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## Contracts

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was to be financed by thirty year bonds, and the bonds were to be paid for by building rents. In *State ex rel. Washington State Building Finance Authority v. Yelle*, 147 Wash. Dec. 632, 289 P.2d 355 (1955), the court held that the law was unconstitutional because it exceeded the debt limit on state obligations placed by art. VIII, § 1 of the Washington State Constitution. The court distinguished *State ex rel. Washington Toll Bridge Authority v. Yelle*, 195 Wash. 636, 82 P.2d 120 (1938), and *Gruen v. State Tax Commission*, 35 Wn.2d 1, 211 P.2d 651 (1949) on grounds that the laws in those cases did not call for the debts to be paid from the general fund, but from independent sources (bridge tolls, and cigarette excise taxes). The Building Finance Authority law called for the bonds to be paid off by rentals from the buildings, but the rent money was to come in large measure from the general funds, and thus, said the court, the law is unconstitutional. Recognizing the law as an obvious attempt to circumvent the constitutional debt limit, the court has indicated that the monies which go to pay off bonds financing similar programs must not in any sense come from the general funds, but must come from sources entirely independent, unless the debt limit is increased by the method provided in the Constitution.

## CONTRACTS

**Offer and Acceptance—Waiver of Condition.** In *Simms v. Ervin*<sup>1</sup> the court held that an offeree could waive the mode of acceptance specified in an offer and accept in a different manner. The offer was in the form of a purchase order submitted to a Buick dealer by a prospective buyer. It requested delivery of a new Buick, specified the price, terms for cash and time payment, and provided, "This order is not binding upon you [seller] until accepted and signed by an executive of your [seller's] company." The seller did not sign the purchase order, but delivered a new Buick to the buyer and got him to sign a conditional sales contract. A few hours after delivery, the buyer called the seller and informed him, "the deal was off." It was held that the buyer did not withdraw in time because the conditional sales contract had superseded the purchase order, or alternatively, because the seller had waived the condition in the offer requiring written acceptance and had accepted by making delivery. To support the rule that the offeree could waive a condition in an offer the court relied on an earlier Washington case, *Pillsbury Flour Mills v. Independent Bakery*.<sup>2</sup> There the same rationale was applied where a buyer submitted a purchase order on the seller's printed form providing for delivery by installments and written acceptance of the order to be sent to the buyer. The buyer

<sup>1</sup> 46 Wn.2d 417, 282 P.2d 291 (1955).

<sup>2</sup> 165 Wash. 360, 5 P.2d (1931). See also *Lowenthal v. McCormack Bros.*, 144 Wash. 229, 257 Pac. 632 (1927), where the order required confirmation by the buyer and delivery was made in full performance without prior confirmation by the buyer. The court, rather oddly, held shipment by the seller constituted acceptance by him and the subsequent receipt of delivery by the buyer, confirmation.

took delivery of a number of installments without written acceptance by the seller before refusing to take further delivery. In an action by the seller for breach of contract it was held that the seller had waived the condition of written acceptance by shipping the installments.

It is a fundamental principle of contract law that, "A manifestation of mutual assent by the parties to an informal contract is essential to its formation. . . ."<sup>3</sup> The offer is the expression of assent by the offeror to the terms contained therein.<sup>4</sup> Acceptance is the expression of assent of the offeree.<sup>5</sup> Since there can be mutual assent only where the offer and acceptance refer to the same terms, the general rule is that acceptance must be unconditional as to all material parts of the offer.<sup>6</sup> To hold otherwise would bind the offeror on terms to which he had not assented. Yet the effect of the rule allowing waiver by the offeree of some of the terms of the offer is to permit exactly that.

In the *Pillsbury* case one authority was cited for the proposition that waiver by the offeree would be allowed where the condition waived was for his benefit.<sup>7</sup> This should not be relevant to the issue of mutual assent unless assent of the offeror to the deletion of such conditions may be implied from that fact as a matter of law. To do so would constitute a fundamental change in the theory of offer and acceptance as presently understood, and would create uncertainty in what should be a well-settled area of the law by opening up factual inquiry as to the nature of the condition in dispute.

In spite of this, a few jurisdictions have applied the rule adopted in the *Pillsbury* case to allow acceptance by other than the mode specified in the offer. A few of the cases hold there was acceptance where shipment was made by the seller, but the buyer did not take delivery.<sup>8</sup> These illustrate how, under the *Pillsbury* case rule, the offeror may find himself a party to a contract to which he has not assented. In most of the cases, as in the *Simms* and *Pillsbury* cases, a contract might have been found on a different theory as there was either receipt of delivery by the buyer under the "contract", or delivery

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<sup>3</sup> RESTATEMENT, CONTRACTS § 20 (1933).

<sup>4</sup> 1 CORBIN, CONTRACTS § 11 at 21 (1950).

<sup>5</sup> RESTATEMENT, CONTRACTS § 52 (1933).

<sup>6</sup> *Bridge v. Calhoun, Denny & Ewing*, 57 Wash. 272, 106 Pac. 762 (1910); *Sillman v. Spokane Savings & Loan*, 103 Wash. 619, 175 Pac. 296 (1918); *Martinson v. Carter*, 190 Wash. 502, 68 P.2d 1027 (1937); *St. Paul & Tacoma Lumber Co. v. Fox*, 26 Wn.2d 109, 173 P.2d 194 (1946); see RESTATEMENT, CONTRACTS § 59 (1933).

<sup>7</sup> 165 Wash. at 365, 5 P.2d at 518, citing *Wales Adding Mach. Co. v. Huver*, 98 N.J. Law 910, 121 Atl. 621 (1923).

<sup>8</sup> *Hercules Mfg. Co. v. Wallace*, 124 Miss. 27, 86 So. 706 (1921); *Case Threshing Mach. Co. v. Donalson*, 10 Ga. App. 428, 73 S.E. 618 (1912).

constituting full performance.<sup>9</sup>

The failure of the Washington court to reject these outside authorities appears to result from confusion of the performance of conditions in a contract, which can be waived, with conditions in an offer, which, under accepted theory of mutual assent, cannot. This is demonstrated in the *Pillsbury* case where the court stated that the seller could waive the condition in the offer requiring written acceptance since it "... could be waived the same as any other condition in a contract."<sup>10</sup>

A more acceptable analysis of the *Simms* and *Pillsbury* cases is that where the manner of acceptance was specified in the offer, that term had to be complied with to create a contract.<sup>11</sup> Failing that, the purported acceptance was operative only as a counter offer which might have been accepted by the buyer.<sup>12</sup> This was the analysis of the Washington court in *Wax v. Northwest Seed Co.*<sup>13</sup> There it was unsuccessfully argued that the offeror-buyer could waive a condition in his offer requiring acceptance by a certain time. The court held that an attempted acceptance after the specified time was effective only as a counter offer and no contract was formed where the buyer did not accept the counter offer.<sup>14</sup> Another possible analysis of the *Simms* case, if delivery of the Buick was full performance by the seller, is that a contract was formed under the rule that full performance by the offeree within the time allowed for acceptance constitutes acceptance although the offer called for a promise.<sup>15</sup> However, signing of

<sup>9</sup> *Pratt-Gilbert v. Renaud*, 25 Ariz. 79, 213 Pac. 400 (1923); *Wales Adding Mach. Co. v. Huver*, 98 N.J. Law, 910, Atl. 621 (1923). Cf. *Columbia Weighing Mach. Co. v. Vaughn*, 123 Kan. 474, 255 Pac. 973 (1927); *Kingman v. Watson*, 97 Wis. 596, 73 N.W. 438 (1897); *Aultman, Miller & Co. v. Nilson*, 112 Iowa 634, 84 N.W. 692 (1900); *Wood & Brooks Co. v. Hewitt*, 89 W.Va. 254, 109 S.E. 242 (1921), where the manner of acceptance was not specified in the offer although the cases are cited in support of the rule of waiver by the offeree. These should be distinguished where the offer may be found to call for or allow acceptance by performance, *Whitman Agricultural Co. v. Strand*, 8 Wash. 647, 26 Pac. 682 (1894); RESTATEMENT, CONTRACTS §§ 52, 61 (1933); Annot., 19 A.L.R. 476 (1922).

<sup>10</sup> 165 Wash. at 364, 5 P.2d at 518.

<sup>11</sup> RESTATEMENT, CONTRACTS § 61 (1933).

<sup>12</sup> RESTATEMENT, CONTRACTS § 73 (1933); 1 WILLISTON, CONTRACTS § 76 (Rev. ed. 1936).

<sup>13</sup> 189 Wash. 212, 64 P.2d 513 (1937).

<sup>14</sup> However, the court used confusing language in a dictum at the end of the opinion by which it appeared to tacitly recognize a power of waiver in the offeror, but this seems to result from a misuse of the term "waiver" in place of the term "acceptance."

<sup>15</sup> *Worthington v. Johnson*, 139 F.2d 274, 277 (3rd Cir. 1943); RESTATEMENT, CONTRACTS § 63 (1933); 1 WILLISTON, CONTRACTS § 78A (Rev. ed. 1936). Cf. *Coerver v. Haab*, 23 Wn.2d 481, 161 P.2d 194 (1945); *Christoferson v. Radovich*, 23 Wn.2d 846, 162 P.2d 830 (1945); *Washington Chocolate Co. v. Canterbury*, 18 Wn.2d 79, 138 P.2d 195 (1943); *Lasswell v. Anderson*, 127 Wash. 591, 221 Pac. 300 (1923); *Hamilton v. Best*, 123 Wash. 488, 212 Pac. 1077 (1923); 12 AM. JUR. § 114 (1938); cited by the court in the *Simms* case to the effect that receipt of the car by the buyer made the agreement, although previously unenforceable, binding on the buyer. However,

the purchase order by the offeree may very well be part of the performance requested by the offeror in such a case.<sup>16</sup>

Therefore, in view of the threat posed to the principles of mutual assent, the apparent inconsistency with Washington case law as represented by the *Wax* case, and the lack of necessity for such a rule, those holdings permitting waiver of conditions in an offer by the offeree should be overruled at the first opportunity.

**Integrated Contracts.** In *Fleming v. August*,<sup>17</sup> *P* attempted to sell property for *D*. Terms of the sale were to be down payment of \$2,500, five per cent of which was to be paid *P* as his commission. *P* secured a buyer who wished to pay \$1,000 down and \$1,500 in ninety days. *D* agreed to this if *P* would take \$200 of his commission out of the \$1,000 and the remaining \$375 out of the \$1,500. *D* then executed a note for \$436.67, of which \$375 was to be *P*'s commission, due on the date set for payment of the \$1,500. The buyer failed to pay the \$1,500. *P* then sued on the note. Held for *D*, except as to the amount of the note exceeding \$375. Evidence was admissible to show that the note was not to be binding until payment of the \$1,500 installment. The court stated that the note was issued on a "condition precedent," and, in discussing whether it was so issued, defined a "condition precedent" as a condition which, "must be a condition precedent to the contract becoming a valid obligation and not merely precedent to its payment . . ." <sup>18</sup> This was distinguished by the court from a "condition subsequent" which it said occurred where a contract would cease to be binding upon happening of a future event.

In *Ravenholt v. Hollowell*,<sup>19</sup> *P*, vendor, and *D*, vendee, executed an earnest money agreement for sale of residence property. It provided, among other things, "There are no verbal or other agreements which modify or affect this agreement." *D* subsequently refused to perform. *P* sued for damages. At the trial *D* testified that she had signed the earnest money agreement with the understanding that her obligation was dependent upon her first obtaining money to complete the transaction. The trial court held for *D*, admitting evidence of the purported oral agreement. On appeal this was held to be error. The evidence was

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application of that proposition depends on existence of prior agreement and so should not be determinative of the issue of whether there was an operative acceptance.

<sup>16</sup> 1 WILLISTON, SALES § 5B, at 13 (Rev. ed. 1948) where it is indicated that this may be particularly true when the purchase order contains express warranties.

<sup>17</sup> 148 Wash. Dec. 119, 291 P.2d 639 (1955).

<sup>18</sup> 148 Wash. Dec. at 122, 291 P.2d at 641.

<sup>19</sup> 148 Wash. Dec. 124, 291 P.2d 653 (1955).

inadmissible under the parol evidence rule since, stated the court, the purported oral agreement was to create a "condition subsequent" rather than a "condition precedent" to the earnest money agreement.

The court's analysis in terms of conditions precedent and subsequent, defining these conditions as qualifying the *existence of the contract*, is clearly contrary to the accepted meaning of these terms of art which are properly defined to qualify the *duty of immediate performance* of an obligation of the contract.<sup>20</sup> That approach was also unnecessary because the issues raised in the principal cases could have been resolved by determining whether or not the writings involved were integrations and, where they were, by analyzing the oral agreements in terms of the event upon which the contract was to become binding.<sup>21</sup>

Where, as in both of these cases, the issue before the court is whether to admit evidence of an oral agreement which will vary the terms of the writing upon which the action is brought, the result reached depends upon the operation of the parol evidence rule.<sup>22</sup> This involves the initial issue as to whether the writing in question is an integration,<sup>23</sup> which it most probably was in the *Ravenholt* case,<sup>24</sup> but probably was

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<sup>20</sup> "Generally in contracts, when reference is made to conditions, what is meant are conditions which become operative after formation of the contract and qualify the duty of immediate performance of a promise or promises thereunder—not conditions which qualify the existence of a contract or promise." 3 WILLISTON, CONTRACTS § 666 (Rev. ed. 1936). "One may also speak of a condition precedent to the existence of a contract. Acceptance is such a condition, but when the question under consideration is the interpretation of a contract or the performance of duties arising under it, the term means a prerequisite to a duty of immediate performance under an existing contract." 3 WILLISTON, CONTRACTS § 666A. "The term 'condition subsequent' should mean subsequent to the duty of immediate performance, that is, a condition which divests a duty of immediate performance of a contract after it has once accrued." 3 WILLISTON, CONTRACTS § 667. RESTATEMENT, CONTRACTS § 250 (1932); 3 CORBIN, CONTRACTS § 628 (1951).

<sup>21</sup> As indicated in note 27 *infra*, a contract which is not to come into existence until the happening of a future event may be exceedingly rare, so the court should seldom be tempted to resort to use of the terms "condition precedent" and "condition subsequent" if it properly analyzes the nature of the relation between the parties before the event upon which the contract is supposed to come into being.

<sup>22</sup> RESTATEMENT, CONTRACTS § 237 (1932).

<sup>23</sup> "An agreement is integrated where the parties thereto adopt a writing or writings as the final and complete expression of the agreement. An integration is the writing or writings so adopted." RESTATEMENT, CONTRACTS § 228 (1932). 3 WILLISTON, CONTRACTS § 633; 3 CORBIN, CONTRACTS § 588. "All courts agree that if the parties have integrated their agreement into a single written memorial, all prior negotiations and agreements in regard to the same subject matter are excluded from consideration whether they were oral or written." 3 WILLISTON, CONTRACTS § 632.

<sup>24</sup> "If a written document, mutually assented to, declares in express terms that it contains the entire agreement of the parties, and that there are no antecedent or extrinsic representations, warranties, or collateral provisions that are not intended to be discharged and nullified, this declaration is conclusive as long as it has itself not been set aside by a court on grounds of fraud or mistake, or on some other ground that is sufficient for setting aside other contracts." 3 CORBIN, CONTRACTS § 578; 3 WILLISTON, CONTRACTS § 811A.

not in the *Fleming* case.<sup>25</sup> Where the writing is not an integration the parol evidence rule does not apply and the evidence can come in.<sup>26</sup> Where the writing is an integration evidence of an oral agreement that it shall not become binding until a future event is admissible if the oral agreement is not inconsistent with the terms of the writing.<sup>27</sup> Because of the "integration clause" in the writing in the *Ravenholt* case, its terms were contradicted by the offered oral agreement. On the other hand, this may not have been the effect of the oral agreement on the note in the *Fleming* case.

The *Fleming* and *Ravenholt* cases most probably are sound holdings on their facts, but the analysis of the parol evidence issues in terms of "condition precedent" and "condition subsequent" tends to confuse the proper meaning of those terms of art. It is suggested that a more fruitful approach to solution of such problems is in terms of whether or not there is an existing integration which is varied or contradicted by a parol agreement.

**Third Party Beneficiary Contracts—Intent of Promisee.** *B* paid *R*, a real estate broker, \$1,000 earnest money for purchase of certain realty. Subsequently, *B* informed *R* that he would relinquish his rights in this property upon return of his money. *R* and *E* then entered into negotiations for purchase of this same property. *E* stated that he would not buy unless *B*'s earnest money was returned. *R* agreed to do

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<sup>25</sup> "Promissory notes and bills of exchange are seldom intended by the parties to be complete integrations of the agreement in pursuance of which they are given. . . . [T]he form of the note is usually drawn for the purpose of making the note negotiable, not for the purpose of integrating the terms of the agreement. The execution and delivery of the note may be nothing more than a part performance by one of the parties of his agreement with the other, and not an attempt at integration in writing of the terms of that agreement." 3 CORBIN, CONTRACTS § 587.

<sup>26</sup> "The parol evidence rule does not apply to every contract of which there is written evidence, but 'only applies where the parties of an agreement reduce it to writing and agree or intend that that writing shall be their agreement.'" 3 WILLISTON, CONTRACTS § 633.

<sup>27</sup> 3 WILLISTON, CONTRACTS § 634; RESTATEMENT, CONTRACTS § 241 (1932); *Pym v. Campbell*, 6 El. & Bl. 370 (Q. B. 1856). However, Corbin has criticized this analysis because it is based on the premise that the contract does not come into existence until the happening of the future event, which he believes is erroneous. The argument is that in most all cases the condition or event is actually precedent to the duty of immediate performance rather than to the contract. "Disregard of the parol evidence rule can not be justified on any such ground in these cases, although it can be justified on other grounds and the admissibility of the proof is well established." 3 CORBIN, CONTRACTS § 746. "Even though the analysis on which the foregoing decisions are based is erroneous, it does not follow that the decisions themselves should not be approved. Not only are the decisions numerous and generally followed, the refusal to admit testimony to prove the parol condition precedent would do far more harm than good. If the testimony is believed, it appears that the writing is not a complete and accurate integration. And the condition is one that prudent persons often do not think necessary to put into the written instrument." 3 CORBIN, CONTRACTS § 589.

this. An earnest money agreement for purchase of the property was then executed by *R* and *E*. *R* failed to return the \$1,000 to *B*. *B*, on the theory that he was a donee beneficiary under the *R-E* agreement, brought suit against *R*. *R* contended that *B* could not recover on that theory because *E* had extracted *R*'s promise for the sole purpose of protecting his interest in the property being purchased, and therefore did not have the necessary intent to benefit *B*. Held for *B*. Where the terms of the purported donee beneficiary contract necessarily require the promisor to confer a benefit upon a third party, the intent of the promisee to create a right in that third party is sufficiently demonstrated and absence of an altruistic motive is immaterial, *Vikingstad v. Baggott*.<sup>28</sup>

This case clarifies the position of the Washington court that it is the intent of the promisee, as "purchaser" of the promise, that is relevant to the existence of a right in the beneficiary.<sup>29</sup> The court stated this rule in an earlier opinion, but left its attitude toward it unclear by then proceeding to analyze the intent of the *promisor*.<sup>30</sup>

Although the steps by which the court arrived at its conclusion that the promisee was possessed of the necessary intent to benefit the third party are not made explicit, it appears that this intent was inferred from the terms of the promise and the circumstances under which it was made. The self-interest of the promisee apparently was insufficient to bar the legal effect of that intent. It can be seen that the analysis is factual and that the criteria available to determine whether the necessary intent is present in a given case are, at best, vaguely defined. Therefore, it may be useful to note the analysis suggested by a leading authority.

The problem before the courts today is not whether the third party must be the person solely to be benefited; he certainly need not be. It is to draw the line between those persons whose benefit is so direct and substantial and so closely connected with that of the promisee that it is economically desirable to let them enforce it. The law would profit greatly if the courts would concentrate upon this aspect of the problem and cease to state the question merely in terms of the supposed "intent" of the parties.<sup>31</sup>

It should also be noted that the court used the phrase, "intent to confer a right" upon the third party. This seems too restrictive and

<sup>28</sup> 46 Wn.2d 494, 282 P.2d 824 (1955).

<sup>29</sup> See 4 CORBIN, CONTRACTS § 776 (1951).

<sup>30</sup> *Ridder v. Blethen*, 24 Wn.2d 552, 166 P.2d 834 (1946).

<sup>31</sup> 4 CORBIN, CONTRACTS § 786, at 95 (1951).

confusing insofar as it is taken to mean that the promisee must understand the legal operation of his act before he can create a legal right in the beneficiary. It is suggested that the phrase "intent to confer a benefit" better describes the requisite intent to create a right in a third party beneficiary.<sup>32</sup>

**Enforceability of Bonus Plans.** The defendant insurance company in *Spooner v. Reserve Life Insurance Co.*<sup>33</sup> presented an "extra earnings agreement" to its insurance agents by which those agents achieving high renewal rates on policies in force would receive bonus payments at the end of each twelve-month period. The plan provided:

This renewal bonus is a *voluntary contribution* on the part of the Company. It is agreed by you and by us that it *may be withheld*, increased, *decreased* or discontinued, individually or collectively, with or *without notice*. Further, this Renewal Bonus is contingent upon you writing business for this Company as a licensed agent at the time such bonus is paid. (emphasis supplied by the court).

Plaintiffs, insurance agents of the defendant, who were eligible for bonus payments under the terms of the agreement, sought to enforce payment by a contract action. The court held that the undertaking of the employer was unenforceable. Because the defendant reserved the right to "withhold" payment his performance was at his option, and reliance by the plaintiffs could not bind him.

Two problems may be encountered in an action to enforce the usual bonus or non-contributory pension<sup>34</sup> plan. First, whether it is enforceable as a unilateral contract. Second, whether it is enforceable on the theory of promissory estoppel. A third problem exists where, as in the principal case, the employer has stipulated that his performance is to be at his option, raising serious doubts as to whether there is a promise to enforce.

The authorities are divided as to whether an employer's promise, made to employees already in his service, to pay a bonus or non-contributory pension can be enforced as a unilateral contract.<sup>35</sup> In Washington the continued service of an employee, not obligated to remain with his employer, has been held to constitute acceptance of

<sup>32</sup> 4 CORBIN, CONTRACTS § 777 (1951).

<sup>33</sup> 147 Wash. Dec. 404, 287 P.2d 735 (1955); see 44 GEO.L.J. 145 (1955).

<sup>34</sup> Because of their similarity it is believed that it is profitable to consider non-contributory pension and bonus cases together. The adjective "non-contributory" is used to modify "pension" to distinguish those plans under which the employee contributes money for his pension.

<sup>35</sup> Annot. 42 A.L.R.2d 462 (1955); Annot. 28 A.L.R. 331 (1924); 56 COLUM. L. REV. 251, 263 (1956) (a discussion of this general area).

an offer for a unilateral contract, and to supply the consideration necessary for enforcement of a bonus plan construed as an offer for a unilateral contract.<sup>36</sup>

There is also well-reasoned authority holding that, even in absence of an intent to create a power of acceptance in his employees, where an employer should reasonably expect his promise of a bonus or pension to induce action or forbearance of a definite and substantial nature, and an employee does so act or forbear in reliance thereon, if the court feels that justice requires it, enforcement may be had on the theory of promissory estoppel.<sup>37</sup> In the *Spooner* case the Washington court, noting its own use of the doctrine in other situations, recognized the applicability of promissory estoppel to bonus or non-contributory pension cases.<sup>38</sup>

Where a bonus or non-contributory pension is stipulated to be payable at the discretion of the employer it would appear that in fact no promise has been made.<sup>39</sup> Established contract principles preclude enforcement of such a plan as a unilateral contract where this is the case.<sup>40</sup> The absence of a promise also precludes enforcement on the theory of promissory estoppel.<sup>41</sup> A number of holdings on bonus and non-contributory pension plans are in accord with these positions.<sup>42</sup> However, in other cases plans similarly stipulated have nevertheless been enforced. This result has been reached either by interpretation,<sup>43</sup>

<sup>36</sup> Scott v. Duthie & Co., 125 Wash. 470, 216 Pac. 853 (1923).

<sup>37</sup> Hunter v. Sparling, 87 Cal.App.2d 711, 197 P.2d 807, 815 (1948); RESTATEMENT, CONTRACTS § 90 (1932).

<sup>38</sup> 147 Wash.Dec. at 407, 287 P.2d at 737.

<sup>39</sup> "An apparent promise which according to its terms makes performance optional with the promisor whatever may happen, or whatever course of conduct in other respects he may pursue, is in fact no promise, although often called an illusory promise." RESTATEMENT, CONTRACTS § 2, Com. b. (1932).

<sup>40</sup> "...an illusory promise is neither enforceable against the one making it, nor is it operative as a consideration for a return promise." 1 CORBIN, CONTRACTS § 145 (1950); See Annot. 42 A.L.R.2d 462 at 464 (1955).

<sup>41</sup> "Action in reliance on a supposed promise creates no obligation on a man whose only promise is wholly illusory." 1 CORBIN, CONTRACTS § 201 (1950); Ford Motor Co. v. Kirkmeyer Motor Co., 65 F.2d 1001 (4th Cir. 1953).

<sup>42</sup> Hughes v. Encyclopedia Britannica, 1 Ill. App.2d 514, 117 N.E.2d 880 (1954); Hughes v. Encyclopedia Britannica, 108 F.Supp. 303 (N.D.Ill. 1952), *vacated for want of jurisdiction*, 199 F.2d 295 (7th Cir. 1952); Bromberg v. United Cigar-Whelan Stores, 125 N.Y.L.J. 687, 19 C.C.H.Lab. Cas. ¶ 66203 (N.Y.S.Ct. 1951); Hekking v. Mills, 70 App. Div. 517, 75 N.Y.Supp. 386 (1902); Fontius Shoe Co. v. Lamberton, 78 Colo. 250, 241 Pac. 542 (1925); McNevin v. Solvay Process Co., 32 App. Div. 610, 53 N.Y.Supp. 98 (1898), *aff'd* 167 N.Y. 530, 60 N.E. 1115 (1901); *cf.* Fickling v. Pollard, 51 Ga. 96, 179 S.E. 583 (1935).

<sup>43</sup> Tilbert v. Eagle Lock Co., 116 Conn. 357, 165 Atl. 205 (1933), where a death benefit plan in which the employer reserved the right to discontinue the benefits at any time without liability to any employee or beneficiary was interpreted to reserve merely the right of the employer to discharge employees and the right of employees to leave the job with a consequent termination of their rights under the plan. The employer's right to discontinue the plan was interpreted to be ineffective against employees who

or by ignoring the issues presented by the employer's stipulations and relying on the rendition of an adequate consideration by the employee.<sup>44</sup> In such cases the finding of the necessary promise, despite the reservation of discretion by the employer, appears to be based on a reaction against denying enforcement where to do so would be undesirable on moral grounds.<sup>45</sup>

In the principal case the court relied on the usual and ordinary meaning of the word "withheld" to find that the employer's plan was not a promise to pay a bonus.<sup>46</sup> Whether this represents an inflexible attitude by the court toward bonus or pension plans so stipulated is not clear although such an inference may be drawn from the opinion. However, by relying on this interpretation to arrive at its conclusion that there was no promise, and by distinguishing cases enforcing similarly conditioned death benefit pension plans on the ground that they avoided "seemingly harsh results,"<sup>47</sup> the court seems to have left the way open for similar plans to be held enforceable under different circumstances.

It may be argued that the court should not resort to interpretation to find a promise in such a bonus or pension plan because enforcing these plans despite the attempt to make performance discretionary will discourage employers from undertaking them altogether.<sup>48</sup> However, employers can avoid this hazard by careful draftsmanship and

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had "acted upon" the employer's promise. *Psutka v. Michigan Alkali Co.*, 274 Mich. 318, 264 N.W. 385 (1936), where the employer's plan was stipulated to be voluntary as to the employer, but the stipulation was interpreted not to apply to accrued rights under the plan. *Schofield v. Zion's Co-op. Mercantile Institution*, 85 Utah 281, 39 P.2d 342 (1934), where a pension plan was conditioned so that employees were not to have vested rights under the plan and the employer had the right to change, reduce or increase pensions and discharge employees without pensions. The court interpreted the discretionary powers of the promisor to apply only to employees as distinguished from ex-employees who had already qualified for the plan.

<sup>44</sup> *Wellington v. Curran Printing Co.*, 216 Mo. App. 358, 268 S.W. 396 (1925), where the plan was stipulated to be a wholly voluntary and not binding on employer or employee. *Mabley & Carew Co. v. Borden*, 129 Ohio St. 375, 195 N.E. 697 (1935), where a death benefit plan was stipulated to be voluntary, creating no legal obligation, and it was provided that the plan might be withdrawn or discontinued at any time.

<sup>45</sup> *Cf. Wilson v. Rudolph Wurlitzer Co.*, 48 Ohio App. 450, 194 N.E. 441 (1934), where the Ohio court holding a pension plan enforceable despite a stipulation that payments thereunder were to be made to those employees, who in the opinion of the officers of the company had been loyal and faithful, indicated this reaction stating, "Where, in the construction of a contract, terms are susceptible of two interpretations, one of which results in a conclusion that the writer of the contract was guilty of gross fraud and deceit, and the other in the expression of an honest purpose, no authority need be cited to sustain the position that the latter interpretation will be placed on the contract." *Sigman v. Rudolph Wurlitzer Co.*, 57 Ohio App. 4, 11 N.E.2d 878 (1937).

<sup>46</sup> 147 Wash.Dec. at 408, 287 P.2d at 738.

<sup>47</sup> 147 Wash.Dec. at 410, 287 P.2d at 739.

<sup>48</sup> A thought which caused one writer to term enforcement of such bonus or non-contributory pension plans as, perhaps, "another case of killing the goose that laid the golden egg." 34 MICH.L.REV. 700, 705 (1936).

presentation of their bonus or non-contributory pension plans so that subsequent reliance by employees will not be justifiable. In addition, a flexible interpretation of the terms of such plans seems a desirable result as it readily can be seen that substantial reliance may be induced by a bonus or pension plan although technically it contains no promise. The interpretation of the terms of such a plan should be affected by the manner of presentation, the identity of the parties, and other circumstances as well as by the normal meaning of the words used.

Once a promise is found, enforcement should then be had upon a showing that this promise was of such a nature that it foreseeably would induce substantial, justifiable reliance and that it did induce such reliance.

In conclusion, the *Spooner* case is noteworthy in three respects. First, the court, by way of dictum, recognized the applicability of the doctrine of promissory estoppel to enforce gratuitously promised bonuses. Second, it held that a promise is essential for enforcement of such a plan either as a unilateral contract or on the theory of promissory estoppel. Third, it indicated that a reservation by an employer of the power to "withhold" payment of such a bonus very likely will cause it to find there is no promise in fact, although possibly, under certain circumstances, a promise might nevertheless be found by interpretation.

DONALD H. BOND.

**Real Property—Earnest Money Agreement as a Contract to Convey.** In *Hedges v. Hurd*, 147 Wash. Dec. 612, 289 P.2d 706 (1955), *P*, as purchaser, and *D*, as seller, signed an earnest money agreement providing for sale of certain described real and personal property for \$7,000, down payment of \$650 and installment payment of the balance at \$55 per month or, at *P*'s option, more, and five per cent per annum interest on the unpaid balance. Provisions were also made for title insurance; closing of the sale fifteen days after receipt of the title report; *P* to take possession at the time; proration of taxes, rents, insurance, utilities as of that date; and for deposit of documents and money in escrow. The agreement contained a clause stating, "The property is to be conveyed by contract for warranty deed . . ." Subsequently, *D* found a better deal and sought a release from *P*. When this was refused, *D* attempted to get either immediate payment in full or discharge under the holding in *Hubbell v. Ward*, 40 Wn.2d 779, 246 P.2d 468 (1952), by offering to convey immediately upon full payment by *P*. This was not accepted. *D* then entered into an agreement to sell the property to a third person. *P* brought suit for damages for breach of contract. *D* contended that the earnest money agreement called for execution of a future contract, the terms of which had not been made certain, and so was too indefinite to be enforced, and also that she was discharged when *P* had failed to accept her offer to convey upon full, immediate payment.

*Held*, for *P*. The earnest money agreement contained all the elements of a binding contract. The *Hubbell* case, upon which *D* relied, was distinguished as the remedy

unsuccessfully sought there was a specific performance of the earnest money agreement rather than damages, and a contract may be too indefinite to allow the former but still sufficiently definite to permit awarding the latter remedy.

It was the position of a dissent that the earnest money agreement should be construed as a contract to make a second contract, the terms of which had not been agreed upon, and so was unenforceable.

A number of questions occur to the reader of the opinions in the *Hedges* and *Hubbell* cases. When, if ever, is an earnest money agreement specifically enforceable? When will it be so indefinite that it will not support an action for damages? What is the effect of the intent of the parties to execute a subsequent, more detailed contract for the sale of the land?

**Guaranty Contract—Consideration.** The case of *Universal C.I.T. Credit Corporation v. DeLisle*, 147 Wash. Dec. 283, 287 P.2d 302 (1955), was an action upon a written guaranty. Dealer was in the business of selling motor cars and executed a contract with C.I.T. whereby C.I.T. agreed to finance Dealer's car and purchases and Dealer promised to assign to C.I.T. its commercial paper. Subsequent to the execution of this financing contract, DeLisle, who was owner of 37% of the stock of Dealer, executed a guaranty to C.I.T. which basically was as follows: "Each of us request you to extend credit to, make advances . . . and to induce you to do so and in consideration thereof . . . each of us . . . unconditionally guarantees to you . . . all Dealer's present and future obligations to you . . ." C.I.T. continued to finance the car purchases and subsequently lost money as a result of Dealer's becoming financially involved. An action brought by C.I.T. on the guaranty was dismissed by the trial court. The judgment was affirmed on appeal, the court holding that the guarantee was not supported by an independent consideration and consequently was unenforceable. The court failed to recognize that the guaranty could be construed as an offer for a unilateral contract and that the subsequent extension of credit by C.I.T. was the acceptance of this offer. Such an analysis would of course have resulted in a contrary holding by the appellate court. For further comment on this and similar cases the reader is referred to a comment entitled *Consideration in Suretyship Contracts in Washington*, 31 WASH. L. REV. 76, where the problem is dealt with at length.

## CORPORATIONS

**Appraisal Statutes—Remedies of Dissenting Shareholders.** In *Van Buren v. Highway Ranch Inc.*,<sup>1</sup> the only activity of the defendant corporation was the leasing of a large wheat ranch in eastern Washington. Since incorporation in 1930, this lease had been held by plaintiff, a minority shareholder. In 1953, the corporation decided not to renew, leasing instead to the son of the majority shareholder. This was done in accordance with RCW 23.36.140, which provides that a sale, lease, or exchange of all the assets of a corporation may be authorized by a vote of two-thirds of the shareholders' voting power, or such percentage as may be provided for in the articles of incorporation. Dissenting from this move, and alleging unfairness and a breach of

<sup>1</sup> 46 Wn.2d 582, 283 P.2d 132 (1955).