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Contracts – 1960 Oregon Survey

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CONTRACTS—1960 OREGON SURVEY*

ROBERT S. SUMMERS†

LIABILITY OF CREDIT-CARD OWNER FOR UNAUTHORIZED PURCHASES

THE decision in *Union Oil Co. v. Lull*[1] is significant to motorists who use credit cards. On the back of many credit cards are provisions in fine print stating that, if the card is lost or stolen, the card owner assumes liability for unauthorized purchases made prior to the time that the card owner notifies the issuer of the loss or theft. The card in the instant case, on which appeared such provisions, was lost or stolen from the defendant, Lull, on or about April 26, 1958. Within four weeks thereafter, a third party made fifty-five purchases, totaling $1,454.25, by presenting Lull's card to dealers along a route extending from Oregon through the southwestern states, and thence through the Midwest to Chicago. At the end of this period, Lull received a statement from the Union Oil Co. and for the first time discovered that his credit card had been lost or stolen. He immediately notified the company of the unauthorized purchases and refused to pay for them. The company brought this action to recover the $1,454.25 and the jury returned a verdict for Lull.

On appeal, the supreme court, in a thorough opinion by Justice O'Connell, held that the fine print on the back of Lull's card obliged Lull to pay the $1,454.25, provided the company could prove on retrial that the dealers who made sales in reliance on Lull's card exercised reasonable care in making inquiry concerning the identity of the imposter. The court stated that facts were proved at the trial on the basis of which a jury could have reasonably decided that the dealers had not discharged their duty of care. The credit card showed that Lull was a resident of the grand city of Halfway, Oregon,[2] while the imposter's car bore an Idaho license plate. Thus, a jury might have determined that a prudent dealer should have suspected that the card, or the car, or both were stolen, and should therefore have made some inquiry, which probably would have revealed the intended fraud. A partial answer to this argument is that Halfway is located near the Idaho-Oregon border.

Several cases hold that a party is not bound by terms unknown to him if, because of the way in which they are embodied in the purported agreement, a reasonable man would not suspect these terms to be a part

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* The period surveyed is from October 1, 1959 to October 1, 1960.

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1 220 Or. 412, 349 P.2d 243 (1960).

2 Although Halfway, Oregon is a small town, it is the birthplace of the author. *Cf.* Trustees of Dartmouth College v. Woodward, 17 U.S. (4 Wheat.) 517 (1819) (oral argument of counsel for plaintiff in error).

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thereof.[3] Lull contended that he was not liable because he had no knowledge of the fine print on the back of his card, and because, in his view, a reasonable person would not believe that these terms were a part of his contract. The court stated that this issue was not raised by the pleadings, and that Lull's evidence had not established unawareness of the terms in issue or that the company had put these terms on the card in deceptive form.

The court also declined to hold that the credit-card contract unfairly allocated the risk of loss arising out of unauthorized purchases. The court thought that the contract allocated this risk equitably inasmuch as the company had assumed such risk on unauthorized purchases made after it received notice of loss or theft of the card, and the card owner had agreed to pay for purchases made prior to such notification.

The decision may be criticized as contrary to principles of contract law inasmuch as the parties had not specifically included, as one of the terms of their contract, a provision that the card owner would be liable for unauthorized purchases made prior to notification only if the company proved that its dealers had exercised reasonable care in making inquiry as to the identity of the imposter. However, the implying of such a term in a case of this character is not unprecedented,[4] and is supported by the consideration that the card owner is essentially a gratuitous indemnitor who can control the extent of his liability only by discovering that he no longer possesses his card. In many cases a card owner cannot be reasonably expected to discover this fact for several days.

The decision may also be criticized as imposing too burdensome a duty on the card owner to assure himself at all times that he possesses his card. On contract principles, however, this criticism is without force, since the card owner, by electing to use the card, accepts the terms and conditions stated thereon and thereby assumes the duty of constant vigilance.

An interesting question that did not arise in the instant case, but that no doubt will arise eventually, is this: When does the recipient of a credit card "elect" to use it? The court stated in the instant case that the company was "entitled to the terms of its bargain with those who elected to use its credit cards."[5] Cases can be imagined in which it would be very difficult to determine whether the recipient of a card had elected to use the card prior to its loss or theft. Suppose, for example, that *P* sends *D* an unsolicited card. After *D* places the card in the glove compartment of his car but before he has occasion to use it, *S* steals the card and uses it to purchase gasoline. Did *D* elect to use the card?

[3] See May Hosiery Mills v. G. C. Hall & Son, 77 Cal. App. 291, 246 Pac. 332 (1926), and cases cited therein.

[4] Gulf Refining Co. v. Williams Roofing Co., 208 Ark. 362, 186 S.W.2d 790 (1945).

[5] 220 Or. at 421, 349 P.2d at 247.

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ASSIGNMENT

In *Earls v. Clarke,*[6] one Frye purchased realty from the plaintiff, Earls, pursuant to an installment contract signed on February 3, 1955. This contract required Frye to make monthly payments and empowered Earls to pay taxes on the property and to add amounts thus paid to the unpaid balance of the sale price. Earls appointed a bank to serve as agent for collection of the monthly payments, and the bank issued a payment-receipt book to Frye in which it thereafter recorded payments and the balance due after each payment. When Frye failed to pay 1955-56 property taxes of $171.95, Earls paid them but did not add their amount to the unpaid balance of the sale price of the property as shown in Frye's receipt book. During 1957, Earls learned that the defendant, Guaranty Co., Inc., of which Clarke was president, was interested in purchasing the property from Frye. Earls telephoned Clarke to discuss the matter, and during this conversation Clarke requested Earls to confirm the balance due on the land-sale contract as shown in Frye's payment-receipt book. Earls refused to do this, and then referred Clarke to his lawyer, who also refused to give the requested information. On December 11, 1957, Frye assigned the land-sale contract to Guaranty. Thereafter, Earls unsuccessfully sought reimbursement for the tax payment from Guaranty. Earls finally brought this action to secure a declaration that Guaranty was obligated to pay Earls $171.95. Guaranty contended that Earls was estopped from recovering this amount because Guaranty, in purchasing the property, reasonably relied on the payment-receipt book maintained by Earls's agent, which did not reveal payment of the taxes by Earls, and because both Earls and his attorney had refused to confirm or deny the accuracy of the amount shown in the payment-receipt book. The supreme court held for Earls, stating that the doctrine of equitable estoppel was not applicable because Earls made no representation to Guaranty and that Earls did not intend that Guaranty should rely upon the amounts shown in the receipt book.

A decision for Guaranty would not have been indefensible. Earls knew that Guaranty was negotiating with Frye for an assignment of the contract, yet declined to verify the accuracy of the payment-receipt book in which Earls's agent made all entries. Thereafter, should Earls be allowed to assert a claim that Guaranty had sought to uncover? Or should we conclude that, because of Earls's refusal to verify, Guaranty should have become suspicious and accordingly should have made further inquiry? Professors Braucher and Sutherland have said in their casebook on commercial law that

> two conflicting urges can be seen in the law of commerce. One drives toward the protection of the completed new transaction even where this means the destruction of older arrangements: the . . . [property] must move: the deal must go

[6] 355 P.2d 213 (Or. 1960).

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ahead . . . But a counter-urge also appears, an impulse to retard the finality of transactions in order to save the rights of the transferror's creditors.[7]

A decision for Guaranty would not have conflicted with either of these dominant policies. Guaranty sought "to save the rights" of Earls. Therefore, was not Guaranty's "completed new transaction" all the more entitled to protection?

ACCORD AND SATISFACTION

In *W. D. Miller Constr. Co. v. Donald M. Drake Co.*,[8] the parties consummated a common form of accord and satisfaction. On July 12, 1955, the plaintiff agreed to supply transit-mixed concrete to the defendant, who was constructing buildings for the United States Navy. On July 15, the plaintiff commenced performance, and on July 27, 28, and 29, the plaintiff made deliveries of defective concrete to the defendant. The plaintiff conceded that this concrete was defective and the defendant agreed to accept a credit of $417.56 therefor. Thereafter, the defendant refused to pay the plaintiff in full for concrete supplied under their contract. The plaintiff brought this action to recover the amount unpaid, and prevailed in the trial court. On appeal, the defendant denied liability partially on the basis that the plaintiff had supplied defective concrete on the above dates. The supreme court held that the settlement for $417.56 constituted an accord and satisfaction whereby, in exchange for the $417.56, the defendant relinquished any rights that might otherwise have arisen from delivery of the defective concrete.

Ohlson v. Steinhauser[9] reaffirms the modern doctrine that an executory promise is enforceable as an accord when the promisee accepts the promise in satisfaction of his original claim. Ohlson had accepted an offer by Steinhauser to pay $6,000 "by way of compromise and in full settlement and discharge of plaintiff's cause of action against the defendant."[10] Upon Steinhauser's refusal to pay the $6,000, Ohlson brought this action and recovered a judgment for that amount. On appeal, the defendant contended that the agreement sued on was an unsatisfied accord and therefore of no effect unless and until he performed his promise to pay the $6,000. The supreme court held that the agreement sued on was a satisfied accord. The court reasoned that, since Ohlson had accepted Steinhauser's offer to pay $6,000, this acceptance constituted a "satisfaction," and Steinhauser thereby became obligated to pay that amount.

Traditionally, an accord was considered "satisfied" only when the

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[7] BRAUCHER & SUTHERLAND, COMMERCIAL TRANSACTIONS, CASES AND PROBLEMS 365 (1958).

[8] 351 P.2d 41 (Or. 1960).

[9] 218 Or. 532, 346 P.2d 87 (1959).

[10] *Id.* at 537, 346 P.2d at 88.

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substitute promise was performed.[11] The theory of the present case and the RESTATEMENT, CONTRACTS, section 418[12] that an executory promise may, if the parties so intend, itself be treated as "satisfaction" appears only to be a convenient way to avoid the doctrine that an unsatisfied accord is not binding. However, as the court in the instant case stated, "there is other, and actually stronger, reason for affirming the trial court."[13] The court then referred to the rule that

> a settlement and compromise of a claim asserted on reasonable grounds and in good faith, which the parties, having equal knowledge of the facts, consider doubtful, constitute a new and valid agreement which will be enforced in law, although the matter compromised be not in fact doubtful in legal contemplation, and the settlement be not what a court would have adjudged upon the facts of the case.[14]

The primary policy underlying this rule is sound: that courts should encourage practices that are likely to reduce the volume of litigation.

MUTUAL MISTAKE

In *Gilbert v. California Or. Power Co.*[15] the plaintiff, Gilbert, sought to reform a contract for the purchase of a sawmill and a planing mill and to recover damages for the nonperformance of this contract. During 1955, California Oregon Power Co. (Copco) was building flumes that required substantial quantities of lumber. Copco had acquired the necessary timber and had erected and operated a sawmill and planing mill for the sole purpose of sawing and planing the lumber to be used in its flumes. Copco eventually decided that its operation was unsatisfactory, and, during April 1955, its officials offered to sell its mills to Gilbert on the condition that Gilbert would improve the mills and then saw and plane the remaining lumber required to construct Copco's flumes. Gilbert informed Copco that he would buy the mills if he could pay for them through an arrangement whereby Copco would be allowed a reduction in the cost of lumber sawed for it of $1.50 per thousand board feet. Copco rejected Gilbert's proposal, stating:

> In analyzing your proposal it is immediately apparent that, with an allocation of $1.50 per thousand board feet toward purchase of the mill, the purchase would not be completed at the end of the *contemplated cut* for the Lemolo #2 project. For example, a cut of nine million board feet at $1.50 per thousand would provide only $13,500 toward the purchase of the mill. The depreciated value of the installation is approximately $36,200. [Italics ours (i.e., the court's).]
>
> Based on our analysis, your proposal would not be sound from our standpoint.[16]

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[11] 6 WILLISTON, CONTRACTS 1846 (rev. ed. 1937).
[12] RESTATEMENT, CONTRACTS sec. 418 (1932).
[13] 218 Or. at 540, 346 P.2d at 89.
[14] *Id.* at 541, 346 P.2d at 89.
[15] 353 P.2d 870 (Or. 1960).
[16] *Id.* at 875.

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Shortly thereafter, a Copco representative called on Gilbert and, according to Gilbert's testimony,

he said $1.50 wasn't enough and I said I didn't realize that the mill was as much as it was. I didn't know it was $36,200.00, and I said "How would $4.00 be?" and he said "Well, that's fair" and that's about all that conversation was, so I went to town and had my attorney write a letter and instead of—I got to figuring; there was $36,200.00 and 9,000,000 feet at $4.00 a thousand would be just $36,000.00, so I had him put another fifty cents on there so I would be sure to get it paid out before the cut was over.[17]

As the $4.50 proposal was satisfactory to Copco, the parties, on May 11, 1955, signed the written agreement that the plaintiff sought by this suit to reform. The agreement embodied the understanding of the parties set forth above respecting price and method of payment, stated that Copco's estimated lumber requirements would be approximately 8,700,000 board feet, required Gilbert to expend $5,000 for improvements, and required Gilbert to remove the mills from their location after sawing the required lumber. However, the agreement did not explicitly guarantee that Copco's flume projects would require a minimum of approximately 8,700,000 board feet of lumber. During July 1956, after Gilbert had sawed 4,633,483 board feet of lumber, and after Copco had decided to substitute concrete for lumber in some of its construction, Copco canceled its order for the milling and planing of lumber and required Gilbert to remove the mills from their location. At that time, $10,849.35 of the purchase price of the mills remained unpaid.

Thereafter, Gilbert sued to reform the contract, and alleged in his complaint that by mutual mistake the parties omitted a provision guaranteeing that Copco would require Gilbert to mill not less than 8,700,000 board feet of lumber. Gilbert also sought recovery for profits that he would have realized on the additional sawing and planing. Copco denied the allegations of Gilbert's complaint and filed a cross complaint demanding the balance of the amount Gilbert had agreed to pay Copco for the sawmill and planing mill.

The trial court refused to reform the agreement, found Gilbert in default on his payments for the mills, and accordingly entered judgment for the defendant. On appeal, the supreme court affirmed the trial court's denial of reformation, stating only that it was apparent to the court that the parties were merely "anticipating what would be required, but not agreeing that any certain amount would be ordered . . . "[18] However, the court held that Gilbert was not obliged to make further payments on the purchase price of the mills because the parties had agreed on a single method of payment the use of which had become impossible because of Copco's cancellation. The court apparently intended that Gilbert was entitled to retain the mills.

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[17] *Ibid.*
[18] *Id.* at 877.

The case appears to be close to the line. Although, as the court stated, the parties had not agreed that a minimum of 8,700,000 board feet of lumber would be required, there appeared to be evidence supporting the theory that both parties signed the contract believing that at least enough lumber would be required to enable Gilbert to pay the purchase price of the mills in accordance with the method of payment agreed upon. A vendor will not ordinarily agree to provisions that do not obligate his vendee to pay the entire purchase price. Copco may, however, have been unwilling to obligate itself to purchase a fixed amount, and, in exchange for desired flexibility, may have intended to incur some risk of receiving less than full payment for the mills.

Statute of Frauds

In *Columbia Brick Works v. Freeman,*[19] the defendant contended that he was not obligated to pay for materials delivered by the plaintiff to one Kayton because his promise to do so was not in writing, as required by section 41.580 of the Oregon Revised Statutes, which provides that an oral agreement to answer for the debt of another is void. The supreme court rejected the defendant's contention, holding that the statute was inapplicable because the defendant, as vendor under an installment contract to convey land to Kayton, benefited indirectly from the plaintiff's delivery of materials to be used in improving this land, and was therefore a principal obligor rather than one who had merely agreed to answer for the debt of another. This case illustrates the operation of the so-called "main purpose" rule, which may be stated generally as follows: if the main purpose of the promisor is to serve some interest of his own, then his oral promise is enforceable notwithstanding the fact that such enforcement operates to discharge the debt of another.

Damages

The case of *Corder v. A & J Lumber Co.*[20] illustrates misuse of the "benefit of the bargain" rule in computing damages for breach of contract. The parties signed an agreement on or about July 19, 1955, whereby the defendant, the A & J Lumber Co., sold to the plaintiff, Corder, all timber and cordwood on certain land for $6,500. The defendant expressly warranted that there were at least 700,000 board feet of timber on said land, and promised that, if such an amount were not there, it would supply any deficiency from other sources. It further agreed to log and deliver the timber at the plaintiff's mill for $30.00 per thousand, and agreed to deliver at least 700,000 board feet at the mill on or before October 31, 1956. During the period from July 19, 1955 to October 31, 1956, the defendant logged and delivered only 363,368 board feet of

[19] 353 P.2d 620 (Or. 1960).
[20] 354 P.2d 807 (Or. 1960).

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timber. In an action by the plaintiff, the trial court found that the defendant had broken the contract and accordingly awarded damages.

On appeal, one of the defendant's contentions was that the trial court should have computed the plaintiff's damages as the difference between $30.00 per thousand, the agreed logging and delivery cost, and the estimated cost per thousand of having another log and deliver the timber. The supreme court held that application of this measure of damages would not give the plaintiff the benefit of his bargain, inasmuch as he had contracted to receive the logs during a period when the market value of lumber was more favorable.

The court then computed the damages as follows: The market value of delivered logs was $50.00 per thousand during the time the defendant was obligated to deliver. As the total stumpage cost to the plaintiff was $6,500, and as the defendant was obligated to deliver 700,000 board feet, the amount the plaintiff paid for stumpage was $9.28 per thousand ($6,500 ÷ 700). Thus, the total cost to the plaintiff of 1,000 board feet of delivered logs was $39.28 ($30.00 for logging and delivery and $9.28 for stumpage). The plaintiff had therefore bargained for a benefit of $10.72 per thousand (the difference between $39.28 and $50.00). As he had not received this benefit on the 336,632 board feet of undelivered timber (700,000 — 363,368), he was accordingly entitled to $3,608.69 (336.632 × $10.72). Moreover, as there were only 285,000 rather than 336,632 board feet of uncut timber remaining on the land owned by the defendant, the court held that the plaintiff was also entitled to recover the stumpage value of the missing 51,632 board feet, which, at $9.28 per thousand, amounted to $479.14. (The plaintiff's recovery of $479.14 for the 51,632 board feet of nonexistent timber was proper if the stumpage value of such timber was $9.28 per thousand.) Thus, his total recovery was $4,087.83 ($3,608.69 + $479.14).

The court's determination that the plaintiff was entitled to $3,608.69 as the expected benefit on the undelivered timber appears erroneous. While acknowledging that he had paid the defendant $9.28 per thousand for stumpage, the court nevertheless deducted $9.28 from $50.00 per thousand (the market value of delivered logs) in computing the plaintiff's expected profit per thousand board feet, and accordingly reduced his recovery from $20.00 per thousand ($50.00 — $30.00, the logging and delivery cost) to $10.72 per thousand. As the plaintiff had already paid $9.28 per thousand for the stumpage, the defendant was not entitled to the benefit of this deduction. The soundness of this proposition may be demonstrated by considering the following hypothetical case: *B* owns standing timber for which he has paid $9.28 per thousand. The value of this timber at *B's* mill is $50.00 per thousand. *B* contracts with *S* to log and deliver this timber for $30.00 per thousand. After logging and delivering half of this timber, *S* repudiates the contract and *B* sues *S* for breach. *B's* maximum recovery against *S* should be $20.00 per thou-

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sand, which is the difference between $50.00 per thousand, the value of the timber at *B's* mill, and $30.00 per thousand, the figure for which *S* contracted to log and deliver the timber. Obviously, this maximum recovery of $20.00 per thousand should not be diminished by the $9.28 per thousand that *B* has paid to acquire the standing timber. The plaintiff buyer's position in the *Corder* case is no different. Inasmuch as the court found that he had purchased and paid for the standing timber, his recovery should not be reduced by the amount thus paid. The effect of giving the defendant the benefit of such a reduction is to charge the plaintiff $18.56 per thousand for stumpage, although he actually paid only half of that amount.

However, this error may have been more than offset by the court's failure to consider the applicability of the usual mitigation-of-damages doctrine in measuring the amount of the plaintiff's recovery. A plaintiff is generally not entitled to recover contract damages that he could have reasonably avoided.[21] The court might have found that, after the defendant's breach, the plaintiff could have, with reasonable effort and without risk of substantial loss, engaged a third party to log and deliver the 336,632 board feet of undelivered timber. If the court had so found, the plaintiff's recovery should have then been reduced in the amount, if any, by which the market value of delivered logs, during the time the defendant was obligated to deliver, exceeded the estimated cost of paying a third party to log and deliver. If the plaintiff at any time contracts with another who actually logs and delivers this timber for an amount less than its market value when delivered, the plaintiff will realize a second profit thereon; i.e., he will actually receive some or all of the profit for the loss of which he has already been compensated. This seeming unfairness might have been avoided had the court inquired whether the plaintiff was "obliged" to mitigate damages.

SURETYSHIP

In *Kliks v. McCaffrey*,[22] Kliks had lent $3,000 to McCaffrey, a used-car dealer, upon McCaffrey's representations that he "had an opportunity to make a good buy on two specific automobiles," that he would later that day give Kliks custody of the titles as security, and that he would repay the $3,000 within thirty days. In fact, McCaffrey had already purchased the automobiles. He did not, however, deliver the titles or repay the $3,000 within thirty days. Kliks sued McCaffrey and his bondsman, Bettis, under section 481.310(2) of the OREGON REVISED STATUTES (1959), which provides:

(2) If any person suffers any loss or damage by reason of the fraud, fraudulent

[21] 5 WILLISTON, CONTRACTS 1353 (rev. ed. 1937); 5 CORBIN, CONTRACTS 1039 (1951).

[22] 350 P.2d 417 (Or. 1960).

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representations or violation of any of the provisions of this chapter by a licensed dealer, he has a right of action against such dealer and a right of action in his own name against the surety upon the bond.

McCaffrey failed to file an answer and the trial judge accordingly directed a verdict against him. However, the court submitted the case against the bondsman, Bettis, to the jury, which found for Bettis.

On appeal, the supreme court properly declined to adopt Kliks's contention that entry of a directed verdict against the principal debtor is binding against his surety. The court based this refusal on the settled principle that, when a debtor's obligation is established by entry of a default judgment, the facts determinative of this obligation have never been the subject of "real inquiry."[23]

[23] ARANT, SURETYSHIP 81 (1931).

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