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Contracts

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tested by the presiding officers. A third judge concurred and preferred to distinguish the *Rizzman* case on the basis that it applied to an enrolled bill only and not to a constitutional amendment.

OLIVER SCHROEDER, JR.

CONTRACTS

Physicians' Covenant Not To Compete: Invalid When Unreasonable

Plaintiff, a young physician, and defendant, an older doctor entered into a partnership agreement, one clause of which provided that in the event of a dissolution of the partnership plaintiff would not practice medicine for ten years in Kinsman, Ohio or within a radius of thirty miles thereof. The restricted area was heavily populated and supported numerous physicians. The court in *Droba v. Berry*¹ held that the restriction to a distance of thirty miles was, under the circumstances, unreasonable and, therefore, invalid.

Fraud: Waiver of Right to Rescind For

Although the court in *Keyerleber v. Euclid Congregation of Jehovah's Witnesses*² held that the plaintiffs had cause for the rescission of the contract of sale of land entered into with the defendant church, due to fraud practiced by the church in leading sellers to believe that an individual was buying the property, rescission of the contract was denied. The court found that plaintiffs, subsequent to disclosure of the fraud, did nothing to indicate to the church that they were dissatisfied with the situation until after the church, with plaintiffs' knowledge: (1) secured a building permit; (2) brought a mandamus action against village council; (3) made changes in its plans at council's suggestion; (4) obtained court approval to mortgage the property and secured a mortgage commitment; (5) let various construction contracts; (6) leveled the land; (7) and made certain excavations and preparations for pouring concrete.

The court stated that such conduct constituted a waiver of the plaintiffs' right to rescission. Plaintiffs' were also held to be estopped from obtaining a rescission on the ground that equity would not come to their aid when the action for rescission was brought only after the happening of an event (issuance of the building permit) that made the contract unattractive to them.

¹ 139 N.E. 2d 124 (Ohio C.P. 1955).

² 143 N.E. 2d 313 (Ohio Ct. App. 1957).

Similarly, the purchaser of a heating supply business was held to have waived his right to rescind where he remained silent and experimented with the business for more than a month after discovering the fraud.³

Disputed Claim: Cashing of Check Constitutes Accord and Satisfaction

In *Venzie Corp. v. Reithmiller*,⁴ a check was tendered in payment of a disputed claim. On the issue of whether there had been a valid and binding accord and satisfaction, the court held that it was immaterial whether the condition of payment was written on the check which was tendered or by a letter or other message or memorandum which was sent with the tendered payment, so long as it was clear to the offeree, before acceptance, that the payment was offered in full settlement of an unliquidated or disputed claim.

Implied Warranty: Sale of House Under Construction

The seller of a house which is under construction and which is not ready for occupancy as a completed house at the time of sale, impliedly warrants that when the house is completed it will be finished in a workmanlike manner and reasonably fit for occupancy as a place of abode, in the absence of an agreement to the contrary. Hence, defective construction of a sewer which caused the basement to become flooded with sewage, damaging furniture and carpeting and causing unhealthy living conditions, was held to be a breach of such warranty.⁵

Arbitration

In *Dresler v. Peter Kiewit Sons' Co.*,⁶ it was held that where a contract provides for arbitration of disputes arising thereunder, and a party proceeds under the disputes clause of the contract until he receives an adverse decision by the arbitrator and then claims no bad faith or fraud on part of the arbitrator, such party is estopped to raise the question of the illegality and unenforceability of the arbitration clause. The Ohio statute⁷ making arbitration agreements irrevocable and enforceable was construed so as to prevent such party from resorting to a court of law to have his rights under the contract determined.

³ *Meyers v. Hoops*, 140 N.E. 2d 65 (Ohio Ct. App. 1955).

⁴ 145 N.E. 2d 460 (Ohio Ct. App. 1957).

⁵ *Vanderschrier v. Aaron*, 140 N.E. 2d 819 (Ohio Ct. App. 1957).

⁶ 102 Ohio App. 503, 144 N.E. 2d 269 (1957).

⁷ OHIO REV. CODE § 2711.01.

Preliminary Expressions Distinguished From Contract

*Joseph v. Doraty*⁸ involves a written agreement relating to the lease of a building. The agreement was specific as to the period of rental, terms of payment, option to renew, option to purchase, maintenance of leased premises, and as to various other lesser matters. The writing provided, however, that the lease to be drawn in pursuance of such agreement would first have to be approved by counsel for the respective parties. The parties designated as lessors under the writing leased the premises to another party, and the so-called lessees brought action for specific performance. When that relief was denied, a supplemental petition was filed claiming a breach of contract. The trial court directed a verdict for the defendant and entered judgment thereon. Plaintiffs appealed on questions of law. The court held, in affirming the lower court, that the writing showed no agreement as to taxes, insurance, utilities, rights of the parties in case of default, destruction of the premises by fire, or extent of repairs by both parties for the portion of the building they agreed to repair. In addition, since the writing contemplated that whatever lease was ultimately executed would have to be approved by counsel for the respective parties, the writing constituted only an agreement to enter into an agreement. Consequently, the writing formed the basis of a contract of lease but was not in and of itself a legally enforceable agreement.

Validity of A Release When Fraud Alleged

*McCuskey v. Budnik*⁹ involved the validity of a release for claims for personal injuries. Plaintiff admitted having signed two papers at the request of a garage attendant, alleged to be defendant's representative. One paper purported to release defendant of all claims for damage to plaintiff's automobile by defendant, and stated that the car had been completely repaired to plaintiff's satisfaction. The other paper, titled "Release in Full of All Claims," was a release of all claims by reason of damage, loss or injury sustained by plaintiff as the result of the collision. The word "Release" appeared in large, bold-face type across the top of the paper, and to the left of plaintiff's signature, in large boxed-in bold-face type, the words: "This is a release in Full."

Plaintiff alleged that defendant, by his representative, the garage attendant, said plaintiff could not receive his car unless he signed a certain paper;¹⁰ that by signing the paper he in no way released defendant

⁸ 144 N.E. 2d 111 (Ohio Ct. App. 1957).

⁹ 165 Ohio St. 533, 138 N.E. 2d 386 (1956).

¹⁰ Plaintiff's testimony showed, however, that at the time of signing he was told that if he paid the repair bill in money he could have his car without signing any papers.

from a claim for personal injuries; that the attendant knew the statement was false and made it for the purpose of having plaintiff rely thereon; that the amount set forth in the document in question represents the amount of damages to plaintiff's car; that the certificate of satisfaction and the release were obtained by fraud and concealment of the fact that the one document was a release of all claims for personal injuries; and that, except for the attendant's false representations, he never would have executed such document.

The Municipal Court of Cleveland ordered that the issue of the validity of the release proceed to trial before the court as a preliminary question of law, and thereafter rendered judgment for the defendant. The court of appeals reversed the judgment and remanded the case.¹¹ Upon allowance of a motion to certify the record, the Supreme Court of Ohio held that:

Facts constituting fraud in the factum are not pleaded, and there is no evidence to support allegations of that character if they were pleaded. The evidence does not require the conclusion as a matter of law that there was fraud in the inducement. *A person of ordinary mind cannot say that he was misled into signing a paper which was different from what he intended to sign when he could have known the truth by merely looking when he signed.*¹² [Emphasis added.]

There is no quarrel with the decision in favor of the defendant. However, the writer believes that the italicized portion of the court's opinion set forth above is too general a statement of doctrine to be approved. As stated by the Kentucky Court of Appeals, "Is it better to encourage negligence in the foolish, or fraud in the deceitful? Either course has most obvious dangers. But judicial experience exemplifies that the former is the least objectionable, and least hampers the administration of pure justice."¹³

Limitation of Liability — Airline

*Randolph v. American Airlines*¹⁴ is an action by a passenger for baggage lost by an interstate airline. Plaintiff purchased a ticket for transportation from Columbus, Ohio, to New Orleans, Louisiana. Plaintiff checked her suitcase, which, with its contents, was worth \$835, with de-

¹¹ McCuskey v. Budnick, 129 N.E. 2d 400 (Ohio Ct. App. 1955).

¹² The Court cites and relies upon *Dice v. Akron, Canton, Youngstown R. Co.*, 155 Ohio St. 185, 98 N.E. 2d 301 (1951), which defines fraud in the factum, or execution, and fraud in the inducement, and sets forth the distinction between them; a distinction which the writer is unable to understand.

¹³ *Western Mfg. Co. v. Cotton and Long*, 126 Ky. 749, 757, 104 S.W. 758, 760 (1907). See Grismore, *CONTRACTS* § 40 (1947).

¹⁴ 144 N.E. 2d 878 (Ohio Ct. App. 1956).