

November 1923

Building Contracts--Architect's Certificate--Avoidance

R. M. M.

West Virginia University College of Law

Follow this and additional works at: <https://researchrepository.wvu.edu/wvlr>



Part of the [Contracts Commons](#)

Recommended Citation

R. M. M., *Building Contracts--Architect's Certificate--Avoidance*, 30 W. Va. L. Rev. (1923).

Available at: <https://researchrepository.wvu.edu/wvlr/vol30/iss1/11>

This Student Notes and Recent Cases is brought to you for free and open access by the WVU College of Law at The Research Repository @ WVU. It has been accepted for inclusion in West Virginia Law Review by an authorized editor of The Research Repository @ WVU. For more information, please contact ian.harmon@mail.wvu.edu.

excepted where there was a manifest intention to leave nothing undisposed of.⁵

The word "surface" has been variously defined, as the mere *vestmentae terrae*, the top of the earth and whatsoever is on the face thereof;⁶ as not the mere plane surface, but all the land except the mines;⁷ as the non-mineral portion of the land which covers and envelopes the minerals;⁸ and as that portion of the land which is or may be used for agricultural purposes.⁹

The holding of the West Virginia Court marks a salient departure from the rule of *stare decisis*. The case in question overrules previously adjudicated West Virginia cases and is contrary, not only to the weight and preponderance, but so far as the writer has been able to determine, to all the American and English authority on the point. Without going into the merits of the present tendency of the courts towards a relaxation of the rigid rule of adherence to precedents as to the law in general, it is certainly regrettable that the rule should be so clearly violated in the field of real property, where it has hitherto been rigidly applied and where it is especially important that vested rights should not be disturbed.¹⁰

The Supreme Court of the United States is definite in laying down the proposition that a decision overruling a former case does not come within the constitutional prohibition against impairing the obligation of contracts, and that the prohibition only applies to legislative action.¹¹ Although judicial legislation is not unconstitutional, it is submitted that the courts should be slow to change the law where contractual or vested rights will be extinguished thereby.¹²

—W. B. H.

BUILDING CONTRACTS—ARCHITECT'S CERTIFICATE—AVOIDANCE.—
The plaintiff agreed to erect a hotel building in a certain time. The contract provided for extension of time in case of delay with-

⁵ Dolan v. Dolan, *supra*, note 3.

⁶ Wakefield v. Buccleuch, 36 L. J. Ch. 179, L. R. 4 Eq. 613, (Eng. 1867).

⁷ Pountney v. Clayton, L. R. 11 Q. B. Div. 320 (Eng. 1883); Dolan v. Dolan, *supra*.

⁸ Kansas Natural Gas Co. v. Board of Commissioners of Neosho County, 75 Kan. 335, 89 Pac. 750, (1907); Big Six Development Co. v. Mitchell, 138 Fed. 279, 1 L. R. A. (N. S.) 332, (U. S. 1905).

⁹ Williams v. South Penn Oil Co., *supra*.

¹⁰ Clarke v. Figgins, 27 W. Va. 670, (1886); Braxton v. Bressler, 64 Ill. 488, (1872); Sweeting v. Sweeting, 10 Jur. N. S. 31 (Eng. 1863); 34 HARV. L. REV., 74.

¹¹ Central Land Co. v. Laidley, 159 U. S. 103 (1894).

¹² Thomas v. State, 76 Ohio St. 341, 81 N. E. 437, (1907).

out fault of the plaintiff and declared that the extended period should be determined and fixed by the architects. *Held*, in the absence of fraud or bad faith, the decision of the architect is conclusive. *Parke v. Pence Springs Co.*, 118 S. E. 508 (W. Va.).

The point is decided under the rules applicable to contracts to be performed to the satisfaction of a third party. The courts differ as to what conduct on the part of the third party in such case will justify the setting aside of his decision. By the strict English rule, when the contract has made the production of an architect's certificate a condition precedent to payment, a failure to produce the certificate will be excused only where the defendant's own act, as collusion with the architect, has prevented. *Batterbury v. Vyse*, 2 H. & C. 42. In the United States recovery is generally allowed on the contract without acceptance by the architect or other party designated as arbiter if he act fraudulently or in bad faith. *North American Ry. Const. Co. v. McMath Surveying Co.*, 116 Fed. 169; *Utah Const. Co. v. St. Louis etc. Equipment Co.*, 254 Fed. 321; *Foster v. McKeown*, 192 Ill. 339, 61 N. E. 514; *Hebert v. Dewey*, 191 Mass. 403, 77 N. E. 822. Some courts in the United States have gone even further, and hold that the architect will not be permitted to act arbitrarily or unreasonably. *Scully v. United States*, 197 Fed. 327; *Nolan v. Whitney*, 88 N. Y. 648; *Cranch v. Guttman*, 134 N. Y. 45, 31 N. E. 271; *Crilly v. Rinn Co.*, 135 Ill. App. 198; *Taft v. Whitney*, 85 Wash. 389, 148 Pac. 43; *Johnson & Grommet Bros. v. Bunn & Monterio*, 114 Va. 222, 76 S. E. 310; but see *Richmond v. Burton*, 115 Va. 206, 78 S. E. 560. In the principal case the court cites *Plumbing Co. v. Carr*, 54 W. Va. 272, 46 S. E. 458, and *Barrett v. Coal Co.*, 51 W. Va. 416, 41 S. E. 220. These cases hold that where performance of a contract is to be to the satisfaction of a third party the reasons for a rejection by that party cannot be investigated if he act in good faith and not fraudulently. The West Virginia court then seems to be in line with the majority American opinion. It, however, has drawn one distinction or permitted one exception. In an action on a contract providing that construction of a building should be to the satisfaction of an architect and according to plans furnished by the architect the court said, "Arbitrary, capricious or palpably unreasonable refusal, on the part of the architect, to accept, are facts sufficient to justify a jury in setting aside, overthrowing or ignoring an architect's decision." The case is distinguished from *Plumbing Co.*

v. *Carr and Barrett v. Coal Co.*, *supra*, on the grounds that it is a working contract, entailing expense of preparation and permitting large expenditures in execution before determination of disputes. *Berry v. Temple Association*, 80 W. Va. 342, 93 S. E. 355.

—R. M. M.

DOMESTIC RELATIONS—ALIENATION OF AFFECTIONS—RECOVERY FOR PARTIAL ALIENATION—MOTIVE.—A's wife left him for cause, and was living apart. A was attempting to effect a reconciliation, and B, who was on intimate terms with A's wife, was partly instrumental in persuading her to seek a divorce. A sues B for alienation of his wife's affections. *Held*, A can recover if B prevented a resumption of marital relations. The fact that the wife's affections were at least partially alienated before B's intervention does not prevent A's recovery for partial alienation of his wife's affections. *Rush v. Buckles*, 117 S. E. 130 (W. Va. 1923).

This case, while reversed on grounds of error in the trial court, propounds a rule that has been established as law in several other states, under similar circumstances. It is a well-settled rule that a husband can recover from a third party for the alienation of his wife's affections. *Gross v. Gross*, 70 W. Va. 317, 73 S. E. 961; *Ratcliffe v. Walker*, 117 Va. 569, 85 S. E. 575; *Nichols v. Nichols*, 147 Mo. 387, 48 S. W. 947; *Miller v. Pearce*, 86 Vt. 322, 85 Atl. 620, 43 L. R. A. (N. S.) 332. And a famous Missouri case is authority for the statement that complete alienation is not necessary but that if the defendant had induced plaintiff's husband to withdraw from her his support and affection, no secret affection he might still retain for her would defeat her cause of action. *Nichols v. Nichols*, 147 Mo. 387, 48 S. W. 947. That case, as setting a precedent for the decision in the principal case, is directly in point. A further development of the same general principle is illustrated by the rule that even if the wife had no affection for her husband at the time of the suit, recovery would be allowed, for the defendant should not have interfered to cut off all chance for the husband to revive his wife's affections. *Dallas v. Sellers*, 17 Ind. 479, 79 Am. Dec. 489; *Van Vocter v. McKillip*, 7 Blackf. (Ind.) 578. This rule was quoted with approval by the court of another jurisdiction, which added that "As to the claim that there