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**Contracts—Tender—Place of Performance;  
Contracts—Consideration—Pre-existing Duty—Promissory  
Estoppel; Criminal Law—Corpus Delicti; Negligence Per  
Se—Railroads—"Trap Rule"; Usury—Borrower's Remedy—Statutory  
Construction**

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## RECENT CASES

**CONTRACTS—TENDER—PLACE OF PERFORMANCE.** An option contract, for the sale of mining stock, was executed in Washington. The mining properties were in California, but the company was incorporated in Washington, and though it was understood that the buyer resided in British Columbia, it was not clear that the seller intended, or that the buyer understood that the seller intended to return to California. Nonetheless, the seller returned to California. The buyer notified the seller that he was exercising the option, and stood ready to pay in Washington, but no tender of payment was ever made. *Held:* Tender was not necessary. Readiness and ability to pay were sufficient, as the buyer is not bound to follow the seller out of the state. Damages were allowed against the seller for the failure to deliver the stock. *Kingston v. Anderson*, 3 Wn. (2d) 21, 99 P. (2d) 630 (1940).

Ordinarily, to put the other party in default in a contract, one must make a tender. Two things are usually considered necessary<sup>1</sup> for a valid tender: ability and willingness to perform at the time and the place fixed by the contract, and a manual proffer or putting into position where the obligee may accept it. A mere readiness to tender is not equivalent to a tender. 6 WILLISTON, CONTRACTS (2d. ed., 1936) § 1808; *Rottman v. Hevener*, 54 Cal. App. 485, 202 Pac. 334 (1921); *Wooton v. Dahlquist*, 42 Idaho 121, 244 Pac. 407 (1926).

Where the contract has not fixed either expressly or impliedly, the place of performance, it is normally set by law as the place of business of the obligee. 3 WILLISTON, CONTRACTS (2d. ed., 1936) § 836; *Barkey v. Brown, Inc.*, 186 N. Y. S. 144 (1921); *Weyand v. Park Terrace Co.*, 202 N. Y. 231, 95 N. E. 723, 36 L. R. A. (N. S.) 308 (1911).

But the rule is subject to the exception, applied in the instant case. That is, where no place is fixed by the contract, and the parties thereto remove to different states, the contract is performable in the state where the contract was executed. *Brown v. Hill*, 280 Pa. St. 1, 124 Atl. 184 (1924); *Gill v. Bradley*, 21 Minn. 15 (1874); *Weyand v. Park Terrace Co.*, *supra*.

It is therefore not required that the obligor follow the obligee beyond the state where the contract was made, since the performance is due there. It is sufficient tender if the debtor stands ready to pay within the state. LITTLETON, § 304, 2 Co. LIT. (3d ed. 1813) 55; *Brown v. Hill*, *supra*; *Gill v. Bradley*, *supra*; *Smith v. Smith*, 25 Wend. (N. Y.) 405 (1840); *Allshouse v. Ramsay*, 6 Whart (Pa.) 331, 37 Am. Dec. 417 (1841); *Weyand v. Park Terrace Co.*, *supra*; cf. *Chambers v. Slethei*, 136 Wash. 84, 238 Pac. 924 (1925).

Most of the authorities cited by the court in the instant case were concerned with money debts. These too, however, hold that an effective tender can be made by the obligor without following the obligee out of the state.

F. A. P.

**CONTRACTS—CONSIDERATION—PRE-EXISTING DUTY—PROMISSORY ESTOPPEL.** X promised P that he would provide her a good home and devise to her all his property upon his death if she would give up her hospital and nurse him for the rest of his life. She left her business and lived with X, marrying him after the first two weeks. P fully performed her part of the bargain. In this action against X's administrator, the defendant claims

that the consideration, *i. e.*, the care for life, was a duty of a wife and hence invalid consideration. *Held*: For *P. Luther v. Natl. Bk. of Commerce*, 2 Wn. (2d) 470, 98 P. (2d) 667 (1940).

The court applied two rules as a basis for its holding: (1) If part of the consideration requested for a promise is insufficient, the other, if sufficient, will support the contract; and (2) quoting § 90 of the RESTATEMENT, CONTRACTS (1930), which the court cites: "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."

The few cases litigated where the parties to the contract for services thereafter intermarry have not taken either view expressed by the Washington court. The majority hold that the marriage causes the consideration for the contract to fail. *In re Callister's Estate*, 153 N. Y. 294, 47 N. E. 268, 60 A. S. R. 620 (1897); *Dockery v. Ryan*, 134 Wis. 431, 114 N. W. 820, 126 A. S. R. 1025, 15 L. R. A. (N. S.) 491 (1908); *Bohanan v. Maxwell*, 190 Iowa 1308, 181 N. W. 683, 14 A. L. R. 1004 (1921); *In re Sonnicksen's Estate*, 23 Cal. App. (2d) 475, 73 P. (2d) 643 (1937). *Contra*: *Bartley v. Greenleaf*, 112 Iowa 82, 83 N. W. 824 (1900).

However, in all but one case, *In re Sonnicksen, supra*, the rendition of the services was the only consideration bargained for by the promisor. In the *Sonnicksen* case, the fact that the promisee as part of the bargain left the nursing profession to care for deceased was not considered; the court merely stating that the marriage contract superseded the services.

The rule adopted by the Washington court, that although the services rendered be considered insufficient consideration, leaving the hospital, an act also bargained for, would support the promise, seems the better rule. See 1 WILLISTON, CONTRACTS (2d ed. 1936) § 134, 12 AM. JUR. 612 § 118, RESTATEMENT, CONTRACTS (1932) § 84(b). This rule, however, applies only to those cases where the promisee has in fact fully performed. Where subsequent intervention has not only invalidated part of the consideration, but precluded the promisor from receiving that part, the promisor cannot be held on the agreement. 6 WILLISTON, CONTRACTS (2d ed., 1936) §§ 1759 and 1939.

The employment of § 90 here is novel. How far will the Washington court go in invoking this principle when the act done in reliance on the promise was bargained for and fails as consideration because it was the performance of a pre-existing duty? Since most of the cases in which the consideration fails under the doctrine of *Foakes v. Beer* (L. R. 9 App. Cas. 605 (H. L. 1884)) are cases in which there has been in fact rendition of the antecedently owed performance, the idea presented in the phase of the instant case, would, if carried to its logical extreme, practically abrogate that doctrine. See Comment (1941) 16 WASH. L. REV. 42 (this issue).

H. K.

CRIMINAL LAW—CORPUS DELICTI. A federal statute made it a crime falsely to represent oneself to be a citizen of the United States. In registering to vote, defendant swore that he was born in the United States, whereas the government charged that he was born in Italy and had never been naturalized. The government introduced in evidence the Affidavit of Registration and defendant's extrajudicial confession that he had been

born in Italy. *Held*: conviction reversed on the ground that the confession was not corroborated by independent evidence of the *corpus delicti*. *Gulotta v. U. S.*, 113 F. (2d) 683 (1940).

This decision suggests the question as to just what constitutes the *corpus delicti*. The authorities are uniformly vague. "*Corpus delicti*" is defined as the body or substance of the offense [*State v. Jackson*, 142 La. 540, 77 So. 196 (1917); *State v. Smith*, 65 Mont. 458, 211 Pac. 208 (1922); *Morris v. State*, 109 Neb. 412, 191 N. W. 717 (1922); 14 AM. JUR. 758; 16 C. J. 771; MILLER, CRIMINAL LAW No. 27; UNDERHILL, CRIMINAL EVIDENCE No. 35 (3d ed. 1923)], the essential elements of the crime, [*People v. Watters*, 202 Cal. 154, 259 Pac. 442 (1927)], the existence of a criminal fact [*State v. Nordall*, 38 Mont. 327, 99 Pac. 960 (1909); *State v. Johnson*, 95 Utah 572, 83 P. (2d) 1010 (1938)], that a crime has been committed [*State v. Fitzsimmons*, 338 Mo. 230, 89 S. W. (2) 670 (1935); 1 WHARTON, CRIMINAL LAW (12th ed. 1932) No. 346-7; 7 WIGMORE, EVIDENCE (3rd ed. 1940) No. 2072].

None of these definitions aid us in distinguishing between the essential elements of a criminal act, and merely incidental facts. Under the factual situation in the instant case, one view would be that the criminal fact or *corpus delicti* is simply the swearing as to citizenship. The statement, "I was born in the United States," was the complete crime, and the fact that he was actually born in Italy is merely a secondary and supporting fact forming no part of the *corpus delicti*. The other view would be that the mere act of swearing to citizenship was colorless and perfectly legitimate without proof that the swearing was actually false (here, that defendant was born in Italy); consequently, that proof of the *corpus delicti* necessarily included proof of his birth in Italy.

There seems to be no authority either way on this question. The point was not raised in the principal case, being apparently conceded by the government. If we consider the crime in the same category as perjury, then falsity would be an essential element (48 C. J. 824) and so part of the *corpus delicti*. But as a practical matter, independent proof of place of birth might be impracticable if not impossible in a citizenship case.

J. S. A.

NEGLIGENCE PER SE—RAILROADS—"TRAP RULE". In an action for wrongful death, the evidence showed that plaintiff's decedent was killed when the truck in which he was riding at night struck the side of a moving freight train at a grade crossing. No warning signs had been erected and the statutory signals had not been sounded. On appeal from judgment on demurrer, *held*: that the demurrers should have been overruled and the case sent to the jury. *Schofield v. Northern Pacific Railway Co.* 4 Wn. (2d) 512, 104 P. (2d) 324 (1940).

The trial court had based its ruling on the general rule that when a railroad train actually occupies a crossing the train itself supersedes all other warnings and gives actual notice by its own presence. *Reines v. Chicago, M. St. P. & Pac. R. Co.*, 195 Wash. 146, 80 P. (2d) 406 (1938); *Webb v. Oregon-Washington Railroad & Navigation Company*, 195 Wash. 155, 80 P. (2d) 409 (1938). The appellate court, in a five to four decision, held that "there is an exception to this general rule where the situation is unusual or extrahazardous, or constitutes a situation in the nature of a trap" and cited as authority *Licha v. Northern Pac. R. Co.*, 201 Minn. 427, 276 N. W. 813 (1937) and *Christensen v. Willamette Valley R. Co.*, 139

Ore. 666, 11 P. (2d) 1060 (1932), where it was held to be a question for the jury. The Washington authority relied upon was the case of *Ulrich v. Columbia & Cowlitz R. Co.*, 189 Wash. 668, 66 P. (2d) 853 (1937) where it was held that while there could be no recovery in that case as a matter of law, it was therein recognized that if a situation was unusual or extra-hazardous, or constituted a trap, the question would be one for the jury.

The majority and minority split company on the question of whether or not this exception, called the "trap rule", was recognized in Washington. This controversy could have been avoided and the case decided entirely on the fundamental principles of negligence. It is better for the courts not to become involved in the use of such labels as the "trap rule."

The Washington court found itself faced with the broad general rule, and yet, five judges believed it would be inequitably applied in the present situation; so they tried to weaken the strictness of the rule by finding an exception where the situation was one they called a "trap." The court is to be commended in breaking away from the general rule, but it is unfortunate that it chose the exception method in so doing. This exception—the "trap rule"—is just as bad and arbitrary as the general rule itself.

The difficulty with which the court is confronted is traceable to its too ready acceptance in former cases of what is no more than arbitrary generalization of a standard of conduct in the form of an inflexible rule. At its worst, it brings a result which is astonishing and unjust; at its best, the doubtful benefit of a rubber stamp decision. It should be recognized that such a method of adjudication is inherently faulty when applied to the negligence problem, since each case is, with rare exceptions, unique and to be decided on its own particular circumstances. Until uniformity of fact can be assured, uniformity of conduct and result are neither to be expected nor desired. For an extreme example of the absurd results sometimes reached by ironclad rules of what constitutes due care, see *Benner v. Philadelphia & R. Ry.*, 262 Pa. 307, 105 Atl. 283 (1918).

Thus the court wisely rejected in *Mattingley v. Washington-Oregon R. & Navigation Co.*, 153 Wash. 514, 280 Pac. 46 (1929) the "stop-look-listen" rule for railroad crossings laid down in *Baltimore & Ohio Railroad Co. v. Goodman*, 275 U. S. 66, 72 L. Ed. 167, 48 S. Ct. 24 (1927), and the "drive within vision" rule for the operation of vehicles on the highway (as to which, see 11 WASH. L. REV. 264) in *Morehouse v. City of Everett*, 141 Wash. 399, 252 Pac. 157 (1926) on the ground that both were too strict and rigid.

The recognition of the so-called "trap rule" by the majority in the instant case as an escape from the rule relied on by the trial court is as equally unsound in principle as the general rule itself, and for precisely the same reasons. It is submitted that both should be rejected and each case decided on its own facts, with the normal opportunity afforded to take cases from the jury on the usual grounds.

J. G.

USURY—BORROWER'S REMEDY—STATUTORY CONSTRUCTION. Plaintiff borrowed money from defendant at a usurious rate of interest, giving collateral security for the loan. He brought this action in equity for an accounting, contending that inasmuch as the total sum of payments made, income from collateral, and the statutory usury penalty of double the interest paid

plus accrued unpaid interest (REM. REV. STAT. § 7304) was greater than the balance due on the loan, plaintiff should have a judgment for the difference and for return of the collateral. *Held*: Plaintiff must do equity and return the amount actually received with lawful interest thereon, and "lawful interest" means, not the 6 per cent provided in REM. REV. STAT. § 7299 to prevail in absence of agreement between the parties, but the 12 per cent maximum allowed by the usury statute, REM. REV. STAT. § 7300. *The Goodwin Co. v. National Discount Corp.*, 105 Wash. Dec. 450, 105 P. (2d) 805 (1940).

Statutes giving the borrower under a usurious contract a set-off of the interest or multiples thereof in an action by the lender, or declaring the contract void, or imposing criminal penalties, do not preclude his maintaining an action at law in the nature of assumpsit for money had and received to recover interest paid, or an action in equity for relief from the usurious bargain. 2 POMEROY, EQUITY JURISPRUDENCE (4th ed. 1918) § 937; cases collected, 27 R. C. L. 269, n. 14.

Where the borrower seeks to recover interest paid, the theory of his action is that it has been wrongfully taken, and since it is taken wrongfully only because prohibited by statute, he can recover only the excess over the maximum rate allowed by statute. WEBB, USURY (1899) § 338; 1 STORY, EQUITY JURISPRUDENCE (14th ed. 1918) § 425.

On the other hand, when the borrower seeks affirmative equitable relief, the maxim, "he who seeks equity must do equity" usually is construed to require that he return the amount actually received, with "legal interest," despite the punitive policy embodied in the usury laws. BISPHAM, PRINCIPLES OF EQUITY (10th ed. 1923) § 43; 6 WILLISTON, CONTRACTS (REV. ED. 1938) § 1683; 17 A. L. R. 123; 70 A. L. R. 693. But few of the authorities undertake to define the term "legal interest." However, a rather extensive search of the reports reveals several cases holding that it means the rate fixed by statute to apply where there is no agreement between the parties as to interest. *Ruddell v. Ambler*, 18 Ark. 369 (1857); *Pickett v. Merchants' Nat. Bank*, 32 Ark. 346 (1877); *Tooke v. Newman*, 75 Ill. 215 (1874); *Garlick v. Mutual Loan & Bldg. Assn.*, 129 Ill. App. 402 (1906); *Bolen v. Wright*, 89 Neb. 116, 131 N. W. 185 (1911); *Moncrief v. Palmer*, 44 R. I. 37, 114 Atl. 181 (1921). No case held, as does the instant case, that it means the maximum rate allowed by law.

Statutes and decisions in a few states make what appears to be the better choice between legislative policy and general equitable doctrines, and relieve the borrower from having to pay interest on a usurious loan under any circumstances. ALA. CODE ANN. (MICHIE, 1928) § 8567; N. Y. GEN. BUS. LAW, Art. 25 § 377; *Robbins v. Blanc*, 105 Fla. 625, 142 So. 223 (1932); *Cornelison v. U. S. Bldg. & Loan Assn.*, 50 Idaho 1, 292 Pac. 243 (1930); *Trauernicht v. Kingston*, 156 Minn. 442, 195 N. W. 278 (1923).

Washington decisions stand for the following propositions: *Where the interest had been paid*, (1) it will be doubled to extinguish the debt in an action for an accounting, *Lay v. Bouton*, 73 Wash. 372, 131 Pac. 1153 (1913); but (2) in an action to recover it, the borrower is entitled only to the excess above the maximum rate permitted by statute, *Trautman v. Spokane Sec. Fin. Corp.*, 163 Wash. 585, 1 P. (2d) 867 (1931). *Where interest has not been paid*, (3) the amount contracted for may not be deducted from the principal in an action to redeem collateral, *Vanasse v. Esterman*, 147 Wash. 300, 265 Pac. 738 (1938). Cf. *Hoover v. Bouffleur*,

74 Wash. 382, 133 Pac. 602 (1913); (4) the full amount of interest contracted for will be deducted from the principal in an action for an accounting, *Trautman v. Spokane Sec. Fin. Corp.*, *supra*: and (5) the borrower must pay the principal plus interest at the maximum rate allowed by statute in an action for an accounting, *The Goodwin Company v. National Discount Corp.*, *supra*.

Holdings (1) and (4), above, are the result of an application of the statutory penalty, although the action was instituted by the borrower. This application was made in *Lay v. Bouton* without any explanation, but in the *Trautman* decision after construing the *Lay* case to mean that, in an action for an accounting, the statute should be applied "insofar as . . . the same was applicable," the court held that where the lender based his defense upon the loan contract, the borrower's action was "upon the contract within the terms of the usury statute." This conclusion was reached without any mention of *Vanasse v. Esterman*, wherein it was clearly recognized that the terms of the statute (in any action on such contract . . . the plaintiff shall only recover the principal, less the amount of interest . . .") were not applicable to an action by the borrower, and that his affirmative remedy was independent of statutory provision.

Although the opinion in the *Goodwin* case reproduces that part of the *Vanasse* opinion, it probably cannot be said that this means that *Lay v. Bouton* and *Trautman v. Spokane Sec. Fin. Corp.* are no longer the law in this state, inasmuch as the court also attempted to distinguish the *Trautman* decision by saying that the statute was applied after the interest had been paid. (Actually, that case involved two causes of action, one to recover interest paid and another for relief from a contract on which no interest had been paid. It was to the latter cause of action that the statute was applied.) If the *Goodwin* case can be given that interpretation, then apparently Washington stands with the majority as to the amount of paid interest recoverable by the borrower, and stands alone as to the amount of unpaid interest which the borrower must pay to get equitable relief.

Justification of the view that a borrower seeking equitable relief from usury should be required to pay any interest at all is doubtful enough in light of the legislative policy manifested in usury statutes, but, conceding that to be the prevailing rule, to require him to pay the usurer all that legally can be paid is to do more violence to that policy than a sound application of equitable doctrine would seem to require.

V. C.