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# Contracts (1962)

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## CHAPTER 4

# Contracts

FREDERICK M. HART

§4.1. **Introduction.** The 1961 *Annual Survey of American Law* pointed to the Uniform Commercial Code as the most significant development in the law of contracts during recent years.<sup>1</sup> This statute, with its many provisions affecting the rules of offer and acceptance, consideration, unconscionable agreements and other aspects of the contractual relationship, will undoubtedly have a substantial effect upon traditional contract concepts. At the very least, there has been a shift from the Willistonian rigidity to Llewellynian flexibility in contracts involving the sale of personal property. Furthermore, with the natural tendency of some courts to reason by analogy and apply the theme of a statute to situations not technically within its scope, the Code may well have a profound influence upon the supposedly unitary concepts which are thought to run whenever a contract is in question.

The sections of the Code which depart from prior contract principles have been little tested in litigation, but one such case is discussed herein.<sup>2</sup> It is perhaps the most interesting of the 1962 SURVEY year's many decisions; unfortunately it is not one of the best. Also noted are cases on contracts for the sale of real property,<sup>3</sup> options,<sup>4</sup> the legality of contingent fees<sup>5</sup> and damages where a cost-plus contract is breached.<sup>6</sup>

One impression survives the uncertainties of evaluating the cases reported since the 1961 SURVEY was prepared: 1962 was a year of lost opportunities. In a number of cases the courts were presented with interesting issues and the opportunity to improve the law of contracts both locally and generally. Unfortunately, these cases were lost among the multitude of insignificant appellate litigation. This prompts the

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§4.1. 1 Collins, 1961 Ann. Surv. American Law, Contracts (1962).

2 See §4.2 *infra*.

3 See §4.3 *infra*.

4 See §4.6 *infra*.

5 See §4.5 *infra*.

6 See §4.4 *infra*.

suggestion, not novel,<sup>7</sup> that our jurisprudence might be bettered if the courts spent less time rationalizing and justifying their decisions in cases that can be decided by the straight application of established and recognized principles. More time might then be available for consideration of the few difficult cases that arise each year.

§4.2. **Offer and acceptance: Uniform Commercial Code.** An attempted acceptance which varies the terms of an offer has been traditionally treated as inoperative to form a contract. In most cases, courts have gone a step further and held that the offer expires when such a response is made, and that the varying acceptance is a counteroffer which gives the original offeror the power to conclude a contract by assenting to its terms.<sup>1</sup>

The logic of this rule is neat. In practice it usually works well. But in some contexts it undoubtedly negates the existence of a contract when the parties intended and believed that enforceable promises had been exchanged. This may often be true when the transaction involves a sale of goods. In modern mercantile practice the buyer uses one form — an order or purchase blank — while the seller uses another — a confirmation form or acknowledgment. On each form are a number of provisions and, by chance or design, secondary promises and disclaimers often conflict to some degree. When there is agreement as to the principal terms of the sale, it would appear that the law should recognize that an enforceable bargain had been struck.

Such was the belief and intent of the Uniform Commercial Code draftsmen. They attempted to effectuate their thinking in Section 2-207.<sup>2</sup> The degree with which they have achieved this objective was

<sup>7</sup> "Those courts are wise who make a standard practice of sorting out some proportion of their cases for memorandum opinions, thus mobilizing resources for more solid effort where more solid effort is more needed." Llewellyn, *The Common Law Tradition* 312 (1960).

§4.2. <sup>1</sup> See, e.g., *Kehlror Flour Mills Co. v. Lindon & Lindstroem*, 230 Mass. 119, 119 N.E. 698 (1918); *Saco-Lowell Shops v. Clinton Mills Co.*, 277 Fed. 349 (1st Cir. 1921).

<sup>2</sup> "Section 2-207. *Additional Terms in Acceptance or Confirmation.*

"(1) A definite and seasonable expression of acceptance or a written confirmation which is sent within a reasonable time operates as an acceptance even though it states terms additional to or different from those offered or agreed upon, unless acceptance is expressly made conditional on assent to the additional or different terms.

"(2) The additional terms are to be construed as proposals for addition to the contract. Between merchants such terms become part of the contract unless:

"(a) The offer expressly limits acceptance to the terms of the offer;

"(b) they materially alter it; or

"(c) notification of objection to them has already been given or is given within a reasonable time after notice of them is received.

"(3) Conduct of both parties which recognizes the existence of a contract is sufficient to establish a contract for sale although the writings of the parties do not otherwise establish a contract. In such case the terms of the particular contract consist of those terms on which the writings of the parties agree, together with any supplementary terms incorporated under any other provisions of this Act." G.L., c. 106, §2-207.

tested during the 1962 SURVEY year in *Roto-Lith, Ltd. v. F. P. Bartlett & Co.*<sup>3</sup>

In this case, the plaintiff mailed an order to the defendant for a drum of emulsion. The defendant sent an acknowledgment of the order, and subsequently shipped the goods. The acknowledgment bore on its face in conspicuous type the statement, "All goods sold without warranty, express or implied and subject to the terms on the reverse side." On the back of the acknowledgment there were two relevant provisions:

1. Due to the variable conditions under which these goods may be transported, stored, handled, or used, Seller hereby expressly excludes any and all warranties, guaranties, or representations whatsoever. Buyer assumes risk for results obtained from use of these goods, whether used alone or in combination with other products. Seller's liability hereunder shall be limited to the replacement of any goods that materially differ from the Seller's sample order on the basis of which the order for such goods was made.

7. This acknowledgment contains all of the terms of this purchase and sale. No one except a duly authorized officer of Seller may execute or modify contracts. Payment may be made only at the offices of the Seller. If these terms are not acceptable, Buyer must so notify Seller at once.<sup>4</sup>

The plaintiff did not object to this limitation of liability, paid for the goods in due course and used them. The plaintiff claimed that the goods were defective and sued for breach of warranty. The defendant's motion for a directed verdict based on the disclaimer was granted by the district court. On appeal the Court of Appeals affirmed.

The plaintiff appellant contended that the acknowledgment operated as an acceptance under Section 2-207(1), as the acknowledgment was not expressly conditioned upon assent by the offeror to the additional provisions therein. The plaintiff also argued that the exculpatory clause constituted a "material alteration"<sup>5</sup> of the original offer under Section 2-207(2) and hence could not become a part of the contract unless he expressly agreed to it. Since he had not agreed, the plaintiff contended that a contract for sale existed and that the implied warranties of fitness and merchantability set out by the Code<sup>6</sup> had not been effectively disclaimed.

Although admitting that the purpose of Section 2-207 was to alleviate the harshness of the principle that a response not precisely in accord with an offer constituted a rejection and counteroffer, the court held that the section did not go as far as the plaintiff argued. If the plaintiff's position were accepted, this, said the court, would lead to

<sup>3</sup> 297 F.2d 497 (1st Cir. 1962).

<sup>4</sup> *Id.* at 499.

<sup>5</sup> With this the court agreed. *Ibid.*

<sup>6</sup> See G.L., c. 106, §§2-314, 2-315.

an absurdity as no offeror would assent, *after* the formation of a contract, to conditions burdensome only upon him:

It would be unrealistic to suppose that when an offeree replies setting out conditions that would be burdensome only to the offeror he intended to make an unconditional acceptance of the original offer, leaving it simply to the offeror's good nature whether he would assume the additional restrictions.<sup>7</sup>

Having determined what the Code should have done to meet satisfactorily the problem of inconsistent forms, the court still had to decide the case under Section 2-207 as it was written and adopted by the legislature. This presented some difficulty, for it is not easy to reconcile the language of the section with the basic position of the court. Section 2-207(1) provides that ". . . a written confirmation . . . operated as an acceptance even though it states terms additional to or different from those offered . . . , unless acceptance is expressly made conditional on assent to the additional or different terms."<sup>8</sup> The court grasped at the proviso, in effect read out the word "expressly" and came to the result that wherever a confirmation contains terms which materially alter the offer the proviso becomes operative and negates the conclusion that a contract has been formed. Thus the acknowledgment did not constitute an acceptance but a counteroffer which was accepted, with all its terms, by the plaintiff when he received and used the goods. Thus the court used Section 2-207 to reach the same result as the pre-Code law would dictate.<sup>9</sup>

The court's interpretation of the section is unfortunate and clearly contrary to the express wording used by the draftsmen in the section<sup>10</sup> and in Comment 2.<sup>11</sup> Absent an *express* condition in the acknowledgment or confirmation, Section 2-207(1) provides that a contract is formed when the acknowledgment is sent although it contains additional terms. Whether any additional terms become part of this contract depends upon Subsection (2) of Section 2-207.<sup>12</sup> Here, absent assent by the buyer plaintiff, the disclaimer would not be included in the contract as it materially altered the offer.

<sup>7</sup> *Roto-Lith, Ltd. v. F. P. Bartlett & Co.*, 297 F.2d 497, 500 (1st Cir. 1962).

<sup>8</sup> See note 2 *supra* for entire text of Section 2-207.

<sup>9</sup> Note, 9 B.C. Ind. & Comm. L. Rev. 573, 574 (1962).

<sup>10</sup> Corman, *The Law of Sales Under the Uniform Commercial Code*, 17 Rutgers L. Rev. 14, 25 n.67 (1962): "The Court is referring to the last phrase in section 2-207(1). However, this phrase does not provide that a response materially altering the obligation is an acceptance conditioned on assent but that a definite reasonable expression of acceptance operates as an acceptance 'unless acceptance is expressly made conditional on assent to the additional or different terms.' Thus, the attempt to give the statute a 'practical construction' results in a direct violation of the language within §2-207(2)(b)."

<sup>11</sup> Comment 2 states in part: "[A]ny additional matter contained in the writing intended to close the deal or in a later confirmation falls within subsection (2) and must be regarded as a proposal for an added term unless the acceptance is made conditional on the acceptance of the additional terms."

<sup>12</sup> See note 2 *supra* for Section 2-207.

Nor is the Code's position overly harsh on the offeree. He can make his acceptance expressly conditional upon the assent of the offeror to the additional terms. If he does not, but instead sends a communication purporting to be a confirmation of an order, there is no abuse in giving his communication its common-sense effect.

It is interesting to note that the court entirely neglected the easiest route to the result it reached. Paragraph 7<sup>13</sup> of the acknowledgment could easily be held to "expressly condition" the defendant's acceptance on assent by the offeror to the additional terms. If the court had so construed the language of that paragraph, then no contract would have been formed by the communications and Subsection (3) of Section 2-207<sup>14</sup> would control. Under the vague language of Subsection (3) it would seem reasonable to hold that the warranty disclaimer became a part of the contract eventually formed.

**§4.3. Sale of real estate: Anticipatory repudiation: Tender.** Massachusetts is often cited as one of the very few jurisdictions which refuses to recognize the doctrine of anticipatory breach.<sup>1</sup> The statement is accurate only when the anticipatory breach rule is defined in the narrowest way, for the courts of this Commonwealth give relief in practically all situations which courts of other states might conveniently subsume under this heading.<sup>2</sup>

Anticipatory repudiation was involved during the 1962 SURVEY year in the case of *La Vallee v. Cataldo*.<sup>3</sup> The plaintiff had agreed to purchase residential real estate from the defendant for \$7900. The contract contained a provision which made the agreement inoperative unless "the seller . . . delivered a written statement issued by the Federal Housing Commissioner setting forth the appraised value of the property for mortgage insurance purposes of not less than \$7,900 . . ." The plaintiff signed the necessary application for an appraisal, but before the application was processed refused to pay the \$20 fee and told the defendant "that he was not going through with the transaction." In this action, the plaintiff sued for the return of his deposit of \$2000.

The district court held that since the plaintiff had repudiated the contract, it was unnecessary for the defendant to tender the appraisal certificate in order to retain the deposit. The Appellate Division and the Supreme Judicial Court affirmed.

It is generally said that an anticipatory repudiation enables the non-repudiatory party to obtain judgment without performing acts that would otherwise constitute conditions precedent to his right to recover.<sup>4</sup> But it is also generally held that the repudiation does not affect the requirement that the non-breaching party have the ability

<sup>13</sup> Set out in text supported by note 4 *supra*.

<sup>14</sup> See note 2 *supra* for Section 2-207.

§4.3. <sup>1</sup> Simpson, Contracts §144 (1954).

<sup>2</sup> Note, A Century Without Anticipatory Repudiation, 31 B.U.L. Rev. 505 (1951).

<sup>3</sup> 343 Mass. 332, 178 N.E.2d 484 (1961).

<sup>4</sup> 4 Corbin, Contracts §977 (1951).

to perform his obligation under the contract.<sup>5</sup> Thus, if for some reason the non-breaching party could not perform, the repudiator would be relieved from liability. The burden of showing the non-breaching party's inability to perform should be on the repudiator.<sup>6</sup> Although this involves proof of a negative, in the *La Vallee* case it would not be too great a burden since the plaintiff had filed an application with the Federal Housing Administration and their decision would be conclusive.

In the *La Vallee* case, the defendant's failure to obtain an appraisal certificate was held to be an "empty gesture" and not essential to the plaintiff's recovery of the deposit. Several factors support this conclusion. The contract stated that the appraisal was "for mortgage insurance purposes"<sup>7</sup> and that there was evidence that a bank was willing to take the plaintiff's mortgage. Also, if the sole purpose of the condition was to obtain financing, then the repudiation would negate the reason for its being obtained.<sup>8</sup> Finally, since the plaintiff did not indicate in his repudiation that he doubted that the certificate would be issued, the doctrine of estoppel might be used to prevent him from now raising the question.<sup>9</sup>

In short, the *La Vallee* case appears to be within that general class of cases wherein the seller fails to make a tender, or remove an incumbrance by the time of tender, owing to the anticipatory repudiation of the buyer. In such cases there is generally no question of the seller's ability to perform the condition if the sale were to go through. As an example of such cases, *La Vallee* is of scant import, but it seems to go a bit further. Here there may have been some question of the seller's ability to obtain an appraisal certificate as required by the contract. If the plaintiff had successfully proved that the certificate would not have been issued, he should have recovered. It might have been more accurate to assign his failure to prove this inability as the reason for the denial of recovery rather than simply to characterize the procurement of the certificate as an "empty gesture."

One aspect of the case is disturbing. The plaintiff forfeited a \$2000 deposit on property to be sold for \$7900. This is more than 25 percent of the purchase price. Although it is possible that the defendant's damages may have amounted to \$2000, this is unlikely. If they did not, then the forfeiture amounts to a penalty.<sup>10</sup> This question was not raised by the defendant, and the Court cannot be criticized for not considering it, but it is unfortunate that the opportunity for clarification of the law in this area was missed. On their face, the facts presented an appealing case for limiting the application of the forfeiture clause.<sup>11</sup>

<sup>5</sup> Id. §978.

<sup>6</sup> Cf. *ibid.*

<sup>7</sup> *La Vallee v. Cataldo*, 343 Mass. 332, 333, 178 N.E.2d 484 (1961).

<sup>8</sup> Cf. *de Freitas v. Cote*, 342 Mass. 474, 174 N.E.2d 371 (1961).

<sup>9</sup> Cf. 3A Corbin, Contracts §762 (1951).

<sup>10</sup> Cf. *A-Z Servicenter, Inc. v. Segall*, 334 Mass. 672, 138 N.E.2d 266 (1956).

<sup>11</sup> 1955 Ann. Surv. Mass. Law §1.6.

**§4.4. Cost-plus contracts: Damages.** The layman may stand firm on the principle that his handshake is as good as a detailed contract, but a lawyer familiar with litigation is forced to wonder and doubt. The bulk of cases decided during any year in the contract field are caused by misunderstanding of the rights and duties of the parties, a poorly drafted agreement, often homemade, or actual lack of agreement at the time of contracting. Most of these problems could have been avoided if intelligent counsel had been employed at the inception of the contract.<sup>1</sup>

One case decided during the past year is striking in this respect. In *White Spot Construction Corp. v. Jet Spray Cooler, Inc.*<sup>2</sup> the plaintiff agreed to construct a building for the defendant on a cost-plus basis. The agreement was sealed by a handshake, and never reduced to writing, nor were any of the details worked out by the parties, each apparently trusting to the other's good faith. The final cost of the building was not agreed upon, but the plaintiff estimated that it would cost approximately \$150,000, which would include his 10 percent profit. Later, the plaintiff sent a memorandum to the defendant proposing to erect the building for a total of \$156,810, and there was evidence that the cost to the plaintiff would have been \$142,000. The defendant breached the agreement and hired another, who constructed a building on the premises for a total cost to defendant of \$161,000, \$5000 of which was for engineering services.

The plaintiff sued for \$14,200, ten percent of the estimated cost to him. The trial court held that a contract existed, but, in accordance with an instruction from the judge, only nominal damages were awarded. On appeal to the Supreme Judicial Court, the judgment was affirmed. In discussing the question of damages the Court said:

Since the recoverable profits would be a percentage of the actual cost to the contractor of constructing the building, it was essential for the plaintiff to prove with substantial certainty what that cost would have been. This it failed to do. All that appears are estimates made by [the plaintiff] at various times. At one time he estimated that the cost would be \$150,000 more or less; at another, \$156,810; and again, that the actual cost of the work would be \$142,000.<sup>3</sup>

The element of certainty in damages has been explained as "a by-product of the jury system, springing from the lack of confidence of American judges in the discretion of juries."<sup>4</sup> The basic element of the rule of certainty is that the jury must have something more than guesswork to account for their verdict. To assure this, judges exercise

§4.4. <sup>1</sup> See 1958 Ann. Surv. Mass. Law §4.1.

<sup>2</sup> 1962 Mass. Adv. Sh. 1131, 183 N.E.2d 719.

<sup>3</sup> 1962 Mass. Adv. Sh. at 1134, 183 N.E.2d at 722.

<sup>4</sup> McCormick, Damages 101 (1935), citing *John Hetherington & Sons, Ltd. v. William Firth Co.*, 210 Mass. 8, 95 N.E. 961 (1911). This case was heavily relied upon by the Court in the present case.



control over the admission of evidence on the question of damages and, in extreme cases, remove the issue entirely from the jury's hands.

The harshness that the certainty rule might cause if applied with vigor has been abated by numerous exceptions or modifications. Emphasis is placed on the certainty of damage, not upon its amount.<sup>5</sup> Less evidence is required when the difficulty of proof stems from the defendant's act.<sup>6</sup> Mathematical precision is not the required standard,<sup>7</sup> and the best available evidence, although this provides merely a basis for an approximation, will often suffice.<sup>8</sup>

By emphasizing the exceptions to the rule of certainty, the Court in the *White Spot* case could have easily come to the opposite result. Since there was a breach of a bilateral contract, the plaintiff did lose the benefit of the bargain. Since the contract was a cost-plus agreement, it would seem that a profit<sup>9</sup> would necessarily have resulted had there been no breach. Thus, it appears that there certainly was damage. Although the exact amount of loss was not shown, the plaintiff did introduce sufficient evidence to make a jury finding more than mere speculation. All of his figures, the estimated cost, the proposed plans and specifications and the cost of the building eventually constructed by another pointed to a loss of approximately \$15,000. This was the best that he could do.

What the Court demanded, however, was that he prove "with substantial certainty" what the cost would have been. This would seem to be a more rigorous assignment than prior cases have put upon plaintiffs. The *John Hetherington & Sons* case,<sup>10</sup> quoted by the Court, speaks of compensation being computed by rational methods "upon a firm basis of facts" and "a solid foundation of fact." Such language is meaningless out of context, but the general tenor of *White Spot* appears to be toward a stricter application of the certainty test.

§4.5. **Illegal bargains: Contingent fee arrangements.** Ambiguity, if not tergiversation, marks the Massachusetts cases on contingent fee arrangements entered into by attorneys with their clients. In 1823 such agreements were illegal and unenforceable.<sup>1</sup> Indeed, their undesirability went so deep as to prevent recovery on a quantum meruit count for services rendered.<sup>2</sup> However, by 1881, it had been established that the illegality might be painted over by the simple expedient of providing that a debt to the attorney was to arise for the services

<sup>5</sup> *Story Parchment Co. v. Paterson Parchment Paper Co.*, 282 U.S. 555, 51 Sup. Ct. 248, 75 L. Ed. 544 (1931). See Note, 61 Harv. L. Rev. 121 (1947).

<sup>6</sup> *McCormick, Damages* 102 (1935).

<sup>7</sup> *Randall v. Peerless Motor Car Co.*, 212 Mass. 352, 99 N.E. 221 (1912).

<sup>8</sup> See *Orbach v. Paramount Pictures, Inc.*, 233 Mass. 281, 123 N.E. 669 (1919).

<sup>9</sup> Whether the entire 10 percent would constitute "profit" is open to question.

<sup>10</sup> *John Hetherington & Sons, Ltd. v. William Firth Co.*, 210 Mass. 8, 95 N.E. 961 (1911).

§4.5. <sup>1</sup> *Thurston v. Percival*, 1 Pick. 415 (Mass. 1823).

<sup>2</sup> *Ibid.*

even if the cause were lost.<sup>3</sup> This debt, it has been held, must be other than an obligation to pay expenses,<sup>4</sup> but it is doubtful whether it need be more than a formality.<sup>5</sup>

Most lawyers probably find little difficulty staying within the framework of legal contingent fee arrangements. Nor is there likely to be any feeling of guilt over walking close to the borders of champerty. The Supreme Judicial Court has approved their tightrope acts, and in most jurisdictions the very problem is non-existent.<sup>6</sup> Occasionally, however, a lawyer through carelessness, unfamiliarity with this idiosyncrasy of Massachusetts law or a misapprehension of prior cases finds himself in litigation with his client as to the collectability of a fee. Under rather unusual circumstances this issue reached the Supreme Judicial Court during the 1962 SURVEY year in *Sullivan v. Goulette*.<sup>7</sup>

The defendant, administratrix of an estate, hired the plaintiff to prosecute a wrongful death action of her intestate. The attorney's fee was to be a percentage of the recovery: if there were no recovery, there would be no compensation. The plaintiff was successful in the action and he filed a claim against the estate for the agreed percentage. The probate judge recognized the contingent nature of the arrangement but held that there was an implied condition that the contract was subject to the approval of the Probate Court. This, in his opinion, was sufficient to take the case out of the category of illegal champertous fee contracts.<sup>8</sup> The Supreme Judicial Court affirmed on the same narrow grounds, refusing to reconsider the legality of contingent fee contracts in general.<sup>9</sup>

An extended exploration of the problems of contingent fee contracts with emphasis on the Massachusetts position has been recently published elsewhere,<sup>10</sup> and any attempt to treat the basic and broad issues here would be futile. A few comments on the *Sullivan* opinion, however, are appropriate. It is difficult to see any true distinction between the fee arrangement in this case and those that have been held cham-

<sup>3</sup> *Ackert v. Barker*, 131 Mass. 436 (1881). See also *Blaisdell v. Ahern*, 144 Mass. 393, 11 N.E. 681 (1887).

<sup>4</sup> *Holdsworth v. Healey*, 249 Mass. 436, 144 N.E. 386 (1923).

<sup>5</sup> See *Blaisdell v. Ahern*, 144 Mass. 393, 11 N.E. 681 (1887); *Radin, Contingent Fees*, 28 Calif. L. Rev. 587, 589 (1940); Note, 41 Cornell L.Q. 683, 687 (1956).

<sup>6</sup> Apparently only Massachusetts and Maine question contingent fees. See Comment, 20 Ohio St. L.J. 329, 336 nn.44-47 (1959).

<sup>7</sup> 1962 Mass. Adv. Sh. 743, 182 N.E.2d 519. See also §22.11 *infra*.

<sup>8</sup> The probate judge did, however, disallow part of the claim. 1962 Mass. Adv. Sh. at 744, 182 N.E.2d at 522.

<sup>9</sup> "It may be that the subject [of contingent fees] should be dealt with by appropriate court rules. For the decision of the present case, however, it is sufficient to say that we are of opinion that, in the circumstances, the principles set forth in the earlier cases should not preclude payment of fair and reasonable compensation to [the attorney]. In reaching this conclusion, we give special weight to the fact that the compensation to be paid is subject to the approval of the Probate Court. We perceive no considerations of public policy which require denial of all compensation." 1962 Mass. Adv. Sh. at 747, 182 N.E.2d at 523.

<sup>10</sup> Hughes, *The Contingent Fee Contract in Massachusetts*, 43 B.U.L. Rev. 1 (1963).

pertous in earlier decisions. Nor does the fact that the Probate Court has the power to disapprove the amount of recovery seem to mark a valid line of distinction. All courts have such power, and it is inconceivable that they would be closed to a suit testing the amount of a fee in a non-death action. Also, it is not the amount of the fee that under prior decisions made the contract champertous; it was the fact that the amount depended solely on the outcome of the case.

The effect of the *Sullivan* case on the practices of the local bar in accepting cases on what are in fact contingent fees is easy to predict. It will be nil. For those interested in discovering what the "law" of contingent fees might be in this jurisdiction, the *Sullivan* case adds more confusion than light. There is a suggestion<sup>11</sup> at one point that the *Blaisdell v. Ahern*<sup>12</sup> escape hatch has been too broadly interpreted. On the other hand, the general tenor of the opinion, and even the simple fact that it was considered by the Court, may furnish some encouragement to the next lawyer who falls into the contingent fee trap.

**§4.6. Options: Termination.** The 1961 SURVEY<sup>1</sup> discussed at some length a case holding that an option expired before it was exercised when the notice of election was mailed before but arrived after the final day of the option. During the past year another decision, *C. & W. Dyeing and Cleaning Co. v. De Quattro*,<sup>2</sup> emphasized the rule that an option holder must perform strictly in accord with the agreement in order to preserve his rights. In this case the plaintiff was the assignee of a lease. The agreement provided:

The Lessor agrees that if the Lessee within five years . . . shall give to the Lessor two months notice in writing that he desires to purchase the premises . . . for the sum of \$23,000.00, the Lessor on or before the expiration of such notice will convey . . . the premises . . . the said \$23,000.00 to be payable as follows: \$5,000.00 in cash and \$18,000.00 by a promissory note . . .<sup>3</sup>

The five-year period expired on September 1. On June 24 the notice of an election to exercise the option was given, but on August 22 the plaintiff informed the defendant that he was unable to raise the down payment, and he asked for an extension, which was denied. Another such request was made and refused on the next day. On August 31, the plaintiff informed the defendant that he believed he could have the cash available on the next day, and on the 1st of September the plaintiff offered to pay the \$5000, but this was refused. The trial court found as a fact that the plaintiff, in spite of his offer, was actually unable to pay the agreed price on September 1. The plain-

<sup>11</sup> 1962 Mass. Adv. Sh. 743, 745, 182 N.E.2d 519, 522.

<sup>12</sup> 144 Mass. 393, 11 N.E. 681 (1887).

<sup>1</sup> §4.6. <sup>1</sup> 1961 Ann. Surv. Mass. Law §4.4, discussing *Cities Service Oil Co. v. National Shawmut Bank*, 342 Mass. 108, 172 N.E.2d 104 (1961).

<sup>2</sup> 1962 Mass. Adv. Sh. 1257, 184 N.E.2d 61.

<sup>3</sup> 1962 Mass. Adv. Sh. at 1258, 184 N.E.2d at 62-63.

tiff's bill in equity for specific performance was dismissed and this decree was affirmed on appeal.

The plaintiff argued that a bilateral contract for the sale of the premises was formed when he exercised the option on June 24 and that, in equity, time is not of the essence in a contract to convey land. The Court accepted the position that the contract came into existence when the notice was given, but held that the general equity rule was not applicable. From the language of the option and the construction placed upon it by the parties, the Court found an intent that the sale was to be consummated within the five-year period. Since the plaintiff was unable to pay the down payment on September 1, the defendant was under no obligation.

The Court's decision rests upon its interpretation of the option agreement. The general rule, that time is not of the essence, should prevail in the absence of a contrary intent of the parties shown in their agreement.<sup>4</sup> The position of the Court is amply supported as the option agreement states, in effect, two conditions to the plaintiff's right to a conveyance: (1) notice and (2) tender of \$5000 within two months thereafter. The necessity of the tender within two months can be inferred by the promise of the defendant to convey within two months after receiving notice. Since the conveyance and payment are concurrent conditions, the tender must be made within the same period of time.

<sup>4</sup> 1 Corbin, Contracts §273 (1950).