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Contracts—Conditions Precedent

Frank Dombrowski Jr.

six days,[25] and in the meantime, accepted invoices for some of the goods and received actual delivery of part of the goods.

This latter delivery satisfied the Statute of Frauds,[26] since it was found that the goods were not sent for approval and were not merely samples of the subject matter of the sale.[27]

The finding of an agreement to arbitrate was also supported by the fact of the retention of the contracts and by the buyer never objecting to their inclusion, and indeed, by his signing one of the three contracts containing this provision.[28] The fact that the buyer had never signed two of the contracts, although it was found to have accepted them, was found to be without legal effect, since the statute, in terms merely provides that an agreement to arbitrate a future controversy must be contained in a written contract, which as shown above, may in certain circumstances be accepted without signing it.[29]

The dissenters felt that since no mention of arbitration was made at the original meeting, the "contracts" containing an arbitration clause were not acknowledgments of a contract, but were counter-offers adding a provision for arbitration.

The interpretation of the arbitration statute seems to be sound, since the court declined to go farther than the Legislature provided when it modified the common law rule. Arbitration by entrapment need not be feared, because the instances of finding an acceptance of a written contract without a signing of same are rare.

Conditions Precedent

The liability of a party to perform his promise is frequently made dependent upon a condition precedent, and, generally, unless such a condition precedent is performed no liability attaches

25. "A party by receiving and retaining under certain circumstances a written agreement signed by another party may be bound by the terms of such writing, though his signature does not appear thereon." *Murray v. Cunard Steamship Co.*, 235 N. Y. 162, 167, 139 N. E. 226, 228 (1923). See *Atlantic Dock Co. v. Leavitt*, 54 N. Y. 35 (1873); *Schnurr v. Quinn*, 83 App. Div. 70, 82 N. Y. Supp. 468 (2d Dep't 1903); 1 WILLISTON, CONTRACTS, § 90A (Rev. ed. 1936).

26. PERSONAL PROPERTY LAW § 85.

27. Samples are never regarded as part of the subject matter of the sale. *Cleveland Worsted Mills Co. v. J. C. Brownstone & Co.*, 190 N. Y. Supp. 601 (Sup. Ct. 1921).

28. The court mentioned that its own experience proves that arbitration clauses are commonly used in the textile industry.

29. *Japan Cotton Trading Co. v. Farber*, 233 App. Div. 354, 253 N. Y. Supp. 290 (1st Dep't 1931); *Exeter Mfg. Co. v. Narrus*, 254 App. Div. 496, 5 N. Y. S. 2d 438 (1st Dep't 1938) reached this result in interpreting the statute on similar facts. The Court of Appeals indicated that it favored this rule in *Gantt v. Felipe y Carlos Hurtado & Cia*, 297 N. Y. 433, 79 N. E. 2d 815 (1948), but declined, at that time, to expressly so hold.

and a discharge of the contract but no breach occurs.[30] Where the non-occurrence of a condition precedent to the promisor's duty has been caused by his own act, he is usually deemed to have waived the condition,[31] and a breach of contract results, on the theory that he has promised expressly or impliedly, not to prevent the occurrence of the condition.[32]

In *Wagner v. Derecktor*,[33] buyers of meat products informed their agents that they could secure a contract with some sellers, but must look to the sellers for their compensation. Sales contracts were executed with the sellers for the purchase of Mexican beef and an ancilliary agreement was made between the buyers agent's and the sellers.[34] The sellers did not perform, alleging that a Mexican embargo on all meat products made compliance impossible. Plaintiff agents sued the sellers. The trial judge instructed the jury that if an employment relationship was established plaintiffs were entitled to judgment, but if the parties entered into a joint venture, defendant should win. The Appellate Division reversed a judgment for plaintiff holding that as a matter of law, a joint venture had been created.[35] The Court of Appeals reversing both judgments, held that the agreement made actual earning and receipt of a net profit a condition precedent to plaintiff's recovery, unless failure to earn such a profit was caused by the defendants.[36] Since the applicable Mexican law was neither proved by the parties, nor was judicial notice taken of it below, and since counsel had not requested judicial notice by this court, the court declined to exercise the discretionary power vested in it,[37] and the case was ordered to retrial.

The court, in analzing the agreement made between the parties, found it to be similar in import to previous agreements which were held to make an earning of a net profit or a fund a condition precedent to a party's right to share in it.[38] If based on considera-

30. Corbin, *Conditions in the Law of Contract*, 28 YALE L. J. 739 (1919).

31. *Young v. Hunter*, 6 N. Y. 203 (1852); *Risley v. Smith*, 64 N. Y. 576 (1876); *Clark v. West*, 137 App. Div. 23, 122 N. Y. Supp. 380 (2d Dep't 1910), *aff'd* 201 N. Y. 569, 95 N. E. 1125 (1911).

32. *Patterson v. Meyerhofer*, 214 N. Y. 96, 97 N. E. 472 (1912).

33. 306 N. Y. 386, 118 N. E. 2d 570 (1954).

34. "It is our (defendant's) agreement with you (plaintiffs) that the difference between the gross proceeds of the Letter of Credit and the applicable expenses shall constitute 'net profit' and shall be divided equally between yourselves and ourselves, such division to be made at the time the proceeds of the Letter of Credit are made available to us."

35. See generally, Nichols, *Joint Ventures*, 36 VA. L. REV. 425 (1950).

36. *Young v. Hunter*, *supra* note 31; 2 CLARK, NEW YORK LAW OF CONTRACTS, § 961.

37. C. P. A., § 344-a; *Pfleuger v. Pfleuger*, 304 N. Y. 148, 106 N. E. 2d 495 (1952).

38. *Illum, Inc. v. American Mach. & Foundry Co.*, 226 App. Div. 5, 234 N. Y. Supp. 161 (1st Dep't 1929); *Hart v. L. D. Garrett Co.*, 93 App. Div. 145, 87 N. Y. Supp. 574 (1st Dep't 1904).

tion, such an agreement is valid and binding. Since there is no allegation that a net profit was earned, only defendant's own wrong resulting in non-performance would entitle plaintiff to recover. If on retrial it is found that the embargo prevented performance, defendant is entitled to judgment, since he may prove non-performance was not caused by himself.

The case indicates with considerable force the distinction between the failure of the occurrence of an event deemed a condition precedent and the failure to perform a promise in a contract. Although the rule has been subject to criticism,[39] New York Courts have continued to hold that the imposition of a foreign embargo will not prevent a breach of a contractual duty, even where it renders performance impossible.[40]

Employment Agreement

In *Wilson Sullivan Co. v. International Paper Makers Realty Corp.*,[41] a building owner entered into a written agreement with a realty firm whereby the former "employ[ed] and appoint[ed]" the latter as exclusive renting and managing agent of the building. The agreement was to continue until a stipulated time, and if not then terminated, it would continue from year to year until terminated by either party at the end of any extended yearly term by giving of thirty days prior notice in writing. Three months after an annual renewal period began, the owner gave notice of his intention to sell the building. The agent sued for damages resulting from an alleged breach of contract.

The granting of authority to an agent is often accompanied by a contract with the agent for services. The parties are principal and agents; they are also contractors. If this dual relationship is kept in mind, the legal effects of a revocation are clear.[42] Although suitable notice by the principal revokes the agent's power, the principal cannot revoke the contract.[43]

The court, in the instant case, observing that it is limited to giving effect only to the parties express intent,[44] held (4-3) that

39. 6 WILLISTON, CONTRACTS, § 1938, (Rev. ed. 1938); RESTATEMENT, CONTRACTS, § 461.

40. *Richards v. Wreshner*, 174 App. Div. 484, 158 N. Y. Supp. 1129 (1st Dep't 1916); *Vanetta Velvet Corp. v. Kakunaka & Co.*, 256 App. Div. 341, 10 N. Y. S. 2d 270 (1st Dep't 1939).

41. 307 N. Y. 20, 119 N. E. 2d 573 (1954).

42. FERSON, PRINCIPLES OF AGENCY § 189 (1954); MECHEM, OUTLINES OF AGENCY § 23 (4th ed. 1952).

43. *Star Fire Insurance Co. v. Ring*, 118 App. Div. 107, 103 N. Y. Supp. 137 (1st Dep't 1907); 1 WILLISTON, CONTRACTS § 279 (Rev. ed. 1938).

44. *Friedman v. Handelman*, 300 N. Y. 188, 194, 90 N. E. 2d 31, 34 (1949); *Rosenthal v. American Bonding Co. of Baltimore*, 207 N. Y. 162, 168-169, 100 N. E. 716, 718, (1912); 3 WILLISTON, *op. cit.*, § 610.