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Property Rights in Professional Service Contracts

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limited to an action to be brought within the five year period applicable to the implied promise to reimburse. The written assignment gives the surety the right to bring an action on the debt at any time within the period of limitations applicable to the creditor's claim against the principal on the debt.¹⁷

The rule which the Kentucky Court of Appeals will follow in a case involving the question of the time within which the surety must bring an action for reimbursement or subrogation is settled by the principal case, but the scope of the rule is not clearly indicated. The court stated that where the proper equitable factors exist a surety could "acquire a superior right of subrogation which would *transcend* the bar raised by the limitations on enforcement of the implied contract."¹⁸ Neither the principal case nor any other case has been found which applies this principle or explains how such a "superior right of subrogation" may be acquired. Nevertheless, the point is significant and deserves attention in this type of case involving subrogation of the surety to the creditor's claims against the principal debtor.

J. ARNA GREGORY, JR.

PROPERTY RIGHTS IN PROFESSIONAL SERVICE CONTRACTS

In 1941 the plaintiff entered into an oral contract with the defendant, a mining engineer, whereby the latter agreed to do certain engineering work and to provide the plaintiff with certain engineering data and information. This arrangement lasted until April, 1951. During this period the defendant furnished the plaintiff with all information, maps and engineering data as was needed or requested by the plaintiff with the exception of the field books, traverse sheets, and base maps that defendant had made in performing the required services. In 1951 the plaintiff terminated the agreement when it decided to hire a full time engineer. The defendant refused to surrender possession of the field books, traverse sheets, and base maps.

¹⁷ *Fidelity & Deposit Co. of Md. v. Sousley*, 151 Ky. 39, 151 S.W. 353 (1912) (the court used the term reimbursement, but there was a written assignment of the creditor's claim, and therefore the court is really speaking of subrogation). See also, *Letton's Adm'r. v. Rafferty*, 154 Ky. 278, 157 S.W. 35 (1913); *Joyce v. Joyce*, 64 Ky. 474 (1867).

¹⁸ *Supra* note 4, at 494.

The plaintiff brought action for possession of these articles alleging ownership and right to possession because, (1) it caused the property to be created, and (2) it paid for the cost of the property's coming into existence. The defendant contended that he had furnished the plaintiff with all necessary maps and information contemplated in the agreement and that the material here in question belonged to him since it was merely incidental data used in preparing the final information.

The trial court directed judgment for the defendant from which the plaintiff appealed. The Court of Appeals held that since the material was necessary for the plaintiff to be able to file a map of its mine workings with the Department of Mines and Minerals of the State as required by KY. REV. STAT. 352.450,¹ plus any additional maps that the department might require, it was an implied term of the contract that such material would become the property of the plaintiff company. *Beach Creek Coal Co. v. Jones* 262 S.W. 2d 174 (Ky. 1953).

The problem presented in professional service contracts as to whether the title to property created is vested in the client or the creator is of interest not only because of its importance to professional engineer but also because of its significance in analogous situations involving the architect, the accountant, the doctor, the attorney, and others.

No one will argue with the court's basic premise that a contract includes not only express promises but also implied promises which perhaps, should have been expressed, and which are necessary to enable the parties to fulfill their obligations.² As the court said in the case of *Warfield Natural Gas Company v. Allen*,³

It is a familiar principle in the law of contracts that, in the absence of specification of duties and obligations intended to be assumed, the law will imply an agreement to do and perform those things that according to

¹ KY. REV. STAT. sec. 352.450 (1934). This statute requires that the operator shall annually make or cause to be made an accurate map to scale of the workings of the mine and he must file a true copy of the map with the chief of the Department of Mines and Minerals. He must thereafter annually file additional maps which show the progress of the mining work. In addition the chief may at any time require additional maps and the operator or superintendent shall immediately comply with the requirement.

² *New York Casualty Company v. Sinclair Refining Company*, 108 F. 2d 65 (10 Cir. 1939); CORBIN ON CONTRACTS, vol. 3, sec. 562 (1951).

³ 248 Ky. 646, 59 S.W. 534 (1933).

reason and justice the parties should do in order to carry out the purpose for which the contract was made.

The court in interpreting a contract is entitled to consider the relation of the parties, the situation as a whole, and the circumstances surrounding the contract at the time it was made, to aid it in determining the intention of the contracting parties.⁴ But is it, as a matter of law, entitled to interpret from a contract such as this one that ownership of the material lies in the party who caused it to be created? Did the circumstances here and the usual usage of such property imply a promise on the part of the engineer to deliver it to his client when their relationship ended? As far as can be ascertained, the question as to ownership of property of this type has never before been decided. However, a few similar situations have arisen in other fields.

In the case of an attorney and his client the ownership of collateral property created by the attorney in preparing his client's case has been held to lie in the attorney. For example, if the client should decide to change counsel, the attorney would not be required to turn over to the new attorney *all* work he had done in preparing the case.⁵

The question of property rights in such material in the case of the public accountant and his client was decided in perhaps what is the only case on the subject, *Ipswitch Mills v. Dillon*.⁶ There it was held that the work sheets compiled in working with the client's books were made while the accountant was engaged in his own business, as a private contractor, and were his property. As was said in that opinion, "In the absence of an agreement that these sheets were to belong to the plaintiff, they were owned by the defendant."⁷

It has been held that the completed plans prepared by an architect belong to the one for whom they are made.⁸ But as was

⁴ *Caudill v. City of Maysville*, 297 Ky. 78, 178 S.W. 2d 945 (1944); *Hawkins and Chamberlain v. Mathews*, 242 Ky. 732, 47 S.W. 2d 547 (1932); *Peters v. Mullins*, 211 Ky. 123, 277 S.W. 316 (1925); *Atkins v. Atkins Adm'r*, 203 Ky. 291, 262 S.W. 268 (1924).

⁵ *McGee v. Lavelock*, 39 Mo. App. 502 (1890); *Anonymous Case*, 31 Me. 590 (); *In re Wheatcroft, L.R.*, 6 Ch. Div. 97 (1877).

⁶ *Ipswitch Mills v. Dillon, et al.*, 260 Mass. 453, 157 N.E. 604 (1927). In connection with this case, see *Ex parte Frye*, 155 Ohio 345, 98 N.E. 2d 798 (1951).

⁷ *Id.* at 455, 157 N.E. at 606.

⁸ *Walsh v. St. Louis Exposition and Music Hall Association*, 101 Mo. 534, 535, 14 S.W. 722 (1890); *Hutton v. School City of Hammond*, 194 Ind. 212, 142 N.E. 427 (1924); *Rutan v. Coolidge*, 241 Mass. 584, 136 N.E. 257 (1922).

pointed out in the dictum of the *Ipswitch* case ". . . it has never been decided so far as we know that preliminary plans and sketches of an architect belong to the person by whom the architect is employed."⁹

The negatives of photographs taken by professional photographers have usually been held to be the property of the customer.¹⁰ It is submitted, however, that these cases are to be distinguished because of their highly personal character. Can the other analogous situations be distinguished as well as the photographer cases just mentioned? It is arguable that they can, on the ground of necessity.

In the attorney-client cases the client is paying for a specific thing, the aid of the attorney in solving some legal question. When that service has been performed the client needs neither the attorney nor his material any further, and by custom such material has remained with the lawyer to aid him in his future work. Likewise, with accountants, the client pays for a particular service, i.e., compiling a statement for him, or filing his tax returns. After this is done the client has no further need for any of the collateral information, and again by custom such material has remained with the creator for the furtherance of his own work. Similarly, the architect contracts to provide the client with a complete set of plans, with all information necessary to the erection of the building. The builder has no need of any extraneous material, for he is provided with everything he can possibly use.

All of the noted situations, with the exception of the photographer cases, seem to have uniformly held that the ownership of such collateral property lies in the originator. And it is submitted that the underlying reason was that the collateral property was of no further value to the client or contracting party, and, being of value to the creator was by custom left with him.

Applying this reasoning to the case at hand, two questions arise: (1) Was the material necessary for the coal company to meet its obligations to the State as provided for by statute?¹¹

⁹ *Ipswitch Mills v. Dillon, et al.*, 260 Mass. 453, 157 N.E. 604 (1927).

¹⁰ *Colten v. Jacques Marchais, Inc.*, 61 N.Y.S. 2d 269 (1946). Cf. *Hochstadter v. H. Tarr, Inc.*, 68 N.Y.S. 2d 762 (1947).

¹¹ *Supra*, note 1.

(2) What was the custom of the trade which the engineer contends establishes title in him?

It would seem that the answer to the first question would depend largely on the second. The statute requiring the submission of maps to the Department of Mines and Minerals was passed in 1934, fifteen years before the bringing of this suit. During that time, if this material was necessary for the coal operators to fulfill their obligations, some standing custom must have grown up in the business whereby the material would always be accessible to the mine owners. Such a custom would seem to be readily ascertainable merely by calling for testimony from men experienced in the field. Yet at the trial the testimony produced a square conflict on this point. Possibly then, this material was not absolutely necessary to the continued operation of the company.

Assuming there was no absolute necessity to be indicated from the usage of this type material, was there enough evidence submitted on custom to entitle the court to give the question to the jury? The Court of Appeals felt, in withdrawing the question from the jury and directing a verdict for the appellant, that the record did not contain proof sufficient to require a submission. The general rule on withdrawing a question from the jury in Kentucky, as was set out in *Nugent v. Nugent's Ex'r.*,¹² is:

When the evidence given at the trial, with all inferences that the jury could justifiably draw from it, is insufficient to support a verdict for the plaintiff, so that such a verdict, if returned, must be set aside, the court is not bound to submit the case to the jury, but should direct a verdict for the defendant.¹³

However, the court went on to say that:

In the application of this rule it must be borne in mind that a verdict is set aside on the ground that it is not sustained by the evidence only when it is 'palpably' or 'flagrantly' against the evidence, or as sometimes said by this court 'so flagrantly against the evidence as to indicate that it was reached as a result of passion or prejudice on the part of the jury.'¹⁴

¹² *Nugent v. Nugent Ex'r*, 281 Ky. 263, 135 S.W. 2d 877 (1940).

¹³ *Id.* at 275, 135 S.W. 2d at 880.

¹⁴ *Ibid.*

Would a verdict by the jury, rendered for either plaintiff or defendant, have been "palpably" or "flagrantly" against the evidence?

True, as the court said in quoting from *Aulich v. Craigmyle*,¹⁵ a custom must be certain, general, uniform, and recognized. But it is submitted that this should be a part of the instructions in giving the question to the jury.

It is felt, then, that perhaps the court erred in not finding that the evidence was sufficient for a jury question, and that, though it should have reversed the trial court's directed verdict, it should have remanded the case with directions to submit the question of custom to the jury with proper instructions.

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¹⁵ 248 Ky. 676, 59 S.W. 2d 562 (1933).