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Contracts

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to public schooling is attendance at an approved private school (under the court's interpretation of the statute). It seems very probable that a child who must avoid music, dancing, and lunch rooms could nevertheless find a private school that would make acceptable arrangements. Under these facts, it is doubtful that the child's position is extreme enough to lead to a finding that the compulsory school attendance law is unconstitutional as applied to her. The alternatives are not unreasonable. A stronger case would be made out for one whose religious beliefs bar association with large groups.[47] In such a case, the state could very well be required to take the next step in loosening control, the allowance of private tutoring. TIMOTHY R. CLIFFORD

CONTRACTS

Contracts — Consideration — Promise to Perform Duty. The Washington court, in the recent case of *Reynolds v. Hancock*,[1] abruptly disposed of a very complicated problem. Performance by a promisee of a duty already owed to a third person was held not to be sufficient consideration.

The defendant, a prospective home purchaser, became interested in a house in Seattle owned by persons residing in another state and signed an earnest-money agreement form furnished by the plaintiff, a real estate broker. The plaintiff's commission was to be paid by the owners. The printed form contained a provision which recited that the purchaser promised the real estate broker not to revoke his offer for a certain period of time in "consideration of agent submitting this offer to seller. . . ."

Before the form reached the owners for acceptance, the defendant sent a telegram to them revoking the offer, thereby precluding the formation of a contract to sell. The plaintiff sued on the above provision in an action for breach of contract, to recover the commission that would have been received from the owner if the sale had been completed.

The court, without citing any previous decisions or discussing the theoretical problems involved, summarily confirmed the trial court's

[46] Pierce v. Society of Sisters of Holy Names, 268 U.S. 510 (1925).

[47] This situation arose in People v. Levisen, 404 Ill. 574, 90 N.E.2d 213 (1950), where the parents, Seventh Day Adventists, believed that school atmosphere led to pugnaciousness in children and inhibited their receptiveness to the teachings of the Bible. The case was not expressly decided on the constitutional ground, however. The court construed its compulsory school law to allow home instruction.

[1] 53 Wn.2d 682, 335 P.2d 817 (1959).

conclusion that the act of submitting the offer was not sufficient consideration because the plaintiff was already bound, by virtue of the agency agreement with the owner, to do it.

As a general rule, the performance of or the promise to perform a pre-existing contractual duty is not sufficient consideration for a new promise by the party entitled to that performance.[2] Many courts have applied this rule indiscriminately to cases like the instant one where the new promise is made by one not previously entitled to performance.[3] The theory underlying the rule is that since the promisee does only what he was bound to do, he gives nothing of legal value in consideration for the new promise, whether made by the original obligee or a stranger. Other courts have acknowledged a substantial difference between a new promise by the original obligee and one made by a stranger to the first contract, and have recognized an injustice in not requiring a promisor in the latter situation to fulfill his promise after having induced the performance for which he bargained.[4]

The second position is the one taken by the *Restatement of Contracts*[5] and seems to be the rule in England.[6]

It is particularly odd that the opinion in the recent case made no mention of *Keane v. Fidelity Sav. & Loan Ass'n*,[7] which is the only other Washington case found where the court squarely dealt with the issue presented by the three-party pattern.[8] In finding sufficient consideration for the promise in that case, the court laid much emphasis on the fact that the promisee was at least in serious doubt as to

[2] 1 CORBIN, CONTRACTS §§ 171-175 (1950); 1 WILLISTON, CONTRACTS §§ 120-129 (3rd ed. 1957); RESTATEMENT, CONTRACTS § 76(a) (1932). Although recognized, the rule, as applied in Washington, has been vulnerable to attack in certain situations, leaving the area in a somewhat confused state. See Shattuck, *Contracts In Washington, 1937-1957*, 34 WASH. L. REV. 24, 55 (1959), and cases cited therein.

[3] See, *e.g.*, Burner v. American Bar Quartz Mining Co., 76 App. 774, 246 Pac. 77 (1926); McDevitt v. Stokes, 174 Ky. 515, 192 S.W. 681 (1917); Havana Press-Drill Co. v. Ashurst, 148 Ill. 115, 35 N.E. 873 (1893); Arend v. Smith, 151 N.Y. 502, 45 N.E. 872 (1897); Conti v. Johnson, 91 Vt. 467, 100 Atl. 874 (1917).

[4] See, *e.g.*, Mertens v. McMahon, 334 Mo. 175, 66 S.W.2d 127 (1933); Briskin v. Packard Motor Co., 269 Mass. 394, 169 N.E. 148 (1929); Joseph Lande & Son v. Wellsco Realty, 131 N.J.L. 191, 34 A.2d 418 (1943); Willard v. Hobby, 134 F. Supp. 66 (E.D. Pa. 1955).

[5] RESTATEMENT, CONTRACTS § 84(d) (1932). "Consideration is not insufficient because of the fact . . . (d) that the party giving 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."

[6] The leading case is Shadwell v. Shadwell, 30 L.J.C.P.(N.S.) 145 (1860); *accord*, Scotson v. Pegg, 6 N. & H. 295 (1861).

[7] 173 Wash. 199, 22 P.2d 59 (1933).

[8] A landowner entered a construction financing agreement with the defendant. The plaintiff, who was under a contract with the owner to supply plumbing, requested the defendant to pay part of the owner's loan directly to him. The defendant consented by letter, but after the construction on the land ceased for other reasons, it released its mortgage and refused to pay the plaintiff for work done.

whether he would fulfill the duty under the first contract. A comparison of the two cases will quickly show that this particular factor was absent in the *Reynolds* case.

The result reached in the *Keane* case was predictable on the basis of *Merchants Bank of Canada v. Sims*.[9] In that case, promoters of a future corporation contracted with the plaintiff for an extension of credit without a guarantee and promised to give the company's business to the plaintiff. Subsequent to the organization of the company, extension of credit without a guarantee was refused until the defendants, two of the promoters, signed a guarantee. When the plaintiff sued to recover the balance of the loan from the defendants, the court allowed a set-off for the amount they were damaged by the plaintiff's breach of the first contract. The opinion gave no indication that there was a question as to whether the promise of the guarantors was supported by sufficient consideration.

Since the *Keane* case was brought to the attention of the court in the *Reynolds* case (it was discussed at length in the respondent's brief),[10] but was not cited in the opinion, it may be inferred that they are not to be considered contrary, but rather, are to be reconciled on their facts.

A rationale of the three cases might be stated as follows: In general, the performance by *A* of a pre-existing contractual duty to *B* is not sufficient consideration for a promise by *C*. However, where *A* is refusing to perform or is in serious doubt as to whether he will perform the act, his performance, induced by the new promise, will be sufficient consideration.[11]

It is not made entirely clear from the *Keane* case whether the refusal to continue under the first contract must be made with a reasonable or honest belief that the duty has been terminated for some reason.[12] A requirement of a "good faith" belief on the part of the promisee that an obligation no longer exists under the first contract

[9] 122 Wash. 106, 209 Pac. 1113 (1922).

[10] Brief For Respondent, pp. 24, 26, 35, Reynolds v. Hancock, *supra* note 1.

[11] In Keane v. Fidelity Sav. & Loan Ass'n, 173 Wash. 199, 207, 22 P.2d 59, 62 (1933), the court said, "We concede the correctness of the rule upon which appellant relies; that is, the mere promise to do what one is by law or contract obligated to do is not a good consideration for a promise to pay. However, where, as in the case at bar, the party refuses to go on with the contract unless assured . . . of payment, the promisor will not be heard to say that the contract was without consideration. . . ." This language might be taken to mean that had the plaintiff promised to perform, instead of actually performing, no consideration would have been found. But see RESTATEMENT, CONTRACTS § 78 (1932).

[12] Such a distinction is made by the New Jersey court. *Compare* Schaefer v. Brunswick Laundry, Inc., 116 N.J.L. 268, 183 Atl. 175 (1936) (finding no consideration),

might be an effective way to avoid legal condonation for coercive techniques used by promisees in some cases.[13] The *Keane* case, however, would seem to suggest that a mere refusal is enough, no matter how capricious.[14] Of course, where the promisee's duty has in fact been terminated the subsequent bargain does not present a consideration difficulty.[15]

The New York court has refused to find sufficient consideration in cases where only one party to a contract bargains with a third for the performance of his duty.[16] Yet, in the much discussed case of *De Cicco v. Schweizer*,[17] consideration was found in the forbearance of both parties to the first contract from mutually rescinding. Professor Corbin observes[18] that such reasoning logically leads to a conclusion that forbearance of one party from seeking rescission should also be consideration. Furthermore, such an analysis appears just as appropriate in cases in which the promisee hesitates to go on with the first contract as in cases where the promise is given to a completely willing promisee as an added incentive. Whether forbearance to seek rescission is actually bargained for in any given situation is a valid question, but the analysis is available to provide a traditionally-minded court with the required "legal detriment."

It is particularly unfortunate, from the standpoint of the above analysis, that the court, in the instant case, did not discuss the *Keane* case. Had the court cited it and distinguished it on its facts, then it might be safe to predict that the rationale of the three Washington cases is that which is set forth above. However, a prediction that the promisee must allege facts parallel to the *Keane* situation in order to enforce the promise of the third person would probably be too narrow.

The rule reached in the *Keane* case had its justification in the fact that each party bargained in good faith with the other and there was no sound policy reason why the promisor should not have performed after receiving the benefit from the promisee's performance. Although one is held to know the contents of a writing he signs, there is cer-

with Joseph Lande & Son v. Wellsco Realty, 131 N.J.L. 191, 34 A.2d 418, 423 (1943), where the court said, ". . . if there was a bona fide dispute as to plaintiff's contractual duty . . . there was in that respect also a good consideration for the owner's promise to pay the contract price on completion of the work."

[13] A good example of coercion is Melnick v. Kukla, 228 App. Div. 321, 239 N.Y.S. 16 (1930).

[14] See Abbott v. Doane, 163 Mass. 433, 40 N.E. 197 (1895).

[15] Ogden v. United Bank & Trust Co., 206 Cal. 571, 275 Pac. 430 (1929).

[16] Arend v. Smith, 151 N.Y. 502, 45 N.E. 872 (1897); Teele v. Mayer, 173 App. Div. 869, 160 N.Y.S. 116 (1916).

[17] 221 N.Y. 431, 117 N.E. 807 (1917).

[18] 1 CORBIN, CONTRACTS §§ 176-178 (1950).

tainly room for doubt in the *Reynolds* case as to whether the defendant was actually aware of making the promise not to revoke the offer in the earnest-money agreement. Yet, it is not difficult to imagine situations where a promisor would want to give one already bound an added incentive to go through with a performance notwithstanding the promisee's intention to perform fully. If the desired act is done, should he then complain that the promisee was already bound to do it for another? On first glance the *Reynolds* case would seem to answer in the affirmative; but it is submitted that while the *Reynolds* case and the *Keane* case are distinguishable on their facts, there is an implicit inconsistency in their results from the standpoint of social policy. For this reason, any prediction as to how the court will react in the future to a similar situation must rest upon tenuous ground.

ROBERT BARONSKY

Contracts—Restraint of Trade in the Form of a Condition. A recent decision which passed upon the legality of a device utilized in employment contracts to protect the employer's good will is that of *Eckman v. United Film Serv., Inc.*[1]

The action was brought by a former employee of the defendant corporation to recover commissions due under the contract of employment. The plaintiff was hired to negotiate for prospective contracts with theater managers and was compensated by a fixed commission on the sales accepted by the defendant, a certain percentage being credited to a reserve commission account. The dispute centered entirely around the following provision in the written contract of employment:

> If this agreement is terminated by either party, then all commission credits shown in the Salesman's Account as of such termination date shall become Reserve credits and no additional commissions of any kind will be earned by the Salesman or credited to him. No such Reserve credits shall be payable in any part to the Salesman for a period of eighteen (18) months after termination date. *If during such period and without United's written consent, the Salesman accepts employment with a film advertising company competitive to United or enters into the film advertising business for himself, then he shall forfeit any rights in such Reserve commission credits.*[2] [Emphasis added.]

The plaintiff terminated the employment and after six months

[1] 53 Wn.2d 652, 335 P.2d 813 (1959).
[2] *Id.* at 653, 335 P.2d at 813, 814.

accepted a position with a competitor of the defendant. When the eighteen month period ended, he claimed the reserve commissions; litigation followed the defendant's refusal to pay.

The trial court granted judgment for the plaintiff, holding the "forfeiture" clause to be void, though the ground for that conclusion was not given. On appeal, the judgment was reversed, with one judge dissenting.

Judge Ott, delivering the majority opinion, interpreted the provision as having the sole effect of a condition to the defendant's duty to pay the reserve commissions. The form of the language used led to the conclusion that the plaintiff did not promise to refrain from competing with the defendant after the employment relationship ceased. However, since the condition was not met, the right to payment did not accrue. On the plaintiff's contention that the condition was void as an unreasonable restraint of trade, the court's own words best explain the answer given: "We know of no legal prohibition which prevents competent parties from contracting as to the terms and conditions under which unaccrued, prospective, and contingent commissions shall be paid. The elements which nullify a contract as being in restraint of trade are not present here."[3]

In dissenting, Judge Mallery viewed the provision as an unreasonable restraint of trade because of the absence of any limitations as to space and the unnecessary scope of the occupation restrained. He took the provision in the contract to be a condition subsequent to the plaintiff's right to the commissions. Nevertheless, he was willing to disregard form and apply to conditions, as well as to covenants, the rules of illegality based upon the public policy favoring the unfettered opportunity to seek a livelihood.

As the problem in the *Eckman* case was one of first impression in Washington, the majority relied upon cases from outside jurisdictions for authority. All of the decisions cited[4] involved similar provisions in employment contracts of insurance agents whereby the right to receive commissions on renewal premiums after termination of the employment relationship was conditioned upon forbearance from

[3] *Id.* at 654, 335 P.2d at 814.

[4] Himes v. Masonic Mut. Life Ass'n, 215 Ala. 183, 110 So. 133 (1926); Barr v. Sun Life Assur. Co., 146 Fla. 55, 200 So. 240 (1941); Seibel v. Commonwealth Life Ins. Co., 194 Iowa 701, 190 N.W. 173 (1922); Lorch v. Kentucky Home Mut. Life Ins. Co., 284 Ky. 828, 146 S.W.2d 33 (1940); Chase v. New York Life Ins. Co., 188 Mass. 271, 74 N.E. 325 (1905); Sutherland v. Connecticut Mut. Life Ins. Co., 87 Misc. 383, 149 N.Y.S. 1008 (1914); Bohrnstedt v. Travelers' Ins. Co., 123 Ore. 539, 259 Pac. 419 (1927), *aff'd on rehearing*, 123 Ore. 539, 262 Pac. 938 (1928); Barton v. Travelers' Ins. Co., 84 S.C. 209, 66 S.E. 118 (1909).

accepting employment with a competitor (limitations as to time and space varying with each case). The conclusion of these cases was that forbearance from competition was a condition precedent to the right to commissions with no question of public policy involved.

However, there is not unanimity of result in cases with similar facts; not all courts have leaped from the premise that the provision legally operates only as a condition, to the conclusion that a question of public policy is not raised.

In *Carson v. Sun Life Assur. Co.*,[5] another case concerning an insurance agent's right to renewal commissions, the Georgia court admitted that forbearance from competition was only a condition precedent according to the contract, but found the condition to be void as an unreasonable restraint of trade; the condition did not contain any limitation as to area. The court reasoned that in practical terms, such a provision has the same effect as a restrictive covenant with a stipulation for liquidated damages. Looked at in that manner, the restriction became subject to the tests applicable for determining the validity of such covenants.[6]

The House of Lords considered the problem in *Wyatt v. Kreglinger*.[7] There it was held that although no promise was made to remain out of a certain trade, the condition of doing so in order to receive an annuity tended unreasonably to restrain trade.

Although the Washington court has undoubtedly aligned itself with the prevailing view, the *Carson* and *Wyatt* decisions are not without some merit. The important difference, of course, is that they recognize the possibility that a condition of forbearance from working in a particular line of work *may* tend to restrain trade unreasonably as much as a promise to do the same. It is the apparent unwillingness of the Washington court to recognize this possibility that makes the *Eckman* case significant.

The purpose that lies behind the insertion of the conditional provision in the *Eckman* contract is obviously the same purpose that lies behind any restrictive covenant ancillary to an employment contract—a purpose which the law has frowned upon by requiring that such covenants meet a test of reasonableness in order to have legal validity.[8]

[5] 56 Ga. App. 164, 192 S.E. 241 (1937).

[6] But see Bryant v. Continental Cas. Co., 58 Ga. App. 518, 199 S.E. 343 (1938), which contains some language contradictory to Carson v. Sun Life Assur. Co., although the case dwelt on another issue.

[7] 1 K.B. 793 (C.A.) (1933); noted in 49 L. Q. REV. 465 (1933).

[8] RESTATEMENT, CONTRACTS §515 (1932), states the criteria for testing the validity of agreements in restraint of trade. The section is in conformity with the generally

Yet, a literal reading of the majority opinion in the *Eckman* case necessarily leads one to say that if the restraint takes the form of a condition to some performance or benefit running to the one restrained, then it is not subject to the test as to its effect on the public interest. This may be contrasted with the words of a Texas appellate court,[9] in deciding one of the insurance agent cases: "The restriction, in our opinion, was reasonably limited as to time and territory and did not violate the rule that restraints of this character shall not be greater than reasonably necessary to protect the business involved."[10]

The course of the law with respect to the illegality of certain contractual relations has usually followed substance rather than form. A good example is that of illegal restraints upon the alienation of land.[11] As for the legal estate in fee simple, the law has been almost uniform in striking down attempted restraints by a conveyor, whether in the form of promises,[12] direct prohibitions,[13] or forfeitures upon a condition subsequent.[14] The public's interest in the free alienation of land remains paramount regardless of the form which an attempted interference may take.

It would seem that the court's answer to the problem in *Eckman* was too categorical. The fact that the defendant could not utilize the injunctive remedy[15] because no promise was given by the plaintiff was perhaps an unduly persuasive argument. The best that can be said for

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applied rules in most jurisdictions, including Washington. See Racine v. Bender, 141 Wash. 606, 252 Pac. 115 (1927), and Schneller v. Hayes, 176 Wash. 115, 28 P.2d 273 (1934), for cases involving restrictive covenants in employment contracts. For restrictive covenants ancillary to the sale of a business, see United Dye Works v. Strom, 179 Wash. 41, 35 P.2d 760 (1934), and Colby v. McLaughlin, 50 Wn.2d 152, 310 P.2d 527 (1957). A detailed analysis of the factors to be considered in the test of reasonableness and an exhaustive listing of cases, text material and periodicals dealing with the subject can be found in Arthur Murray Dance Studios v. Witter, 62 Ohio L. Abs. 17, 105 N.E.2d 685 (1952).

[9] Stancliffe v. Southland Life Ins. Co., 172 S.W.2d 521 (Tex. Civ. App. 1943). See also Masden v. Travelers' Ins. Co., 52 F.2d 75 (8th Cir. 1931). A brief, but clear, discussion of the problem is to be found in 6 CORBIN, CONTRACTS §1396 (1951).

[10] Stancliffe v. Southland Life Ins. Co., supra note 9, 172 S.W.2d. at 522.

[11] 6 POWELL, REAL PROPERTY §§839-848 (1958).

[12] Sisters of Mercy v. Lightner, 233 Iowa 1049, 274 N.W. 86 (1937); Drachenberg v. Drachenberg, 142 N.J. Eq. 127, 58 A.2d 861 (1948).

[13] Richardson v. Danson, 44 Wn.2d 760, 270 P.2d 802 (1954); Fowler v. Wyman, 169 Wash. 307, 13 P.2d 501 (1932).

[14] Bonnell v. McLaughlin, 173 Cal. 213, 159 Pac. 590 (1916); Douglass v. Steven, 214 N.C. 688, 200 S.E. 366 (1939).

[15] Where restrictive covenants in employment contracts are found to be reasonable, courts grant an injunction at a litigant's request, almost as a matter of course, because of the uncertain nature of damages resulting from a breach. In Racine v. Bender, 141 Wash. 606, 252 Pac. 115 (1927), an injunction was granted without a discussion of the inadequacy of the damages remedy. See WALSH, EQUITY 351 (1930).

the result is that it makes the drafter's task easier with respect to contract provisions restraining competition by a former employee. If they are couched in terms of condition, the court apparently will not consider a public policy argument. This, of course, leaves the field wide open to the imaginative drafter, although there is the safeguard rule that express conditions may be excused if their requirement involves extreme forfeiture.[16]

In short, the court has allowed a restraint of trade to be imposed indirectly by the conditional provision while not subjecting the terms to the scrutiny required by the public interest. If and when the question is again presented, it is to be desired that the court will look behind the weight of precedent and re-examine the position taken in the *Eckman* case.

ROBERT BARONSKY

CORPORATIONS

In the recent Washington case of *Bellinger v. West Coast Tel. Co.*, 154 Wash. Dec. 702, 343 P.2d 189 (1959), the Washington Supreme Court decided a question of first impression in this state as to which state law controls ownership of stock which is issued by a Washington corporation but held in another state by domiciliaries of the latter state. Two marital couples domiciled in Oregon and California, respectively, had acquired stock in defendant, a Washington corporation. There was a recital on the face of the certificates issued to each couple that the spouses held their stock as "joint tenants with right of survivorship and not as tenants in common." Upon the death of one of the spouses in each case, the defendant refused to transfer the stock to the surviving spouse as sole owner. The defendant claimed that it was precluded from making the requested transfer because of the Washington law abolishing joint tenancy with right of survivorship, RCW 11.04.070. The surviving spouses sued to compel the transfer and the superior court held that the Washington statute abolishing joint tenancy did not control the character of the plaintiffs' ownership and that the plaintiffs were entitled to be recognized as the sole owners of the shares represented by the respective certificates, since Oregon and California law permitted joint tenancy with right of survivorship. The supreme court affirmed, holding that under the Uniform Stock Transfer Act, RCW 23.80, the shares were embodied in the certificate and since the certificates were held in Oregon and California by couples who were domiciled in those states, the law of those states, rather than the law of Washington, controlled the question of the character of plaintiffs' ownership in the shares.

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[16] See RESTATEMENT, CONTRACTS §302 (1932); Hegeberg v. New England Fish Co., 7 Wn.2d 509, 110 P.2d 182 (1941).