Denver Law Review

Volume 39 | Issue 2 Article 1

April 2021

One Year Review of Agency, Partnerships, and Corporations

Gerald H. Kopel

ONE YEAR REVIEW OF AGENCY, PARTNERSHIPS, AND CORPORATIONS

BY GERALD H. KOPEL*

Most of this article will deal with the law of agency because the Colorado Supreme Court decisions in the field of business associations were concerned mainly with agency law.

I. AGENCY

A. Fiduciary Duty

The fiduciary duty owed by an agent to his principal is the cornerstone of their relationship. Competition by the agent without the consent of the principal was justifiably disapproved by the Colorado Supreme Court in 1961 in several cases.

In *Dawson v. Clark*,[1] plaintiff sold his business to defendants and contracted to remain as an employee in a "supervisory capacity" for one year. Before the year ended, plaintiff was fired. The court held that dismissal of plaintiff was justified because while he was employed he "carried on the same type of business in his own name and at times submitted bids in competition with"[2] his employers.

The case provides good orthodox law from *Bilz v. Powell*;[3] namely, that a servant cannot engage in any business or employment in competition with his master, which may tend to injure the latter's business, without the consent of his master. The supreme court notes, without comment, the lower courts decision to award plaintiff money found to be due on account of services rendered prior to the date of his discharge. This would appear to support the paraphrasing of another rule enunciated in *Bilz v. Powell*;[4] the rule, that is by no means uniform throughout the country, that a servant, justifiably discharged for a breach of fiduciary duty, is still entitled to compensation already earned and accrued.

In *Addressograph-Multigraph Corp. v. Kelley*,[5] two former sales agents of plaintiff were enjoined from engaging in competition with plaintiff. The injunction was based upon a provision of the contract entered into by the salesmen at the time of their employment.[6] The supreme court found the provision to be reasonable and a sufficient block to the use of advantageous information concerning present and prospective customers of plaintiff, which defendants acquired in connection with their employment.

---

* Member of the Denver firm of Kopel and Kopel.

1 358 P.2d 591 (Colo. 1961).
2 358 P.2d 591, 592 (Colo. 1961).
3 50 Colo. 482, 117 Pac. 344 (1911).
4 *Ibid.*
5 362 P.2d 184 (Colo. 1961).
6 *Id.* at 185. "Inasmuch as Salesman through his connection with Company will obtain confidential information regarding Company's methods of doing business, records, and the names and requirements of users of Company's equipment throughout Company's territory, which it would be improper to use to Company's detriment, or in competition with Company, therefor, in part consideration for this agreement Salesman expressly hereby agrees and covenants that for a period of one year from and after the termination of this Contract by either party he will not, without the written consent of Company, engage, directly or indirectly, for himself or as agent or employee of another in the manufacturing, selling, buying, dealing or servicing of . . . within 100 miles of . . . ."

Several other cases dealt with competition.[7]

B. Apparent Authority

Defendants purchased land from the City of Aurora.[8] The written offer (which was accepted by the city council) included a promise by defendants to place a drainage pipe on their land of the *same size,* and connecting with two city-maintained drainage pipes located on opposite boundaries. Defendants sought instruction and approval of their proposed plans and specifications for the drainage pipe from the city manager. They were referred to the city engineer, who rejected their plans and who then himself designed the pipe which was installed by the defendants. The pipe installed was *smaller* than the connecting pipes. Concrete was poured into the void left at the connections, forming an unbroken, continuing tube. All this was done at the direction and dictate of the city engineer, who, after suggesting minor changes which were made, approved the end result.

Following heavy rains, the neighborhood was flooded, due allegedly to the failure of the smaller connecting pipe to adequately carry the runoff from the larger pipe. Landowners sued defendants and the city for damages resulting from flooding. The city sought damages by cross-claim from defendants for their failure to construct a pipe of the same size as the connecting pipes. All issues were settled except those between the city and defendants. The lower court entered judgment in favor of the city, which judgment was reversed by the supreme court.

The supreme court conceded that the engineer had no actual authority to modify the terms of the contract; since he could not have entered into the contract, he was not expressly empowered to modify it. But, the court stated, a municipal corporation cannot supervise every detail of performance and then repudiate the supervisory authority of its own engineer, by claiming that the contracting party should have disregarded the instructions of the city's agent, notwithstanding the agent's disapproval. There was "justifiable reliance on the appearance of authority which was exhibited to these defendants."[9] The reliance was to their detriment.

Besides using the doctrine of equitable estoppel, the court quotes Seavy and the Restatement[10] on the estoppel theory of apparent authority, as a basis for its decision. Normally, to qualify under this theory, there is needed: (a) a principal who, by his conduct, has misrepresented the existence of authority of an "agent" to a third person, and (b) reliance by the third person on appearance of authority and a subsequent change of position. The principal is then bound because he is estopped to deny the "truth of his words."

7 England v. Colorado Agency Co., 359 P.2d 1 (Colo. 1961); Swart v. Mid-Continent Refrigerator Co., 360 P.2d 440 (Colo. 1961). In *Swart* v. *Mid-Continent,* two defendant partners were doing business under the trade name "Mid-Commercial Refrigeration Co." Plaintiff's firm was "Mid-Continent Refrigerator Co." The defendants were former employees of Mid-Continent, and one was discharged after plaintiff discovered he was soliciting business for Mid-Commercial. The supreme court concluded that the obvious purpose of defendants in adopting a name similar to that of plaintiff was to benefit from the goodwill established by plaintiff, and approved the continuation of an injunction against defendants' use of the trade-name.

8 Franks v. City of Aurora, 362 P.2d 561 (Colo. 1961).

9 *Id.* at 563.

10 Seavy, Studies in Agency 184 (1949); Restatement, Agency § 8 (1958).

There is no contract between the principal and the third person with whom the "agent" deals. The one estopped (the principal) is given no rights, and the third person is either compensated for his loss or protected from harm.

While inclusion of the doctrine of apparent authority by estoppel does not detract from the justifiable decision rendered, it does add more fuel to the twin flames which light the rationale by which too many cases of similar nature are decided, *i.e.*, estoppel and ratification. Where the court is handicapped in finding a change in position necessary for estoppel, or where the facts justify holding each side bound to a contract, ratification is used. The "contract" theory of apparent authority has been misplaced in Colorado.

Under the contract theory, there is a "real" contract from the inception under which each party has both rights and liabilities. There is no need for straining the facts to fit the multi-requirements of ratification, or to find a change in position. Each theory has its proper place, and should be used where justified by the facts. Seavy, the author quoted by the supreme court in speaking of estoppel as an aspect of apparent authority, favors the contract approach.[11]

C. Agent or Independent Contractor

In *Argonaut Builders, Inc. v. Dare*,[12] defendant was engaged in soliciting building contracts, and in representing plaintiff in other dealings with customers; profits and losses to be divided 60-40. Because of the nature of the business, defendant's share of the profits was often delayed, and plaintiff made regular advances in varying amounts which coincided with the bringing in of business. Defendant received weekly statements from plaintiff which showed profits credited, losses debited, the old deficit and the new deficit based upon advances made.

There was no written contract to show the exact nature of the relationship of plaintiff and defendant. When defendant terminated his work with plaintiff, he was overdrawn on plaintiff's books, based upon the advances, for $2,473. Plaintiff sued to recover the money, claiming it was loaned to defendant and that defendant was an independent contractor. Defendant maintained that he was a commission salesman (therefore an agent); that the sum involved constituted drawing account advances (thus in the nature of salary) and no repayment was contemplated.

At the end of plaintiff's case, defendant's motion to dismiss was granted. The supreme court reversed the trial court and held that plaintiff's evidence that defendant was an independent contractor was sufficient to withstand the motion to dismiss.

A hasty reading of this decision could lead to erroneous conclusions. The court says that "from the circumstances it appears that the defendant operated . . . free of control by the plaintiff."[13] However, the circumstances showing absence of control were not fully explained in the decision. The payment to defendant based upon the amount of profit, in the form of advances which varied as to amounts, and the plaintiff's running tabulation of defendant's account with weekly statements to the defendant is as conducive to a finding of principal-agent as it is to a finding of independent contractor.[14]

Of much greater significance is the sharing of losses by defendant. Sharing of profits by an agent as an inducement for greater efficiency is now a normal custom, but the sharing of losses to the extent that an "agent" might earn less than zero annually, would certainly not be customary.

Although the court does seem to stress the fluctuation in "the manner of making advances"[15] by plaintiff, it is difficult to tell

11 Seavy, *The Rationale of Agency*, 29 Yale L.J. 859, 873 (1920); Seavy, Studies in Agency 82-83 (1949).
12 359 P.2d 366 (Colo. 1961).
13 *Id.* at 367.
14 2 Am. Jur. Agency § 311 (1936).
15 *Supra* note 12, at 367.

whether this applied to the varying amounts paid (ranging from $10 to $400) or to a time lapse in the periods when the sums were paid. Nor is it clear whether this fluctuation is evidence of the non-existence of principal-agent relationship, or of a debt regardless of the relationship.

However, the rule suggested by the court would appear to be: Payments to an employee in the nature of advances are wages or salary when they (a) are to be charged to and deducted from commissions agreed upon as the same may accrue, and (b) are made in *regular* amounts in consideration of continued activity by the employee. Because of this *regularity* of payment and the requirement that the employee give full time to his employment, the presumption arises that the advances are recoverable only from commissions and thus the excess cannot be collected by the employer in absence of an express or implied agreement to repay.

D. Vicarious Liability — Respondeat Superior

1. Joint Employers. — In *Colorado & S. Ry. v. Duffy Storage & Moving Van Co.*,[16] a train, operating under a joint agreement by the Colorado and Southern Railway Company and the Atchison, Topeka and Santa Fe Railway, negligently damaged plaintiff's truck, trailer, and crane. Defendant Santa Fe claimed it had nothing to do with operation of the train and should not be held responsible for negligent operation by the engineer. The engineer was an employee of Colorado and Southern Railway Company, but, on the "run" of the train at the time of the accident, he was paid by Santa Fe and was responsible to the Santa Fe superintendent.

The supreme court held both railroads liable as joint employers "notwithstanding the particular service being rendered was for only one of the employers, and the employee was paid directly by only one of the joint employers. The legal rule of liability cannot be affected by a contract which provides that one of several joint employers shall bear the entire responsibility for the act of their joint employee."[17] The court then points out that the matter of who made payments is not determinative in this case, stating that liability would apply against one who "knowingly and without objection receives the benefits of labor, or holds out to the public one as engaged in his service . . . when the act or failure constituting the negligence comes within the apparent scope of the servant's employment. . . ."[18] quoting *Denver & R.G.R.R. v. Gustafson.*[19]

If the court is basing its decision upon a holding out to the public and an apparent scope of employment, then it is conceivably using the language of apparent authority by estoppel, and comment is required.

The facts in the *Gustafson* case are considerably different from the facts in *Colorado & S. Ry. v. Duffy Storage & Moving Van Co.* The former case dealt with a flagman, and plaintiff testified he

16 361 P.2d 144 (Colo. 1961).
17 *Id.* at 147, quoting 35 Am. Jur., *Master and Servant* § 537 (1936). Nor can liability be affected by promulgating rules or establishing customs, practices or usage, or adopting constructions thereto so as to absolve oneself of his own imputed negligence: Denver & R.G.W.R.R. v. Lloyd, 364 P.2d 873, 876 (Colo. 1961).
18 361 P.2d 144, 148 (Colo. 1961).
19 21 Colo. 393, 41 Pac. 505 (1895).

relied solely upon the flagman for safe transit. The flagman was well known to the public, having been stationed at the same place for nearly ten years, flagging trains for two companies, and so far as the public could know, was serving two companies. Thus the court was justified in speaking of a holding out which leads to estoppel and which requires reliance by the injured person. But it can hardly be said that the driver of plaintiff's truck relied upon the engineer of the train that caused the accident as being the servant of the Santa Fe Railway, especially since the train was that of the Colorado and Southern Railway. In the *Gustafson* case, the plaintiff moved forward into the area of impact because the flagman signaled him to go ahead. Can it be said in *Colorado & S. Ry. v. Duffy Storage & Moving Van Co.* that plaintiff would not have placed himself in a perilous position except for his reliance on a particular engineer as a servant of two railways?

2. Family Car Doctrine. — The indicia of ownership of a car is sufficient to justify the application of the family car doctrine, with resultant imputed negligence to the owner who permits members of his household to drive it for their pleasure or convenience, even if the owner of record does not drive the vehicle and has been repaid the entire purchase price by the negligent member of the household who drives the car. This is the rule of *Appelhans v. Kirkwood.*[20]

3. No Indemnification If Not Vicarious. — *William F. Larrick, Inc. v. Burt Chevrolet, Inc.*[21] supports the general rule that a

20 365 P.2d 233 (Colo. 1961).
21 362 P.2d 1030 (Colo. 1961).

master who *actively supervises and participates* in the negligent acts of his servant is not entitled to indemnity from the servant for damages which the master must pay to an injured person. The active supervision and participation precludes application of the rule where the master, whose liability is based upon the doctrine of respondeat superior, is entitled to indemnification from the servant.[22]

4. Workmen's Compensation. — Agency law does not technically include workmen's compensation cases since they are governed by special statutes and strict case interpretations. Moreover, as to vicarious liability, the law of agency is designed to aid an innocent third party, while workmen's compensation law provides benefits to an employee. Nevertheless, the Colorado cases on workmen's compensation are important as aids in anticipating possible decisions as to whether respondeat superior will apply in given situations.

Where an employee is "looking the town over" or "killing time," his injury does not arise out of and in the course of his employment even though the employee is in the particular town for the purpose of contacting an agent of his employer.[23]

An employee sustained a fatal injury while playing for a softball team sponsored by his employer. The game was conducted during off hours and in a public park. The employer and the municipality joined in financing the activity. The advertising value to the employer was negligible and the benefits derived by it consisted entirely in the indirect improvement of employee morale. It was held that the injury was not compensable as the activity was not an incident of employment.[24]

An employee of the Game and Fish Department was killed while driving a department tractor down a mountain trail after inspecting a privately owned television antenna behind his department-owned residence. The accident was held to arise out of and within the scope of employment.[25] The supreme court reasoned that because deceased was on 24-hour call, 7 days per week, was required to live on department property in a remote area, was expected to maintain the premises, including residence and appurtenances, and because the use of television was approved as a morale factor, the activity (repairing the antenna) was a direct and real benefit to his employer, as distinguished from *Lindsay v. Public Service Co.*[26]

A Denver geologist was employed by Geophoto to perform work in Lybia.[27] After completing his mission, he and his wife, on travel orders from Geophoto, returned to the United States enroute to Denver. While returning by car to Denver, the geologist was fatally injured in an automobile accident in Pennsylvania. At the time of the accident, the geologist was on the Pennsylvania turnpike traveling in an *easterly* direction. Defendants claimed no liability because the deceased was traveling east, away from Denver, at the time

22 Hamm v. Thompson, 143 Colo. 298, 353 P.2d 73 (1960).
23 General Plant Protection Corp. v. Industrial Comm'n, 361 P.2d 138 (Colo. 1961). There is a strong and compelling dissent by Justice Frantz.
24 Lindsay v. Public Service Co., 362 P.2d 407 (Colo. 1961).
25 Game & Fish Dep't v. Pardoe, 363 P.2d 1067 (Colo. 1961).
26 362 P.2d 407 (Colo. 1961).
27 Employers' Liab. Assur. Corp. v. Industrial Comm'n, 363 P.2d 646 (Colo. 1961).

of the accident, and was thus in a personal activity not within the course of his employment.

In the following language the supreme court held the death was compensable:

> It seems clear that the plaintiff, who was traveling pursuant to company orders, was within the scope and coverage of the Act even though he was at the moment of impact driving in the wrong direction. It would be both illogical and unjust to hold the injury non-compensable because of a temporary direction departure occurring in the course of a covered journey of several thousand miles. Claimants satisfied their burden when they showed . . . traveling pursuant to orders. It was incumbent on the insurer to show a specific deviation.[28]

"The only evidence offered before the commission was offered on behalf of the claimants."[29]

The court goes astray in delving at great length into the "dual purpose" theory (as presented by Larson on Workmen's Compensation[30]) and in only casually justifying its decision on the basis of a negligible deviation.[31]

The dual purpose theory, as stated by Justice Cardozo in *Marks' Dependents v. Gray*[32] and interpreted by Larson,[33] is that the injury is compensable if it occurred on a trip which was concurrently for business and pleasure, and where, if the pleasure portion were cancelled, the trip for business would have had to be made anyway, if not by the specific traveler, then by some other employee at another time.

In all the dual purpose cases cited by Larson, both personal and business purposes are set forth. But if there was a personal purpose for the geologist's deviation, it was not stated in the supreme court's decision.[34]

Moreover, the cases cited by the court from Larson[35] are simply illustrations of the dual purpose rule, and are not necessarily germane to a deviation situation. At the risk of presenting too stark an explanation, it could be said that dual purpose is concerned with the reasons for originally beginning a journey or a particular portion of a journey, while deviation is concerned with the geographical location of (a) the accident, and (b) the employment destination.

In *National Sugar Mfg. Co. v. Bauer*,[36] a factory superintendent, who was responsible for efficient operations of the factory, had no specific working hours and often made trips combining company business with pleasure or personal affairs. His wife often accompanied him. At the time of his death, he was driving from the plant to Pueblo. His wife was riding with him to do some shopping in the

28 *Id.* at 649.
29 *Id.* at 647.
30 1 Larson, Workmen's Compensation § 18.12 (1961).
31 *Id.* §§ 19.50, 25.00.
32 251 N.Y. 90, 167 N.E. 181 (1929).
33 1 Larson, *supra* note 30, § 18.13.
34 The supreme court does recognize that if an employee is traveling away from home, then staying at a motel, eating at a restaurant, and going to and from those places comes within the compensation act. Employer's Liab. Assur. Corp. v. Industrial Comm'n, 363 P.2d 646, 648 (Colo. 1961).
35 1 Larson, *supra* note 30, § 18.12.
36 366 P.2d 388 (Colo. 1961).

city. The evidence showed he had stated he would not go to Pueblo in such weather "if I did not have to;" he took some specifications from the factory with him; and the company had considerable business dealings in the city. The court held he was within the scope of employment when the accident occurred, but no mention was made in the decision of the "dual purpose" rule stated in *Employers' Liability Assur. Corp. v. Industrial Comm'n.*[37]

5. Loaned Servant—Whose Employee? — Plaintiff Erbes was an employee of M & A Enterprises,[38] a firm which contracted with defendant Sugar Company to construct sugar bins on the latter's property. M & A rented a crane and operator (defendant Nickle) from Sugar Company. While Nickle was operating the crane, he negligently injured plaintiff. The plaintiff collected workmen's compensation and sued both defendants for negligence, alleging Nickle was the servant of Sugar Company. The jury verdict for plaintiff was affirmed by the supreme court.

The question involved was whether the loaned servant became the servant of the special employer (M & A), or remained the servant of his general employer (Sugar Company).[39] Nickle was paid by his general employer. There was a rental of a valuable machine, together with a skilled operator, for a short period of time. Sugar Company could replace Nickle at any time, they were responsible for maintenance and repair of the crane, and M & A had no right to discharge Nickle.

The supreme court has stressed the business of renting equipment as a strong indication of intent of the general employer not to release control of its servant.[40] Sugar Company contended it was not in the business of renting cranes, but the evidence showed the rental had been provided to others doing work on the Sugar Company premises, which, while a restricted type of rental, was

37 363 P.2d 646 (Colo. 1961).

38 Great Western Sugar Co. v. Erbes, 367 P.2d 329 (Colo. 1961).

39 For an interesting Colorado resume of modern loaned servant cases, read Chartier v. Winslow, 142 Colo. 294, 350 P.2d 1044 (1960) (regular employee sues loaned servant's general employer); Jacobson v. Doan, 136 Colo. 496, 319 P.2d 975 (1957) (loaned servant sues special employer); and Netherton v. Haver, 140 Colo. 140, 342 P.2d 671 (1959) (innocent third person sues loaned servant's general employer).

40 Chartier v. Winslow, 142 Colo. 294, 311, 350 P.2d 1044, 1053 (1960). Restatement, Torts, § 227, c: " . . . the fact that the general employer is in the business of renting machines and men is relevant, since in such cases there is more likely to be an intent to retain control over the instrumentality. The person who is not in such business and who, gratuitously or not, as a matter not within his general business enterprise, permits his servant and instrumentality to assist another, is more apt to intend to surrender control."

still a business of renting. The supreme court felt the rental issue was relevant, but not determinative of the issue, and that the question of "loaned servant" was properly submitted to the jury.[41]

E. Liability of Agent to Third Person — Contract

When a person signs his name to a simple contract, without designating that he does so as an officer or agent or in a representative capacity acting for or on behalf of another, and the principal's name does not appear in the instrument as principal of the person signing, then the one signing is personally liable on the contract so signed. The president of a corporation discovered this, to his detriment, in *Sago v. Ashford,*[42] when he responded to an offer of sale by writing at the bottom of the offering letter "we wish to order this equipment as specified above. Fred Sago."[43]

Although the term "undisclosed principal" was not used by the court in its decision, it was present as an added factor when the court stated ". . . evidence was sufficient . . . that neither the instrument itself nor other circumstances advised the seller of the existence of the corporation or the claimed representative capacity of Sago."[44] When there is an "undisclosed principal" both the principal and agent are liable in the alternative.

One issue is not clear in the decision and might disturb the reader. The written offer was directed to "Howard Sand and Gravel Co. — Mr. Fred Sago." The testimony of the seller at the trial left a strong inference that the seller considered the company as the "trade name" of Mr. Sago, and an indication by the court to this effect would have been helpful.

In *Frye v. Switzer,*[45] the plaintiff sought to collect from an agent of a home-building corporation for items sold to the corporation. Plaintiff claimed defendant made a personal commitment to pay a debt carried on plaintiff's books as a corporation debt. The supreme court found that the language used[46] to promise payment was insufficient to warrant a judgment against defendant.

In *Empire Diesel, Inc. v. Brown,*[47] the plaintiff, a former employee, sought to collect loans he claimed were made to his corporate employer. Defendant claimed the loans were made to Mr. Clark, the president of the corporation, and not to the corporation itself. Defendant was in the business of repairing trucks, and loans were made to purchase needed items of repair. Clark requested the loans, the checks named Clark as payee, and the money was deposited to the corporation account.

41 The circle is now completed as to when an injured employee may bring an action for negligence rather than recover only under workmen's compensation. (a) General contractor's employee sues landowner for negligence when contractor carries workmen's compensation: Great Western Sugar Co. v. Erbes, *supra* note 38; (b) Sub-contractor's employee sues general contractor for negligence when sub-contractor carries workmen's compensation: Whiting v. Farnsworth & Chambers Co., 293 F.2d 45 (10th Cir. 1961); (c) General contractor's employee sues sub-contractor for negligence when general contractor carries workmen's compensation: Chartier v. Winslow, 142 Colo. 294, 317, 350 P.2d 1044, 1056 (1960).

42 358 P.2d 599 (Colo. 1961).

43 *Id.* at 600.

44 *Ibid.*

45 359 P.2d 370 (Colo. 1961).

46 *Id.* at 371. "Q. . . . you promised to make payment . . . ?" "A. As we could, because the *corporation* had homes they had money coming from, surely." (" . . . Frye said he would pay the balance due . . . out of 'closings' that he had coming up. . . .") The supreme court said: "It was the corporation, not Frye, which was 'closing' deals for the sale of homes."

47 361 P.2d 964 (Colo. 1961).

In Brown's testimony:

> [H]e made use of personal pronouns in referring to Clark and himself. He also mentioned Clark by name. He explained that Clark was solely in charge of the business . . . and that no thought was given to a distinction between Clark and the corporation as referring to separate entities. This was not natural to Brown, Clark was the corporation and the corporation was Clark.[48]

The court held that under the circumstances, ". . . it is a permissible, if not necessary, inference that the loans were made to the corporation."[49]

F. Attorneys as Agents

In *Eadon v. Reuler*,[50] a frustrated divorce-litigant turned upon the attorneys who represented the parties, alleging fraud, connivance and conspiracy. The supreme court upheld the dismissal of the litigant's complaint seeking damages and in language, which attorneys perhaps should frame and place in view for clients to see, states:

> A lawyer does not guarantee results. He merely undertakes to use his best skill and judgment. A result unsatisfactory to the litigant scarcely justifies a suit charging the lawyers with fraud and conspiracy. Efforts of a lawyer to obtain an amicable disposition do not subject him to a charge of treason.[51]

Rupp v. Cool[52] contains a definite admonition to attorneys that they are to be treated as a special class in contracting for fees with their clients because of the confidential relationship involved. The plaintiff, employed by defendant as his attorney, rendered the required services and his bill for $2500. The client tendered $1000, and refused to comply with monthly statements which followed, requesting payment of the remaining $1500. Nothing was said about compensation until the work was completed, and the testimony was in conflict as to whether the defendant, at that time, protested and refused to pay the entire sum.

48 *Id.* at 965-66.
49 *Id.* at 966.
50 361 P.2d 445 (Colo. 1961).
51 *Id.* at 450.
52 362 P.2d 396 (Colo. 1961).

The supreme court stated the following rules: (a) An attorney and his *prospective* client may enter into a contract with reference to fees to be charged and such a contract will be treated and construed as other contracts. The client is regarded as competent to judge for himself what is a proper sum to pay for services, and it cannot be repudiated merely because of the *subsequent* confidential relationship.[53] (b) *After* the confidential relationship of attorney and client exists, the law governing fee contracts subsequently entered into between them is very different. The burden is *then* on the attorney to prove that the agreement was fairly and openly made, that it was supported by an adequate consideration, that he gave the client full knowledge of the facts and of his legal rights, and that the services to be performed were reasonably worth the amount stated in the agreement.[54]

Several other cases dealt with attorneys as agents.[55]

G. Real Estate Agents

"[W]ithout paying for the seed he sought to reap the field that the broker had sowed. The scheme is very old, but so is the law which frustrates it."[56] *Brewer v. Williams*[57] differs from most suits by real estate brokers for commissions in that the contract of employment, resulting in a principal-agent relationship, was oral and implied from the particular circumstances of the case, namely; awareness, encouragement, and repeated inquiries by the owner of the progress made to effect a sale.

Defendant circumvented the brokers and sold directly to purchasers that the brokers had produced. No commission was due the brokers, defendant urged, because they failed to comply with Colo. Rev. Stat. § 117-2-1 (1953), which requires finding a purchaser ready to complete purchase on terms proposed by the seller. The court found that no rigidity was ever placed upon the brokers as to the types of offers defendant would consider.

This case reaffirmed the rule that a broker who procures a purchaser ready, willing and able to purchase upon the terms and conditions imposed by the owner is entitled to his commission even though the owner and the purchaser thereafter conduct further negotiations resulting in a change of the terms.[58]

H. Miscellaneous

Fistell v. Centennial Truck Lines, Inc.[59] would appear to be authority for the following general rule: After a sale, when the

53 7 C.J.S. *Attorney and Client* § 181 (1937).

54 7 C.J.S. *Attorney and Client* § 204(3) (1937); Enyart v. Orr, 78 Colo. 6, 238 Pac. 29 (1925).

55 Attorneys should note, as pointed out in Burgess v. Federated Credit Service, Inc., 365 P.2d 264 (Colo. 1961), that Colorado's statutes provide inroads into areas which are mistakenly considered the private domains of attorneys. Thus, prosecution of suits in courts which are not courts of record need not be carried on by licensed attorneys. Colo. Rev. Stat. § 79-5-17 (1953). In workmen's compensation cases, either side may be represented by persons other than attorneys. Colo. Rev. Stat. § 81-14-3 (1953). Whatley v. Wood, 366 P.2d 570 (Colo. 1961), points out that an attorney for the director-trustees of a defendant corporation cannot, in the process of discharging the employment entered upon as counsel, acquire the property of the corporation.

56 Brewer v. Williams, 362 P.2d 1033, 1036 (Colo. 1961).

57 *Ibid.*

58 *Id.* at 1036. *Compare* the *Brewer* case *with* Scott v. Huntzinger, 365 P.2d 692 (Colo. 1961), where the court held that a broker under agreement providing for commission if owners sold a leasehold interest to optionee as provided in the agreement had no right to a commission where the optionee did not exercise the option thereunder, notwithstanding the fact that optionee subsequently, acting on behalf of himself and others, resumed negotiations culminating in purchase, absent any showing of bad faith or conspiracy to let the option lapse with intent to deprive the broker of his commission.

59 359 P.2d 368 (Colo. 1961).

buyer requests the seller to ship the goods to the buyer, the seller, in choosing without negligence a carrier to deliver the goods, is acting as agent for the buyer-principal, and is not liable for damages to the buyer caused by non-delivery by the carrier of some of the goods purchased.

Wilder v. Baker[60] is authority for the rule that notice to an agent imputes knowledge to the principal only when it is within the scope of the agent's authority to accept notice. Here, plaintiff sued defendant as one of two joint obligors. Defendant pleaded bankruptcy prior to suit, but his bankruptcy schedule did not list the transaction with plaintiff. Defendant advised plaintiff's agent of the bankruptcy proceedings, but the only evidence of authority of the agent was to collect payments from defendant and apply them to the obligation owed. "There is nothing in the evidence to indicate it was within the scope of . . . authority to accept notice of bankruptcy . . . on behalf of the plaintiff and, therefore, the knowledge of the . . . bankruptcy . . . cannot be imputed to the plaintiff."[61] The court fails to cite any authority for its decision, although the fact situation is not uncommon.[62]

Unless an agent is himself responsible for unpaid sums due his principal from third persons, the agent is not the real party in interest to sue such third persons, according to *Baumgartner v. Burt*.[63] In this case, insurance agents sued the insured to recover unpaid premiums for policies issued by the insurance company. The supreme court held that unless the agent is personally liable to insurer for the premiums, then the general rule applies that an agent cannot maintain a suit in its own name for an insurance premium due its principal.

II. CORPORATIONS

A. Procedural Requirements

State of Colorado ex rel. Gentles v. Barnholt[64] was an action by Gentles in the nature of quo warranto to test the right of the Barnholt slate of directors to hold office as directors of the corporation. The pertinent issue presented to the supreme court was on allegations that Barnholt caused treasury stock of the corporation to be sold, after the election, to a Henry Pui Chun of Honolulu, Hawaii. Having accomplished this, Barnholt then caused the votes of such stock to be counted as cast for his slate at the election.

Barnholt claims that Chun must be joined as an indispensable party. The supreme court ruled that a non-resident shareholder need not be joined if the action is merely one to review the propriety of the election and does not seek any action directly or indirectly against the particular shareholder whose vote is being challenged. The supreme court felt that to hold otherwise would result in an impotent right to challenge an election, since personal

60 362 P.2d 1045 (Colo. 1961).
61 *Id.* at 1047.
62 2 Am. Jur. Agency § 374 (1936).
63 365 P.2d 681 (Colo. 1961). Several other minor Colorado cases dealing with the law of Agency are: Minissale v. Goldman, 363 P.2d 488 (Colo. 1961) (real estate agents); Lasnetske v. Parres, 365 P.2d 250 (Colo. 1961) (vicarious liability, joint ownership of car, right to exercise control); and Bunnell v. Iverson, 364 P.2d 385 (Colo. 1961) (symbolic delivery to agent of gift causa mortis).
64 358 P.2d 466 (Colo. 1961).

service could not be had upon Chun until he came within the borders of Colorado, which was unlikely.

The legality of the issuance of the stock to Chun cannot be adjudicated without his presence, but his right to vote in the election could be, according to the Delaware cases adopted by the supreme court as establishing a better approach to the problem.[65]

In *Norton v. Dartmouth Skis, Inc.*,[66] the supreme court again points out that business may be sufficient to subject a foreign corporation to service of process within the state, and yet insufficient to subject the corporation to the power of the state to impose regulations upon its activities.

Plaintiff sought money due him as commissions, but the complaint was filed more than six years after the cause of action accrued. Defendant claimed the action was barred by the statute of limitations, but plaintiff alleged that the foreign corporation was not licensed to do business in this state, was absent therefrom, and the statute had been tolled.

However, the corporation had since 1937 been selling in Colorado through local salesmen who carried samples and merchandise catalogues. Customer orders were given to the local salesmen who chose the means of delivery, assisted in collecting delinquent accounts, solicited new accounts and checked on customer credit ratings. The supreme court held this constituted sufficient "presence" for service of process, and that an entry of summary judgment which dismissed plaintiff's case based upon the statute of limitations, was not error.

B. Fiduciary Violations

American Founders, a general life insurance corporation, sued Colorado Management, a counseling and management corporation, to recover $32,839 paid to the latter under a service contract to last for ten years, and which was entered into on March 1, 1956.[67] The supreme court held that Colorado Management breached the contract after March 1, 1957, by ceasing to render services required by the contract, and that such breach justified American Founders

65 Standard Scale & Supply Corp. v. Chappel, 16 Del. 331, 141 Atl. 191 (1928); *In re* Diamond State Brewery, 22 Del. 364, 2 A.2d 254 (1938).
66 364 P.2d 866 (Colo. 1961).
67 Colorado Management Corp. v. American Founders Life Ins. Co., 359 P.2d 665 (Colo. 1961). Companion case on options, with same title is 367 P.2d 335 (Colo. 1961).

in terminating the contract. The court found that Colorado Management had earned $6,248 of the amount paid to it, and that American Founders was entitled to a judgment for the remainder.

Basically, this was all that was actually necessary to render a decision. But because of the lower court's ruling of a void contract and the various arguments and theories presented by counsel on each side, the court produced what appears to this writer to be an extreme amount of dictum regarding voidable contracts between corporations having directors in common, and ratification.

Six of the eight directors of American Founders were present at a meeting at which all approved the contract with Colorado Management. Five directors were necessary for a quorum. Three of the six were directors of both corporations. The court held this did not render the contract void, but voidable, if found to be unfair, even if there was no taint of fraud. But the contract is voidable regardless of its fairness, the court states, if the vote of a director, who is a director of both corporations, is necessary to form a quorum and effectuate the transaction. Since there were only three "disinterested" directors, the contract was voidable.[68]

This voidable contract was not ratified, the court asserted, and American Founders is not estopped from maintaining its action because it accepted some services offered by Colorado Management and in return made some payments. The court said, "This is not a situation where the court is faced with a contract fully performed by one or both of the parties. . . ."[69] (Whether a divisible contract could ever be ratified under this reasoning is speculative.)

The court held that approval by American Founders' board of directors of the minutes of the meeting which approved the contract is not a legalization of the invalid acts recorded therein, but only an acknowledgement that the secretary had properly recorded the acts of the board. Further, approval by the stockholders at their annual meeting of all lawful acts of the board for the preceding year is not ratification unless it is clearly shown that the stockholders had full knowledge of all material facts and thereafter knowingly accepted and approved the contract.

In *Crowley v. Green*,[70] seller, of California, sold two pneudraulic lifts to Provision Corporation. While Provision had the power to buy and sell equipment, it was really not part of its business activities. It had no use for the lifts and was insolvent to the point where it could not have afforded the expense of the purchase. Green was an officer and director of Provision and was in the meat packing business at the same address as Provision. The lifts were useful in Green's business and he had himself ordered them. As soon as the lifts arrived, they ended up in Green's meat packing business where they were used. Seller sued Green for the purchase price, and the supreme court held that Provision was used only as a conduit through which the lifts passed uninterruptedly from seller to Green as the ultimate purchaser (even though the contract was in Provision's name and Green was not the sole owner

68 This should allay the fears of author Ernest W. Lohf, in *One Year Review of Corporations, Partnership and Agency*, 37 DICTA 11, 14, note 11 (1960).
69 Colorado Management Corp. v. American Founders Life Ins. Co., *supra* note 67, at 669.
70 365 P.2d 230 (Colo. 1961).

of Provision). Seller maintained the contract was in Provision's name as a favor of Green, so that he could use a Provision truck to transport the lifts from California to Denver. Green contended Provision was buying the lifts for the purpose of resale.

The court avoided establishing a rule as to the "conduit" role of Provision, which was the contracting party, and in order to hold Green liable, the court tore into Green's defense that he was a secondary purchaser for value. (Green contended Provision owed him money and he set off the debt for the value of the lifts.) A director of an insolvent corporation cannot prefer himself, said the court, as a creditor of that corporation, and divert assets to discharge an obligation to him to the detriment of other creditors. He is a trustee for the creditors as well as for the corporation, and if he does purchase corporate assets, he must account for the full value of the property purchased to those who have the right to demand it.[71]

The court made no mention of creditors other than seller, who was awarded the full amount. Query: If other creditors had sued on their debts, would they have been entitled to share in the sum to be paid by Green?

C. Shifting Liability to Directors or Promoters

Guarantee Reserve Life Ins. Co. v. Holzwarth[72] deals with an attempt by a corporation to divert its liability to plaintiff under a stock repurchase agreement, onto its president and one of its directors. The supreme court held the company to its contract to repurchase. A letter written after the contractual rights and duties were defined and fixed, which was signed by the president and the director as individuals without indication of representative capacity and which stated, "We also agree . . . to repurchase the . . . shares" was held to be the letter of the company rather than the individuals. The letter was on a company letterhead and dealt largely with the affairs of the company.

The fact that the shares in question were transferred to plaintiff from the president's holdings and not from treasury stock was considered by the court to be immaterial. The court stated, "The company could make a lawful agreement to sell stock which it did not then own, or it could retain its then holdings and fill the order from shares owned by others."[73]

Another director of the company was held liable to plaintiff for the damages which occurred by the company's failure to repurchase the stock. This defendant was director at the time the company was insolvent, and he declared and paid a dividend. The fact that one statute[74] provided civil liability and another statute[75] provided criminal liability for such action was not considered by the court to be inconsistent or in conflict.

---

71 For another case holding the surviving directors of a defunct corporation as trustees for the creditors and stockholders with a fiduciary relationship which precludes the directors from acquiring any interest in corporate assets, other than as trustees, see Whatley v. Wood, 366 P.2d 570 (Colo. 1961).

72 366 P.2d 377 (Colo. 1961).

73 *Id.* at 382.

74 Colo. Rev. Stat. § 31-2-12 (1953).

75 Colo. Rev. Stat. § 72-2-3 (1953).

Quaker Hill, Inc. v. Parr[76] supports the general rule that promoters of a corporation are personally liable on their contracts, even though made on behalf of a corporation to be formed, except where the contracting party agrees to look to the corporation and not to the promoters for payment. Supporting the use of the exception to the general rule in this case was the fact that Quaker Hill, the plaintiff, acting through its agent, was well aware that the corporation was not formed, but, nevertheless, urged that the contract be made in the name of the proposed corporation. Not only were the defendants not promoters of a corporation at the time of the contract, the court stated, but the agent for the plaintiff even suggested the name to be used for the then non-existent corporation.

III. PARTNERSHIPS

A. Rights Upon Dissolution and After Termination

Davis v. Davis[77] is concerned with the best method for distribution of partnership property upon dissolution of the partnership. The supreme court feels that when the partners cannot agree[78] and dissolution and winding up of the partnership is under the auspices of the court, then the court has discretion to provide either for division or sale of the property, depending upon the circumstances of each case. The court also states that it is the general rule that in an action for a partnership accounting and dissolution, the entire partnership property will be converted to cash.[79]

Quelland and Roy[80] became partners in 1952. Together they leased real estate and constructed and operated a coffee shop and cocktail lounge on the premises. Later, they orally dissolved the partnership and Roy took over the business. He orally agreed to pay "Quelland 1¾ percent of the gross sales of all products sold on the premises"[81] for the duration of the lease. Roy then built a "tap room" and "dining room" on the premises with his own money. The issue was whether Quelland was entitled to his percentage of

76 364 P.2d 1056 (Colo. 1961).
77 366 P.2d 857 (Colo. 1961).
78 Colo. Rev. Stat. § 104-1-38(1) (1953). "When dissolution is caused . . . each partner . . . unless otherwise agreed, may have the partnership property applied to discharge its liabilities, and the surplus applied to pay in cash the net amount owing to the respective partners."
79 Some dictum concerning joint or joint and several liability of partners was deleted from the opinion prior to its final publication.
80 Quelland v. Roy, 365 P.2d 899 (Colo. 1961).
81 *Id.* at 899.

gross sales only from the two rooms built prior to dissolution (which percentages were always paid) or also from the two rooms built after dissolution.

The lower court approved a motion to dismiss on behalf of Roy after Quelland put on his evidence, and this was affirmed by the supreme court which held that a partner leaving the business is only entitled to a return on the use of his capital by the continuing partner in the absence of an express agreement. He is not entitled to earnings on new capital to which he did not contribute.

One point was not made clear by the court. A sub-tenant had taken over operation of the "dining room" (built after dissolution) and the "coffee shop" (built prior to dissolution). The sub-tenant was paying the 1¾ percent of gross sales on food sold in both rooms to Quelland "in accordance with Roy's agreement."[82] Is Quelland still entitled to a percent of gross sales on food sold in the "dining room"?

Roy, by counter-claim, sought to become owner of the entire lease on the real estate. The court held Quelland could only be divested of his interest as a tenant in common by operation of law or by assignment of his interest. There was no written assignment as provided by the statute of frauds, and the evidence showed that up to the time of litigation, Quelland had always been considered a joint lessee. What was not mentioned in the decision is that under the Uniform Partnership Act, such assignment would be by operation of law as to old and new creditors, even if no assignment were made.[83]

B. Partnership Property — Limited Partnership

Wise v. Nu-Tone Products Co.[84] affirms the general rule that unless the contrary intent appears, property acquired with partnership funds is partnership property,[85] and this presumption is not negated merely because the property is placed in the name of one of the individual members of the partnership.[86]

The interesting aspect is that this was a limited partnership and "the Uniform Limited Partnership Act does not have a comparable or parallel statutory provision"[87] to the Uniform Partnership Act[88] as to purchase of property with partnership funds. The supreme court based its decision on Colo. Rev. Stat. §104-2-9 (1953) which provides that "in any case not provided for in this article, the rules of law and equity, including the law merchant, shall govern."

C. Employee v. Partners

In *Pospicil v. Hammers,*[89] a car salesman sued for unpaid commissions. The employer was originally an individual, later, a partnership, and last, a corporation. The salesman sued the in-

82 *Id.* at 900.
83 Colo. Rev. Stat. § 104-1-41(3) (1953). "When any partner retires . . . and the business of the dissolved partnership is continued . . . with the consent of the retired partners . . . but without any assignment of his right in partnership property, rights of creditors of the dissolved partnership and of the creditors of the person . . . continuing the business shall be as if such assignment had been made."
84 367 P.2d 346 (Colo. 1961).
85 Colo. Rev. Stat. § 104-1-8 (1953).
86 Oswald v. Dawn, 143 Colo. 487, 354 P.2d 505 (1960).
87 *Supra* note 84 at 349.
88 Colo. Rev. Stat. § 104-1-8 (1953).
89 365 P.2d 228 (Colo. 1961).

dividual, the three partners, and the corporation. Judgment was entered in the lower court against the defendants, and each of them for $819. The corporation liability for the entire amount of unpaid commissions was approved by the supreme court, but not the judgment against the individual or the partners. The reasoning of the court was that plaintiff failed to establish when the individual's liability terminated or when that of the partnership began, and the amount of unpaid commissions earned under each separate employer. The court pointed out that the individual and the members of the partnership could not have been held responsible for any commissions earned by plaintiff following his employment by the corporation.

D. Joint Ventures

While not stated in specific terms, *Griffith v. Cooper*[90] appears to support the general rule that joint ventures will be governed by the law of partnership. Thus, when four joint venturers agree to share profits equally (and apparently nothing is stated as to sharing of losses) the losses are shared equally.

The joint venturers were engaged in construction of sixteen homes. Three of them, as plaintiffs, sought an accounting. Each had received advance withdrawals totaling $11,000. The master's report was unfavorable to them and in favor of defendant Griffith for losses of $17,000. The trial court ignored the master's report and left the parties where they were before the accounting. On appeal by defendant Griffith, the plaintiffs contended they were independent contractors rather than joint venturers and thus entitled to retain the benefits received without having to share the losses. The supreme court held they were bound by the accounting and by their admissions in the trial court that they were joint venturers and must therefore contribute to Griffith for their proportionate share of the total loss.

90 359 P.2d 360 (Colo. 1961).

QUALIFICATION QUICKENER #3

Among the time savers developed by CT for use by lawyers about to qualify a client in a foreign state are CT *Data Sheets.* They summarize all data needed by the lawyer to complete qualification forms.

When you are about to qualify a client, telephone us for the CT *Data Sheet* for the state (or states) on which you are working. CT has an individual *Data Sheet* for each state, each Canadian province, each U. S. Territory and possession. They are furnished without extra charge as part of CT's qualification services (for lawyers only).

OTHER CT QUALIFICATION QUICKENERS

—all developed to make a lawyer's task of qualifying a client in an outside state easier, less time-consuming and less expensive to handle—

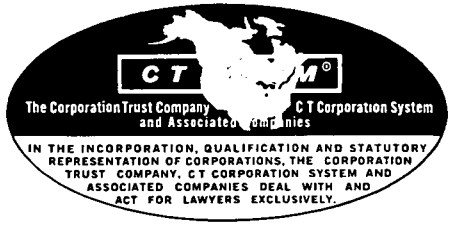
1. Information helpful to the lawyer in determining whether or not a client's out-of-state activities require qualification.

2. Information on a state's initial and annual costs, qualification requirements and penalties for failure to qualify.

4. Information on *timing* of qualifications so that, when practicable, the lawyer can, by delaying qualification until after certain dates, save his client the cost and bother of paying taxes and filing reports.

5. Information from which the lawyer, by comparison, can determine advisability of incorporating a separate corporation rather than qualifying the existing corporation.

6. CT's continent-wide system of offices and representatives to expedite the filing of the lawyer's papers.



SERVING COLORADO LAWYERS

CT CORPORATION SYSTEM
1700 BROADWAY
DENVER 2, COLORADO
TAbor 5-8148