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C O N T R A C T L A W .

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INTRODUCTORY REMARKS - Colonel Irving J. Carr, S.C.

Gentlemen:

This morning we are taking up the subject of Contract Law. In our capacity as procurement officers we are very much concerned with that subject - it is one of the last steps we take in our procurement game to start the manufacturer to work. We first determine what we want and where we can get it; we then make the agreement covering the turning out of that materiel. The next step is the signing of the contract. Therefore the fundamentals of contract law must be known to us. We are not supposed to be contract lawyers but we must know the fundamentals of the subject.

Mr. Dickey is a lawyer in the District of Columbia and is conversant with this subject. He has consented to talk to us this morning and I take great pleasure in introducing Mr. Dickey.

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C O N T R A C T   L A W .

Colonel Carr, Major Rutherford, and Gentlemen:

I came down here this morning to talk to you on the subject of contract law, and I also have in mind a few very interesting jokes to tell you. One of our very delightful attorneys was telling a story the other day which might be of interest to you. During the World War there was a little negro who had entered the Holy Lands and the word was given around that they would make the drive Over the Top at three or four A.M. This poor little negro sat on the hillside and tried to pen a few lines to his Mammy telling her "Here I am tonight sitting on the hillside over here looking into the town where Christ was born, but Oh, Mammy dear, how I wish that I was over there in the town where I was born".

Gentlemen, I feel that one of the most interesting studies we have in law is the subject of contract law. Any lawyer who is not conversant with that subject will find he has a very difficult road to travel throughout his entire legal career, because the law of contract is interwoven with every other branch of the law - involving the law of partnership; the law of agency; the law of negotiable papers, such as a bill of sale, promissory notes, etc. In order to have a proper understanding of any subject of law we must have a fair understanding of the law of contract. I am told that you gentlemen will be brought face to face with this subject in the course of your dealings, so you also must have a fair idea of what the law of contract really is.

However you must not expect that I will be able to cover any thing like the broad subject, of which countless volumes have been written, in the short time we have available for this talk. Prof. Samuel Williston has produced five volumes; Clark two volumes; to say nothing of the thousands of proceedings of courts (almost millions of pages) which take up the law of contract. Of necessity, I can only touch upon some of the high spots.

I might ask you gentlemen, "What is a contract?". You know it is much easier to illustrate a thing than it is to define it. If someone should ask you what a spiral stairway is, the chances are you would say, "A spiral stairway is a stairway that does this" - illustrating by a gesture. I have no doubt everyone of you believe you know what a contract is, but I wonder how many would be able to define a contract without writing and re-writing the definition several times.

I believe the most graphic definition of contract to be this - "A contract is a promise or set of promises<sup>to</sup> which the law attaches legal obligations". That is perfectly satisfactory if you understand the other features of the law of contract, but it does not care for certain essential elements of a contract that must be taken into account if we really are to understand the proper definition. Prof. Anson has defined a contract in these few words - "It is an agreement, enforceable at law, made between two or more persons by which rights are acquired by one or more to acts or forbearances on the part of the other or others".

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Blackstone (whose commentaries are the bane of the law student's existence because he has to take Blackstone's copy up at the outset of his work - and there is nothing more difficult) undertakes to define a contract as follows: "A contract is an agreement based upon sufficient consideration to do or not to do a particular thing".

I believe a free definition of a contract would be something like this. This is not entirely original, nor, however, do I believe that it has been bodily taken from any particular text or opinion of the courts. If in an examination I were asked the question, "Define a contract in your own language", rather than give the definition that I have just quoted I think I would say, "A contract is an agreement between two or more competent parties based upon a valuable consideration to do or not to do a particular thing". That would show you, if you were passing judgment upon my papers, that I knew there was such a thing as "competent" and "incompetent" parties. It would also indicate to you that a contract had to be based on a valuable consideration or else it is not a contract. You have to have competent parties and valuable consideration in order to make a contract.

Who can make a contract? In answering that question it is best not to define the persons who can make a contract but rather the persons who cannot make a contract. In making a clean sweep of this question, I would answer in this manner - "Any person or all persons can make a contract except infants, insane persons, (and the text books written some years ago include drunkards),

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also aliens and corporations to a limited degree. Prior to the time of women's rights countless pages have been written by text writers including married women. I know of no restriction in the District of Columbia that is made concerning married women. I have difficulty in keeping up with the law in this jurisdiction, however. In the District of Columbia a married woman can make any contract that a man can make or an unmarried woman can make.

In the old text books there were six exceptions to the rule that any person can make a contract; eliminating married women you have these five left - infants, drunkards, insane people, aliens to some extent, and corporations limited to the powers of their charters.

Generally classified, contracts may be divided into "expressed" and "implied" contracts. There are few difficulties encountered in dealing with expressed contracts. If I agree to work for you at ten dollars a week and you agree to pay me, that is an expressed contract. If I agree to perform any obligation and you agree to pay me a certain price for it, that is an expressed contract. The terms are distinctly agreed upon.

What is an "implied" contract? An implied contract is one that is not expressed, or that is not wholly expressed. It is implied from the conduct of the parties. Illustration always aids in definitions, as I have told you before. I might go into a grocery store where I am well known and find the clerk very busy.

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I pick up a ham weighing about ten pounds, show it to the clerk and walk out with it. I have not verbally agreed to pay the clerk for that ham. I do not know the market price but the law requires that I will pay as much as the ham is worth that day. I take the ham as an implied promise that I will pay for it.

For another example, say I want an artesian well drilled. I send for a man to do the work and say nothing about the price or terms. When it is completed he sends me a bill for \$650.00. Can he recover \$650 from me? I made an implied promise to pay him for his services. How do we determine the amount that he should receive? We have the alternative of quanto merit - so much as it is worth. If I am of the opinion that the price is excessive, I can decline to pay. True it was an implied contract, but in case of an excessive charge I can get two or more men who are experts in that line of work to look at the job, determine the distance drilled, etc., and they may quote the price of \$400 as being large enough under the circumstances involved. The man may sue me to recover the \$650. I would tender to the court the sum of \$400 as a fair price, being sustained by competent testimony in the courts. If the judge or jury determines that \$400 is a fair charge, the workman cannot get more and cannot get the costs of the trial. That is an example of an implied contract - pay so much as it is worth, no more and no less.

You may get into a taxicab and say to the driver, "Union Station, please". When you get to the Station he tells you that

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the charges are \$1.50; you have not agreed to pay him but the fact that you used his taxi implied a promise to pay as much as it was worth.

We have another division of contracts - the formal and the informal. I dare say the formal contract will be the kind you will deal with in your work. I have seen several and assume that most of the Government contracts are formal in that they are under seal. If it is written out on a typewriter with all the language of a formal contract, reading "whereas", "parties of the first part", "parties of the second part", etc., it may look very formal to the reader but no matter how formidable it may look it is not a formal contract unless it is under seal.

In the old days the red wafer and wax seal were used, but the word "Seal" is just as effective. It is a sealed instrument. What is the advantage of a sealed instrument over the same kind of a looking paper that does not have the word "seal" on it? It does not mean a great deal today, but in the old days it meant a whole lot. A seal imparted or indicated consideration, and in the black letter days of English Common Law you could not construct any testimony that was not founded on valuable consideration. A seal itself conclusively imparts consideration. The fact might be that there was no actual consideration between the parties in a contract, but the word "seal" prevented either of the parties from making the contract void due to lack of consideration. Many of our States have stricken out that old idea of the

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seal because they contend that the courts of today, particularly the Courts of Equity and of Law, will strike down the form. Courts of Equity glory in examining records, substance rather than form, and striking down the form, disregarding pretense and all the pomp and show attached, will go right to the substance of the thing, proving same. The seal of today, in most jurisdictions, creates a prima facie, a presumption in the first instance that it is founded on valuable consideration. We can overcome by evidence that part of a contract which states a consideration was paid; you can make a witness admit that there was no actual consideration. For instance, you would say, "What did you pay?". "I paid \$1,000.00". You cannot get on the witness stand and lie satisfactorily all the way through. When asked the question, "On what bank did you draw the check?", you cannot make your statements dovetail in quickly and properly. So we have instruments under seal, or formal contracts.

Negotiable instruments are formal contracts, also checks, drafts, trade acceptances, promissory notes, etc. Every check you draw is a formal contract; every bill of exchange or draft is a formal contract - those are only two of the formal contracts. Text books say that judgments are formal contracts.

What are informal contracts? Having told you what the formal contracts are, we will now take up the others. Instruments under seal and negotiable contracts are formal contracts; every other contract other than those two are informal. For

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example, if I agree to sell this watch for \$20, and you agree to pay that sum for it, that is an informal contract. Although it was not in writing or under seal it is none the less a contract.

Then there is another class of contracts - those known as the bilateral and the unilateral contract. I dare say that all the Government contracts you come in contact with are bilateral contracts. Those of contracts by and between the parties of the other part and the Government. If the party of the other part agrees to sell certain material to the Government and the Government agrees to pay a certain price therefor, each party assumes a certain obligation. That makes a bilateral contract. If the seller finds another purchaser (other than the Government) who offers him 25% more on the bushel or ton of whatever the commodity might be, he could clear perhaps ten or fifteen thousand dollars more than from the Government. He sends a letter to the Government stating that he is going to sell the material to the higher bidder, refusing to carry out the promise of the contract previously entered into with the Government. The Government then can do one of two things; it can let it go at that or it can go into the open market and buy at the market price, which may be in excess of the contract price. In that case it can sue the man who originally promised to sell to it for the difference between what was originally agreed to be paid and the actual purchase cost. That also is a bilateral contract, the Government being designated as a person and each person having the right of action for a breach of promise. Suppose the Government refuses to buy - and I am not overlooking the fact that normally you cannot sue the Government

except by consent of the Court of Claims. If the Government finds that it has been euchered into a bad bargain with a private corporation and that it could buy the same material for \$20,000 cheaper from another source, refusing to accept the material for that reason, the private corporation could take action against the Government. Its damages would be the difference between the price at which it could then sell the goods and the price the Government had agreed to pay.

The unilateral contract is one in which only one person assumes an obligation. Let me illustrate. Suppose I had a little plot of ground, about forty by forty feet, and say to you that if you will spade up that ground I will give you \$20.00. You undertake to do the work and after having completed seventy-five percent of it decide to quit, demanding \$15.00. I say, "No. When you spade up the entire plot I will give you \$20.00; not until then will I give you any money". You did not agree to spade the land, but I agreed to pay you \$20.00 if you did - only one party assumed an obligation and that is a unilateral contract. A reward offered for the apprehension of a certain person is another example - it is agreed to pay a certain sum of money if the person is apprehended. No one has obligated himself to find that person, but in case the act is performed the person offering the reward is obligated to pay.

There is the contract known as the voidable contract - those which are voidable because they violate some public policy or statutory enactment. For instance, if I ask a man to kill an enemy

of mine, agreeing to pay him \$50 for the act and then refuse to pay, he could not collect the money for he had committed a crime of murder which is a violation of public policy. An attempt to influence by bribery the votes of a legislator; an agreement with the Judge to give him \$500 if he would render a decision in your favor would subject you to criminal prosecution. These are contracts are violates public statutory enactment. Voidable contracts may be described as those that persons enter into that can be voided by one but not by the other. As an example, a young man, eighteen years of age, goes to the Packard Automobile Company and buys a car, pays \$1,000 cash and gives a note for the balance. He is having a grand time in the car and runs it off a precipice, breaking it up. The Packard people sue him on his contract but cannot recover. He is an infant in the interpretation of the law. An infant can not only make the contract voidable but he can also sue the Packard people and recover his \$1,000.

An unenforceable contract is one which is perfectly legal in all respects but due to some legislative requirement cannot be enforced. If you own real estate and want to sell it for \$5,000, I might offer you \$4,500 - \$500 cash and a note payable in three yearly installments, secured by a deed of trust. You accept my offer and I have the papers prepared. I am not in a hurry and let two or three days go by before I take those papers to you. There were four or five mutual friends that overheard our agreement for the purchase and sale. I notify you that I am ready for the signing of the papers, deed, etc. You tell me that you have decided not to sell to me, someone else having offered

you \$6,000. Not wishing to accept a \$1500 loss, you will not comply with the terms of our agreement. I consult a lawyer concerning the specific performance of the contract and he tells me that I have a contract but it is unenforceable because it is not in writing.

For another example, a friend might have come to me and said he needed a suit of clothes - I took him to Parker and Bridget's and introduced him to the man in charge of the Credit Department, vouched for his credit and agreed to pay for the suit in case he failed to do so. When the time came for him to pay he could not be located and Parker and Bridget's requested me to do so. Under the Statute of Frauds they could not hold me in this obligation. The agreement upon which such action could be brought must be in writing and signed by you. A contract upon which no action shall be brought is <sup>not</sup> void and not voidable, but merely unenforceable.

What is consideration? A contract is not good, even if made between legal contracting parties, unless it is supported by a valuable consideration. A consideration may be defined by "that which moves from the promisee to the promisor at the expressed or implied request of the latter in return for his promise". In the eyes of the law it means a valuable consideration. A promise for a promise is a consideration. Any advantage accruing out of your promise to do a thing is consideration. The adequacy of consideration is immaterial. Contract law does not consider the price to be paid. If you agree to sell an automobile worth \$10,000 for \$500 - that is valuable consideration.

I thank you gentlemen very much, and it has been a very great pleasure to see you again.