Washington Law Review

Volume 38
Number 2 *Washington Case Law—1962*

7-1-1963

Contracts—Promissory Estoppel—Forbearance

Kenneth O. Jarvi

Follow this and additional works at: https://digitalcommons.law.uw.edu/wlr

 Part of the Contracts Commons

Recommended Citation

Kenneth O. Jarvi, Washington Case Law, *Contracts—Promissory Estoppel—Forbearance*, 38 Wash. L. Rev. 289 (1963).
Available at: https://digitalcommons.law.uw.edu/wlr/vol38/iss2/5

This Washington Case Law is brought to you for free and open access by the Law Reviews and Journals at UW Law Digital Commons. It has been accepted for inclusion in Washington Law Review by an authorized editor of UW Law Digital Commons. For more information, please contact lawref@uw.edu.

Judge Hunter stresses the purpose of the constitutional provisions —to protect against benefit to private parties at public expense. If this be correct, private bodies might receive gifts or privileges when the result would be to contribute primarily to the public welfare. He suggests this on the theory that the benefits derived by the public are a sufficient consideration for the "gift" or grant.[23]

In any case, the fact that utilities have been granted free use of the highways suggests that some gratuitous benefits—whether they be privileges, immunities, gifts, or loaned credit—have been justified when a public purpose is served. It is, of course, difficult to draw the line between public purpose and private advantage, especially when they are so often intermixed. The present decision, however, provides little help in defining that line.

WAYNE BOOTH, JR.

CONTRACTS

Promissory Estoppel—Forbearance. The Washington court in *Weitman v. Grange Ins. Ass'n.*,[1] enforced a gratuitious promise by a promisor-insurer that it would notify the promisee-insured of any lapse or termination in his insurance coverage.

The promisee had the policy in his possession and thus knew the date upon which the policy was to terminate. The date of termination passed, but because of the insurer's promise the insured-promisee failed to procure insurance which was available from another source. The court held that the insured had not only relied in fact upon his insurer's promise, but also that he had been legally entitled to do so. Consequently the insurer was obligated to pay for fire loss occuring after the policy's termination date. The court stressed the fact that the promisor had on two prior occasions notified the promisee that his insurance coverage was suspended. It had little difficulty in determining that on the date of policy termination the promisee could again rely on the promised notice.

The *Weitman* decision suggests that the Washington court may have

---

[23] State Highway Comm'n v. Pacific Northwest Bell Tel. Co., 59 Wn.2d 216, 227, 367 P.2d 605, 612 (1961) (dissenting opinion); State *ex rel.* Tattersal v. Yelle, 52 Wn.2d 856, 329 P.2d 841 (1958).

[1] 59 Wn.2d 748, 370 P.2d 587 (1962).

clarified its thinking about one detail of enforcing gratuitous promises. That is, that forbearance is a sufficient change of position[2] by the promisee to hold the promisor to his promise. The Washington court has frequently recognized[3] the promissory estoppel doctrine of RESTATEMENT, CONTRACTS § 90 (1932):

> 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.

However, in *Hazlett v. First Federal Sav. & Loan Ass'n*[4] (an earlier case with facts similar to *Weitman,* but which was not discussed or cited in *Weitman*) the court considered arguments based upon the Restatement theory and found them inapplicable. It said that promissory estoppel is available only if the promisee can show sufficient forbearance,[5] a showing not made in the case at bar.

Hazlett involved an oral promise to obtain insurance. The plaintiff-mortgagor had applied to defendant mortgagee for a loan, for which the property in question was to be security. The mortgage provided that the mortgagor was to keep the property insured and that the mortgagee was not responsible for failure to have insurance placed upon the premises. When the subject of insurance arose during negotiations, the mortgagee indicated he would "take care" of it along with other details necessary to complete the transaction. The mortgagee failed to procure any insurance, but the mortgagor believed the mortgagee's statement to be a promise and, relying upon it, failed to take any action himself. Subsequently, a fire destroyed the property. When the mortgagor brought an action to recover for breach of contract, the Washington Supreme Court found for the defendant. After stating that the parol evidence rule prevented admission of the oral promise as evidence to interpret the mortgage agreement, the court went on to say that even if the oral promise had been independent and subsequent, it was

---

[2] That forbearance can be a change of position seems paradoxical. However, "change of position" is more illustrative than "reliance" that the promisee has failed to take action to protect his rights.

[3] Recognized but not applied in Spooner v. Reserve Life Ins. Co., 47 Wn.2d 454, 287 P.2d 735 (1955); Hill v. Corbett, 33 Wn.2d 219, 204 P.2d 845 (1949); State v. Northwest Magnesite Co., 28 Wn.2d 1, 182 P.2d 643 (1947). Recognized and applied in Luther v. National Bank of Commerce, 2 Wn.2d 470, 98 P.2d 667 (1940).

[4] 14 Wn.2d 124, 127 P.2d 273 (1942).

[5] To the court in *Hazlett* sufficient forbearance meant only "active" forbearance. Since forbearance means failure to act, it seems meaningless to say that forbearance can be either "passive" or "active."

gratuitous and unenforceable.[6] The court noted that gratuitous promises were enforceable if the promisor had begun to perform or if he was in fact a broker or insurance agent. Since neither exception[7] applied, the promise in *Hazlett* was not enforced.

The impact of *Hazlett* on the Washington law of gratuitous promises was two-fold. First, by blind adherence to stare decisis in relying on *Hudson v. Ellsworth*[8] it gave new vitality in this jurisdiction to the then obsolete[9] gratuitous agency and bailment theories.[10] Its second effect was two-fold. First, by blind adherence to stare decisis in relying on arising from the court's choice of language.[11] This second effect of *Hazlett* arose because of the court's eagerness to adhere to its past position, even though the promisee had in this case argued promissory estoppel to the court. To sustain its gratuitous agency premise the court was forced to refute the promissory estoppel argument. This was done in a summary fashion after a review of the Restatement

[6] The court relied upon Hudson v. Ellsworth, 56 Wash. 243, 105 Pac. 463 (1909), a decision during a period of contract law when the courts enforced gratuitous promises only if a bailment or agency relationship could be found, and only if the promisor only had begun performance of his promise. Finally legal scholars, recognizing in actuality the courts were giving effect to a justified change of position by the promisee relying upon the promise, formulated the Restatement doctrine. See 4 ALI PROCEEDINGS 107 (1926). For a discussion of the historical evolution of the promissory estoppel principle See Boyer, *Promissory Estoppel: Principal from Precedents* 50 MICH. L. REV. 639, 873 (1952) ; Shattuck, *Gratuitous Promises—A New Writ?* MICH. L. REV. 908 (1937).

[7] Each of these exceptions presents a situation which makes it easily ascertainable to the court that the promisor by initiating his act is inviting reliance by the promisee. Before the Restatement rule was drafted, the courts required extensive activity by the promisor before the promisee would be justified in relying upon the promise to the extent of obtaining enforcement. See Shattuck, *Gratuitous Promises—A New Writ?* 35 MICH. L. REV. 908 (1937).

[8] 56 Wash. 243, 105 Pac. 463 (1909).

[9] An obsolescence that in some jurisdictions has not been realized because the purpose of Restatement § 90 has not been comprehended. Recent decisions based upon that theory are: Lester v. Marshall, 143 Colo. 189, 352 P.2d 866 (1959); Brunelle v. Nashua Building & Loan Ass'n, 95 N.H. 391, 64 A.2d 315 (1949); Spiegel v. Metropolitan Life Ins. Co., 6 N.Y.2d 91, 160 N.E.2d 40 (1959); Dallas Title & Guaranty Co. v. Jarrell, 320 S.W.2d 696 (Tex. Civ. App. 1959).

[10] These theories refuse to hold the gratuitous agent or bailee liable on the basis of an executory promise. The situation changes, however, if the promisor has begun to carry out his promise. The relationship which is then established requires the gratuitous agent or bailee to act with "due care." No change in effect on the promisee occurs. In each situation (whether executory or executed) the promisee relies upon the promised performance and is injured because of his reliance. In one instance the promisor takes no action (he may, for example, fail to procure insurance) but he is not liable because he has not undertaken to do anything. However, should the promisor begin performance under the gratuitous agency theory, as obtaining insufficient coverage or an invalid policy, then the promisor has failed to use "due care" and will be liable. In each case the injury and reliance are identical; the only difference is that the court can say in the latter case that the promisor should be able to expect the promisee's reliance. See, Boyer, *Promissory Estoppel, Principal from Precedents* 50 MICH. L. REV. 639, 873 (1952); Shattuck, *Gratuitous Promises—a New Writ?* 35 MICH. L. REV. 908 (1937).

[11] See text accompanying note 4 *supra.*

illustrations.[12] Since the court could not find among them an active[13] forbearance example, it concluded "Surely, forbearance was not intended to include the mere passive failure of the promisee to procure elsewhere, or by other means, the service or the thing promised."[14] This failure to comprehend what is meant by forbearance may be excused not only by the compelling commands of stare decisis, but also by realizing that the court was looking at the Restatement at the threshold of its development. Had the court endeavored to determine the basis of the Restatement definition, it would have learned that the purpose of Section 90, in clarifying[15] an uncertain area of contract law, was to enforce promises such as that made in the *Hazlett* case.[16] Now twenty years later, the *Weitman* case demonstrates that the court is re-oriented on the forbearance question, as it has accepted without question what was contemplated as forbearance by the Restatement framers.

Decisions from other jurisdictions support the *Weitman* position. In *Lusk-Harbison-Jones, Inc. v. Universal Credit Co.*[17] the plaintiff re-

[12] RESTATEMENT, CONTRACTS § 90 (1932), Illustrations:
"1. A promises B not to foreclose for a specific time, a mortgage which A holds on B's land. B thereafter makes improvements on the land. A's promise is binding.
"2. A promises B to pay him an annuity during B's life. B thereupon resigns a profitable employment, as A expected that he might. B receives the annuity for some years, in the meantime becoming disqualified from again obtaining good employment. A's promise is binding.
"3. A promises B that if B will go to college and complete his course he will give him $5000. B goes to college and has nearly completed his course when A notifies him of an intention to revoke the promise. A's promise is binding.
"4. A promises B $5000, knowing that B desires that sum for the purchase of Blackacre. Induced thereby, B secures without any payment an option to buy Blackacre. A then tells B that he withdraws his promise. A's promise is not binding."

[13] See text accompanying note 4 *supra*.

[14] 14 Wn.2d 124, 131, 127 P.2d 273, 277 (1942).

[15] Llewellyn, *The Rule of Law in Our Case-Law of Contract*, 47 YALE L.J. 1243 at 1252, n.25 (1938): "Is § 90 of the Contracts Restatement, or § 45 a 'new' doctrine? The cases say: Both are rather belated *explicit* doctrine." See 4 ALI PROCEEDINGS 106 (1926). There Professor Williston explains that the cases involving reliance on gratuitous promises are a special group and that if the law in this area is to be simplified then section 88 (present section 90) must be included within the Contracts Restatement.

[16] While the illustrations at note 12 *supra* do not present a situation where, through failure to act, the promisee has manifested a reliance, it does not seem likely that the Restatement doctrine was meant to exclude such a form of reliance. Non-existence of such an example presented the court with an easy basis for distinguishing the Restatement proposition deciding *Hazlett* on the basis of stare decisis. This observation is based upon ALI PROCEEDINGS 106-109 (1926) where Professor Williston discusses cases which he felt came within the Restatement doctrine. Among these was "a recent New York case" which allowed recovery from promisee's reliance on a promise to procure insurance. Forbearance from procuring insurance was sufficient reliance to allow recovery. The case alluded to must be Siegel v. Spear & Co., 234 N.Y. 479, 138 N.E. 414 (1923).

[17] 164 Miss. 693, 145 So. 623 (1933).

lied upon a confidential pamphlet distributed to it by Universal Credit Co. This pamphlet stated that when dealers repossessed cars from delinquent purchasers "insurance protection for dealers interest will continue in force until such account is liquidated, after which the dealer should provide such insurance as he may require." The plaintiff, a dealer, refrained from procuring insurance. After the repossessed automobiles were damaged, suit was initiated and the Mississippi court, without discussion and relying solely on the Restatement theory, held that the forbearance in reliance on the circular's representation was sufficient.

In *W. B. Saunders Co. v. Galbraith,*[18] a widow promised to pay her deceased spouse's debt to the plaintiff, who refrained from filing a claim against deceased's estate. Thereafter, the widow gave a note and mortgage to secure the debt. When the plaintiff sued to foreclose, the defense was want of consideration. The Ohio court refused to entertain the defense, saying that the promise reasonably induced the plaintiff to forbear asserting its claim against the estate at a time when it would have been effective.[19] While the number of appellate decisions on the forbearance element is small the decisions evidence a proclivity to follow the expressed intention of the American Law Institute.[20]

KENNETH O. JARVI

[18] 40 Ohio App. 155, 178 N.E. 34 (1931).

[19] In contrast to the Washington court in *Hazlett,* the Ohio court accepted the Restatement approach enthusiastically, saying; "we are content, however, to take the restatement as the law of this state without exploring its soundness, and hold that of its own vigor it is adequate authority." *Id.* at 156, 178 N.E. at 35-36 (1931).

See McCowen v. McCord, 49 Ga. App. 358, 175 S.E. 593 (1934) for a similar result on nearly identical facts, and Schafer v. Fraser, 207 Or. 446, 290 P.2d 190 (1955) where the court concludes that reliance upon an attorney's promise to prorate the cost of a law suit among several litigations was sufficient reason for promisee's forbearance from seeking alternative relief.

[20] Within the past fifteen years, California has developed a substantial body of law on this point of the Restatement doctrine.

In Van Hook v. Southern California Waiters Alliance, Local 17, 158 Cal. App.2d 556, 323 P.2d 212 (1958), a union officer had been promised by the local that he would get retirement benefits if he remained with the local. He refused an outside position. This forbearance was sufficient; the court enforced the contract when the union failed to provide the retirement benefits. For other promises involving retirement benefits which were enforced under section 90 involving identical forbearance see West v. Hunt Foods, 101 Cal.App.2d 597, 225 P.2d 978 (1950) and Hunter v. Sparling, 87 Cal.App.2d 711, 197 P.2d 807 (1948). The Federal court has also enforced this type of promise, Gill v. U.S. Rubber Co., 195 F.Supp. 837 (N.D. Ind. 1961).

Graddon v. Knight, 138 Cal.App.2d 577, 292 P.2d 632 (1956) involved an implied promise by the bank to the borrower that the bank would insure the residence upon which the loan was sought. Relying upon this promise the borrower failed to procure insurance. The court held the promise enforceable under section 90.

In Wade v. Markwell & Co., 118 Cal.App.2d 410, 258 P.2d 497 (1953) a pledgor refrained from redeeming a valuable coat, relying upon the pledgee's promise to hold the coat for another week. When the coat was sold within the week the pledgor was allowed to recover under the Restatement.

Edmonds v. Los Angeles County, 40 Cal.2d 642, 255 P.2d 772 (1953) involved a