

1960

## Rock-ola Manufacturing Co. v. Dan Stewart Co., Inc., and Dan Stewart : Brief of Appellant

Utah Supreme Court

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LaMar Duncan; Ronald C. Barker; Attorneys for Appellant;

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**IN THE SUPREME COURT  
of the  
STATE OF UTAH**

**FILED**

JUL 21 1960

ROCK-OLA MANUFACTURING  
CORP.,

*Plaintiff*

vs.

DAN STEWART COMPANY,  
INC., and DAN STEWART,

*Defendants*

Clerk, Supreme Court, Utah

Case No.  
9266

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**BRIEF OF APPELLANT**

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*Attorneys for Appellant*

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## INDEX

	<i>Page</i>
Statement of Case .....	1
Statement of Points .....	2
POINT I. That the Court erred in granting Plaintiff's motion for summary judgment .....	2
POINT II. That the Court erred in entering its judgment and order dismissing Defendants' counterclaim .....	2

## POINTS TO BE ARGUED

1. It is the position of Defendants that the agreement entered into created an exclusive distributor's agreement, which was breached by Plaintiff's permitting others to sell its product in the area defined (Exh. 1) .....	2
2. It is further the position of Defendants that the ruling of the Trial Court enforces the agreement without mutuality; that the condition therein binding upon Defendants were by said ruling not binding upon Plaintiff and therefore lacking in mutuality .....	2
Argument .....	3
Conclusion .....	10

## CASES CITED

Navy Gas & Supply Co. vs. A. A. Schoench, Colo. 98 P. 2nd 860, 126 ALR 1225 .....	3
Baird vs. Baird, 48 Col. 506, 111 Pac. 79 .....	4
Hinkle vs. Blinn, 92 Colo. 302, 19 P. 2nd 1038 .....	4
White Co. vs. Farley & Co., 219 Ky. 66, 292 SW 472, 52 ALR 541 .....	5
Dupont De Nemours & Co. vs. Clairbourne-Rene Co., 89 ALR 238, 64 Fed. 224 .....	9

Hutchings vs. Stevenson, 148 ALR 1320, 141 Tex. 448, 178 SW  
2nd 487 ..... 9

Naify vs. Pacific Indemnity Co., 115 ALR 476, 11 Cal. 2nd 5,  
76 P. 2nd 663 ..... 9

Hoffman vs. Pfingston, 260 Wis. 160, 50 NW 2d 360, 26 ALR  
2nd 1131 ..... 10

AUTHORITIES CITED

Restatement of the Law Agency #449 ..... 3

2 Am. Jur. 44, Sec. 47 ..... 9

**IN THE SUPREME COURT**  
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ROCK-OLA MANUFACTURING  
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Case No.  
9266

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**BRIEF OF APPELLANT**

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**STATEMENT OF FACT**

This is an action filed by Plaintiff to recover \$9,068.28, with interest on a contract for certain commercial phonograph machines.

By stipulation Defendants admitted the owing of the debt, but allege by way of counterclaim, that Plaintiff and

Defendants entered into a written agreement (Exhibit 1-) which was breached by Plaintiff to Defendants' damage in the sum of \$50,000.00.

Defendants were prepared to prove the damages on the counterclaim when Plaintiff made a motion for summary judgment on the ground that there was no genuine issue as to any material fact and that Plaintiff is entitled to judgment as a matter of law, based on the files and records herein and the deposition of Dan B. Stewart.

The motion was argued, submitted and briefs supplied by both sides. Thereafter, the Court granted the motion and dismissed Defendants' counterclaim. It is from this summary judgment that this appeal is taken.

## STATEMENT OF POINTS

1. The Court erred in granting Plaintiff's motion for summary judgment.
2. The Court erred in entering its judgment and order dismissing Defendants' counterclaim. (Tr. 35)

## POINTS TO BE ARGUED

1. It is the position of Defendants that the agreement entered into created an exclusive distributors' agreement, which was breached by Plaintiff's permitting others to sell its product in the area therein defined. (Exh. 1)
2. It is further the position of Defendants that the ruling of the trial Court enforces the agreement without mutuality; that the condition therein binding upon De-

fendants was by said ruling not binding upon Plaintiff, and therefore lacking in mutuality.

## ARGUMENT

We must consider in this case whether or not the contract (Exhibit 1) was an exclusive distributors agreement. As will appear from the other agreements of previous years (Exhibit 2), the word "exclusive" was used but was deleted by this year's agreement.

It is our position that the agreement itself (Exhibit 1) created an exclusive distributors agreement, by the following: (a) the territory in which Stewart might sell is defined. (b) Stewart's guarantee to purchase 96 machines during the year as set forth in par. 5. (c) Stewart's agreement to follow policies and practices relative to prices and delivery of sales as prepared by Rock-Ola in paragraph 14; (d) Stewart's promise that he will "not sell, solicit or receive orders for any products manufactured by any company other than Rock-Ola, which competes with Rock-Ola Equipment, whether current year or prior year equipment" — par. 22.

"Whether or not a principal who has contracted to pay an agent compensation if the agent is successful in accomplishing a definite result promises that he will not compete with the agent, either personally or through another agent, depends upon the manifestation of the parties interpreted in light of the circumstances to which the manifestations are made." Restatement of the Law Agency #449.

In 126 ALR 1225 *Navy Gas & Supply Co. vs. A. A. Schoench*, Colo.-98 P.2nd 860 (1940) at p. 1229. Under

date of the contract, by letter Defendant advised Plaintiff: "As a means of clarification the tank wagon area of Golden, Colo., is defined as follows: Jefferson County with the exception of the S. W. corner which is now being served by the Morrison Auto Supply Co. This will clarify the situation to such an extent that there will be no misunderstanding as to the area you are to serve." By this language of limitation the amendment clearly imports that the Plaintiff should not be allowed to sell Defendants' products outside the sharply defined area indicated and implies exclusiveness therein. Upon the principle approved by us in *Baird vs. Baird*, 48 Colo. 506, 111 P. 79 *Hinkle vs. Blinn*, 92 Colo. 302, 19 P. 2nd 1038, and other similar cases, that the practical interpretation given to the contract by the parties while engaged in its performance and before any controversy has arisen is one of the best indications of their true intent, the Plaintiff, as demonstrative of the exclusive agency construction, introduced evidence to the effect that previously upon at least six occasions he was paid commission by Defendant upon sales made directly to it to construction contractors and to governmental agencies in Plaintiff's territory.

Under the terms of the agency agreement, viewed in the light of the surrounding circumstances, as well as the manner of its interpretation by the parties, we are of the opinion that the trial Court did not err in instructing the Jury as it did on the legal effect of the contract. The fact that it provides that the commissions were to be paid upon such products as are sold by second party and on gasoline and kerosene delivered by him, is not compatible with the exclusive agency interpretation, since if that construction

is accorded, no one other than Plaintiff had authority to sell or deliver Defendants' products in the area. In the case before us Plaintiff was precluded from doing these things by the assumption of this authority by Defendant.

It is well settled that the grant of an "exclusive" agency to sell, i.e. exclusive right to sell the products of a wholesale dealer in a specified territory ordinarily is interpreted as precluding competition by the principal in any form within the area.

The Court held in *White Co. vs. Farley & Co.*, 219 Ky. 66, 292 SW 472-52, ALR 541-1927: "A sales agency contract which assigns the agent certain territory, outside of which he is not allowed to operate in the sale of the principal's motor cars, which requires him to handle no cars or parts, except those manufactured by the principal, and which allows the agent a bonus commission depending upon the amount of his total cash sales, confers an exclusive agency, although it does not specifically so provide." The contract appears to have been prepared by appellant, and does not specifically provide that it is an exclusive contract. Its provisions, as a whole however, are inconsistent with any other view. It not only definitely fixes the area in which appellee is authorized to sell its trucks, but the agent is expressly required not to sell any of Appellant's trucks outside of or to be sold outside of the designated territory, and provides that if the agent violates this provision, the company may immediately cancel the contract. It requires the agent to handle no other commercial motor cars except those manufactured by appellant, and to handle no parts for White Commercial Motor cars, except those manufactured by appellant. It further

provides for the allowance to the agent for an additional discount called a bonus commission, based upon the net amount paid on or before the expiration of the contract, the amount of the bonus commission depending upon the total cash sales during the existence of the contract; and that additional discount is based partially "upon the price the purchaser would have paid hereunder for all standard models of new commercial car chassis above enumerated delivered by the White Company and used in the territory in which the purchaser (agent) hereunder sells White Commercial Motor cars.

Clearly, under these provisions the contract was, intended to be and was considered by the parties, as exclusive agency during its term, and there is no contention in appellant's brief that it was otherwise, it being virtually conceded that appellant, during the life of the contract had no right to invade that territory and sell its trucks so as to deprive appellee of his contract commission."

In the present case we therefore take the position that the contract gave to Stewart an exclusive distributorship. The other agreements for previous years, introduced and received at the pre-trial, used the word "Exclusive" distributor. The word "exclusive" was deleted from the 1959 contract. However, the 1959 distributor's agreement was and is by its terms an exclusive agreement even though the word "exclusive" has been deleted.

The deposition of Dan Stewart shows in 1959 Rock-Ola sold machines to B & G Sales, a competitor of Stewart, and that although the machines were shipped to Uni-Con in Wichita, Kansas, they were immediately sent to B & G sales in Salt Lake City and financed by Rock-Ola (Stewart's

Deposition p. 6). Based on recorded chattel mortgages we were prepared to show that the machines sold in this manner were new machines. This conduct continued all through the year, 1958. Our evidence would have shown, had we been permitted to go on trial, that on several occasions Stewart complained and Plaintiff's representatives promised to look into the matter and stop the B & G sales.

Uni Con was a distributor working out of Wichita, Kansas and was selling in Stewart's territory with financing help from Plaintiff.

This practice continued into 1959 and on January 29, 1959, Mr. Stewart wrote a letter informing Plaintiff that he was being seriously handicapped in carrying out the provisions of his agreement relative to a certain quota of sales. (Stewart Deposition p. 7-8)

Thereafter, Plaintiff not only failed to stop the Uni-Con Sales to B & G but financed them. Further, Plaintiff failed to ship the machines after Defendants sent in sales orders. Defendants were required to purchase machines to fill orders from B & G Sales at their price.

We were prepared to show further that on July 1st, 1959, Mr. Stewart was informed by a letter which he finally received July 7th, 1959, that "because of your failure to maintain said quota for each of said two quarterly periods, and to purchase at least said number of phonographs and said amount of accessories, during each of said two quarterly periods, (provided in paragraph 5 of Distributor's Agreement, Exh. 1) the undersigned Rock-Ola Mfg. Corp. pursuant to Par. 6 of said Distributor's Agreement will, 15 days from date hereof terminate said Dealer's Agreement." (Dan Stewart Dep. p. 21)

Mr. Stewart further testified that at the time of the termination he had in excess of \$6,000.00 in parts for the machines, (Stewart Dep. p. 18) and that he lost \$6,000.00 or \$7,000.00 in sales because he was unable to deliver the machines.

Mr. R. J. Baker, in his deposition (p. 7) testified that the machines which he purchased were financed through Rock-Ola and that payments were made directly to Rock Ole from B & G Sales in Salt Lake City.

Mr. Stewart in his depositions also testified that Rock-Ola financed the machines for B & G (16 Stewart Dep.)

We will show from the serial numbers that the machines sold by B & G Sales were new current models. Some of these machines were routed through Uni-Con in Wichita, while some of them were shipped directly to Salt Lake City from Rock-Ola. Stewart purchased one of these machines and saw the label and serial numbers on the other (Stewart Dep. p. 11-12)

Plaintiff in this case does not appear before this Court asking relief with clean hands. Plaintiff has deliberately misled Defendant on its past transactions and has gone out of its way to put Stewart out of business. Mr. Stewart testified (Dep. p. 23) that: "when you receive a distributorship from a factory like Rock-Ola that you have the territory allotted to you and they will work with you and protect you every way they can, and keep other people from infringing on your territory; and that is the oral part of it.

Q. You say it is understood; now how is it understood?

A. Well that is a practice of the business. For instance, all customers — if they want Rock-Ola Services — they come to the distributor, that is the distributor for Rock-Ola to get it. If they want Seeburg service, they go to a Seeburg Distributor to get it.”

We come now to the further consideration of the lack of mutuality contained in the agreement (Exhibit 1).

2 Am. Jur. 44 Sec. 47: Whether or not a party to an agency may recover damages for a breach of contract based upon the wrongful termination of the agency depends, of course, on whether there is a valid obligation of such nature existing between the parties, which question in turn depends in some cases on whether there is any mutuality of obligation between the parties.

*Hutchings vs. Stevenson* 148 ALR 1320, 141 Tex, 448-178 SW 2d 487.

*Naify vs. Pac. Suden Co.* 115 ALR 476, 11 Cal. 2d 5, 76 Pac. 2d 663.

A contract must have mutuality of obligation, and an agreement which permits one party to withdraw at his pleasure is void.

*Dupont De Nemours & Co. v. Clarbourn-Rene Co.*, 89 ALR 238, 64 Fed. 224: “The rule which requires mutuality of obligation with respect to contracts to be performed in the future where the promise of one party constitutes the sole consideration for the promise of the other arises from the inherent unfairness of enforcing a contract which requires performance by one of the parties while leaving the other party free to accept or reject performance.

In *Hoffman vs. Pfingston* (1951) 260 Wic. 160, 50 NW 2nd 360, 26 ALR 2d 1131, the Court held that the rule that an agreement to supply a buyer according to the requirements of his business is sufficiently definite as to quantity to be enforceable is inapplicable to render valid a contract lacking mutuality because of the absence of a corresponding duty of the Buyer to order.

THE COURT: "The named standard being gone we do not see how Pfingston could have appealed to another which the parties had never referred to, either in the original or in the modified agreement, and this is particularly so where Hoffman had no obligation to give all his time to "Old Tanner" nor to prosecute its development vigorously but was permitted by the contract to engage in another business which did not deal in products similar to "Old Tanner".

"Our conclusions that the contract as modified lacks mutuality and is therefore void makes it necessary to consider propositions that Pfingsten may end it at will because its duration is indefinite. The argument has much force and was resolved in Pfingston's favor by the trial Court, but the solution is not necessary to our determination."

In the present case there is a duty imposed upon the Defendants to sell in the territory defined in the contract (Exh. 1). There was also a duty on the part of Plaintiff to perform under the contract.

## CONCLUSION

Under the circumstances we submit that Defendants did have an exclusive distributorship; that Plaintiff's conduct resulted in Defendants' failure to produce under the

contract. Defendants had done business with Plaintiff for a number of years and had had the exclusive franchise during that time.

Plaintiff had to this point successfully avoided any liability under the contract and has caused the loss which Defendants set forth in their counterclaim, by merely deleting therefrom the word "Exclusive." (Exh. 1)

Respectfully Submitted,

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