

Contracts, Sales, and Agency

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The subject matter of this chapter covers a broad field in the traditional scope of law school courses. In practice, the material overlaps to an extent that makes it difficult to justify separate treatment. Contract law questions may arise in regard to a sale, and most agency problems arise in commercial transactions. It was therefore decided that at least for the purposes of the 1954 SURVEY the three subjects could best be presented in one chapter.

§5.1. **Offer and acceptance.** In *Kuzmeskus v. Pickup Motor Co.*¹ the Supreme Judicial Court reaffirmed the oft-repeated rule² that an offer revoked prior to any purported acceptance by the offeree cuts off the offeree's power to ripen prior negotiations into a binding contract.

The plaintiff, suing for the return of a \$1000 deposit, was the successful bidder for a contract to supply school bus transportation, one of the provisions of which required the plaintiff to transport the children in five new school buses. The defendant, a dealer in buses, had assisted the plaintiff in securing the contract. Within an hour after the plaintiff had been notified of the acceptance of his bid, the defendant through its general manager and a salesman called upon the plaintiff, at which time the parties orally determined the price, model, and date of delivery of the buses. Thereupon the defendant's general manager presented to the plaintiff five order forms which the defendant had prepared and which the plaintiff then executed. One of the orders was then canceled. Each order form contained the following: "Enter my order for one . . . bus. . . . This order is not binding unless authorized by an officer of the company . . ." Below the line for the signature of the purchaser appeared the words "authorized by" and a line for a signature. The plaintiff delivered to the general manager and salesman a check in the amount of \$1000, representing a deposit of \$250 on each of the four buses ordered. Less than a day later, and before signature by a company officer, the plaintiff first orally and later by telegram canceled the orders and requested the re-

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§5.1. ¹ 330 Mass. 490, 115 N.E.2d 461 (1953).

² See *Bishop v. Eaton*, 161 Mass. 496, 37 N.E. 665 (1894); 1 Restatement, Contracts §§34, 35 (1932).

fund of his deposit. The Court, holding that the plaintiff was entitled to the return of his deposit, ruled, first, that the order forms were not memoranda of a valid oral contract previously entered into, but constituted invitations for offers from the purchaser; and second, that since the order forms themselves indicated the mode of acceptance, the cancellation of the plaintiff's offer prior to signed authorization by a company officer rebutted the defendant's contention that even if a contract had not previously come into existence, the delivery of the order forms to the defendant's general manager by the plaintiff had ripened the negotiations into a contract.

The Court's rulings are both sound. The fact that the defendant had previously prepared and had presented written order forms to be executed by the plaintiff seems amply to demonstrate the lack of an intent that oral negotiations and promises should constitute the contract. Rather, the facts bring the case squarely within the rule that no contract exists if the intent of the parties is that none shall exist until the agreement be memorialized in writing.³

The Court is also on firm ground in ruling that the plaintiff's delivery of the order form did not complete a contract. The defendant clearly indicated an intent not to make a binding promise until the conditions on its own order form were performed. In such case acceptance of the delivery of the order form is merely an indication of present intent to be bound only when a further expression of assent is given by signature of a company officer. Acceptance of delivery of the order form would not be a present promise, hence there could be no presently binding contract.⁴ The fact that the defendant's general manager was the person to whom the order was delivered does not aid the defendant. Even if the general manager were an officer of the company with authority to execute sales, the order form required his signature as the only indication of assent on the part of the company to make a presently binding promise.

§5.2. Terms of the contract: Usage. Usage is a tool employed in interpreting the meaning of words.¹ It applies as a rule of interpretation where parties to a contract are of the same occupation.² Where parties are of the same occupation or engaged in the same trade, and usage in such trade is generally known by those in the trade, a party to a contract in such circumstances is charged with knowledge of it, with the result that actual knowledge of usage by such a party is immaterial.³

The above rules were applied in *Berwick & Smith Co. v. Salem Press, Inc.*⁴ The plaintiff, a book printer for many years, sent to the defendant's general manager an estimate of the cost of printing and

³ Id. §26.

⁴ Id. §58.

§5.2. ¹ 1 Restatement, Contracts §246, Comment a (1932).

² Id. §§247, 248.

³ Ibid.

⁴ 1954 Mass. Adv. Sh. 217, 117 N.E.2d 825.

binding the defendant's book. The book was in two volumes. The defendant's general manager was familiar with the printing of books even though he had never had a book printed before. That part of the estimate concerned with binding the books read "5000 copies @ .561, 10,000 copies @ .538." A contract was entered into on the basis of the estimate. The plaintiff, contending that the bid was on a per volume basis, introduced evidence tending to show that estimates on cost of binding were on a per volume basis and that such is a well-recognized custom in the book production business. The defendant moved for a directed verdict, contending that the bid was on the basis of a set of two volumes. The Court held that the plaintiff's evidence was sufficient to take the case to the jury. It ruled that, inasmuch as there was ambiguity in the terms of the contract, evidence of usage was correctly admitted. The Court also ruled that there was no necessity on the part of the plaintiff to prove actual knowledge of the usage on the part of the defendant where both parties were engaged in the same trade. The statement in the decision, "Where the usage is established the presumption is that the parties contracted with reference to it," is questionable. The Court could have been clearer in pointing out that usage once established makes immaterial any evidence as to knowledge of one of the contracting parties, rather than confusing the issue with the phraseology of presumptions.

§5.3. The Statute of Frauds and allegations of agency. Non-adherence to the requirements of the Statute of Frauds in real estate contracts provides a fertile field of litigation that could be avoided by proper draftsmanship. Much of the litigation in this area may be due to the fact that in many instances the original agreement is not prepared by an attorney. Although the layman generally knows that real estate agreements have to be in writing, his unfamiliarity with the rules governing the content of the writing and the signatures required gives rise to the frequent litigation that flavors this area of contract law. *Cluff v. Picardi*¹ is such a case. The buyer sued the sellers for specific performance, alleging in the bill an agreement with the sellers, "a memorandum of which agreement is hereto annexed and marked 'A.'" The land in question was formerly owned by a wife, who by will left a two-thirds undivided interest therein to her daughter, Kathleen Picardi, and the remaining undivided one third to her surviving husband. After the wife's death suit was brought against the daughter and the husband. The memorandum above noted read, "I Kathleen Picardi, hereby sell to [buyer] the land . . . formerly the home of my mother for the sum of thirty-seven hundred dollars of which this is a receipt for two hundred dollars as a down deposit. The remainder to be paid upon the settlement of the estate. Mrs. Kathleen Picardi Administrator." The case was presented to the Supreme Judicial Court on appeal by the plaintiff from a decree sustaining the defendants' demurrer and dismissing the bill.

§5.3. ¹ 1954 Mass. Adv. Sh. 349, 118 N.E.2d 753.

After first deciding that a demurrer was the proper procedural tool to test the sufficiency of the bill, which pleaded an oral contract with an alleged memorandum of it, a majority of the Court held the memorandum insufficient to satisfy the Statute of Frauds. The Court reasoned that the agreement was between the buyer and the two sellers jointly and that the memorandum contained nothing in it to bind the surviving husband. The Court asserted that if the bill had alleged that the daughter was signing as agent for her father, the memorandum would have been sufficient. Such authority to act as agent for her father in signing the memorandum would not have to be in writing.² The memorandum, assuming such agency, would be sufficient notwithstanding the absence in it of any indication of the existence or identity of the principal — the daughter's father.³ The Court ruled that the plaintiff-buyer had failed to allege the agency.

The precise point on which the case turns is whether the daughter's signature to the memorandum as administrator of her mother's will is a sufficient description of herself personally and as the agent for the only other person interested in the will of the deceased wife, her father. On this narrow point the majority of the Court ruled that it was not; hence the plaintiff had not alleged the agency necessary to have the memorandum bind the father.

The plaintiff's bill alleged that the oral agreement related to the land described in the memorandum. It further alleged that a petition for a license to sell at private sale was prepared by Kathleen Picardi as executrix of the will of her mother, which was assented to by her father. This later allegation could conceivably be interpreted as showing agency on the part of the father to his daughter to do all things necessary to effect the sale of his interest and that of the daughter in one parcel to the plaintiff. This allegation together with the signature as "administrator" to a memorandum executed subsequent to the appointment of the daughter as executrix makes a plausible case for the plaintiff's contention that agency was alleged in the plaintiff's bill. A liberal view of the plaintiff's bill could lead to such a conclusion. A majority of the Court chose to apply the rule that on demurrer the language in the bill is to be construed against the pleader, and that nothing can be assumed in his favor. The case can be explained on the above ground, yet the result seems harsh. It should serve to put all on notice that unless all parties to be charged have signed the memorandum, the agency of those who sign to bind nonsignatories must be clearly made out. Allegation of assent to prior petitions for license to sell and documents of like import by nonsignatories is not sufficient to meet the buyer's requirement of adequately pleading agency.

§5.4. Performance and damages. Massachusetts law concerning recovery under building contracts has developed into well-defined rules. A builder is precluded from recovery on the contract if he has

² 1 Restatement, Agency §30 (1933).

³ *Id.* §153.

not fully performed.¹ He is allowed to sue off the contract in quantum meruit if he has performed substantially and in good faith.² However, "in the absence of special exculpating circumstances, an intentional departure from the precise requirements of the contract is not consistent with good faith in the endeavor fully to perform it, and unless such departure is so trifling as to fall within de minimis, it bars all recovery."³ Some confusion resulted when a combination of the above rules was applied in computing the amount of recovery in a suit by an owner against a builder who had willfully defaulted. In *Glazer v. Schwartz*⁴ the builder brought suit in equity to establish a mechanic's lien; the owner sought affirmative relief by way of damages. The builder was denied relief on the basis that he had willfully defaulted. The contract price for building the house was \$14,700. After having received \$13,000, the builder failed to finish the house according to the specifications in the contract. The value of the house as built was \$700 less than it would have been if the builder had fully performed. Notwithstanding the fact that the diminution in value of \$700 was considerably less than the remaining price stipulated in the contract, the owner was granted affirmative relief in damages measured by the amount necessary to make the structure conform in a reasonable way to the contract. The Court's granting of affirmative relief in the *Schwartz* case cannot be squared with settled principles of contract law concerning damages. Section 346 of the Restatement of Contracts provides: "For a breach by one who has contracted to construct a specified product, the other party can get judgment for compensatory damages for all unavoidable harm that the builder had reason to foresee when the contract was made, less such part of the contract price as has not been paid and is not still payable . . ." By way of example this rule works out as follows: Building contract price, \$10,000. Willful failure to complete by builder after he has been paid \$2000. Cost of completion of the building, \$12,000. Owner's measure of recovery is \$12,000 less \$8000, or \$4000. If the cost of completion is less than the amount of the unpaid price, the owner is not entitled to any compensatory damages.⁵

Whatever aberration from settled principles of contract law was introduced into Massachusetts by the *Schwartz* case has now been corrected. In *Ficara v. Belleau*⁶ the Supreme Judicial Court refused to follow the *Schwartz* case. In the *Ficara* case the owner sued the contractor for damages for breach of a contract by which the contractor had agreed to install a heating and cooling system for the contract price of \$6200. The contractor willfully and intentionally abandoned the contract after having been paid \$4200. The plaintiff

§5.4. ¹ See cases cited in *Glazer v. Schwartz*, 276 Mass. 54, 56, 176 N.E. 613, 614 (1931).

² *Hayward v. Leonard*, 7 Pick. 181 (1864).

³ *Andre v. Maguire*, 305 Mass. 515, 516, 26 N.E.2d 347, 348 (1940).

⁴ 276 Mass. 54, 176 N.E. 613 (1931).

⁵ *McCormick*, Damages §169 (1935).

⁶ 1954 Mass. Adv. Sh. 87, 117 N.E.2d 287.

had paid \$2361 to another contractor to perform the remaining work. An auditor, whose findings of fact were final, awarded the plaintiff \$2361. The amount of the damages was reduced to \$361 by a judge of the Superior Court, from which judgment the plaintiff appealed. The Court affirmed. The arithmetic of the Restatement rule applied to the *Ficara* case is cost of completion (\$2361) less amount unpaid on the contract (\$2000) equals damages to be awarded (\$361). The plaintiff's contention that the unpaid balance of the contract price should not be taken into account amounts to an argument that exemplary damages should be awarded in case of willful abandonment. The Court refused to allow such damages, adhering to the fundamental contract view that damages are compensatory.⁷ Failure to take into account the unpaid amount of the contract price would put the plaintiff in a better position than he would have been in had there been full performance. As the Court pointed out, disallowance of the unpaid portion of the contract price in computing the damages would result in the plaintiff's getting a \$6200 heating and cooling system for \$4200. The rule⁸ that bars the builder in case of willful abandonment has no application in computing the owner's recovery.

⁷ 1 Restatement, Contracts §342 (1932).

⁸ *Sipley v. Stickney*, 190 Mass. 43, 76 N.E. 226 (1906).