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The American Law Institute's Restatement of the Law of Contracts with Annotations to the Washington Decisions

Committee of Washington State Bar Association on Annotations to the Restatement of the Law by the American Law Institute

The American Law Institute's Restatement of the Law of Contracts with Annotations to the Washington Decisions*

Chapter 3

FORMATION OF INFORMAL CONTRACTS**

Topic C. Consideration and Its Sufficiency

Section 84. APPLICATION OF RULES TO A NUMBER OF SPECIAL CASES.

Consideration is not insufficient because of the fact

(a) that obtaining it was not the motive or a material cause inducing the promisor to make the promise, or

(b) that part of it does not fulfill the requirements of sufficiency, or

(c) that the party giving the consideration is then bound by a duty owed to the promisor or to the public, or by any duty imposed by the law of torts or crimes, to render some performance similar to that given or promised if the act or forbearance given or promised as consideration differs in any way from what was previously due, or

(d) that the party giving the consideration is then bound by a contractual or quasi-contractual duty to a third person to perform the act or forbearance given or promised as consideration, or

(e) that it is a promise, and a special privilege not expressly reserved in the promise but given by the law, makes the promise or the whole agreement unenforceable or voidable, or

(f) that it is a promise, performance of which is conditional on either a future or past event, if when the promise is made there is any possibility, or there would seem to a reasonable man in the position of the promisor to be any possibility, that the promise can be performed only by some act or forbearance which would be sufficient consideration.

Comment

a. The various circumstances set out in the Subsections of this Section are specifically stated for the purpose of amplifying general rules stated in previous Sections with reference to questions which have most frequently raised controversy

Comment on Clause (a)

b. As it is the intent of the parties as manifested to one another which determines whether consideration is given in exchange for a promise, it follows that if such an intent is manifested, the motive or the cause is immaterial.

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*The absence of annotations to particular sections of the Restatement indicates that no Washington decisions have been found on the principle therein stated.

**Continued from last issue.

Comment on Clause (b)

c. If something capable of operating as consideration is given, it matters not that other things also given as consideration are in themselves insufficient or that the exchange which the promisor undertakes to give in return is disproportionately great, but if part of the consideration is illegal the whole agreement may thereby become invalid.

d. Compositions with creditors fall within this Clause. The consideration for which each of the assenting creditors bargains may be any or all of the following· 1. part payment of the sum due him, 2. the promise of each other creditor to forego a portion of his claim, 3. forbearance (or promise thereof) by the debtor to pay the assenting creditors more than equal proportions, 4. the action of the debtor in securing the assent of the other creditors. Of these, number 1 is not a sufficient consideration, but each of the other four is sufficient. Numbers 4 and 5 are seldom bargained for in fact, but numbers 2 and 3 are practically always bargained for, by reasonable implication if not in express terms. Still other considerations may be agreed upon in any case.

Comment on Clause (e), P 104.
Comment on Clause (f), P 104.

ANNOTATION

Washington decisions are in accord with this Section.

Subsection (a) Though the fact that an aged man had been supported in the home of his daughter and son-in-law for a number of years may not be consideration for a contract to devise property of the value of $12,000 to the son-in-law, that circumstance may be properly taken into account in determining whether he intended to contract to devise the property in consideration of the son-in-law's promise to support him for the remainder of his life, *Alexander v. Lewes*, 104 Wash. 32, 42, 175 P. 572 (1918).

Subsection (b). Where a contract for the cutting, sale and delivery of all railroad ties on certain land had been partly performed by delivery of some of the ties contracted for and payment therefor, a promise by the vendor to release the vendee from further liability is supported by the promise of the vendee to accept and pay in accordance with the contract for such ties as were then cut and release the vendor from further liability on the contract, though the promise to pay for ties already cut is inadequate as consideration, *LaPlante v. Hubbard*, 125 Wash. 621, 217 P. 20 (1923) a contract to clear about seventeen acres of land in consideration of the use of the same for two years is superseded by the promise of the owner to pay $250 in consideration of the promise of the other party to complete the clearing of the seventeen acres, clear another small tract and surrender the unexpired term of the lease notwithstanding that the promise to complete clearing of the seventeen acres is not good consideration. *Loudon v. Spencer*, 84 Wash. 236, 146 P. 612 (1915), where a steamship company, in consideration of the purchase of shares of its stock for cash, agreed to employ the purchaser as master of its steamship at $200 per month, and, in case he should be discharged, to repurchase, at his option, said shares at par, the sale is absolute and can not be avoided even if the agreement to repurchase should be *ultra vires*, *Olsen v. Northern Steamship Co.*, 70 Wash. 493, 127 P 112 (1912).

Subsection (c). Payment of less than the total amount of an indebtedness upon notes, where a part of the debt was not due, is sufficient consideration for discharge of the notes, *Russell & Co. v. Stevenson*, 34 Wash. 166; 75 P. 627 (1904) payment of interest in advance is sufficient sideration for an agreement to extend the time of payment of a promissory note, *Binnian v. Jennings*, 14 Wash. 677, 45 P. 302 (1906) the giving by a judgment debtor in financial embarrassment of cash and a

note secured by mining stock for a portion of the debt in full discharge thereof, is a valid consideration for discharge of the debt, *Brown v. Kern*, 21 Wash. 211, 57 P.798 (1899) although a subcontractor has contracted to do certain grubbing, represented as not exceeding ten acres, the contractor's subsequent promise to pay additional compensation for grubbing in excess of ten acres is based on a valid consideration, *Zindorf v. Tillotson*, 83 Wash. 472, 145 P 587 (1915).

Subsection (d). While no Washington case has been found expressly announcing the rule of this subsection, it seems to have been applied in the case of *Merchants Bank of Canada v. Sims*, 122 Wash. 106, 209 P 1113 (1922) In that case a bank orally contracted with three promoters of a fish company to extend a credit of $25,000 to the company, without guaranty, in consideration of the promise of the promoters that the company's account should be carried with the bank and its business there conducted. The bank, later, refused to extend credit without a guaranty, whereupon two of said promoters executed a guaranty which recited that it was given in consideration of the bank "dealing" with the company. The bank then advanced to the company amounts aggregating $14,600, but refused to make further advances. In a suit against the guarantors it was held that the bank's breach of contract was a valid defense to the extent that the guarantors were damaged thereby. There was no suggestion that the guaranty was without consideration.

Subsection (e) A contract for the sale of goods of over the value of fifty dollars may be enforced as against the vendor who signed a memorandum thereof as required by the statute of frauds although the vendee has not signed the memorandum and could himself avoid the contract, *Wright v. Seattle Grocery Co.*, 105 Wash. 383, 177 P 818 (1919) a written offer to sell land which is accepted orally may be enforced though the acceptance may be avoided. *Western Timber Co. v. Kalama River L. Co.*, 42 Wash. 620, 85 P 338 (1906).

Subsection (f). A vendor's promise to sell land upon condition that if, in a pending action, his title should be held to be defective, he should not be under obligation to make conveyance, supports the vendee's promise to pay for the land in stated installments and to forfeit all payments made if any installment is not paid when due, and, the vendee having paid some installments but being in default as to others, can not recover from the vendor payments made prior to the title being held defective in said pending action, *Jennings v. Dexter Horton & Co.*, 43 Wash. 301, 86 P. 576 (1906) a promise to repay a loan with interest at a stated time upon condition that the obligation to repay shall terminate in case the payee dies before repayment, is sufficient consideration for the loan, *Compton v. Westerman*, 150 Wash. 391, 273 P 524 (1928) an agreement to sell and deliver lumber alongside steamers at sailing dates to be determined later is supported by an agreement to buy the lumber although the buyer is to have the right to cancel the contract on account of excessive shipping delays, *Kent Lumber & Timber Co. v. Montborne Lumber Co.*, 150 Wash. 377, 272 P 957 (1928).

Considerations, Not Included in the Restatement, Which Are Recognized by Washington Decisions as Sufficient.

1. *Moral obligations.*

The services of a broker in effecting a sale of real estate under an oral contract of employment void under the statute of frauds creates a moral obligation sufficient as consideration to support a written promise made after the rendition of the services to pay the same, *Muir v. Kane*, 55 Wash. 131, 104 P. 153 (1909) *Henneberg v. Cook*, 103 Wash. 685, 175 P 313 (1918) *Grant v. Ten Hope*, 117 Wash. 531, 201 P. 750 (1921) *White v. Panama Lumber & Shingle Co.*, 129 Wash. 189, 224 P. 563 (1924). A promise by a wife to her dying husband, at his request, to pay $10,000 to a foster son who had rendered valuable services over a series of years to his foster parents, but not under any express or implied contract, imposes upon her a moral obligation to perform it which constitutes sufficient consideration for her promise to the foster son to pay him that sum, *Olsen v. Hagan*, 102 Wash. 321, 172 P 1173, 105 Wash. 698, 178 P 451 (1918, 1919).

2. *The consideration for a Contract is Sufficient to Support an Agreement for Its Modification.*

The parties to a contract for the sale of mining claims to be paid for in installments at fixed rates, with interest only after maturity, agreed to modify the contract by postponing the time of maturity of the remaining installments, interest to be paid thereon after maturity as extended, the original contract to "remain in full force and effect in every respect except as modified by this supplemental agreement." The court said, "there having been no default upon the original contract, the consideration of that contract was sufficient to support the modification contained in the supplemental agreement." The court also stated that the supplemental contract called for performance by the purchaser of something in addition to that which was undertaken by him in the original contract. What this was does not appear in the opinion, *Sunset Copper Co. v. Black*, 115 Wash. 132, 196 P. 640 (1921). The Supreme Court has also stated that no new consideration is required to support an agreement modifying a contract in a number of other cases in which the application of the principle announced was not necessary to uphold a modification of contract because there was either new and independent consideration for the modification or the new agreement amounted merely to a waiver of conditions or an election of one of several permissible alternative performances. Thus, in *Carstens v. Burleigh*, 20 Wash. 283, 55 P. 221 (1898), where performance of a carrier's contract for the transportation of cattle was rendered impossible by refusal of a connecting carrier to accept them and by a strike of the carrier's employees, it was held that an agent of the carrier could bind it by a new contract to pay the expense of caring for and feeding the cattle without a new consideration. (That the shipper furnished the services in caring for the cattle, which he was not required to do by the original contract, thus relieving the agent from the necessity of a personal supervision, would, it seems, be an adequate, independent consideration for the new agreement.) An agreement by the parties to a building contract to suspend work until the building owner could raise money with which to carry on the contract, requires no new or independent consideration to support it, *Dyer v. Middle Kittitas Irrigation District*, 25 Wash. 80, 64 P. 1009 (1901). When a contract for the sale of a large quantity of railroad ties had been partly performed, the parties thereto mutually agreed to rescind it except as to ties that were then cut. The court said, "we do not think it is or should be the law that any new consideration was required to make the new agreement enforceable. Every day in the business world men relieve one another from the performance of certain agreements and it has never been thought that any new consideration was necessary to the validity of such agreements. The second agreement was a new contract taking the place of the first, which had not been executed by either of the parties, and the first was a sufficient consideration for the second." *LaPlante v. Hubbard*, 125 Wash. 621, 217 P. 20 (1923). Where a dispute arose as to the volume of flow of water in a well located under a contract by which $500 was to be paid for locating it, provided a flow of 250 gallons in 24 hours was obtained, a supplemental contract providing for a test of volume at a future date and for payment at the rate of two dollars per gallon daily flow as determined by such test, with a further provision that in case the water in the well should be lost and no other water obtained nothing should be payable, requires no new consideration and is supported by the consideration of the original contract, *Winn v. Stanton*, 146 Wash. 328, 262 P 645 (1928).

In *Hunters Cattle Co. v. Carstens Packing Co.*, 129 Wash. 377, 225 P 68 (1924), the court found consideration for the modification of a contract in the mutual agreements of the parties to the modification and did not resort to the consideration for the original contract. In that case while a contract for feeding cattle for the compensation of $9 per ton for hay fed them was still executory, an oral agreement was entered into to modify the same by omitting a requirement therein that cut hay be fed in tight boxes and permitting in lieu thereof the spreading of the hay to be fed on clean snow. The court in holding the agreement not void for want of consideration stated that "while a contract remains executory in a substantial measure on both sides, an agreement to annul or modify on one side is a consideration for an agreement to annul or modify on the

other side." So, also, in *Tingley v. Fairhaven Land Co.*, 9 Wash. 34, 36 P 1098 (1894), where a contract for the sale of logs at $6.50 per thousand delivered at purchaser's mill, was modified by a subsequent oral agreement where the purchaser agreed to waive delivery at the mill and the seller to accept seventy-five cents less per thousand and the purchaser took possession, the court, after stating that the new agreement was enforceable without the actual payment of any consideration, added that the transaction was substantially an abrogation of the contract and was as if, without any previous negotiations or contract, the seller had said to the purchaser, "I will sell you my logs at six dollars and a half per thousand feet for boomage," and the purchaser had replied, "I will take them," and had taken possession of them. Where the parties to a building contract orally agreed, shortly after work thereunder had begun, that the provision in the contract requiring the contractor to give notice in writing of all claims for extra work within ten days of the beginning of such work, should be waived and abandoned and that the contractor should be paid for all extra labor and materials whether written notices of such claims were given or not, the court, in response to the contention that the new agreement was without consideration, said, "No express or independent consideration was necessary. 'The contract, when modified by the subsequent oral agreement, is substituted for the contract as originally made, and the original consideration attaches to and supports the modified contract. *Thomas v. Barnes*, 156 Mass. 581, 31 N. E. 683," (1892) *Long v. Pierce County*, 22 Wash. 330, 348, 61 P 142 (1900). (The agreement recited, constituting merely a waiver of a condition in the contract, would, in accordance with generally accepted principles of law and the provisions of Section 88 of the Restatement, require no consideration.

In *Stofferan v. Depew*, 79 Wash. 170, 139 P. 1084 (1914), a vendor of soldiers' scrip, in consideration of $720 paid therefor, guaranteed in writing in case said scrip should be finally rejected and not allowed, to refund the $720 or furnish the purchaser valid scrip in lieu thereof. Afterward the vendor executed a second guaranty in which he agreed, in consideration of the sale of said scrip, to refund the purchase price of $720 in case the scrip should be rejected by the Department of the Interior as invalid. The court said it was apparent "that the second agreement, as a mutual act of the parties, was made as an amendment to, or in substitution for the original. The substitution of a new contract for an old one in itself constitutes a sufficient consideration," citing *Long v. Pierce County*, 22 Wash. 330, *supra*, 61 P 142 (1900). (If the second guaranty were construed as a designation by the guarantor of the particular alternative performance which he elected to render, it would, seemingly, require no consideration.)

TOPIC D. INFORMAL CONTRACTS WITHOUT ASSENT OR CONSIDERATION

Section 85. ASSENT OR CONSIDERATION UNNECESSARY IN CASES ENUMERATED IN SECTIONS 86-90.

Neither an expression of assent, unless the promise is in terms conditional upon such an expression, nor consideration is requisite for the formation of an informal contract in the cases enumerated in Sections 86 to 90.

Comment

a. The cases referred to in this Section are exceptions to the general rule stated in Clauses (b) and (c) of Section 19. The requirements stated in Clauses (a) and (d) of that Section are not affected. The limiting effect of Section 93 should also be observed.

Section 86. PROMISE TO PAY A DEBT IS BINDING THOUGH THE DEBT IS BARRED BY THE STATUTE OF LIMITATIONS.

(1) Except as stated in Section 93, a promise to fulfill all or part of an antecedent contractual or quasi-contractual

duty for the payment of money due from the promisor, other than a judgment, is binding if the antecedent duty was once enforceable by direct action, and is either still so enforceable or would be except for the effect of a statute of limitations.

(2) The following facts operate as such a promise as that stated in Subsection (1) unless other circumstances indicate a different intention.

(a) A voluntary acknowledgment to the obligee, admitting the present existence of such an antecedent duty as is described in Subsection (1),

(b) A voluntary transfer of money, a negotiable instrument, or other property to the obligee of such an antecedent duty as is described in Subsection (1), if made as interest thereon, or part payment thereof or collateral security therefor by the obligor, or by an agent of the obligor whose authority so to act was not given irrevocably before the antecedent duty was barred;

(c) A promise to the obligee of such an antecedent duty as is described in Subsection (1) not to plead the Statute of Limitations as a defense to an action thereon.

(3) An executor, administrator, trustee or guardian who makes such a promise as that stated in Subsection (1) cannot by so doing impose a duty upon the estate which he represents. Nor will he be personally bound unless he was bound by the antecedent duty

Comment

a. The promises included under this Section, but not the part payments or giving of negotiable instruments or collateral security, are required by statutes enacted in most States to be evidenced by a signed writing in order to be operative. In a few States, however, no writing is required in any case. In a few other States part payment or giving of security imposes no duty on a debtor unless accompanied and characterized by a writing.

b. The antecedent duty must be for the payment of money but it need not be for a liquidated sum and it may be under seal. An antecedent duty under a judgment is not, however, included.

ANNOTATION

Washington decisions, except as noted below, are in accord with this Section.

Remington's Code, Section 176, provides that "No acknowledgment or promise shall be sufficient evidence of a new or continuing contract whereby to take the case out of the operation of this chapter (on limitation of actions), unless the same is contained in some writing signed by the party to be charged thereby· but this section shall not alter the effect of any payment of principle or interest." A new promise, to remove the bar of the statute, must be in writing even if the original cause of action be regarded as consideration for the new promise, *Zuhn v. Horst*, 100 Wash. 359, 170 P. 1033 (1918)

Subsection (1). A city ordinance, creating a special fund for the payment of street improvements for which warrants had been drawn against

a prior special fund which had become exhausted by its misappropriation, renders the city liable to pay the warrants out of the second special fund, although a tort action for misappropriation of the first special fund is barred by the statute of limitations, *Quaker City Bank v. Tacoma*, 27 Wash. 259, 67 P 710 (1902). A community debt, past or present, is sufficient consideration for a joint promise of husband and wife to pay it, *Lumbermen's National Bank v. Gross*, 37 Wash. 18, 79 P 470 (1905) *Northern Bank & Trust Co. v. Graves*, 70 Wash. 411, 140 P 328 (1914). (The provisions of Section 85, *supra*, is that in such case consideration is *not necessary*).

Remington's Code, Section 3416, provides that "Value is any consideration sufficient to support a simple contract. An antecedent or pre-existing debt constitutes value * * *"

Subsection (2) (*a*)

Subsection (2) (*b*). *Effect of part payment.* Remington's Code, Section 177, provides that "When any payment of principal or interest has been or shall be made upon any existing contract, whether it be a bill of exchange, promissory note, bond or other evidence of indebtedness, if such payment be made after the same shall have become due, the limitation shall commence from the time the last payment was made."

Payment of interest in advance tolls the running of the statute to the time to which interest is paid, *Miller v. Miller* 90 Wash. 333, 156 P. 8 (1916).

Payment must be voluntary. Where a grantee of mortgaged lands has been compelled to redeem a portion thereof from execution sale under a personal judgment against the mortgagor upon notes secured by the mortgage, such involuntary payment will not operate to extend the statute of limitations as against an action of foreclosure upon the mortgage indebtedness remaining unpaid, *Hanna v. Kasson*, 26 Wash. 568, 67 P 271 (1901) payments by an administratrix on a lawful claim against the estate for family expenses are not voluntary and do not toll the statute upon her separate statutory liability for family expenses, *Haddad v. Chapin*, 153 Wash. 163, 279 P. 583. (1929)

What constitutes payment. Indorsements by the payee of a note of partial payments thereon after action on the note was barred by the statute of limitations, are not admissible in evidence of the fact of actual payment, *Schlotfeldt v. Bull*, 18 Wash. 64, 50 P 590 (1897) judgment for the amount of an indebtedness secured by a mortgage and foreclosure of the mortgage does not toll the statute as to parties claiming an interest in the property who were not made parties to the foreclosure proceedings, *Damon v. Leque*, 17 Wash. 573, 50 P. 485 (1897) *Hanna v. Kasson*, 26 Wash. 568, 67 P 271 (1901) There is, in effect, a cash payment sufficient to remove the bar of the statute where, at the request of a debtor, credit was given by the creditor on the debt to the amount of an independent debt, not barred by the statute, due to the debtor from the creditor, the debtor promising orally to pay the balance of said account shortly, *Eureka Cedar Lumber & Shingle Co. v. Knack*, 95 Wash. 339, 163 P 753 (1917). (This case seems to go beyond at least the literal provisions of this Subsection which requires a "transfer of money a negotiable instrument, or other property")

Transfer of property must be as interest, part payment or collateral security. Where delivery of property to a claimant whose claim was barred by the statute appears to have been intended as a gift rather than as a part payment it will not revive the claim, *Pinnell v. Copps*, 149 Wash. 578, 271 P 882 (1928).

Payment must be by the obligor or his agent. Part payment by one of two co-obligors does not extend the period of limitations as to the other where he did not authorize the payment or participation therein as his own act, *Perkins v. Jennings*, 27 Wash. 145, 67 P 590 (1902) payments made on a promissory note by a principal do not stop the running of the statute in favor of a surety where he has not ratified such payments, *Bassett v. Thrall*, 21 Wash. 231, 57 P 806 (1899) payments of principal and interest by a husband upon a note executed by husband and wife for a separate debt of the husband and secured by a mortgage on community realty, will not extend the time of the running of the statute as against the wife, *Stubblefield v. McAuliff*, 20 Wash. 442, 55 P 637

(1898). But in *Catlin v. Mills*, 140 Wash. 1, 247 P. 1013 (1926), it is held that a payment of interest by the husband upon the note of husband and wife for a community debt after the statutory period of limitations has run, revives the note as against the community by virtue of Remington's Code, Sections 6892, 6893, conferring upon the husband the management and control of the community property and making him the community agent. Payments by a mortgagor upon a mortgage indebtedness after conveyance of the mortgaged premises will not extend the running of the statute against the grantee without his consent, *Hanna v. Kasson*, 26 Wash. 568, 67 P. 271 (1901) nor as against a judgment creditor of the mortgager who has bought the property under execution sale, *Raymond v. Bales*, 26 Wash. 493, 67 P. 269 (1901). Where the statute has barred foreclosure of a mortgage, no act of the mortgagor will revive it as against a subsequent lienholder, *Devoe v. Rundle*, 33 Wash. 604, 74 P. 836 (1903), nor as against a purchaser of the equity of redemption, *Damon v. Leque*, 17 Wash. 573, 50 P. 485 (1897) Payments by a mortgagor on account of a mortgage indebtedness toll the statute of limitations as to a prior grantee of the equity of redemption who did not record his deed, *Bode v. Rhodes*, 119 Wash. 98, 204 P 802 (1922) payments on a first mortgage by the mortgagor while in possession of and holding title to the land after giving a second mortgage will toll the statute against an action to foreclose the first mortgage, *Hess v. State Bank of Goldendale*, 130 Wash. 147, 226 P. 257 (1924) Where judgment on a partnership note was entered against the partnership and one of the partners personally, his partial payment of the judgment will not revive the obligation against a partner not served in the action after the statute of limitations has run on the note in the absence of express authority to make such payment. *Northern Commercial Co. v. Big Four Trading Co.*, 86 Wash. 589, 150 P. 1151 (1915) part payment of a note by the maker will toll the statute of limitations as to guarantors thereof if they authorized or ratified the payments, *Van de Ven v. Overlook Mining & D. Co.*, 146 Wash. 332, 262 P. 981 (1928) part payment of a note by a joint maker out of his own funds tolls the statute as to him, *Old Dominion Mining Co. v. Daggett*, 38 Wash. 675, 80 P. 839 (1905). Credits of partial payments do not toll the statute unless payment was authorized or ratified by the debtor, *Arthur & Co. v. Burke*, 83 Wash. 690, 145 P. 974 (1915) payment on a joint note by one of the makers will toll the statute as to the other maker where he knowingly permitted it to be made and afterward ratified the application, *Sanders v. Brown*, 123 Wash. 611, 212 P. 1070 (1923).

A company check made for the company by an officer who was also a joint maker of the company's note, is not thereby individually authorized or ratified so as to toll the statute as to such officer, *Farmers & Mechanics Bank v. San Poil, etc., Co.*, 126 Wash. 137, 217 P. 707 (1923) payment of interest by the grantee of an equity of redemption while he held the legal title to the land, though not personally liable for the mortgage debt, tolls the statute of limitations for foreclosure of the mortgage, both as to him and as to his subsequent grantees, *Lihl v. Schaeffer*, 134 Wash. 168, 235 P. 26 (1925) payment of interest by trustees to whom a debtor had conveyed his property for the benefit of creditors by a trust mortgage vesting the trustees with full authority to make extensions of time for the payment of the indebtedness, does not toll the statute of limitations, it not clearly appearing that the debtor intended that the trustees should have power to do so, *Berteloot v. Remillard*, 130 Wash. 587, 228 P. 690 (1924).

Subsection (3). In accord with this subsection is *Bank of Montreal v. Buchanan*, 32 Wash. 481, 73 P 482 (1903), holding that a community debt of husband and wife barred by the statute of limitations after death of the wife and appointment of the husband as her executor, would not be made a charge against the community estate by the renewal notes of the husband whether such notes were executed in his capacity as executor or as survivor of the community.

North Pacific Mortgage Co. v. Sieler 146 Wash. 530, 264 P. 4 (1928), however, holds that payments by an executor upon mortgages of the testator not barred at the time of his decease, will toll the statute as against devisees under a non-intervention will in which the executor was

directed to pay the debts and settle the estate. (This case seems contrary to the provisions of this Subsection. The authority conferred upon the executor by the will to pay the debts would not, according to Subsection(2) (b) of Section 86, empower the executor, by a part payment, to toll the statute as the authority to pay the debts was given irrevocably before the antecedent duty was barred.)

Section 87 PROMISE TO PAY A DEBT DISCHARGED IN BANKRUPTCY IS BINDING.

Except as stated in Section 93, a promise to pay all or part of a debt of the promisor, discharged or dischargeable in bankruptcy proceedings begun before the promise is made, is binding.

Comment

a. In a few States only are the promises described in this Section required to be in writing in order to be e nforceable.

ANNOTATION

A new promise, though oral, to pay a debt, made after the filing of a petition in bankruptcy for its discharge, will revive the debt if the promise be clear, distinct and unequivocal, *Vachon v. Ditz*, 114 Wash.11,194 P 545 (1921) likewise if such promise is made after the discharge, *Parker v. Smith*, 144 Wash. 24, 255 P 1026 (1927). A letter of a bankrupt in reply to a demand by an administrator for payment of indebtedness to his intestate discharged in bankruptcy stating, "regret that I can not comply with your request. I had expected to do something of that kind last spring but unexpected matters prevented me. * * * I have paid quite a few of the old losses, expect to pay more, and the next one shall be the family of my departed friend," is not sufficient to revive the debt under the rule that the new promise must be clear, distinct and unequivocal, "an expectation to pay or a present intention to pay can not be construed as a promise to pay" *Coe v. Rosene*, 66 Wash. 73, 118 P. 881 (1913) *Brennen v. Bolotin*, 148 Wash. 263 semble, 268 P 1118 (1928)

The theory of the Washington cases is that the new promise revives the old debt. *Parker v. Smith, supra.*

Section 88. PROMISE TO FULFILL A DUTY IN SPITE OF NONPERFORMANCE OF A CONDITION IS BINDING WHEN.

(1) Except as stated in Subsection (2) and in Section 93, a promise to fulfill all or part of an antecedent conditional duty in spite of the non-fulfillment of the condition is binding, whether the promise is made before or after the time for fulfilling the condition, if performance of the condition is not a substantial part of what was to have been given in exchange for the performance of the antecedent duty, and if the uncertainty of the happening of the condition was not a substantial element in inducing the formation of the contract;

(2) If a promise such as stated in Subsection (1) is made before the time of fulfilling the condition has expired and the condition is some performance by the promisee or other beneficiary of the contract, the promisor can make his duty again subject to the condition by giving notice of his intention so to do before there has been any substantial change of position by the promisee or beneficiary and while there is still reasonable time to perform the condition.

Comment

a. A promise may be conditional on receiving some performance regarded as the equivalent of the performance in the promise, as a promise to sell a horse if the promisee pays $500 for him. A promise may also be conditional on the happening of some event, or the performance of some act which is little or no part of the agreed exchange for the performance of the promise, but fixes the time or manner in which the promise is to be performed. In this last class of cases a promise to disregard the condition is operative.

b. The new promise may be made either before the time for the performance of the condition or after that time has elapsed. If made before the time for the happening of the condition, the new promise naturally induces failure to perform the condition, and if it does so the promisor cannot assert as an excuse a failure that he himself brought about (see Section 279). A new promise subsequent to the time of the happening of the condition cannot have this effect. The failure of the condition discharges the original duty, but the new promise subjects the promisor to a new duty, as where an insurer promises to carry out a policy in spite of default in some minor condition, or where a guarantor, indorser, or other surety promises to be bound as such in spite of lack of a requisite notice or of the creditor's failure to exercise diligence in presentment or in the prosecution of his claim against the principal debtor or against the promisor himself, or in spite of variation of the duty of the principal debtor to the creditor.

c. It is immaterial how the promisor manifests his intention to fulfil the prior duty without the performance of the condition thereof. Whether he speaks of waiver or uses other words in this connection is of no consequence, if the undertaking to perform is made plain.

ANNOTATION

Washington cases are in accord with this Section.

Subsection (1) A provision for stipulated damages in case of failure by defendant to plant a tract of plaintiff's land to apple trees as early in the spring of 1912 as the weather would permit and to plant a cover crop between the rows at the same time is waived where the plaintiff wrote a letter to defendant on May 20th, knowing that the planting was then in progress, that it would be satisfactory if the cover crop were planted by September 1st, *Sledge v. Arcadia Orchards Co.*, 77 Wash. 477, 137 P. 1051 (1914). Where the agent of an insurance company promised the insured to indorse upon a policy in the agent's possession, consent for removal of insured goods from one building to another the agent having power to make such indorsement, and the goods were destroyed after removal and before the indorsement of such consent, the insurer is estopped from setting up the neglect of its agent to relieve itself of liabilities, *Henschel v. Oregon Fire, etc., Inc. Co.*, 4 Wash. 476, 30 P. 735 (1892) provision in a building contract that no alterations be made in the work therein specified except upon a written order of the architect, may be waived by an oral agreement to pay for extra work, *Gehri v. Dawson*, 64 Wash. 240, 116 P. 673 (1911). A clause in a fire insurance policy that no action on the policy shall be sustainable unless commenced within six months after the fire, is waived by the statement of an adjuster having apparent authority to act for the insurer, that the insurer desired to wait until other companies having insurance upon the goods insured had acted and that the insurer would do what the other companies did, *Staats*

v. Pioneer Insurance Ass'n, 55 Wash. 51, 104 P 185 (1909). Failure to notify a surety for a building contractor of the contractor's default within thirty days as required in the bond of the surety is waived, when, after receiving notice of such default the surety requested the building owner to complete the work at the surety's expense, *Eiler's Music House v. Hopkins*, 73 Wash. 281, 131 P. 838 (1913).

Subsection (2) Where the vendor of real estate, under a contract by which the vendee was to pay the balance of the purchase price in monthly installments and time was of the essence of the contract, accepted several installments after their maturity and, upon accepting payment thereafter of several installments in advance, agreed that the vendee could make payments of the balance of the purchase price whenever convenient and that no advantage would be taken of the forfeiture clause, he can not forfeit the contract for non-payment of a subsequent installment until after demand for the installment due and the lapse of a reasonable time to meet the demand, *Whiting v. Doughton*, 31 Wash. 327, 71 P 1026 (1903) Bodin *v. Wilcox*, 129 Wash. 208, 224 P. 558 (1924) *Cunningham v. Long*, 134 Wash. 433 235 P 964 (1925).

Section 89. PROMISE TO PERFORM A VOIDABLE DUTY IS BINDING.

Except as stated in Section 93, a promise to perform all or part of an antecedent contract of the promisor, theretofore voidable by him, but not avoided prior to the making of the promise, is binding.

Section 90. PROMISE REASONABLY INDUCING DEFINITE AND SUBSTANTIAL ACTION IS BINDING.

A promise which the promisor should reasonably expect to induce action or forbearance of a definite and substantial character on the part of the promisee and which does induce such action or forbearance is binding if injustice can be avoided only by enforcement of the promise.

ANNOTATION

The Washington decisions upon the rule of this Section appear to be divided.

A subscription for the erection of a Young Men's Christian Association building can not be avoided after work has been done or expenditure made in reliance of the subscription, *Young Men's Christian Ass'n v. Olds Company*, 84 Wash. 630, 147 P 406 (1915) the rule of this case is also announced in *DePauw University v. Ankeny*, 97 Wash. 451, 166 P. 1148 (1917) and in *Ellison v. Keith*, 117 Wash. 648, 202 P. 241 (1921), though in both of the cases last cited there appears to have been consideration sufficient to support the subscriptions made. The holder of an overdue mortgage, upon which a large amount of interest was also due, who promised the mortgagor to remit $1,500 from the amount of the unpaid interest and to reduce the rate of interest from 7 per cent to 5 per cent on condition that the balance of the back interest be promptly paid, can not, after the lapse of three years, assert the invalidity of the promise for want of consideration, where the mortgagor, in reliance on the promise made, has remained in possession of the property for three years and paid not only the overdue interest unremitted but additional interest under the modified agreement to the amount of more than $3,000, *Hidden v. German Savings & Loan Society*, 48 Wash. 384, 93 P 660 (1908) But in *Mitchell v. Pirie*, 38 Wash. 691, 80 P 774 (1905), it was held that a promise to devise land to the promisor's sister could not be enforced after the death of the promisor although the sister, in reliance on the promise, moved with her family from Massachusetts upon the land in Washington and kept house for the promisor until his death, it not appearing that any return for the promise was requested or expected, and where lands were conveyed to a corporation as an endowment for educational purposes, no consideration being requested or expected from the grantee, the assumption by the grantee of an indebtedness against the

land and the incurring of expense in conducting a school thereon would not constitute consideration to prevent reversion of the land to the grantor upon abandonment of the trust by the grantee, *Jenkins v. Jenkins University*, 17 Wash. 160, 49 P. 247 (1897).

Section 91. PROMISES ENUMERATED IN SECTIONS 86-90 IF CONDITIONAL ARE PERFORMABLE ONLY ON HAPPENING OF CONDITION.

If a promise within the terms of Sections 86, 87, 88, 89 and 90 is in terms conditional or performable at a future time the promisor is bound thereby, but performance becomes due only upon the happening of the condition or upon the arrival of the specified time.

ANNOTATION

Where improvement warrants drawn upon a special fund were not paid because of misappropriation of the fund, an ordinance, passed after the right of action for the misappropriation is barred, creating a special fund for the payment of said warrants, makes the warrants collectible, but only out of the special fund and in accordance with the terms and conditions of the ordinance, *Quaker City National Bank v. Tacoma*, 27 Wash. 259, 67 P. 710 (1902).

The rule of this Section has been applied to promises to perform contracts *void* under the statute of frauds. Thus, the recovery of a broker for services performed in the sale of real estate under oral contract of employment is limited to the amount which the employer, after rendition of the services, has promised in writing to pay and is dependent upon all terms and conditions of said promise, *Rossea v. Rosche*, 153 Wash. 54, 279 P. 80 (1929) *Sims v. Olympia Holding Co.*, 153 Wash. 254, 279 P. 575 (1929).

Section 92. TO WHOM PROMISES ENUMERATED IN SECTIONS 86-89 MUST BE MADE.

The new promise referred to in Sections 86, 87, 88 and 89 must be made to the person to whom the money is then due, or to the promisor's surety or co-principal or indemnitor.

Comment

a. The word surety is used to include everyone who is bound on an obligation, which as between himself and another person, also bound to the obligee for the same performance, the latter obligor should discharge. Thus an indorser or a guarantor is a kind of surety

b. The promisee may be the original obligee or an assignee, and after the new promise is made, as well as before, the right of the promisee will be negotiable or assignable, depending on the character of the original duty and of the renewal promise.

ANNOTATION

This section is in accord with the following Washington cases:

A deed reciting that it is subject to a certain mortgage is not such acknowledgment of the mortgage as to toll the statute of limitations, *Boyer v. Price*, 45 Wash. 667, 85 P. 1106 (1906) *Byrnes v. Payne*, 103 Wash. 260, 173 P. 1091 (1918) but payment on a promissory note to one with whom it was left for collection will stop the running of the statute, *Warnock v. Itawis*, 38 Wash. 144, 80 P. 293 (1905).

Section 93. PROMISES ENUMERATED IN SECTIONS 86-89 NOT BINDING IF MADE IN IGNORANCE OF FACTS.

A promise within the terms of Sections 86, 87, 88 or 89 is not binding unless the promisor knew or had reason to know the essential facts of the previous transaction to which

the promise relates, but his knowledge of the legal effect of the facts is immaterial.

Section 94. STIPULATIONS.

Agreements with reference to a proceeding pending in court, made by attorneys representing adverse parties to the proceeding, are not deprived of legal operation because of lack of consideration, nor, if made in the presence of the Court, because made orally If not made in the presence of the Court, a writing is generally required by statute or rule of court.

Comment

Such agreements as are within the rule stated in this Section are called stipulations. In some States if a stipulation is not made in the presence of the Court, other formalities than a writing, such as filing in court, are requisite for its validity

ANNOTATION

Washington decisions are in accord with this Section.

A stipulation to dismiss a pending personal injury case, made in writing and directed by plaintiff's attorney to the court upon being paid a specified, agreed sum by defendant, is more than an accord and satisfaction, being an agreement for final disposition of the case. The court is bound to carry it into effect unless it should appear to him to be improper and unconscionable, and the plaintiff is bound by it until it is properly set aside. *State ex rel. Gould v. Superior Court*, 151 Wash. 413, 276 P. 98 (1929). A stipulation in a pending case may be vacated, in the discretion of the court, on motion, where it was entered into under a mutual mistake of fact, *Levy v. Shehan*, 3 Wash. 420, 28 P. 748 (1892). Oral stipulations made out of court are not binding, *Livesley v. Pier* 9 Wash. 658, 38 P 158 (1894).*

HARVEY LANTZ.**

*To be continued.

**Late Professor of Law, University of Washington.