4-1962

Commercial Law and Contracts – 1961 Oregon Survey

Robert S. Summers
Cornell Law School, rss25@cornell.edu

COMMERCIAL LAW AND CONTRACTS—1961 OREGON SURVEY*

ROBERT S. SUMMERS†

THE enactment of the UNIFORM COMMERCIAL CODE was by far the most significant development in the field of commercial law in Oregon during 1961.[1] The code becomes effective in this state on September 1, 1963.[2] Eighteen states, including New York, Pennsylvania, Massachusetts, Ohio, Illinois, and Michigan, have now adopted the code.[3]

The Oregon Supreme Court during the period covered by this survey did not decide any landmark cases in the fields of commercial law and contracts. The subheadings in this article indicate the nature of the cases here selected for comment.

SECURITY

The litigation in *Scott v. Lawrence Warehouse Co.*[4] arose out of involved chattel security transactions. The plaintiffs, Karl Scott and John W. Hunter, were successors in interest of the T. L. Clark Lumber Co. (hereinafter referred to as Clark), which, in 1951, was operating a wholesale lumber business in Seattle, Washington. Earl Calder, one of Clark's suppliers, operated a planing mill near Elgin, Oregon. In 1951 Calder notified Clark of his need for funds to finance the purchase of rough lumber from nearby sawmills. Since Clark wanted to acquire the output of Calder's mill, Clark, through the Canadian Bank of Commerce in Seattle (hereinafter referred to as the Seattle bank), sent a letter of credit to the La Grande branch of the First National Bank of Portland authorizing Calder to draw sight drafts on the La Grande bank to pay for lumber purchased from mills in the Elgin area. To secure these loans, the parties used both trust receipts[5] and the field-warehousing device.[6] Each time Calder bought rough lumber, he had the seller issue a bill of sale to Clark, and Calder simultaneously gave Clark "purchase" trust receipts covering the lumber described in the bill of sale. This arrangement effectively secured Clark's loan from the time of purchase until the time Calder received the lumber at his mill. When the lumber

---

* The period surveyed is from October 1, 1960 to October 1, 1961.

† Assistant Professor of Law, University of Oregon.

[1] See Or. Laws 1961, vol. 2.

[2] *Id.* at 181.

[3] Other states that have enacted the code are: Wyoming, New Mexico, Kentucky, Oklahoma, Arkansas, New Hampshire, Connecticut, Rhode Island, New Jersey, Georgia, and Alaska.

[4] 227 Or. 78, 360 P.2d 610 (1961).

[5] See OR. REV. STAT. ch. 73 (1961).

[6] See, generally, Skilton, *Field Warehousing as a Financing Device,* 1961 WIS. L. REV. 221.

arrived at his mill, Calder deposited it in a duly posted warehouse operated by the defendant, Lawrence Warehouse Co. The defendant then issued nonnegotiable warehouse receipts covering this lumber, and Calder pledged these to Clark, who, in turn, pledged them to the Seattle bank. This arrangement further secured Clark's loans to Calder, and indirectly secured loans the Seattle bank had made to Clark. When Calder had to withdraw lumber from the warehouse for planing and shipment to Clark's customers, the bank and Clark authorized the defendant to release specified quantities and Calder gave Clark and the bank "processing" trust receipts for the lumber withdrawn. After the lumber had been planed and shipped to Clark's customers, Calder sent invoices to Clark, and Clark remitted to Calder the proceeds of the sales, less the amount of loans and other charges.

On September 16, 1951, after a fire had destroyed some of the lumber that Calder had deposited in the warehouse, an insurance investigation revealed that, for some time prior to the fire, the lumber covered by outstanding warehouse receipts exceeded the lumber actually stored in the warehouse. Upon learning of this shortage, the Seattle bank demanded that Clark repay the amounts it had advanced to finance Calder's timber purchases. The plaintiffs, as successors in interest of Clark, paid the Seattle bank, and the latter delivered to them all outstanding warehouse receipts. The plaintiffs then sued the defendant to recover for the amount of the shortage, for damages occasioned by certain wrongful delays in delivering lumber to Clark, and for restitution of fees and charges that the plaintiffs had paid the defendant under protest. The trial court entered judgment for the plaintiffs. The defendant appealed, and the plaintiffs cross-appealed from the refusal of the trial court to allow recovery for the full amount of the shortage. The supreme court affirmed that part of the judgment allowing recovery for the defendant's wrongful delays in delivering lumber to Clark and for fees and charges that the plaintiffs had paid the defendant under protest. The court also concluded that the facts supported a judgment for the plaintiffs in the full amount of the shortage, and accordingly allowed the plaintiff's cross-appeal.

The court properly held the defendant liable for the entire shortage. When the Seattle bank transferred the receipts to the plaintiffs, they thereby acquired "the direct obligation of the warehouseman to hold possession of the goods for . . . [them] according to the terms of the . . . [receipts]."[7] Because of the shortage, the warehouseman could not deliver all of the goods covered by the receipts. In such a case, the warehouseman is liable for the amount of the shortage unless he can prove "the existence of a lawful excuse."[8] Since the defendant could not establish such an excuse, it was liable.

[7] OR. REV. STAT. sec. 74.420 (1961).
[8] *Id.* sec. 74.080.

CONDITIONAL SALES

In *Miller v. Whitaker*,[9] the plaintiff's assignor leased a tavern to the defendant and sold to him all of the stock and fixtures therein pursuant to a conditional-sale contract. The parties had executed this contract in Bremerton, Washington, where the tavern was located. The buyer failed to pay the purchase price as agreed, and the plaintiff then sued him in the Circuit Court for Lane County, Oregon to recover the unpaid amount. The buyer did not deny that he was indebted to the plaintiff; instead, he asserted that the plaintiff's only remedy was to retake possession of the tavern. At the trial, the court applied Oregon law and found for the buyer. However, on the plaintiff's motion for a new trial, the court decided that it should have applied Washington law and ordered a new trial. The buyer appealed, contending that, although Washington law should have been applied, Washington law would not allow the plaintiff to recover. The supreme court disagreed and affirmed the new trial order, citing Washington Supreme Court decisions[10] holding that a buyer's breach of a conditional-sale contract entitles the seller either to sue the buyer for the price agreed upon or to disaffirm the contract and repossess the property sold. The court relied on Washington cases decided under the Uniform Sales Act.[11] Under the UNIFORM COMMERCIAL CODE, a seller who retakes possession may generally (1) dispose of the collateral at a public or private sale and hold the buyer liable for any deficiency or (2) retain the collateral in full satisfaction of the obligation.[12]

SURETYSHIP

In *Butte Motor Co. v. Strand*,[13] the plaintiff sold three cars on a conditional-sale contract to Strand, a car dealer. Strand resold these cars but did not pay the plaintiff for them. The plaintiff then sued Strand and the Hartford Accident and Indemnity Company, the surety on Strand's dealership bond. Strand did not appear and Hartford denied liability on the bond. At the trial, the court entered verdict and judgment for Hartford. On appeal, the plaintiff claimed that Strand's failure to pay was "fraudulent" within the meaning of that term as used in the bond and in OR. REV. STAT. sec. 481.310.[14] The supreme court disagreed, stating

---

[9] 224 Or. 205, 355 P.2d 760 (1960).

[10] Standard Fin. Co. v. Townsend, 1 Wash. 2d 274, 95 P.2d 786 (1939); Washington Cooperative Chick Ass'n v. Jacobs, 42 Wash. 2d 460, 256 P.2d 294 (1953).

[11] Cases cited in note 10 *supra*.

[12] UNIFORM COMMERCIAL CODE secs. 1-106, 2-703, 9-503, 9-504, 9-505.

[13] 225 Or. 317, 358 P.2d 279 (1960).

[14] OR. REV. STAT. 481.310(2) (1961) provides: "If any person suffers any loss or damage by reason of the fraud, fraudulent representations or violation of any of the provisions of this chapter by a licensed dealer, he has a right of action against such dealer and a right of action in his own name against the surety upon the bond."

that Strand's actions amounted to breach of contract but not fraud. The court added that, if the plaintiff had shown that, at the time of Strand's promise to pay for the cars, he did not really intend to pay for them, this would have been fraud and Hartford would have been liable. One notable feature of the case was the court's repeated assertion[15] that, even if the bond had been broad enough to include breach of contract, the plaintiff would not have prevailed because the statute prescribing the bond was the measure of the surety's liability thereon and the statute did not protect against damage or loss arising from breach of contract. While there is some support for this view,[16] there does not appear to be any sound reason why the parties should not be allowed to contract for greater protection than the statute requires.

Offer and Acceptance

In *Bonnevier v. Dairy Cooperative Ass'n*,[17] the defendant association had employed the plaintiff, Bonnevier, until he suffered an injury that made it impossible for him to work for a time. Bonnevier and his wife owned a residence near the defendant's property and, since the defendant planned to expand operations, a representative thereof commenced negotiations with Bonnevier and his wife for the purchase of their property. According to the Bonneviers, in consideration for their agreement to sell this property to the defendant at less than its fair value, the defendant agreed to provide employment for the plaintiff when he could return to work. When the defendant later refused to employ Bonnevier, he and his wife brought this action to recover damages for breach of contract. They won a verdict, but the trial court set it aside and ordered a new trial. The Bonneviers appealed, and the defendant also appealed from the trial court's refusal to enter judgment for the defendant notwithstanding the verdict. The supreme court remanded the case with instructions to sustain the defendant's motion for judgment. The court based its decision on the settled principle that an indefinite promise is unenforceable.[18] According to the testimony of Mrs. Bonnevier, the defendant's promise was: ". . . we will be glad to see you back to work when you are able."[19]

Because this "promise" did not refer to any specific job, did not set wages, and did not set any period of employment, the court properly concluded that it could not be enforced. A plaintiff should not be allowed to recover for a breach of promise if he cannot establish a reasonable

[15] 225 Or. at 321, 358 P.2d at 281.

[16] State ex rel. Dwyer v. Francis, 152 Or. 448, 54 P.2d 297 (1936). Distinguish the situation where the terms of the bond are *narrower* than the statutory terms. Or. Rev. Stat. sec. 747.190 (1961).

[17] 227 Or. 123, 361 P.2d 262 (1961).

[18] 1 Williston, Contracts secs. 37, 42 (3d ed. 1957).

[19] 227 Or. at 130, 361 P.2d at 265.

basis for computing his damages.[20] The defendant's promise in this case afforded no such basis.

CONSIDERATION

The case of *Oregon State Highway Comm'n ex rel. Pantovich Constr. Co. v. Brassfield*[21] involved an action by a subcontractor to recover a balance allegedly due on a contract with the general contractor. The Oregon Supreme Court affirmed the trial court's judgment for the plaintiff, which included $1,500 that the plaintiff claimed as a bonus for completing its contract before the contract date. On appeal, the defendants contended, in part, that their promise to pay a bonus was without consideration since the plaintiff was already bound to complete its work in an expeditious manner. The supreme court refused to accept this argument, but not for the right reason. The court said that the argument was without merit, for, if the plaintiff finished early, the defendants could then use equipment of a paving subcontractor that would have otherwise been moved to another job. What the court should have said was this: The defendants were seeking to invoke the "preexisting-duty rule" that a promise to do what the promisor is already obliged to do cannot be consideration,[22] a rule that was inapplicable here since the plaintiff was not obligated to finish when he did, for, under the terms of the contract, several days remained in which he could have completed his performance.

SUBSTANTIAL PERFORMANCE

Copenhagen, Inc. v. Kramer,[23] *Winters v. Shelton*,[24] and *Walton v. Denhart*[25] illustrate the familiar principle that a party ordinarily cannot have relief on a contract if he does not substantially perform his own obligations thereunder.

In the first of these cases, the defendants had contracted with a general contractor for the construction of a residence. The latter subcontracted some of the work to the plaintiff, but did not thereafter pay him in full for the work he had performed. The defendant owners then allegedly promised to pay the plaintiff subcontractor for the work provided he would complete satisfactorily to them the work subcontracted to him. The plaintiff here sued the owners for breach of this alleged promise and was nonsuited. The supreme court affirmed the nonsuit primarily because a review of the evidence revealed that the plaintiff had not satis-

[20] 1 WILLISTON, CONTRACTS secs. 37, 42 (3d ed. 1957).
[21] 363 P.2d 1075 (Or. 1961).
[22] CORBIN, CONTRACTS sec. 171 (1950).
[23] 224 Or. 535, 356 P.2d 1064 (1960).
[24] 225 Or. 105, 357 P.2d 284 (1960).
[25] 226 Or. 254, 359 P.2d 890 (1961).

factorily completed the plumbing and had not satisfactorily completed the heating system, which was out of balance. The court also thought there was no basis for recovery in *quantum meruit* since "there was very little, if any, . . . direct benefit to the defendants . . ."[26]

In *Winters v. Shelton*,[27] the plaintiffs bought the "stock, fixtures, equipment and goodwill of a pool room and beer parlor" from the defendants and agreed to pay therefor in monthly installments. The buyers defaulted, and the defendants regained possession via a forcible-entry-and-detainer proceeding.[28] The buyers then sought specific performance of the contract and damages in the alternative. The trial court entered a decree for the defendants and the supreme court affirmed because the plaintiffs had failed to pay several installments on the purchase price. The court also stated that this result involved no forfeiture, especially in view of the fact that the defendants returned $1,223.70 for interest and rent that the plaintiffs had paid pursuant to the contract.

In *Walton v. Denhart*,[29] the plaintiffs sought to rescind a contract to purchase a house that the defendants had been constructing. They based their right to rescind on the alleged failure of the defendants to complete the residence "on or about" May 15, 1957, and on the alleged failure of the defendants to complete the residence in a workmanlike manner. The evidence showed that the house was completed on or before June 30 and that the defendants had, except for "minor details," substantially completed the construction in a workmanlike manner. According to the plaintiffs' testimony, these "minor details" consisted of the following:

> . . . on June 30th the defendants had not as yet fastened the black base molding or installed a medicine cabinet in the basement bathroom; had not checked for poorly fitted tile in the basement fireplace; had not fixed a bulge under window in the master bedroom; had not installed decorative blocks on the garage door; had not repainted exterior trim where bugs had collected and rain had damaged; splash blocks had not been put down; interior surfaces had not been washed; where varnish had run onto painted surfaces it had not been redone; the shower rod in a bathroom had not been installed; a room divider in the frontroom was not entirely finished; the molding in the upstairs bathroom was loose; there was a hole around the family room light fixture that had not been filled; and . . . there was moisture under some of the asphalt tiles in the basement and these tiles were loose.[30]

The trial court denied rescission and the supreme court affirmed. The supreme court emphasized that "on or about" does not mean "exactly" and stated that "rescission is not warranted where the breach is not substantial and does not defeat the object of the parties."[31]

---

[26] 224 Or. at 540, 356 P.2d at 1066.
[27] 225 Or. 105, 357 P.2d 284 (1960).
[28] OR. REV. STAT. sec. 105.110 (1961).
[29] 226 Or. 254, 359 P.2d 890 (1961).
[30] *Id.* at 258, 359 P.2d at 892.
[31] *Id.* at 261-62, 359 P.2d at 893.

DAMAGES

The usual measure of damages for a buyer's breach of a contract for the sale of goods is the difference between what the buyer contracted to pay and the market value of the goods at the time the goods should have been accepted.[32] However, both the Uniform Sales Act[33] and the new UNIFORM COMMERCIAL CODE[34] allow the seller to recover more than this difference in an appropriate case. The supreme court thought that *Schnitzer Steel Products Co. v. Dulien Steel Products, Inc.*[35] was such a case. There the buyer contracted to buy scrap metal from the seller, but refused to accept delivery of the final one-third contracted for. The seller sued the buyer for breach of contract and sought to prove damages consisting of the difference between the amount the buyer agreed to pay and the amount for which the seller was able to resell the refused scrap on the open market. The trial court allowed such proof and entered a verdict and judgment for the seller. The supreme court affirmed, stating that "there were 'special circumstances showing proximate damages' in greater amount than the difference between contract and market price."[36] By "special circumstances" the court apparently referred to the buyer's refusal to accept that part of the metal that "could rarely be sold except with an equal amount of the better grades of scrap metal."[37] Though the decision appears sound, the court may have erroneously assumed that the "market price" of the refused scrap was not equivalent to the amount for which the seller was able to resell the refused scrap. Although this latter amount was at best only evidence of market price, it may have been equivalent to the market price. In the instant case, therefore, the seller's recovery may have in fact been the actual difference between the amount the buyer had agreed to pay for the scrap metal and the market value thereof, rather than some amount in excess of this difference. Some of the evidence tended to show that the refused scrap was valueless, and, as hereinbefore noted, this part of the scrap was of a kind that "could rarely be sold except with an equal amount of the better grades of scrap metal."[38]

REFORMATION

In *Moyer v. Ramseyer*,[39] Moyer, who was in the pole and piling business, wanted to purchase timberland along the Yaquina River owned by Ramseyer and his wife. Although Moyer knew that the Ramseyers'

---

[32] WILLISTON, SALES sec. 582 (rev. ed. 1948).
[33] OR. REV. STAT. sec. 75.640(3) (1961).
[34] UNIFORM COMMERCIAL CODE sec. 2-708.
[35] 227 Or. 348, 362 P.2d 362 (1961).
[36] *Id.* at 353, 362 P.2d at 364.
[37] *Id.* at 352, 362 P.2d at 363.
[38] *Ibid.*
[39] 226 Or. 122, 359 P.2d 407 (1961).

own deed did not give them the right to raft logs on the river, Moyer, in his offer to contract, added the following words to the legal description of the Ramseyers' land:

> together with all riparian and booming rights on the Yaquina River upon which the above described land abutts [*sic*], tide and overflow lands.[40]

According to Moyer, he informed the Ramseyers of these added words, and told them that, if they did not then own such rights, they should try to acquire them before the transaction was closed. The parties signed the contract with the "fattened description" appearing therein. Subsequently the escrowee reported to Moyer that the Ramseyers could not supply a marketable title since they did not own the riparian and booming rights. Moyer, who had, by that time, expended considerable sums on the property, sued the Ramseyers for breach of contract. The Ramseyers denied that Moyer had informed them of the fattened description and claimed that they were unaware that it had been embodied in the contract. Accordingly, they prayed for reformation. The trial court found that, unknown to them, Moyer had changed the description of their property, and it reformed the words in the contract involved in the litigation to read:

> all grantors' riparian and booming rights, *if any*, on the Yaquina River upon which the land above described as Parcel I abuts, and all grantors' right, title and interest, *if any*, to adjacent tide and overflow lands.[41]

The court also granted foreclosure of the contract as reformed since Moyer refused to make the final payment thereon, and the Ramseyers reacquired the property at the foreclosure sale. On appeal, the supreme court reviewed the evidence and concluded that the Ramseyers must have known what was in the contract before they signed it and therefore must have known that they were expected to provide a title that included riparian and booming rights. Because of this, the supreme court reversed. The court was cognizant of the fact that its reversal would expose the Ramseyers to a breach-of-contract action in which Moyer might recover substantial damages in spite of the fact that his "part in the transaction was not blameless."[42] Whether Moyer's part in the transaction was blameworthy is doubtful, however. As the court states, his "moves were open," and there was substantial evidence that tended to show that the Ramseyers knew of the fattened description when they signed the contract.[43] The testimony did reveal that Moyer's attorney explained the contract to the Ramseyers point by point, "omitting the description," but this did not appear to have misled the Ramseyers.

---

[40] *Id.* at 125-26, 359 P.2d at 408.
[41] *Id.* at 133, 359 P.2d at 412. (Emphasis added by the court.)
[42] *Ibid.*
[43] *Id.* at 129-30, 359 P.2d at 410.

INTERPRETATION

In *Morrison v. Oregon State Highway Comm'n*,[44] the supreme court was called upon to interpret and apply a standard "changed conditions" clause in a construction contract. This clause provided:

> Should the contractor encounter, or the engineer [for the highway commission] discover during the progress of the work, [1] *subsurface and/or latent conditions* at the site materially differing from those shown on the drawings or indicated in the specifications, [2] *or unknown conditions of an unusual nature differing materially from those ordinarily encountered and generally recognized as inhering in work of the character provided for in the plans and specifications*, the attention of the engineer shall be called immediately to such conditions before they are disturbed. The engineer shall thereupon promptly investigate the conditions, and if he finds that they do so materially differ, the contract may be modified by the engineer to provide for any increase or decrease of cost and/or difference in time resulting from such conditions.[45]

The plaintiffs had agreed to build a highway across irrigated land. Since they anticipated that irrigation water might impede operations, they specified an additional amount in their bid to cover this contingency. However, because the volume of water that eventually flooded the construction site was greater than expected, they had to incur "extra costs" beyond this additional amount to complete the job. They then claimed that the highway commission was obligated under the "changed conditions" clause quoted above to reimburse them for their "extra costs." The commission refused payment, and the contractors brought suit. In a nonjury trial, the court entered verdict and judgment for the contractors. The supreme court reversed. Whereas the trial court apparently thought the plaintiffs had no reason to foresee the volume of water that eventually flooded the site, the supreme court concluded otherwise. The plaintiffs therefore could not invoke the changed-conditions clause to recover their extra costs. Although the reversal appears sound, the court suggested, erroneously in my view, that, since the contractors anticipated some water, it would make no difference how much water actually flooded the site. If the contractors had been able to establish that the actual floodwaters substantially exceeded what would have been a reasonably foreseeable volume of flood water, they should have been allowed to invoke the "changed conditions" clause. A question that the court did not discuss was whether the engineer for the highway commission was notified of the fact that conditions encountered were materially different from those expected. By the terms of the contract, the engineer was authorized to increase the plaintiff's compensation if he found that conditions differed materially from those anticipated. Moreover, under the contract, such conditions were not to

[44] 225 Or. 178, 357 P.2d 389 (1960).
[45] *Id.* at 180-81, 357 P.2d at 390. (Emphasis added by the court.)

be disturbed until the engineer had inspected them. If the plaintiffs proceeded with their work in spite of the different conditions and without notifying the engineer thereof, it would appear that they should not be entitled to recover their extra costs.

In *Libby Creek Logging, Inc. v. Johnson*,[46] the plaintiff sold standing timber to the defendant, representing that the timber had been cruised and that the cruise showed over one and one-half million board feet on the property. The contract between the parties provided that the buyer, Johnson, would pay $18,500 for "all logs removed up to and including 1,000,000 board feet" and $18.50 a thousand for all logs removed in excess of 1,000,000 board feet.[47] The buyer paid $15,000 in cash to the seller and gave him a note for $3,500. The buyer then logged the property, and, because he found only 504,250 board feet thereon, refused to pay the note. The seller then instituted this action. The buyer answered that the contract was ambiguous and should be interpreted as a timber-cutting contract obliging him to pay $18.50 a thousand for logs cut and removed. He also interposed a counterclaim based on the seller's allegedly fraudulent misrepresentations with respect to the quantity of timber on the seller's land. The trial court determined that the contract was ambiguous and submitted the issue of interpretation to the jury, which found for the buyer. The jury also returned a verdict for the buyer on his counterclaim. On appeal, the supreme court agreed that the seller's misrepresentation as to quantity furnished a proper basis for the buyer's counterclaim, but disagreed with the trial court's view that the contract was ambiguous. The court quoted the following provision of the contract in support of its conclusion that the agreement was to sell all timber up to and including 1,000,000 board feet for $18,500:

> . . . said payment of eighteen thousand five hundred dollars ($18,500) previously agreed to, constitutes full and complete payment for all logs removed up to and including 1,000,000 board feet.[48]

In *Collins v. Post*,[49] Post had contracted with the state of Oregon to build the "State Correctional Institution" near Salem. Post subcontracted much of the work, including the construction of a maintenance tunnel that Collins had contracted to build. After Collins had completed the tunnel, but before officials of the state had accepted the work, an independent contractor building residences for the state nearby damaged the tunnel. Post then urged Collins to repair the tunnel "so that acceptance of the work under the principal contract would not be delayed."[50] Collins repaired the tunnel and sought reimbursement from

[46] 225 Or. 336, 358 P.2d 491 (1960).
[47] *Id.* at 338, 358 P.2d at 492.
[48] *Id.* at 340, 358 P.2d at 493.
[49] 227 Or. 299, 362 P.2d 325 (1961).
[50] *Id.* at 301, 362 P.2d at 326.

Post for the cost of the repairs. Post refused reimbursement and Collins then sued Post on the theory that the latter had impliedly made a separate contract to pay for the repair costs. Both the trial judge and the supreme court agreed with Post that no separate contract had been entered into and that the following provision of Collins' subcontract with Post obligated him to "deliver" the tunnel in a satisfactory condition at the time of its acceptance by the state:

> The Sub-Contractor agrees to be bound with the Contractor by all of the terms of the contract, and to assume toward him all the obligations, and responsibility that he, by documents, assumes toward the Owner, and to indemnify and save harmless the said Contractor from any and all loss, costs, damage or liability due to the failure of the Sub-Contractor to fully and faithfully keep and perform every obligation of the Contractor to the Owner in connection with the work hereunder undertaken by the Sub-Contractor.[51]

On contract principles, this decision appears sound. It seems improbable that, at the time Collins agreed to the foregoing provisions, he in fact anticipated contingencies such as the one that materialized here. However, this is irrelevant since Collins appears to have made a "lock and key" contract with Post—i.e., one in which he assumed the risk of damage to the tunnel from any source prior to the time it was turned over, fully completed, to the owner.

---

[51] *Id.* at 302-03, 362 P.2d at 326-27.