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# CONTRACTS—1961 TENNESSEE SURVEY

PAUL J. HARTMAN\*

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## I. OFFER AND ACCEPTANCE—NOTIFICATION OF ACCEPTANCE BEFORE NOTIFICATION OF REVOCATION—DURATION OF OFFER WITH FIXED EXPIRATION DATE

In determining whether the parties had entered into a binding contract to sell real estate in *Dobson & Johnson, Inc. v. Waldron*,<sup>1</sup> the Tennessee Court of Appeals had to deal with the question of the termination of an offer which had a fixed expiration date; in addition, it had to deal with the question whether real estate brokers, employed by the vendor to sell real estate, had authority to receive an acceptance of an offer by the purchaser. The complainant-purchaser<sup>2</sup> sued defendant-vendor for breach of contract to sell land, asking for specific performance of the contract, or in the alternative for damages. Complainant had made an offer to defendant to purchase the land in question. In response to this offer, defendant made a counter-offer to sell, providing that this "offer expires July 1st, 1958." On June 30 complainant's acceptance of defendant's counter-offer was written on the counter-offer itself, and on July 1 the real estate brokers who handled the matter for defendant were notified of complainant's acceptance. Prior to the receipt of this notice of acceptance by the real estate brokers, defendant had not communicated to complainant

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1. 336 S.W.2d 313 (Tenn. App. M.S. 1960).

2. *Dobson & Johnson, Inc.*, a Tennessee corporation engaged in the general real estate business, brought suit for the use and benefit of itself, Frank L. Turner, Carl D. Storey, Jr., and Frank A. Berry, Jr., against Clarence H. Waldron and Margaret Virginia Waldron. *Dobson & Johnson, Inc.* represented the other complainants in the real estate transaction.

any revocation of his counter-offer. After the brokers had been notified of complainant's acceptance, defendant informed the brokers on July 1 that he had withdrawn his counter-offer.

The chancellor who heard the case on oral testimony dismissed the complaint, holding that no contract had come into existence. He was of the opinion that the counter-offer had been withdrawn before it was accepted. The court of appeals reversed and decreed specific performance for complainant. The appellate court held that the real estate brokers employed by defendant were proper agents to receive notice of the acceptance by complainant of defendant's counter-offer, and that complainant had accepted defendant's counter-offer before it had expired or was withdrawn; therefore a binding contract had been brought into existence.

If it is determined that the real estate brokers were the agents of defendant,<sup>3</sup> then, under well-settled principles of contract law, it is exceedingly difficult to escape the conclusion that the defendant's counter-offer was properly accepted, and that a binding contract to sell the land in question was formed. It is almost universally settled that a revocation of an offer (counter-offer here) requires communication to the offeree in order for the revocation to be effective; therefore, an acceptance of a revocable offer prior to a communicated revocation will create a binding contract.<sup>4</sup> The attempted revocation in the case at hand was communicated only to the real estate brokers employed by defendant, and this was done after complainant's acceptance had been communicated to the same brokers. These brokers were found not to be agents of complainant, but rather agents of defendant. The acceptance was thus received by defendant through his agents prior to any communicated revocation to complainant or its agents. If the offer had not lapsed, the acceptance became operative when communicated to these agents of defendant, and a contract for the sale of the land in question was formed.

The only remaining question presented in this case is whether or not defendant's counter-offer had lapsed on July 1, when complainant purported to accept. The counter-offer expressly stated it would expire July 1. The lack of authority squarely on point is little short of amazing. The court of appeals, however, seems to have reached a logical conclusion when it decided that the counter-offer had not lapsed.

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3. Elsewhere in this survey of Tennessee law, Mr. Overton has discussed the agency question *re* whether the brokers could properly be considered the agents of the defendant. See pp. 1124-25 *supra*.

4. 1 CORBIN, CONTRACTS § 39 (1950); 1 WILLISTON, CONTRACTS § 56 (3d ed. 1957).

II. IMPLIED AND QUASI CONTRACT—CLAIM FOR  
SERVICES WHERE FAMILY RELATIONSHIP INVOLVED

The Tennessee Court of Appeals case of *Cotton v. Roberts*<sup>5</sup> involves a rather close question of whether complainant should be allowed to recover against defendant (executor of an estate) either on implied or quasi contract for services performed for defendant's decedent during her life. Complainant, a nephew of the deceased Mrs. Roberts (defendant's testator), sued Mrs. Robert's estate for services performed for her over a thirty-five-year period, until her death in 1956. Mrs. Roberts was a widow during this entire period. The claim was based on several items, including: (1) driving decedent's automobile for eleven years; (2) transporting decedent in complainant's own automobile for twenty-four years; (3) running errands, getting groceries, feeding and tending livestock, and milking; and (4) hauling crops for decedent.

On the other side of the ledger, claimant lived quite near decedent on a large, productive farm owned by decedent under a crop sharing contract. In her will, decedent left complainant a larger individual portion of her property than she did any other beneficiary. Moreover, during decedent's lifetime, she and complainant had regular settlements of their farm business, at which time each party accounted to the other in full. During none of these settlements, nor at any other time during decedent's life, did claimant ever claim that decedent owed him anything for any of the services on which his present claim was predicated.

Under all these circumstances, the lower court held, and the court of appeals agreed, that claimant's services to decedent, while valuable, were not rendered with a reasonable expectation of pay. Therefore no recovery was allowed to complainant. The court's opinion seems to stress three main factors in finding no expectation of pay: (1) claimant was a nephew of decedent; (2) claimant and decedent had regular settlements of accounts during the period when the services were rendered and no claim for the services in question had been made at such times; and (3) the services were performed by complainant with the hope that decedent would provide for him in her will. Although complainant may have been disappointed at the extent of decedent's bounty which he received in her will, he was nevertheless a major beneficiary and cannot now recover, as an afterthought, for the services. So reasoned the court.

While the court talks primarily of implied contract as complainant's theory of recovery, his claim could properly be based on either implied contract or quasi contract. While there are distinct differences

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5. 337 S.W.2d 776 (Tenn. App. M.S. 1960).

between the two, there are also some similar essentials in both,<sup>6</sup> as will be presently seen. Moreover, a case may be one of implied or quasi contract depending upon a slight variation in facts, and the courts do not always differentiate between these two different theories of liability.<sup>7</sup>

If a party giving the performance (complainant here) reasonably expects to be paid, and the other party (decedent here) either intended to pay or should have known that complainant expected to be paid, then there arises a claim based on implied contract.<sup>8</sup> This is a genuine contract (offer and acceptance), which is spelled out of, or implied from, the conduct of the parties; it differs from an express contract, essentially, only in the method of proof.<sup>9</sup>

If a party giving the performance (complainant here) reasonably expected to be paid, if he conferred a benefit on the recipient of the performance (decedent here), and if he was not officious (a volunteer), then he has a claim in quasi contract.<sup>10</sup> Quasi contract is not predicated upon agreement or promises, and manifested intent to contract is not an essential element in its structure. It is generally based on the idea of unjust enrichment.<sup>11</sup>

It will be seen, however, from examining the essentials of both the implied contract and quasi contract that complainant will be denied a recovery if he performed his services without a reasonable expectation of pay. As the *Cotton* opinion makes clear, under such circumstances the services would be a gratuity and no recovery will be allowed. Complainant cannot be an "Indian giver."

In view of the facts, the *Cotton* case does not seem unreasonable in its conclusion that when complainant performed the services he did not reasonably expect to be paid, and the decedent did not reasonably think that he expected to be paid. As we have already seen, complainant and decedent periodically settled accounts during the

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6. Elsewhere in earlier surveys of the Tennessee law, the writer has discussed in some detail the differences and similarities in implied contract and quasi contract. Consequently, any extended treatment of that facet of the subject is not necessary at this time. See Hartman, *Contracts—1959 Tennessee Survey*, 12 VAND. L. REV. 1110 (1959); Hartman, *Contracts—1957 Tennessee Survey*, 10 VAND. L. REV. 1013, 1050 (1957).

7. *E.g.*, *Murray v. Grissim*, 40 Tenn. App. 246, 290 S.W.2d 888 (M.S. 1956), where plaintiff's suit for services was based on both quasi contract and implied contract. Plaintiff recovered.

8. *Hill v. Waxburg Constr. Co.*, 237 F.2d 936 (9th Cir. 1956); *Spencer v. Spencer*, 181 Mass. 471, 63 N.E. 947, 948 (1902); 1 WILLISTON, CONTRACTS §§ 3, 36 (3d ed. 1957); 1 CORBIN, CONTRACTS § 18 (1952).

9. *Murray v. Grissim*, 40 Tenn. App. 246, 250, 290 S.W.2d 888 (M.S. 1956); 1 WILLISTON, CONTRACTS §§ 3, 36, 36A (3d ed. 1957); 1 CORBIN, CONTRACTS § 18 (1950); RESTATEMENT, CONTRACTS §§ 5, 72 (1932).

10. 1 WILLISTON, CONTRACTS §§ 3, 3A (3d ed. 1957); 1 CORBIN, CONTRACTS § 19 (1952).

11. 1 WILLISTON, CONTRACTS § 3A (3d ed. 1957).

period when complainant rendered the services in question. No claim was ever made by complainant for the services at such settlements, nor at any other time during decedent's life. Although complainant was disappointed at what he received by decedent's will, the court was satisfied that complainant performed these services because he expected that he would receive something under decedent's will. Moreover, the family relationship of complainant and decedent may tend to negate a reasonable expectation of pay. As it is stated in *Williston on Contracts*:

*Silent Acceptance and Family Relationship.* The inference that services are to be paid for at their reasonable or fair value where no price has been stipulated is not usually drawn where these services are rendered to a member of the family circle by another member of the same household or close relative.<sup>12</sup>

Probably, however, the relationship of aunt and nephew in the *Cotton* case would not be enough in itself to warrant a finding that there was no reasonable expectation of pay.<sup>13</sup>

If services are accepted, it is nearly always a question of fact whether a reasonable man in the position of the parties would understand that they are offered in return for a fair compensation, or rather would suppose that they are offered gratuitously, or if not, that the recipient might think so.<sup>14</sup> While complainant has an appealing claim for valuable services rendered over a thirty-five-year period, under the circumstances the triers of fact (trial court and court of appeals) resolved the fact question of expectation of pay against complainant. It would be difficult, therefore, to find much quarrel with Judge Humphreys' opinion on this aspect of the *Cotton* case.

Unfortunately, there is some language in the *Cotton* opinion that is a bit confusing. In his opinion in that case, Judge Humphreys seems to lay down as a cardinal principle of the law of implied contracts that "in order to make out an implied contract for the rendition of services, facts and circumstances must be shown which

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12. 1 WILLISTON, CONTRACTS § 91AA (3d ed. 1957). For an extensive collection of cases dealing with recovery for services rendered by members of household or family, other than spouses, without express agreement for compensation, see Annot., 7 A.L.R.2d 8 (1949).

13. See Annot., 7 A.L.R.2d 8, 36 (1949), where the cases are summarized to the effect that the relation existing between uncle or aunt and nephew or niece is generally considered insufficient in itself to raise a presumption of gratuity with respect to services rendered by one to the other, or to rebut the general implication of a promise to pay for such services. See, e.g., *In re Burg's Estate*, 282 Mich. 304, 276 N.W. 458 (1937), where compensation was awarded to a nephew who carried on his aunt's business; the jury found he did so with expectation of payment.

14. 1 WILLISTON, CONTRACTS § 36 (3d ed. 1957).

amount to a request for services.”<sup>15</sup> A little later in the same paragraph of his opinion, however, he states an inconsistent proposition of law that “in the absence of facts and circumstances amounting to such a request, a contract may yet be implied when the facts and circumstances show that the person receiving the benefit of such work or services knew, or reasonably should have known, that the person doing the work expected to be paid and that the services were performed and accepted on this basis.” This last statement by Judge Humphreys is in line with the authorities that make it clear that such a request for the services is not necessary for an implied contractual recovery. As Mr. Williston summarizes the law in his monumental treatise on contracts: “And even though no request is made for the performance of work or service, if it is known that it is being rendered with the expectation of pay, the person benefited is liable.”<sup>16</sup>

It is unfortunate that Judge Humphreys gratuitously states an erroneous and inconsistent proposition of law in what is an otherwise lucid treatment of an implied contracts question.

### III. PAROL EVIDENCE RULE—APPLICATION OF RULE TO THIRD PARTY NOT A PARTY TO THE WRITTEN INSTRUMENT—PRE-EXISTING DUTY AS CONSIDERATION

*Memphis Street Railway v. Williams*<sup>17</sup> raised the question whether the parol evidence rule prevented plaintiffs from showing that an alleged release of one joint tort-feasor was not a release of the other joint tort-feasor, the defendant; he was not a party to the agreement constituting the release. Plaintiffs, who were injured by a tort jointly committed by defendant and Graham Transfer, settled their claim with Graham Transfer and sued defendant. Its defense was that it was released by reason of the release given by plaintiffs to Graham Transfer. Plaintiffs took the position that they had only executed a covenant not to sue Graham Transfer and had not released their cause of action in tort. At the trial, plaintiffs undertook to show by extrinsic evidence that a release of the tort claim had not been intended, although plaintiffs actually had agreed in writing to release the tort claim. To counter plaintiffs' efforts to show that they had not executed a release, defendant invoked the parol evidence rule.

Under orthodox common law doctrine, the release by the injured party of one joint tort-feasor released the others; the theory behind

15. 337 S.W.2d at 779.

16. 1 WILLISTON, CONTRACTS § 36, at 101-02 (3d ed. 1957). See also 1 *id.* § 91A.

17. 338 S.W.2d 639 (Tenn. App. W.S. 1959).

this doctrine was that the injured party had a single cause of action against the wrongdoers, and when he released one of them this single cause of action was extinguished.<sup>18</sup> On the other hand, a covenant not to sue given by an injured party to one joint tort-feasor did not release any of the tort-feasors, but was simply an agreement not to enforce the cause of action against one or more of the tort-feasors; the cause of action continued to exist and was enforceable against the other joint tort-feasors.<sup>19</sup>

The common law doctrine that the release of one joint tort-feasor bars any action against those jointly liable has been severely criticized,<sup>20</sup> and has lost much of its force by legislative<sup>21</sup> and judicial action.<sup>22</sup> Nevertheless, this anachronistic doctrine still holds a firm beach-head in our legal system,<sup>23</sup> including Tennessee.<sup>24</sup>

The point involved in the *Memphis Street Railway* case was whether plaintiffs had executed a release to Graham Transfer or had simply given a covenant not to sue. The controversy on this facet of the case stemmed from the fact that plaintiffs did execute with Graham Transfer a covenant not to sue, and plaintiffs accepted, endorsed, and cashed checks given by Graham Transfer's insurance company in payment of the settlement; the checks contained recitations that they were given in *release* of plaintiffs' claims arising out of the collision in which they were injured.

In affirming a judgment for plaintiffs against the defendant, the court of appeals rejected defendant's contention that plaintiffs had released it from liability. The court held that plaintiffs only intended to execute a covenant not to sue, and not a release. The court thought that the trial court properly admitted parol evidence to show that the plaintiffs intended only to execute a covenant not to sue, and

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18. See PROSSER, TORTS § 46 (2d ed. 1955).

19. *Ibid.*

20. Various reasons have been given for the dissatisfaction with the rule, among which are the following: (1) the rule is a trap for the unwary releasor; (2) it often disregards the actual intent of the parties and prevents full compensation; (3) it discharges the wrongdoer who does not contribute; and (4) it is generally unjust. The common law doctrine has been extensively criticized by text writers. *E.g.*, 1 HARPER & JAMES, TORTS 711-12 (1956); PROSSER, TORTS § 46 (2d ed. 1955).

21. For a succinct and comprehensive summary of the law on the subject of the release of joint tortfeasors, including the legislative developments, see 12 VAND. L. REV. 1414 (1959).

22. For judicial developments along this line, see 12 VAND. L. REV. 1414 (1959). For a fairly recent case where the court refused to hold that the release of one joint tort-feasor released the other, see *Breen v. Peck*, 48 N.J. Super. 160, 137 A.2d 37 (App. Div. 1957).

23. *E.g.*, *Brewer v. Casey*, 196 Mass. 384, 82 N.E. 45 (1907); *King v. Powell*, 220 N.C. 511, 17 S.E.2d 659 (1941); *Turner v. Pfisterer*, 137 N.E.2d 168 (Ohio 1954). For a collection of states where the doctrine still has vitality, see 12 VAND. L. REV. 1414, 1416 (1959).

24. *Byrd v. Crowder*, 166 Tenn. 215, 60 S.W.2d 171 (1933).



did not intend to execute a release of their cause of action. The language on the checks stating that it was a release was treated by the court as surplusage.

The court in *Memphis Street Railway* took the position that the case turned entirely on whether or not it was proper to admit parol evidence to show that the parties did intend to execute a covenant not to sue, rather than a release of the tort claim. The court was of the opinion that such parol evidence was properly admitted, on the ground that the parol evidence rule is applicable only to the parties to the instrument (plaintiffs and Graham Transfer) and cannot affect third parties (defendant here) who might be prejudiced by the contents of the written document. Hence, concluded the court, the rule would not exclude the parol evidence which showed that the plaintiffs and Graham Transfer did not intend to execute a release of the tort claim.

To be sure, in numerous cases it is said that the parol evidence rule has no application in contests between one of the parties to the writing and a stranger.<sup>25</sup> Tennessee courts follow this view<sup>26</sup> on the ground that the parol evidence rule cannot affect third parties who might be prejudiced by things contained in the writing. That reasoning can scarcely have any application to the *Memphis Street Railway* case, because the *third party* (defendant) invoked the parol evidence rule so as to *protect* his alleged rights as found in the writing. Moreover, it is hard to defend the position that the parol evidence rule has no application to third parties who are strangers to the writing in question, and the leading authorities in the field take the contrary position.<sup>27</sup> These authorities, as well as many courts, agree that if the parol evidence rule is correctly stated and understood, the rule is applicable in favor of or against a third party who was not a party to the written instrument.<sup>28</sup> Where the issue is the legal relation created by the writing between the parties to it, the parol evidence

25. *E.g.*, *Essington v. Parrish*, 164 F.2d 725 (7th Cir. 1947) (parol evidence used to show release intended only as covenant not to sue); *Broder v. Epstein*, 101 Cal. App. 2d 197, 225 P.2d 10, 11 (Dist. Ct. App. 1950); *Cunningham v. Day Bros. Eng'r Co.*, 55 A.2d 89, 90 (D.C. 1947); *Bowman v. Tax Comm'n*, 135 Ohio St. 295, 20 N.E.2d 916, 919 (1939); *In re Frederick's Estate*, 156 Pa. Super. 547, 41 A.2d 59, 62 (1945).

26. *Nashville Interurban Ry. v. Gregory*, 137 Tenn. 422, 193 S.W. 1053, 1056 (1917); *Swift v. Beaty*, 39 Tenn. App. 292, 282 S.W.2d 655, 658 (W.S. 1954).

27. See MORGAN, *BASIC PROBLEMS OF EVIDENCE* 354 (1954); 9 WIGMORE, *EVIDENCE* § 2446 (3d ed. 1940); 3 CORBIN, *CONTRACTS* § 596 (1960); 3 WILLISTON, *CONTRACTS* § 647 (rev. ed. 1936).

28. *E.g.*, *Flynn v. Butler*, 189 Mass. 377, 75 N.E. 730 (1905) (release of claim against one tort-feasor could not be varied by parol evidence); *Loria's Garage, Inc. v. Smith*, 49 N.J. Super. 242, 139 A.2d 430, 434 (App. Div. 1958); *National Power Co. v. Clark*, 31 Wyo. 284, 225 Pac. 586 (1924) (release of one joint tort-feasor could not be varied by parol evidence). See Harris, *Does the Parol Evidence Rule Apply When One of the Parties to the Controversy Is a Stranger to the Contract*, 22 ILL. L. REV. 274 (1927).

rule is thought applicable regardless of the parties to the litigation.<sup>29</sup>

In the case at hand, defendant's rights regarding the release are derived entirely from the legal relation created by the written agreement between plaintiffs and Graham Transfer. If the agreement between plaintiffs and Graham Transfer is so completely integrated in the written release that the parol evidence rule would prevent the parties to that agreement from introducing parol evidence to change or affect the meaning of the written agreement, then it is most difficult to understand how parol evidence could be used by a stranger to the document to show that his rights, flowing entirely from the written release, are different from the legal relation created for him by the release. On the other side of the coin, if the agreement between plaintiffs and Graham Transfer is so completely integrated in the release that parol evidence could not be used in a suit between plaintiffs and Graham Transfer, then it is most difficult to see how plaintiffs can logically and reasonably use parol evidence to show that their legal relationship with defendant, with respect to the same release, was different from the legal relationship set forth in its entirety in the release. This is because the legal relation between plaintiffs and defendant regarding the release stems entirely from the agreement between plaintiffs and Graham Transfer. If prior agreements of plaintiffs and Graham Transfer are completely integrated in their release, then by the same token the release agreement is the sole embodiment of the legal relation between plaintiffs and defendant in so far as it concerns the question of whether defendant was released. As one court has succinctly stated the pith of the matter recently: "If there be a complete written integration, the rule is the same no matter who asserts or denies the release; the intention of the parties is equally binding upon strangers to the instrument."<sup>30</sup> Or, as Professor Corbin puts it: "If A has a claim for damages against B, and this claim is honestly discharged by a release or an accord and satisfaction, the operation of this discharge is not affected by the fact that it is C who afterwards asserts or denies it."<sup>31</sup>

While Professor Corbin is of the firm conviction that if "two parties have by a complete written integration discharged and nullified antecedent negotiations between them, they are so discharged and nullified without regard to whoever may be asserting or denying the fact,"<sup>32</sup> he would nevertheless go much farther than most authorities in allowing the parties to establish by parol evidence that there was *not* a complete written integration. He would permit parties to show

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29. See authorities cited notes 26 and 27 *supra*.

30. *Atlantic Northern Airlines v. Schwimmer*, 12 N.J. 293, 96 A.2d 652, 655-56 (1953).

31. 3 CORBIN, CONTRACTS § 596, at 572 (1960).

32. *Ibid.*

by parol evidence that what appears on the face of an instrument to be a "release" of one joint tort-feasor was not intended as a discharge of another such obligor or tort-feasor.<sup>33</sup> Such parol evidence should be admitted, argues Professor Corbin, to show that the claimant did not intend the document to be a discharge of all of his claims. His position is that the parties could thus show whether the written release was a complete and accurate integration of their agreement. Thus, under his approach, what is plainly designated in the written document as a "release" can be shown by the claimant through extrinsic evidence to be only a covenant not to sue.<sup>34</sup> For such purposes he concludes that "it [the parol evidence] should be admissible in any suit against anybody."<sup>35</sup> It is submitted that Professor Corbin's view goes far toward destroying the purpose of the parol evidence rule, which is the stabilizing of commercial transactions. His approach presumably would sanction the use of parol evidence in the *Memphis Street Railway* case to show that the release executed by plaintiffs with Graham Transfer was intended to be no more than a covenant not to sue Graham Transfer, and was not a release of their entire cause of action. It should be made clear, however, that Professor Corbin would *not* be sanctioning the use of parol evidence on the ground that the parol evidence rule has no application to strangers to the writing; he would admit it to determine whether the release was a complete integration of the agreement between plaintiffs and Graham Transfer.<sup>36</sup>

In the *Memphis Street Railway* case, if the covenant not to sue and the release clause had been contained in the same document, or had been executed contemporaneously, apparently parol testimony could properly have been used to clear up an ambiguity, thus showing whether a release or a covenant not to sue was intended.<sup>37</sup> The use of parol evidence would appear proper to clear up an ambiguity because the single transaction would have contained the conflicting agreements of a covenant not to sue and a release. The admittance of parol evidence would have been especially proper under these circumstances if, as in the case at hand, the covenant not to sue had reserved to plaintiffs their right to proceed against all persons other than Graham Transfer.

However, a different situation is presented in the actual case at

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33. 3 *id.* § 596.

34. *Ibid.* A recent case following Corbin is *Breen v. Peck*, 48 N.J. Super. 160, 137 A.2d 37 (App. Div. 1957).

35. 3 *id.* § 596, at 576-77.

36. 3 *id.* § 596, at 572-73.

37. Parol evidence is always admissible to explain or clarify ambiguous terms of a writing. *E.g.*, *Meader v. Allen*, 110 Iowa 588, 81 N.W. 799 (1900); *Faulkner v. Ramsey*, 178 Tenn. 370, 158 S.W.2d 710 (1942); *Wheelwright v. Pure Milk Ass'n*, 208 Wis. 40, 240 N.W. 769 (1932).

hand because the release agreement presumably was executed by plaintiffs and Graham Transfer *after* the covenant not to sue. Under those circumstances, the agreement releasing plaintiffs' tort claim could properly be considered to have integrated completely the agreement between Graham Transfer and plaintiffs. If the release agreement became the final, complete and binding expression of the agreement between plaintiffs and Graham Transfer, then it is most difficult to see how parol evidence could properly be used to show that the plain and unambiguous release agreement was actually no more than a covenant not to sue. This is true since the written integration of an agreement makes all prior or contemporaneous extrinsic agreements relating to the same subject, whether oral or written, inoperative for purposes of varying or adding to the principal agreement.<sup>38</sup>

What is the criterion for determining whether there has been a complete integration sufficient to prevent the use of evidence of prior or contemporaneous extrinsic agreements? While the authorities are not in complete accord, many courts take the position that where the writing (release agreement here) deals with the particular subject-matter of the alleged prior or contemporaneous agreement (settlement containing covenant not to sue here), there is a firm basis for a reasonable deduction that it (release agreement here) was intended to be a complete integration.<sup>39</sup> The release in the *Memphis Street Railway* case did recite that plaintiffs were releasing their claims arising out of the collision in question.

While not mentioned in the *Memphis Street Railway* opinion, the real pivotal point on which the case seems properly to turn is one of consideration. Did Graham Transfer give any consideration for the release agreement executed by plaintiffs which was separate and apart from the consideration given for the plaintiffs' covenant not to sue? That is to say, did plaintiffs enter a binding contract giving Graham Transfer an actual release of the tort claim, as distinguished from their covenant not to sue? The tendering of the checks containing the release clearly could be an offer to plaintiffs for a contract of release;<sup>40</sup> the cashing of the checks could clearly constitute an acceptance of the offer for a release.<sup>41</sup> There remains, however, the question whether Graham Transfer gave any consideration to support

38. See MORGAN, *op. cit. supra* note 27, at 342-43; 3 CORBIN, CONTRACTS § 573 (1960); RESTATEMENT, CONTRACTS § 237 (1932).

39. See MORGAN, *op. cit. supra* note 27, at 344; 9 WIGMORE, EVIDENCE § 2430 (3d ed. 1940).

40. Grubb v. Anderson, 198 Tenn. 492, 281 S.W.2d 241 (1955); Barham v. Bank, 94 Ark. 158, 126 S.W. 394 (1910); Kall v. W. G. Block Co., 319 Ill. 339, 150 N.E. 254 (1926); Beck Elec. Constr. Co. v. National Contracting Co., 143 Minn. 149, 173 N.W. 413 (1919).

41. 6 WILLISTON, CONTRACTS § 1854 (rev. ed. 1938); cases cited note 40 *supra*.

plaintiffs' promise of release. It would appear that no consideration was given, and therefore the alleged release was not binding for want of consideration.

The release clause on the checks in the *Memphis Street Railway* case was printed by the insurer of Graham Transfer on all checks given by it in settlement of claims against those it insured. When the insurance company's checks containing the release clause were tendered to plaintiffs, they were tendered as discharge of the pre-existing duty to pay as per the terms of the previously executed agreement containing only plaintiffs' covenant not to sue Graham Transfer. Plaintiffs could not have become bound contractually on the release agreement until plaintiffs cashed the insurance company's checks containing the release clause. That would have been the acceptance of the insurance company's offer for a release. Presumably the cashing of the check took place after the parties had entered into the contract of settlement containing the covenant not to sue. Thus, when plaintiffs allegedly agreed to the release, Graham Transfer and the insurance company were already under a legal obligation to pay plaintiffs a liquidated, undisputed sum certain, with plaintiffs having executed only their covenant not to sue as consideration for the promise to pay. Plaintiffs received from neither Graham Transfer nor the insurance company that issued the checks in settlement of plaintiffs' claims any additional consideration for plaintiffs' promise to release Graham Transfer. Hence, under the pre-existing duty rule, the performance of what Graham Transfer and the insurance company were already legally obligated to do could not constitute consideration to support plaintiffs' promise (if it was a promise) to release the tort claim against Graham Transfer.<sup>42</sup> Consequently, the release was not a binding contract, and it therefore released neither Graham Transfer nor defendant. The only relevant remaining binding contractual obligation was plaintiffs' covenant not to sue Graham Transfer, which would not release plaintiffs' tort claim against defendants.

#### IV. EXCULPATORY CONTRACTS—CONTRACTING AGAINST LIABILITY FOR CONSEQUENCES OF OWN NEGLIGENT CONDUCT

The Tennessee Supreme Court case of *Moss v. Fortune*<sup>43</sup> presented the question whether the operator of a business which rented riding horses to the public could contract away his liability for injury resulting from his own negligence in furnishing a defective stirrup to a renter of a horse. Plaintiff, who rented a horse from defendant,

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<sup>42</sup> 1 WILLISTON, CONTRACTS § 120 (3d ed. 1957); 1 CORBIN, CONTRACTS §§ 171-75 (1960).

<sup>43</sup> 340 S.W.2d 902 (Tenn. 1960).

sued defendant for personal injuries suffered by plaintiff when a stirrup strap broke. Plaintiff claimed that defendant was negligent in furnishing a defective stirrup strap. By way of defense, the defendant interposed an agreement by which plaintiff, on renting the horse, agreed to assume all risks. Plaintiff, by demurrer, claimed the agreement was invalid. In affirming a lower court judgment for defendant, the Supreme Court of Tennessee held that plaintiff had contractually excused defendant from the consequences of his negligence, and that such an exculpatory clause was valid.

In determining the validity of a contract by which one party agrees to free the other from liability for damages which the former may suffer in the future because of the negligence of the latter, certain important and conflicting considerations of social policy must be balanced against each other. Two broad policies of the law that directly clash with each other are (1) the policy of freedom of contract and (2) the undesirable social effect of a contract which relieves a party for the harm caused by his own wrongful conduct. The resolution of this conflict of social policies is not easy, and the cases are by no means completely harmonious.

In some few cases the rule is laid down that one simply cannot insulate himself from liability for his own negligent conduct. By this view, such contracts relieving against liability for negligence in the future are invalid.<sup>44</sup> Most jurisdictions, however, do not go so far in regard to simple negligence,<sup>45</sup> although it is well established that there are some situations where contracts relieving from liability for negligence will almost always be struck down as against public policy. Thus, the law seems well settled that a common carrier, owing a duty to serve all qualified persons who apply, cannot, when acting in its public capacity, validly exempt itself by contract from liability for negligence. This doctrine was early applied to carriers by the Supreme Court of the United States in *New York Central Railroad v. Lockwood*.<sup>46</sup> In deciding that a clause in the contract exculpating a carrier from liability for its negligence was invalid, the Court relied heavily on the disparity in bargaining power between the carrier and its individual customers. Of course, a carrier with its monopoly has the power to exact a contract that is most favorable to it; on the other hand, the traveller or shipper must either agree to relieve the carrier of liability for its negligence, or refuse to

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44. See *Papakalos v. Shaka*, 91 N.H. 265, 18 A.2d 377 (1941).

45. For authority that a party may normally contract away his liability for the consequences of his simple negligence, see *McKAY v. Louisville & N.R.R.*, 133 Tenn. 590, 182 S.W. 874 (1916); 6 WILLISTON, CONTRACTS § 1751B (rev. ed. 1938). For a good comment dealing with the subject of contracting against liability for negligent conduct, see 4 Mo. L. REV. 55 (1939).

46. 84 U.S. (17 Wall.) 357 (1873).

agree at the risk of great inconvenience. An additional argument advanced as a reason for declaring any exculpatory contract invalid is the possibility that the party who has such immunity from liability will become lax in the performance of his duties. The incentive to use due care would be destroyed if harm can be inflicted with impunity because of the relieving clause.

In a great many similar situations not involving common carriers, the relative bargaining power of the contracting parties appears to be the most dominant factor in determining the validity of exculpatory clauses.<sup>47</sup> A contractual exemption from liability for negligence is rarely upheld where the contracting parties do not stand on a footing of approximate bargaining equality. The farther apart the contracting parties are in their relative bargaining strength the greater is the likelihood that the exculpatory clause will be struck down. Validity generally is denied to contracts exempting from liability for its negligence the party which has an appreciably superior bargaining position. But whatever the reason given in the opinions, the doctrine that a common carrier cannot validly contract away its liability for the consequence of its negligence has been widely accepted by the courts.<sup>48</sup> Having once found lodgment, this doctrine has been extended in varying degrees to public utilities and businesses of a similar nature which are thought to be affected with the public interest.<sup>49</sup> Thus, a telegraph company with its superior bargaining power resulting from its limited competition, plus its duty owed to the public, is in much the same situation as a common carrier with respect to the telegraph company's power to exculpate itself from liability for negligence. Consequently, most courts hold that in the absence of a permissive statute any contractual limitation on the liability of a telegraph company is invalid because of public policy.<sup>50</sup>

47. See Annot., 175 A.L.R. 8 (1948) for a very extensive collection of cases on the subject of limiting liability for one's own negligence. The statement made in the text accompanying this footnote is repeatedly emphasized there.

48. *Pierce v. Southern Pac. Co.*, 120 Cal. 156, 47 Pac. 874 (1897); *Shellabarger Elevator Co. v. Illinois C.R.R.*, 278 Ill. 333, 116 N.E. 170 (1917); *Insurance Co. v. Lake Erie & W.R.R.*, 152 Ind. 333, 53 N.E. 382 (1899); *Cox v. Vermont C.R.R.*, 170 Mass. 129, 49 N.E. 97 (1898); see *Thomas v. Atlantic C.L.R.R.*, 201 F.2d 167, 169 (5th Cir. 1953); *Carolina, C. & O. Ry. v. Unaka Springs Lumber Co.*, 130 Tenn. 354, 367, 170 S.W. 591 (1914); 6 WILLISTON, CONTRACTS § 1751C (rev. ed. 1938); Annot., 175 A.L.R. 8, 38-39 (1948). However, where a common carrier or public utility is not acting in the discharge of its duty as a carrier or utility, it may validly contract against liability for its negligence. *Baltimore & O.S.R.R. v. Voigt*, 176 U.S. 498 (1899); see *Ringling Bros.-Barnum & Bailey Circus Shows v. Olivera*, 119 F.2d 584, 587 (9th Cir. 1941).

49. *Gas companies*: *Fairfax Gas & Supply Co. v. Hadary*, 151 F.2d 939 (4th Cir. 1945), noted 19 So. CAL. L. REV. 441 (1946); *electric companies*: *Denver Consol. Elec. Co. v. Lawrence*, 31 Colo. 301, 73 Pac. 39 (1903); *Turner v. Southern Power Co.*, 154 N.C. 131, 69 S.E. 767 (1910). See 6 WILLISTON, CONTRACTS § 1751C (rev. ed. 1938).

50. *Western Union Tel. Co. v. Chamblee*, 122 Ala. 428, 25 So. 232 (1898);

In view of the obligation imposed upon banks by the common law to refrain at their peril from making disbursements after receipt of a stop payment notice, banks have often tried to restrict their liability by exculpatory clauses, either by a stipulation in the deposit slip or in the form provided by the bank for stop payment notices. The validity of such release clauses has been the subject of conflicting judicial opinions. By what is thought to be the weight of authority, a bank may limit its common law liability for wrongful payment after having received a stop payment notice.<sup>51</sup> The policy that the parties should have the utmost freedom of contract is permitted by the courts of this persuasion to outweigh the public policy considerations against the validity of such agreements exempting the bank from liability. There is one line of authority, however, that treats such release clauses in the bank-depositor relationship as contrary to public policy and invalid.<sup>52</sup> Perhaps a bank and its depositor may, in legal contemplation, be viewed as having equal bargaining power and freedom of contract; but full recognition of modern day realities may well suggest a contrary conclusion.<sup>53</sup> The somewhat monopolistic character of the banking business may make it necessary for the individual either to accept the offered terms or to forego the desired services altogether. Moreover, the bank has been entrusted with an important franchise to serve the public and has received broad legislative protection. In light of all these circumstances, it is not surprising that a number of courts have treated the bank as a quasi-public enterprise, similar to an utility, and have invalidated exculpatory clauses in the bank's contract with the depositor.<sup>54</sup>

The cases vary widely as to the power of a purely private contractor to stipulate by contract against liability for negligence. If there is no great disparity of bargaining power between the contracting parties, the contracts exempting from liability for the consequences of negligence will likely be upheld.<sup>55</sup> The policy favoring the freedom of contract is regarded as paramount. Some authorities take the view that the employer and employee do not stand upon an equal footing

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Thompson v. Western Union Tel. Co., 64 Wis. 531, 25 N.W. 789 (1885); see 6 WILLISTON, CONTRACTS § 1751C (rev. ed. 1938); Annot., 175 A.L.R. 8, 42-75 (1948).

51. Hodnick v. Fidelity Trust Co., 96 Ind. App. 342, 183 N.E. 488 (1932); Tremont Trust Co. v. Burack, 235 Mass. 398, 126 N.E. 782 (1920); Gaita v. Windsor Bank, 251 N.Y. 152, 167 N.E. 203 (1929).

52. Hiroshima v. Bank of Italy, 78 Cal. App. 362, 248 Pac. 947 (Dist. Ct. App. 1926); Reinhardt v. Passaic-Clifton Nat'l Bank & Trust Co., 16 N.J. Super. 430, 84 A.2d 741 (Super. Ct. 1951); Speroff v. First-Central Trust Co., 149 Ohio St. 415, 79 N.E.2d 119 (1948); see Annot., 1 A.L.R.2d 1155 (1948).

53. See Reinhardt v. Passaic-Clifton Nat'l Bank & Trust Co., 16 N.J. Super. 430, 84 A.2d 741, 744 (Super. Ct. 1951).

54. See cases cited note 52 *supra*.

55. See Standard Ins. Co. v. Ashland Oil & Ref. Co., 186 F.2d 44, 46 (10th Cir. 1950); 6 WILLISTON, CONTRACTS §§ 1751A, 1751B (rev. ed. 1938).



when entering into a contract of employment. Consequently, contracts excusing the employer from the consequences of his negligence have been declared invalid.<sup>56</sup>

Where a bailee contracts against the results of a negligent discharge of his duty as a bailee, the cases are in confusion as to the validity of such an agreement.<sup>57</sup> While the weight of authority seems to be that the bailee can so relieve himself, nevertheless there is a strong tendency in the more recent decisions to regard such contracts void as violative of public policy, particularly where made by what might be called the professional bailee, such as the owners of parcel checkrooms,<sup>58</sup> owners of parking places,<sup>59</sup> garagemen,<sup>60</sup> and especially warehousemen.<sup>61</sup>

Regarding the lessor and the lessee, the courts normally take the position that they stand upon an equal footing from the standpoint of bargaining power, and the courts usually treat as enforceable a clause exempting the landlord from the consequences of his own negligence.<sup>62</sup>

56. *Chicago, W. & V. Coal Co. v. Peterson*, 39 Ill. App. 114 (1890); *Palmer v. Boston & M.R.R.*, 227 Mass. 493, 116 N.E. 899 (1917); *Johnston v. Fargo*, 184 N.Y. 379, 77 N.E. 388 (1906); *Hilleary v. Bromley*, 82 Ohio App. 473, 75 N.E.2d 818 (1947); see 6 WILLISTON, CONTRACTS § 1751D (rev. ed. 1938).

57. For cases taking the view that the bailee can exculpate himself, see *Hall-Scott Motor Car Co. v. Universal Ins. Co.*, 122 F.2d 531 (9th Cir. 1941); *Newport News Shipbuilding & Dry Dock Co. v. United States*, 34 F.2d 100 (4th Cir. 1929); *World's Columbian Exposition Co. v. Republic of France*, 96 Fed. 687 (7th Cir. 1899); *Interstate Compress Co. v. Agnew*, 276 Fed. 882 (8th Cir. 1921); *Missouri Pac. R.R. v. Fuqua*, 150 Ark. 145, 233 S.W. 926 (1921). For cases taking the view that such exculpatory clauses are invalid, see *Compañía de Navagacion v. Fireman's Fund Ins. Co.*, 277 U.S. 66 (1928); *Alaska Commercial Co. v. Williams*, 128 Fed. 362 (9th Cir. 1904). See Annot., 175 A.L.R. 8, 111 (1948), giving collection of cases upholding the clause, as well as cases striking down the clause.

58. *Hotels Statler Co. v. Safer*, 103 Ohio St. 638, 134 N.E. 460 (1921); *Denver Union Terminal Ry. v. Cullinan*, 72 Colo. 248, 210 Pac. 602 (1922).

59. *Miller's Mut. Fire Ins. Ass'n v. Parker*, 234 N.C. 20, 65 S.E.2d 341 (1951); see Annot., 175 A.L.R. 8, 123-28 (1948).

60. *Renfro v. Fouche*, 26 Ga. App. 340, 106 S.E. 303 (1921); *Weinberger v. Werremeyer*, 224 Ill. App. 217 (1921); *Scott Auto & Supply Co. v. McQueen*, 111 Okla. 107, 226 Pac. 372 (1924); *Pilson v. Tip-Top Auto Co.*, 67 Ore. 528, 136 Pac. 642 (1913).

61. Warehousemen apparently are treated as performing duties of public service in a much higher degree than most other types of bailees for hire; hence the cases generally take the position that the warehouseman lacks the power to relieve himself from liability by contract. *E.g.*, *George v. Bekins Van & Storage Co.*, 196 P.2d 637 (Cal. Dist. Ct. App. 1948). See Annot., 175 A.L.R. 8, 131-44 (1948).

62. *Inglis v. Garland*, 19 Cal. App. 2d 767, 64 P.2d 501 (Los Angeles County Super. Ct. 1936); *Bullard v. Asa G. Candler, Inc.*, 32 Ga. App. 187, 122 S.E. 813 (1924); *O'Callaghan v. Waller & Beckwith Realty Co.*, 15 Ill. App. 2d 349, 146 N.E.2d 198 (1957), *aff'd*, 15 Ill. 2d 436, 155 N.E.2d 545 (1959); *J. W. Grady Co. v. Herrick*, 288 Mass. 304, 192 N.E. 748 (1934); *Kirshenbaum v. General Outdoor Advertising Co.*, 258 N.Y. 489, 180 N.E. 245 (1932); *Burnett v. Texas Co.*, 204 N.C. 460, 168 S.E. 496 (1933); *Robinson v. Tate*, 34 Tenn. App. 215, 236 S.W.2d 445 (W.S. 1950); see Annot., 175 A.L.R. 8, 83 (1948); 6 WILLISTON, CONTRACTS § 1751C (rev. ed. 1938). A lease provision ex-

Generally speaking, the courts will not permit anyone to contract away his liability for wilful or wanton conduct.<sup>63</sup> Such exculpatory clauses are thought to be patently against public policy.

Tested by the criteria normally employed by most courts in determining the validity of clauses relieving against liability for the consequences of negligence, the exculpatory clause in the *Moss* case would be sustained. The decision in this case is thus in line with ample precedent. There was no apparent disparity of bargaining power between the defendant, who rented horses to riders, and plaintiff; nor was the defendant's business of renting horses affected with any appreciable public interest. So the policy of freedom of contract was thought by the court to be paramount. On the other side of the coin, there still remains the rather forceful argument against the validity of such exculpatory contracts to the effect that such clauses have a tendency to cause a party to become lax in the performance of his duties. The incentive to use due and reasonable care is, in part, destroyed; the party knows that he is insulated from liability for the consequences of his negligence through the contract which has exempted him from the payment of damages for injury suffered by the other party to the contract.

V. AGREEMENT IN RESTRAINT OF TRADE—AGREEMENT OF SELLER OF BUSINESS NOT TO COMPETE—ENFORCEMENT OF RESTRAINT IN AREA GREATER THAN REQUIRED TO PROTECT PURCHASER

*Greene County Tire & Supply, Inc. v. Spurlin*<sup>64</sup> presented the question whether the Tennessee court would enforce an agreement by the seller of a tire recapping business not to compete with the buyer throughout an area which the court expressly found to be in excess of that necessary to protect the buyer. The facts are relatively simple. The defendant, Spurlin, was one of three stockholders in the selling corporation which engaged in the "recapping or repairing of automobile truck tires." The selling corporation, located in Greeneville, Tennessee, sold its assets to plaintiff, the Greene County Tire and Supply Company. As part of the consideration, the selling corporation, as well as all three stockholders, agreed not to engage in a similar business for five years within a radius of 100 miles of Greeneville. About a year later, defendant-stockholder did engage in

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operating the tenant from liability for loss due to fire has been upheld. *Cerny-Pickas Co. v. C. R. John Co.*, 7 Ill. 2d 393, 131 N.E.2d 100 (1936).

63. See *Thomas v. Atlantic C.L.R.R.*, 201 F.2d 167, 170 (5th Cir. 1953); *Robinson v. Tate*, 34 Tenn. App. 215, 227, 236 S.W.2d 445 (W.S. 1950) (may not contract against liability for fraud); 6 WILLISTON, CONTRACTS § 1751B (rev. ed. 1938).

64. 338 S.W.2d 597 (Tenn. 1960).

the recapping business in Greeneville. Plaintiff sued to enjoin defendant from violating the non-competitive agreement. In his defense, defendant took the position that the agreement not to compete was unreasonable and an unlawful restraint of trade in violation of a Tennessee statute<sup>65</sup> and the Sherman Anti-Trust Act.<sup>66</sup>

The court twice declared in its opinion that the area in which defendant had agreed not to engage in the recapping business was in excess of that which was necessary fairly to protect the plaintiff-buyer in procuring the benefits of the purchase.<sup>67</sup> The court also thought the recapping business to be a common type of enterprise which would be found in most of the counties of Tennessee. Moreover, this business was thought by the court to involve no trade secrets. Nevertheless, the court found defendant's agreement not to compete to be valid and enforced it against defendant throughout an area having a radius of 100 miles from Greeneville, this being the area in which defendant had agreed not to compete. As a reason for its holding, the court declared that the public policies concerning injury to the public or the inconvenience which would be experienced by defendant resulting from the enforcement of the agreement were of less weight than public policies with reference to maintaining honesty and freedom of alienation.

Neither the Tennessee statute<sup>68</sup> involved in this case nor the Sherman Anti-Trust Act<sup>69</sup> outlaws all agreements in restraint of trade, but only those that constitute an "unreasonable" restraint. In determining whether the particular restraint of trade comes within the statutory condemnation, both the Tennessee statute and Sherman Anti-Trust Act apply the "rule of reason."<sup>70</sup> For practical purposes it thus appears that the agreements and combinations in restraint of trade to which both statutes are applicable are the same as those that are made unenforceable by the common law.<sup>71</sup> In short, both statutes seem to provide new penalties and enforcing sanctions to the same

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65. TENN. CODE ANN. § 69-101 (1956).

66. 26 Stat. 209 (1890), 15 U.S.C. §§ 1-7 (1958).

67. 338 S.W.2d at 600.

68. Baird v. Smith, 128 Tenn. 410, 161 S.W. 492 (1913). In an earlier issue of the *Tennessee Survey*, the writer had occasion to deal somewhat extensively with another Tennessee case dealing with the enforceability of a covenant not to compete, where the same Tennessee statute was involved. See Hartman, *Contracts—1957 Tennessee Survey*, 10 VAND. L. REV. 1013, 1033 (1957).

69. *United States v. United States Steel Corp.*, 251 U.S. 417 (1920); *Standard Oil Co. v. United States*, 221 U.S. 1 (1911).

70. This "rule of reason" was expressly adopted and applied in *Dark Tobacco Growers' Ass'n v. Dunn*, 150 Tenn. 614, 266 S.W. 308 (1924); *State ex rel. Attorney-General v. Burley Tobacco Growers' Ass'n*, 2 Tenn. App. 674 (E.S. 1926).

71. In addition to cases cited in note 70 *supra*, see 6 CORBIN, CONTRACTS § 1397 (1951).

agreements that were unenforceable at common law because the restraint was unreasonable.<sup>72</sup>

Professor Williston, the eminent authority on contracts, states that it is everywhere agreed that in order to be valid a promise imposing a restraint in trade or occupation must be reasonable.<sup>73</sup> In considering what is reasonable, the authorities make it clear that regard must be paid, among other things, to the question whether the promise is wider than is necessary for the protection of the promisee in some legitimate interest.<sup>74</sup> Professor Williston also adds that if the restraint imposed is greater than necessary for the protection of the covenantee, the promise is necessarily invalid.<sup>75</sup>

The question necessarily arises, therefore: When is an agreement restraining competition unreasonable with respect to the area covered and therefore unenforceable? In resolving this query, the authorities make the question turn on whether the area embraced in the agreement is greater than is required for the protection of the good will of the business.<sup>76</sup> The purpose of enforcing a restraining promise that is ancillary to a contract for the sale of a business with its good will is to make good will a saleable asset by protecting the buyer in the enjoyment of that for which he pays.<sup>77</sup> Consequently, as is pointed out by Professor Corbin, very many cases have held a restraining agreement valid on the ground that it was ancillary to such a purchase and that the extent of the restraint was no greater than was reasonably necessary to protect the buyer's interest.<sup>78</sup> On the other hand, Professor Corbin declares that the authorities make it equally plain that a promise by a seller not to compete with the buyer is illegal and unenforceable insofar as the restraint is in excess of the extent of the good will purchased.<sup>79</sup> The restraint is illegal if it covers territory greater in extent than that in which the seller

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72. In addition to cases cited in note 70 *supra*, see *Appalachian Coals, Inc. v. United States*, 288 U.S. 344 (1933); *Standard Oil Co. v. United States*, 221 U.S. 1 (1911); *American Tobacco Co. v. United States*, 221 U.S. 106 (1911); 6 CORBIN, CONTRACTS § 1397 (1951).

73. 5 WILLISTON, CONTRACTS § 1636 (rev. ed. 1937).

74. *Ibid.*; 6 CORBIN, CONTRACTS § 1384 (1951). For a comprehensive collection of authorities dealing, in part, with this facet of the problem, see *Arthur Murray Dance Studios, Inc. v. Witter*, 105 N.E.2d 685 (Ohio C.P. 1952). For an exhaustive collection of cases dealing with the importance of the territory covered as affecting the validity of a restrictive covenant, see Annot., 46 A.L.R.2d 119 (1956). See RESTATEMENT, CONTRACTS §§ 515, 516 (1932).

75. 5 WILLISTON, CONTRACTS § 1636 (rev. ed. 1937). See exhaustive Annot., 46 A.L.R.2d 119, 205, 215 (1956) to the same effect.

76. 6 CORBIN, CONTRACTS § 1386 (1951), and cases cited. See also Annot., 78 A.L.R. 1038, 1039 (1932). See exhaustive annotation in which this facet of the problem is accentuated in 46 A.L.R.2d 119, 149, 204, 215 (1956).

77. 6 CORBIN, CONTRACTS §§ 1385, 1387 (1951).

78. 6 *id.* § 1386.

79. 6 *id.* § 1390. See extensive annotation to this effect, 46 A.L.R.2d 119, 188-252 (1956).

had already developed business and good will.<sup>80</sup> As Professor Williston puts it: "One whose business is confined to New York is not helped by the promise of another not to do business in Chicago, and if the promise is enforced by injunction the promisor is injured, while the promisee is not correspondingly helped."<sup>81</sup> Nor is a restraint on competition made reasonable by the fact that the buyer afterwards extends his business into the larger territory or by the fact that he himself was already doing business in such larger territory.<sup>82</sup>

As we have already seen, the *Spurlin* opinion seems to make it clear that the area in which defendant-seller agreed not to engage in the recapping business was in excess of that which was necessary fairly to protect the plaintiff-buyer in procuring the benefits of the purchase. This fact alone shows that part of the *Spurlin* restraint was unreasonable under well-established principles of law.

Since an agreement restricting competition may be perfectly reasonable as to a part of the territory included within the restraint, but unreasonable as to the remainder of the territory, what will the courts do with such an agreement? The cases make it clear that such an agreement is illegal and unenforceable insofar as the restraint is in excess of the extent of the good will purchased.<sup>83</sup> When the court enforces the *Spurlin*-type agreement in a territory greater in extent than that which is reasonably necessary for the protection of the plaintiff's interest, it does so squarely in the teeth of the overwhelming weight of authority. What will courts faced with the *Spurlin* situation do? Will the courts enforce such an agreement in part while holding the remainder invalid? Or will they hold the entire agreement to be illegal and void where the restraint imposed is in excess of what was reasonable?

The courts split on this question. Professor Corbin states the law to the effect that many cases have held the entire contract to be illegal and void where the restraint imposed was in excess of what was reasonable and the terms of the agreement indicated no line of division.<sup>84</sup> However, Professor Corbin also states that in the best considered modern cases the court has decreed enforcement as against a defendant whose breach has occurred within an area in which restriction would clearly be reasonable, even though the terms of the agreement imposed a larger and unreasonable restraint.<sup>85</sup> Under

80. See 6 CORBIN, CONTRACTS § 1387 (1951).

81. 5 WILLISTON, CONTRACTS § 1636, at 4581 (rev. ed. 1937).

82. See 6 CORBIN, CONTRACTS § 1387 (1951). Some authority takes the view that the territorial scope may include reasonable expectation of expansion. Annot., 46 A.L.R.2d 119, 253 (1956).

83. See text and supporting authorities in notes 79, 80, 81, 82 *supra*.

84. 6 CORBIN, CONTRACTS § 1390 (1951).

85. *Ibid.*

this latter view, the *Spurlin* agreement should have been enforced within an area in which the restriction would clearly be reasonable but should not have been enforced in those areas where the restraint would have been unreasonable.

In short, one line of authority, supported by very many cases, would have held the entire *Spurlin* restraint to be illegal and void because, by what seems to be treated as a fact by the court, the restraint imposed was in excess of what was reasonable. The other line of authority would have enforced the restraint against the defendant within an area in which the restriction would clearly be reasonable but would not have enforced the agreement beyond what was reasonably necessary to protect plaintiff in the benefits of the sales transaction. It is rather apparent, however, that neither view supports the *Spurlin* decision insofar as it enforces the restraint throughout the area in excess of what was necessary to protect the plaintiff-buyer in the enjoyment of that for which he paid.

The *Spurlin* opinion<sup>86</sup> relies on 78 *American Law Reports* 1039 to support its conclusion that it should enforce the restraint throughout the entire area. However, on the *same* page of the *same* authority is this pertinent summary that suggests that the court should not have enforced the restraint insofar as it was not reasonably necessary to protect the buyer: "In determining whether the covenant does impose an unreasonable restraint upon trade, the question is whether the area embraced therein is greater than is required for the protection of the good will of the business sold, and this ordinarily is one of fact."<sup>87</sup> The Tennessee Supreme Court seems to regard it as a fact that the restraint in the *Spurlin* case was "in excess of that which seems necessary to fairly protect Greene County Tire and Supply, Inc. [plaintiff], in procuring the benefits intended by the purchase of these assets in carrying on of such a common place business."<sup>88</sup> The *Spurlin* opinion's own cited authority, therefore, suggests a different decision in *Spurlin*.

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86. 338 S.W.2d at 600.

87. Annot., 78 A.L.R. 1038, 1039 (1932).

88. 338 S.W.2d at 600.