, the court held that the failure to comply therewith did not render the listing agreement void because (1) it was not expressly made so by the terms of the act, and (2) the act did not purport to declare public policy. See *Way v. Pacific Lumber & Timber Co.*, 74 Wash. 332, 133 Pac. 595 (1913).