University of Miami Law Review

Volume 27
Number 3 *Volume 27 Numbers 3-4 (Spring & Summer 1973)*

Article 11

7-1-1973

Conflict Certiorari Jurisdiction and Contracts as Told By the Supreme Court of Florida

Larry C. Linder

should consider creating a hybrid between the copyright and patent statutes in order to solve some of the above mentioned problems.[69] A speedy registration process coupled with a shorter period of monopoly would encourage public disclosure of programs without tying up new developments in the industry. If infringement protection could be granted to the holder of this quasi-patent while still leaving some leeway for independent creation by another, production costs for small one-of-a-kind projects could be held to a minimum because prior art searches to avoid infringement liability would not have to be made. This is a touchy area. Too much leeway for independent creation could preclude any degree of protection against infringement, while not enough could raise costs by requiring a prior art search before any attempt to create a program for any purpose.

Whatever Congress' final solution is, it should act quickly. The computer industry affects almost every kind of industry and business in this country.[70] A system of protection for software that would cut costs and increase productivity in that industry would therefore tend to have the same effect on costs and productivity in general. Given the present state of the economy, such a result would seem to be desirable.

ERIC COHEN

CONFLICT CERTIORARI JURISDICTION AND CONTRACTS AS TOLD BY THE SUPREME COURT OF FLORIDA

The vendor, Kendel, brought an action against the broker, Pontious, and the purchaser, Fernandez, for specific performance of an alleged contract for the sale of land. The alleged contract, "a deposit receipt," which contained a provision that the contract would be binding when signed by both parties or their agent, was prepared and signed by the

69. Perhaps a compulsory licensing system, similar to that used for phonograph records, could be established using a licensing organization similar to A.S.C.A.P. *See* 17 U.S.C. § k(e) 1964); U.S. COPYRIGHT OFFICE, REGISTER OF COPYRIGHTS, SUPPLEMENTARY REPORT ON THE GENERAL REVISION OF THE U.S. COPYRIGHT LAW: 1965 REVISION BILL (Comm. Print 1965).

Another possibility is a broader type of copyright protection such as the German system which protects all intellectual creations containing an element of individuality, even if they are intangible or imperceptible to humans. *See* Ulmer, *Der Urheberschutz wissenschaftlicher Werke unter besonderer Berucksichtigung der Programme electronischer Rechenanlagen*, 1967 BAYERISCHE AKADEMIE DER WISSENSCHAFTEN, SITZUNGSBERICHTE 1. *But see* Note, *supra* note 149, at 1551.

A third alternative would be to establish "petty patent" protection for software, similar to the German "Gebrauchsmuster," requiring a lesser showing of novelty than the present patent law standard and extending rights for a shorter period of time. *See* Stedman, *Trade Secrets*, 23 OHIO ST. L.J. 4, 32-33 (1962).

Id. at 392 n.170.

70. *See generally* 54 CORNELL, note 7 *supra*; 68 COLUMBIA, note 7 *supra*; and 81 HARVARD, note 1 *supra*.

defendant-purchaser. It was then mailed to the plaintiff-vendor's attorney[1] who approved and then forwarded it to Kendel. Kendel signed and returned it to the attorney's office. However, before it was forwarded to the purchaser, the purchaser dispatched a telegram of revocation followed by a letter of revocation bearing the same date as the telegram. Several days later the vendor's attorney notified the purchaser by letter that "the revocation of January 17 had been ineffective because the Deposit Receipt agreement . . . had been executed[2] by KENDELS [sic] on January 16 . . . ."[3] The trial court, in an apparent rejection of this argument, held that " '[a]cceptance must be communicated to the offeror,' "[4] and the offer may be revoked if notice of the revocation is received by the offeree prior to acceptance. On direct appeal, this decision was adopted by the Court of Appeal, Third District.[5] On petition for certiorari based on an alleged "direct conflict"[6] between the the district court's decision and *Strong & Trowbridge Co. v. H. Baals & Co.*, a prior decision of the Supreme Court of Florida,[7] the supreme court *held*, writ discharged: No jurisdictional direct conflict existed since the supreme court in *Strong* "was not concerned with the question of whether the actual acceptance must be communicated to the offeror prior to an effective revocation." *Kendel v. Pontious*, 261 So.2d 167 (Fla. 1972).

The supreme court's refusal to exercise conflict jurisdiction, under

1. The deposit receipt mailed to the vendor's attorney was accompanied by a note stating that, " 'Mr. Kendell [sic] (the seller) has verbally accepted but desired you to check the contract over before signing.' " Kendel v. Pontious, 261 So.2d 167, 170 (Fla. 1972) (dissenting opinion).

2. The pertinent provision of the deposit receipt specified that: " '[T]his contract shall be binding on both parties . . . when this contract shall have been signed by both parties . . . .' " *Id.* at 168.

3. Brief for Respondent at 5, Kendel v. Pontious, 261 So.2d 167 (Fla. 1972).

4. Kendel v. Pontious, 244 So.2d 543, 544 (Fla. 3d Dist. 1971). The text of the holding follows:

> Since the offer to purchase was transmitted to the seller by mail, if the offer or contract does not otherwise provide, it will be implied that acceptance would be by mail. In Morrison v. Thoelke [Fla. App.], 155 So.2d 889, the Florida courts adopted the 'deposited acceptance rule' under which acceptance becomes effective as of date of deposit in the mail. Acceptance must be communicated to the offerer. Where an offer has not been accepted by the offeree, the offeror may revoke the offer provided the communication of such revocation is received prior to acceptance. 33 Fla. Jur. 365, Tucker v. Gray [82 Fla. 351], 90 So. 158, Montane vs. Bush [Fla. App.], 167 So.2d 884.

5. *Id.* at 543.

6. The Constitution of Florida authorizes discretionary review of appellate court decisions by the following language:

> The supreme court may review by certiorari any decision of a district court of appeal . . . that is in direct conflict with a decision of another district court of appeal or of the supreme court on the same point of law . . . .

FLA. CONST. art. V, § 4(2).

7. Strong & Trowbridge Co. v. H. Baars & Co., 60 Fla. 253, 54 So. 92 (1910) [hereinafter cited as *Strong*]. The asserted conflict was with the following rule of law appearing in *Strong:*

> The acceptance of an offer, to result in a contract, must be: (1) Absolute and unconditional; (2) identical with the terms of the offer; and (3) in the mode, at the place, and within the time expressly or impliedly required by the offer.

Kendel v. Pontious, 261 So.2d 167, 169 (Fla. 1972), *citing Strong.*

the facts presented, is puzzling, if not disappointing. The oft-stated purpose of discretionary review of district court of appeal decisions is to provide uniformity in the law.[8] However, this purpose has evidently been overlooked by the supreme court in the disposition of this case.

The supreme court has on various occasions stated the principal situations in which "direct conflict" arises. These situations occur when (1) a district court of appeal announces a rule of law which conflicts with a rule[9] previously enunciated by the supreme court[10] or (2) a district court of appeal applies a rule of law in a case involving substantially the same controlling facts as a prior supreme court case, but obtains a different result[11] or (3) a district court misapplies the cases cited for affirmance of the trial court's decision[12] or (4) a district court decision has made the law " 'unclear, if not in conflict.' "[13] Even a cursory examination reveals that the third district court's decision falls within three of the four conflict situations mentioned.

The first and fourth conflict situations appear from a comparison of the rule pronounced in *Strong*[14] with the rule in *Kendel.* The unavoidable implication of the principle enunciated in *Strong* is that a contract results from an acceptance in accordance with the express or implied terms of the offer. Since the terms of the offer may expressly or impliedly obviate the general necessity[15] of communication of acceptance, communication under these circumstances would not be a prerequisite to the formation of a contract.[16] When one compares the third district court's rule, that acceptance of an offer must be communicated, with the above rule, one finds the law "unclear, if not in conflict."

A conflict situation of the third type is evident after reading the cases cited by the district court in affirmance of the trial court's decision, since those cases[17] do not control the instant case. *Morrison v. Theolke,*[18]

8. *See, e.g.*, N & L Auto Parts Co. v. Doman, 117 So.2d 410 (Fla. 1960); Board of Comm'rs of State Institutions, 116 So.2d 762 (Fla. 1959).

9. The "rule" need only be obiter dictum of a supreme court decision. *See* Hawkins v. Williams, 200 So.2d 800 (Fla. 1967); Sunad, Inc. v. City of Sarasota, 122 So.2d 611 (Fla. 1960).

10. Nielson v. City of Sarasota, 117 So.2d 731, 734 (Fla. 1960), *citing* Florida Power & Light Co. v. Bell, 113 So.2d 697 (Fla. 1959).

11. *Id.*

12. *See* Allen v. Florida Power Corp., 253 So.2d 401 (Fla. 1971). The supreme court stated: "It is apparent to us the cases cited by the District Court were misapplied, creating patent conflict in that they do not *directly relate* to the instant situation. . . ." *Id.* at 403 (emphasis added).

13. Benefield v. State, 160 So.2d 706, 707 (Fla. 1964), *citing* Trustees of the Internal Improvement Fund v. LoBean, 127 So.2d 98 (Fla. 1961).

14. See note 7 *supra.*

15. Corbin, in discussing the rule that there must be communication, concludes that "such a general requirement is not to be found." 1 A. CORBIN, CONTRACTS § 67 (1963).

16. *See, e.g.*, Shortridge v. Ghio, 253 S.W.2d 838 (Mo., Kansas City Ct. App. 1952); International Filter Co. v. Conroe Gin, Ice & Light Co., 277 S.W. 631 (Tex. Com. App. 1925).

17. See note 4 *supra.*

18. 155 So.2d 889 (Fla. 2d Dist. 1963).

which first adopted the "deposited acceptance rule" in Florida, was cited as controlling; but the rule that acceptance is complete upon depositing in the mail, is applicable only when no particular mode of acceptance has been specified.[19] The second case cited, *Tucker v. Gray*,[20] was obviously cited for its quotation from *Ryan v. United States*.[21] The court in *Tucker* was concerned with an agency and a statute of frauds question. In *Ryan*, the United States Supreme Court dealt with the timelessness of a written and communicated acceptance. The remaining authority cited by the lower appellate court, "33 Fla. Jur. 365,"[22] was equally inapplicable.[23] Since none of the cited authorities or cases were concerned with an offer which specified the manner of acceptance in terms which impliedly dispensed with the necessity of communication of that acceptance, the cases were misapplied[24] by the district court. This misapplication created a conflict situation of the third type.

Nevertheless, the supreme court was unable to find the existence of a conflict and, consequently, certiorari was denied. A denial of certiorari, however, is "not to be construed as a decision upon the merits . . . ,"[25] nor can it be used "as precedent or authority for or against the propositions urged or defended in such proceedings."[26] However, the bench and bar may easily forget this when confronted with the text of *Kendel*. Justice Atkins writes:

> The trial judge and the District Court of Appeal in the case *sub judice correctly held* that the acceptance must be communicated to the offeror and that the offeror could revoke the offer provided the communication of such revocation is received prior to the acceptance.[27]

That certainly reads like a decision on the merits.

The supreme court's reasoning in this "decision on the merits" resulted from a judicial shelving of the expressed intent of the contracting parties. Despite the parties' manifest intent to be bound by the terms

---

19. *See* Morrison v. Thoelke, 155 So.2d 889, 893 (Fla. 2d Dist. 1963), *citing* 1 A. CORBIN, CONTRACTS §§ 78, 80 (Supp. 1961).

20. 82 Fla. 351, 90 So. 158 (1921).

21. 136 U.S. 68 (1890).

22. Kendel v. Pontious, 244 So.2d 543, 544 (Fla. 3d Dist. 1971).

23. The only pertinent portion of this "authority" alluded to by the appellate court contained the statement: "But if an offer is accepted without conditions, and without varying its terms, and the acceptance is communicated to the other party without unreasonable delay, a contract arises from which neither party can withdraw at pleasure." 33 FLA. JUR. *Vendors and Purchasers* § 13 (1960). The encyclopedic text credits *Tucker v. Gray*, 82 Fla. 351, 90 So. 158 (1921), for this proposition, but as the text of this article indicates, *Tucker* did not and does not support such a broad statement.

24. *See* Allen v. Florida Power Corp., 253 So.2d 401 (Fla. 1971).

25. Platt v. Mannheimer, 149 So.2d 538, 539 (Fla. 1963) (dissenting opinion).

26. Southern Bell Tel. & Tel. Co., v. Bell, 116 So.2d 617, 619 (Fla. 1959), *citing* Collier v. City of Homestead, 81 So.2d 201 (Fla. 1955).

27. 261 So.2d at 170 (emphasis added).

of the contract as soon as both had signed it, the supreme court reasoned that:

> It was necessary that the sellers do more than indicate their acceptance of the purchasers' offer by signing the deposit receipt. They were required to set in motion some means by which knowledge of that acceptance would come to the purchasers before any enforceable contract could arise. An acceptance under these circumstances, which only remains in the breast of the acceptor without being communicated to the offeror, is no binding acceptance.[28]

The reasoning quoted above reflects the general rule regarding the necessity of a communication of the acceptance of an offer for a bilateral contract.

However, the encyclopedic authorities cited by the supreme court in support of this general rule also report an exception to the rule. Williston states, at the end of the section quoted in the *Kendel* opinion, that:

> Where the offeror manifests his satisfaction with some other mode of acceptance which the acceptor thereupon adopts, the law imposes upon both parties the obligations which they expect or by their course of conduct should have good reason to expect.[29]

Corpus Juris Secundum specifies that:

> It is sufficient if the offer is accepted in the mode expressly or impliedly required by the offerer, . . . *and if the offerer requires or suggests a mode of acceptance which turns out, as far as giving actual notice to the offerer, to be insufficient or entirely nugatory, it is the fault of the offerer, and the agreement is complete.*[30]

And the last authority cited, the second edition of American Jurisprudence, also recognizes the exception to the general rule with the following language:

> If a reciprocal promise is required, . . . it is also essential, to convert such proposal into a valid contract, that such acceptance be communicated to the proposer *or that some act be done by the party accepting the proposal which the other party has expressly or impliedly offered to treat as a communication.*[31]

The supreme court's "decision on the merits" which ignores the exception to the general rule and its failure to find conflict where con-

---

28. 261 So.2d at 169.
29. 1 S. WILLISTON CONTRACTS § 70 (3d ed. 1957).
30. 17 C.J.S. *Contracts* § 45 (1955) (footnote omitted and emphasis added).
31. 17 AM. JUR. 2d *Contracts* § 43 (1964) (footnote omitted and emphasis added).

flict exists, can do little to promote uniformity in the law. These shortcomings may, however, do much to lighten the supreme court's work load by discouraging deserving litigants from seeking supreme court review of conflicting decisions.

LARRY C. LINDER

THE EXPANSION OF STATE POWER THROUGH THE TWENTY-FIRST AMENDMENT

Following public hearings which revealed numerous incidents of sexual conduct between dancers and customers[1] in bars licensed and regulated by the California Department of Alcoholic Beverage Control, the Department promulgated regulations expressly prohibiting sexual live entertainment and films in such bars and nightclubs. Plaintiffs, including holders of various liquor licenses issued by the Department, and dancers at premises operated by such licensees, unsuccessfully sought discretionary review of the regulations in both the state court of appeals and in the Supreme Court of California. The Department then joined with plaintiff-petitioners in requesting the three-judge federal district court to decide whether the regulations were invalid under the United States Constitution. The district court held that the regulations unconstitutionally abridged the freedoms guaranteed to petitioners by the first and fourteenth amendments.[2] The United States Supreme Court *held*, reversed: States have broad latitude under the twenty-first amendment to control the manner and circumstances under which liquor in bars and nightclubs may be dispensed. The Department's conclusion that both the sale of liquor and lewd or naked entertainment should not take place simultaneously in licensed establishments was not irrational nor was the prophylactic solution unreasonable. *California v. LaRue*, 93 S. Ct. 390 (1972).

The Court, while admitting that the regulation would prevent certain activities which would not be obscene under *Roth v. United States*,[3] and subsequent Supreme Court decisions, granted the state agency wide latitude to suppress not only obscenity outside the scope of the first amendment, but also speech which is clearly protected.[4] In justifying

1. The Court summarized the transcript of the hearings by stating:

> Customers were found engaging in oral copulation with women entertainers; customers engaged in public masturbation; and customers placed rolled currency either directly into the vagina of a female entertainer, or on the bar in order that she might pick it up herself.

California v. LaRue, 93 S. Ct. 390, 393 (1972) [hereinafter referred to as *LaRue*].

2. California v. LaRue, 326 F. Supp. 348 (C.D. Cal. 1971).

3. 354 U.S. 476 (1957) [hereinafter referred as *Roth*].

4. The obscenity test developed in *Roth* requires that the material must be taken as a whole and when so viewed, must appeal to a prurient interest in sex, patently offend